SHOULD CHILD CUSTODY AWARDS BE BASED ON PAST CARETAKING? THE EFFECT OF THE APPROXIMATION STANDARD TEN YEARS AFTER ITS ADOPTION.

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I. Introduction

In a District of Columbia dispute, Sharon Prost lost custody of her two children to the children’s father, Kenneth Greene, because the judge believed Prost was more occupied with her career than her children. The judge claimed Prost, “[was] simply more devoted to and absorbed by her work and her career than anything else in her life,” and Greene had made the children’s activities a priority in his life. However, this decision was made even though the trial judge determined both parents “[had] provided a supportive, loving, structured and nourishing environment in which the children may thrive.” So was it really in the best interest of the child to award sole custody to the father?

Prost and Greene were married eight years, and both provided care for their children. When they decided to divorce they unfortunately had to rely on the courts to determine custody because they were unable to come to their own custody resolution. This is often the case when two parents get divorced and things turn hostile. This relationship did turn hostile, and the litigation process only exacerbated the parental conflict.

The spouses presented contradictory testimony at the trial in order to win custody. Prost provided an expert, who recommended Prost be awarded sole custody, because she would be better able to give the children “a kind of stability, a kind of predictability, a kind of regularity, a

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1 A custody award resolves the issues of “legal custody” and “physical custody.” KELLY D. WEISBERG & SUSAN FREELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 721 (Aspen Publishers 4th ed. 2010). Legal custody determines responsibility for major decision making, such as the child’s health and welfare. Id. Physical custody determines the child’s residency and confers responsibility for making the day-to-day decisions regarding physical care. Id.


3 Id. at 624.

4 Id. at 625.

5 Id. at 624.

6 Id.

7 Id. at 633 (Schwelb, J., concurring). For example, the husband wrote a letter to his attorney on June 1, 1992 referring to his wife as a “slimey, sleazy, vile, and disgusting leech.” Id. He introduced this letter as evidence during the trial, but doctored the letter by removing this harsh language. Id.

8 Id. at 624.
structure, a sort of evenness of living.” Prost was a hardworking career mother who worked as a Senate Judiciary Committee Chief Counsel and had a steady career. She also worried the children would be unsafe living with their father because of instances of abuse she experienced with Greene. Greene believed he should be awarded custody because he spent more time with the children since Prost did not get home from work until 7 or 8 PM, and often brought her work home. The trial judge agreed with Greene, and awarded him sole physical and legal custody of the children.

Divorce is at epidemic proportions and in 1993 there were 1.2 million divorces, about one-half of which involved at least one minor child. An estimated forty percent of children born to married mothers will be affected by the divorce of their parents. It is clear custody determinations are among the most difficult decisions judges must make because they deeply affect the personal lives of parents and innocent children. These decisions are made after being provided with only a snap-shot of the parents’ lives, so parents should be encouraged to determine their own custody solutions that will work for their own family’s situation.

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9 Id. at 628.
10 Id. at 623.
11 Id. at 630.
12 Id. at 624.
13 Id. at 625.
16 A judge must often make two types of custody awards. Interview with Lynne W. Lugar, Partner, Law Offices of Lugar and Pohl, in San Diego, Cal. (Mar. 11, 2010). The first is a temporary order where the courts try to maintain the status quo for the child as much as possible. Id. This means the child’s daily routines should remain the same to the extent possible. Id. The ideal temporary arrangement is a nesting arrangement where the child remains in the same home and the parents come in and out of the home at different times. Id. This ensures continuity for the child because the child’s universe is mimicked and then change is introduced gradually over time. Id. The other determination is the permanent custody award which will be the discussion of this paper. Id. Parental plans are often encouraged in which parents come to their own solutions. See discussion infra note 110 for a description of parenting plans.
Unfortunately, some parents are unable to cooperate and come to an agreement and a judge must decide custody for them.

Proper legal standards are needed to help judges make these difficult decisions. Standards create the framework in which individual’s bargain, so a proper legal standard can reduce litigation and hostility between parties. The current custody law in the majority of states is the generalized best interest of the child standard ("best interest standard"). Under this standard custody is determined using a non-exclusive list of factors to predict which parent will better enhance the child’s future well-being. The best interest standard has been criticized because it is a discretionary standard, which provides little guidance to judges who must then rely on their own personal values in deciding custody. This causes uncertainty on how custody will be decided because there may be different custody outcomes depending on which judge hears the case.

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18 Legal presumptions limit judicial discretion by providing subsidiary rules for the judges to follow in determining what is in the best interest of the child. Janet Bowermaster, Legal Presumptions and the Role of Mental Health Professionals in Child Custody Proceedings, 40 DUQ. L. REV. 265, 265 (2002).
19 See WEISBERG & APPLETON, supra note 1, at 685.
22 Bowermaster, supra note 23, at 269.
23 For example in one case, The Alabama Supreme Court had 7 different opinions written by 6 of the 9 justices. G.C., Jr. v. E.B., 924 So. 2d 651 (Ala. 2005). Justice Parker stated “I find this remarkable, because neither the applicable child-custody laws nor the relevant legal precedents appear to be unclear or inconsistent…after considerable reflection, I have concluded that the primary cause of the Court’s varied and often conflicting opinions in this case is disagreement over foundational issues that underlie the more visible custody issues.” Id. at 675 (Parker, J., dissenting). In Prost v. Greene, custody was awarded to Greene because the judge believed Greene provided a more supportive and loving environment, which was best for the child. Prost, 652 A.2d at 625. Other judges may have reached a different conclusion if they believed continuity and stability are the most important factors in a child’s life. If a judge gave more weight to this factor then custody would have probably been awarded to Prost.
For these reasons there has been a trend in family law toward more objective rules of decision through the creation of objective legal presumptions. These presumptions limit discretion under the best interest standard by “providing subsidiary rules of decision for certain types of cases with recurring fact patterns.” A proper presumption is needed to ensure predictable results, but also to allow for flexibility for unique cases that require exceptions.

In 2000, The American Law Institute (“ALI”) sought to change family law by publishing their Principles of the Law of Family Dissolution: Analysis and Recommendations (“Principles”). The Principles endorsed a child custody standard known as the approximation standard. Under the approximation standard the “court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking for the child prior to the parents’ separation….” Therefore, the Principles created an objective rebuttable presumption that awards custody according to the allocation of past caretaking. This is in the best interest of the child because it will promote continuity and stability in the child’s life.

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25 Bowermaster, supra note 18, at 265.
26 Id. at 274.
28 This standard was originally proposed by Elizabeth Scott in Elizabeth S. Scott, Pluralism, Parental Preference, and Child Custody, 80 CAL. L. REV. 615, 637-43 (1992).
29 PRINCIPLES § 2.08(1). If the parents never lived together then the court will allocate the time spent performing caretaking functions prior to the filing to the action. Id.
30 The Principles provide 8 express exceptions in which the approximation standard should not be applied. Id. § 2.08(1)(a)-(h). If evidence is offered to rebut the approximation standard then custody will be allocated according to the generalized best interest standard, but the court should preserve to the extent possible the Principles priority on the share of past caretaking functions each parent performed. Id. § 2.08(3).
31 See Id. § 2.08 cmt b.
However, the approximation standard has not achieved widespread success. To date, only three cases\(^{32}\) have specifically referenced the approximation standard, and West Virginia is the only state to officially adopt the approximation standard through legislation.\(^{33}\) It is necessary to look at the criticisms of the approximation standard, and the history of the standard in West Virginia, to determine how the standard can be improved upon if it is to significantly affect custody law.

Section II describes the history of child custody law and the causes for the changes throughout the years. Section III provides an in-depth focus on the problems of the best interest standard, and why change is needed. Section IV discusses the approximation standard’s advantages and disadvantages. Section V looks at the impact the approximation standard has had upon family law by looking at the few cases that have discussed the approximation standard. It also focuses on West Virginia, the only state to legislatively adopt the approximation standard. Section VI discusses why the approximation standard is a step in the right direction to achieving an objective custody standard, and how the approximation standard can be improved upon to achieve widespread acceptance.

II. The History of Child Custody Law

A. Gender Presumptions: Father’s Property, and the Tender Years Presumption

Custody was easy to decide prior to the nineteenth century because laws mandated children be placed with their fathers.\(^ {34}\) This was because society viewed children as property

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32 _See_ discussion _infra_ section V.A. for a description of these three cases.
34 Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect But Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449, 452 (2005). The only exception to this law was if the father was so unfit that a deviation was required. Bowermaster, _supra_ note 18, at 267.
that belonged to their fathers.\textsuperscript{35} It was assumed fathers could better provide for and supervise the child because the father, as the head of the household, was in charge of his family.\textsuperscript{36}

The paternal presumption was eliminated during the nineteenth century, and was replaced by a generalized best interest standard where each judge decided what was in the best interest of the child.\textsuperscript{37} The indeterminacy of this standard led courts to develop presumptions for determining what was in the child’s best interest.\textsuperscript{38} One presumption many courts adopted was the tender years presumption, which awarded custody to mothers because society believed mothers were the more suitable custodians for young children.\textsuperscript{39} Women were awarded sole custody unless the mother was deemed unfit or was at fault for the divorce.\textsuperscript{40} This presumption was believed to be in the best interest of the child because society assigned responsibility for parenting to mothers, and believed mothers were biologically superior as parents.\textsuperscript{41}

Lower courts struck down the tender years presumption in the 1970’s when society began to believe gender biased standards were not in the best interest of the child.\textsuperscript{42} This occurred while the feminist movement gained strength, and sought equal rights for women by advocating

\textsuperscript{35} Peskind, \textit{supra} note 34, at 452.
\textsuperscript{37} Bowermaster, \textit{supra} note 18, at 267.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} Mason & Quirk, \textit{supra} note 36, at 219-20.; Kreiger v. Krieger, 81 P.2d 1081, 1083 (Idaho 1938) (the maternal presumption “needs no argument to support it because it arises out of the very nature and instincts of motherhood; nature has ordained it”); Ullman v. Ullman, 135 N.Y.S. 1080, 1083 (1912) (“the children at tender age is entitled to have such care, love, and discipline as only a good mother can usually give.”)
\textsuperscript{40} \textit{IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS} 560 (Mathew Bender & Company, Inc. Lexus) (4th ed. 2004).
\textsuperscript{41} \textit{Id.} at 560; Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916) (“Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother’s care more than a father’s.”).
\textsuperscript{42} \textit{ELLMAN ET AL., supra} note 40, at 560-61; Devine v. Devine, 398 So. 2d 686, 695 (Ala. 1981) (Court concluded “The tender years presumption represents an unconstitutional gender-based classification which discriminates against fathers and mothers in child custody proceedings solely on the basis of sex.”).
for the demise of stereotypes.\textsuperscript{43} Research also began to support the belief that fathers play an important role in the development of their children.\textsuperscript{44} The US Supreme Court then ruled in favor of gender equality under the 14\textsuperscript{th} amendment.\textsuperscript{45} Today, the tender years presumption has been formally abolished in virtually all states.\textsuperscript{46}

Upon the rejection of this presumption, the courts were again left with a generalized best interest standard, which had no definitive presumptions to guide judges.\textsuperscript{47} This generalized best interest standard has remained the dominant child custody standard,\textsuperscript{48} but state courts and legislatures have created modern presumptions to declare clear and consistent principles to guide custody adjudication.\textsuperscript{49} Two general trends emerged in creating these presumptions: joint custody and the primary caretaker standard.\textsuperscript{50}

\textbf{B. Joint Custody Movement}

The joint custody movement developed in the 1980’s under the influence of fathers’ rights groups who believed joint custody laws would make custody equally available to fathers.\textsuperscript{51} Fathers felt undervalued because mothers received sole custody in the majority of custody awards, and fathers only received visitation.\textsuperscript{52} The parent who was awarded sole custody had the

\begin{itemize}
\item \textsuperscript{43} Mason & Quirk, supra note 36, at 220.
\item \textsuperscript{45} Id. \textit{(citing} Reed v. Reed, 404 U.S. 71 (1971); Stanton v. Stanton, 421 U.S. 7 (1975); Califano v. Wescott, 443 U.S. 76 (1979)).
\item \textsuperscript{46} ELLMAN ET AL., \textit{supra} note 40, at 560. The Supreme Court of Alaska held the tender years doctrine was not a permissible criterion for the state’s trial courts to use, and that the doctrine was inconsistent with the statutory “best interests” requirement. Johnson v. Johnson, 564 P.2d 71, 75 (Alaska 1977).
\item \textsuperscript{47} Mason & Quirk, \textit{supra} note 36, at 220-21.
\item \textsuperscript{48} MARY ANN MASON, \textit{FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS} 129 (Columbia University Press 1994).
\item \textsuperscript{49} Bowermaster, \textit{supra} note 18, at 274. Presumptions create clear guidelines by declaring what criteria must be considered in determining the best interests of the child. \textit{Id}.
\item \textsuperscript{50} Mason & Quirk, \textit{supra} note 36, at 398.
\item \textsuperscript{51} Scott, \textit{supra} note 28, at 615-16. For a discussion of the role that father’s advocacy groups played in the joint custody movement, see Elizabeth Scott & Andre Derdeyn, \textit{Rethinking Joint Custody}, 45 OHIO ST. L.J. 455, 462 (1984).
\item \textsuperscript{52} Elrod & Dale, \textit{supra} note 44, at 398.
\end{itemize}
sole right to exercise authority over the child, but under joint custody parents divide decision making authority.\textsuperscript{53} Joint custody was based on the notion that the best interest of the child is advanced if children have substantial contact with both parents.\textsuperscript{54} Supporters also believed joint custody would advance social change because divorced fathers are more likely to continue to support their children and stay emotionally attached if they are not deprived of authority over their children.\textsuperscript{55} Many state legislatures adopted joint custody statutes under the influence of lobbying by father’s rights groups.\textsuperscript{56} These statutes influenced custody awards in three different ways: some states have a presumption of joint custody, some states have a preference for joint custody, and other states allow joint custody to be one type of arrangement that can be ordered by a judge.\textsuperscript{57}

However, the joint custody movement received a great deal of criticism, and one state (Vermont) has specifically declared joint custody to not be in the best interest of the child.\textsuperscript{58} Critics of joint custody believe this movement was started by fathers to reduce their support obligations.\textsuperscript{59} Joint physical custody is also not appropriate when parents are unable to

\textsuperscript{53} Lumbr v. Lumbr, 394 A.2d 1139, 531 (Vt. 1978).
\textsuperscript{54} MASON, supra note 48, at 130. The doctrine recognized that fathers as well as mothers have an important role in child rearing. WEISBERG & APPLETON, supra note 1, at 721. But see JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 38 (New Edition, The Free Press 1979) (1973) (The healthy development of children requires an “omnipotent” parent on whom children can rely on for all important decisions).
\textsuperscript{55} Robert J. Levy, Custody Law and the ALI’s Principles: A Little History, a Little Policy, and Some Very Tentative Judgments, in, RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION. 69 (Robin Fretwell Wilson ed., Cambridge University Press 2006); But see Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 Va. L. Rev. 1901, 1969 n.190 (2000) (“[R]eforms favoring joint physical custody failed to influence behavior because they were apparently inconsistent with the private preferences of parents regarding custody arrangements. These laws expressed support for equal sharing of child care responsibility, but the predicted role change has not occurred.”).
\textsuperscript{56} Scott, supra note 28, at 625.
\textsuperscript{57} WEISBERG & APPLETON, supra note 1, at 721. California was the first state to provide for statutory recognition of awards of joint custody in 1980. See Cal. Fam. Code § 3080 (West 2004). For an example of a preference for joint custody see Bell v. Bell 794 P.2d at 97.
\textsuperscript{58} Lumbr, 394 A.2d at 1142 (“Joint custody should only be decreed in cases where there is a finding of extraordinary circumstances.”)
\textsuperscript{59} Herma Hill Kay, No-Fault Divorce and Child Custody: Chilling Out the Gender Wars. 36 FAM. L.Q. 27, 34 (2002). For example, A West Virginia lawyer advised his client to seek child custody in order to force his wife to
communicate and reach shared parenting decisions. Therefore, joint custody is only appropriate when there is a lack of hostility between the parents and they are able to cooperate. Joint custody should also not be awarded when domestic violence is involved because continuing parental communication is often not appropriate in such cases.

C. Primary Caretaker Presumption

The primary caretaker presumption has also influenced the courts in awarding custody. The primary caretaker presumption was adopted by two states as the conclusive test for determining custody disputes. Under this presumption the best interest of the child is served by placing the child with the parent who has taken the primary responsibility for the child’s care, as long as he or she meets the minimum criteria for being a fit parent. The primary caretaker is defined as “the person who, before divorce, managed and monitored the day to day activities of the child, and met the child’s basic needs including: feeding, clothing, bathing, and protecting the child’s health.” Several factors should be considered in determining the primary caretaker.

seek a lower financial award. The lawyer candidly admitted his client indicated “that two children were the last thing he wanted from his divorce.” Id.

MASON, supra note 48, at 131.


WEISBERG & APPLETON, supra note 1, at 724.

Paul L. Smith. The Primary Caretaker Presumption: Have We Been Presuming Too Much? 75 IND. L.J. 731, 732. (2000). This standard was introduced into the legal community in 1981. Id.

We West Virginia adopted the rebuttable presumption in Garska v. McCoy, 278 S.E.2d 357, 362 (W. Va. 1981); Minnesota courts adopted the rebuttable presumption in 1985 in Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985).

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

Smith, supra note 63, at 736.

In establishing the primary caretaker, the trial court shall consider the following caring and nurturing duties of a parent:

(1) preparing and planning of meals;
(2) bathing, grooming and dressing;
(3) purchasing, cleaning, and care of clothes;
(4) medical care, including nursing and trips to physicians;
(5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings;
(6) arranging alternative care, i.e. babysitting, day-care, etc.;
(7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning;
This presumption was criticized, especially by fathers’ rights groups who believed it created the same gender bias as the tender years presumption because women are generally the primary caretakers.\textsuperscript{68} Others believed the primary caretaker presumption granted judges too much discretion in determining the primary caretaker, and that it did not always place the child with the better parent.\textsuperscript{69} Due to these criticisms, the standard has been repealed in both states.\textsuperscript{70} However, many states still use the primary caretaker status as one factor in determining the best interest of the child.\textsuperscript{71}

\section*{II. Current State of the Law: Best Interest of the Child}

\subsection*{A. A Generalized Best Interest of the Child Standard}

Due to the lack of support for these presumptions, the courts have again been left with a generalized best interest standard.\textsuperscript{72} This standard provides little guidance to judges who award custody because there are no substantive guidelines for judges to evaluate the competing values of the parents.\textsuperscript{73} Instead, judges award custody on a case by case basis by considering and weighing certain factors, which are determined by state statutes.\textsuperscript{74} These factors were based on the Uniform Marriage and Divorce Act (“UMDA”), which listed five factors the courts should

\begin{itemize}
\item (8) disciplining, i.e. teaching general manners and toilet training;
\item (9) educating, i.e. religious, cultural, social, etc.; and,
\item (10) teaching elementary skills, i.e., reading, writing and arithmetic.
\end{itemize}

\textit{Garska}, 278 S.E.2d at 357.
\textsuperscript{68} \textit{Elrod & Dale}, \textit{supra} note 44, at 401.
\textsuperscript{69} \textit{See Smith}, \textit{supra} note 63, at 742-745.
\textsuperscript{70} The West Virginia presumption was overturned by W. VA. CODE § 48-9-206 (2003); The Minnesota primary caretaker presumption was overturned in 1989 by MINN. STAT. ANN. § 518.17 (Stating “The primary caretaker factor may not be used as a presumption in determining the best interests of the child”). For a description of why the primary caretaker failed in Minnesota, see generally Gary Crippen, \textit{Stumbling Beyond the Best Interests of the Child: Re-examining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment With the Primary Care Taker Preference}, 75 MINN. L. REV. 427 (1990).
\textsuperscript{71} \textit{Weisberg & Appleton}, \textit{supra} note 1, at 686. One study found the term “primary caretaker” was the most enunciated factor in judicial opinions of the nineties. Mason & Quirk, \textit{supra} note 36, at 224.
\textsuperscript{72} This generalized best interest standard is the current legal standard in 45 states. Kohm, \textit{supra} note 20, at 338.
\textsuperscript{73} \textit{Bowermaster}, \textit{supra} note 18, at 268.
\textsuperscript{74} Kohm, \textit{supra} note 20, at 338-39.
consider in all custody decisions.\textsuperscript{75} These UMDA factors were meant to focus judges on specific parenting skills to keep judges from awarding custody solely upon the judge’s own subjective views, but only 8 states have adopted the entire UMDA.\textsuperscript{76} Many states have created their own lists of factors, which often include the UMDA’s five factors as some of the many factors to consider.\textsuperscript{77}

**B. Criticisms of the Best Interest Standard**

The best interest standard is discretionary because the factors listed in the state statutes are often un-weighted and are not required to be considered.\textsuperscript{78} Other states have failed to provide any factors to consider.\textsuperscript{79} This means there is considerable discretion in determining which factors should be considered over others, and if other unlisted criteria should be considered.\textsuperscript{80} “With such little guidance judges often rely on personal values to determine what individual qualities, parenting skills, or situational factors are important in their decisions.”\textsuperscript{81} One Minnesota court stated, “In applying the best interest analysis we recognize much must be

\textsuperscript{75} \textsc{unified marriage and divorce act} § 402 (amended 1973).

\textsuperscript{76} Elrod & Dale, \textit{supra} note 44, at 394.

\textsuperscript{77} \textit{Id.} Statutes which have added factors include \textsc{col. rev. stat.} § 14-10-124(1.5)(a) (2007); \textsc{alaska stat.} § 25.24.150(c) (2001); \textsc{idaho code ann.} § 32-717(a)(2000).

\textsuperscript{78} Elrod & Dale, \textit{supra} note 44, at 397. However, Minnesota’s statute does preclude the use of one factor to the exclusion of another. \textsc{minn. stat. ann.} § 518.17 (West 1990).

\textsuperscript{79} The Arkansas statute simply requires that the award “shall be made without regard to the sex of the parent but solely in accordance with the welfare and best interests of the children.” \textsc{ark. code. ann.} § 9-13-101 (1987).

\textsuperscript{80} Bowermaster, \textit{supra} note 18, at 269.

\textsuperscript{81} \textit{Id.}
left to the discretion of the trial court. Some statutory criteria will weigh more in one case and less in another and there is rarely an easy answer.\textsuperscript{82}

What one judge believes is in the best interest of the child, is not what another judge may believe is in the best interest of the child.\textsuperscript{83} This is because judges are influenced by their different values and beliefs when choosing which factors are more important to the welfare of a child.\textsuperscript{84} The Principles list judicial discretion as one of the major downfalls of the best interest standard: “When the only guidance for a court is what best serves the child’s interest, the court must rely on its own value judgments, or upon experts who have their own theories and value judgments of what is good for children and what is effective parenting.”\textsuperscript{85}

One problem created by the indeterminacy of the best interest standard is it undermines parental autonomy by comparing parenting styles and values, which should be parental decisions.\textsuperscript{86} Parenting roles are constantly changing in today’s society, and families disagree on how to raise their children.\textsuperscript{87} Parents make these important decisions upon the birth of their children, and these decisions should not be altered by a judge who has different beliefs and values about childrearing.

Indeterminacy also leaves parents unable to predict the outcomes of their cases.\textsuperscript{88} Parties are unable to rely on past cases as precedent because each award is determined on a case by case basis.

\textsuperscript{82} Maxfield v. Maxfield, 452 N.W.2d 219 (Minn. 1990). However, judicial discretion also has advantages because it allows judges to determine custody using creative resolutions that they have seen work for other families. Lugar, \textit{supra} note 16.
\textsuperscript{84} Kohm, \textit{supra} note 20, at 337. For example, one judge may award custody to the parent who can offer stability and a consistent routine, while a different judge may award custody to the parent with the most creativity, spontaneity, and warmth. Bartlett, \textit{supra} note 83, at 13.
\textsuperscript{85} \textsc{Principles} § 2.02 cmt. c.
\textsuperscript{86} Id. § 2.02 cmt. b.
\textsuperscript{87} Scott, \textit{supra} note 28, at 616.
\textsuperscript{88} Kohm, \textit{supra} note 20, at 339.
analysis based upon the unique facts of each case. Trial judges have the discretion to individually determine the cases before them, so the outcome in each case is dependent upon which judge hears the case.

This unpredictability encourages an environment where parents are able to engage in strategic and manipulative behavior before and during trial. Some parents may be financially motivated and may use custody as a bargaining chip during negotiations to lower child support and alimony. Parents who are risk-adverse will be willing to give up financial advantages in order to ensure they receive custody. Parents may also ask for greater custody than what they actually want in order to get out of paying higher child support awards. Maccoby and Mnookin found that only twenty percent of fathers who wanted custody according to their interviews later requested either sole or joint physical custody.

Indeterminate standards can also lead to manipulative behavior inside the court room because judges have a limited amount of time to determine which parent should be awarded custody, so the parents must compete to see who can put on the better show. The West Virginia Supreme Court stated that “[i]n custody disputes it is often a power struggle between the parties to see who can provide the most evidence in support of his or her position. It

90 Id.
91 PRINCIPLES § 2.02 cmt. c.
93 Scott, supra note 28, at 653
94 Brinig, supra note 92, at 309. The court will often grant this desired time because the current best interest standard encourages continuous contact with both parents. See PRINCIPLES § 2.02 Reporter’s Notes cmt. d. However, the parent will then not actually spend the awarded time with the child, since they were not motivated from actually wanting the extra time. Lugar, supra note 16.
96 PRINCIPLES § 2.02 cmt. c (2002).
becomes a bitter battle and eventually comes down to one party’s word against the other.”97 This strategic behavior is destructive for the child because each parent competes to expose the flaws of the other, creating a negative environment.98

C. Advantages of the Best Interest Standard

The best interest standard prevailed as the dominant custody standard despite these criticisms because many believe there is no better alternative that can be agreed upon.99 The major advantage of the best interest standard is it provides the flexibility needed to determine difficult cases: “The best interest standard represents a willingness on the part of the court and the law to consider children on a case by case basis rather than adjudicating children as a class or a homogenous grouping with identical needs and situations.”100 Judges are able to consider each individual child’s needs depending on their unique family structure.101

The best interest standard also allows judges to create unique custody awards that may work for each particularized family.102 It is important children have continuous contact with both parents,103 and a judge is able to determine how that contact can be achieved in each family.104 The judge must determine how to integrate the non-primary parent into the child’s life in a way that will work for that child.105 This is not always an easy task and parents often need to experiment to determine what will work for their situation.106 Judges are in the unique

98 Scott, supra note 28, 623.
99 Kohm, supra note 20, at 337.
101 Id. at 385.
102 Lugar, supra note 16.
103 PRINCIPLES § 2.02 cmt. e (“continuity of existing parental-child attachments after the break-up of a family unit is a factor critical to the child’s well-being”)
104 Lugar, supra comment 16.
105 Id.
106 Id.
position where they have seen what has worked for other parents in the past, so they can create custody awards using creative solutions that can work for the particular family in front of the judge.\(^\text{107}\)

## III. The Approximation Standard: The ALI’s Recommendation for Child Custody

Several alternatives to the best interest standard have been proposed, including the “approximation standard,” which was endorsed by the ALI in its Principles.\(^\text{108}\) The Principles’ central goals were to develop standards that provided quicker and more certain results when families break up.\(^\text{109}\) In order to achieve these goals the Principles encourage parents to create their own custody resolutions by first requiring parenting plans.\(^\text{110}\) If parents are unable to agree to a parenting plan, the courts must then decide custody using the approximation standard.\(^\text{111}\) This achieves the goals because “the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.”\(^\text{112}\) Under the approximation standard, judges are required to approximate the proportion of time each parent spent providing caretaking functions to the child, in the custody award.\(^\text{113}\) The Principles define caretaking functions as “tasks that involve

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\(^{107}\) *Id.* One example of a creative resolution that Lynne Lugar saw a judge apply was to increase the contact of the non-residential parent by ordering that the non-residential parent be allowed to have 15 minutes of contact with the child each night over webcam. *Id.*

\(^{108}\) *PRINCIPLES § 2.08.*

\(^{109}\) Bartlett, *supra* note 83, at 12.

\(^{110}\) *PRINCIPLES § 2.05.* A parenting plan protects parental autonomy by allowing parents to customize their own arrangements to account for each family’s own circumstances. *Id.* cmt. a. The parenting-plan allows for a diverse range of childrearing arrangements and rejects all of the pre-established statutory choices about what arrangements are in the best interests of the child. *Id.* A parenting plan allows arrangements that express the preferences, experience, or welfare of all families. *Id.*

\(^{111}\) *Id.* § 2.08(1).

\(^{112}\) *Id.* § 2.02 cmt. e.

\(^{113}\) *Id.* § 2.08. Many criticize the standard stating it is the same as the primary caretaker presumption. Levy, *supra* note 55, at 76. It is different from the primary caretaker presumption because the approximation test does not
interaction with the child or that direct, arrange, and supervise the interaction and care provided by others."\textsuperscript{114}

\textbf{A. Advantages of the Approximation Standard}

One advantage of the approximation standard is it is an objective standard, which forces judges to base custody awards on concrete facts\textsuperscript{115} instead of inflicting their own subjective value judgments about parenting.\textsuperscript{116} The approximation standard constrains judges to an objective analysis because judges must “allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation….\textsuperscript{117}

The approximation standard promotes parental autonomy by respecting the decisions parents have made in the past regarding child rearing.\textsuperscript{118} Past caretaking decisions reflect the parents’ genuine beliefs about caretaking arrangements because they were made when the marriage was intact and the parties could agree.\textsuperscript{119} These decisions are a more accurate measure of parental bonds than the conflicting facts that are presented in court during litigation when emotions are high.\textsuperscript{120} Pre-divorce roles also more accurately reflect the true presumptions of parents for their future relationship with their children because they are made in accordance with each family’s set of values and strengths.\textsuperscript{121}

\textsuperscript{114} PRINCIPLES § 2.03(5)(a)-(h). (Defines “A non-exclusive list of caretaking functions including such matters as “satisfying the nutritional needs of the child,” “directing the child’s various developmental needs,” “providing discipline,” “supervising chores;” “arranging for the child’s education,” and several other specified functions).

\textsuperscript{115} Id. § 2.02 cmt. d.

\textsuperscript{116} Mnookin, supra note 89, at 251.

\textsuperscript{117} Id. § 2.08(1).

\textsuperscript{118} Id. § 2.08 cmt. b.

\textsuperscript{119} Id.

\textsuperscript{120} Warshak, supra note 21, at 602. This is because during divorce parents’ true desires are often clouded by feelings of loss, anxiety, guilt, and anger. PRINCIPLES § 2.08 cmt. b.

\textsuperscript{121} Scott, supra note 28, at 633.
Parents will also be better able to predict the outcome of their custody dispute under the more determinate approximation standard, reducing litigation and negative bargaining which occurs between parents during divorce.\(^\text{122}\) Presumptions often play a pivotal role in how parties negotiate because if a presumption favors one parent, the other parent may only pursue litigation if he or she feels that there is sufficient evidence to overcome the presumption.\(^\text{123}\) A determinate standard will keep parents from using custody as a bargaining chip in the divorce.\(^\text{124}\) For example, the parent who has the greater stake in continuing his or her parenting relationship will be more reluctant than the other parent to subject the custody decision to the uncertainty of a judicial determination.\(^\text{125}\) The other parent may use this to his or her advantage by only giving up custody if the other parent agrees to a reduction in alimony or property distribution.\(^\text{126}\) If custody is determined by past caretaking, the parents will be assured custody, and will not need to bargain away their other rights.\(^\text{127}\)

Many experts believe the most important factor to a child’s future welfare is the undisturbed continuity of their relationships to their caregivers.\(^\text{128}\) Continuity of existing parent-child

\(^{122}\) Id. at 643.

\(^{123}\) Elrod & Dale, supra note 44, at 390. Reduced litigation is an important goal of child custody because social science research has documented the damaging effects on children who are exposed to parental conflict. Joan B. Kelly, Children’s Adjustment in Conflicted Marriage and Divorce: A Decade of Review of Research, 39 J. AM. ACAD. CHILD AND ADOLESCENT PSYCHIATRY 963 (2000).

\(^{124}\) Scott, supra note 28, at 652.

\(^{125}\) Id. at 653.

\(^{126}\) Id.

\(^{127}\) Id. at 654.

\(^{128}\) See generally Goldstein, supra note 54, at 17-20, 31-35. Goldstein argued that stability in a child’s early relationships was the most important factor in child placement decisions. See Id. at 31-34 Therefore, there should only be one custodial parent and authority over a child’s needs must be clearly allocated to that one parent. Id. at 38. That parent should also have the ability to determine how much contact the other parent received with the child. Id.; But see Joan B. Kelly and Robert E. Emery, Children’s Adjustment Following Divorce: Risk and Resilience Perspectives, 54 FAM. RELATIONS 352, 356 (2003) (encouraging increased time for the non-residential parent). A meta-analysis of 57 studies found that children who had close relationship with their fathers benefited from frequent contacts with their fathers. Paul Amato and J. Gilbreth, Nonresident fathers and Children’s Well-being: A Meta-Analysis, J. OF MARRIAGE AND THE FAMILY, 61, 557-573 (1999). However, when there is intense interparental conflict then more frequent contact was associated with poorer adjustment in children due to the increased exposure
attachments is a critical factor to a child’s well being, and these attachments affect the child’s well being and later ability to form healthy relationships.\textsuperscript{129} The approximation standard promotes continuity and stability by continuing past caretaking roles.\textsuperscript{130} These relationships are negatively affected by the best interest standard because judges are not qualified to analyze qualitative factors such as the strength of parent-child bonds.\textsuperscript{131} The approximation standard will better preserve stability in the child’s life because “how caretaking was divided in the past….is likely to reflect various qualitative factors that are otherwise very hard to measure, including the strength of the emotional ties between the parent and each child, relative parental competencies, and the willingness of each parent to put the child’s interest first.”\textsuperscript{132}

### B. Criticisms of the Approximation Standard

One criticism of the approximation standard is parents do not expect their past decisions to forever determine their future relationships with their children.\textsuperscript{133} Parents make decisions during the marriage based on their own needs and the child’s needs.\textsuperscript{134} Needs change over time and parents’ situations change after divorce, so they should not be locked into their past roles.\textsuperscript{135} For many parents the separation of spousal roles to parenting roles can be very difficult, and divorce means the division of child rearing responsibilities must be renegotiated because there are now two parental households.\textsuperscript{136}
Continuous contact with both parents should be encouraged, and the approximation standard would create a presumption in which parents who wish to increase their time with the child are unable to do so.\textsuperscript{137} Parents who want to increase their caretaking roles should be able to do so if an arrangement will work.\textsuperscript{138} It may also be advantageous to include both parents in important aspects of the child’s life.\textsuperscript{139} For example, the mom may have always taken the child to the doctor in the past, but now both parents should go with the child to the doctors because the child is living in two homes, so both parents will provide essential information that the doctor needs to know about the child.\textsuperscript{140}

The approximation standard may not properly predict the bond between the parent and child because time spent between a parent and child does not necessarily reflect the bond they share.\textsuperscript{141} Studies show that quality of interaction, and the parent’s sensitivity and responsiveness to the child’s needs, are far more important to predicting the quality of a parent/child relationship rather than quantity of interaction.\textsuperscript{142} Time may foster the attachment of a bond, but it does not

\textsuperscript{137}Lugar, supra note 16. \textit{But see} PRINCIPLES § 2.08(1)(a) (the approximation standard should not be applied if it would not “permit the child to have a relationship with each parent…”).

\textsuperscript{138}Certain routine functions were easily replicated in two-parent households like preparing meals, washing clothes, bathing, and dressing. MACCOBY & MOONKIN, supra note 136, at 212. Children may be hesitant to have parents change their roles, but that is why parents must work together to create a sense of stability for the child. Lugar, supra note 16. For example, in the intact relationship the mom may have always driven the child to soccer practice, but now that the parents are separated the dad may have a more flexible schedule, and may want to pick the child up; so why not allow him to do that if it can work? \textit{Id.}

\textsuperscript{139}Id.

\textsuperscript{140}Id.


\textsuperscript{142}Paul R. Amato & Joan F. Gilbreth, \textit{Nonresident Fathers and Children’s Well-Being: A Meta-Analysis}, 61 J. MARRIAGE & FAM. 557, 569 (1999) (Finding, in a meta-analysis of 63 studies, that how often fathers see their children is less important than what fathers do when they are with their children); Marsha Kline Pruett \& Kyle D.
necessarily create a secure bond. The factors that are significantly correlated with a strong parent-child attachment are emotional care, caretaker’s emotional investment, and quality of care; the approximation standard does not consider these factors. For example, parents must engage in a balance of social and instrumental activities in order to demonstrate to their children that they are important to them. In contrast, neither physical care nor time spent with the child have been empirically linked to attachment security.

The approximation standard is also still a discretionary standard. The Principles provide judges with few guidelines on how to determine how much time parents spent performing caretaking functions; the Principles only list several caretaking functions judges must consider, and the language is vague. For example, one of the caretaking functions is “providing moral and ethical guidance.” Parents and judges may disagree what constitutes providing moral guidance. This lack of clarity may result in disputes over how much time each parent actually invested in the children, and whose account of time is correct. Therefore, the approximation standard will not ensure a predictable outcome if judges come to different conclusions of how

Pruett, Fathers, Divorce, and Their Children, 7 CHILD & ADOL. PSYCHIATRIC CLINICS OF NORTH AMERICA 389, 401-2 (1998) (frequency and regularity of visits less predictive of child outcome than the quality of relationships, especially for boys).

Riggs, supra note 141, at 487.

Id.

Daniel N. Hawkins, et al., Nonresident Father Involvement and Adolescent Well-Being: Father Effects or Child Effects? 72 AM. SOC. REV. 990, 992 (2007). Social activities such as playing sports and watching movies are often not associated with a child’s well-being, but they are needed to keep the parent child relationship fun. Id. In contrast, instrumental activities such as working on school projects, talking with children about problems, and attending religious services together are more directly related to children’s educational and social development. Id.

Riggs, supra note 141, at 487.

Warshak, supra note 21, at 603.

PRINCIPLES § 2.03(5). The principles define caretaking functions as “tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others.” Id. The Principles then list several examples of caretaking functions that should be considered. Id.

Id. § 2.03(5)(g).

Warshak, supra note 21, at 604. For example, in Hoover v. Hoover, the majority of the appellate court affirmed the trial court’s holding that the father had “a slightly more active engagement in the child’s lives.” Hoover v. Hoover, 764 A.2d 1192, 1194 (Vt. 2000). However, the dissent believed the mother spent twice as many hours with the child and provided the majority of caretaking tasks. Id. at 1199-1200 (Johnson, J. dissenting).
much time each parent spent performing caretaking functions. Parents may also exaggerate their past caretaking patterns, which can produce bitter disputes between parents.\textsuperscript{151}

The Principles also list several exceptions in which the approximation standard should not be applied.\textsuperscript{152} If the facts fall into one of the exceptions then the court will use the generalized best interest standard instead.\textsuperscript{153} Judges may inadvertently or intentionally overuse these exceptions due to their vague language.\textsuperscript{154} Two of the exceptions are to avoid an allocation of custodial responsibility that would be “extremely impractical” or “manifestly harmful to the child”\textsuperscript{155} However, extremely impractical and manifestly harmful are not specifically defined, so judges may disagree as to whether an exception should be applied to their cases. Therefore, these broad exceptions threaten to eliminate the objectivity of the approximation standard.\textsuperscript{156}

However, the Principles’ authors intended the exceptions to apply only to rare cases where it is clear that a shared parenting decision under the approximation standard would not be

\begin{footnotesize}
\begin{enumerate}
\item[151] Crippen, \textit{supra} note 70, at 462.
\item[152] The exceptions to the approximation standard are:
\begin{enumerate}
\item Each parent who has been minimally responsible for the child is guaranteed a minimal level of access. The jurisdiction will choose the minimal level of time to constitute that minimal level of access. PRINCIPLES § 2.08(1)(a) (2002).
\item A child’s preferences may alter the allocation of time if those preferences are firm and reasonable. The age of the child will be set by the jurisdiction. \textit{Id.} at § 2.08(1)(b).
\item to keep siblings together where the ct finds that doing so is necessary to their welfare \textit{Id.} at § 2.08(1)(c).
\item the allocation may be altered if necessary to protect a child and take account of a gross disparity in the quality of each parent’s emotional attachment to the child, ability, or availability to meet the child’s needs. \textit{Id.} at § 2.08(1)(d).
\item prior agreements between couples may be taken into consideration if necessary to protect the reasonable expectations of the parties and the interests of the child. \textit{Id.} at §2.08(1)(e).
\item to avoid extremely impractical arrangements. \textit{Id.} at § 2.08(1)(f).
\item The standard is not applied when necessary to protect the child from domestic abuse. \textit{Id.} at § 2.08(1).
\item The standard is not applicable if it would require an allocation that would be manifestly harmful to the child. \textit{Id.} at § 2.08(1)(h).
\end{enumerate}
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\item[153] PRINCIPLES § 2.08(3).
\item[154] Warshak, \textit{supra} note 21, at 604.
\item[155] PRINCIPLES § 2.08(1)(f), (h)
\item[156] Crippen, \textit{supra} note 70, at 452-3 (1990). Minnesota’s primary caretaker rule is one example of a presumption which was ineffective because of its exceptions and vague language. \textit{Id.}
\end{footnotesize}
appropriate. These exceptions were drafted with specific language to limit their scope and use. The language used includes, “harm the child because of gross disparity,” “extremely impractical,” and “manifestly harmful.” The Principle’s authors used this language because the exceptions should only apply in the most exceptional cases and speculative harm or an outcome that is only somewhat less desirable than the alternative would not justify deviating from the approximation standard. The authors take a tough position on the determination that a parent is unfit, stating that “it requires a showing of both a high degree and high likelihood of harm. Speculative harm or an outcome that is only somewhat less desirable than the alternative would not satisfy this standard.” These exceptions are specific and are only intended for the cases in which there is a general consensus that a shared custody arrangement would not be in the best interest of the child. For example, there is a general consensus that physical abuse and chronic alcoholism are not in the best interest of the child. In addition, the comments to the Principles contain numerous illustrative examples to aid judges in determining the scope of the exceptions. Judges should reference these examples when they are unsure if an exception is appropriate.

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157 PRINCIPLES § 2.08(1)(d), (f).
158 Levy, supra note 55, at 77.
159 PRINCIPLES § 2.08 cmt. 1.
160 Id.
161 Id.
162 See Id. § 2.08 cmt. a.
163 Mnookin, supra note 89, at 261.
164 See generally PRINCIPLES § 2.08 cmt. (e)-(j).
V. The Approximation Standard Has Not Significantly Influenced Child Custody Law

A. A Look at Case Law

The approximation standard has not had a large impact on child custody law, despite the anticipation that the Principles would have an overwhelming impact.\textsuperscript{165} West Virginia has been the only state to adopt the approximation standard by legislation.\textsuperscript{166} Among the other states, only three cases have specifically referenced the approximation standard.\textsuperscript{167}

In Hansen \textit{v. Hansen}\textsuperscript{168} the Supreme Court of Iowa upheld the appellate court’s award of physical custody of two children to the mother.\textsuperscript{169} The court of appeals awarded custody to the mother because she was the primary caretaker in the intact relationship, so this award created continuity and stability for the children.\textsuperscript{170}

In reviewing the appellate court’s decision, the majority of the Supreme Court of Iowa discussed the Principles in a favorable light and agreed that custody of children should attempt to preserve and continue the parties’ past caretaking roles.\textsuperscript{171} The court believed the Principles provided a relatively objective factor for the court to consider, while reflecting the diversity of families.\textsuperscript{172} However, the supreme court stated child custody must still be determined under the best interest standard because it is Iowa law.\textsuperscript{173} Under the best interest standard successful past caretaking is a strong indicator of the best interest of the child, but it is only one factor to

\begin{footnotesize}
\textsuperscript{165} Clisham & Wilson, \textit{supra} note 33, at 613.
\textsuperscript{166} \textit{Id.} at 573.; The current statute is codified as W. VA. CODE ANN. 48-9-206 (West 2003).
\textsuperscript{167} \textit{Id.} The cases that have cited the approximation standard are: Hansen \textit{v.} Hansen, 733 N.W.2d 683 (Iowa 2007); Custody of Kali, 792 N.E.2d 635 (Mass. 2003); and Young \textit{v.} Hector, 740 SO. 2d 1153 (Fla. Dist. Ct. App. 1998).
\textsuperscript{168} Hansen, 733 N.W.2d 683 (Iowa 2007).
\textsuperscript{169} \textit{Id.} at 686.  The mother wanted the children to be active in the Methodist church and other extracurricular activities, and believed in less discipline than the father. \textit{Id.} The father did not want the children to be raised Methodist and did not want the children exposed to the mother’s family. \textit{Id.}
\textsuperscript{170} \textit{Id.} at 690.
\textsuperscript{171} \textit{Id.} at 697.
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.} (“Iowa Code Section 598.41(3) and our case law requires a multi-factored test where no one criterion is determinative”).
\end{footnotesize}
consider among many because there may be circumstances that outweigh considerations of stability, continuity, and approximation.\textsuperscript{174} One example the court gave is when parents fail to perform their responsibilities because of alcohol or substance abuse.\textsuperscript{175} However, the approximation standard would not apply to a case involving substance abuse because it is one of the exceptions listed in the Principles.\textsuperscript{176}

When applying the best interest standard to this case, the court still affirmed the appellate court’s decision because awarding physical custody to the mother, who could promote continuity and stability, would more likely promote the children’s physical and emotional health rather than a joint custody arrangement.\textsuperscript{177} This was because the couple had a hostile relationship, which would negatively affect the child’s lives in a joint physical care context.\textsuperscript{178} However, if the approximation rule had applied, the ruling would have been different because the court would have looked at past caretaking in order to apportion time and each parent would have received an allocation of custody in proportion to his or her past caretaking duties during the marriage.\textsuperscript{179}

\textit{Custody of Kali} also discussed the approximation standard.\textsuperscript{180} The Massachusetts Supreme Judicial Court upheld the trial court’s award of sole legal and physical custody of the child to the mother.\textsuperscript{181} The trial court judge was critical of the father because he “[did] not appear to be overly concerned about Kali’s physical needs beyond the basics.”\textsuperscript{182} The supreme

\textsuperscript{174} \textit{Id.} at 696-97, 700.  
\textsuperscript{175} \textit{Id.}  
\textsuperscript{176} The standard is not applicable if it would require an allocation that would be manifestly harmful to the child. \textit{PRINCIPLES} § 2.08(1)(h).  
\textsuperscript{177} Hansen, 733 N.W.2d at 700.  
\textsuperscript{178} \textit{Id.} at 700.  
\textsuperscript{179} \textit{PRINCIPLES} § 2.08  
\textsuperscript{180} Kali, 792 N.E.2d 635 (Mass. 2003).  
\textsuperscript{181} \textit{Id.} at 635.  
\textsuperscript{182} \textit{Id.} at 644.
The court also pointed out that “this case illustrate[d] how subjective value judgments affect a judge’s assessments of the child’s best interests.”184 The court then went on to state the approximation standard would remove this subjectivity by providing judges with more direction in determining the best interest of the child by limiting the inquiry to past caretaking.185 Therefore, if the approximation standard had been the law in Massachusetts, it is arguable that the supreme judicial court would have overruled the trial court because the father was the primary caretaker in the intact relationship.186 The court would have had to determine the amount of time the father spent performing caretaking functions and then base the custody award upon this allocation of time.187

However, the supreme judicial court affirmed the trial court’s ruling because the best interest standard is the legal standard in Massachusetts.188 Therefore, the trial judge properly considered all of the circumstances, as opposed to just past caretaking, and he attempted to structure a permanent custody award in the best interest of Kali.189 The trial court has discretion under the best interest standard, so the supreme judicial court could only overrule the decision if there was an abuse of discretion.190

In Young v. Hector, the trial court awarded custody of two daughters to the mother.191 The District Court of Appeal of Florida overruled the trial court’s decision, but then on rehearing en

183 Id.
184 Id.
185 Id. at 641.
186 Id. at 643.
187 PRINCIPLES § 2.08
188 Id. at 642.
189 Id. at 645.
190 Id. at 642.
banc, the appellate court upheld the custody award to the mother.\textsuperscript{192} The couple resided in Florida, but in 1992 the father spent time in New Mexico in order to direct a treasure recovery project.\textsuperscript{193} During this 14 month period, the children remained in Miami with their mother.\textsuperscript{194} Upon the father’s return, the mother asked for a divorce in May 1995.\textsuperscript{195} At this time the father began to take a more active role in the custody of the children.\textsuperscript{196} The father began to coach the children’s soccer teams, lead their Brownie troops, and take the children to their appointments.\textsuperscript{197} Neighbors, teachers, and friends all testified that the father had a close relationship with his children.\textsuperscript{198} Upon the weighing of all factors, the trial court awarded custody to the mother.\textsuperscript{199}

The appellate court agreed with the father that the trial court abused its discretion by awarding custody to the mother.\textsuperscript{200} The appellate court stated the decision should attempt to preserve and continue the caretaking roles.\textsuperscript{201} The court cited an example provided in the Principles which showed that the court should have allocated custody based upon parent’s past caretaking roles, and a fairness argument was irrelevant.\textsuperscript{202} The majority believed the trial court’s award of primary residential custody of the children to the mother failed to continue the roles the parents had established.\textsuperscript{203} They believed it was clear from the record the father had always, as primary caretaker, provided the children with food, clothing, shelter, and medical attention, and that the father would continue to provide for the children.\textsuperscript{204}

\textsuperscript{192} Id.  
\textsuperscript{193} Id. at 1154.  
\textsuperscript{194} Id.  
\textsuperscript{195} Id.  
\textsuperscript{196} Id.  
\textsuperscript{197} Id. at 1155-56.  
\textsuperscript{198} Id.  
\textsuperscript{199} Id. at 1156.  
\textsuperscript{200} Id.  
\textsuperscript{201} Id. at 1157.  
\textsuperscript{202} Id.  
\textsuperscript{203} Id. at 1158.  
\textsuperscript{204} Id. at 1157.
However, on rehearing en banc, the previously discussed opinion was withdrawn, and the appellate court upheld the trial court’s decision to award primary custody to the mother. The majority stated the sole issue on appeal was whether the trial court abused its discretion in determining the mother was the primary caretaker. The majority found there was sufficient evidence to establish the mother was the primary caretaker. The trial court had determined that from the time the children were brought to Miami in 1989 until the fall of 1993, the needs of the children were attended to by their live-in housekeeper during the day and the mother at all other times. This time was spent awakening the children, dressing them, and having breakfast with them prior to school, and spending evening and weekend hours with them. It was not until the mother announced her desire for divorce that the father began spending less time away from Miami and became involved in the activities of his two daughters. In addition, the mother continued to spend time with the children when she returned home from work each day. The trial court deemed it more important to assess the time spent with the children during the course of the entire marriage, and not just the years immediately preceding the divorce. Therefore, the trial court did not abuse its discretion in awarding custody to the mother.

This case demonstrates many of the problems in determining the allocation of past caretaking duties. Here, it was unclear whether past caretaking should have been based upon the entire relationship or the most recent allocation of time. This is one of the issues that must be more narrowly defined in the future if the approximation standard is to achieve success.

205 Id. at 1158.
206 Id.
207 Id.
208 Id. at 1159.
209 Id. at 1160.
210 Id. at 1161.
211 Id.
212 Id. at 1163.
213 Id.
B. West Virginia: The Only State to Legislatively Adopt the Approximation Standard

One reason the approximation standard has not achieved success is because the approximation standard has only been adopted by one state.\textsuperscript{214} West Virginia adopted the approximation standard word for word, repealing the state’s primary caretaker presumption.\textsuperscript{215} It is necessary to look at how the approximation standard was adopted in West Virginia, and if the standard has had success in West Virginia, to determine if the standard can be successful in other states.

The adoption of the approximation standard in West Virginia was heavily debated between gender groups.\textsuperscript{216} Father’s rights groups lobbied the West Virginia Legislature to advocate for a joint physical custody standard instead of the approximation standard.\textsuperscript{217} Many fathers argued the approximation standard was a return to a maternal presumption because caretaking factors are associated with mothers.\textsuperscript{218} However, the West Virginia legislature believed adopting the standard would create a compromise between gender groups.\textsuperscript{219} The first version of the bill adopted the primary caretaker presumption, but the bill was recalled and amended by the Senate Judiciary Committee on February 1, 1999, and the committee removed the primary caretaker rule.\textsuperscript{220} Senator Andy McKenzie agreed to introduce this change to the bill after he met with fathers’ rights groups and other senators who sought the abandonment of the

\textsuperscript{214} Clisham & Wilson, \textit{supra} note 33, at 573.
\textsuperscript{215} The current statute is codified as W. VA. CODE ANN. 48-9-206 (West 2003).
\textsuperscript{216} Disagreements over proper legal standards have often centered around gender wars because mothers and fathers often disagree as to what type of standard will best protect their needs. Father’s rights groups have often advocated for joint custody while many feminists have supported standards that give a preference for the parent who was the primary caretaker during the marriage. See ELLMAN, \textit{supra}, note 40, at 604, 611.
\textsuperscript{217} One of these groups was the West Virginia Alliance for Two Parents. Karin Fischer, \textit{Changes in Custody Law Concern Some; Predictability of Primary Caregiver Positive, Negative}, Charleston Daily Mail, May 5, 1999, P1A.
\textsuperscript{218} Kay, \textit{supra} note 73, at 34.
\textsuperscript{219} ELLMAN ET AL, \textit{supra} note 40, at 614.
\textsuperscript{220} Karin Fischer, \textit{Family Law Bill Amended Once Again Senate Committee Does Away With Caretaker Rule}, Charleston Daily Mail, March 02, 1999, P1A.
primary caretaker presumption.\textsuperscript{221} The West Virginia Alliance for Two Parents (“Alliance”) was one interest group that lobbied the legislature against the primary caretaker presumption stating, “I don’t understand the concept of awarding custody solely on the basis of who changed the most diapers.”\textsuperscript{222} Ginger Thompson, spoke for the Alliance, and stated that the best option would be to adopt a presumption of joint physical custody.\textsuperscript{223} The Alliance took this position because a joint custody presumption would allow both parents to participate more fully in raising their child.\textsuperscript{224}

Supporters of the primary caretaker presumption argued that joint physical custody is too extreme because parents will then try to prove that the other parent is not fit and should be denied joint custody.\textsuperscript{225} However, the Senators instead adopted the approximation standard, which created a concept of shared parenting and listed several factors for the judge to consider in determining parents’ past caretaking.\textsuperscript{226} The apparent legislative purpose was to promote stability in children’s lives, so children spend the same amount of time with their parents following divorce as they did before separation.\textsuperscript{227}

West Virginia may have been more willing than other states to adopt the approximation standard because the state already had a primary caretaker presumption, and had a framework of looking at past caretaking when determining custody.\textsuperscript{228} Under the primary caretaking

\begin{footnotes}
\item[221] Id.
\item[222] Fischer, supra note 217.
\item[223] Id.
\item[224] Id.
\item[225] Id.
\item[226] Fischer, supra note 217. The Senate Floor approved the bill on March 4, 1999 in a 33-1 decision. Karin Fischer, Senator Says She Can’t Support Family Law Bill. Charleston Daily Mail, March 04, 1999. P9A. The one Senator who did not approve the bill was Senator Martha Walker who disagreed with the bill’s provisions regarding the relocation of the custodial parent. Id.
\item[228] The primary caretaker presumption was originally stated in the West Virginia case of Garska, 278 S.E.2d at 357.
\end{footnotes}
presumption, the primary caretaker is defined as “that natural or adoptive parent who, until the initiation of divorce proceeding, has been primarily responsible for the caring and nurturing of the child.” Judges determined who the primary caretaker was by looking at factors. Many of these factors are similar to the current approximation factors, so the courts were already used to determining past caretaking functions. However, the approximation standard is different from the primary caretaker presumption because it recognizes that parents often divide

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[229] Garska, 278 S.E.2d at 357.

(a) “caretaker” means a person who performs one or more caretaking functions for a child. The term “caretaking functions” means activities that involve interaction with a child and the care of a child. Caretaking functions also include the supervision and direction of interaction and care provided by other persons.

(b) Caretaking functions include the following:

(1) Performing functions that meet the daily physical needs of the child. These functions include, but are not limited to the following:

(A) Feeding;
(B) Dressing;
(C) Bedtime and wake-up routine;
(D) Caring for the child when sick or hurt;
(E) Bathing and grooming;
(F) Recreation and play;
(G) Physical safety; and
(H) Transportation

(2) Direction of the child’s various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence and maturation;

(3) Discipline, instruction in manners, assignment and supervision of chores and other tasks that attend to the child’s needs for behavioral control and self-restraint;

(4) Arrangements for the child’s education, including remedial or special services appropriate to the child’s needs and interests, communication with teachers and counselors and supervision of homework;

(5) The development and maintenance of appropriate interpersonal relationships with peers, siblings, and adults;

(6) Arrangements for health care, which includes making medical appointments, communicating with health care providers and providing medical follow-up and home health care;

(7) Moral guidance; and

(8) Arrangement of alternative care by a family member, baby sitter or other child care provider or facility, including investigation of alternatives, communications with providers and supervision.

Id.
childrearing responsibilities in ways that do not follow the primary caretaker model.\textsuperscript{232}

Therefore, an allocation of joint physical custody could be awarded, but only if the parents shared child care equally when the family was intact.\textsuperscript{233}

Unfortunately, the approximation standard has not had much of an impact in West Virginia since its adoption, and has only been referenced three times by West Virginia appellate courts.\textsuperscript{234} In addition, all three cases involved exceptions to the approximation standard, so the courts went on to analyze each case under the best interest standard.\textsuperscript{235} In one case, the Circuit Court affirmed the trial judge’s custody award to the father.\textsuperscript{236} The court found that it would be “manifestly harmful” to the children to live with the mother because her live-in boyfriend was previously convicted of sexual misconduct.\textsuperscript{237} The other two cases did not explicitly use the approximation standard to determine custody, and did not explicitly reference the exceptions.\textsuperscript{238}

The appellate courts have ignored the current legislation regarding the approximation standard, and have instead applied a best interest standard. A review of the recent West Virginia appellate court opinions shows that many of these cases involved one of the exceptions to the approximation standard because many of the cases contained issues of sexual and physical abuse, so the use of the approximation standard would have been “manifestly harmful” to the child.\textsuperscript{239}

\textsuperscript{232} Ellman et al., supra note 40, at 614-5. Under the approximation standard parenting functions are also defined more broadly than just caretaking, so a father who supports his children, but does little caretaking will qualify for a minimum allocation. Id.
\textsuperscript{233} Id. at 615.
\textsuperscript{235} Id.
\textsuperscript{236} B.M.J., 575 S.E.2d at 277.
\textsuperscript{237} Id.
\textsuperscript{238} See Jon L, 625 S.E.2d at 259 (Starcher, J., concurring); Lindsie D.L., 591 S.E.2d at 313.
\textsuperscript{239} Examples of cases involving abuse include: John P.W. ex rel. Adam W. v. Dawn D.O., 591 S.E.2d 260, (W. Va. 2003) (Father was granted custody of the two children by the trial court due to domestic violence); Hager v. Hager, 591 S.E.2d 177 (W.Va. 2003) (The father asserted that he should have custody due to the alleged unfitness of the child's mother due to the alleged danger to the child from the mother's fiancé); In re Frances J.A.S. 213 W.Va. 636, 584 S.E.2d 492 (W.Va., 2003) (Transfer of custody of children from biological father to mother and stepfather
The courts have failed to even cite the current legislation. The courts should state the proper law then determine whether the case would fall into one of the exceptions, and explain why the exception applies. Instead of citing the current legislation, the courts have cited *Carter v. Carter*, which held that “*i*n visitation as well as custody matters, we have traditionally held paramount the best interest of the child.” This case was decided in 1996, well before the approximation standard was adopted. The *Carter* case has been cited twenty-eight times for the use of the best interest of the child standard since the legislature passed the approximation standard.

There have also been disagreements among gender groups of whether the approximation standard is the best custody presumption. The movement for a joint custody standard has been spearheaded by the efforts of the Men and Women Against Discrimination (“MAWAD”). To combat the efforts of MAWAD, Representatives from several statewide organizations formed the ad hoc group known as the Coalition for Safe Families (“CSF”) in December 2007. MAWAD first introduced the idea of joint custody to the West Virginia legislature in 2007 in House Bill 2943, which proposed a 50/50 split for custody time with few exceptions, but the bill quickly

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242 Legislative Summary from the Coalition for Safe Families 315 (May 2009) (on file with author) [Hereinafter CSF]. This group appeared in West Virginia in 2005 as Men Against Discrimination, and then later changed their name. *Id.* For three years they “effectively organized constituency, had a presence at the legislature, and made large media buys to advocate their position.” *Id.* Their efforts were linked to large national groups such as the American Coalition for Fathers and Children and the Children’s Rights Initiative for Shared Parents Equally. *Id.* Their efforts promoted prioritizing father’s access to children, lessening or eliminating child support obligations, and increasing penalties for false allegations. *Id.*
243 *Id.* at 3-4. CSF is comprised of 29 organizational members whose common goals is “to ensure that West Virginia families and children remain safe and that the rights of children are considered before the rights of parents.” *Id.* at 4. CSF meets on a regular basis to develop policy statements, strategies to educate policymakers and the general public, and coordinated monitoring of legislative initiatives related to the safety and welfare of families. *Id.* They support the approximation standard because it serves the best interests of the child by facilitating parental planning, continuity of pre-existing attachments, meaningful contact between children and each parent, prior caretaking relationships, security from exposure to violence, and predictable decision making. *Id.* at 10.
failed. The bill was then reintroduced in 2008 and received some support when national speakers came to West Virginia to speak in support of the bill. However CSF provided testimony from legal, child abuse, and domestic violence experts in opposition of the bill, and the bill once again did not move out of the committee. In 2009, MAWAD again proposed a joint custody standard, but instead of proposing an entirely new custody standard they proposed rewriting the current approximation standard to one in which there would be a maximum parenting time standard. The bill still proposed a joint custody standard, just not a 50/50 split. This bill received more support, and was endorsed by the committee chair, but it again died in committee. This bill to amend the approximation standard was proposed again in 2010, and is currently pending in the legislature.

244 Id. at 4. In 2006 the West Virginia Legislature responded to MAWAD by conducting an interim study of the family court system to determine if any actions should be recommended to the next regular legislative session in the area of family law. Id. MAWAD was able to present their proposals to a legislative study committee, however, no documented recommendations for legislative action resulted. Id. 245 Id. at 5. Once again prior to this legislative session there was a joint resolution to study the family court system through the next interim report. Id. at 4-5. The report of the legislative committee was a recommendation that no changes be made to the current statutes. Id. at 5. 246 Sue Julian and Tonia Thomas testified that the MAWAD policy initiatives “cause a great deal of concern for the safety and well being on victims of domestic violence, and child abuse and neglect.” Id. at 22 (Hearing before West Virginia Legislature Select Committee A: the Committee On Children, Juveniles, & Other Issues (2008) (testimony of Sue Julian and Tonia Thomas, Coordinators with the West Virginia Coalition Against Domestic); Sam Hickman testified that legislation requiring a 50/50 presumption runs counter to the ALI recommendations because research shows a high correlation between contested custody cases and domestic violence, so a 50/50 presumption would jeopardize safety provisions passed by the West Virginia Legislature. Id. at 38 (Citing Regarding West Virginia’s Joint Parenting Provisions, Hearing before the Joint Standing Committee on the Judiciary, Subcommittee B (2008) (testimony of Sam Hickman, CEO National Association of Social Workers, West Virginia Chapter)). 247 Id. at 5. After the failure of the bill the legislature passed a joint resolution to conduct an interim study on joint custody. Id. The committee heard testimony and recommendations from a family law practitioner, two family court judges, a CSF representative, and several MAWAD representatives. Id. The interim study committee issued no recommendations for changes to current statute. Id. 248 Id. at 6. CSF retained the position that preserving West Virginia’s current custody law is in the best interests of the child. Id. 249 H.R. Res. 4659, 79th Leg. (W. Va. 2010). The bill would amend the current custody law to one in which the “court shall allocate custodial responsibility so that each parent shares maximum parenting time with the child. The court shall presume that parents act in their child’s best interests and also that sharing maximum parenting time with the child is in the child’s best interests...” Id. 250 CSF, supra note 242, at 6. 251 H.R. Res. 4659, 79th Leg. (W. Va. 2010).
History has shown joint physical custody has several problems. It often creates strategic bargaining and is an unworkable standard when parents cannot communicate with one another. Joint custody is only appropriate when there is a lack of hostility between the parents and they are able to cooperate. In addition, CSF argued that 25-50% of disputed custody cases involve domestic violence, so increased parenting time for the abusive parent would expose children to violence. Abusive parents are more likely to seek sole custody than nonviolent ones and are successful about 70% of the time. Therefore, CSF believes joint custody is inappropriate for several reasons: it disrupts children’s schedules, children suffer economically, children are exposed to abuse, and even when joint custody is imposed by the courts proportions are likely to resort back to pre-divorce arrangements. Adapting this legislation would be a step backward in creating a workable objective custody standard.

VI. The Approximation Standard is a Step in the Right Direction

A. The Approximation Standard is the Best Alternative

The Principles are a step in the right direction to create a workable, determinate, child custody standard. The answer is not to eliminate the approximation standard in favor of a different standard that will have as many or more problems than the approximation standard. Unfortunately, no standard can create a perfect resolution for every case. The painful fact is it impossible to create a completely satisfactory legal process to cope with two angry people whose

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252 See discussion supra Section II.B.
253 MASON, supra note 48, at 131.
257 This is because joint parenting results in a decrease in child support awards. Id. at 15.
258 Id. at 15-16. CSF believes the current approximation standard provides gender neutral joint decision-making while honoring parents caretaking roles and maintains safety provisions when families experience domestic violence and child abuse/neglect. Id. at 26.
love has turned to hatred. 259 The goal is to create a presumption that allows the proper amount of flexibility with enough determinacy. It is important to note that a strictly determinate standard will not always produce the best results because throughout much of the nation’s history custody cases did have fairly predictable results. 260 Most individuals would agree that a return to a presumption in which custody automatically goes to the father is not the way to go. A proper standard needs to have enough flexibility because families are unique and not every case should be treated the same. The current best interest standard has achieved this flexibility, but it is too discretionary and the problem is that without presumption-based rules every case is treated as if it is unusual. 261 The approximation standard has improved upon the best interest test by focusing courts on past caretaking allocation, which is an objective criterion. This is a step in the right direction. The next step should be to conduct further studies into areas that need further defining.

The success of the standard will also depend upon getting interest groups to support it. The approximation standard is neutral on its face and is designed to treat mothers and fathers equally because the Principles expressly prohibit the court from considering “the sex of a parent or a child.” 262 Fathers will receive the benefit of the standard just as much as mothers if the fathers took care of the children. 263 Child custody is a zero sum game and it is impossible to create a presumption which will lead to a result in which both parents are happy in all cases. 264

260 Bartlelt, supra note 83, at 12.
261 Id. at 17.
262 PRINCIPLES § 2.12(1)(b).
263 Kay, supra note 59, at 34.
264 Scott, supra note 28, at 644.
Gender groups should see that the approximation standard will be mutually beneficial by continuing the relationships that the parents have already created with the children.\textsuperscript{265}

In order to further define the approximation standard an advisory committee should be created to collect research and create a model code to provide further guidelines for determining the allocation of past caretaking. The Principles were a great starting point in creating the foundation of an objective standard, however, more guidance needs to be provided to judges who would apply the standard, and a model code could provide this guidance. The National Council of Juvenile and Family Court Judges created a Model Code of Domestic Violence (“MCDV”) in 1994, which could serve as a guide.\textsuperscript{266} The Model Code was developed with the collegial and expert assistance of an advisory committee composed of leaders in the domestic violence field including judges, prosecutors, defense attorneys, matrimonial lawyers, battered women’s advocates, medical and health care professionals, law enforcement personnel, legislators, educators and others. A similar group of individuals should come together to create a Model Code for child custody. Hard choices and necessary compromises are needed in the area of custody law. In addition, if groups across the board are represented then they will be given a voice, and more likely to implement the decisions. This would create a compromise for conflicting ideals of the gender groups. Therefore, both father’s and mother’s rights groups should be involved in creating a more defined standard, resulting in a positive outcome for both groups.

\textsuperscript{265} Kay, \textit{supra} note 59, at 40.  
\textsuperscript{266} \textsc{Model Code on Domestic and Family Violence} § 401 (Advisory Committee of the Conrad N. Hilton Foundation, Model Code Project of the Family Violence Project 1994).
B. Further Defining Past Caretaking Functions

The Principles acknowledge some parents will disagree on how caretaking roles were previously divided, and this will lead to a contention among parents, but these difficulties must be evaluated in light of alternatives.²⁶⁷ Under the approximation standard, the inquiry into past caretaking roles requires judges to evaluate specific criteria on which concrete evidence is available, and therefore there is greater determinacy than under most standards.²⁶⁸ Judges may still be unclear on how to evaluate past caretaking. Caretaking may have changed throughout the marriage, so it becomes unclear at what point caretaking should be measured.²⁶⁹ The approximation standard must be defined so as to narrow the inquiry into the matters of fact that are least likely to result in bitter dispute.²⁷⁰

In order to create these subsidiary guidelines, the advisory group will need to conduct further studies on how judges should allocate past caretaking. A starting point could be to look at past experiences with the primary caretaker presumption. Judges have measured past caretaking in the past when applying the past caretaking standards, so this is not an entirely new concept.²⁷¹ In Minnesota the primary caretaker exception failed, but in West Virginia it achieved some success for a number of years. An advisory group can learn from these past experiences in determining how past caretaking could be structured.

²⁶⁷ PRINCIPLES § 2.08 cmt. 2.
²⁶⁸ Id.
²⁶⁹ However the principles do state that the court should not take into account the temporary arrangements after the parents separation. Id.
²⁷⁰ Crippen, supra note 70, at 500.
²⁷¹ It is important to note that caretaking duties must be more heavily scrutinized under the approximation standard then they were under the primary caretaker presumption. This is because under the primary caretaker presumption the courts only needed to be determine which parent had been responsible for the majority of the caretaking tasks. Garska, 278 S.E.2d at 357. Under the approximation standard the courts will need to determine the percentage of time that each parent performed caretaking tasks. PRINCIPLES § 2.08.
In applying the past caretaking presumption the Minnesota and West Virginia courts used the same factors in determining past caretaking roles yet Minnesota’s primary caretaker presumption led to an increase in litigation while West Virginia’s did not. In Minnesota there was an increase in litigation because parents argued over who performed the majority of caretaking tasks, and many parents exaggerated their past roles. Some attorneys did believe that the presumption was effective in reducing litigation in Minnesota. The main reason the primary caretaker presumption was more effective in West Virginia was because the West Virginia Supreme Court frequently corrected the trial courts loose application of the presumption, while the Minnesota appellate courts rarely corrected trial court decision making and gave little guidance to trial court in limiting the definition of caretaking. Several West Virginia appellate court cases overruled the trial courts application of the primary caretaker presumption and ensured the presumption was being applied correctly. If the approximation standard is to be applied correctly the appellate courts must correct the trial courts incorrect

272 See factors cited supra note 67.
273 Crippen, supra note 70, at 452.
274 Id. In 1984 Minnesota courts decided nine original custody decisions. Then after the adoption of the primary caretaker presumption the courts decided an average of 30 original custody cases each year from 1986 to 1988. Id at 453.
275 Id. at 455. One study showed that 41% of attorneys believed that the presumption was effective in reducing litigation some of the time, 37% said the presumption was effective most of the time, and 9% said it was clearly effective in reducing litigation. Id.
276 Id. at 471-79.
277 Lounsbury v. Lounsbury, 296 S.E.2d 686, (W. Va. 1982) (reversed the circuit court’s final custody order awarding custody of two infant children to the father because it was obvious that the mother was the primary caregiver before the divorce proceedings arose); Wagoner v. Wagoner, 310 S.E.2d 204, (W. Va. 1983) (reversed circuit court’s final custody order awarding custody of the children to the father because the mother spent more time with the children even though the father spent more time at home, so she was the primary caretaker); Gibson v. Gibson, 304 S.E.2d 336, (W. Va. 1983) (reversed the circuit courts custody award and awarded custody instead to the mother because she was the primary caretaker and the primary caretaker presumption must be followed because the presumption was designed to minimize senseless litigation about the custody of children); Heck v. Heck, 301 S.E.2d 158, (W. Va. 1982) (reversed the circuit court’s final custody award giving custody to the father because there was no evidence that showed the father had a major role in the caretaking of the children, while the mother had been the primary caretaker).
interpretations of the approximation standard, and be willing to provide guidance to the lower courts in applying the standard.

VII. Conclusion

As divorce has increased in the United States it has become increasing important to ensure that custody of children is determined properly. Custody decisions are among the most difficult decisions a parent or judge must make, so proper legal presumptions are needed to improve upon the discretionary best interest standard. The approximation standard is a more determinate standard because it focuses on the objective criteria of past caretaking. The standard’s exceptions and vague language have created discretion, but there remains less discretion in this standard than other alternatives. One scholar has argued that any legislative or judicially crafted custody rule will inevitably lead to the creation of subsidiary discretionary exceptions to the rule.278 The approximation standard is a step in the right direction, and the next step should be to continue to refine the standard to eliminate as much of the discretion as possible.

However, the approximation standard has not achieved a significant amount of success. Even though, it has been adopted in West Virginia it has still not heavily impacted West Virginia case law and gender groups continue to argue over whether the standard should be repealed. Therefore, it is necessary to learn from West Virginia’s experience by looking at why the courts have not applied the standard and why gender groups continue to disagree over the approximation standard. Unfortunately, all parties in child custody disputes cannot be 100 percent satisfied because the child’s time will need to be divided. However, it is clear that the current state of custody law is not appropriate and changes need to be made. Therefore, the

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approximation standard is an improvement upon the best interest standard, but improvements in the approximation standard will need to be continuously made to create a successful legal presumption.