

The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed

Richard Neely*

The discussion of divorce in our society dwells disproportionately on the problems of the upper middle class. This is understandable, because it is the upper middle class that disproportionately reads and writes books and articles about divorce and, therefore, has a disproportionate voice in fashioning the laws and social mores that affect those undergoing divorce. The problems of upper middle class individuals undergoing divorce, however, are different from those afflicting the less-well-off individuals who make up the bulk of the divorcing population. The guilt feelings that may oppress a Yale Medical School-trained single mother when she hires a full-time housekeeper to care for her three-year-old are difficult for her, but the problems facing most of the mothers who pass through my court are more urgent and more concrete. They have all they can do to pay the rent and utility bills, keep the car running and find a little adult conversation.

Their problems are made worse by a system of laws designed to provide the best possible decision in every case, but which instead has the effect of subjecting litigants to delays, inequities and intrusions so intolerable as to invest the whole divorce process with even more misery than is already present. These delays, inequities and intrusions encourage out-of-court settlements in divorce cases—settlements that effectively bypass the system of laws intended to govern the divorce process. A parent concerned with paying as little child support as possible can use the threat of a custody fight, with its never-certain outcome, as a lever during settlement negotiations. The result is that one parent—typically the father—winds up paying less in child support than the needs of the child or children warrant, while the other parent—typically the mother—is forced to scrape by on inadequate support, a problem exacerbated by the generally lower earning power of women. Although this result is certainly not

* Chief Justice, West Virginia Supreme Court of Appeals; Professor of Economics, University of Charleston. A.B. Dartmouth College, 1964; LL.B. Yale Law School, 1967. The author would like to thank Glenn Reynolds, Elizabeth Boggs, Cynthia Coe, John Colwell, Deborah Jeon and David Weiser, along with the entire staff of the *Yale Law & Policy Review*, for their excellent work in editing this article.

Child Custody

the sole cause of the feminization of poverty, even a brief glance at the way most settlements in divorce actions are reached should make the connection evident.

The old maternal preference rule, once used in child custody cases by many states, was an effective means of avoiding this sort of destructive gamesmanship. Such a rule, of course, is unfair to men who want custody. Many women also find the rule offensively sexist, notwithstanding, as I will argue, that it benefits women as a class. What is needed is a standard that does not promote sharp practice in custody negotiations, that does not penalize fathers on account of their sex, and that is not so unwieldy and intrusive that it constitutes a cure worse than the disease.

I believe that such a standard exists: It is the "Primary Caretaker Parent Rule" developed in West Virginia.¹ In the pages that follow, I will discuss in more detail the ways in which current child-custody rules work against the interests of those parents, predominantly women in today's society, who want strongly to keep their children after divorce. I will also discuss the ways in which rules intended to produce results that are in the best interests of the children involved are in fact so clumsy and oppressive as to constitute a positive menace to the well-being of many children who must endure them. I will then explain why I believe the primary caretaker parent rule to be a solution to many of these problems, one that is superior to the institution of joint custody in the vast majority of cases, despite joint custody's current trendy appeal.

I. *The Problem*

In the nineteenth century, and in the early part of this century, the law gave fathers custody of their children after divorce, particularly when mothers were held at fault in breaking up the marriage.² That rule was a logical extension of the inferior legal status of women, the husband's property right in his family's labor, and the husband's ab-

1. The primary caretaker parent rule is described in *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). See also *J.B. v. A.B.*, 161 W. Va. 332, 242 S.E.2d 248 (1978) (a precursor case which discussed the dynamics of the old maternal preference rule).

2. J. WESTMAN, *CHILD ADVOCACY* 273 (1979); Derdeyn, *Child Custody Contests in Historical Perspective*, 133 AM. J. PSYCHIATRY 1369, 1370 (1978). For documentation of the paternal preference and the emergence of the maternal preference in some states during the nineteenth century, see Foster & Freed, *Child Custody*, 39 N.Y.U. L. REV. 423, 425 (1964); Schiller, *Child Custody: Evolution of Current Criteria*, 26 DE PAUL L. REV. 241, 242-44 (1977); Comment, 12 CUM L. REV. 513, 515-17 (1982).

solute obligation to support his children.³ Even a hundred years ago, however, this rule made little sense in light of human emotions and society's expectation that children would be raised by women. Consequently, it was abolished in this century. By 1950, it was almost always the rule that a mother was the preferred custodian of young children if she was a fit parent.⁴

But the behavior that different courts characterized as evidencing "fitness" differed dramatically. 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."

Today, the presumption in favor of mothers is rapidly eroding because the maternal preference presumption discriminates against fathers on the basis of sex. Although many jurisdictions retain some type of maternal preference in awarding custody of very young children, this preference has become largely a tie breaker. The emerging rule is that all custody disputes should be decided on their individual merits, with the parent whom the judge considers the most competent receiving custody.⁵ At first glance, this emerging rule seems to make sense, since some fathers are excellent parents and some mothers are child abusers.⁶ Unfortunately, however, this sex-neutral approach poses serious problems because of the dis-

3. Derdeyn, *supra* note 2, at 1370; Schiller, *supra* note 2, at 242; Foster & Freed, *supra* note 2, at 423-25.

4. J. WESTMAN, *supra* note 2, at 273; Foster & Freed, *supra* note 2, at 425.

5. It is impossible (and probably useless) to summarize the exact nature of the law throughout the 50 states and the District of Columbia on this subject because courts and legislatures are changing it from day to day. To make matters worse, although most jurisdictions use similar terminology (e.g., "maternal presumption," "tender years doctrine"), the meanings that they attach to this legal jargon often differ. In general, states can be divided into three classes: (1) those with no maternal presumption; (2) those with a weak maternal presumption; and (3) those with a strong maternal presumption. The states making use of a strong maternal presumption require a fairly high order of proof of a father's superior parental ability before awarding him custody; those with a weak maternal presumption use the presumption only as a tie breaker. All states that engage in a maternal presumption appear to permit the presumption to be rebutted if it can be shown that the award of custody to the father will be in the "best interests of the child." For a recent snapshot of state laws across the nation, see Freed & Foster, *Divorce in Fifty States: An Overview as of August 1, 1981*, 7 FAM. L. REP. (BNA) 4049 (1981). As the title of the article suggests, much of the law in this area is to be found in "pocket parts."

6. Despite popular perceptions to the effect that child abusers are predominantly male, women are just as likely to be abusers as are men. See D. GIL, VIOLENCE AGAINST CHILDREN 117 (1970). See also Schwartz, *Book Review*, 2 YALE L. & POL'Y REV. 179, 183-84 (1983).

Child Custody

torted incentives created by the divorce settlement process. The process—or even the prospect—of sorting out custody problems in court affects those problems, usually for the worse.

The unpredictability of courts in divorce matters offers many opportunities for a parent (generally the father) trying to minimize child support payments to gain leverage in settlement negotiations. The most effective, and hence the most generally used, tactic is to threaten a custody fight. The effectiveness of the threat increases in direct proportion to the other parent's unwillingness to give up custody. Because women, much more than men, are likely strongly to want custody, seemingly gender neutral custody rules actually serve to expose women to extortionate bargaining at the hands of their husbands.

My belief that mothers are much more likely than fathers to feel close to their children is not just homespun wisdom; it has been confirmed by a sizable body of research. In 1977, Sharon Araji of Washington State University published a study entitled *Husbands' and Wives' Attitude-Behavior Congruence on Family Roles*.⁷ In that study, she asked her subjects their opinion on the proper division of family labor and then asked how such work was in fact divided in their households. More than two-thirds stated that child-care labor *should* be equally divided. When asked about actual performance, however, those same individuals overwhelmingly responded that it was the woman in their household who bore the brunt of child-care duties. Shared responsibility for child care would seem more a cosmopolitan pretension than a reality in most settings.

Another study done at the University of Nevada that same year⁸ found that the division of labor within households is resistant to change. Furthermore, the responsibility for the care of children was among the duties least often shared. To the extent that husbands participated in child care at all, they were more likely to be involved in playing, baby-sitting and disciplining rather than in such day-to-day tasks as feeding, changing and bathing. The Nevada study is also significant in that it examined cohabiting couples as well as married ones. One might expect that those cohabiting would ex-

7. Araji, *Husbands' and Wives' Attitude-Behavior Congruence on Family Roles*, 39 J. MARR. & FAM. 309 (1977).

8. Stafford, Backman & diBona, *The Division of Labor Among Cohabiting and Married Couples*, 39 J. MARR. & FAM. 43 (1977). Cf. Kotkin, *Sex Roles Among Married and Unmarried Couples*, 9 SEX ROLES 975 (1983) (study finding conventional allocation of household tasks and male career precedence among married couples and cohabiting couples planning to marry but more egalitarian attitudes among cohabiting couples not planning to marry).

hibit more progressive attitudes regarding division of domestic responsibilities, but the study found that such couples nonetheless exhibited a remarkable adherence to the sexual stereotypes of the world in which they grew up.

Such was also the case with couples in which the women were highly career-oriented, according to another study.⁹ Even among such couples, it was found, both spouses generally assumed that the woman would be the one primarily responsible for child care. A crucial finding was that the decision to take primary responsibility for the children was frequently a voluntary one for women, who saw parenting as a fundamental element of a successful female life.

The findings of these studies are borne out by my own experience as a lawyer and judge. During the years that I handled divorce cases, I never represented a father who wanted custody of his children. No doubt that is partly the result of my having practiced in a rural area, but I have consulted practicing lawyers around the country over many years and they confirm my experience. Relatively few men actively desire custody of their children, and in my experience those who are awarded custody of young children usually delegate actual child care to a female, often their own mothers. Though many may find this fact discouraging, it should come as no surprise to anyone truly familiar with American society.¹⁰

Still, just because most women strongly desire custody and most men do not doesn't mean that such is the case in every instance. Fathers who want to retain the companionship of their children and who believe that they would be better single parents than their wives expect the judicial system to operate on the basis of more refined principles than simple statistically-based discrimination.

Fathers are now demanding that courts award custody based on an individualized inquiry into their specific situations. This appears reasonable on its face. But when we understand the costs of such an inquiry, and appreciate as well just how much sinister bargaining is carried out in the shadow of such an unpredictable, case-specific system, we must think again.

9. Heckman, Bryson & Bryson, *Problems of Professional Couples: A Content Analysis*, 39 J. MARR. & FAM. 323, 327-29 (1977).

10. I recognize that some may find this discussion objectionable, or even sexist. If, however, one wishes to help the millions of divorced women struggling to support families, it is necessary to face facts as they are, even when the status quo conflicts with notions of how things ought to be. If things were as they *ought* to be, fewer couples would divorce, and those who did would settle matters amicably and rationally, leaving everyone except the divorce lawyers better off.

Child Custody

A. *The Costs of an Individualized Approach*

The individualized approach might be ideal if it were costless and if courts actually considered the relative merits of the parents in each case. In fact, however, the individualized approach is intrusive, time-consuming and inherently distortive in its effect. And, because the vast majority of divorces are settled without ever reaching court,¹¹ very few custody arrangements receive even the dubious benefit of a judicial determination that they are in the “best interests of the child.” We shall, however, explore the nature of those benefits, if such they are, before going on.

Under the “best interests of the child” standard, custody, when contested, goes to the parent whom the court believes will do a better job of child rearing. This standard is a substitute for the maternal preference rule. It operates as well in those states retaining a weak maternal preference, with that preference being only a tie breaker. In order to assign custody, the court must explore the dark recesses of psychological theory to determine which parent will, in the long run, do a better job.

This undertaking inevitably leads to the hiring of expert witnesses—psychologists, psychiatrists, social workers and sociologists. These experts are paid by the parties to demonstrate that one or the other (coincidentally, always the client) is the superior parent in light of his or her personality, experience and aptitude for parenting. The experts will advance the theory that whatever positive aspects of personality their client possesses are preeminently important to successful single-parent child-raising.

I am not a fan of expert psychological testimony. My disapproval does not come from any contempt for a science that has contributed much to the quality of our lives. Rather, it comes from my experience that in a courtroom context there is a “Gresham’s Law of Experts,” with the bad ones driving out the good. When hiring an expert witness, parties generally want a person of the lowest possible integrity, one who will lie, or at least mislead, under oath. Expert witnesses are, after all, very much like lawyers: They are paid to take a set of facts from which different inferences may be drawn and to characterize those facts so that a particular conclusion follows.

11. Over 90 percent of divorces are uncontested. This means that the granting of the divorce is *pro forma* and routine, with all of the important decisions made out of court — usually in law office negotiations. In the case of middle- or upper-income clients, failure to contest usually means a settlement has been reached. N.Y. Law Journal, July 11, 1984, at 1, col.1.

There are indeed cases in which a mother or father may appear competent on the surface, only to be exposed after perfunctory inquiry as a child abuser. Under truly careful inquiry, such discoveries might be made more often. Such careful inquiry, however, is almost impossible in the real world because it requires experts who combine competence and integrity in a way that is seldom found, at least in courtrooms. The side with the stronger case can afford to hire only competent experts with profound integrity; the side with the weaker case, on the other hand, wants impressively glib experts who are utterly devoid of principles. When both parents are good parents, the battle of the experts can result only in gibberish.

I cannot imagine an issue more subject to personal bias than a decision about which parent is "better." Should children be placed with an "open, empathetic" father or with a "stern but value-supporting" mother? 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. It is unlikely that the decision will be the kind of individualized justice that the system purports to deliver.

Even when the judge, like most judges, has an intuitive grasp of the difference between good testimony and bunkum, the process is itself destructive. Judges in states that have a "best interests of the child" standard or a weak maternal presumption must allow days of testimony from a parade of highly paid experts before finally rendering a decision. In most cases, the judge ends up deciding that the mother is closer to the children and awards custody accordingly. Yet the hearings, as generally irrelevant as they are to the outcome, are bad in and of themselves because the very process of preparing experts to testify increases the hardship for all concerned.

In order for a psychiatrist or psychologist to testify in court about so-called personality integration or similar psychological phenomena, the expert must interview parents and children, conduct tests and perhaps observe the litigants in a family setting. This very exercise can undermine the mental health of the children as well as the emotional stability of the parents. When an elaborate custody battle is anticipated, the experts will create painful situations in their efforts to substantiate the testimony they have been paid to give. In much the same way that an artillery battery can "liberate the hell out of" a peaceful hamlet, experts can create emotional imbalances in the very children they are trying to "protect."¹²

12. S. GOLDSTEIN & A. SOLNIT, *DIVORCE AND YOUR CHILD* 64 (1984).

Child Custody

In this context I should point out that, for purposes of child custody cases, children fall into one of three groups, depending on their age. Children under six years of age are called “children of tender years”: They are the most dependent on their parents, but they usually cannot articulate an intelligent opinion about their custody. Children between six and fourteen are also dependent on their parents, but they can usually articulate a preference regarding custody arrangements and explain their reasons. By the age of fourteen a child takes on many of the qualities of an adult; in most cases, unless geography interferes, a child over fourteen will decide for himself or herself the parent with whom he or she wants to live, regardless of what a court says.

Children over the age of six might seem to be the best available experts on the subject of how the parents and children get along. Usually, however, children do not want what is best for them; they want what is pleasant. If children are permitted to influence decisions about custody simply by stating a preference, the parents are placed in the position of being competitive bidders in a counterfeit currency. For the children, the results are seldom positive.

Two of my own court’s cases come to mind as examples of the dangers inherent in giving play to the desires of children. The first involved a twelve-year-old girl who fanned the fires of a protracted interstate custody battle because she wanted to date older boys and stay out late at night; the second involved a nine-year-old boy who tried to get his custody changed because he resented his mother’s demand that he devote three hours a night to his schoolwork. I have observed divorce cases that have gone on for more than a year during which time both parents vied with each other to purchase the children’s affection. The result was that, whichever parent wound up with custody, the children were on the high road to ruination.

That is because the litigation process is not neutral, but has its own peculiar and dangerous side effects. The very act of going to court does more than just sort out rights and obligations based on facts frozen at the moment the papers were filed. If the divorce drags through the trial and appellate courts for two years, the lawsuit itself may wound or destroy the very children whose welfare is supposed to be at its center. In addition, money that would have been available to ease the transition from joint household to separate households is diverted instead to lawyers, court fees and expert witnesses.

In my experience, once a custody battle is contemplated, the rela-

tionship between parents and children usually changes for the worse. The overriding need to prepare for court will dominate the lives of both parents and if the children are to be polled—either directly through court testimony or indirectly through the probing of experts—each parent is probably going to attempt to poison the other's well.

The degree to which children suffer during divorce is a widely discussed subject.¹³ The slowly grinding machinery of the courts inevitably exacerbates the emotional stresses that result from the simple fact of divorce. Among the damaging effects of custody litigation are uncertainty, painful psychological probing (e.g., "Who do you love more, Mommy or Daddy?"), and competitive parental bribery. The magnitude of these effects is a direct function of the time it takes to conclude the proceedings.

That fact is magnified by the different meaning time has for children as opposed to adults. I can remember in meticulous detail the events that transpired in my life from the age of eight until I graduated from law school. The twelve years since I became a judge, however, are largely a blur. When a person is forty, a year represents one-fortieth of his or her life; for someone who is five, a year represents one-fifth. Divorce is by its very nature traumatic not only in terms of the mother's and father's separation but also in terms of new male and female companions for each entering the scene. If the children have no idea with whom they will live or under what terms or even where, their consequent uncertainty is likely to undermine their ability to function. Their relations with other children may suffer, their ties to the community may be threatened, and the stress they are under can cause academic failure.¹⁴

Throughout this extended discussion of the harms of courtroom custody battles, many readers may have been reflecting that as bad

13. See, e.g., J. DESPERT, CHILDREN OF DIVORCE 91-150 (1962); J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 37-39 (rev. ed. 1979); S. GOLDSTEIN, *supra* note 12, at 8; J. WESTMAN, *supra* note 2, at 273-75, 287; Wallerstein, *The Child in the Divorcing Family*, in THE RIGHTS OF CHILDREN 99, 99-108 (J. Henning ed. 1982); Kirshner, *Child Custody Determination*, in THE RIGHTS OF CHILDREN 117, 125-26 (J. Henning ed. 1982).

14. J. DESPERT, *supra* note 13, at 116-50; J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 13, at 37-39. See also sources cited at note 13, *supra*. Cf. Okpaku, *Psychology: Impediment or Aid in Child Custody Cases?*, 29 RUTGERS L.J. 1117, 1140-41 (1976) (lack of conclusive empirical research in the area of children's reaction to custodial discontinuity); Dembitz, *Beyond Any Discipline's Competence* (Book Review), 83 YALE L.J. 1304, 1309-11 (1974) (continuity of the custodial arrangement not always of supreme importance) (reviewing J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973)).

Child Custody

as all of the above sounds, it happens, by my own admission, only in a relatively small minority of divorce cases. And indeed, because the vast majority of divorce cases are settled out of court, such is the case. I have, however, discussed the many drawbacks of courtroom custody determinations in order to emphasize how unpredictable and undesirable such determinations can be. With this in mind, it is time to turn to the problems that the *possibility* of a courtroom custody battle can cause in out-of-court settlement negotiations.

B. *Unequal Bargaining Power Out-of-Court*

Divorce decrees are typically drafted for the parties after compromises reached through private negotiation. These compromises are then approved by a judge, who generally gives them only the most perfunctory sort of review. The result is that parties (usually husbands) are free to use whatever leverage is available to obtain a favorable settlement. In practice this tends to mean that husbands will threaten custody fights, with all of the accompanying traumas and uncertainties discussed above, as a means of intimidating wives into accepting less child support and alimony than is sufficient to allow the mother to live and raise the children appropriately as a single parent. Because women are usually unwilling to accept even a minor risk of losing custody, such techniques are generally successful.

To make these abstract statements more concrete, I would like to use an example from my own experience. My first encounter with the manner in which the unpredictability of divorce proceedings can be used to terrorize women came early in my career as a small-town lawyer.¹⁵ My client was a railroad brakeman who had fallen out of love with his wife and in love with motorcycles. Along the way, he had met a woman who was as taken with motorcycles as he. After about a year, my client's wife filed for divorce. My client had two children at home—one about nine and the other about twelve. Unfortunately for him, the judge in the county where his wife had filed

15. I realize that some readers, particularly those who are unfamiliar with the realities of the practice of law, may find this anecdote unattractive. Lawyers, however, respond keenly to incentives, and the current custody system in states following "best interests" or similar standards provides a strong incentive to behave like Simon Legree. Lawyers who do not do so are sacrificing their clients' interests in order to feel good about themselves; to the extent that clients figure this out, such lawyers are also likely to go broke. Those interested in ending such behavior should look to changes in the law that will put an end to such incentives, rather than pinning their hopes on any sudden change in the realities of legal practice in a world well supplied with Simon Legrees and economically disadvantaged women.

her suit was notorious for giving high alimony and child support awards. The last thing that I wanted to do was go to trial. The wife had a strong case of adultery against my client, and the best my client could come up with was a lame countersuit for "cruel and inhuman treatment"—not exactly a showstopper in a rural domestic court.

During the initial interview, I asked my client about his children, and he told me that he got along well with them. He also indicated, however, that two children were the last thing he wanted from his divorce. Nonetheless, it occurred to me in my role as zealous advocate that if my client developed a passionate attachment to his children and told his wife that he would fight for custody all the way to the state supreme court, we might settle the whole divorce fairly cheaply. My client was a quick study: That night he went home and began a campaign for his children. His chance of actually getting custody from the judge was virtually nonexistent, but that did not discourage our blustering threats.

My client's wife was unwilling to take any chance, no matter how slight, on losing her children. Consequently, the divorce was settled exactly as we wanted. The wife got the children by agreement, along with rather modest alimony and child support. All we had needed to defeat her legitimate claims in the settlement process was the halfway credible threat of a protracted custody battle. As Solomon showed us, the better a mother is as a parent, the less likely she is to allow a destructive fight over her children.

The above story is more than just a homey example, for it is repeated across the nation every day. Under our purportedly sex-neutral system, women on statistical average come out of divorce settlements with the worst of all possible results: They get the children, but insufficient money with which to support them. They are forced to scrape along to support their families at inadequate standards of living, and the children are forced to grow up poor, or at least poorer than they should be. Yet the dynamic demonstrated above is seldom discussed, despite its importance in promoting the growth of a rapidly-expanding class of poor people, the female-headed household.

An important reason that little attention has been given to the effect of in-court rules on out-of-court bargaining is that our views on divorce are informed more by wishful thinking than by the facts of life. Many people (especially men) begin with a political conviction that women *ought* to be equal to men economically, from which

Child Custody

they leap to the insupportable conclusion that women *are* equal to men economically. It then follows that women can support children as well as men can and that whoever wants the children can pay for them.

In the real world, however, women are much poorer than men, and this pattern is highly resistant to change.¹⁶ The cost of child care itself, in terms of lost working time, is a major economic burden placed on single mothers. Just getting the children is a tremendous economic burden: Aside from the great expense involved in feeding and clothing them, they absorb great amounts of time that could be spent earning money.¹⁷ But the unfairness only begins there, as so many women are forced to accept lower child support and alimony payments in order to be sure of getting the children (and the accompanying economic burden) at all.

The everyday occurrence of children being traded for money should be sufficient in and of itself to prompt a reevaluation of a system that turns custody awards into bargaining chips. The fact that such trading also has contributed to the impoverishment of women makes the need for change still more urgent. What is needed, as I mentioned at the first, is a standard for custody awards that does not encourage such pernicious bargaining, but which also does not discriminate on the basis of sex.

16. "[Single] [w]omen maintaining families are far more likely to be unemployed than husbands or wives, their average (median) family income is less than half that of married couples, and they are five times as likely to be in poverty." BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *WOMEN AT WORK: A CHARTBOOK* 26 (1983). This gap seems to be widening. U.S. COMMISSION ON CIVIL RIGHTS, *DISADVANTAGED WOMEN AND THEIR CHILDREN: A GROWING CRISIS* 6 (1983) (hereinafter cited as "DISADVANTAGED WOMEN").

17. Of economically active women ages 25-34 with no spouse present, those without children worked an average of 1,966 hours annually, while those with children worked from 1,171 hours (for those with four or five children) to 1,775 hours (for those with one child). Smith, *Estimating Annual Hours of Labor Force Activity*, 106 MONTHLY LAB. REV. 13, 19 (Feb. 1983).

This hardship is compounded in several ways. First, in order to work full-time, working mothers must obtain child care, which (unless relatives or friends are available on a regular basis) is always expensive and often prohibitively so. *DISADVANTAGED WOMEN*, *supra* note 16, at 12-13, 63. Second, in general "[w]omen are segregated in a few occupations that pay low wages and have little promotion potential." *Id.* at 63. And third, there is evidence that the pressures of raising a family alone and beating back poverty are major sources of emotional stress. *Id.* at 52. Note also that women acting as single parents "are also in the category of persons who are least likely to receive preventive health care or adequate care during illnesses." *Id.* Men, on the other hand, largely avoid the economic pitfalls afflicting divorced women. *Id.* at 12. For more on the psychological strains suffered by working women, see J. WESTMAN, *supra* note 2, at 105, and Johnson & Johnson, *Attitudes Toward Parenting in Dual Career Families*, 134 AM. J. PSYCHIATRY 391 (1977).

II. *The Solution: The Primary Caretaker Parent Rule*

Most of the problems of child custody litigation can be avoided by not litigating the issue in the first place. It is here that the wisdom of the old maternal preference, or its sex-neutral alternative, the "primary caretaker parent rule," becomes apparent. The primary caretaker parent rule provides a presumption that severely limits opportunities for using child custody litigation as a bargaining chip. Sadly, however, the sex-neutral primary caretaker parent rule is unique to West Virginia law.¹⁸

West Virginia law does not permit a maternal preference. But we do accord an explicit and almost absolute preference to the "primary caretaker parent," defined as the parent who: (1) prepares the meals; (2) changes the diapers and dresses and bathes the child; (3) chauffeurs the child to school, church, friends' homes and the like; (4) provides medical attention, monitors the child's health, and is responsible for taking the child to the doctor; and (5) interacts with the child's friends, school authorities, and other parents engaged in activities that involve the child.

This list of criteria usually, but not necessarily, spells "mother." That fact reflects social reality; the rule itself is neutral on its face and in its application. In West Virginia we have women who pursue lucrative and successful careers while their husbands take care of the children; those husbands receive the benefit of the presumption as strongly as do traditional mothers. Furthermore, where both parents share child-rearing responsibilities equally, our courts hold hearings to determine which parent would be the better single parent.¹⁹ This latter situation is rare, but is evidence of the actual sex-neutrality of the primary caretaker presumption.

Our rule inevitably involves some injustice to fathers who, as a group, are usually not primary caretakers. There are instances where the primary caretaker will not be the better custodian in the long run. Yet there is no guarantee that the courts will be able to know, in advance and based on the deliberately distorted evidence that characterizes courtroom custody proceedings, when such is the case. And, notwithstanding its theoretical imperfections, the primary caretaker parent rule acknowledges that exhaustive hearings

18. However, some states consider primary caretaker parent status as one factor in a "best interests" determination. *See, e.g.*, *Jordan v. Jordan*, 302 Pa. Super. 421, 425-26, 448 A.2d 1113, 1115 (1982); *Derby and Derby*, 31 Or. App. 803, 806, 571 P.2d 562, 564 (1977).

19. *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981).

Child Custody

on relative degrees of parenting ability rarely disclose any but the most gross variations in skill and suitability. Permitting such hearings inevitably has a distortive effect on the parties' behavior, and is likely to lead to potentially disastrous emotional trauma for all concerned if the case goes to court.

Any rule concerning custody matters will be sex-biased, in effect if not in form. An allegedly sex-neutral rule that permits exhaustive inquiry into relative degrees of parental fitness is inevitably going to favor men in most instances. This bias follows from the observed pattern that in consensual divorces where there is no fight over money—either because there isn't any or because there is enough to go around—women overwhelmingly receive custody through the willing acquiescence of their husbands. Experience teaches that if there is any chance that the average mother will lose her children at divorce, she will either stay married under oppressive conditions or trade away valuable economic rights to ensure that she will be given custody.

A. *How It Works*

Under West Virginia's scheme, the question of which parent, if either, is the primary caretaker is proved with lay testimony by the parties themselves, and by that of teachers, relatives and neighbors. Which parent does the lion's share of the chores can be demonstrated satisfactorily in less than an hour of the court's time in most cases. Once the primary caretaker has been identified, the only question is whether that parent is a "fit parent." In this regard, the court is not concerned with assessing relative degrees of fitness between the two parents, but only with whether the primary caretaker achieves a passing grade on an objective test.

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 *grossly* immoral behavior under circumstances that would affect the child. In this last regard, 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. Whether a primary caretaker parent meets these criteria can be determined through nonexpert testimony, and the criteria themselves are sufficiently

specific that they discourage frivolous disputation.²⁰

Furthermore, we divide children into the three age groups I described earlier.²¹ With regard to children of tender years, the primary caretaker presumption operates absolutely if the primary caretaker is a fit parent. When, however, we come to those children who may be able to formulate an intelligent opinion about their custody, our rule becomes more flexible. When the trial judge is unsure about the wisdom of awarding the children to the primary caretaker, he or she may ask the children for their preference and accord that preference whatever weight he or she deems appropriate. Thus, the only experts who can rebut the primary caretaker presumption are the children. The judge is not, however, required to hear the testimony of the children, and will usually not do so, particularly if he or she suspects bribery or undue influence. Nonetheless, by allowing the children to be the only acceptable experts in our courts, we do provide an escape valve in unusually hard cases.

Finally, once a child reaches the age of fourteen, we permit the child to name his or her guardian if both parents are fit. Often, as might be expected, this means that the parent who makes the child's life more comfortable will get custody; there is little alternative, however, since children over fourteen who are living where they do not want to live will become unhappy and ungovernable anyway. In all three cases, the parent who receives custody is primarily responsible for making decisions concerning the child and for providing the child's permanent home. The other parent, however, is usually accorded liberal visitation rights, including the right to have the child during holidays, part of the summer, and some weekends.

Although this method for handling child custody may appear overly cut-and-dried and insufficiently sensitive to the needs of individual children, it has reduced the volume of domestic litigation over child custody tremendously. Because litigation *per se* can be the cause of serious emotional damage to children (and to adults), we consider this to be in the best interests of our state's children. Even more importantly, children in West Virginia cannot be used as pawns in fights that are actually about money. Under our system 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. The result is that questions of alimony and child support are settled on their own merits.

20. *Id.* at 278 S.E.2d 361.

21. *See* p. 174, *supra*.

Child Custody

B. *Alternatives: Joint Custody, Mediation and the Rest*

By this point the reader may be desperate to interject that many of these problems can be solved by using the newest divorce court fad, joint custody. Under joint custody, divorced parents have equal time with the children and equal say in decisions about their schooling, religious training and lifestyle.²² Joint custody, however, does not solve the problem of extortion in the settlement process since many mothers find shared custody as unacceptable as complete loss of custody.

Joint custody works well when both parents live in the same neighborhood or at least in the same city, and so long as they can cooperate on child-rearing matters. Divorcing couples on their own often agreed to joint custody in the past, long before court-ordered joint custody became a public issue. When joint custody is by agreement, the same cooperative spirit that animated the underlying agreement will usually allow the parents to rear a child with no more antagonism than is experienced in most married households.

Voluntary joint custody, however, must be distinguished from court-ordered joint custody. A court can order that custody be shared, but it cannot order that the parents stop bickering, stop disparaging each other, or accommodate one another in child care decisions as married persons would. And if parents do not live close to each other, joint custody can place an intolerable strain on a child's social and academic life if one parent is not willing to allow the other to supply a more-or-less permanent home.²³

Furthermore, parents must constantly give permission for one thing or another. Who decides whether the child can have a driver's license at age sixteen? Who decides when the child can date, under what conditions, and with whom? When the parents violently disagree—and particularly when they disagree because they are continuing fights left over from the marriage—the child is likely to be left hopelessly confused as the parents are played off one against the other.

In West Virginia we do not encourage court-ordered joint cus-

22. Actually, in many cases one parent will provide the permanent residence of the child while other aspects of child-raising are shared evenly. Generally, the parent with whom the child is staying at the time will make day-to-day decisions (e.g., permission for school outings), with major decisions being shared between the two. See generally Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C D. L. REV. 523 (1979) (thoroughly documented discussion of joint custody plans, including history and prevailing attitudes).

23. See text accompanying note 14, *supra*.

tody, although parents can agree to such an arrangement. Elsewhere, however, legislatures are being urged to make court consideration of joint custody mandatory in all contested cases. In states that already encourage extensive litigation over child custody, the sparing use of joint custody may not cause any more damage than does the existing system. If the geography is right and the parents are mature, there is no reason why joint custody cannot work at least as well as, and sometimes better than, custody with one parent and visitation with the other. Joint custody as an option should not be rejected out of hand, but it should be recognized for what it is—a good middle ground that works occasionally when conditions are particularly favorable.

Another means of resolving custody disputes that has received considerable attention lately is that of mandatory custody mediation. One such service is the Custody and Divorce Mediation Service in Los Angeles County, California. Mandatory mediation of custody disputes is a statutory requirement in California; it was adopted statewide after a successful experiment in Los Angeles County. The Service works quite well for Los Angeles County in that very few cases in that county wind up being contested before a judge.

The mediator in Los Angeles does almost everything that a divorce judge would do, but in a much less formal atmosphere with the emphasis being on getting the viewpoints of the parties rather than on proving everything through outside witnesses. This makes for a much more comfortable proceeding than a standard courtroom hearing. Such proceedings are also less expensive than a courtroom custody contest.²⁴

While many aspects of divorce can be handled successfully in a mediation-type setting, the mandatory mediation idea is nothing like the panacea that it has been proclaimed to be. Custody litigation should be quick and permanent. Any complicated approach that sets out to achieve perfect justice puts custody decisions up for grabs. Alternative approaches—joint custody, mediation, or best interests—are sure to be counterproductive in the end because they

24. Telephone interview with Dr. Ronald Hulbert, Los Angeles County Conciliation Court, January 24, 1985. (Notes on file with the *Yale Law & Policy Review*.) For the California statute, see Cal. Civ. Code § 4509 (West 1983) (Conciliation Court guidelines), Cal. Civ. Proc. Code §§ 1730-72 (West 1983) (mandatory mediation in contested child custody cases). For a discussion of Los Angeles County's mandatory mediation system and of other non-mandatory systems, see Note, *Non-Judicial Resolution of Custody and Visitation Disputes*, 12 U.C.D. L. REV. 593 (1979).

Child Custody

will produce disastrous effects on out-of-court settlements. The prospect of losing custody at the hands of a mediator is just as terrifying as the prospect of losing custody at the hands of a judge.²⁵

III. *Conclusion*

The nationwide debate over child custody, including the arguments for joint custody and a greater role for fathers, indicates just how acutely many men feel the loss of their children. But no matter how modern we seek to become, or how keenly we desire to be liberated from the oppressive hand of traditional institutions, it is not possible to create custody arrangements that satisfactorily duplicate parent-child relationships in happily married households. Divorce must be understood for what it is—sometimes the best way out of an intolerable situation, but often a tragedy and a disaster. Laws based on believing otherwise may give their (usually) upper middle class sponsors a warm feeling inside, but are likely to result in additional hardship for most divorcing families.

Legislatures may pass any number of custody statutes, and domestic courts may be given all manner of powers, but judges are nonetheless never going to be the architects of a brave new world of happy single-parent households. In my experience, courts are more like salvage crews. To the extent that husbands and wives engage in their own programs of damage control, they can salvage far more from the ruins than can courts. The talk about joint custody and its near-miraculous attributes misses the point. The point is that what a court orders is insignificant when compared to how the parents behave. Mature parents can make a bad court order work superbly; immature parents can—and usually will—make even the best court order useless.

Nonetheless, courts must do what they can to make things better. I believe that the West Virginia primary caretaker parent rule represents the best solution so far to the problems of gender neutrality

25. I do not mean to disparage the Los Angeles program. I believe, however, that its advantages do not stem from its impact on the matters that I have been discussing. Its main virtues are that it is cheaper and less threatening than a traditional courtroom battle over custody. Those are relative virtues, given the incredibly expensive and threatening nature of such battles: a 16-inch artillery shell is cheaper and less threatening than an MX missile, but ground zero remains an unattractive place to be. The virtue of the primary caretaker parent rule is that it eliminates such battles altogether. Joan Wexler makes a similar point in an article on modification of custody decrees: "In short, if the legal system provides no battleground, it is less likely that there will be a battle." Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 *YALE L.J.* 757, 792 (1985).

and child custody bargaining. To the extent that fathers take an active role in child-raising, they are not disadvantaged at all by the rule. Yet at the same time, the rule prevents sham custody battles that are really about money. By so doing, it removes a major cause—though certainly not the only cause—of the explosive growth in the number of poor households headed by women.

The primary caretaker parent rule may strike some as unsatisfactory because it does not attempt to arrive at precisely the correct decision in each case. Adjudication, however, is an imprecise exercise. The greatest frustration in lawmaking is that there is never a choice between systems that work and systems that do not; the choice is always between two systems that are both unsatisfactory in some manner. The best that can be hoped for is a system that works better than others in most cases, and which doesn't do too much damage in the instances where it doesn't. By this test, the primary caretaker parent rule is a success: Although there is some unfairness to parents who do not take a preeminent role in caring for their children before divorce, that unfairness is more than balanced by the effectiveness of the rule in preventing the trading of children for money and in reducing drastically the need for complex and damaging inquiry into family life and parental fitness.

The virtues of West Virginia's scheme for handling child custody matters may be scant consolation to divorcing couples in New York, Iowa, or any other state that fails to appreciate the real-world pressures in divorce cases. However, if those states see fit to adopt the rule in the future, it will represent an important step toward freeing women and children from some of the worst effects of divorce. That is surely worth doing.