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### The New Paradigm In Custody Law: Looking at Parents With a Loving Eye

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# The New Paradigm In Custody Law: Looking at Parents With a Loving Eye

Mary Kate Kearney\*

## I. INTRODUCTION

Current custody laws are broken. They are built on a legal paradigm of rights and duties that disregards both the purpose of custody and the nature of the parent-child relationship in a custody case. The purpose of a custody decision is to determine which parent is better able to meet a child's future needs and the nature of the parent-child relationship leads parents to seek custody out of love and concern for their child's future welfare.<sup>1</sup> Current custody standards, however, assume that rights and duties motivate a parent to seek custody and make the decision a reward for past behavior.

This Article proposes a custody standard that rejects the rights/duties paradigm. The standard articulates a two-part test to determine which parent is more willing and able to embrace the opportunities associated with meeting the child's future needs. The first part of the test assesses the credibility of a parent's expressed desire to be the custodial parent, and the second part considers each parent's effectiveness in raising the child.

Part II of this Article examines current custody standards and is divided into three sections. The first section traces the historical evolution of custody standards and sets forth the three most commonly used approaches: the best interest of the child standard, joint custody, and the primary caretaker standard.<sup>2</sup> The second section discusses the advantages and disadvantages of each standard as articulated by other commentators.<sup>3</sup> The

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1. Although custody decisions may involve more than one child, this Article usually refers to one child. The analysis is the same regardless of the number of children involved. Also, this Article uses both the male and female pronoun to refer to a parent and tries to avoid gender stereotyping.

2. See discussion *infra* part II.A.

3. See discussion *infra* part II.B.

third section explains how each of the three approaches is firmly grounded in the rights/duties paradigm and what limitations exist with that paradigm in a custody determination.<sup>4</sup>

Part III presents the proposed custody standard and is divided into two sections. The first section discusses how the proposed standard departs in two significant ways from standards rooted in rights and duties.<sup>5</sup> First, the proposed standard better reflects the purpose of custody decisions because it is prospective rather than retrospective. The standard recognizes that people are capable of change and, therefore, does not evaluate a parent's custody claim solely on the basis of past behavior. Instead, in deciding which parent will be the better caretaker, the standard considers what the parent can offer the child in the future. The standard accommodates a parent who may not have been able to meet a child's needs in the past if that parent can demonstrate a commitment to meeting the child's future needs.

Second, the proposed standard recognizes the true nature of parent-child relationships because it looks at what motivates parents to seek custody of their children. Parents usually are motivated by love and concern for their children's future welfare and are not acting out of either a sense of duty or of entitlement. The right to custody is not something that parents should be able to earn by fulfilling parental duties. Custody is not a reward for past behavior because parents presumably have already been rewarded by having been able to meet a child's needs. Through their custody claims, they seek the opportunity to secure the child's future welfare.

This section concludes by acknowledging that laws based on rights and duties are necessary to regulate people's behavior in other contexts. The rights/duties paradigm is essential when people would not act a certain way unless the law compelled them to do so. This model is useful in contracts, torts, and even some areas of family law. In certain family law contexts, rights and duties protect one person's interests when another person or entity's interests are opposed to them. For example, rights secure a parent's interests when the state seeks to intervene in the parent-child relationship, and they protect a child's interests from parental over-intrusion. However, the rights paradigm fails when the interests are not opposed, and people are motivated to act for other reasons. In the custody context, a parent's and a child's interests are not opposed because love motivates the parent to seek custody of the child. The rights/duties model may be necessary later to enforce the custody decision between parents whose interests are opposed;

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4. See discussion *infra* part II.C.

5. See discussion *infra* part III.A.

however, the award itself should more accurately reflect the reason why a parent seeks custody.

The second section of Part III presents my proposed two-part custody standard. The standard evaluates which parent is most ready to embrace the opportunities associated with meeting the child's future needs. The first part considers each parent's willingness to raise the child by examining the parent's own assertions and the credibility of those assertions.<sup>6</sup> The inquiry does not dwell on the parent's past behavior; instead, it scrutinizes the sincerity of the parent's future willingness. In the case of a parent who has not been successful at meeting a child's past needs but expresses a desire to do so in the future, the standard allows the parent to show that the parent has changed. This inquiry more accurately reflects the prospective nature of a custody determination than current standards because it is willing to forgive a parent's past failures and is open to the possibility that people can change.

The second part of my proposed standard discusses which parent is more able to embrace the childrearing opportunities presented by custody.<sup>7</sup> The threshold question is whether the parent is fit, and assuming that the parent is, the standard then evaluates the child's needs and the parent's ability to effectively meet those needs. The parent's effectiveness can be measured by the parent's plan for raising the child, his or her maturity, and the emotional bond with the child. Although past behavior may be one indicator of future behavior, it is not the sole determinative factor. This standard may be criticized for being too indeterminate just as the best interest standard was. The response is that the values behind this standard are clear: it seeks to place the child with the parent who can demonstrate the greater love for the child, and it is willing to forgive a parent for past mistakes. Judges should be trusted to implement these values in their custody determinations because the standard gives them enough guidance about how to proceed. This standard helps judges to select the better future caregiver for the child.

Part IV applies the proposed standard to a recent custody decision. The trial court in *Ireland v. Smith*<sup>8</sup> used a best interest of the child standard to award custody to a father who sought custody only after he had been sued for nonpayment of child support.<sup>9</sup> Part IV first reviews the trial court's rationale behind that decision<sup>10</sup> and then explains how a different outcome

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6. See discussion *infra* part III.B.1.

7. See discussion *infra* part III.B.2.

8. No. 93-385 DS (Mich. Cir. Ct. June 27, 1994) (slip opinion), *aff'd in part, rev'd in part, and remanded*, 542 N.W.2d. 344, 347 (Mich. Ct. App. 1995).

9. See discussion *infra* part IV.A-B.

10. See discussion *infra* part IV.B.

would be reached for different reasons under the proposed standard.<sup>11</sup> Finally, this section compares the analysis under the proposed standard to current custody standards and concludes that the proposed standard more accurately assesses who will better meet the child's future needs.

Part V considers the important contributions that other legal commentators have made to reforming current custody laws. These commentators have identified the inadequacies of current standards and have suggested revisions to them.<sup>12</sup> They have correctly argued that custody laws should abandon the rights/duties model, but their proposals do not move far enough away from that paradigm. The failure of their proposals to make the necessary break underscores how profound changes in custody laws must be.

This Article concludes that this change must reflect two features of a custody decision. First, a standard must be open to the possibility that parents can grow and change because custody is a prospective, rather than a retrospective, decision. Second, love motivates a parent to seek custody rather than a sense of right or duty. Therefore, a standard that evaluates a parent's willingness and ability to meet a child's future needs best measures which parent will embrace the opportunities presented by custody.

## II. CURRENT CUSTODY STANDARDS

### A. Historical Evolution

Both past and present custody standards are founded on a system of rights and duties.<sup>13</sup> Current custody standards originated from English and Roman

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11. See discussion *infra* part IV.C.

12. See discussion *infra* part V.A-C.

13. This Article considers custody disputes between unmarried and married heterosexual parents. When a couple is married, the custody issue usually arises during divorce proceedings. When a couple is unmarried, the non-custodial parent is challenging the custodial parent's right to raise the child. Although many of the same custody issues arise when the parents are homosexual, those disputes present additional legal questions that are outside the scope of this article. For a good discussion of these issues, see NAN HUNTER ET AL., *THE RIGHTS OF LESBIANS AND GAY MEN* 98-117 (3d ed. 1992); Shaista-Parveen Ali, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009 (1989); Kristine L. Burks, *Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve*, 24 GOLDEN GATE U. L. REV. 223 (1994); Stephen B. Pershing, "Entreat Me Not to Leave Thee": *Bottoms v. Bottoms and the Custody Rights of Gay and Lesbian Parents*, 3 WM. & MARY BILL RTS. J. 289 (1994); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); Nancy D. Polikoff, *Lesbian Mothers, Lesbian Families: Legal Obstacles, Legal Challenges*, 14 N.Y.U. REV. L. & SOC. CHANGE 907 (1986).

law.<sup>14</sup> Both of those legal systems assumed that being the custodial parent meant having certain rights to a child.<sup>15</sup> Men traditionally held these rights because women were not considered separate legal entities.<sup>16</sup> Under Roman law, a father's unchecked authority over his child even included the right to sell the child like property.<sup>17</sup> The English common law gave fathers similar, but not identical, authority over their children.<sup>18</sup> A father was presumed to be the "natural guardian" of his child,<sup>19</sup> but parental rights were conditioned on his fitness.<sup>20</sup> His parental rights also carried corresponding duties to provide for the child's care and maintenance.<sup>21</sup>

Early American custody laws borrowed the idea that fathers owed their children a duty of support, and in return, acquired rights to them.<sup>22</sup> A father's rights were never absolute, however, and nineteenth century American courts tended to award custody to the parent who was more fit.<sup>23</sup> This usually meant that the parent who was not at fault in the divorce would get custody.<sup>24</sup> Under the fault-based system for custody, mothers frequently

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14. Henry H. Foster & Doris J. Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321, 322, 326-27 (1978); Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 425-28 (1976-77).

15. Often such "rights" to the child have been cast in terms of "property" rights. See I WILLIAM BLACKSTONE, COMMENTARIES 452-53 (William Carey Jones ed., Bancroft-Whitney Co. 1916) (1795).

16. Ramsay L. Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 337 (1982) (explaining that "[u]nder the common law, a father had an absolute right to the control and custody of his legitimate minor children [because] [p]arental rights were property rights and, like other property rights acquired during marriage, they vested exclusively in the husband") (citations omitted); see also *id.* at 341 n.43.

17. Roth, *supra* note 14, at 425.

18. Like other property rights arising out of the common law, property belonging to a woman transferred to the husband upon marriage, and similarly any rights the woman might have had in the children automatically vested in the children's father upon their birth. See Klaff, *supra* note 16, at 337.

19. Foster & Freed, *supra* note 14, at 322.

20. *Id.* at 326; see also Roth, *supra* note 14, at 428 (noting that limits on father's rights over children were eventually recognized to protect the children's welfare).

21. Indeed, it was only when the courts began openly recognizing instances in which fathers failed to adequately provide for their child's care and maintenance that the English common law began slowly breaking away from the previously unquestioned property rights of the father. See Klaff, *supra* note 16, at 337-40.

22. See Foster & Freed, *supra* note 14, at 322-29.

23. *Id.* at 326-29; Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 234 (Summer 1975).

24. JAMES C. BLACK & DONALD J. CANTON, CHILD CUSTODY 11 (1989) (stating that "[i]n several states the parent who was found to be at fault for the disruption of the family unit was considered to be by definition less qualified to act as the custodial parent than the injured parent"). In fact, some states statutorily mandated that the parent not at fault receive custody. See *id.* at 11-12.

were chosen to be the custodial parent.<sup>25</sup> By the early twentieth century, courts and legislatures adopted maternal preference rules in recognition of the practice of awarding custody to mothers.<sup>26</sup>

One legal formulation of the maternal preference standard, the “tender years doctrine,” provides that as long as the mother is fit, she should have custody of her children who are below a certain age.<sup>27</sup> According to one commentator, two assumptions underlie the tender years doctrine: first, that a child’s most basic need is for a mother’s love and care; and second, that a mother is better able than a father to meet a young child’s needs.<sup>28</sup> Just as earlier custody standards emphasized the father’s rights and duties to the child, so too does the tender years doctrine make a mother’s rights and

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25. Tennessee went so far as to recognize this practice by enacting a specific statute designed to grant custody to mothers in cases in which they were not the party at fault. *Id.* at 11.

26. Foster & Freed, *supra* note 14, at 329-32; Mnookin, *supra* note 23, at 235; Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 295 (1992).

Legislatures often have stepped in and created a rule whereby mothers who were otherwise deemed fit were automatically granted custody of children of tender years. *See, e.g.*, CAL. CIV. CODE § 138 (1872) (as amended Stats. 1905, chs., 49, 43, § 1; Stats. 1931, chs. 930, 1928, § 1; Stats. 1951, chs. 1700, 3911, § 6) (stating that “other things being equal, if the child is of tender years, custody should be given to the mother”).

The cases illustrating the courts’ adoption of maternal preference rules are plentiful. *See, e.g.*, Clayton v. Clayton, 254 P.2d 669, 671 (Cal. Dist. Ct. App. 1953) (noting that “in awarding custody, [the court] is to be guided by what appears to be for the best interests of the child, and other things being equal, a child of tender years should be given to the mother”); Schildgen v. Schildgen, 148 N.W.2d 629, 631 (Iowa 1967) (stating that “[the court has] said repeatedly that a mother is ordinarily best fitted to care for a child during tender years”); Clark v. Clark, 181 S.W.2d 397, 398 (Ky. 1944) (awarding custody to the mother because “[t]he child is very young and the courts are always loath to deprive a mother of the custody of very young children”); West v. West, 170 So. 2d 160, 161 (La. Ct. App. 1964) (explaining that “in cases of custody of children, the mother, for their best interest and welfare, is to be preferred to the father, save in the most exceptional cases”); Barry v. Mercein, 8 Paige Ch. 47, 70 (N.Y. Ch. 1839) (explaining that “[t]he law of nature has given [the mother] an attachment for her infant offspring . . . [a]nd where no sufficient reasons exist for depriving [the mother] of the care and nurture of her child, it would not be a proper exercise of [judicial] discretion . . . to violate the law of nature”); McKim v. McKim, 12 R.I. 462, 465 (1879) (surveying the history of a custody disputes to determine the legality of leaving a child with the mother to avoid “tearing the mother’s heartstrings asunder” and for “the good of the child”).

27. Foster & Freed, *supra* note 14, at 329; Mnookin, *supra* note 23, at 235; Sack, *supra* note 26, at 295. Commentators have discussed the judicial and legislative uncertainty regarding how to define the age range of children in their “tender years.” Foster & Freed, *supra* note 14, at 332. Most agree that children of preschool age fall into this category. *Id.* One commentator notes that the doctrine frequently applies to children age seven and under. 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). Another commentator suggests that the age range should not be arbitrarily circumscribed and could include children up to adolescence. Klaff, *supra* note 16, at 353-56.

28. Klaff, *supra* note 16, at 343.

duties central to the award of custody.<sup>29</sup> A mother has an obligation to nurture her child and is in the best position to do so.<sup>30</sup> In return, she has the right to raise her child.

This preference for awarding custody to mothers fell into widespread disfavor by the mid-1970s.<sup>31</sup> Courts have struck down the tender years doctrine because it discriminates against men and thus violates equal protection.<sup>32</sup> Although the standard simplifies custody decisions, it unfairly disqualifies men from consideration as custodial parents.<sup>33</sup> Feminists have also criticized this standard because it stereotypes women as natural caregivers.<sup>34</sup> In an effort to replace maternal preference rules with a gender-neutral custody standard, legislatures and courts have embraced the best interest of the child standard.<sup>35</sup>

In fact, most states have adopted some variation of the best interest of the child standard.<sup>36</sup> Using this approach, a court tries to determine which parent will be a better caregiver for the child.<sup>37</sup> Legislatures typically set

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29. Interestingly, the initial view of the tender years doctrine only recognized the mother's special status for children of tender years. See BLACK & CANTON, *supra* note 24, at 13-14. If the child was old enough to be of any "value" in terms of work or educational ability, the father generally received custody. See *id.*

30. Eventually, courts disregarded the age of the child and adopted the blanket rule that mothers were by definition the "superior custodian" of their children regardless of the children's ages. See *id.* at 14.

31. *Id.*; Mnookin, *supra* note 23, at 235; see also Spriggs v. Carson, 368 A.2d 635, 639-40 (Pa. 1977) (finding that the tender years doctrine "is offensive to the concept of the equality of the sexes which we have embraced as a constitutional principle within this jurisdiction.").

32. Johnson v. Johnson, 564 P.2d 71, 75 (Alaska 1977) (rejecting the tender years presumption because it "flies in the face of the legislative finding of fact underlying the specific command of [the statute], that the best interests of the child are served by the court's approaching the facts of the particular case before it without sex preconceptions of any kind"); see also Bazemore v. Davis, 394 A.2d 1377, 1380 (D.C. Cir. 1978); *In re Pokrzywinski*, 221 N.W.2d 283, 285 (Iowa 1974); Waites v. Waites, 567 S.W.2d 326, 333 n.3 (Mo. 1978); Watts v. Watts, 350 N.Y.S.2d 285, 287-88 (N.Y. Fam. Ct. 1973); Foster & Freed, *supra* note 14, at 334 (stating that some "courts, with or without the aid of statutes, have condemned the [tender years] doctrine as sex discrimination"); Klaff, *supra* note 16, at 359.

33. *Ex parte Devine*, 398 So. 2d 686, 695 (Ala. 1981).

34. Sack, *supra* note 26, at 296 (discussing the writings of Professor Mary Joe Frug and other commentators).

35. See CAL. FAM. CODE § 3040(a) (West 1994); 23 PA. STAT. ANN. § 5301 (1991); S.D. CODIFIED LAWS ANN. § 30-27-19 (1984); UTAH CODE ANN. § 30-3-10 (1995); see also Martin v. Martin, 306 N.W.2d 648, 650 (S.D. 1981) (noting that the legislature had repealed the tender years doctrine and that neither parent warranted a preference based solely on his or her sex); Pusey v. Pusey, 728 P.2d 117, 119-20 (Utah 1986) (explaining that judicial preference for custody awards to mothers had been repudiated).

36. Mnookin, *supra* note 23, at 236 n.45.

37. Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 173 (1984).

forth a number of criteria for courts to use in deciding whether to award custody to the mother or the father.<sup>38</sup> Those factors may include: (1) the emotional, social, moral, material, and educational needs of the child; (2) the home environment that each parent offers; (3) the characteristics of each parent, including age, stability, and mental and physical health; (4) the child's preference; and (5) the experts' recommendations.<sup>39</sup> Courts have great discretion in applying these factors, and their ultimate determination depends upon the totality of the circumstances.

Joint custody has emerged as an alternative custody option under the best interest standard, which usually awards sole custody to one parent or the other.<sup>40</sup> Over the past twenty years, this "small revolution" in custody law has given both divorcing parents an opportunity to retain legal authority to raise their child.<sup>41</sup> If a court decides that joint custody is in the child's best interest, then the award can take one of a number of different forms. It may mean that one parent has physical custody of a child, but both parents have legal authority to make major decisions about the child's upbringing.<sup>42</sup> Alternatively, parents may share physical custody of the child and divide

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38. As has been noted, the criteria embodied within state statutes' definitions of best interests vary greatly. Mnookin, *supra* note 23, at 236 n.45. For example, the criteria that Pennsylvania includes within its custody statute directs courts to consider "which parent is more likely to encourage, permit and allow frequent and continuing contact and physical access between the noncustodial parent and the child. In addition, the court shall consider each parent and adult household member's present and past violent or abusive conduct . . . ." 23 PA. STAT. ANN. § 5303 (1991). Other states, however, set forth additional factors such as the ability to mold proper "moral" standards or character in the child. See S.D. CODIFIED LAWS ANN. § 30-27-19 (1984); UTAH CODE ANN. § 30-3-10 (1995).

39. *Ex parte Devine*, 398 So. 2d 686, 696-97 (Ala. 1981). The Uniform Marriage and Divorce Act ("UMDA") proposed the following best interests test:

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; (5) the mental and physical health of all individuals involved; (6) which parent is more likely to allow the child frequent and meaningful continuing contact with the other parent; (7) if one parent, both parents, or neither parent has provided primary care of the child; (8) the nature and extent of coercion or duress used by a parent in obtaining an agreement regarding custody.

UMDA, § 402(A) (1995).

40. Despite the general belief that this standard is relatively new, it was recognized by courts as early as 1932. See *Baer v. Baer*, 51 S.W.2d 873, 878 (Mo. Ct. App. 1932).

41. Elizabeth Scott, J.D. & Andre P. Derdeyn, M.D., *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 455-57 (1984).

42. See Jeff Atkinson, *Criteria for Deciding Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 36 (1984).

their time with the child in any one of a number of ways.<sup>43</sup> Moreover, parents can privately agree to joint custody, or courts can impose the arrangement with or without the parents' permission.<sup>44</sup>

In the 1980s, the primary caretaker standard was introduced as an alternative to both the best interest test and joint custody.<sup>45</sup> The primary caretaker standard awards custody to the parent who assumed responsibility for meeting the child's needs before the divorce, as long as that parent is fit.<sup>46</sup> Those needs include the daily caretaking activities of:

- (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 . . . ; (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>47</sup>

The standard applies to young children who cannot express a custodial preference.<sup>48</sup> Although the primary caretaker standard can operate as a presumption<sup>49</sup> or as one factor in the best interest test,<sup>50</sup> its proponents advocate its use as a presumption.<sup>51</sup>

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43. *See id.*

44. Scott & Derdeyn, *supra* note 41, at 471-74. Because of the importance of parental cooperation, joint custody works best when both parents agree to the arrangement. *See* Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 759 (1983) (explaining that research conducted on joint custody arrangements indicated that requiring the parents to create their own joint custody plan is critical to determining whether joint custody is truly a viable option).

45. *Garska v. McCoy*, 278 S.E.2d 357, 362-63 (W. Va. 1981).

46. *Id.*

47. *Id.* at 363.

48. Phyllis T. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?*, 8 B.Y.U. J. PUB. L. 75, 84 (1993).

49. Two states have adopted a primary caretaker rule. In West Virginia, the state supreme court adopted the primary caretaker standard as a presumption. *Rhodes v. Rhodes*, 449 S.E.2d 75, 77 (W. Va. 1994); *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). In Minnesota, the primary caretaker standard operated as a presumption for a few years until the legislature made it one factor in the best interest standard. MINN. STAT. § 518.17 (1990); *Pikula v. Pikula*, 374 N.W.2d 705, 713 (Minn. 1985); *see also* 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, 440 (1990).

50. *See In re Marriage of Knight*, 507 N.W.2d 728, 730 (Iowa Ct. App. 1993); *Nazar v. Nazar*, 505 N.W.2d 628, 633 (Minn. Ct. App. 1993); *Faries v. Faries*, 607 So. 2d 1204, 1210

## B. Traditional Advantages and Disadvantages

### 1. Best Interest of the Child

The best interest standard has enjoyed widespread use and has endured harsh criticism.<sup>52</sup> Many viewed the standard as an improvement over the maternal preference rule because it made a parent's gender irrelevant to a custody determination.<sup>53</sup> The best interest test was also praised for discarding an arbitrary rule in favor of a flexible, individualized approach.<sup>54</sup> One commentator noted the standard's ability to take into account all of the

(Miss. 1992); *Crum v. Crum*, 505 N.Y.S.2d 656, 657 (N.Y. App. Div. 1986); *Foreng v. Foreng*, 509 N.W.2d 38, 40 (N.D. 1993); *Bechtol v. Bechtol*, 550 N.E.2d 178, 180, *reh'g denied*, 552 N.E.2d 952 (Ohio 1990); *Robinson v. Robinson*, 863 P.2d 478, 479 (Or. Ct. App. 1993), *review denied*, 870 P.2d 219 (Or. 1993); *Wiskoski v. Wiskoski*, 629 A.2d 996, 999 (Pa. Super. Ct. 1993); *Smith v. Smith*, 363 S.E.2d 404, 406 (S.C. Ct. App. 1987); *Pusey*, 728 P.2d at 120; *Harris v. Harris*, 546 A.2d 208, 214 (Vt. 1988).

51. See Bookspan, *supra* note 48, at 86; Neely, *supra* note 37, at 169; Sack, *supra* note 26, at 327.

52. Perhaps foremost in their praise of the best interests standard are Joseph Goldstein, Anna Freud, and Albert Solnit. They propose using psychoanalytic theory as a means of determining how the child's best interests can be met. GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 5 (1979). To them, determining what is in the child's best interests includes steps that address both the physical and the emotional well-being of the child. See *id.* at 7. Specifically, they seek to incorporate psychoanalytic theory into the best interests standard in order to "manipulat[e] . . . a child's external environment as a means of improving and nourishing his internal environment." *Id.* Such a standard raises the best interests standard to a new level:

[T]he law must make the child's needs paramount. This preference reflects more than our professional commitment. It is in society's best interests. Each time the cycle of grossly inadequate parent-child relationships is broken, society stands to gain a person capable of becoming an adequate parent for children of the future.

*Id.*

Despite the advantages of the best interests standard, strong criticism also exists. Compare Nanette Dembitz, *Beyond Any Discipline's Competence*, 83 YALE L.J. 1304, 1308-12 (1974) (noting other commentators' evaluation of the best interests standard as a way to maintain the child's continuity of relationships, surroundings, and influences, as well as to evaluate parents in neglect and abuse cases), with David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984) (pointing out that the best interests standard can be arbitrary, overreaching, discriminatory, and also allows for judges to interject too much of their own "personal or sexist biases"); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 7 (1987) (arguing that the best interests standard is at its very core faulty because it rests on "institutional machinery for making the claim [that] works against that very interest"); Mnookin, *supra* note 23, at 230 (stating that "[b]ecause what is in the best interests of a particular child is indeterminate, there is good reason to be offended by the breadth of power exercised by a trial court judge in the resolution of custody disputes.").

53. See *supra* note 35 and accompanying text.

54. Chambers, *supra* note 52, at 481.

relevant factors and to weight them according to the circumstances of the case.<sup>55</sup>

The corresponding disadvantage of a flexible standard is that it is too indeterminate.<sup>56</sup> Professor Robert Mnookin and other critics have attacked the indeterminacy of the best interest standard on various grounds.<sup>57</sup> Professor David Chambers has observed that it forces judges to rely on their own values because “legislatures have failed to convey a collective social judgment about the right values.”<sup>58</sup> Thus, judges’ individual biases are bound to creep into their determination of what is in a child’s best interests.<sup>59</sup> Alternatively, judges may rely too heavily on experts whose own biases influence their recommendations.<sup>60</sup> Either way, the best interest standard too easily can become a summary of an individual’s prejudices.<sup>61</sup>

Although this concern about which values will guide a judge’s decision is legitimate, a judge’s use of values is unavoidable,<sup>62</sup> and perhaps even desirable, in a custody case. The fact that judge-made law can be attuned to

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55. *Id.* But see Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986) (discussing the “futility of attempting to achieve perfect, individualized justice” under the best interest standard).

56. See generally Carl E. Schneider, *Discretion, Rules and Law: Child Custody and UMDA’s Best-Interest Standard*, 89 MICH. L. REV. 2215, 2219-25 (summarizing commentators’ criticisms of the best interest standard).

57. Mnookin, *supra* note 23, at 255-60, 262-72; see, e.g., Elster, *supra* note 52; see also sources cited *supra* note 52.

58. Chambers, *supra* note 52, at 481-82.

59. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 303 (1988); Mnookin, *supra* note 23, at 260; see also *Holcomb v. Holcomb*, 888 P.2d 1046, 1049 (Or. Ct. App. 1995) (determining that the trial court erroneously granted custody to the father as a result of that court’s “apparent disdain for [the] mother’s educational ambitions and . . . her continued breast feeding of the child,” and not as the result of applying a best interests analysis).

60. Neely, *supra* note 37, at 173-74; Sack, *supra* note 26, at 297-98.

61. Mnookin, *supra* note 23, at 260, 269; Neely, *supra* note 37, at 174, 179 (stating that “[he could not] imagine an issue more subject to personal bias than a decision about which parent is ‘better’”). For a related criticism, see Bartlett, *supra* note 59, at 303 (criticizing the best interest standard as “a highly contingent social construction” that makes a custody decision a form of social engineering rather than a principled decision based on objective data).

62. Commentators have remarked that:

Leaving judges with an ultimate standard but with no real guidance on how to satisfy it puts them in a position of having only two ways to do their job: either they follow their own instincts or they rely on the expertise of others. Following their own instincts is simply another way of saying that they act in a vacuum, a philosophical vacuum, in which their particular experience, upbringing, biases, and, perhaps, irrationalities lead them to a conclusion. This form of decision-making is not only personal, bearing no necessary relation to what another judge might decide on the facts, but also utterly without any necessary relation to what is best for the child in question.

BLACK & CANTON, *supra* note 24, at 42.

the nuances of the individual case is important in a sensitive area such as custody.<sup>63</sup> Society has entrusted judges with the responsibility of drawing on their own values in various legal contexts, and many value judgments are clearcut enough in custody cases that we can be comfortable allowing judges to make them.<sup>64</sup>

A related criticism is that allowing judges to rely on their own values will yield unpredictable results in custody cases.<sup>65</sup> Professor Mnookin explains that uncertainty about the outcome will increase child custody litigation because parties will have to take their custody claims to court to resolve the issue.<sup>66</sup> He further argues that this uncertainty is unfair to parents seeking custody because they will not be on notice of what is expected of them and, therefore, will not have an opportunity to conform their behavior to meet judicial expectations.<sup>67</sup> Moreover, he concludes that the unpredictability undermines the value of judicial precedent because similar cases may not have similar results.<sup>68</sup>

This criticism does not stand up to close scrutiny, however, because it is not necessary to notify parents in advance that the law plans to speculate about their future behavior. In fact, the law does not give parents any less notice in custody disputes than it does in other situations. The only reason to put parents on notice would be to encourage them to spend their marriage jockeying for position in case there is a custody battle. This can hardly be the type of behavior that the law seeks to encourage. Furthermore, even if a parent is not on notice about what to expect from a particular family law judge, most lawyers who practice in front of that judge should have a good sense of what to expect. Alternatively, the inability to predict custody decisions in advance may give parents an incentive to negotiate private custody agreements in which they can preserve their interests rather than risk losing everything in a judicial determination.<sup>69</sup>

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63. *But see id.* (stating that “[i]t might . . . be intelligently argued that it is not the judge’s place to rely on *unguided* discretion but rather on discretion guided by the evidence adduced at trial”).

64. *See* Mnookin, *supra* note 23, at 261 (noting that some custody decisions are straightforward and easy to make).

65. *Id.* at 258-59.

66. *Id.* at 262.

67. *Id.* at 263.

68. *Id.*

69. *See* Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 26-27 (1990-91) (arguing that mothers may accept otherwise unacceptable “property settlements, spousal support or child support responsibilities” to avoid even the possibility of losing the custody of the children); *see also* Henry H. Foster & Doris J. Freed, *Politics of Divorce Process—Bargaining Leverage, Unfair Edge*, 192 N.Y. L.J., July 11, 1984, at 1. (noting that the “official law of divorce” operates

A final concern about the standard's indeterminacy is the difficulty of predicting the future.<sup>70</sup> According to Professor Mnookin, judges do not have enough information to assess who will be the better caregiver even if such a determination is possible at all.<sup>71</sup> In addition, they do not know whether they should be evaluating a child's short-term or long-term future interests.<sup>72</sup>

However, as Professor Mnookin himself acknowledges, custody is a prospective determination.<sup>73</sup> This means that judges have the responsibility of figuring out who will be the better future caretaker of the child.<sup>74</sup> Although there is no perfect way of doing that, a judge must look at the available information and try to make that assessment.<sup>75</sup> The best interest standard at least has the advantage of being able to take into account all of the relevant factors in a custody decision rather than focusing exclusively on past parental behavior.<sup>76</sup>

## 2. Joint Custody

Commentators have observed that the main advantage of the joint custody option is that it permits both parents to have a close involvement in their child's life after divorce.<sup>77</sup> This opportunity should increase the parents' commitment to the child because both parents are sharing responsibility for raising the child.<sup>78</sup> In addition, this shared responsibility encourages

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primarily to give bargaining leverage and to set parameters on the party's negotiations in a divorce process because less than ten percent of divorces are contested).

70. Mnookin, *supra* note 23, at 257.

71. *Id.*; Chambers, *supra* note 52, at 481-82.

72. Mnookin, *supra* note 23, at 260.

73. *Id.* at 251-52.

74. *See id.*

75. Not only must the judge take the information presented at trial and conform it to the best interests standard, but the judge likewise must conform varying definitions of what the best interests standard in fact means from parties who may have vastly different views on the standard. BLACK & CANTON, *supra* note 24, at 42.

76. One area of particular importance in making such a prospective determination is which parent is more likely to foster future visitation of the noncustodial parent. *See, e.g.*, Schmidkunz v. Schmidkunz, 529 N.W.2d 857, 859 (N.D. 1995) (upholding the trial court's finding that the custody award to the father promoted the best interests of the child where the father would be likely to foster visitation with the mother, and it would be unlikely that the mother would foster visitation with the father).

77. Atkinson, *supra* note 42, at 37; Steinman, *supra* note 44, at 743. Sometimes, courts are faced with the difficult task of mandating joint custody even over the objections of one of the parents. *See Beck v. Beck*, 432 A.2d 63, 65 (N.J. 1981).

78. Indeed, at least one commentator has argued that the constitutional right of a parent-child relationship mandates the award of joint custody. *See Holly L. Robinson, Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27 (1985).

divorcing parents to maintain a civil relationship with each other.<sup>79</sup> Joint custody minimizes the trauma of divorce to the child as well because it allows him to “enjoy a meaningful relationship with both parents.”<sup>80</sup> Furthermore, like the best interest standard, the joint custody alternative was hailed as an improvement over gender-biased standards.<sup>81</sup> The option does not view either mothers or fathers as the preferred custodial parent; instead, it favors both parents’ involvement in the child’s life. Finally, the joint custody option has been praised for checking judges’ ability to insert their own biases into the best interest standard.<sup>82</sup> Because they are not selecting the “better” parent, they do not have to scrutinize the character of both and decide whom they prefer.

Critics of joint custody point out its limitations particularly when parents cannot cooperate to raise their child.<sup>83</sup> They note that a breakdown in the parents’ relationship often places the child in a “tug-of-war” between the child’s parents.<sup>84</sup> The pressures on parents to maintain a relationship after a divorce can adversely affect both parents and child.<sup>85</sup> In addition, joint custody assumes that parents should have equal childraising rights and duties after the divorce because they were equally involved in childrearing before the divorce.<sup>86</sup> One commentator has pointed out that the mother may have had more childraising duties before the divorce and, therefore, should not

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79. Catherine R. Albiston et al., *Does Joint Legal Custody Matter?*, 2 STAN. L. & POL’Y REV. 167, 168 (1990); Steinman, *supra* note 44, at 743.

80. *Taylor v. Taylor*, 508 A.2d 964, 970 (Md. 1986); *see also* Steinman, *supra* note 44, at 743.

81. Albiston et al., *supra* note 79, at 168; Scott & Derdeyn, *supra* note 41, at 461-62 (noting the “legal advantage” that fathers gain under a joint custody standard as opposed to a maternal preference standard such as the best interests standard).

82. Scott & Derdeyn, *supra* note 41, at 469.

83. *Taylor*, 508 A.2d at 971 (discussing that the most important factor in a joint custody determination is the “capacity of the parents to communicate and to reach shared decisions affecting the child’s welfare”).

84. Atkinson, *supra* note 42, at 37; Foster & Freed, *supra* note 14, at 341.

85. Bookspan, *supra* note 48, at 83; Andre P. Derdeyn, M.D., & Elizabeth Scott, J.D., *Joint Custody: A Critical Analysis and Appraisal*, 54(2) AM. J. ORTHOPSYCHIATRY 199, 204 (Apr. 1984). Moreover, even a well-intentioned objection to such joint custody arrangements can place parents in a disfavorable light, thus potentially subjecting them to complete loss of custody. *See* Joanne Schulman & Valerie Pitt, *Second Thoughts on Joint Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U. L. REV. 538, 554-55 (1982).

86. Feminist commentators are quick to point out that such equally distributed childbearing duties are often at best, no more than a fiction. As a result, joint custody awards provide fathers with nothing more than an additional tool to manipulate mothers into accepting less than optimal arrangements regarding both custody and support, for fear of losing the children altogether. *See* Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 504-05 (1988).

have to share custodial rights equally with the father after the divorce.<sup>87</sup> She concludes that joint custody's rhetoric of gender equality does not reflect the way that labor is divided between men and women.<sup>88</sup>

### 3. Primary Caretaker

Commentators endorse the primary caretaker standard for a number of reasons.<sup>89</sup> First, the standard is objective because it simply looks at whether the parent performed certain childraising tasks, and awards custody on that basis.<sup>90</sup> The standard, therefore, avoids the interpretive problems inherent in a subjective test such as the best interest standard.<sup>91</sup> Second, the standard is predictable because prospective litigants know what criteria the courts will use to evaluate them, and lawyers can better advise their clients about the merits of their claims.<sup>92</sup> The certain outcome will reduce custody litigation

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87. Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 735 (1988).

88. *Id.*

89. Bookspan, *supra* note 48; Fineman, *supra* note 87; Neely, *supra* note 37; Sack, *supra* note 26, at 301 n.54, 302.

Commentators are not alone in their endorsement of the primary caretaker standard. Numerous state courts apply the primary caretaker standard in two different ways. First, West Virginia courts have created a presumption in favor of the primary caretaker standard that can be rebutted by a showing of unfitness. *Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981). Second, most states adopting the best interests of the child standard embody the primary caretaker standard as a heavily-weighted factor to be included within that analysis. *See, e.g., Milum v. Milum*, 894 S.W.2d 611, 613 (Ark. Ct. App. 1995) (awarding custody of the children to the mother who was employed on a part-time basis as being in the best interest of the children largely because of her role as their primary caretaker for the majority of their lives); *In re Marriage of Boldt*, 801 P.2d 874, 875 (Or. Ct. App. 1990) (stating that when applying the best interests standard, "[the court] can consider evidence that one parent has been the primary caretaker or is the more nurturing parent"); *Wiskoski v. Wiskoski*, 629 A.2d 996, 999 (Pa. Super. Ct. 1993) (stating that one parent's role as the primary caretaker can be a determining factor in a custody decision when both parents are otherwise fit).

90. *Garska v. McCoy* set forth the objective elements courts in West Virginia were to use in determining which parent was the primary caretaker. 278 S.E.2d 357, 363 (W. Va. 1981). *See supra* text accompanying note 47 for a listing of these objective criteria.

91. Crippen, *supra* note 49, at 442-45 (noting that the best interests standard "presents a particular hazard [by allowing] personal values [to be] the measuring device for custody decisions"); Sack, *supra* note 26, at 302 (stating that the use of a primary caretaker standard "renders . . . subjective factors that a court might otherwise consider . . . irrelevant to the award of custody"). *But see* Mason, *supra* note 69, at 24-25. Mason argues against a primary caretaker standard because "many judges are critical of working mothers who no longer play the full-time caretaker role." *Id.* at 25 (citation omitted). According to Mason, judges therefore subjectively grant greater "parenting credit" to lesser activities performed by fathers simply because the working mother is stepping outside of the judge's view of the appropriate role of a mother. *Id.* at 26-27; *see also* Polikoff, *supra* note 27, at 235.

92. Fineman, *supra* note 87, at 772.

and avoid its financial and emotional costs.<sup>93</sup> Third, the standard ensures that the child's needs will continue to be met because custody goes to a parent who already has been meeting those needs.<sup>94</sup> The standard assumes that this parent has formed the closest emotional bond with the child.<sup>95</sup> Finally, some commentators maintain that the standard is gender-neutral, at least "on its face."<sup>96</sup> If mothers are awarded custody more often than fathers under the standard, then it is because mothers perform the bulk of the childrearing tasks.<sup>97</sup> Therefore, the standard accurately reflects the division of labor between parents and rewards mothers for meeting their child's needs.<sup>98</sup>

Critics of the primary caretaker standard first argue that it is a thinly-disguised version of the tender years doctrine.<sup>99</sup> Although its language is gender-neutral, in reality, mothers usually are their children's primary caretakers.<sup>100</sup> Therefore, the standard usually awards custody to mothers over fathers.<sup>101</sup> Second, the standard assumes that the child has a primary caretaker. This may not be the case, particularly in a family where both parents work outside the home and participate in childrearing.<sup>102</sup> Third, the primary caretaker standard over-emphasizes one parent's relationship with

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93. Crippen, *supra* note 49, at 429, 446; Fineman, *supra* note 87, at 772; Sack, *supra* note 26, at 302.

94. Fineman, *supra* note 87, at 773; *see also* Sack, *supra* note 26, at 302-03.

95. Crippen, *supra* note 49, at 441 and n.53.

96. Fineman, *supra* note 87, at 773. Fineman argues that the primary caretaker standard instead promotes behavior modification by encouraging both parents to take on a nurturing role. *Id.*; *see also* Crippen, *supra* note 49, at 450-51.

97. Crippen, *supra* note 49, at 450-51; Fineman, *supra* note 87, at 773; Neely, *supra* note 37, at 171-72; Sack, *supra* note 26, at 302; *see* Polikoff, *supra* note 13; Joan C. Williams, *Sameness Feminism and the Work/Family Conflict*, 35 N.Y.L. SCH. L. REV. 347, 353-54 (1990).

98. Fineman, *supra* note 87, at 771 (stating that "[c]ustody can be viewed as a reward for past caretaking behavior").

99. Bookspan, *supra* note 48, at 84; Judith B. Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 RUTGERS L. REV. 1141, 1153, 1158 (1991); *see also* Crippen, *supra* note 49, at 451 n.93; Fineman, *supra* note 87, at 738 n.47; Klaff, *supra* note 16, at 359-71.

100. *See* Mason, *supra* note 69, at 5 (noting that women still bear the bulk of the responsibility for childrearing in two-parent households despite the alleged movement towards equality between men and women); *see also* SARA F. BERK, *THE GENDER FACTORY* 7-10 (1985); Linda Liefland, *Career Patterns of Male and Female Lawyers*, 35 BUFF. L. REV. 601, 607-08, 613-17 (1986); Joseph H. Pleck, *Men's Family Work: Three Perspectives and Some New Data*, 25 FAM. COORDINATOR 481, 487 (1979).

101. *See supra* text accompanying note 87.

102. *See* Mason, *supra* note 69, at 25 (arguing that determining who the primary caretaker is can be anything but clearcut in a society in which both parents are forced to work to make ends meet or one in which women are forced to enter the work force following a divorce).

the child, and fails to consider the child's bond with the other parent.<sup>103</sup> Fourth, the threshold fitness requirement means that courts will consider many of the same subjective factors they used in determining custody under a best interest approach.<sup>104</sup> The need to define fitness will result in the same amount of litigation that was conducted under a best interest standard and the same problems of unpredictable standards and uncertain outcomes.<sup>105</sup> Fifth, the mechanical nature of the rule means that courts will have to ignore other relevant factors when deciding custody.<sup>106</sup>

Finally, even though some commentators have embraced the primary caretaker standard, others explain that it actually promotes gender stereotypes.<sup>107</sup> The standard rewards women who have limited their work outside the home to devote their time to the traditional female role of childrearing.<sup>108</sup> One could therefore argue that in "favoring" mothers over fathers, the primary caretaker standard allows courts to excuse fathers from child care responsibilities. For example, a father can tell his child that he wishes that he had custody but that there is nothing that he can do. He then can leave the child to the mother and avoid any custodial responsibilities. In contrast, the mother cannot escape her responsibilities to her child without the court's permission.

### C. A Rights-Based Critique

#### 1. Best Interest of the Child

In addition to their traditional advantages and disadvantages, these custody standards must also be evaluated under the rights/duties model. Initially, it may look as though courts and legislatures moved away from a rights-based custody standard when they replaced the tender years doctrine with the best interest of the child test. The tender years doctrine assumes that mothers have the right to raise their children, but the best interest standard does not give either parent an automatic or presumed right of custody. Under the best interest standard, custody is designed to preserve

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103. Chambers, *supra* note 52, at 533; Scott & Derdeyn, *supra* note 41, at 628-29.

104. Sack, *supra* note 26, at 303.

105. See Crippen, *supra* note 49, at 452-59 (discussing the increase in child custody litigation after Minnesota adopted the primary caretaker standard); Sack, *supra* note 26, at 320-21 (proposing that the threshold fitness standard be narrowed to eliminate problems of vagueness).

106. Crippen, *supra* note 49, at 487-88.

107. Scott & Derdeyn, *supra* note 41, at 629.

108. *Id.*

and respect the child's interests and preferences.<sup>109</sup> Therefore, the focus moves away from a consideration of what the parent wants, to what is best for the child.

A closer analysis reveals that although the best interest test is more prospective than other current standards, it does not abandon a rights-based approach to custody determinations; it simply replaces the rhetoric of rights with the language of a child's best interest.<sup>110</sup> Under this standard, a child's best interests and rights are equated. The standard correlates a child's best interest or a child's right with a parent's duty. For example, a child has a right to live in a stable environment because it is in his best interest, and a parent has a corresponding duty to provide that environment. Thus, the parent's right to custody is still dependent on fulfillment of a parental duty. The label may have changed from parental rights and duties to a child's best interest, but the analysis remains the same.

## 2. Joint Custody

Joint custody keeps the focus on parents' rights and duties, but distributes these rights and duties differently from the all-or-nothing best interests of the child approach.<sup>111</sup> Joint custody allows both parents to retain rights to raise their child as long as both are willing to fulfill their parental obligations.<sup>112</sup> The main difference from other standards is that in joint custody proceedings, courts do not choose one parent over another: parents demand equal rights to make childrearing decisions and, in some cases, to spend time with their child.<sup>113</sup>

Joint custody erroneously assumes that rights and duties motivate parents to seek joint custody. The result is that joint custody seeks to punish or reward parents for past behavior. Parents usually are eligible for joint

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109. Elster, *supra* note 52, at 4.

110. See Bartlett, *supra* note 59, at 303 (stating that "the best interests standard merely substitutes the interests or 'rights' of one party—the child—for those of others"); see also Elster, *supra* note 52, at 21-26 (expressing concern that ignoring parental interests leads to inaccurate results in custody cases).

111. See Scott & Derdeyn, *supra* note 41, at 470 (noting that a "secondary objective" of joint custody is "the recognition of both parties' parental rights").

112. For a discussion on the mechanics of joint custody and the requirements of parental cooperation, see *supra* notes 77-88 and accompanying text.

113. This demand is perhaps the greatest shift in custody litigation because it reflects "attitudinal" changes. BLACK & CANTON, *supra* note 24, at 33. Specifically, "[t]he attitudes of men have changed. They do not now accept, as they used to, the notion that they are as a gender innately incapable of nurturing children, and consequently, men now seek and fight for custody as never before." *Id.*

custody only if they have met their past childrearing obligations, and parents who failed to do so usually are not awarded joint custody.<sup>114</sup> This only makes sense if parents earn custody or if their fulfillment of a past obligation requires a reward. In contrast, a custody standard that is based on love, as opposed to rights and duties, focuses on raising a child as its own reward.

Furthermore, the distribution of rights between parents in joint custody arrangements reflects the shortcomings of a retrospective standard because joint custody tries to recreate a family unit that no longer exists. Divorce changes a family's relationships, and the parents' relationship most likely has changed forever. Joint custody ignores this reality, however, and the standard requires parents to pretend to maintain a relationship that is already broken.<sup>115</sup> The joint custody option remains frozen in the past by refusing to recognize that parents' attitudes and priorities change after a divorce.

### 3. Primary Caretaker

The primary caretaker standard most explicitly fits into the rights/duties analytical framework. A parent must perform his childraising duties to gain the right to custody of the child.<sup>116</sup> Not only does the standard focus on rights and duties, but it also ignores certain duties. For example, a parent who changes the child's diapers, feeds the child, and puts the child to bed at night has met the parent's obligations to the child.<sup>117</sup> In return, the parent has secured the right to act as the child's future caregiver.<sup>118</sup> However, when parents decide that one of them will work in the home to raise the child, the other usually agrees to support the family financially. This division of labor probably occurs long before either parent is contemplating divorce. When the unanticipated occurs and a couple gets divorced, one parent finds that the labor outside the home carries no weight.<sup>119</sup> The parent

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114. Scott & Derdeyn, *supra* note 41, at 469 & nn.62-63; Steinman, *supra* note 44, at 745-46.

115. Bookspan, *supra* note 48, at 83; Scott & Derdeyn, *supra* note 41, at 199.

116. For a discussion of the primary caretaker standard and the specific duties it mandates, see *supra* notes 89-108 and accompanying text.

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

118. *Id.*

119. *In re Marriage of Boldt* clearly illustrates this concept. 801 P.2d 874 (Or. Ct. App. 1990). In that case, the judge recognized that:

One apparent difference between the parties is that [the] mother has been the primary caretaker and, at this time, is the more nurturing parent. Before the parties' separation, mother cared for the child almost exclusively. Father spent short periods with the child before and after work and on weekends. Since the parties' separation, father has assumed basic care responsibilities for the child during visitation. Although the [Oregon] statute prohibits giving preference to a mother just because she is the mother, we can consider

may have met his or her financial obligations to the family, but the parent has no custodial rights to the child. Therefore, the primary caretaker standard conditions custody on the fulfillment of only certain kinds of duties.

Like the joint custody alternative, the primary caretaker standard fails to recognize that love motivates a parent to seek custody of his child. The standard presumes that the parent who has assumed primary responsibility for raising the child has undertaken a significant burden, while the parent who is working outside the home has failed to assume a comparable burden.<sup>120</sup> Because the primary caretaker standard assumes that the primary caretaker is “working harder” at parenting than the parent who is employed outside the home, the standard honors a parent’s non-financial contributions but disregards financial ones. The standard thus discourages parents from choosing to work outside the home to support the family if they know that their contribution is not valued.

The primary caretaker standard further assumes that the primary caretaker is entitled to something in return for the parent’s hard work.<sup>121</sup> If the parents divorce, then that parent has earned the right to future custody of the child as a reward for a job well done. The parent can expect a court to value the parent’s contribution of raising the child and penalize the parent who did not take on this burden. The primary caretaker standard fails to recognize that meeting a child’s needs can be a worthwhile opportunity in and of itself. A parent who chooses to meet those needs does so because he or she wants to, not because the parent expects to get something in return. Therefore, the primary caretaker standard erroneously bases parenthood on an incentive system that does not reflect the reality of parent-child relationships.

Moreover, the primary caretaker standard disregards the prospective nature of custody by imagining that family relationships are static. Both circumstances and people often change in the wake of a divorce. The parent who was the child’s primary caretaker before the divorce will probably not be able to play the same role because the parent will have to work more outside the home.<sup>122</sup> Therefore, this parent will have less time to spend with

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evidence that one parent has been the primary caretaker or is the more nurturing parent.

*Id.* at 875.

120. See Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1431-35 (1991).

121. See, e.g., *Garska*, 278 S.E.2d at 362-64.

122. See, e.g., *Milum v. Milum*, 894 S.W.2d 611, 613 (Ark. Ct. App. 1995) (affirming the grant of custody of the children to the mother who “testified that this was the first time she had ever really worked” largely because she had previously been the children’s primary caretaker).

the child and may not be the more effective future caretaker. Conversely, the parent who worked outside the home before the divorce may have done so solely because that is how the parents agreed to divide responsibilities. In light of the divorce, the parent might choose to alter the parent's work schedule to spend more time with the child. The primary caretaker standard, however, would disregard the parent's future commitment to childrearing.<sup>123</sup> In depriving this parent of an opportunity to gain custody, the primary caretaker standard eliminates consideration of potentially the most relevant indicia of future behavior: a parent's ability to grow and change.

### III. PROPOSED CUSTODY STANDARD

#### A. *The Theoretical Foundation*

The proposed custody standard abandons the rights/duties paradigm in favor of an approach that is based on principles of forgiveness and love. This shift allows courts to address custody questions prospectively rather than retrospectively. The standard sets forth a two-part test to determine which parent should have the opportunity to meet the child's future needs. The first part of the test considers which parent is more willing to embrace the opportunities associated with childrearing. This inquiry takes into account the parent's own expression of willingness as well as the court's assessment of the credibility of that assertion. The second part of the test evaluates the respective childrearing abilities of each parent to determine which parent will be more effective at meeting a child's needs.

This test improves on current standards based on rights and duties in two important ways. First, the proposed standard more accurately reflects the prospective nature of a custody decision.<sup>124</sup> The emphasis on future

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123. *See, e.g.*, Rhodes v. Rhodes, 449 S.E.2d 75, 78 (W. Va. 1994) (reversing a lower court's grant of custody to the father because the mother had been the primary caretaker for a longer period in the children's lives, despite the efforts the father displayed to adopt that role).

124. Many commentators have noted the problems with looking to the past instead of attempting to predict the future. For example, Professor Jon Elster concludes that in order to have a determinate custody decision, four conditions must be satisfied:

- (1) all the [custody] options must be known; (2) all the possible outcomes of each option must be known; (3) the probabilities of each outcome must be known; [and] (4) the value attached to each outcome must be known.

Elster, *supra* note 52, at 12. Clearly, each of these conditions attempts to predict with certainty the optimal custody arrangement based on future events and behaviors. According to Elster, the conditions cannot be predicted with certainty because "each of the options is accompanied by a number of unknown and essentially unknowable possibilities whose materialization depends upon

behavior reflects a willingness to forgive a parent's past performance and gives parents the opportunity to redeem themselves. Second, the proposed standard recognizes that rights and duties do not motivate a parent to meet a child's needs; rather, a parent acts out of love and concern for the child's welfare.<sup>125</sup>

First, the prospective nature of a custody decision makes the relevant inquiry turn on which parent is better able to meet the child's future needs. The problem with most current standards modeled on rights and duties is that they award custody to a parent based on past behavior. This is so because these standards regard future rights as a reward for the fulfillment of past duties. These approaches fail to take into account the changes that can take place within a person. A major event in a person's life, such as a divorce, makes it even more likely that the person will reevaluate his or her life and change. A parent who was not available to help meet a child's needs in the past may now be willing and able to do so. A retrospective custody standard based on rights and duties, however, would not give that parent a second chance.

In contrast, the forward-looking proposed standard is rooted in the values of forgiveness and redemption. A custody standard based on forgiveness is open to the possibility that people can grow and change, and a standard based on redemption takes into account who the parent is now rather than who he or she was in the past. Therefore, the proposed standard is willing to forgive a parent for past mistakes so long as the parent can demonstrate a commitment to meet the child's future needs.<sup>126</sup>

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the future development of the universe." *Id.* Thus, by definition, courts must look into the future for the answers they need to render determinate custody decisions. *See also* Atkinson, *supra* note 42, at 18 (pointing out that the primary caretaker standard is flawed because "as children grow older and more independent, the closeness of the parent/child relationship and the ability to meet the child's needs are less determined by who has been the primary caretaker" in the past); Mnookin, *supra* note 23, at 251 (explaining that "[p]roof of what happened in the past is relevant only insofar as it enables the court to decide what is likely to happen in the future" when making a custody determination).

125. Professor Francis J. Catania, Jr. observes that family members' individual rights should not take priority over their relationships in custody disputes. Francis J. Catania, Jr., *Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes*, 71 NEB. L. REV. 1228, 1233 (1992). Professor Catania proposes a non-adjudicatory procedure for resolving custody disputes which recognizes both the value of individual autonomy and the need to protect family relationships. *Id.* at 1258-68.

126. Professor Robert J. Lipkin effectively argues that such a structure would be largely irrelevant in a criminal law context where coercion, rather than love or responsibility, is the motivation for accepting past consequences and seeking a change in future status. Robert J. Lipkin, *Punishment, Penance and Respect for Autonomy*, 14 SOC. THEORY & PRAC. 87, 99 (1988).

Second, by acknowledging the role of love in parenting, this standard refuses to turn custody into a reward for past behavior.<sup>127</sup> Under a rights-based standard, performance of a legal duty creates a future right and, therefore, a parent who has successfully completed certain childraising tasks has earned the right to custody. Conversely, a parent who has not demonstrated a commitment to meeting the child's needs in the past loses the right to become the custodial parent. This approach could mean that a parent who has performed most of the childraising activities might object to the other parent having an equal opportunity to get custody. The first parent would argue that he or she has fulfilled the childrearing duties, but the other parent has not. Because the parents did not assume equal responsibility in the past, they should not enjoy equal opportunities in the future.

Under the proposed standard, past parenting is treated as its own reward. The parent who has been taking care of the child already has enjoyed the benefits of parenting. Although one parent claims that past behavior entitles that parent to a future reward, the parent's behavior in becoming a parent would indicate that the parent saw serving a child as its own reward. This individual made a series of conscious decisions when he or she chose to become a parent. It is reasonable to infer that the parent made those choices because the parent saw some benefits attached to becoming a parent. Furthermore, if a parent made those choices in the context of marriage, the parent should have anticipated sharing the benefits of childrearing. If the parent claims that he or she should be able to preclude the other parent from caring for the child based on the parent's past service, the response is that the parent has already received benefits which the other parent has been denied. The parent has had the opportunity to meet a child's needs. Having realized the benefits of that service, a parent should be willing to share future childraising opportunities with the other parent.

If the parent does not recognize that the opportunity to meet a child's needs is a benefit, then the court should examine further the parent's reasons for seeking custody. One possible explanation is that custody gives the parent power over the child and over the other parent. The parent who believes that he or she is entitled to this power as a reward for past behavior, and is not acting out of concern for the child, does not have a legitimate custody claim.

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127. See Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 1074-77 (1995) (discussing the danger of applying an economic analysis to parent-child relationships because such an analysis fails to consider that love and obligation underlie those relationships).

Although the rights/duties paradigm may be appropriate in certain legal contexts, it does not explain what motivates a parent in a custody case. A parent is motivated by love and concern for the child's welfare rather than a sense of obligation or entitlement. Even though the relationship between parents may be broken in a divorce, each parent seeking custody wants the opportunity to have a relationship with his child. The parent does not need the law to require him to meet the child's needs because the parent has already expressed a desire to do so. For example, a parent who stays up all night with a sick child does not do so because the parent fears that he or she will be charged with neglect if the parent does nothing. Concern for the child's health rather than concern about the parent's legal duty explains the parent's behavior. The legal system currently attributes the parent's behavior to the performance of a legal duty and then grants that parent custody according to the parent's history of meeting similar duties when, in reality, the parent is acting out of love.

The legal system has organized people's behavior into sets of reciprocal rights and duties when it requires them to act a certain way. This arrangement may work in contract, tort and some kinds of family law when people may not behave in a certain way unless the law compels them to do so. It does not work when people are motivated to act for other reasons. For example, people have a duty not to touch others without consent, and in return, people have a right to be left alone.<sup>128</sup> Tort law has created this right and duty so that people will conform their behavior to a minimally acceptable standard of conduct. In contrast, tort law does not impose a comparable duty to assist strangers who are in trouble, nor has it created a corresponding right to such assistance.<sup>129</sup> The law traditionally takes the position that people should not expect others to be inconvenienced on their behalf.<sup>130</sup>

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128. See *Fisher v. Carrousel Motor Hotel*, 424 S.W.2d 627 (Tex. 1967).

129. RESTATEMENT (SECOND) OF TORTS § 314 (1965) (stating that "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not itself impose upon him a duty to take such action"); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 373-82 (5th ed. 1984).

130. See *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959) (noting that there may be moral culpability but no legal liability when the defendant dared another man to jump into the water and then let him drown); Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 219-21 (1908). In fact, legislatures have enacted "good samaritan" laws to relieve citizens of liability when they are confronted with situations in which they take it upon themselves to help another person who is in need. See, e.g., 42 PA. STAT. ANN. § 8332(a) (1982) (relieving persons from the possibility of damages as a result of delivering aid to another person in an emergency situation).

The rights/duties paradigm may be necessary in certain family law contexts to regulate the relationship between parent and state and between child and parent.<sup>131</sup> The rights/duties model secures one group's interests when those interests are opposed to another group's. For example, parents need rights to protect themselves from unjustified governmental intrusion into their lives. Therefore, the state cannot interfere when parents exercise their right to direct the upbringing of their children unless it has a legitimate reason for doing so.<sup>132</sup> Absent recognition of this parental right, the state could specify the parent's child-rearing methods and could even remove the child from the home without cause. The rights/duties model also protects the interests of a weaker group against those of a stronger group. For instance, the state has the duty to check the inappropriate behavior of a parent who abuses a child.<sup>133</sup> The court's duty arises from the child's right to be secure from harm and from the transgression of the parent's right to raise the child as the parent sees fit. Therefore, rights and duties are necessary to protect individual interests when no other social mechanism is in place to regulate behavior.

When love controls a parent's behavior, however, rights and duties are unnecessary to determine what a parent should do with the child. Once that determination is made in the custody context, the court may need the structure of rights and duties to enforce the determination between parents because the parents already have indicated that love is not going to organize their relationship. If their relationship is not based on love, the parents may fail to adhere to the custody arrangement in an attempt to undermine each other. However, the legal system should recognize that rights and duties do not explain parents' relationships with their children and accordingly adopt a custody standard that more accurately reflects the reality of those parent-child relationships.

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131. One commentator has suggested that parents should have a "child-rearing privilege" as opposed to a parental right, and that children should have the right to protect their own interests. James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1374, 1446-47 (1994).

132. See *Prince v. Massachusetts*, 321 U.S. 158, 166-70 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); see also Francis B. McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975 (1988).

133. See *Prince*, 321 U.S. at 166-67; *In re Rodney C.*, 398 N.Y.S.2d 511, 515-16 (N.Y. Fam. Ct. 1977) (distinguishing force applied for the "training or education of the child or for the preservation of discipline" from force "administered for the gratification of passion or rage"); see also Mary Kate Kearney, *Substantive Due Process and Parental Corporal Punishment: Democracy and the Excluded Child*, 32 SAN DIEGO L. REV. 1, 33-51 (1995) (proposing a test to distinguish between reasonable corporal punishment and child abuse).

### *B. The Proposed Test*

The proposed test evaluates a parent's willingness and ability to meet a child's future needs. The first part assesses each parent's willingness to embrace the opportunities associated with raising the child, and the second part evaluates each parent's effectiveness at doing so.

#### 1. Parental Willingness

The question of parental willingness can be subdivided into two parts. The first part focuses on how the parent perceives himself or herself, and the second part considers how others perceive the parent. If one parent is willing to raise the child and the other is not, then the decision is easy; custody goes to the willing parent. If neither parent is willing, then custody will go to a third party, and the court must determine how the parents will divide the expense of the child's upbringing. In that situation, love between the parents and the child has disappeared; courts must therefore fall back on a rights/duty analysis to fill the void. It is when both parents express a willingness to embrace the opportunities associated with childrearing that the court must determine how others perceive each parent as a prospective caregiver under the proposed standard.

This evaluation depends upon the credibility of each parent's assertion that he or she is willing to meet the child's future needs. For example, a parent who has not been involved in raising the child in the past may later express a desire to be the custodial parent. The court must look at the reasons for this change of heart and decide whether they are sincere. Perhaps the parent always wanted to spend more time with the child, but the parents had agreed when they were married that the parent would work more outside the home to help meet the family's needs. Alternatively, the parent may have become completely involved in work outside the home and avoided in-home childraising responsibilities. In either event, the court should determine whether this parent is now ready to embrace the opportunities associated with childrearing.

Courts may have difficulty making this assessment because the legal system is unable to look into someone's heart. Courts are reluctant to use subjective standards to determine a person's state of mind in other legal contexts because they lack expertise in determining a person's intent.<sup>134</sup>

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134. *McGuire v. Almy*, 8 N.E.2d 760, 763 (Mass. 1937) (in determining whether an insane person is liable for intentional torts, the court refused to inquire further into his particular mental state).

However, courts need not rely solely on their own insights in a custody dispute; they can look to the parent's recent behavior as evidence of a genuine willingness to assume parental responsibilities. For example, a court could determine if the working parent who was never around has changed jobs or reduced his or her work hours, or if an alcoholic parent has started treatment. Thus, the court can require that the parent's deeds match the parent's words.

Moreover, the court does not bear the burden of determining what is in the parent's heart. The parent is charged with figuring out a way to show that the parent has changed; the court simply must look at what the parent has demonstrated. The parent may meet his or her burden in part with testimony from friends, family, or co-workers, and with examples of a renewed commitment to parenting. A court is in the best position to weigh this evidence because it has a first-hand opportunity to see the demeanor of the parent and witnesses, hear their testimony, and observe the parent's behavior. In addition, the legal system can draw on its experience in assessing credibility in other contexts, such as parole hearings, to decide whether a person has truly changed.<sup>135</sup> Even though a court's assessment may not be perfectly accurate, this judicial inquiry into a parent's credibility represents a search for the truth.

In sum, the first part of the proposed custody standard simply preserves a parent's opportunity to have the court consider that parent as the custodial parent, provided the parent can demonstrate that he or she genuinely wants to meet the child's future needs. A parent's past behavior is neither irrelevant to the consideration of who gets custody, nor is it dispositive of the matter. The important issue is whether that person can show that he or she has grown and matured. The burden is on the parent who says that the parent has changed to prove it, and that parent may or may not successfully meet that burden. Thus, the inquiry under the first part of the standard does not focus on the ultimate question of whether this parent deserves to have custody of the child; rather, it merely concludes that the parent deserves the opportunity to show that the parent has changed.

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135. Unlike the risks resulting from a wrong decision in a parole hearing, the risks in a wrong custody decision can be easily remedied. The child and the noncustodial parent can monitor the custodial parent's behavior, and the court can make adjustments if the court makes a mistake. Furthermore, even though there are occasional high-profile cases where a parole board releases someone who then commits a serious crime, such boards do a competent job overall. *See, e.g.,* Pamela Sampson, *Testimony of Prison Officials Sought in Simon Parole Probe*, HARRISBURG PATRIOT & EVENING NEWS, July 21, 1995, at B1 (discussing the weaknesses in the parole system that allowed Robert "Mudman" Simon to be released only to kill a police officer in New Jersey shortly afterwards).

## 2. Parental Ability

Still, it is not enough for a parent to say that the parent wants to raise the child, even if a court believes those assertions. The court has the additional responsibility of determining whether the parent can do what the parent says. Therefore, the second part of the proposed standard evaluates each parent's ability to meet the child's future needs. This part focuses on which parent will more effectively embrace the opportunity to take care of the child.

As a threshold consideration under the second part, the court must decide whether the parents, who have demonstrated their willingness to raise the child, are fit to do so. This inquiry need not probe deeply into the lifestyles of each parent.<sup>136</sup> Instead, the fitness requirement should be narrowly drawn to this point: a parent will be considered unfit only if he or she physically or psychologically abuses a child, partner, or spouse, or neglects a child,<sup>137</sup> is addicted to drugs or alcohol, or has a clinically recognized mental problem that prevents him or her from taking care of a child. This fitness standard automatically eliminates from consideration parents who are not capable of meeting a child's needs, and continues to include those who may have non-traditional lifestyles.

Assuming that the court finds both parents fit, the issue becomes which parent will more effectively meet the child's future needs. This question first requires the court to define the child's needs. This is a good approach because it keeps the child's interests at the forefront of the judicial inquiry, and allows a court to consider the particular needs of the individual child. Critics may assert that this approach is too indeterminate and subjective in the same way that they attack the best interest standard.<sup>138</sup> The answer to these concerns is twofold: first, values are a necessary part of certain determinations; and second, some value judgments are clearcut enough that we can trust the judiciary to make them.<sup>139</sup> The benefit of this individualized focus is that courts will be able to make more appropriate custody arrangements because they can match a child with the parent who can best meet the child's needs. For instance, a deaf child has special needs, and the court has the responsibility of figuring out which parent is better able to meet those needs. If one parent is learning sign language to communicate with the

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136. See Sack, *supra* note 26, at 303-16 (discussing how courts' broad reading of the fitness exception to the primary caretaker standard permits judges to discriminate against women in custody decisions).

137. See *id.* at 325-26 (proposing a fitness standard that considers a parent's physical or psychological abuse of the other parent or of the child).

138. See *supra* notes 56-61 and accompanying text.

139. See *supra* notes 65-69 and accompanying text.

child, while the other parent has not figured out a way to communicate with the child, the court should choose the former parent over the latter.

After a child's needs are defined, the court should examine each parent's childraising ability. The court could compare both parents' plans for meeting the child's future needs,<sup>140</sup> their respective maturity, and their emotional bond with the child. The court also should consider a parent's past childraising performance. However, it must reevaluate the past performance in light of the changes brought about by the divorce. If a parent has met a child's needs competently and consistently before the divorce, then the parent might continue to do so in the future. However, the change of circumstances as a result of the divorce might require that parent to work more outside the home and give him or her less time to spend with the child. Alternatively, a parent who has been working more outside the home may be able to adjust his or her work schedule after the divorce to spend more time with the child. Therefore, past performance is only relevant as it reflects on future behavior.

Certain issues are outside the scope of judicial review when a court considers parental ability. For instance, financial ability is irrelevant in deciding whether a parent is able to embrace the opportunity to meet the child's needs. The court easily can remedy any financial inequities between the parents after one parent is given custody. Once the court decides who the custodial parent will be, it can evaluate each parent's finances. If the custodial parent earns less than the noncustodial parent, then the noncustodial parent can increase the child support payment to make up the difference. This financial contribution gives the noncustodial parent a different type of opportunity to meet a child's needs.<sup>141</sup>

The evaluation of each parent's childraising abilities in the proposed test differs from the best interest of the child standard in two significant ways.<sup>142</sup> First, the best interest standard is based on rights and duties rather than on opportunities for parents to act out of love. Under the best interest standard,

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140. One state has replaced traditional custody and visitation arrangements in its statute with a "parenting plan" that requires courts to divide childraising responsibilities between parents. WASH. REV. CODE §§ 26.09.002, 26.09.181-26.09.210 (1994); *see also* Czapanskiy, *supra* note 120, at 1443-46 (discussing the shortcomings of Washington's parenting plan).

141. One commentator, who proposes that parents assume equal responsibility for childraising, has a similar idea when she suggests that "the nonresidential parent should compensate the residential parent for the extra caregiving effort, if he or she has the financial ability to do so, because the child is in need of care, and money will make it easier for the residential parent to provide it." Czapanskiy, *supra* note 120, at 1475.

142. As discussed in connection with the fitness issue, both standards give the judge some discretion in deciding which parent is better able to demonstrate a commitment to meeting a child's needs.

parents can also secure a right to raise their child by successfully fulfilling their duties to their children.<sup>143</sup> Second, by denying parents a fresh start, the best interest standard undervalues what it means to be a parent and disregards a parent's potential value. A parent is not someone who has taken care of a child in the past; a parent is a person who is willing and able to embrace future caretaking opportunities. The standard declines to recognize that a parent may mature and that the person who was not able to assume responsibility for the child in the past may be ready to do so in the future. In fact, that parent may be a better caregiver because he or she appreciates the second chance that the parent has been given.

In conclusion, the proposed standard evaluates the credibility and ability of parents who express a willingness to embrace the opportunities associated with childraising. This assessment enables a court to choose the caregiver who will best meet the child's current and future needs. The advantages of this standard are evident when it is applied to a recent custody case.

#### IV. A CASE ANALYSIS: *IRELAND V. SMITH*

##### A. *The Facts*

An analysis of *Ireland v. Smith*<sup>144</sup> under the proposed custody standard emphasizes the strengths of this standard as compared to current custody standards. The Michigan case involved a custody dispute between two eighteen-year-old unmarried parents over their three year-old daughter, Maranda Kate Ireland-Smith. Jennifer Ireland, age fifteen, gave birth to Maranda in 1991, and Steve Smith, also age fifteen, acknowledged that he was the father.<sup>145</sup> Although Jennifer briefly considered placing her daughter for adoption, she decided to raise the child in her mother's home with the help of her mother and sister.<sup>146</sup> Jennifer and Steve continued to attend high school full-time, and the trial court noted the "immaturity" of both parents at that time.<sup>147</sup> Jennifer's mother, who had been a professional nanny,<sup>148</sup> was

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143. See *supra* note 110 and accompanying text.

144. No. 93-385 DS (Mich. Cir. Ct. June 27, 1994) (slip opinion), *aff'd in part, rev'd in part and remanded*, 542 N.W.2d 344, 347 (Mich. Ct. App. 1995).

145. *Id.* at 1.

146. *Id.*

147. *Id.* The court found that both parents had resumed their former school lives and delegated child care responsibilities to other people. *Id.* at 4.

148. *Id.* at 6.

the “staying force” in Maranda’s early upbringing.<sup>149</sup> She took care of Maranda while Jennifer completed high school and supported Jennifer and Maranda financially.<sup>150</sup> When Maranda turned one, Steve Smith began to visit Maranda, and the court observed that his mother was “instrumental” in taking care of Maranda during those visits.<sup>151</sup>

After both parents graduated from high school, Jennifer was awarded a scholarship to the University of Michigan. In the summer of 1993, she and Maranda moved away from her mother into residential student housing in Ann Arbor. Although Jennifer’s mother had been Maranda’s “primary caregiver”<sup>152</sup> until that time, the court stated that Jennifer displayed a “new maturity and determination” after she and Maranda moved to the college.<sup>153</sup> Maranda went to a day care facility while Jennifer was attending class. Steve Smith continued to reside with his parents, enrolled in a local community college, and worked part time.<sup>154</sup>

This case arose when Jennifer Ireland sued Steve Smith for nonpayment of child support in the amount of \$12.00 a week.<sup>155</sup> Steve Smith then petitioned for custody of his daughter. The custody claim was the issue before the Michigan Circuit Court.

### *B. The Trial Court’s Opinion*

The Michigan Circuit Court evaluated the parents’ claims under the Michigan Child Custody Act and determined that they would share legal custody of Maranda but that physical custody would be transferred from Jennifer Ireland to Steve Smith.<sup>156</sup> The court first determined that an established custodial environment already existed because Maranda had been living with Jennifer for her entire life.<sup>157</sup> The court then considered whether

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149. *Id.* at 1.

150. *Id.* at 6.

151. *Id.* at 2-3.

152. *Id.* at 5.

153. The court acknowledged that Jennifer had “borne the burden of raising the child” and had grown into her role as mother: “In the early days there may have been a question as to the plaintiff’s commitment to child raising but in the past year the record clearly reflects that the child and the mother are united and that the mother looks to the future to have this relationship continued on a permanent basis.” *Id.* at 3.

154. *Id.* at 7.

155. The original child support order was for \$8.00 a week and then was raised to \$12.00. *Id.* at 5.

156. *Id.* at 11.

157. This threshold question affected the burden of proof standard that would be applied to the best interest analysis. If an established custodial environment did not exist, the court would apply the lower preponderance of the evidence standard used in initial custody determinations. *Id.* at 2.

Steve Smith had established by clear and convincing evidence that a change of custody was in Maranda's best interest and concluded that it was.<sup>158</sup> The best interest standard in Michigan consists of twelve factors,<sup>159</sup> and the court found one factor dispositive of the matter.<sup>160</sup> The court focused on the stability of the parents' respective living environments when it singled out "[t]he permanence, as a family unit, of the existing or proposed custodial home or homes."<sup>161</sup> The "pivotal" concern was that Maranda would be living with Jennifer in university housing "for some considerable number of years."<sup>162</sup>

Two related aspects of this living arrangement particularly troubled the court. First, the court found that the arrangement was unstable because of the temporary nature of student housing.<sup>163</sup> Jennifer and Maranda would be transients who had to shuttle back and forth between Jennifer's mother's house and university housing during vacations.<sup>164</sup> In contrast, Maranda would have greater stability with Steve because they could live indefinitely in his parents' home.<sup>165</sup>

Second, the court determined that, as a single parent, Jennifer would not be able to meet the combined demands of a rigorous academic program and childrearing obligations.<sup>166</sup> The judge criticized her use of day care as an

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If a custodial environment was established, then the court would have to apply the higher clear and convincing evidence standard used in change of custody cases. *Id.* at 4. The court found that a custodial environment had been established, and thus applied the higher standard.

158. *Id.* at 10-11.

159. The court discussed a number of factors including the "capacity and disposition of the party involved to give the child love, affection, and guidance and continuation of the educating and raising of the child in its religion or creed, if any," "the capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of the state in place of medical care, and other material needs," and "the length of time the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity." *Id.* at 4-6.

160. *Id.* at 10.

161. *Id.* at 7. One commentator studied the most important criteria under the best interest standard in appellate courts reviewing trial court custody decisions. Atkinson, *supra* note 42, at 9, 21-22. He found that a stable environment was the important factor, and that courts often define a stable environment by looking at the child's current residence and the strength of each parent's bond with the child. *Id.*

162. *Ireland*, No. 93-385 DS, slip op. at 7.

163. *Id.*

164. *Id.*

165. *Id.*

166. "There is no way that a single parent, attending an academic program at an institution as prestigious as the University of Michigan, can do justice to their studies and the raising of an infant child." *Id.* at 8. This statement could be read to imply that single parents simply are not capable of raising their children.

inadequate substitute for raising Maranda herself.<sup>167</sup> He made disparaging remarks about her plan to leave her child “in the care of strangers” and praised Steve’s proposal to leave Maranda with his mother while he was attending classes or working.<sup>168</sup> The decision came down to entrusting Maranda to professional caregivers or to family members. The court compared the two arrangements:

Under the future plans of the mother, the minor child will be in essence raised and supervised a great part of the time by strangers. Under the future plans of the father, the minor child will be raised and supervised by blood relatives. Under the mother’s plan, the child will not have a specific residence, being moved periodically between the University of Michigan and the maternal grandmother’s home. Under the father’s plan, the child will reside in the paternal grandparent’s home for an indefinite period.<sup>169</sup>

The court concluded that Steve’s ability to provide his daughter with a more stable environment was a factor that weighed “heavily” in his favor and therefore awarded him custody on that basis.<sup>170</sup>

### *C. An Alternative Approach*

#### 1. Measuring Parental Willingness

The analysis and outcome are different when the case is analyzed under the proposed custody standard. This approach does not assume that either Jennifer or Steve is entitled to custody of Maranda based upon past behavior. Instead, the court would be willing to forgive both parents for their past failures if they could demonstrate that they are now ready to meet Maranda’s needs. Moreover, the standard seeks to determine whether each parent is motivated to seek custody out of love for Maranda, rather than out of any sense of parental right.

The first step is to assess each parent’s willingness to embrace the opportunities associated with raising a child. This step takes into account how the parents perceive themselves, and how others perceive their

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167. “[S]he must rely upon other people to take care of this child while she is in class and it is pretty clear that the demands of academia are such that her time for her youngster would be circumscribed.” *Id.* at 8.

168. *Id.* at 8.

169. *Id.* at 10.

170. *Id.*

willingness. Both Jennifer and Steve expressed a willingness to meet Maranda's future needs; their competing custody claims triggered this lawsuit. Therefore, the court must next determine the credibility of their assertions by assessing their motivation and behavior.

A court should find that Jennifer's expressions of willingness are more sincere than Steve's. This evaluation of credibility admits the possibility that a person can grow and change, and judges the parent based on who the parent is now, not who the parent was in the past. A court, therefore, should not look at what Steve did as an unwed fifteen-year-old father but, rather, should assess his current motivation and behavior. Because the proposed standard is willing to forgive a parent's past behavior, the fact that Steve did not visit Maranda during her first year would not be held against him.<sup>171</sup> However, Steve brought his custody claim when Maranda was three years old, and then only after he had been sued for nonpayment of child support.<sup>172</sup> Although we do not know with certainty that Jennifer's lawsuit triggered Steve's response, the timing and sequence of the two claims make the inference reasonable. Moreover, Steve failed to pay first \$8.00 a week, and then \$12.00 a week, in child support despite the fact that he was working part-time.<sup>173</sup> Steve's non-payment of child support and his plan for his mother to perform the bulk of the childrearing tasks cast doubt on his motivations. If he was motivated to seek custody by something other than love for his daughter, then his expressed willingness to meet Maranda's future needs is not sincere.

Jennifer's assertion that she is willing to meet her daughter's future needs is matched by her conduct.<sup>174</sup> The proposed standard overlooks Jennifer's immaturity as evidenced by her turning over responsibility for Maranda to her mother while she completed high school.<sup>175</sup> The standard forgives Jennifer's past behavior because she can show that she has changed and is ready to meet her daughter's future needs.<sup>176</sup> Although the court disapproved of Jennifer's decision to take Maranda away to college with her, it recognized that Jennifer displayed "a new maturity and determination"

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171. *See id.* at 2.

172. *Id.* at 1.

173. *Id.* at 1, 5, 7. The court noted that Jennifer Ireland initiated the lawsuit "to force [Steve Smith] into making some form of monetary payment to assist [in] raising the child." *Id.* at 5.

174. *See id.* at 3 (noting that "the record clearly reflects that the child and the mother are united and that the mother looks to the future to have this relationship continued on a permanent basis").

175. *Id.* at 2, 4. The court noted that after Maranda's birth, both parents continued the lifestyles that they had enjoyed before she was born. *Id.* at 4.

176. *See id.* at 4-5.

during the year that she and Maranda lived on their own.<sup>177</sup> Jennifer should have the opportunity to redeem her earlier mistakes because custody is a prospective decision rather than a referendum on prior conduct. Jennifer's current behavior makes her assertion that she wants to meet Maranda's future needs credible. Her efforts to balance school and childraising indicate that she is motivated by love and concern for her daughter's future welfare. Thus, she should have the second chance to continue to demonstrate her parental commitment.

## 2. Measuring Parental Ability

A custody decision could be made at this point because only one parent is a credible future caregiver. The inquiry would not end, however, if a court found that both parents demonstrated sincere willingness to raise Maranda. In that situation, a court would turn to the second part of the proposed standard, which evaluates each parent's abilities to meet Maranda's future needs. This part first examines both parents' fitness, and then assesses their future childrearing plans, the strength of their emotional bonds with their daughter, and their maturity.<sup>178</sup>

Both parents are fit because neither one has physically or psychologically mistreated the other or Maranda, abused drugs or alcohol, or suffers from mental problems that would affect either parent's ability to raise their daughter.<sup>179</sup> A court then can compare each parent's effectiveness at meeting Maranda's needs. Maranda does not have any special needs beyond the universal need for love from her custodial parent, and Jennifer is better able to meet that need.

Both Steve and Jennifer have a plan to meet Maranda's future needs. Steve plans for Maranda to reside with him in his parents' home indefinitely while he goes to school and works part-time.<sup>180</sup> His mother will be at home to take care of Maranda when he is not available.<sup>181</sup> Jennifer plans to continue to live with her daughter in residential student housing while she

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177. Jennifer expressed an initial willingness to raise her daughter when she chose not to place Maranda for adoption. Then, she confirmed that desire when she took Maranda with her to college instead of leaving Maranda in her grandmother's home. *Id.* at 1.

178. *See supra* part III.B.1.

179. The Michigan court discussed the parents' "moral fitness" in terms of their sexual promiscuity. *Ireland*, No. 93-385 DS, slip op. at 8. That issue is not part of the proposed fitness evaluation.

180. *Id.* at 7.

181. *Id.*

completes her college degree.<sup>182</sup> Maranda will go to day care while Jennifer is in class.<sup>183</sup> Other commitments prevent either parent from taking care of the child twenty-four hours a day. Given that both plans contemplate time away from the child, the real issue is which parent is better able to meet Maranda's needs during the time that he or she has with the child.

The answer to that question depends on the strength of each parent's emotional bond with the child and their respective levels of maturity. The trial court found that Maranda's emotional bond was stronger with Jennifer than it was with Steve.<sup>184</sup> This can be explained because Jennifer has been the custodial parent, and Steve has therefore spent far less time with Maranda.<sup>185</sup> Nevertheless, the connection between mother and daughter makes Jennifer more effective than Steve at meeting Maranda's future needs.

Although the court found Jennifer and Steve to be equally mature,<sup>186</sup> the reality is that the parents have shown drastically different levels of commitment to meeting Maranda's needs. Admittedly, neither parent was effective at meeting Maranda's early needs: Steve abandoned his daughter at birth and did not visit her until she was one, and Jennifer's mother initially raised her granddaughter.<sup>187</sup> The court correctly did not dwell on either parent's past immaturity or on their youthful failures. The court rightly acknowledged that Jennifer had redeemed her early parental deficiencies when she and Maranda moved to Ann Arbor. Jennifer demonstrated her newfound maturity by taking care of Maranda and successfully completing her first year at the University of Michigan.<sup>188</sup>

The court incorrectly assessed Steve's childraising abilities, however, when it allowed him to prove his commitment to fatherhood by showing that his mother would be able to take care of Maranda. His mother's childraising ability is irrelevant to Steve's custody claim because it offers no insight into his effectiveness as a future caregiver. If anything, it demonstrates an inability to meet his daughter's needs and an immaturity in not accepting personal responsibility for her welfare. The only insight that we have into Steve's capability as a father is a failure to make minimal weekly child support payments. If Steve does not love Maranda enough to contribute to

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182. *Id.*

183. *Id.*

184. *Id.* at 3.

185. The court stated that although Maranda "reacts favorably" to Steve during visitation, the child "looks to [her mother] naturally for guidance, discipline, and the necessities of life." *Id.*

186. *Id.* at 5. The court determined that "the development and maturity of both parents would justify a finding that they stand equally in their capacity and disposition to give the child love, affection, and guidance." *Id.*

187. *Id.* at 4.

188. *Id.* at 4-5.

her financial needs, then there is no reason to assume that he is mature enough to meet her other needs.

In sum, the criteria used to determine a parent's effectiveness point to keeping Jennifer as the custodial parent. Her proven ability to meet Maranda's needs, her plan to continue to do so, her maturation, and her strong bond with her daughter, make her better able to embrace the opportunities associated with raising Maranda.

One could argue that the court would reach the same result under the primary caretaker standard. The primary caretaker standard would allow Jennifer to earn a right to custody as a reward for her past behavior. There are two flaws in equating the primary caretaker with the proposed test. First, the primary caretaker standard does not guarantee the same outcome, and second, even if it did, it would reach the right result for the wrong reasons.

A different result would be reached under the primary caretaker standard if a court determined that Jennifer had not stepped into this role. Jennifer's mother was Maranda's original "primary caregiver," and Jennifer did not begin to perform the tasks associated with a primary caregiver until she and Maranda moved to Ann Arbor.<sup>189</sup> Therefore, Jennifer has been Maranda's primary caretaker for only one-third of her daughter's life. A court might decide that this past performance does not entitle her to be declared Maranda's primary caretaker, and that she should not be awarded custody on that basis.

Moreover, a finding that Jennifer is Maranda's primary caretaker would impose a retrospective standard on a prospective determination. Jennifer should not get custody because she has earned a future right through past behavior. A parent should not expect anything more than what she has already received by having the opportunity to meet her child's needs. Therefore, Jennifer needs no additional reward for taking care of Maranda because she has enjoyed the benefit of their year together in Ann Arbor.

Instead, the court should give Jennifer custody of Maranda because she is motivated by love and concern for her daughter's welfare. Jennifer has grown up with her daughter, and her past parenting inadequacies should be forgiven. She will be the better parent because she has proven her willingness and ability to embrace the opportunity to meet Maranda's future needs.

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189. *Id.*

*D. The Court of Appeals' Opinion*

The Michigan Court of Appeals attempted to embrace a standard similar to that proposed in this article, when it reviewed the trial court's decision and affirmed it in part, reversed it in part, and remanded the case for further proceedings.<sup>190</sup> That court initially upheld the trial court's findings that a custodial environment had been established with Jennifer and then turned its attention to the trial court's evaluation of "[t]he permanence, [of the] family unit."<sup>191</sup> In determining that the trial court had defined "permanence" incorrectly, the court explained that the emphasis should not be on the "acceptability" of each parent's living arrangements.<sup>192</sup> Instead, the court relied on a recent Michigan decision which defined permanence as "whether the family unit will remain intact."<sup>193</sup> Thus, the court of appeals sought to focus on the future stability of the family unit.

Although the court correctly emphasized the importance of sustained parental commitment to meeting a child's ongoing needs, it struggled to articulate a test for predicting which parent is better equipped to fulfill that commitment. The court thoroughly discussed the parents' child care plans and living arrangements, but ultimately the court was unable to find a way to connect those considerations to a sustained parental commitment.<sup>194</sup> The court of appeals thus declined to review Jennifer Ireland's use of university housing and day care and Steve Smith's plans to live at his parents' house while his mother took care of Maranda.<sup>195</sup> While the court chose not to evaluate those choices, it failed to identify any other criteria to be considered, thus leaving a void about how to measure the permanence or long-term stability of a family unit.

The standard proposed here seeks to fill that void. Under the approach presented here, a parent's living arrangements may be used to determine the depth of his or her commitment to childrearing. In this case, since Maranda's birth five years ago, Jennifer Ireland's consistent adjustments in her living arrangements have demonstrated her commitment to keeping the family unit intact.<sup>196</sup> After rejecting the idea of placing Maranda for adoption, Jennifer

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190. Ireland v. Smith, 542 N.W.2d 344, 347 (Mich. Ct. App. 1995).

191. *Id.* at 348-49.

192. *Id.* at 349-50. The Court of Appeals remanded the case to the trial court for reconsideration of the permanence factor. *Id.* at 350. The court also reversed the denial of Jennifer Ireland's motion to disqualify the trial judge and remanded the case to a different judge. *Id.* at 352.

193. *Id.* at 350 (citing Fletcher v. Fletcher, 504 N.W.2d 684, 690 (Mich. Ct. App. 1993), *aff'd*, 526 N.W.2d 889, 895 (Mich. 1994)).

194. *Id.* at 349-50.

195. *Id.*

196. *See id.* at 347.

devised a child care plan that would allow her to live with her daughter while finishing high school. When Jennifer received the opportunity to go away to college, she did not entrust her daughter to any one else's care. Instead, she moved her daughter with her across the state and again developed a child care plan that would enable her to meet her child's daily needs while attending college.<sup>197</sup> In contrast, Steve has seldom adjusted his own living arrangements to accommodate Maranda. Steve showed little interest in his daughter during her first year. He did not pay child support until he was ordered to do so and expressed a custodial interest only after Jennifer sued him for nonpayment of child support.<sup>198</sup> He will rely heavily on his mother for child care and does not exhibit the same commitment to parenting that Jennifer has shown since she enrolled at the University of Michigan. In addition, as noted in the preceding section, Jennifer's maturation and her strong bond with her daughter, coupled with this proven ability to raise Maranda, mitigate in her favor.<sup>199</sup>

In sum, both Jennifer's and Steve's childrearing decisions are relevant to deciding which parent has the willingness and ability to keep the family unit intact. The evidence of Jennifer's consistent commitment to her daughter should allow a trial court to conclude that a custody award in her favor satisfies the permanence factor.

## V. OTHER COMMENTATORS' PROPOSALS

Other commentators have identified the shortcomings of existing custody laws and have made important contributions to reforming them.<sup>200</sup> They have criticized current approaches for their emphasis on parental rights and have proposed standards that purport to move away from the rights/duties model.<sup>201</sup> A closer examination reveals, however, that their proposals have not moved far enough from the rights/duties framework.<sup>202</sup>

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197. *Id.*

198. *Id.* at 348.

199. *See supra* part IV.C.

200. These commentators have been particularly critical of the best interest of the child standard. *See supra* notes 52-76 and accompanying text.

201. Bartlett, *supra* note 59; Czapanskiy, *supra* note 120; Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1809-14 (1993).

202. Professor Linda C. McClain has examined the current "discontent with rights and rights talk." Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 1087 (1994). She concludes that although the critique of rights allows for a close examination of rights, the communitarian response has serious shortcomings. *Id.* at 1087-88.

### A. Professor Bartlett's Responsibility Standard

Professor Katharine Bartlett proposes that parental responsibility replace parental rights as the governing value in defining parenthood.<sup>203</sup> She is critical of the law's present "exchange view of parenthood" in which parents must fulfill certain duties to their child to earn custodial rights.<sup>204</sup> The exchange view does not treat the satisfaction of a duty as a separate legal obligation; rather, it becomes a condition for granting a right.<sup>205</sup> The expectation that a parent deserves something in return for meeting the parent's duties to the child wrongly focuses not on what a parent should give but on what the parent should get.<sup>206</sup> Professor Bartlett correctly suggests that the relevant inquiry instead should be on what the parent can give the child. Her responsibility standard properly demands that a parent make "a self-enlarging, open-ended commitment on behalf of" a child to do whatever is necessary to enable the child to "'turn out' well."<sup>207</sup>

Professor Bartlett's approach makes sense in theory; the problems arise in the way that she develops and implements the definition. According to Professor Bartlett, the responsibility standard gives parents the freedom to make childrearing choices but carries the obligation to make those choices within the constraints imposed by society.<sup>208</sup> Thus, the corresponding concepts of freedom and obligation contained in the responsibility standard

203. Bartlett, *supra* note 59, at 294, 296. Other commentators also make the value of parental responsibility the basis for their definitions of parenthood. For example, Professor Barbara Bennett Woodhouse calls for a "generist perspective" that defines parenthood as "stewardship, not ownership." Woodhouse, *supra* note 201, at 1755. This perspective makes children's needs the core concern, and parenthood something that "must be earned through actual caregiving, and lost if not exercised with responsibility." *Id.* at 1815.

Although Professor Woodhouse's notion of "earned parenthood" claims to part company with a rights-based approach, both punish or reward parents for their past behavior. *See id.* at 1846. Professor Woodhouse suggests that custody serves as such a reward when she endorses the primary caretaker standard. *Id.* at 1849. The retrospective nature of both standards forecloses any effort to guarantee that custody will secure a child's future well-being. *See also* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 105, 107 (1991) (noting the inclination to frame the discussion of rights "in a stark, simple, and absolute fashion" and to omit the "language . . . of responsibility"); MARTHA MINOW, MAKING THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990) (proposing a legal theory of rights based on relationships); J. Roland Pennock, *The Problem of Responsibility*, in RESPONSIBILITY (NOMOS III) 3, 19 (C. Friedrich ed., 1960) (noting that "[r]esponsibility" . . . is a term for use in a complicated, dynamic, quasi-organic society . . . [and that] in morals . . . relations between 'individual' and 'society' are too complicated . . . to be dealt with adequately by the concept of 'rights' and 'duties. . . .").

204. Bartlett, *supra* note 59, at 298.

205. *Id.* at 297-98.

206. *Id.* at 298.

207. *Id.* at 299-300.

208. *Id.* at 300 (citing Ludwig Freund, *Responsibility—Definitions, Distinctions, and Applications in Various Contexts*, in RESPONSIBILITY (NOMOS III) 28, 37 (C. Friedrich ed., 1960)).

naturally invite comparison to the exchange view of parenthood: the more appropriately one exercises freedom or parental rights, the less society needs to dictate childrearing obligations or duties.

Professor Bartlett seeks to illustrate the difference between a rights approach and her responsibility standard in the context of a custody dispute that is factually similar to the *Ireland v. Smith* case.<sup>209</sup> When an unmarried father originally said that he did not want to raise the child, a court had to determine how to weigh that assertion in light of his later custody claim.<sup>210</sup> Professor Bartlett acknowledges that the same result could be reached under either standard but asserts that the reasons differ.<sup>211</sup> Using a rights approach, a court would decide custody on principles of “fault, entitlement: exchange.”<sup>212</sup> For instance, a court could reject the father’s claim because his past behavior indicates that he does not “‘deserve’” to be a parent or conclude that he has earned the right to custody because he has met his obligation to pay child support.<sup>213</sup> In contrast, the responsibility approach would allow a court to award custody to the parent who had developed more significant connections with the child.<sup>214</sup> For example, the mother’s connection to a newborn child formed during pregnancy could be considered more important than any possible future relationship that the father may have.<sup>215</sup> Therefore, a court should affirm the gestational relationship by awarding the mother custody.<sup>216</sup>

The exchange view and the responsibility standard have the same shortcoming; both offer retrospective approaches to a prospective determination. Although their rhetoric is different,<sup>217</sup> each affirms the importance of what the parent has already done for the child instead of what he or she can do in the future. The rights-based approach punishes the father for his earlier decision not to raise his child, and rewards the mother

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209. No. 93-383 DS (Mich. Cir. Ct. June 27, 1994) (slip opinion), *aff’d in part, rev’d in part, and remanded*, 542 N.W.2d 344, 347 (Mich. Ct. App. 1995); *see also supra* notes 144-55 and accompanying text.

210. Bartlett, *supra* note 59, at 314.

211. *Id.* at 315.

212. *Id.* [sic].

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Professor Bartlett notes that the “choice of how to state our reasons for recognizing, or declining to recognize, parental claims is a rhetorical move, but nonetheless important.” *Id.* Professor Bartlett believes that a rights-based custody standard inadequately conveys the value of parental responsibility. *Id.*

for the bond created during her pregnancy.<sup>218</sup> The responsibility standard compares the connections between parent and child, and concludes that the parent with the established bond is more likely to have fulfilled her responsibilities.<sup>219</sup>

Neither approach admits that people can change for better or worse. For example, the mother who is awarded custody of her newborn child in recognition of a strong maternal bond may not be able to meet her child's emotional needs as the child gets older. Yet the standards do not require her to demonstrate that she will do whatever it takes in the future to enable the child to "turn out" well" before awarding her custody.<sup>220</sup> Conversely, the father who initially chose not to participate in raising his child may have a sincere desire and ability to do so in the future. In refusing to acknowledge parental growth or change, both the rights and responsibility-based custody standards fail to provide for the child's future well-being.

### *B. Professor Czapanskiy's "Volunteers and Draftees"*<sup>221</sup>

Professor Karen Czapanskiy expands Professor Bartlett's "responsibility ideal" to include the relationship between parents as well as their relationships with their children.<sup>222</sup> Professor Czapanskiy defines a parent as someone who:

by procreation, conduct or adoption, enters into two commitments: First, a commitment to a dependent human being to provide all the nurturance, whether financial or nonfinancial, of which the person is capable; and second, a commitment to deal respectfully and supportively with another person or persons who are in a parental relationship with the same child.<sup>223</sup>

Although this definition is framed in the language of responsibility, the cornerstone is a parent's fulfillment of his duties to others, especially to the other parent. The standard does not acknowledge that individual parents' obligations to their child and to each other may vary due to their differing capabilities. In addition, the standard does not assume that a parent who

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218. *Id.* (noting that the standard might consider the "different degrees of relationship that have been formed").

219. *Id.*

220. *Id.* at 299-300.

221. Czapanskiy, *supra* note 120, at 1415.

222. *Id.* at 1466.

223. *Id.* at 1464.

meets his child's needs, as the first part requires, will necessarily fulfill the requirements of the second part and treat the other parent with respect. Therefore, the standard explicitly requires that a parent fulfill both duties to secure his parental rights.

According to Professor Czapanskiy, this standard is needed because current family laws assign women a disproportionate share of childraising responsibilities.<sup>224</sup> She notes that both parents usually work outside the home, but mothers do most of the work inside the home.<sup>225</sup> Fathers are "volunteers" inside the home because their responsibilities are limited, but their parental rights are well-protected.<sup>226</sup> In contrast, mothers are "draftees" because they bear the burden of raising the children without receiving any additional protection of their parental rights.<sup>227</sup> Professor Czapanskiy proposes that this imbalance should be rectified by dividing parental duties equally between mothers and fathers.<sup>228</sup>

This perspective is embedded in the rights/duties model of parenthood. Professor Czapanskiy views childraising as an obligation into which both parents must be drafted to prevent it from becoming a "lonely and self-sacrificing experience."<sup>229</sup> The parents should share the responsibility to better appreciate the sacrifices that the other parent is making and to ease each other's burden. Meeting a child's needs is the high price of parenthood, and both parents must pay that price.

This punitive view of raising a child carries the corresponding expectation that a parent will be rewarded for meeting the parent's obligations. Professor Czapanskiy alludes to this when she notes that mothers' custodial

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224. *Id.* at 1415-16.

225. *Id.* at 1415; *see also* Woodhouse, *supra* note 201, at 1824 (stating that "[w]omen . . . have disproportionately borne the costs and done the work of childbearing and care giving, and children are clearly more central to women's 'gendered lives' than to men's").

226. Czapanskiy, *supra* note 120, at 1415-16.

227. *Id.* at 1416.

228. The emphasis on dividing child care responsibilities forces the state to regulate every aspect of a family's life. In a custody dispute, a court will have to decide who will take responsibility for each childrearing activity and what sanctions will be imposed if a parent abdicates that responsibility. *Id.* at 1474-75 (criticizing Washington state's parenting plan for its lack of a sufficient enforcement mechanism). A court will have to weigh each task to decide if the responsibilities are being divided equally. For example, a court will have to decide if taking the child to a doctor's appointment is the same as consoling a child who has a bad dream. Courts do not like to get involved in the details of arranging a family's life even in the divorce context. This requires courts to make subjective determinations about the relative value of different childrearing activities and will lead to inconsistent, unpredictable results. The already shaky relationship between divorcing parents will be further undermined as parents fight about who has to do what for the child.

229. *Id.* at 1466 (discussing the difference between one parent raising a child alone and two parents sharing the burden).

rights are not protected more than fathers' even though they have more childraising duties.<sup>230</sup> A parent's belief that the parent is entitled to more because the parent has invested more time and energy in raising the child makes it impossible to forgive the other parent for past failures. If the legal system is willing to overlook instances where one parent did not honor the parent's commitment to his child, or to the other parent, then it would have to reject the idea that a custody award should punish one parent and reward the other. Moreover, the decision to treat custody as a reward for past behavior gives a parent an excuse for future failure. This retrospective approach does not take into account a parent's future childraising abilities and, thus, cannot judge harshly a parent who is unable to meet the child's future needs.

### C. Professor Scott's "Approximation Standard"<sup>231</sup>

Probably the starkest use of the rights/duties paradigm as a basis for custody decisions is Professor Elizabeth Scott's "approximation standard."<sup>232</sup> The approximation standard looks exclusively at past parental behavior and seeks to divide custody between divorcing parents in the same way that parents divided their time with the child during the marriage.<sup>233</sup> For example, if both parents were involved in the child's upbringing before the divorce, then the post-divorce arrangement would resemble joint custody. The difference is that each parent's time with the child would be allocated specifically according to the amount that the parent spent with the child before the divorce.<sup>234</sup> One father might get custody of his child twelve days a month while another would have it for eight days a month depending on differing amounts of time that each man spent with his child.<sup>235</sup>

The approximation standard is problematic because it neither forgives past behavior nor provides for the child's future. The standard refuses to acknowledge that people and circumstances both can change. A person who buried himself or herself in work may realize that he or she is missing out on the experience of parenthood and may change his or her work habits to

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230. *Id.* at 1416.

231. Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615 (1992).

232. *Id.* at 617.

233. *Id.* at 615.

234. *Id.* at 640.

235. Professor Scott points out the benefits of this standard: it keeps continuity in the child's life; it preserves the choices that parents made before the divorce; and it involves both parents in the child's life. *Id.* at 630-33.

embrace childraising opportunities. Yet, the approximation standard makes no allowance for a change of heart. Alternatively, circumstances may have dictated why a parent did not spend much time with the child during the marriage. For example, a married couple having a child may decide that one of them will work outside the home and the other will not. This decision means that the employed parent probably will not be able to spend as much time with the child as the other parent. In the event of divorce, the approximation standard punishes the parent who assumed financial responsibility for the child and rewards the parent who performed child care responsibilities.

Furthermore, the approximation standard equates spending time with a child with taking responsibility for him. The problem is that a parent can take responsibility for a child when the parent is not spending time with the child. For example, a parent who is doing a child's laundry, going grocery shopping for the child, or earning money to support the child, is not spending time with the child, but the parent is taking responsibility for that child. This limited definition, therefore, ignores relevant factors in deciding which parent should get custody. The approximation standard, therefore, does not respect mutual choices made during marriage.

Finally, the theory ignores the prospective implications of divorce. The pattern of family relationships necessarily changes after divorce because the parent who stayed at home to raise the child most likely will have to work outside the home. Given the financial realities of divorce, it would be impossible to replicate past family relationships. Even if it were possible, it may not be desirable to do so. The fact that parents are divorcing suggests that at least one family relationship was unhealthy. That relationship may have been unhealthy in part due to the way that the parents were apportioning their time with their child. The divorce is the parents' statement that they want something better than the status quo for themselves; the child should be able to expect at least that much. The goal of custody, therefore, should not be to repeat past mistakes; a custody decision should seek to repair what is broken.

## VI. CONCLUSION

Because both current custody standards and other commentators' proposed custody standards are rooted in the rights and duties paradigm, they overlook the reality of most custody claims. Most parents seek custody because they want the opportunity to meet their child's future needs, yet these standards presume that parents are motivated by a sense of entitlement

or obligation. This focus on parents' rights and duties makes a custody decision a referendum on past behavior: a parent has either earned or lost the right to custody. The problem with this emphasis on past behavior is that it disregards a parent's potential to meet a child's future needs and, therefore, does not take into account a parent's ability to grow and change.

The custody standard advanced in this Article represents a radical departure from those founded on the rights/duties model because it is rooted in the values of love and forgiveness. The standard presumes that love motivates a parent to seek the opportunity to meet a child's future needs, and that a parent who may not have met a child's needs in the past should be given a second chance to demonstrate a commitment to the child. A standard that assesses a parent's willingness and ability to meet a child's future needs furthers these values and better represents the truth of most parent-child relationships.