

# Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases

Laura Sack<sup>†</sup>

*[A] custody decree is not meant to punish a parent, or anyone else; its only purpose is to help the children.<sup>1</sup>*

## I. INTRODUCTION

*The Good Mother*<sup>2</sup> tells the story of a divorced woman, Anna, whose daughter Molly is the center of her life. Anna's grandfather criticizes her "bohemian" lifestyle (she teaches piano and works in a lab) and the fact that her daughter attends daycare instead of being cared for at home. Anna's ex-husband is an attorney who remarried immediately after their divorce. Anna meets a sculptor named Leo, and, in time, both she and her daughter enjoy a close, loving relationship with him. Anna's ex-husband disapproves of her lifestyle and sexual conduct with Leo, and he institutes a lawsuit to gain custody of Molly.

At trial, Anna's ex-husband has to prove that she is an unfit mother. He raises two sexual conduct issues to prove her unfitness: first, that she and Leo made love one night while Molly was asleep in their bed; second, that Leo once allowed Molly to touch his penis after she asked his permission to do so. A psychiatrist testifies that Molly was not harmed by either incident, that she has a very strong relationship with Anna, and that taking custody of Molly away from Anna would actually put Molly "at risk." It is also clear that Molly wants to remain with her mother. Nonetheless, the court awards custody to Molly's father, even though he and his wife are both described as workaholics who will not have a great deal of time to spend raising Molly.

---

<sup>†</sup> Law Clerk, Judge Raymond J. Pettine, United States District Court for the District of Rhode Island; A.B., Brown University, 1988; J.D., Yale Law School, 1991. I am indebted to Pamela Smith, Fall Ferguson, John DiPaolo, Alisa Jancu, and Maria Acebal for their invaluable editorial assistance. I would also like to thank David Leventhal, Kristen Boyles, and David Dorsey for their cogent substantive comments as well as for their unflagging moral support and encouragement. This article is dedicated to the memory of my great-grandmother, Rebecca Kowarski Magid, whose life demonstrated that feminism was born long before I was.

1. *In re Custody of Temos*, 450 A.2d 111, 125 (Pa. Super. 1982) (citations omitted).  
2. SUE MILLER, *THE GOOD MOTHER* (1986).

Anna's losing battle to retain custody of Molly in *The Good Mother* illustrates the problem I explore in this article: the denial of custody to women whose conduct does not adhere to many judges' sexist notions about acceptable conduct by a mother. I begin by evaluating the child custody standards which have predominated in the United States since colonial days. As Section II demonstrates, antiquated notions of male and female roles within the family underlie most of these custody standards. In addition, some custody standards have been defined in such nebulous terms that judicial discretion in their application is virtually limitless. The cases discussed in Sections III-V demonstrate that judicial discretion often results in custody decisions denying women custody not because they are incapable of responsible parenting, but simply because they are women.

I examine one child custody standard that shows promise as a non-discriminatory method for determining custody. The primary caretaker standard requires courts to award custody to those parents who have been principally responsible for attending to their children's daily needs; one state supreme court has enumerated ten specific factors to be applied in determining which parent is the primary caretaker.<sup>3</sup> The standard's specificity limits the degree to which judicial discretion can be injected into custody decisions.

West Virginia was the first state to adopt the primary caretaker standard,<sup>4</sup> and today it is the sole state to use the standard in its "pure" form.<sup>5</sup> In Section III of this article, I evaluate how West Virginia has implemented the standard. From 1985 to 1989, Minnesota joined West Virginia in applying the primary caretaker standard to custody cases,<sup>6</sup> in Section IV, I analyze the results of Minnesota's brief experiment with the standard.

As Sections III and IV demonstrate, the primary caretaker standard is laudable in theory, but not in practice. Every variation of the standard has included an exception denying custody to primary caretaking parents who are deemed "unfit."<sup>7</sup> While the standard itself is quite specific, no court has defined the parental unfitness exception in other than extremely vague terms. Trial court judges in particular have effectively transformed the exception into a gaping loophole by repeatedly finding primary caretaking mothers "unfit" on the basis of their sexual conduct (usually characterized as "sexual

---

3. See *infra* text accompanying note 50.

4. *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981).

5. Courts in a number of states have adopted a "hybrid" approach, in which the primary caretaker is one of several factors to be considered in determining child custody. See, e.g., *Seibert v. Seibert*, 584 N.E.2d 41 (Ohio Ct. App. 1990), *cert. denied*, 558 N.E.2d 60 (Ohio 1990); *Derby v. Derby*, 571 P.2d 562 (Or. App. 1977); *Jordan v. Jordan*, 448 A.2d 1113 (Pa. Super. 1982); *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986). I evaluate this hybrid standard in Section V.

6. In 1989, Minnesota's legislature replaced the judicially adopted primary caretaker presumption with a test in which the primary caretaker is one of twelve factors to be considered. See MINN. STAT. § 518.17, subd. 1 (Supp. 1992). I discuss this development in Minnesota's child custody law in Section V.

7. See, e.g., *infra* text accompanying notes 53 & 142. The implications of the parental unfitness exception, which calls for denial of custody to parents who are "unfit," will be addressed throughout this article.

*misconduct*”), their survival of domestic abuse,<sup>8</sup> or their paucity of economic resources, without establishing any connection between these factors and their fitness as parents. In short, the vagueness of the unfitness exception reintroduces unfettered judicial discretion into the primary caretaker standard. This discretion has had a disproportionately adverse effect on women. In Section VI of this article, I outline my proposed revision to the primary caretaker standard: a more precisely defined and narrowly tailored unfitness exception aimed at reducing judicial discretion and the resultant discriminatory denial of custody to women.

I write this article from a feminist perspective. As a feminist, I assume that in the family law context, as elsewhere, a person’s gender plays a significant role in how the law regards him or her. Analysis of the primary caretaker standard from a feminist perspective thus entails a search for gender-based patterns in judicial application of the standard. If we find that such patterns exist, we must reflect on whether these patterns help or harm women. Reversing legal trends that harm women is the next logical step in a feminist legal agenda. In the context of family law, however, the concept of harm to women evades facile definition. Are women harmed by laws that perpetuate rather than change gendered role definitions within American families? Or, rather, are we harmed by laws that fail to reflect the reality that mothers bear greater responsibility for raising children than do fathers?

The relationship between feminism and family law is difficult to define precisely because there is no single, all-encompassing answer to the question of what conception of gender equality women should seek within family law. As legal scholar Martha Minow has suggested, “the meanings of equality are complicated and multiple. . . . [There are] contrasts between the idea of formal legal equality (eliminating gender preferences and disadvantages in legal rules) and practical equality (eliminating gender-based differentials in the burdens and benefits actually distributed in people’s lives).”<sup>9</sup>

In studying the effects of the primary caretaker standard on women, I seek to determine whether the standard fosters or hampers both formal legal equality and practical equality. Because the standard is facially ungendered (by

---

8. See PHYLLIS CHESLER, *MOTHERS ON TRIAL* 149 (1986) (in nationwide study of sixty primary caretaking mothers engaged in custody disputes, 62% were battered by their husbands during marriage and/or during marital breakup).

9. Martha Minow, *Consider the Consequences*, 84 MICH. L. REV. 900, 909-10 (1986) (reviewing LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985)). Minow comments further about the relationship between formal legal equality and practical equality:

[C]hanges in formal legal equality between men and women do not themselves usher in changes in lived inequalities, and indeed, . . . formal legal equality can disempower women from improving their circumstances. The struggle for gender equality is a struggle that must be waged at the level of assumptions and attitudes—and of actual social and economic practices in childrearing and in the workplace. Formal legal changes in such items as child custody preferences could supply a focus for mobilizing such struggles, but they could also disable individual women in their personal efforts to improve their situations.

*Id.* at 908.

expressing a preference for neither men nor women as custodial parents), it promotes legal equality. As applied, however, the standard has had a discriminatory impact on women, denying them equality in practice.

This article discusses various sources of discriminatory application of the primary caretaker standard and its unfitness exception, and proposes a modification of the standard designed to minimize this problem. Since the discrimination I seek to address is discrimination against women, I focus on the standard's effect on women, leaving it to others to argue that the standard is detrimental to men. As for the children whose custody is at stake, my concern for their well-being informs my entire analysis.<sup>10</sup> I will not argue that women who are incapable of being adequate parents should nonetheless have custody simply because they are women. On the contrary, the crux of my argument is that children should not be denied the care of loving, responsible parents simply because those parents are women.

## II. A BRIEF HISTORY OF CHILD CUSTODY STANDARDS

### A. *Paternal Rights Versus Maternal Preference*

Changes in child custody standards over time have reflected both shifting societal norms regarding women's role in the family and changing notions about child development. In preindustrial America, the law assumed that men were the custodial parents of their children.<sup>11</sup> The Industrial Revolution marked a shift toward a "maternal preference" standard, which generally gave custody to women.<sup>12</sup> More recently, courts have looked to "the best interests" of the children in determining which parent shall have custody;<sup>13</sup> some contemporary courts also favor "joint custody," a regime under which parents share legal custody of their children.<sup>14</sup> Numerous commentators have written at length about the evolution of these standards;<sup>15</sup> I will provide a brief analysis of each.

Under English common law, as under Roman law, children were the property of their fathers. Mothers virtually never got custody of their children

---

10. Evaluation of custody standards strictly from the child's perspective has spawned a wealth of literature. See, e.g., JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) [hereinafter *BEYOND THE BEST INTERESTS*]; *BEFORE THE BEST INTERESTS OF THE CHILD* (1979) [hereinafter *BEFORE THE BEST INTERESTS*]; JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT SOLNIT & SONIA GOLDSTEIN, *IN THE BEST INTERESTS OF THE CHILD* (1986) [hereinafter *IN THE BEST INTERESTS*].

11. See *infra* text accompanying notes 16-17.

12. See *infra* text accompanying notes 18-22.

13. See *infra* text accompanying notes 29-32.

14. See *infra* text accompanying notes 42-43.

15. See generally Henry H. Foster & Doris Jonas Freed, *Life With Father: 1978*, 11 *FAM. L.Q.* 321 (1978); Marcia O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian*, 63 *N.D. L. REV.* 481 (1987); Donald C. Schiller, *Child Custody: Evolution of Current Criteria*, 26 *DEPAUL L. REV.* 241 (1977).

following separation or divorce.<sup>16</sup> Colonists carried this practice to the United States, and it remained the dominant American custody trend until at least the mid-nineteenth century.<sup>17</sup> The maternal preference standard evolved in response to the Industrial Revolution and the adoption of compulsory public education, both of which made children economically less valuable to their fathers.<sup>18</sup> Courts tended to justify their adoption of a maternal preference by invoking the unique, irreplaceable nature of mother-child relationships.<sup>19</sup>

The "tender years" doctrine presents a variation on the maternal preference theme. The doctrine centers on the premise that the bond between mothers and their young children<sup>20</sup> is natural, unique, and singularly important to healthy child development.<sup>21</sup> In custody decisions regarding children of "tender years," courts applying the doctrine generally award custody to the mother if she is a "fit" parent.<sup>22</sup>

In recent years, other standards have almost entirely superceded maternal preference, with or without the tender years doctrine. Not surprisingly, "fathers' rights" advocates attacked the doctrine.<sup>23</sup> Courts in several states have held that maternal preference violates the federal Equal Protection clause

16. 1 JEFF ATKINSON, *MODERN CHILD CUSTODY PRACTICE* 222 (1986).

17. Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 *WOMEN'S RTS. L. REP.* 235, 235 (1982). According to West Virginia Supreme Court Chief Justice Richard Neely, fathers were given custody of their children as a matter of law until the early twentieth century. Richard Neely, *Child Custody and the Dynamics of Greed*, 3 *YALE L. & POL'Y REV.* 168, 169 (1984).

18. Polikoff, *supra* note 17, at 235.

19. See, e.g., *Bruce v. Bruce*, 285 P. 30, 37 (Okla. 1930) ("[M]other love is a dominant trait in the heart of a mother, even in the weakest of women. It is of divine origin, and in nearly all cases far exceeds and surpasses the parental affection of the father. Every just man recognizes the fact that minor children need the constant bestowal of the mother's care and love."). For a more recent articulation of the same, see *Meinhardt v. Meinhardt*, 111 N.W.2d 782, 784 (Minn. 1961) ("That there is no substitute for the love, companionship, and guidance of a good mother hardly needs any argument.").

20. Courts differ widely as to the age at which a child is sufficiently "young" for the doctrine to apply. See *Dennis v. Dennis*, 1990 WL 207392, at \*9 (Tenn. Ct. App. Dec. 19, 1990) (citations omitted) ("There is considerable disagreement concerning the age at which the infant requires the nurturing care of a female. Scientific observations appear to place this age between 30 and 60 months.") (quoting *BEYOND THE BEST INTERESTS*, *supra* note 10, at 32-33); Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 *J. FAM. L.* 1, 20 (1990) ("The age constituting 'tender years' has been left to judicial discretion, with the teen years usually considered the upper limit.")

21. See generally Ramsay Laing Klaff, *The Tender Years Doctrine*, 70 *CAL. L. REV.* 335 (1982); Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 *J. FAM. L.* 423 (1976-77). For assertions that the mother-child relationship is unique and should therefore be preserved through maternal preference, see *Krieger v. Krieger*, 81 P.2d 1081, 1083 (Idaho 1938); *Helms v. Franciscus*, 2 *G. & J.* 544 (Md. 1830); JOHN BOWLBY, *ATTACHMENT AND LOSS* 29 (1969).

22. *But see* Neely, *supra* note 17, at 170:

In application, the rule of maternal preference allowed judges substantial leeway to take a mother's fault into consideration in the award of custody. It was frequently the case, therefore, that sexual "promiscuity" (a term that tends to mean different things when applied to women than to men, with women getting the short end of the double standard) on the part of the woman would cause a court to declare her "unfit".

23. See Polikoff, *supra* note 17, at 236. The recent proliferation of fathers' rights groups is at least in part a backlash against women's quest for equality in the realm of family law. "Although the fathers' rights movement purports to act purely from the principles of sex equality and children's interests . . . much of its rhetoric has uncomfortably misogynist overtones." Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 *HARV. WOMEN'S L.J.* 107, 116 (1978).

by discriminating against men on the basis of their gender,<sup>24</sup> and even states that have not expressly disavowed the tender years doctrine have sharply limited its use.<sup>25</sup>

For women, the maternal preference was a mixed blessing.<sup>26</sup> While the presumption generally benefits women who want custody of their young children, it also legitimates and reinforces gender-bound roles in American family life.<sup>27</sup> Professor Mary Joe Frug argued that such a legal rule "maternalizes the female body;" a maternal presumption "not only allocate[s] disproportionately more child rearing responsibilities to women in formal legal disputes; it also signal[s] to men and women making 'private' decisions regarding parenting responsibilities that the legal system expect[s] women to do more parenting and to do it better than men."<sup>28</sup> As long as courts award custody to women on the grounds that "children naturally belong with their mothers," feminists will have difficulty debunking the myth that a woman's "natural" role is that of nurturer and caregiver to children.

### B. *Best Interests of the Child*

Maternal preference evolved into the "best interests of the child" standard, which is the most commonly used custody standard today. Commentators have argued that the maternal preference operates to protect children's best interests and that the two standards may have the same results.<sup>29</sup> The Uniform Marriage and Divorce Act ("UMDA") defined the best interests standard as follows:

---

24. See, e.g., *Ex Parte Devine*, 398 So.2d 686 (Ala. 1981); *Watts v. Watts*, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (1973); *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986).

25. "Although many jurisdictions retain some type of maternal preference in awarding custody of very young children, this preference has become largely a tie breaker." Neely, *supra* note 17, at 170.

26. Catharine MacKinnon has characterized the maternal preference as "ideologically injurious but materially helpful" to women. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1293 (1991).

Martha Minow has also commented on the dilemma maternal preference poses for feminists: "[R]eformers can invoke equality as a reason to end maternal preference in child-custody decisions at the same time that critics cite the end of the maternal preference for child custody as a new disadvantage for already disadvantaged women." Minow, *supra* note 9, at 914.

Abandonment of the maternal preference may prove antithetical to the interests of lesbians seeking custody. "[F]or lesbians, who often face nonmaternal stereotypes in the courtroom, a legal presumption that they could be good parents might be beneficial. If the maternal presumption were applied to lesbians, it might make it easier for them to undermine the courts' stereotypes with respect to their fitness as mothers." Ruth Colker, *The Example of Lesbians: A Posthumous Reply to Professor Mary Joe Frug*, 105 HARV. L. REV. 1084, 1092 (1992).

27. "[T]he rule lacks validity because it is unnecessary and perpetuates outdated stereotypes." *Pusey*, 728 P.2d at 120. See also Uviller, *supra* note 23, at 108 ("The legal presumption that children belong with their mothers absent maternal unfitness reinforces the enduring stereotype of women as instinctive child rearers, inherently unsuited for worldly pursuits.").

28. Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1060-61 (1992).

29. See, e.g., UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561-596 (1970) [hereinafter UMDA] (recommending use of "best interests" tests, but acknowledging that preference for mothers of young children may be in children's best interests).

The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved. The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.<sup>30</sup>

Several states adopted the best interests test as promulgated in the UMDA;<sup>31</sup> almost every other state has adopted a similar test either by statute or by judicial interpretation.<sup>32</sup>

The best interests standard is clearly in judicial and legislative favor at present; nonetheless, it has numerous shortcomings.<sup>33</sup> First, the best interests test requires the court to award custody to the "better parent;" this necessitates reliance on the opinions of expert witnesses such as psychologists, psychiatrists, social workers, and sociologists.<sup>34</sup> Days or weeks of testimony must be heard from experts whose opinions are likely to do little more than cancel each other out.<sup>35</sup> Moreover, experts generally conduct extensive psychological tests and interviews of children and parents to provide a basis for their testimony.<sup>36</sup> The costs associated with such testing and the resultant expert testimony can easily become prohibitive for women, given that women

---

30. UMDA § 402, 9A U.L.A. 561 (1970).

31. See, e.g., ARIZ. REV. STAT. ANN. § 25-332 (1991); KY. REV. STAT. § 403.270 (1984); MINN. STAT. § 518.17 (Supp. 1992).

32. See, e.g., ALASKA STAT. § 25.20.060 (1991); N.M. STAT. ANN. § 40-4-9 (Michie 1978); N.D. CENT. CODE § 14-09-06.1 (1991); WASH. REV. CODE § 26.10.100 (Supp. 1992); Quiner v. Quiner, 59 Cal. Rptr. 503, 509 (Cal. Ct. App. 1967) ("The law of this state makes it abundantly clear that the best interests of the child is the polestar of decision in custody cases."); Feldman v. Feldman, 45 A.D.2d 320, 324, 358 N.Y.S.2d 507, 512 (N.Y. App. Div. 1974) ("[O]ur sole concern is for the best interests of the children.").

33. "[T]he broad best interests standard . . . risks unwise results, stimulates litigation, permits manipulation and abuse, and allows a level of judicial discretion that is difficult to reconcile with an historic commitment to the rule of law. The costs of this system, especially for children, mothers and those with the least resources to resist threats of litigation, are readily apparent." Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 499-500 (1990) (citations omitted).

34. Neely, *supra* note 17, at 173.

35. Often, in custody hearings, each party to the dispute hires an expert (or experts) whose testimony supports that party's custody petition. This testimony will, by its very nature, contradict the expert testimony presented by the opposing party. See Uviller, *supra* note 23, at 125 ("[N]either side will have difficulty finding an 'eminent expert' to testify that the child will be 'better off' with him or her."). This tendency for expert witnesses to play partisan roles is not limited to the realm of child custody litigation. See generally David Bernstein, *Out of the Fryeing Pan and into the Fire: The Expert Witness Problem in Toxic Tort Litigation*, 10 REV. LITIG. 117 (1990); *Expert Witnesses: Booming Business for the Specialists*, N.Y. TIMES, July 5, 1987, at A1.

36. Neely, *supra* note 17, at 174.

are likely to suffer significant financial loss as a result of divorce.<sup>37</sup>

While extensive testing and lengthy judicial hearings in pursuit of the "best interests of the child" often disadvantage women, so too does the significant role of judicial discretion. Chief Justice Neely of the West Virginia Supreme Court of Appeals commented on the implications of reliance on judicial discretion in custody cases: "I cannot imagine an issue more subject to personal bias than a decision about which parent is 'better.' . . . The decision may hinge on the judge's memory of his or her own parents or on his or her distrust of an expert whose eyes are averted once too often."<sup>38</sup> Judicial discretion in the realm of family law is particularly troubling when viewed from a feminist perspective. Too often, judges base their decisions regarding family matters on anachronistic, gender-biased assumptions about women's place in the family, their sexuality, and their rights outside the home.<sup>39</sup> Until judges actively seek to replace such antiquated, discriminatory modes of judicial analysis with ungendered objectivity, women are better served by custody standards that rely less heavily on judicial discretion.

The indeterminacy of the best interests test has negative implications for women who settle their custody disputes before trial as well as for those who seek judicial resolutions. As commentators Mnookin and Kornhauser point out, "[u]ncertainty has several important effects on the relative bargaining power of the parties. . . . [I]f there is substantial variance among the possible court-imposed outcomes, the relatively more risk-averse party is comparatively disadvantaged."<sup>40</sup> When a woman wants custody of her children and her ex-husband has no real interest in getting custody, he may nonetheless threaten a custody battle to increase his bargaining power and reduce the amount of child support he will have to pay.<sup>41</sup>

37. See, e.g., Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1251 (1981) (study finding women's standard of living decreased by 73% in the first year after divorce); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *WOMEN AT WORK: A CHARTBOOK* 26 (1983), cited in Neely, *supra* note 17, at 179 (unemployment rates are much higher for single women with children than for married persons with children, single women's median family income is less than half that of married couples, and single women are five times more likely than married couples to live in poverty).

38. Neely, *supra* note 17, at 179. See also Uviller, *supra* note 23, at 124 ("A 'child's best interest' comprises any and all of the deciding judge's child rearing prejudices.").

39. See, e.g., cases discussed *infra* Sections III-V.

40. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 978-79 (1979). See also Neely, *supra* note 17, at 177-79 (describing how "the unpredictability of divorce proceedings can be used to terrorize women . . .").

41. Neely, *supra* note 17, at 177. Justice Neely commented on this phenomenon, which he called the "Solomon syndrome," in *Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981). The parent who actually desires custody:

will be willing to sacrifice everything else in order to avoid the terrible prospect of losing the child in the unpredictable process of litigation. . . . [T]he parent who is most attached to the child will be most willing to accept an inferior bargain. . . . [T]he sacrificing parent generally loses necessary support or alimony payments.

*Id.* This dilemma for women was also acknowledged in *J.B. v. A.B.*:

Regardless of whether a father actually wants custody or would be qualified for it, a demand for custody will have an ominous effect upon a mother. As a high proportion of final divorce orders concerning alimony and child support are consent orders, presented to the court by counsel after

### C. Joint Custody

In recent years, a number of states have adopted a presumption that joint custody is generally in the children's best interests:<sup>42</sup>

Joint custody attempts to solve some of the problems of sole custody by providing the child with access to both parents and granting parents equal rights and responsibilities regarding their children. . . . Under a joint custody arrangement legal custody—the legal authority and responsibility for making 'major' decisions regarding the child's welfare—is shared at all times by both parents. Physical custody, the logistical arrangement whereby the parents share the companionship of the child and are responsible for 'minor' day-to-day decisions, may be alternated in accordance with the needs of the parties and the children.<sup>43</sup>

Joint custody is at least as problematic as the best interests test. Numerous commentators have argued that joint custody works only when an estranged couple is willing and able to cooperate.<sup>44</sup> Nancy Polikoff has pointed out that:

[p]resumptions favoring joint custody upon divorce, regardless of who has provided care and nurturance during the marriage, actually discourage co-parenting during marriage by sending a clear message to fathers that they have a right to intimate involvement with their children upon divorce—if they choose to exercise it—no matter how detached they are from the ongoing care of their children during the marriage.<sup>45</sup>

---

extensive negotiation, the threat of loss of children can be used as a terrorizing weapon to force unjust and inadequate settlements.

242 S.E.2d 248, 254 n.4 (W. Va. 1978). Another commentator noted that:

[M]any fathers who do not really want the responsibility of daily child care are using paternal custody as a means of extortion. With the mother's custodial advantage less secure, many men threaten their former wives with taking the children as a means of securing favorable financial settlements, often in the form of truncated child support. . . . Since divorced men are generally in a better financial position than their former wives to back up the custody threat with costly litigation, women are acceding to unfavorable settlements rather than risk the loss of their children.

Uviller, *supra* note 23, at 127.

42. See, e.g., CAL. CIV. CODE § 4600.5(a) (West 1983); CONN. GEN. STAT. § 46b-56a(b) (1991); IDAHO CODE § 32-717B(4) (1983); N.M. STAT. ANN. § 40-4-9.1(A) (Michie 1978).

43. Beck v. Beck, 432 A.2d 63, 65-66 (N.J. 1981).

44. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 761 (1988) ("Joint custody can be a disaster if parents are unwilling or unable to cooperate.") (citing Elissa S. Benedek & Richard S. Benedek, *Joint Custody: Solution or Illusion?*, 136 AM. J. PSYCHIATRY 1540, 1541-42 (1979)); Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 539, 570-71 (1982); Uviller, *supra* note 23, at 128.

45. Polikoff, *supra* note 17, at 242.

Joint custody fails to acknowledge parents' relative levels of day-to-day involvement with their children during marriage. This failure forces parents who have taken most of the responsibility for attending to their children's daily needs to share custody with ex-spouses who previously may have provided only sporadic assistance with child care. In this respect, joint custody is more disadvantageous for women than for men, since American women still shoulder most of the responsibility for childcare.<sup>46</sup> Finally, joint custody places battered women in a particularly untenable position by forcing them to remain in geographic proximity to the men who abused them.<sup>47</sup> With a chilling lack of foresight, joint custody ensures that battered women's lives remain inextricably intertwined with those of their abusers.

### III. THE PRIMARY CARETAKER STANDARD: WEST VIRGINIA, 1981-PRESENT

Each of the child custody standards discussed in the preceding Section has its share of problems, and yet, the primary caretaker standard, the most recent custody innovation, has not been widely considered or adopted. In this Section I analyze the consequences of West Virginia's use of the primary caretaker standard. The cases discussed demonstrate an alarming trend. Lower courts repeatedly misapply—or simply fail to apply—the primary caretaker standard. In case after case, the state supreme court has systematically reversed lower court decisions that unjustifiably denied custody to primary caretaking mothers.

The state supreme court at times rectifies lower courts' misapplication of the primary caretaker standard. However, it is impossible to assess the number of women whose custody battles end in premature defeat because they can not afford to seek appellate review. The cases that follow illustrate this central problem with the primary caretaker standard. The standard must be modified to prevent its misapplication by the lower courts. A custody standard that requires women to endure several rounds of appeals before receiving justice is far from utopian, regardless of how theoretically egalitarian it may be.

In 1981, West Virginia became the first state to adopt the primary caretaker standard as the sole determinant of child custody.<sup>48</sup> In *Garska v. McCoy*, the state supreme court explained that it was in the child's best interests to grant custody to his or her primary caretaker.

Since trial courts almost always award custody to the primary caretaker anyway, establishment of certainty in this regard permits the issues of

---

46. See Neely, *supra* note 17, at 171-72. See also Fineman, *supra* note 44, at 773 ("[W]omen are the primary nurturers of children in our society."); MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 132 (1981) (regardless of whether women work outside the home or not, they usually serve as primary caretaker).

47. Andi Rierden, *Citing Abuse, Women Ask for Clemency in Killings*, N.Y. TIMES, May 12, 1991, § 12 (Connecticut Weekly), at 13.

48. See *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981).

alimony and support to stand upon their own legs and to be litigated or settled upon the merits of relevant financial criteria, without introducing into the equation the terrifying prospect of loss to the primary caretaker of the children.<sup>49</sup>

The court went on to provide a fact-specific test for determining which parent has been the primary caretaker:

In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for, *inter alia*, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i. e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i. e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i. e. teaching general manners and toilet training; (9) educating, i. e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i. e. reading, writing and arithmetic.<sup>50</sup>

Under the test enunciated by the *Garska* court, when custody disputes involve children of tender years,<sup>51</sup> "there is a presumption in favor of the primary caretaker parent, if he or she meets the minimum, objective standard for being a fit parent . . . ." <sup>52</sup> The court defined unfitness as "fail[ure] to provide: emotional support; routine cleanliness; or nourishing food . . . ." <sup>53</sup>

The virtues of the primary caretaker presumption have been extolled by numerous commentators:<sup>54</sup>

---

49. *Id.* at 361.

50. *Id.* at 363.

51. See *infra* text accompanying notes 82-84 for a discussion of the significance of an older child's preference as it affects judicial application of the primary caretaker standard.

52. *Garska*, 278 S.E.2d at 362.

53. *Id.* at n.9 (citing *J.B. v. A.B.*, 242 S.E.2d 248 (W. Va. 1978)).

54. See, e.g., Fineman, *supra* note 44, at 770-774; IN THE BEST INTERESTS, *supra* note 10, at 66-67 (praising the standard because it allows continuity of children's care); Neely, *supra* note 17, at 185-86; O'Kelly, *supra* note 15, at 311-33; Polikoff, *supra* note 17, at 242-43. Cf. Uviller, *supra* note 23, at 129 (arguing for maternal presumption in favor of a woman "who has committed herself to care for home and children, [yielding] only to a showing that in fact it has been the father who has assumed that role during marriage.").

*But see* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 527-38 (1984) (arguing that evidence in favor of primary caretaker standard is weak where children are more than five years old); Sheri A. Ahl, Note, *A Step Backward: The Minnesota Supreme Court Adopts a "Primary Caretaker" Presumption in Child Custody Cases*; *Pikula v. Pikula*, 70 MINN. L. REV. 1344 (1986) (criticizing Minnesota's adoption of primary caretaker standard).

When properly applied, the primary caretaker parent presumption reduces sharp practices in custody negotiation, prevents fathers and mothers from being penalized on account of their gender, and avoids custody battles that are so unwieldy and intrusive that they make the lives of a divorcing couple and their children even more miserable than they otherwise would be.<sup>55</sup>

At least in theory, the presumption solves many of the problems raised by more common custody standards.<sup>56</sup> The primary caretaker standard promotes gender equality in practice, as well as in theory, insofar as it recognizes that in most American families, the mother takes primary responsibility for her child's daily needs.<sup>57</sup> The presumption renders the finances of the parties, and the numerous other subjective factors that a court might otherwise consider in determining a child's "best interests," irrelevant to the award of custody.<sup>58</sup> In theory, the presumption provides certainty of outcome,<sup>59</sup> encouraging private settlement of custody disputes, and thus diminishing the need for long, painful, and costly custody battles in court. It also deters fathers from using the threat of such custody battles to reduce the amount of child support they will be asked to provide.<sup>60</sup> Finally, the presumption recognizes that courts are ill-equipped to determine what a child's best interests are, and instead provides a set of specific *factual* determinations for courts to make before awarding custody.<sup>61</sup> Courts do not need expert testimony to determine which parent has been a child's primary caretaker.

The primary caretaker standard appears to alleviate much of the post-divorce suffering of women and their children. Proper application of the standard could put women on a more equal footing with men vis-a-vis custody; it also allows children to remain with the parent who has already proven able

55. *David M. v. Margaret M.*, 385 S.E.2d 912, 915 (W. Va. 1989).

56. See *supra* text accompanying notes 16-47. See also IN THE BEST INTERESTS, *supra* note 10, at 67:

The gender-related, the blood tie, and the primary caregiving parent preferences are all meant to enable courts to identify who has been or is most likely to be responsible for the child's care. But only the primary caregiver preference explicitly identifies the evidence essential for assuring that this function will be served.

57. "[T]he primary caretaker presumption avoids overvaluing fathers who do more than nothing and undervaluing mothers who do less than everything." O'Kelly, *supra* note 15, at 521. See also *supra* note 46.

58. In *Garska*, the lower court awarded custody to the child's father on the grounds that he was "better educated," "more intelligent," "better able to provide financial support," "ha[d] a somewhat better command of the English language," and "a better appearance and demeanor" than did the child's mother, even though he had never lived with the child. *Garska v. McCoy*, 278 S.E.2d 357, 359 (W. Va. 1981).

59. "Under [the primary caretaker standard] a mother's lawyer can tell her that if she has been the primary caretaker and is a fit parent, she has *absolutely no chance* of losing custody of very young children." Neely, *supra* note 17, at 182. See also Crippen, *supra* note 33, at 429 (primary caretaker preference was intended "to provide a 'bright line' standard for child custody decision-making and to thereby reduce litigation and provide more predictable results.").

60. See Fineman, *supra* note 44, at 772; O'Kelly, *supra* note 15, at 521-24.

61. See O'Kelly, *supra* note 15, at 524-30 for a more complete discussion of the "judicial manageability" of the primary caretaker standard.

and willing to care for them. Moreover, the primary caretaker standard spares women and children alike the emotional trauma and financial burden associated with judicial application of the best interests test.<sup>62</sup>

In reality, the primary caretaker standard falls short of the ideal, as the seemingly narrow exception for "unfit" primary caretakers effectively swallows the rule in many cases.<sup>63</sup> This exception has been read expansively by courts at both the trial and appellate levels. Simple determinations of which parent is the primary caretaker have become vicious battles over each spouse's unfitness.<sup>64</sup> In particular, the cases show a disturbing pattern of accusations of sexual misconduct against the female primary caretaker.<sup>65</sup> For the purpose of determining parental fitness, it seems that judicially defined "sexual misconduct" is treated as wholly irrelevant when perpetrated by a man, but entirely relevant (and often sufficient "proof" of unfitness) when committed by a woman.

While West Virginia did not adopt the primary caretaker standard until *Garska*, its accompanying parental unfitness exception came to light three years earlier, in *J.B. v. A.B.*<sup>66</sup> The lower court in *J.B.* awarded custody to the father, notwithstanding the state's then-existing maternal preference, presumably because it found the mother unfit.<sup>67</sup> The lower court based its conclusion of unfitness on one alleged act of fellatio in a parked car at night. The mother denied this accusation to no avail.<sup>68</sup>

62. Cf. Crippen, *supra* note 33, at 448 (citations omitted):

Although commentators generally emphasize the child's interests in controlling courtroom disputes, mothers also benefit from decreased litigation. Courts and other observers have found that mothers are more frequently the primary parent and are more often the party with fewer resources for a courtroom proceeding. Thus, although the caretaker standard is facially gender-neutral, by promoting less litigation, it actually favors mothers.

63. "We have noted that our very narrow exception to the primary caretaker rule has of late developed a voracious appetite which, if left unchecked, will allow it to eat the rule." *David M. v. Margaret M.*, 385 S.E.2d 912, 915 (W. Va. 1989). *But see* Note, *supra* note 54, at 1371 (arguing that it is *too difficult* to rebut the primary caretaker standard under current law—"with such a high rebuttal standard, it will be nearly impossible for a judge to grant custody to the nonprimary caretaker parent . . .").

64. *See, e.g., Novotny v. Novotny*, 394 N.W.2d 256, 258 (Minn. Ct. App. 1986) (unfitness exception to primary caretaker preference "encouraged the parties to bring up every character fault to deny custody. Appellant attacked Sandra as an immature, self-centered hedonist. She complained that Jim drinks too much and is foul-mouthed and slovenly.").

65. While I have not found a single case in which a male primary caretaker has been denied custody on the basis of his sexual activity, numerous cases discussed in this article involve denial of custody to the primary caretaking mother on the basis of her alleged "sexual misconduct."

In her study of sixty "custodially challenged" primary caretaker mothers (selected from across the nation), Phyllis Chesler found that 48% of these women were custodially challenged because of their alleged non-marital sexual behavior; moreover, in two-thirds of these cases, the alleged sexual activity occurred after the breakup of their marriages. CHESLER, *supra* note 8, at 96.

66. 242 S.E.2d 248 (W. Va. 1978).

67. *Id.* at 250.

68. *Id.* at 251. According to the state supreme court:

The trial court relied upon one incident of sexual misconduct on the part of the wife as grounds for awarding custody to the husband. The evidence indicates that very late one evening in December 1974, during a period of trial separation between the parties, the [wife] and a male companion parked their car in downtown Martinsburg and entered a bar. Later that same evening, [she] and her male companion left the bar and returned to their parked car where they were observed by the [husband], [his] cousin, and [his] minister, all of whom had followed the [wife]

The state supreme court reversed, noting that this alleged incident was "totally unrelated to the mother's relationship with her child," and that "[e]xcept for this one incident, the record is devoid of any evidence that the [mother] is an unfit parent."<sup>69</sup> The court reasoned: "While the [mother's] conduct in this case might be outrageous to some, reasonable men would differ about whether it were sufficiently outrageous, *per se*, to lead us to conclude she is an unfit custodian, given the lack of consensus about these matters in contemporary society."<sup>70</sup> The court concluded that in order for a parent's sexual conduct to bear upon his or her fitness as a parent, "the conduct must be so outrageous that reasonable men cannot differ about its deleterious affect [sic] upon the child."<sup>71</sup>

When *Garska* replaced the maternal presumption with the primary caretaker standard, the law in West Virginia did not change regarding the relevance of a parent's sexual activity. Theoretically, absent a "deleterious effect" upon her children, a woman's sexual activity is not relevant to her fitness as a parent.<sup>72</sup> Lower courts in West Virginia have nonetheless continued to find women unfit parents on the basis of their alleged sexual behavior where no harm to the children is demonstrated. In *S.H. v. R.L.H.*,<sup>73</sup> the appellate court reversed the trial court's custody award to the mother in part because "the appellant mother had an affair with a man who is now her husband before she married him . . . ."<sup>74</sup> Notwithstanding the trial court's finding that the children's mother had been their primary caretaker,<sup>75</sup> the supreme court affirmed the lower court's decision, stating:

[T]he remarriage of a child's guardian or a permanent relationship in which a child's guardian and another adult share living quarters constitutes a significant change in circumstances and upon proper motion, warrants inquiry by the trial court into the relationship between the child and the new adult. . . . However, remarriage or a relationship with another adult, *per se*, raises no presumption against continued custody in the parent who was originally awarded custody.<sup>76</sup>

Justice Neely's opinion in *S.H. v. R.L.H.* clashes with his earlier decisions

to the area without her knowledge. Although [she] denies it, the weight of the evidence is that she committed the act of fellatio with her male companion late that night in the parked car, after leaving the bar.

69. *Id.* at 255.

70. *Id.* at 256.

71. *Id.*

72. *See, e.g., Isaacs v. Isaacs*, 358 S.E.2d 833, 835 (W. Va. 1987); *M.S.P. v. P.E.P.*, 358 S.E.2d 442, 445 (W. Va. 1987).

73. 289 S.E.2d 186 (W. Va. 1982).

74. *Id.* at 189. The court's use of the term "affair" to characterize this relationship is puzzling, since it appears that neither the appellant nor her future husband were married when their relationship began.

75. *Id.* at 188.

76. *Id.* at 191.

in *J.B. v. A.B. and Garska*.<sup>77</sup> In *S.H. v. R.L.H.*, the trial court found that the children's mother had been their primary caretaker, and did *not* find any evidence that she had failed to provide them with emotional support, routine cleanliness, or nourishing food;<sup>78</sup> nonetheless, the supreme court upheld the lower court's decision to change custody from the mother to the father.

Justice Neely's explanation for his decision is unenlightening.<sup>79</sup> He does not indicate whether living with another woman, living with a male relative, or living with a man who is not a sexual partner would warrant inquiry into a woman's parental fitness. Given that most women suffer economically after divorce,<sup>80</sup> it is unfair to punish those who may have no alternative but to share housing with other adults for financial reasons.<sup>81</sup> Economic hardship and the sacrifices it forces upon women have no bearing on women's parenting ability. Courts should not be permitted to penalize women for living with other adults unless there is specific evidence that such a living arrangement harms the children at issue.

An additional facet to *S.H. v. R.L.H.* may explain Justice Neely's willingness to depart from the *Garska* unfitness test in affirming the custody change from mother to father. The supreme court's opinion in *S.H. v. R.L.H.* emphasized that the oldest of the three children, who was fourteen at the time, preferred to live with her father.<sup>82</sup> Judicial adherence to the custodial preference of older children is not unprecedented. In *Garska*, Justice Neely stated, "Where a child is old enough to formulate an opinion about his or her own custody the trial court is entitled to receive such opinion and accord it such weight as he feels appropriate."<sup>83</sup>

Reliance by courts on older children's preferences increases the likelihood that parents will compete for their children's favor. In addition, encouraging even older children to choose between two parents may add to the anxiety and stress inescapable after divorce. While I do not explore at length these and other concerns raised by judicial reliance on a child's preference, I suggest that the primary caretaker standard as amended in Section VI should be uniformly applied regardless of the age of the minor child involved.<sup>84</sup>

Following *S.H. v. R.L.H.*, West Virginia courts continued to deem women "unfit" parents on the basis of their living arrangements. In *Porter v.*

---

77. See *supra* text accompanying note 71.

78. 289 S.E.2d at 191.

79. See *supra* text accompanying note 76.

80. See *supra* note 37.

81. See *infra* text accompanying notes 95-97.

82. 289 S.E.2d at 188.

83. *Garska*, 278 S.E.2d at 363.

84. See Fineman, *supra* note 44, at 771-72:

I would apply the rule to all contested custody cases, not just to those involving children of 'tender years' . . . [L]imiting the rule to [young children] unrealistically assumes that nurturing ends when a child begins school. This limitation would also send the message that if a parent fails to nurture during a child's early years, he need not worry, because there will be no negative consequences with respect to later custody determinations.

*Porter*,<sup>85</sup> the lower court found the mother unfit on the sole ground that she "had been living with a man without benefit of marriage in the marital home."<sup>86</sup> Prior to the first custody hearing, *each* parent had been living with another adult,<sup>87</sup> and the children had spent time in *both* homes under these conditions. The lower court offered no explanation for its assumption that an unmarried woman's cohabitation rendered her an unfit parent while a man in the same situation was not unfit.<sup>88</sup>

Finding no evidence that the children's mother "neglected the children or engaged in sexual activity in their presence,"<sup>89</sup> the supreme court reversed the lower court's decision, stating:

[A] change of custody is not justified where, as here, the only basis for the court's decision is the existence of an extramarital relationship on the part of the parent originally awarded custody. There must also be a showing that the parent's relationship with another adult has a deleterious effect upon the child and that the child will materially benefit from the change of custody.<sup>90</sup>

Like the primary caretaker standard as a whole, this refinement of the parental unfitness exception sounds better than it is. As written, it disallows a finding of unfitness based solely on the existence of a woman's intimate nonmarital relationship. With the new exception, a court would be able to find unfitness only upon a showing of a nexus between this relationship and some harm it has caused the child. In practice, however, this "amendment" to the parental unfitness exception has fallen prey to the same abuse of judicial discretion as its precursor. Because the supreme court in *Porter* did not precisely define its terms (i.e., "deleterious effect" and "materially benefit"), lower court judges were once again left to decipher the meaning of these all-important phrases for themselves. And, not surprisingly, cases following in *Porter's* wake illustrate lower courts' tendency to read these terms so broadly as to render them essentially meaningless.

West Virginia trial judges continued to deny women custody on the basis of their adult relationships without first finding that these relationships had a deleterious effect on their children. In *Stacy v. Stacy*,<sup>91</sup> the lower court failed

---

85. 298 S.E.2d 130 (W. Va. 1982).

86. *Id.* at 131. The father's petition to modify custody accused the mother of raising the children in an "immoral atmosphere." *Id.*

87. The children's father remarried after filing a petition to modify the custody order, but before the hearing on said petition took place. *Id.*

88. "It is permissible for fathers to have nonmarital sexual relationships without jeopardizing their custody rights. However, if a woman does so, she may well lose custody." Laurie Woods, Vicki Been & Joanne Schulman, *Sex and Economic Discrimination in Child Custody Awards*, 16 CLEARINGHOUSE REV. 1130, 1133 (1983).

89. 298 S.E.2d at 132.

90. *Id.*

91. 332 S.E.2d 260 (W. Va. 1985).

to apply the primary caretaker standard; it simply determined that the mother was an adulterer and thus an unfit parent, and awarded custody to the father.<sup>92</sup> The supreme court reversed, directing the lower court that “to be a fit parent a person must . . . refrain from grossly immoral behavior under circumstances that would affect the child.”<sup>93</sup>

In *Bickler v. Bickler*,<sup>94</sup> the lower court denied a mother custody, even though she was the child’s primary caretaker, because she was living with a man.<sup>95</sup> Both the woman and her male co-habitee testified that they were sharing living quarters solely for economic reasons, and that they did not engage in sexual activity with one another.<sup>96</sup> Nonetheless, the woman lost custody of her child due to the lower court judge’s *predisposition* to disbelieve her in matters concerning her sex life. According to the supreme court, “the evidence that a sexual relationship existed between the appellant and [her male co-habitee] was far from convincing. Moreover, the circuit judge indicated at the hearing a predisposition to disbelieve any assertion that a man and a woman would share living quarters without engaging in sexual relations.”<sup>97</sup>

The supreme court reversed the circuit court’s decision, stating that the mother’s unfitness had not been proven by “a clear preponderance of the evidence.”<sup>98</sup> The court found that the lower court had erred in declaring the mother an unfit parent because:

[t]here was no evidence that the appellant engaged in sexual activity in the presence of her daughter or that she neglected the child because of her relationship with [her male co-habitee] . . . [n]or is there any evidence that [the male co-habitee] mistreated the child or that she disliked or was afraid of him.<sup>99</sup>

According to the supreme court in *Bickler*, the only considerations relevant to parental fitness were whether the woman’s sexual activity took place in front

92. *Id.* at 261 (“There was no finding of which parent was the primary caretaker and, indeed, most of the evidence at the final hearing did not go to the issue of which parent took primary responsibility for the children’s care but to the allegedly adulterous behavior of the appellant.”).

In *Isaacs v. Isaacs*, a remarkably similar case, the lower court awarded custody to Timothy Isaacs on the grounds that Tammy Isaacs had committed adultery during their marriage (“the circuit judge was particularly concerned with [Tammy’s] apparent sexual misconduct when he made the custody award . . .”). 358 S.E.2d 833, 835 (W. Va. 1987). No evidence was offered to prove that the couple’s child had been adversely affected by her mother’s alleged sexual misconduct, nor that Tammy was an unfit parent. For these reasons, the supreme court reversed and awarded custody to Tammy. *Id.* at 836.

93. *Stacy*, 332 S.E.2d at 262.

94. 344 S.E.2d 630 (W. Va. 1986).

95. *Id.* at 631.

96. *Id.*

97. *Id.* at 632. At least one member of the supreme court shared the lower court’s view. See *id.* at 633, n.2 (Brotherton, J., dissenting) (“While not absolute proof, a man and a woman of similar age living together is certainly evidence of a sexual relationship and would at least be strong enough that the trial judge could base an opinion on it.”).

98. *Id.* at 631.

99. *Id.* at 632.

of her daughter, whether the woman was a negligent parent, and whether the child had a good relationship with the male co-habitee.

The West Virginia Supreme Court again reversed a lower court decision in *M.S.P. v. P.E.P.*<sup>100</sup> In *M.S.P.*, the lower court awarded custody to the children's father, even though it did not find that their mother, who had been their primary caretaker, was an unfit parent.<sup>101</sup> The lower court's justification for its decision was "[t]hat the moral atmosphere which exists in the home of [the mother], resulting from visits of her close friends, who are bi-sexual or homosexual, does not appear to be a fit and proper place for the children to reside."<sup>102</sup> The court based its opinion solely on the husband's accusation that his ex-wife was involved with a man who had previously had a homosexual relationship.<sup>103</sup> The husband presented no proof of this allegation; nor was there any evidence that the children had been exposed to or influenced by any homosexual conduct.<sup>104</sup> The husband explained his motivation for seeking custody as follows: "I don't like to think that my children are exposed to someone that is a bisexual or homosexual, whatever he is, I don't want my children exposed to this."<sup>105</sup>

The supreme court reversed and awarded custody of the children to their mother.<sup>106</sup> Relying in part on its opinion in *Bickler*, the court stated that "[a]dverse effects upon the children must be demonstrated before a divorcing parent's subsequent associations, standing alone, can be the basis for finding a parent who is the primary caretaker, unfit to have custody of her minor children."<sup>107</sup>

In *David M. v. Margaret M.*,<sup>108</sup> the West Virginia supreme court enunciated a new test for parental fitness:

To be a fit parent, a person must: (1) feed and clothe the child appropriately; (2) adequately supervise the child and protect him or her from harm; (3) provide habitable housing; (4) avoid extreme discipline, child abuse, and other similar vices; and (5) refrain from immoral behavior under circumstances that would affect the child.<sup>109</sup>

The lower court in this case awarded custody to David, even though Margaret

100. 358 S.E.2d 442 (W. Va. 1987).

101. *Id.* at 444.

102. *Id.*

103. *Id.*

104. The court's assumption that interaction with a bisexual was *per se* harmful to the children clearly exposes its general intolerance toward homosexuality and bisexuality.

105. *Id.* at 445.

106. *Id.* at 447.

107. *Id.* at 445. See also *Rowsey v. Rowsey*, 329 S.E.2d 57, 60 (W. Va. 1985) (state supreme court instructs lower court: "The fact that a custodial parent and her children are in the presence of a woman who is reputed to be a lesbian is not a ground for changing custody to the noncustodial parent.").

108. 385 S.E.2d 912 (W. Va. 1989).

109. *Id.* at 924.

had been their child's primary caretaker.<sup>110</sup> The court found that Margaret was not a fit parent because she had committed adultery three times in two years.<sup>111</sup> Applying its newly established test, the supreme court reversed, stating that "restrained normal sexual behavior does not make a parent unfit. The law does not attend to traditional concepts of immorality in the abstract, but only to whether the child is a party to, or is influenced by, such behavior."<sup>112</sup> The supreme court appeared to sever the previously assumed connection between a woman's sexual activity and her fitness as a parent. Several pages later in its opinion, however, the court stated that *either* "evidence establishing that the child was harmed *or* that the conduct *per se* was so outrageous, given contemporary standards, as to call into question her fitness as a parent" would warrant a finding of unfitness.<sup>113</sup>

The *David M.* test for parental fitness is more precise than either the *J.B. v. A.B.* test<sup>114</sup> or the *Porter* test.<sup>115</sup> The fact that each test has been more specific than the last suggests a concern that vague language left too much to lower courts' discretion. While the *David M.* test does remove some of the ambiguity inherent in earlier fitness tests by laying out five qualifications a parent must meet to be found "fit," the fifth element of this test merely revisits the very problem the test as a whole was designed to avoid. By defining fit parents as those who "refrain from immoral behavior under circumstances that would affect the child,"<sup>116</sup> the test invites judges to decide for themselves what constitutes "immoral behavior." The supreme court in *David M.* did not attempt to specify what "immoral behavior" would warrant a finding of unfitness; it merely stated that Margaret M.'s behavior did not render her unfit.

As the cases discussed in this Section demonstrate, lower court judges in West Virginia have seized upon such broad terms as "immoral behavior" as a means to criticize and punish women (through denial of custody) for behavior many people would not consider immoral. The supreme court in *David M.* could have prevented this result by omitting the fifth element of its fitness test; instead, it proved itself unable or unwilling to repudiate what it referred to as "traditional concepts of immorality."<sup>117</sup> By stating that particularly "outrageous" conduct could, by itself, warrant a denial of custody to a primary caretaker, without identifying which conduct would be sufficiently "outrageous" to meet this standard, the court preserved the connection between

---

110. *Id.* at 914.

111. *Id.* at 924. "Mrs. M. testified that two of the instances occurred about midnight when the child was asleep and the third occurred after the child and his stepbrother left to visit a neighbor and was concluded before the children returned home." *Id.* at 928.

112. *Id.* at 924.

113. *Id.* at 928 (first emphasis added).

114. See *supra* text accompanying note 71.

115. See *supra* text accompanying note 90.

116. 385 S.E.2d at 924.

117. *Id.*

sexual behavior and parental fitness.

Nevertheless, in its most recent opinions on the subject, the West Virginia supreme court has used increasingly strong language to reverse lower court decisions denying custody to primary caretaking women on the basis of their "sexual misconduct." In *Dottie S. v. Christopher S.*,<sup>118</sup> the court reversed a lower court ruling which granted custody to the child's paternal grandparents. The lower court's decision was apparently based on its belief that the child's mother had been involved in an incestuous relationship with her half-brother, and that this rendered her an unfit parent.<sup>119</sup> The supreme court noted, however, that the woman denied having had a sexual relationship with the man in question and that she was unaware of their familial relationship when they met for the first time as adults.<sup>120</sup> Moreover, there was evidence to suggest that the man was not, in fact, her half-brother.<sup>121</sup> The supreme court invoked *J.B. v. A.B.* and admonished, "[M]ere sexual misconduct which does not impact upon [the mother's] willingness or ability to be emotionally and physically supportive of the child does not constitute unfitness to have custody of the child."<sup>122</sup>

*Judith R. v. Hey*<sup>123</sup> is perhaps the most extreme and most disturbing example of a judicial pattern now common in West Virginia. The West Virginia supreme court reversed a lower court decision denying custody to a primary caretaking mother because of her alleged or actual sexual activity. Judith R. sued the lower court judge, who had instructed that she would lose custody of her daughter if she did not, within thirty days, either marry the man with whom she lived or move out of their shared home.<sup>124</sup> Judith R. also alleged that Judge Hey had appeared on the nationally-televised program "Crossfire," where he publicized his views on Judith R.'s custody battle.<sup>125</sup>

---

118. 408 S.E.2d 46 (W. Va. 1991).

119. *Id.* at 48.

120. *Id.*

121. *Id.* at 49.

122. *Id.* See also *Kenneth L.W. v. Tamyra S.W.*, 408 S.E.2d 625, 629-30 (W. Va. 1991):

[A]lthough the circuit court explicitly stated that it did not base its decision on the adulterous conduct of the [mother], a review of the record indicates that the overwhelming thrust of the evidence related to such conduct. The issue of such conduct was repeatedly belabored in an apparent attempt to discredit the [mother] as a parent. That fact, coupled with the family law master's finding relating marital misconduct to parental fitness (which was adopted by the circuit court) leads us to the conclusion that indeed the custody decision did hinge on the misconduct issue. . . . We fail to perceive any evidence indicating that the adulterous conduct of the [mother] had a deleterious effect on [her children] and therefore refuse to permit such conduct to bear upon our decision.

123. 405 S.E.2d 447 (W. Va. 1991).

124. *Id.* at 449.

125. *Id.* at 452. During the course of the program, Judge Hey commented, "I don't think it is in the welfare, the best interests of a child 13 years old to see her mother sleeping with a man that is not her father, and next week there may be a different man in the house, and the third week there may be a third one." *Id.* at 452 n.4. As the supreme court noted, these comments made by the judge on "Crossfire" were "adverse to [Judith's] reputation, character, and motivations . . . for which there was no evidentiary basis whatsoever and which seem to indicate a bias and prejudice against [Judith]. Since no evidence was taken as to any of these matters, one is left to wonder where the judge came into possession of this information." *Id.* at 452.

Both Judge Hey's television appearance and his custody order in the case indicated an unabashed bias against Judith simply because she cohabitated with a man. As the supreme court acknowledged, "[n]o findings of fact warranting a finding of unfitness were set forth by Judge Hey. . . . [The custody] order was grounded merely on the premise that the court would not 'tolerate' Judith R.'s conduct."<sup>126</sup>

Judge Hey's answer to Judith R.'s complaint demonstrates his intolerance in this regard. He alleged:

that petitioner and 'her paramour' are violating criminal and moral law on a daily basis . . . ; sexual promiscuity on the petitioner's part . . . ; [and that] the cohabitation of petitioner with another person is an 'illegal and reprehensible activity which is obviously occurring in the presence of and affecting a teen-age daughter who should be receiving lessons in morality and chastity rather (than) a home study course in promiscuity.'<sup>127</sup>

Judge Hey's conduct in this case serves as a poignant reminder that judges continue to rely on their own morality codes in denying women custody of their children. While we may take solace in the West Virginia Supreme Court's systematic reversal of such erroneous decisions, at least one member of that state's highest court shares Judge Hey's viewpoint on cases like *Judith R.* In his partial dissent, Justice Brotherton opined, "The majority is clearly wrong in permitting the fourteen-year-old child . . . to remain in the custody of her mother . . . while she is openly cohabitating with a man and his family."<sup>128</sup> Arguing that cohabitation should be considered as evidence of parental unfitness, he continued, "If Judith R. really loved her child, she would have provided a stable family environment, even if she had to live alone. Her sacrifice would be bolstered by the knowledge that her child would be exposed to proper principles and conduct that would be building blocks for her life."<sup>129</sup>

#### IV. THE PRIMARY CARETAKER STANDARD: MINNESOTA, 1985-1989

In 1985, Minnesota followed West Virginia's lead and abandoned its "best interests of the child" standard<sup>130</sup> in favor of the primary caretaker standard in *Pikula v. Pikula*.<sup>131</sup> As the cases that follow demonstrate, women in Minnesota were no better served by courts' discriminatory implementation of

---

126. *Id.* at 450.

127. *Id.* at 453.

128. *Id.* at 455 (Brotherton, J., dissenting).

129. *Id.* at 455-56 (Brotherton, J., dissenting).

130. *See, e.g.,* Berndt v. Berndt, 292 N.W.2d 1, 2 (Minn. 1980).

131. 374 N.W.2d 705 (Minn. 1985).

the standard than were their sisters in West Virginia. In *Pikula*, the trial court awarded custody to Dana, the father of two children, even though he was an alcoholic who verbally and physically abused Kelly, his wife, in his daughters' presence.<sup>132</sup> At one point, shortly before Kelly moved out of the marital home, Dana threatened to keep her there and to take the children away "so she would know what it was like to be alone."<sup>133</sup> Kelly moved into a battered women's shelter shortly after this threat, where she remained until the trial.<sup>134</sup>

All of the foregoing evidence, as well as the recommendations of three social workers,<sup>135</sup> failed to dissuade the trial court from awarding custody to Dana.<sup>136</sup> The court's opinion did not address the effects of Dana's alcoholism and wife battering on the children and offered no support for the finding that Kelly "would subject the children to considerable uncertainty and instability in home, community, culture, persons and religion" and that her "behavior and practices of child rearing as well as her interest in her children are at least subject to serious question."<sup>137</sup>

Reversing the trial court decision, the appellate court noted that "the trial court had penalized Kelly for the divorce and remarriage of her parents, for actions and attitudes of other close relatives, and for her involvement with persons concerned with women's issues, without finding that any of these factors affected the relationship between children and mother."<sup>138</sup> In its discretionary review of the case, the state supreme court agreed, noting also that "[l]egal rules governing custody awards have generally incorporated evaluations of parental fitness replete with ad hoc judgments on the beliefs, lifestyles, and perceived credibility of the proposed custodian."<sup>139</sup>

The Minnesota supreme court in *Pikula* sought to redress this problem of subjective, biased judicial decision-making in child custody cases by replacing

132. One such assault took place in front of other adults as well, who felt the incident was serious enough to report it to the police. *Id.* at 707.

133. *Id.*

134. *Id.* at 708.

135. *Id.*

136. The primary reason for this decision seems to have been that Dana had a large extended family, which "surrounded the girls with a social milieu imbued with the 'traditional' values, shared and fostered by Dana." *Id.* at 710. While alcohol abuse and wife battering may be "traditional values" in some families, the trial court's acceptance of these activities defies comprehension.

137. *Id.* Kelly was seventeen years old when her first daughter was born. While she did not have a job outside the home, she had managed to complete high school while raising two babies and caring for the home. Dana accused Kelly at trial of disciplining the children too severely and of being "ambivalent" about her role as a mother. *Id.* at 707. The evaluations of three social workers contradicted this testimony. In observing Kelly with her daughters, all three concluded that Kelly was affectionate towards them and did not use excessive discipline. *Id.* at 708.

138. *Id.* at 709. The appellate court's reference to "persons concerned with women's issues" suggests that the trial court was actually punishing Kelly for seeking refuge from Dana at a battered women's shelter. See also Woods, et al., *supra* note 88, at 1134 ("[B]attered women are penalized by courts for lifestyles which result directly from the physical abuse.").

139. *Pikula*, 374 N.W.2d at 713.

the best interests of the child standard with the primary caretaker standard.<sup>140</sup> The court adopted the criteria set out by the *Garska* court for determining which parent is the primary caretaker.<sup>141</sup> However, it defined the parental fitness exception somewhat differently: “[T]he primary parent should be given custody unless it is shown that the child’s physical or emotional health is likely to be endangered or impaired by being placed in the primary parent’s custody.”<sup>142</sup> The Minnesota exception for parental unfitness was even less clearly defined than the *Garska* exception<sup>143</sup> since it failed to provide any criteria for courts to use in determining whether a child’s health is endangered by his or her parent’s conduct.

Minnesota cases arising after *Pikula* illustrate lower courts’ inability or unwillingness to apply the primary caretaker standard and its nebulous exception in a non-discriminatory manner. In *Tanghe v. Tanghe*,<sup>144</sup> the trial court awarded custody of the couple’s five children to Mark, their father, on the grounds that Debra, their mother, while primarily responsible for the children’s physical needs, was incapable of providing adequately for the emotional needs of the four eldest daughters.<sup>145</sup> The court found that Debra verbally and physically disciplined the children severely,<sup>146</sup> although it paid little attention either to Mark’s admission that he had spanked one of the children too hard (the child received welts on his body as a result of this spanking), or to the fears expressed by two of the children to the social worker about being spanked by Mark.<sup>147</sup> The testimony of a social worker, Debra’s psychologist, and the children’s guardian ad litem stressed Debra’s emotional instability, while, as the appellate court noted, “[n]one of the expert witnesses investigated reports that [Mark] had physically abused [Debra] on approximately 20 occasions. The information was provided in a letter from a counselor at a domestic treatment center, where a treatment program for [Mark] had been outlined. He did not complete the program.”<sup>148</sup>

The trial court failed to identify the possible connection between Debra’s “emotional instability,” as described by the guardian ad litem, and the fact that Mark frequently assaulted her.<sup>149</sup> Rather than being emotionally unstable,

---

140. “[W]hen both parents seek custody of a child too young to express a preference, and one parent has been the primary caretaker of the child, custody should be awarded to the primary caretaker absent a showing that that parent is unfit to be the custodian.” *Id.* at 712.

141. *Id.* at 713. See also *supra* text accompanying note 50.

142. *Pikula*, 374 N.W.2d at 714.

143. See *supra* text accompanying note 50.

144. 400 N.W.2d 389 (Minn. Ct. App. 1987).

145. *Id.* at 392.

146. Evidence was introduced at the dissolution hearing concerning three acts of physical discipline over a five-year period. *Id.* at 390.

147. *Id.* at 391.

148. *Id.*

149. Additionally, the court failed to consider the fact that some battered women may hit their children more frequently than do other women as a result of the abuse they suffer. See LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 150 (1984) (“Eight times as many women report using physical discipline on their children while with their batterers than when living alone or in a nonbattering relationship.”). See

Debra may have instead exhibited the characteristics of a woman who reasonably feared being beaten by her husband. The trial court described her as “suffer[ing] from a lack of self-esteem” and displaying a “dependent personality.”<sup>150</sup> These characteristics may be more appropriately attributed to Mark’s repeated abuse of Debra than to some generalized disability or deficiency of Debra herself.<sup>151</sup> Not only was Debra forced to suffer Mark’s abuse for the years during which they lived together; the trial court then forced her to give up her five daughters to her abuser because his beatings had rendered her “emotionally unstable.” The court also gave no recognition to the fact that Debra had received psychological therapy,<sup>152</sup> while Mark had failed to complete his recommended treatment program for domestic abuse.<sup>153</sup> Finally, the court ignored the very real connection between Mark’s physical abuse of Debra and the increased likelihood that, as custodial parent, he would abuse his daughters as well.<sup>154</sup>

The appellate court reversed and remanded the case, directing the trial court as follows:

Possibly a parent who serves as a full-time homemaker and child caregiver occasionally may invoke different disciplinary techniques than a parent who works both full and part-time jobs and is not called upon to provide constant or consistent discipline. In addressing the emotional stability of the parties, the trial court should also make specific findings regarding [Mark’s] alleged abuse of [Debra] and alleged inappropriate discipline of the minor children.<sup>155</sup>

The appellate court in this case acknowledged the trial court’s misapplication

---

also Jean Giles-Sims, *A Longitudinal Study of Battered Children of Battered Wives*, 34 FAMILY RELATIONS 205 (1985) (citing MURRAY STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY (1980) (battered woman is twice as likely as non-battered woman to abuse her own child)).

150. *Tanghe*, 400 N.W.2d at 392.

151. See, e.g., WALKER, *supra* note 149, at 82 (“[T]he battered women in our study were highly depressed . . .”). But see *id.* at 80 (study found battered women’s self-esteem was surprisingly high: “This finding of positive self-image is unusual and inconsistent with current theories about battered women.”).

Researchers have noted that a uniform characteristic of battering men is “an overwhelming need to control the woman.” *Id.* at 129. Thus, it should not be surprising that battered women like Debra adopt defensive postures (i.e., the appearance of dependence) in an effort to minimize future abuse. Moreover, both the social worker and Debra’s psychologist testified that she had begun making progress emotionally after she separated from Mark, which suggests that whatever emotional problems she had resulted from her relationship with him.

152. 400 N.W.2d at 391.

153. *Id.* at 393.

154. See, e.g., WILLIAM STACEY & ANSON SHUPE, THE FAMILY SECRET: DOMESTIC VIOLENCE IN AMERICA 63-64 (1983) (45% of the children of battered women studied had been physically abused and/or seriously neglected—authors noted that this figure is 1500% higher than national average in general population); WALKER, *supra* note 149, at 59 (53% of approximately 400 battering men studied abused their children as well as their partners); David Finkelhor, *Common Features of Family Abuse*, in THE DARK SIDE OF FAMILIES 17, 22 (David Finkelhor, et al. eds., 1983) (men who batter their wives are more prone than non-batterers to abuse their children as well).

155. 400 N.W.2d at 394.

of the primary caretaker standard as enunciated in *Pikula*.<sup>156</sup> However, the emotional distress that this ordeal caused Debra must have been enormous and was largely unnecessary. Had the trial court obeyed the *Pikula* mandate, Debra's ordeal might have ended sooner. Instead, her case was heard by a court that displayed no concern for her suffering at Mark's hands, but concluded only that she might be too emotionally unstable to care for her children. Moreover, she had to live with the fear that Mark might hurt her daughters as he had hurt her so many times before. The appellate court's reversal and remand of the trial court's decision could not expunge the antecedent proceedings, which were protracted and undoubtedly compounded Debra's suffering.<sup>157</sup>

In *Sinsabaugh v. Heinerscheid*,<sup>158</sup> the appellate court held that the trial court had not erred in failing to apply the primary caretaker standard, given that three years had passed between the parties' separation and the custody hearing.<sup>159</sup> Although neither the trial court nor the appellate court found Nancy Sinsabaugh to be an unfit parent, both were greatly concerned by the fact that she suffered from depression and anxiety and was under a therapist's care.<sup>160</sup> Neither court investigated the cause of Nancy's emotional distress, even though her depression and anxiety may well have resulted from her divorce, and might have diminished over time.<sup>161</sup> Neither court mentioned any negative impact Nancy's emotional state had on her child.<sup>162</sup>

On the other hand, both courts looked favorably upon Paul Heinerscheid's remarriage to a woman who had two children of her own and who "quit her job to spend more time caring for the children."<sup>163</sup> The courts' reliance on this factor is particularly troubling in light of the fact that many more men than women remarry after divorce.<sup>164</sup> If remarriage is accepted as a legitimate factor for courts to consider in making custody determinations, women who are primary caretakers will nonetheless be denied custody of their children because other women have effectively "replaced" them as mothers.<sup>165</sup>

---

156. See *supra* note 141 and accompanying text.

157. Debra was lucky that financial constraints did not prevent her from pursuing an appeal. Legal fees are often staggering, and one can only surmise that many women who are wrongfully denied custody at the trial level simply cannot afford to appeal. To get a sense of how large legal fees are in similar custody disputes, see *Sinsabaugh v. Heinerscheid*, 428 N.W.2d 476, 481 (Minn. Ct. App. 1988) (the mother's legal fees for the trial and her appeal totalled \$30,960, while the father's totalled \$50,000).

158. *Id.*

159. *Id.* at 479.

160. *Id.* at 480.

161. In fact, Nancy admitted to being depressed and anxious in 1984, the year in which she and Paul were separated, and she further testified that she was improving at the time of trial. *Id.*

162. Nancy's psychologist "found her an emotionally stable person well suited for parenting." *Id.*

163. *Id.* at 478.

164. For every 100 divorced men who remarry, only about 60 divorced women remarry. See NATIONAL CENTER FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, VITAL STATISTICS OF THE UNITED STATES 1978, VOLUME III—MARRIAGE AND DIVORCE, 1-10 (1982).

165. *Accord In re Custody of Temos*, 450 A.2d 111, 125 (Pa. Super. 1982) ("By awarding the children to the father the lower court did not ensure that they would have any more time with the father than they now have with the mother. It only ensured that they would have a few hours a day with the

Furthermore, single women often find it impossible to stay home all day with their children, because financial constraints force them to work outside the home. Courts should redress this problem by ordering and enforcing more realistic child support payments, *not* by awarding custody to men whose new wives can afford to stay home because their husbands work.

## V. USE OF THE "HYBRID" PRIMARY CARETAKER STANDARD

While two states have determined custody using solely the primary caretaker standard, others have adopted a hybrid form of the primary caretaker and the best interests of the child standards. In such schemes, the identity of the child's primary caretaker is one of many factors considered in reaching an overall determination of the best interests of the child. As the cases in this section demonstrate, this hybrid standard has done little to prevent judges from acting in accordance with the same biased and unjustifiable presumptions discussed above. The following cases demonstrate that the primary caretaker standard must be made narrower and more absolute if it is to operate in a non-discriminatory fashion. Using it as one of numerous factors renders it ineffective.

### A. *Minnesota's Shift to a Hybrid Standard*

In 1989, the Minnesota legislature created a statutory child custody standard which nullified the judicially mandated primary caretaker standard.<sup>166</sup> In its place, the legislature adopted a modified "best interests of the child" standard, elaborating twelve factors courts should consider in deciding custody cases. The child's primary caretaker is one of these twelve factors.<sup>167</sup> One of the legislature's goals in enacting the new law was to abolish use of the primary caretaker presumption as the sole determinant for child custody. According to the statute, "[t]he court may not use one factor

---

father's wife instead of with a babysitter."). Phyllis Chesler has noted that judges' willingness to accept men's mothers or new wives as "mother substitutes" illustrates judicial devaluation of maternal labor, "as if any female surrogate is the same as the mother . . ." CHESLER, *supra* note 8, at 256.

166. MINN. STAT. § 518.17 (Supp. 1992).

167. The statute spells out the following twelve factors:

(1) the wishes of the child's parent or parents as to custody; (2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference; (3) the child's primary caretaker; (4) the intimacy of the relationship between each parent and the child; (5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests; (6) the child's adjustment to home, school, and community; (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; (8) the permanence, as a family unit, of the existing or proposed custodial home; (9) the mental and physical health of all individuals involved; (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any; (11) the child's cultural background; and (12) the effect on the child of the actions of an abuser, if related to domestic abuse . . . that has occurred between the parents.

*Id.*

to the exclusion of all others."<sup>168</sup> A 1990 amendment to the statute added an even stronger admonition against judicial over-reliance on the primary caretaker.<sup>169</sup>

The Minnesota legislature was apparently concerned that the primary caretaker standard was overly mechanical and inflexible in application.<sup>170</sup> The cases discussed in Sections III and IV, however, do not indicate that the primary caretaker standard has been applied rigidly by either West Virginia or Minnesota courts. To the contrary, the major problem is that the standard has been applied too casually. Women who are undisputedly their children's primary caretakers have lost custody for reasons having nothing to do with their fitness as parents (as defined by the courts in the context of the primary caretaker standard).<sup>171</sup> Thus, it is not entirely clear why the Minnesota legislature sought so aggressively to abrogate the primary caretaker standard.<sup>172</sup>

Regardless of the legislature's rationale for discarding the primary caretaker standard, judicial application of Minn. Stat. § 518.17 may put women in an even more precarious position with respect to custody of their children.<sup>173</sup> In other states where a similar best interests test is employed with the primary caretaker as one of numerous factors to be considered, women lose custody of children for whom they have cared almost exclusively.

---

168. *Id.*

169. "The primary caretaker factor may not be used as a presumption in determining the best interests of the child." *Id.*

170. *See, e.g.,* Maxfield v. Maxfield, 452 N.W.2d 219, 222 (Minn. 1990) ("Apparently the 1989 amendments were a reaction to the mechanical way in which *Pikula* was being applied.") In his dissent, Justice Yetka agreed with the majority on this point: "[T]he clear intent of the legislature [is] . . . to eliminate inflexible and stereotypical presumptions in child custody cases." *Id.* at 224.

171. *See supra* Sections III & IV.

172. However, the practical significance of the adoption of a hybrid test in place of the pure primary caretaker test is questionable. In a random sample of nine recent Minnesota custody cases, I found only two instances in which courts did *not* award custody to the primary caretaker, even though the primary caretaker is now merely one of the twelve factors to be considered. For cases in which courts awarded custody to the primary caretaker, see *Bennett v. Bennett*, No. C4-91-1051, 1991 WL 263486 (Minn. Ct. App. Dec. 17, 1991); *Rutanen v. Olson*, 475 N.W.2d 100 (Minn. Ct. App. 1991); *Gibson v. Gibson*, 471 N.W.2d 384 (Minn. Ct. App. 1991); *Braun v. Braun*, No. CO-90-2607, 1991 WL 80691 (Minn. Ct. App. May 21, 1991); *Kern v. Kern*, No. C9-90-2475, 1991 WL 80699 (Minn. Ct. App. May 21, 1991); *Matlon v. Thomas*, No. C5-90-1808, 1991 WL 34686 (Minn. Ct. App.); *Dauer v. Dauer*, No. C9-90-905, 1990 WL 146606 (Minn. Ct. App. Oct. 9, 1990). For cases in which courts did not award custody to the primary caretaker, see *Pierce v. Pierce*, No. C2-91-805, 1991 WL 185095 (Minn. Ct. App. Sept. 24, 1991); *Shaney-Kearney v. Kearney*, 1991 WL 30345 (Minn. Ct. App.).

173. Note, however, that as of January 4, 1991, four women and three men compose Minnesota's supreme court. While this recent (and historic) change in court composition may have no implications for the future of child custody decisions in Minnesota, feminists can hope that a female majority will be especially vigilant about gender discrimination in the law. *See* David Margolick, *Women's Milestone: Majority on Minnesota Court*, N.Y. TIMES, Feb. 22, 1991, at B16 ("No one is predicting that the new female majority on the seven-member Minnesota court will instantly produce changes in its jurisprudence, though some lawyers anticipate heightened sensitivity to cases involving domestic abuse, child custody, spousal support, sexual harassment, employment discrimination and other issues of traditional concern to women.").

### B. *Other Hybrid States*

In *Merriam v. Merriam*,<sup>174</sup> a recent Utah case, the trial court awarded custody to the father, Todd, finding that neither parent was the primary caretaker.<sup>175</sup> At trial, Todd accused his ex-wife, Raychelle, of having affairs and of hitting their son about the face several times. Raychelle denied these allegations. She asserted that it was Todd who had committed adultery, who had abused drugs and alcohol, and who had threatened and assaulted her.<sup>176</sup> Despite Raychelle's testimony, neither the trial court nor the appellate court accepted any of the allegations except that of Raychelle's alleged infidelity. Todd's proof of this "fact" rested solely on his own testimony that Raychelle had admitted to marital infidelity, and the testimony of one witness who "took the Fifth" when asked if he had engaged in sexual intercourse with Raychelle.<sup>177</sup> In affirming the trial court's decision, the appellate court stated, "Although Raychelle denied infidelity, we defer to the trial court's assessment that Todd's testimony was more credible. . . . Nor do we find that the trial court abused its discretion in considering Raychelle's sexual conduct in making its custody decision."<sup>178</sup> The court indicated that to rely "solely" on Raychelle's sexual conduct would have been an abuse of discretion, but noted that the trial court had indeed considered other "relevant" factors, including the relative wealth of Todd and Raychelle.<sup>179</sup>

*In re Custody of Temos* is another example of judicial misapplication of the hybrid best interests/primary caretaker standard.<sup>180</sup> The lower court in this Pennsylvania case awarded custody to the father, in large part because the mother was involved in a relationship with a married man, and because she had become "increasingly career-oriented."<sup>181</sup> The author of the lower court opinion acknowledged that the suppositions upon which his opinion was based made him "sound like an old stodgy judge;" he admitted "that mores and standards of the community have changed . . . ."<sup>182</sup> Even so, he ignored testimony from the children's teachers, neighbor, and babysitter indicating that the children were doing well in their mother's custody.<sup>183</sup> Disregarding previous Pennsylvania decisions,<sup>184</sup> the lower court presumed that the

174. 799 P.2d 1172 (Utah App. 1990).

175. *Id.* at 1175. In Utah, the primary caretaker is to be given "considerable weight" in custody determinations. *See Davis v. Davis*, 749 P.2d 647, 648 (Utah 1988).

176. 799 P.2d at 1174.

177. *Id.* at 1176-77.

178. *Id.*

179. *Id.* at 1177. I would argue that a woman's financial status is not relevant to her parenting ability. *See supra* text accompanying notes 80-81.

180. 450 A.2d 111 (Pa. Super. Ct. 1982). When *Temos* was decided, the child custody standard in use in Pennsylvania was the best interests of the child, with "positive consideration" given to the primary caretaker parent. *See, e.g., Jordan v. Jordan*, 448 A.2d 1113, 1115-16 (Pa. Super. Ct. 1982).

181. 450 A.2d at 112.

182. *Id.* at 121.

183. *Id.* at 115.

184. *Id.* at 122.

woman's relationship with a married man and her career responsibilities rendered her a poor custodial parent.<sup>185</sup>

The superior court reversed, noting that, "Instead of recognizing and giving weight to the beneficial effects on the children of the care and home that the mother has provided, the lower court concentrated its attention on certain aspects of the mother's life that it disapproved of."<sup>186</sup> The superior court also observed, "In terms of legal reasoning, the lower court's error was to think in terms of presumptions."<sup>187</sup>

*Seibert v. Seibert*<sup>188</sup> also illustrates some courts' reliance on unsubstantiated presumptions in applying a hybrid custody standard. In *Seibert*, an Ohio appellate court reversed a lower court's erroneous award of custody to Jeffrey Seibert. Although it is a relevant factor in custody determinations in Ohio, the trial court's opinion failed to acknowledge Vicki Seibert's status as primary caretaker. Instead, the trial court's decision rested largely on the testimony of a clinical psychologist who stated that Vicki, while not an unfit parent, was "unstable" because she would have to relocate and find a job with her limited qualifications, because she had lost the emotional and financial support of her husband, and because she took prescription medications for a "nervous condition."<sup>189</sup> The trial court failed to recognize the possibility that the instability in Vicki's life was a foreseeable—and temporary—result of both the divorce itself and the failed marriage which preceded it, rather than an inherent flaw in her parenting ability.<sup>190</sup>

The trial court's rationale leads almost inescapably to the conclusion that women are unfit parents *because* they have gotten divorced. Women are *usually* left poorer after divorce, both because many women work as homemakers during their marriage and thus find it difficult to re-enter the job market after divorce,<sup>191</sup> and because most women rely on their husbands for some amount of financial support during marriage which often becomes unavailable to them upon divorce.<sup>192</sup> If courts permit the relative financial effects of divorce on each parent to affect custody awards, women will almost

---

185. *Id.* at 115-16.

186. *Id.* at 115.

187. *Id.* at 121.

188. 584 N.E.2d 41 (Ohio Ct. App. 1990).

189. *Id.* at 44.

190. This fact was not lost on the appellate court, however, which stated, "The conclusions which the trial court drew from [the psychologist's] testimony ignores [sic] the fact that [Vicki's] financial and emotional instability stem in part from her relationship with [Jeffrey] and her reliance upon him to provide for her financial well-being." *Id.*

191. "[T]he woman who has not worked outside the home during the marriage . . . may be . . . disadvantaged by a lack of workplace skills—and various forms of sex discrimination—if she seeks work after the divorce . . . [W]omen may be systematically disadvantaged in the marketplace, after divorce." Minow, *supra* note 9, at 909.

192. According to the results of a study of 20,000 families, fewer than half of the absent fathers were paying child support in the first year following marital breakup. This study also found that although many women returned to full or part-time work following marital dissolution, their family income declined by 26%. Jason DeParle, *Child Poverty Twice as Likely After Family Split, Study Says*, N.Y. TIMES, March 2, 1991, at 8.

invariably be disadvantaged.

These cases demonstrate that overly vague, flexible custody standards like the hybrid primary caretaker/best interests test can give rise to an abuse of judicial discretion. This causes some women to lose custody of their children not because they are inadequate parents, but simply because they are, as women, subject to judges' personal prejudices. The solution to this problem is not, however, to abandon the primary caretaker presumption, but rather to apply it in its "pure" form with a well-defined unfitness exception. This approach, which is set forth in the following section, will effectively sever the tie between gender bias and child custody awards that has been preserved by the hybrid test.

#### VI. PROPOSED REVISIONS TO THE PRIMARY CARETAKER STANDARD

The primary caretaker standard is laudable in theory; in practice, however, it may operate to the detriment of women and children alike. As discussed in Section II of this article, numerous commentators have warned that lengthy, uncertain custody trials can gravely harm children psychologically.<sup>193</sup> These commentators favor stringent custody standards that do not rely on the predilections of individual judges. Such standards would hopefully produce more predictable outcomes without the emotional trauma associated with long, embattled trials.<sup>194</sup>

Similar concerns about the judiciary's handling of custody disputes have been raised by feminists. Women were historically disadvantaged by a presumption that children remain with their fathers after divorce.<sup>195</sup> Then, an equally sexist presumption favored mothers as custodial parents.<sup>196</sup> While this preference may have helped individual mothers seeking custody, it nonetheless disadvantaged women as a class by perpetuating stereotypical gender roles.<sup>197</sup> Since the more subjective "best interests of the child" standard has come into vogue in courts across the country,<sup>198</sup> women have fared no better. Women lack the resources to hire experts and engage in

---

193. *E.g.*, BEYOND THE BEST INTERESTS, *supra* note 10, at 42-43 ("The courts, social agencies, and all the adults concerned with child placement must greatly reduce the time they take for decision . . . . [T]o avoid irreparable psychological injury, placement, whenever in dispute, must be treated as the emergency that it is for the child."). Justice Neely states:

The degree to which children suffer during divorce is a widely discussed subject. The slowly grinding machinery of the courts inevitably exacerbates the emotional stresses that result from the simple fact of divorce. . . . The magnitude of these effects is a direct function of the time it takes to conclude the proceedings.

Neeley, *supra* note 17, at 176.

194. *See, e.g.*, Neely, *supra* note 17, at 182 (arguing that "[a]lthough th[e] primary caretaker standard] may appear overly cut-and-dried," it is the standard which best serves children by reducing the amount of litigation, "[b]ecause litigation *per se* can be the cause of serious emotional damage to children . . . .").

195. *See supra* notes 16-17 and accompanying text.

196. *See supra* text accompanying notes 18-25.

197. *See supra* text accompanying notes 26-28.

198. *See supra* text accompanying notes 29-32.

prolonged legal battles;<sup>199</sup> their ex-husbands coerce them into accepting lower child support payments by threatening custody battles.<sup>200</sup> They are also disfavored as custodial parents because they lack resources;<sup>201</sup> they have not remarried;<sup>202</sup> they have relationships with men<sup>203</sup> or with women;<sup>204</sup> they work full-time;<sup>205</sup> or they do not work.<sup>206</sup> In short, even the most personal aspects of women's lives are scrutinized by judges whose morals and values often reflect presumptions about gender roles.

The primary caretaker standard can be tailored to address the concerns of both child advocates and feminists. As the cases discussed earlier indicate, the problem lies in the extremely vague, ill-defined "unfitness" exception to the standard. The standard will operate in a truly gender neutral manner only if the gaping loophole ironically termed an "exception" becomes what it should be: a narrowly-drawn, precisely-defined set of criteria whose application requires no judicial subjectivity.<sup>207</sup> Furthermore, the purpose of these criteria should be to prevent specific harms to children, *not* to punish women for the lifestyles they have chosen or have been forced to adopt.

My proposal does not absolutely eliminate exceptions to the primary caretaker presumption, for there clearly are some primary caretakers who are unfit. Instead, I propose a reform that would define and narrow the unfitness exception to the primary caretaker standard. A more narrowly drawn exception would increase the certainty of custody decisions and prevent judges from employing biased assumptions and scrutinizing aspects of parents' personal lives that have no bearing on their fitness. The model I propose parallels reforms suggested in the child abuse and neglect context. Adoption of such a proposal would create a system in which parents seeking custody after divorce are held to the same standard of fitness as nondivorcing parents.<sup>208</sup>

199. See *supra* text accompanying note 37.

200. See *supra* text accompanying note 41.

201. See *supra* text accompanying note 179.

202. See *supra* text accompanying notes 163-165.

203. See *supra* text accompanying notes 181-85.

204. See *supra* note 107.

205. See *supra* text accompanying note 185.

206. See Polikoff, *supra* note 17, at 239:

The flip side of penalizing mothers with limited financial resources due to sporadic or part-time employment is penalizing mothers who work full-time for not being sufficiently available to their children. Since men are traditionally expected to be full-time workers, fathers do not face this disadvantage. In fact, a man with a full-time job who provides any assistance in childrearing, however limited, looks like a dedicated father, while a woman with a full-time job who still does primary, but not all, caretaking, looks like 'half' a mother, dissatisfied with the childrearing role.

See also Crippen, *supra* note 33, at 463 ("[A]pplication of the [primary caretaker] preference often results in the celebration of caretaking contributions of fathers and the criticism of shortcomings of mothers.") (citations omitted).

207. "There is a marked trend toward making custody modifications fairly easy to obtain. Instead, rigorous statutory criteria should firmly limit both the parents' ability to bring such litigation and the courts' discretion to make such custodial modifications." Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 760 (1985).

208. See also Mnookin & Kornhauser, *supra* note 40, at 957 ("We believe divorcing parents should be given considerable freedom to decide custody matters—subject only to the same minimum standards for protecting the child from neglect and abuse that the state imposes on *all* families.").

### A. Application of Child Neglect/Abuse Standards in Custody Cases

In the context of parental neglect, states typically remove children from their parents' custody only when there is evidence of child neglect or abuse by the parents.<sup>209</sup> Commentators have criticized state abuse and neglect laws for employing vague standards that invite courts to rely on their personal values and biases in determining whether to terminate parental rights.<sup>210</sup> The parental fitness test I propose is borrowed in large part from the critique offered by Michael Wald in 1975.<sup>211</sup> Wald notes that most abuse and neglect statutes are vaguely defined,<sup>212</sup> and are based on "desired" parental behavior instead of on specific harms to the children in question.<sup>213</sup> Wald argues primarily from the perspective of the child, and attempts to minimize the state's role as custodian.<sup>214</sup> The concerns he raises in the child neglect context, such as abuse of judicial discretion and courts' frequent reliance on unsubstantiated presumptions, parallel feminist concerns in the context of divorce and custody.

Child custody law should strive to minimize decisions based on judges' personal biases and opportunities for non-primary caretaker parents to challenge courts' original custody orders.<sup>215</sup> Wald's ideas suggest that we

209. In New York, for example, a neglected child is defined as a child under eighteen:

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care

(A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by using a drug or drugs; or by using alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court . . . .

N.Y. FAM. CT. ACT § 1012 (Supp. 1986).

210. Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975).

211. *Id.*

212. *Id.* at 1000.

213. *Id.* at 1004. Wald notes more specifically that:

Because the statutes do not reflect a considered analysis of what types of harm justify the risks of intervention, decisionmaking is left to the ad hoc analysis of social workers and judges. There is substantial evidence that their decisions often reflect personal values about childrearing, which are not supported by scientific evidence, and which result in removing children from environments in which they are doing adequately. Only through carefully drawn statutes, drafted in terms of specific harms to the child, can we limit the possibility of intervention in situations where it will do more harm than good.

*Id.* at 1001-02.

214. See also BEFORE THE BEST INTERESTS, *supra* note 10, at 12 ("A policy of minimum coercive intervention by the state . . . accords not only with our firm belief as citizens in individual freedom and human dignity, but also with our professional understanding of the intricate developmental processes of childhood.").

215. See Wexler, *supra* note 207, at 782:

Children of divorce, and their families, need a new, more restrictive standard for custody modification. No custodial modification should be allowed . . . unless the child is seriously

must first identify the specific harms to children that we seek to avoid through the unfitness exception to the primary caretaker presumption. Second, we must fashion a definition of parental fitness that addresses only those specific harms, and that does not allow judges' personal values to enter into the calculus.<sup>216</sup>

According to Wald, state intervention is warranted only when the child has been seriously harmed and the intervention will do more good than harm.<sup>217</sup> More specifically, he argues that:

[C]oercive intervention should be permissible only when a child has suffered or is likely to suffer serious physical injury as a result of abuse or inadequate care; when a child is suffering from severe emotional damage and his parents are unwilling to deal with his problems without coercive intervention; when a child is sexually abused; when a child is suffering from a serious medical condition and his parents are unwilling to provide him suitable medical treatment; or when a child is committing delinquent acts at the urging or with the help of his parents.<sup>218</sup>

This definition of child neglect should also apply in the context of unfitness exceptions in divorce.<sup>219</sup> If it were substituted for the *Garska* and *Pikula* unfitness tests,<sup>220</sup> it would eliminate much of the judicial discretion and gender bias at work in the cases discussed in Sections III through V of this article. Such a test has the advantage in the custody context of removing women's sexual conduct and similarly subjective factors from judicial consideration unless such factors cause harm to the children whose custody is at issue. Under the proposed test, only a concrete set of specific harms to the child(ren) is relevant to the court in determining whether a primary caretaker

---

endangered. The definition of endangerment should be as specific as possible, focusing on whether the custodial parent is taking prudent care of the child. . . . This new test would not differ substantially from model statutes that define when the state may, due to parental neglect, intervene in family decisionmaking and assume responsibility for a child.

216. See Wald, *supra* note 210, at 1034 ("[T]he morality of the parents and the type of upbringing they provide should not constitute a basis for state intervention.")

217. *Id.* at 1005. Cf. Wexler, *supra* note 207, at 817-18 ("A custodial parent should lose custody only when there is actual or imminent risk of serious harm to the child and the potential detriment to the child caused by remaining in the family outweighs the harms and disruptions that a change in custody would cause.")

218. Wald, *supra* note 210, at 1008. See generally INSTITUTE OF JUDICIAL ADMIN. & AM. BAR ASS., JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ABUSE AND NEGLECT § 2.1 (1981), cited in Wexler, *supra* note 207, at 782-83 n.95. Cf. BEFORE THE BEST INTERESTS, *supra* note 10, at 193-96 (outlining suggested grounds for state intervention in child placement matters).

219. See Wexler, *supra* note 207, at 817-18 ("A custodial parent should lose custody only when there is actual or imminent risk of serious harm to the child and the potential detriment to the child caused by remaining in the family outweighs the harms and disruptions that a change in custody would cause."). State intervention in child abuse/neglect cases is not entirely analogous to judicial custody decisions; the former will result in divestment of custody from both parents, whereas the latter generally results in one parent's retention of custody. In my view, however, this distinction is not significant enough to render a neglect/abuse standard for parental unfitness inappropriate for analogy to custody cases.

220. See *supra* notes 53 & 142 and accompanying text.

is fit.

Moreover, the test I propose would require more than vague allegations of unfitness before a court could reconsider a custody order. To reopen the issue of custody once the primary caretaker has been awarded custody, the noncustodial parent would have the initial burden of proof. If the noncustodial parent is unable to establish that the child had suffered one or more of the enumerated harms while in the care of the primary caretaker, the original custody order would not be subject to further judicial inquiry. This requirement will minimize the trauma to both the custodial parent (usually the mother) and the child. The financial as well as emotional toll on divorced women and their children will be greatly reduced if custody litigation does not linger on through one or more rounds of appeals.

### B. *Physically Abusive Husbands and Fathers*

Several of the cases discussed earlier illustrate a disturbing problem which is not addressed by Wald's proposed child neglect test. In *Pikula, Tanghe, and Merriam*,<sup>221</sup> each court awarded custody of the children to the ex-husband *even though he had battered his wife*. As previously discussed, the courts declared the women unfit on the basis of a variety of questionable justifications. The fitness of their husbands, however, who had a history of physical violence in the home, was not even addressed.<sup>222</sup> Men who batter their wives are more likely to physically abuse their children as well;<sup>223</sup> in addition, battering men who remarry tend to remain physically abusive in their future domestic relationships.<sup>224</sup> Evidence suggests that children exposed to physical violence in their homes are more likely to grow up to be batterers or victims of battering themselves.<sup>225</sup> It is preferable to remove children from homes in which battering takes place rather than to award custody to a parent who is likely to continue this practice.

In short, I argue that men who batter their wives are presumptively unfit for custodial parenthood. Their ability to refrain from abusing their children is questionable, and the long-term effects on children who see their fathers abuse their mothers may be extremely detrimental. My proposed fitness test

---

221. See *supra* notes 132, 144, & 174 and accompanying text.

222. See Woods, et al., *supra* note 88, at 1133 ("Courts are refusing to consider a father's battering of his wife as evidence that he is an unfit parent . . . even when the acts are committed in front of the children. On the other hand, other forms of moral and criminal culpability are sufficient for a denial of custody.").

223. See *supra* note 154.

224. LENORE WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 72 (1989) (batterers frequently repeat battering behavior in subsequent relationships with other women). See also Lenore Walker & Angela Browne, *Gender and Victimization by Intimates*, 53 J. PERSONALITY 179, 192 (1985) (at least half of battering men who receive treatment continue their violent behavior with new partners).

225. See, e.g., Walker, *supra* note 224, at 146 ("Children who grow up in abusive families are more likely to be on the giving or receiving end of abuse in the families they create as adults."). See also ANGELA BROWNE, WHEN BATTERED WOMEN KILL 23-35 (1987).

thus includes physical or emotional abuse of a spouse as grounds for a judicial finding of parental unfitness. Not only will this provision protect the children of battering men to the greatest extent possible, but it will also spare battered women the additional trauma of losing custody of their children to men who have repeatedly abused them.

### C. A Proposed Child Custody Statute

In summary, I would adopt the primary caretaker standard delineated by the court in *Garska*. The court describes ten parental duties and states that the parent who takes primary responsibility for them, *inter alia*, is the primary caretaker.<sup>226</sup> The ten factors are to be applied irrespective of the age of the minor child. There shall be no exceptions to the application of this standard unless the court determines the primary caretaker to be unfit. Only the following conditions may be considered as evidence that a primary caretaker is unfit:

(1) Physical abuse of the child(ren) by, or with the approval of, the primary caretaker. "Physical abuse" shall be defined as "a physical harm, inflicted nonaccidentally upon [the child] by his/her parent[ ], which causes, or creates a substantial risk of causing disfigurement, impairment of bodily functioning, or other serious physical injury."<sup>227</sup> There shall be a rebuttable presumption that a primary caretaker parent "who knew or should have known that his [or her] child was being abused [but] did not take reasonable action to protect the child"<sup>228</sup> is responsible for the abuse of that child by another individual. This presumption may be rebutted by evidence that the primary caretaker was incapable of taking steps to prevent the abuse due to his or her exceptionally limited intellectual or financial resources, or due to severe emotional or physical intimidation of the primary caretaker by the child abuser.

(2) Psychological abuse of the child(ren), by or with the approval of, the primary caretaker. "Psychological abuse" shall be defined as a psychological harm, inflicted nonaccidentally upon the child by his/her parent, which causes or creates a substantial risk of causing serious emotional, physical, or developmental disability. Psychological abuse connotes both overt parental action, such as verbal abuse/threats, and parental inaction, in the form of neglect or deprivation of parental attention/affection. Psychological abuse may

---

226. See *supra* note 50 and accompanying text.

227. JUVENILE JUSTICE STANDARDS RELATING TO ABUSE AND NEGLECT pt. II § 2.1(A) (Institute of Judicial Admin. Tentative Draft 1977), reprinted in MARK HARDIN & PATRICIA TAZZARA, TERMINATION OF PARENTAL RIGHTS: A SUMMARY AND COMPARISON OF GROUNDS FROM NINE MODEL ACTS 35 (1981). My definition of physical abuse is based on the Justice Department's proposed criteria for deciding when a child is endangered.

228. Victor Pike, et al., Model Dissolution of Parent-Child Relationship Act § VII(c)(2) (Suggested Draft 1976), reprinted in HARDIN & TAZZARA, *supra* note 227, at 40.

be manifested by such symptoms as a child's emotional illness, inability to progress educationally, loss of sleep or appetite, or poor socialization skills. Again, knowledge of such abuse, coupled with inaction, renders the primary caretaker responsible for the abuse, unless s/he is incapable of responding as detailed in (1).

(3) Sexual abuse of the child(ren) by, or with the approval of, the primary caretaker. "Sexual abuse" shall be defined as the commission against the child of any sexual offense punishable under state law. The same rebuttable presumption described in (1) and (2) shall apply.

(4) Serious physical or developmental harm to the child(ren) resulting from inadequate care by the primary caretaker. "Inadequate care" shall be defined as

fail[ure] to supply the child with adequate food, clothing, shelter, education (as defined by law), or health care, although financially able to do so or offered financial or other reasonable means to do so. . . .  
 "Adequate health care" includes any medical or non-medical remedial health care permitted or authorized under state law.<sup>229</sup>

However, a primary caretaker parent "who, legitimately practicing his [or her] religious beliefs, does not provide specified medical treatment for a child, is not for that reason alone a[n unfit] parent and the court is not precluded from ordering necessary medical services for the child according to existing state law."<sup>230</sup> The rebuttable presumption outlined in (1) and (2) applies here as well.

(5) Commission of delinquent acts by the child(ren) "as a result of pressure from or with the approval of their . . . primary caretaker."<sup>231</sup> The primary caretaker parent shall be assumed to "approve" of the child's delinquency if that parent knew or should have known of this behavior and failed to take reasonable steps to thwart it. The parent's intellectual and financial resources may be considered only insofar as these factors have an impact on the parent's ability to take requisite delinquency prevention/cessation measures.

(6) Physical or emotional abuse of the nonprimary caretaker parent by the

---

229. Sanford N. Katz, *Freeing Children for Permanent Placement Through a Model Act*, 12 FAM. L.Q. 203, 209 (1978). This language is borrowed from Sanford Katz's Model Act, aimed at establishing standards for freeing children in foster care from their "legal limbo" in order to "establish a permanent plan for their future." *Id.* at 203.

230. *Id.* at 217.

231. STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE § 3.113(h) (Report of Nat'l Advisory Comm. for Juvenile Justice & Delinquency Prevention 1980), reprinted in HARDIN & TAZZARA, *supra* note 227, at 46.

primary caretaker parent. Such abuse shall be defined as any behavior which is punishable under state domestic violence laws or other applicable criminal laws.

As noted earlier, the noncustodial parent seeking to reopen a custody decision on the grounds that the primary caretaker is an unfit parent would initially have to proffer specific evidence that the primary caretaker meets one of the above criteria for unfitness. Without such specific evidence, no reconsideration or modification of custody would be warranted.

## VII. CONCLUSION

Feminists have long been troubled by the gender bias, express or implied, in various child custody standards. The primary caretaker standard, at least on its face, alleviates this problem.<sup>232</sup> It is gender-neutral and fact-specific, apparently relying little on judges' personal notions about the appropriateness of women's lifestyles and behavior. Unfortunately, the vague unfitness exception invites courts to scrutinize and pass judgment upon women's sexual behavior, their financial affairs, their living arrangements, their friends' sexual orientation, and any other factors courts consider "relevant" to women's fitness as parents. In finding mothers unfit under the primary caretaker standard, lower courts in particular have employed the same gender-biased philosophies regarding parenting and family life that made other custody standards unworkable for women.

Feminists should not abandon the primary caretaker standard altogether, but should refine the standard to promote practical equality for women. Section VI of this article provides a clear, narrowly defined unfitness exception to the primary caretaker standard. Borrowing from commentary in the area of child neglect, I base my definition of unfitness on specific, provable harm to children. This exception, in conjunction with the primary caretaker presumption, *will* work for women and children. The result will be a child custody standard that not only reduces litigation and promotes certainty of outcome, but also furthers the feminist goals of formal and practical gender equality.

Approximately half of all marriages end in divorce;<sup>233</sup> approximately half of all currently divorcing couples have children.<sup>234</sup> The number of children

---

232. See Minow, *supra* note 9, at 908 (primary caretaker preference "recognize[s] the actual social practices without confining women and men to traditional roles . . .").

233. Donald H. Stone, *The Moral Dilemma: Child Custody When One Parent is Homosexual or Lesbian—An Empirical Study*, 23 SUFFOLK U. L. REV. 711, 712 (1989) (citing Lenore J. Weitzman, *Changing Families, Changing Laws: Ten Major Trends That Have Altered the Lifestyles of Parents and Children*, 5 FAM. ADVOC. 2, 4 (1982)).

234. Stone, *supra* note 233, at 712 (citing Howard A. Davidson & Katherine Gerlach, *Child Custody Disputes: The Children's Perspective*, in LEGAL RIGHTS OF CHILDREN 252 (Robert M. Horwitz & Howard A. Davidson eds., 1984); Weitzman, *supra* note 233, at 5).

involved in divorce has more than tripled since 1970.<sup>235</sup> These dramatic statistics highlight the need for child custody laws steeped in fairness, equality, and empathy. Practical changes in child custody statutes will not “make everthing all better” for the thousands of women and children involved in divorce. Such changes are, however, necessary steps toward even-handed administration of justice in this emotionally charged legal context.

---

235. *Id.*