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A Content Analysis of Judicial Decision-Making - How Judges Use the Primary Caretaker Standard to Make a Custody Determination

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A CONTENT ANALYSIS OF JUDICIAL DECISION-MAKING— HOW JUDGES USE THE PRIMARY CARETAKER STANDARD TO MAKE A CUSTODY DETERMINATION†

KATHRYN L. MERCER¹

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† Portions of this article have been extracted from another law review article written by the author, entitled *The Ethics of Judicial Decision-Making Regarding the Custody of Minor Children: Looking at the "Best Interests of the Child" and the "Primary Caretaker" Standards as Utility Rules*, 33 IDAHO L. REV. 389, 391 (1997). This article expands upon her previous discussion of the efficacy of the primary caretaker standard in West Virginia.

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This article is excerpted from a larger piece by the author entitled *Content Analysis of Judicial Decision-Making—How Judges Use the Primary Caretaker Standard to Make a Custody Decision* (1997) (unpublished Ph.D. dissertation, Case Western Reserve University) (on file with the Case Western Reserve University Library).

I wish to thank my Dissertation Chair, Professor John Yankey, the Dissertation Committee members, Professors Kathleen Wells, Mark Singer and Paul Salipante. I also wish to thank my daughters, Cecelia and Dominique, for their patience, and my husband, Guy, for his support. He has often been the primary caretaker in our family over the years.

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I. INTRODUCTION

A. *The Problem*

Following a divorce, families face many adjustments. Issues to be addressed include choosing a custodian for the children, arranging visitation for the non-custodial spouse, and determining child support. Jurisdictions have been struggling to find precise and workable standards to help divorcing parties, and the courts make these arrangements.

West Virginia, for example, uses a non-discretionary, rule-based standard to determine custody; the West Virginia Legislature requires that the child's best interests be considered in all custody disputes.² The West Virginia Supreme Court has interpreted "best interests" as being presumptively satisfied when custody is awarded to the primary caretaker.³ Thus, if fit, the parent who has taken primary responsibility for satisfying the child's physical, social and educational needs will be given custody.⁴

The primary caretaker standard focuses on and awards custody to the parent who provided the physical care and socialization for the child, provided he or she is a fit parent.⁵ In West Virginia, to determine who is the primary caretaker, the court is to look at which parent provides the bulk of the nurturing duties.⁶ Ten duties are to be considered: (1) who prepares and plans meals; (2) who bathes, grooms and dresses the child; (3) who purchases and cares for the child's clothes; (4) who arranges for and drives the child to medical care; (5) who arranges and transports the child to social activities; (6) who arranges for child care; (7) who puts the child to bed and who wakes the child in the morning; (8) who disciplines the child; (9) who educates the child in religion, culture, etc.; and (10) who teaches the child basic reading, writing and math skills.⁷

The primary caretaker standard is loosely based on the psychological parent standard proposed by Joseph Goldstein, Anna Freud and Albert Solnit.⁸ The presumption behind the primary caretaker standard is that children develop a stronger relationship

2. See W. VA. CODE ANN. § 48-2-15 (Michie 1988).

3. See *Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981).

4. See W. VA. CODE ANN. § 48-2-15B (Michie 1988).

5. See *id.*

6. See *Garska*, 278 S.E.2d at 363.

7. See *id.*

8. JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 40-43 (1979).

with the parent who provides daily care and that relationship must be preserved after a divorce.⁹

In 1926, Sigmund Freud suggested that the dependence and helplessness of infants burden the parents with the responsibility for the offspring's survival and well-being, and "assure[s] that the day-to-day ministering to the child's multiple requirements will turn the physical tie between them into a mutual psychological attachment."¹⁰ The child subsequently becomes attached to the parent who provides basic care. It is also suggested that

[a]ttachment is crucial to the survival and development of the infant. . . . The power of this attachment is so great that it enables the mother and father to make the unusual sacrifices necessary for the care of their infant day after day, night after night: changing diapers, attending to his crying, protecting him from danger, and giving feeds in the middle of the night despite their desperate need to sleep.¹¹

Later in the child's life, this psychological connection provides the basis for the child's successful socialization.

This original parent-infant tie is the major source for all the infant's subsequent attachments and is the formative relationship during which the child develops a sense of himself. Throughout his lifetime the strength and character of this attachment will influence the quality of all future ties to other individuals.¹²

Scholars argue that the psychological parent should be afforded an "uninterrupted *opportunity* to meet the developing physical and emotional needs of their child so as to establish the familial bonds critical to every child's healthy growth and development."¹³ They warn against custody standards which permit case-by-case determinations of what is best for the child, thus investing judges with unlimited discretion to impose their own child-rearing preferences.¹⁴ Such discretion and intervention risk denying a child the continuity of affectionate, emotional care so needed for their optimal development. The authors of *Before the Best Interests of the*

9. See *id.* at 40.

10. *Id.* at 8.

11. MARSHALL H. KLAUS & JOHN H. KENNEL, *BONDING: THE BEGINNING OF PARENT-INFANT ATTACHMENT* 2 (1983).

12. *Id.*

13. GOLDSTEIN ET AL., *supra* note 8, at 9-10.

14. See *id.* at 17.

Child conclude "the disruption of developmental processes which might otherwise carry the child forward toward normal adulthood is a risk that no child should be forced to take."¹⁵

Citing "substantial research" which has "confirmed that young children, as a result of intimate interaction, form a unique bond with their primary caretaker," the West Virginia Supreme Court explained the psychological importance of the primary caretaker as "an essential cornerstone of a child's sense of security and healthy emotional development."¹⁶

At the earliest stage, [the attachment to a primary caretaker] is critical to the child's learning to place trust in others and to have confidence in her own capacities. Later, it plays a central role in the child's capacity to establish emotional bonds with other persons. The sense of trust in others and in self that the attachment provides may also affect the child's development of intellectual and emotional skills. The growing child passes through many developmental stages, each requiring her to acquire critical skills and capacities. . . . The original bond of the child with the primary caretaker is believed to have an important continuing effect on the child's ability to pass through each stage with success.¹⁷

For several years, Minnesota also used the primary caretaker standard to determine custody. The Minnesota Supreme Court held that primary caretakers are essential to a child's emotional and psychological stability. In *Pikula v. Pikula*,¹⁸ the court stated:

The importance of emotional and psychological stability to the child's sense of security, happiness, and adaptation that we deemed dispositive in *Berndt* is a postulate embedded in the statutory factors and about which there is little disagreement within the profession of child psychology. . . . For younger children in particular, that stability is most often provided by and through the child's relationship to his or her primary caretaker—the person who provides the child with daily nurturance, [sic] care and support. As we further noted in *Berndt*, a court order separating a child from the primary parent could thus rarely be deemed in the child's best interests.¹⁹

15. *Id.* at 44.

16. *David M. v. Margaret M.*, 385 S.E.2d 912, 916-17 (W. Va. 1989) (footnotes omitted).

17. *Id.*

18. 374 N.W.2d 705 (Minn. 1985).

19. *Id.* at 711.

Later, the Minnesota Court of Appeals reaffirmed the rationale for the presumption.²⁰

Besides preserving the affectionate bond between the caretaking parent and the child, additional benefits of a presumption in favor of the primary caretaker exist: (1) husbands will be deterred from using "the threat of protracted and emotionally damaging custody battles to extract monetary concessions from their wives in divorce settlements;"²¹ (2) the standard will eliminate the need for a trial with expert witnesses who testify to the child's best interests;²² (3) mothers and fathers will not be penalized on account of their gender;²³ and (4) custody proceedings will be "shorter, more economical [and] less acrimonious . . . leaving more dollars in the marital estate to be divided."²⁴

In *Garska*,²⁵ the Supreme Court of West Virginia summarized its adoption of the primary caretaker standard: (1) to prevent children from being used as sacrificial pawns in a custody battle; (2) to provide judges with tools to make a more predictable custody result; and (3) to promote settlement of cases.²⁶

Despite many positive outcomes deriving from the use of the primary caretaker standard,²⁷ Professor Mary Becker has suggested that judicial bias continues to pervade the standard due to its gender neutrality.²⁸ In her study, of the thirty-five reported child custody decisions since the adoption of the primary caretaker

20. See *Brauer v. Brauer*, 384 N.W.2d 595, 597 (Minn. Ct. App. 1986) (citing *Pikula v. Pikula*, 374 N.W.2d 705, 711-12 (Minn. 1985)). The *Brauer* court held that:

[P]lacing the child with the primary parent best serves the child's interests because of the intimate relationship that exists between the child and the primary parent. It is in the best interests of the child that there be a continuity of caregiving and that there be stability in the child's life. That continuity and stability is best achieved by salvaging the child's relationship with the primary parent.

Id.

21. Dan O'Hanlon & Margaret Workman, *Beyond the Best Interest of the Child: The Primary Caretaker as Doctrine in West Virginia*, 92 W. VA. L. REV. 355, 371 (1990) (noting Justice Neely's concerns in *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981)).

22. See *id.* O'Hanlon and Workman note that the *Garska* court characterized "trial by experts" as being "expensive, intellectually dishonest and emotionally destructive of the very children we are purporting to protect." *Id.*

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

24. O'Hanlon & Workman, *supra* note 21, at 372.

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

26. See *id.* at 361-62.

27. See Richard Neely, *The Primary Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 180-86 (1984).

28. See Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 190-203 (1992).

standard in West Virginia in 1981, Becker reports that "68% of the cases appealed involved fathers who received custody at the trial court level even though the mother seems to have been the primary caretaker and fit."²⁹ She suggests that judicial bias in favor of the father is most evident in the circumstances where: "(1) the fathers did more than the average father; (2) the mothers voluntarily separated from the children at some point for some reason; (3) the mothers were sexually active outside the marriage."³⁰

B. Focus of the Study

This study examines how the primary caretaker standard is used in appellate court decisions and makes some predictions as to whether this standard has led to determinacy and consistency in judicial custody decision-making. Reported (published) custody cases in West Virginia, decided between January 1981 and July 1995 which utilized the primary caretaker presumption, were examined using the research techniques of virginity analysis, content analysis and map analysis.

First, cases were coded for the judge's analysis of the ten primary caretaker duties specified by the *Garska* decision. Coders determined which of the ten factors were manifestly or latently discussed and which factors influenced the court's decision. They then recorded whether that category was considered in the decision. Coders also identified additional factors which influenced the court. Second, the cases were content analyzed for pre-disposing conditions which influenced how the court reached a custody decision. Third, the cases were content and map analyzed for trends in decision-making.

Specifically, this study concentrates on two questions: First, how do West Virginia appellate courts decide who is the primary caretaker? That is, have West Virginia courts been using the primary caretaker standard by systematically applying the ten factors? The answer to this question lies in determining which factors are being used and to what degree and if other factors not in the list are being considered. Second, are there analytical trends and predisposing conditions which help predict patterns of decision-making?

29. *Id.* at 194.

30. *Id.* at 195-96.

C. *Implication of the Study*

For the last decade, legislators, judges and scholars have been asking the questions: Which standard is better—the indeterminate best interests of the child standard or the determinate primary caretaker presumption? How can we operationalize “best?” Information as to how child custody decisions are made using the standards is needed before either of these questions can be answered. “[T]here has been a dearth of empirical data on custody issues. Often decisions [as to which standard should be used] have been based on impressionistic observations and anecdotal data because valid empirical data have not been available.”³¹ The need for this type of information is great because more than one million children a year, and almost forty percent of children to a marriage, will experience a divorce.³²

This study attempts to increase our knowledge about the custody decision-making process. It singles out the primary caretaker standard and its use in West Virginia courts over a fourteen year period (1981-95). The goal of this article is to illuminate how judges are using the ten factor, rule-based primary caretaker standard and whether some of the factors are used more regularly or are more determinative of a custody award than others.

Additionally, this study begins to predict whether rule-based decision guidelines effectively eliminate judicial bias and discretion which is inherent in the best interests standard which it replaced. A principle complaint about judicial discretion is that it can be used to reach a custody decision which ignores or underestimates the importance of the child's attachment to the primary parent. Destruction of this special psychological caretaking parent-child bond can undermine the child's development and socialization.

Alternatively, even if the bond is considered, under an individualized approach to the best interests of the child standard, the court explores “the dark recesses of psychological theory to determine which parent will, in the long run, do a better job.”³³ This inquiry is intrusive and requires expert testimony which increases the hardship for all concerned.

To arrive at a trustworthy opinion of a particular child's true mental state as to who are his psychological parents is a matter

31. Stephen J. Bahr et al., *Preference Made a Difference?*, 28 FAM. L.Q. 247, 265-66 (1994).

32. *See id.* at 247.

33. *David M. v. Margaret M.*, 385 S.E.2d 912, 918 (W. Va. 1989).

which taxes the skills of even the most experienced clinicians—skills not easily taught and usually beyond the training of courts, social service personnel, and other mental health professionals. Such opinions are often not obtainable at all. More than that, the many necessary intrusive sessions with a child that a clinician requires before rendering an opinion would create intolerable periods of uncertainty.³⁴

When psychological information is used to determine the best interests of the child, the mental health of the child can be undermined. "In much the same way that an artillery battery can 'liberate the hell out of' a peaceful hamlet, experts can create emotional imbalances in the very children they are trying to protect."³⁵ In sum, if the primary caretaker standard is being consistently used and is leading to predictable results, it is a useful rein on unfettered judicial discretion.

Narrowly, this study will help fathers and mothers who live in West Virginia and who are divorcing to understand how custody will be determined and what evidence they must present to the court if they wish to be the custodial parent. The more knowledge parties have about their options, the less uncertainty and stress they will face in the divorce process. This certainty may also foster settlement rather than custody battles.

Additionally, this study will assist lawyers who are representing divorcing parties in West Virginia to plan their case and to predict the result of a custody battle for their clients. It also will provide guidance as to whether a trial court decision which is unfavorable to one side should be appealed. Protracted family law litigation is painful and costly to the parties and the children, so if proceedings are fruitless, both human and material resources are wasted.

Finally, it is hoped that this study will lead to progress in the continuing struggle throughout our society and legal system to make custody decisions less traumatic and more beneficial to children, and fair to parents. "What is essential for reform is information. . . . Only when acting on the basis of full information can policymakers ensure that divorce law truly comports with the needs and interests of American families."³⁶ This study will help inform

34. GOLDSTEIN ET AL., *supra* note 8, at 43.

35. *David M.*, 385 S.E.2d at 919.

36. Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AT THE CROSSROADS* 101 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

legislators whether adoption of the primary caretaker standard presumption is a viable alternative to the prevailing best interests standard. Sugarman and Kay suggest that "divorce reform is now at an important crossroads."³⁷ This study seeks to shed some light on one path that future reform might take.

Part II of this article explores the historical development of custody decision-making and demonstrates how custody decisions have evolved from rule-based gender presumptions to an indeterminate focus on the best interests of the child. It then looks at the evolution of the primary caretaker standard as a reaction to the indeterminacy of the best interests of the child standard.

Part III reviews both prior studies of divorce/custody decisions and commentaries about the primary caretaker standard. It begins with a brief look at how judges decide cases and makes some limited comments about research on judicial decision-making in the child custody field. Then, it summarizes what we do not know about how the primary caretaker standard works and suggests how this study will fill some of those gaps.

Part IV presents research questions, hypotheses and the theoretical framework used in the study. The study combines quantitative and qualitative techniques and utilizes both social scientific and legal perspectives to analyze forty-nine custody cases from West Virginia which were decided under the primary caretaker standard.

Part V reports research findings. Part VI discusses the results, concludes and suggests opportunities for further research.

II. BACKGROUND: THE EVOLUTION OF CUSTODY DECISION-MAKING AND EMERGENCE OF THE PRIMARY CARETAKER STANDARD

Judges operate from a historic context. Understanding that historic context is key to studying the standard which a judge is applying to a situation. Thus, one must begin by looking at the evolution of custody decision-making in the United States, and at how West Virginia created the primary caretaker standard in 1981. More particularly, because the primary caretaker standard was adopted to eliminate the unpredictability of the best interests of the child standard,³⁸ a further look at the evolution of the best interests

37. Stephen D. Sugarman, *Introduction to DIVORCE REFORM AT THE CROSSROADS* 5 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

38. See *Garska v. McCoy*, 278 S.E.2d 357, 361 (W. Va. 1981).

standard and an analysis of how it promoted indeterminate, discretionary decision-making is necessary.

A. *Historical Development of the Best Interests of the Child Standard in Custody Disputes*

The prevalent ethical principle governing child custody decisions today is that the best interests of the child should guide decision-making. Application of this doctrine is varied.

Should the decisionmaker be primarily concerned with the child's happiness or with the child's spiritual and religious training? Is the primary goal long-term economic productivity when the child grows up? Or are the most important values of life found in warm relationships? In discipline and self-sacrifice? Are stability and security for a child more desirable than intellectual stimulation?³⁹

As this quotation reveals, alternative moral theories which can be utilized in decision-making exist. A judge's moral stance and her view of her role as a decision-maker influence how she determines which parent obtains custody after a divorce.⁴⁰ Different judges can reach different custody results given the same fact situation if their ethical perspectives are different, and if the custody standard allows them to exercise judicial discretion. This indeterminacy is the major criticism of the best interests of the child custody standard.

This section of the article reexamines the historical values which operate in custody awards in order to identify distinct moral theories in judicial decision-making regarding the custody of minor children. Next, the article will explore the limitations and barriers involved in using the best interests standard effectively. Finally, the article will demonstrate how the primary caretaker standard is one of several proposals to create more determinate custody decision-making.

1. *Historical Underpinnings of the Best Interests Standard*

This part of the paper looks at the development of custody decision-making from the late seventeenth century to the 1980s. Value clarification is used to understand and classify the often

39. ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN 18 (1985).

40. See *id.* at 25.

conflicting value premises which operate in a best interests of the child custody decision, and is used to specify the moral theory which may be historically operating in the decision. Value clarification essentially requires: (1) identifying the objectives of a particular ethical position; (2) identifying the stakeholders who will affect and be affected by the implementation of the position; (3) specifying the values underlying and the level of each stakeholder's commitment to the position; and (4) classifying these value premises.⁴¹

a. *Increasing Judicial Intervention in Custody Decisions: Patria Potesta vs. Parens Patriae (1640-1770)*

Custody law started with the natural law concept of *patria potestas*, which means paternal power. A father had a near absolute right to his children, whom he viewed as chattel.⁴² The first stakeholder in a custody decision was the father, who had an economic and legal right to his child's services.⁴³ The courts were powerless to interfere with the natural relationship between a father and his children because of its foundation in religion.

[T]he Divine Command Theory states that morality is not based on consequences of actions or rules, nor on self-interest or other-interestedness, but rather on something "higher" than these mere mundane events of the imperfect human or natural worlds. It is based on the existence of an all-good being or beings who are supernatural and who have communicated to human beings what they should do and not do in a moral sense. In order to be moral, then, human beings must follow the commands and prohibitions of such a being or beings to the letter without concerning themselves with consequences, self-interest, or anything else.⁴⁴

In the late seventeenth century, a conflicting doctrine developed in the Chancery Courts of England—*parens patriae*—the State as parent.⁴⁵ Courts, as a second stakeholder, began to intervene in custody matters to protect the welfare of the child. The *parens patriae* doctrine evidenced the State's recognition of both its

41. See WILLIAM N. DUNN, PUBLIC POLICY ANALYSIS 254 (1981).

42. See Joan B. Kelly, *The Determination of Child Custody*, 4 THE FUTURE OF CHILDREN 121 (1994); Becker, *supra* note 28, at 168.

43. See Maurice Wilcox, Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917, 920 (1976).

44. JACQUES P. THIROUX, ETHICS: THEORY AND PRACTICE 60-61 (1986).

45. See Wilcox, *supra* note 43, at 920.

interest in children, and, secondarily, its sense of responsibility for them.⁴⁶ This paternalistic interference with and potential restriction on parental rights could be seen as the beginning of a utilitarian approach to custody decisions. The establishment of the Plymouth Colony brought English custody law, and this utilitarian approach, to the new world.

In pre-revolutionary America, ethical decision-making regarding children was left to the courts.⁴⁷ First, Plymouth Colony codified the doctrine of *parens patriae* by permitting community intervention upon parental neglect. "When 'persons in this Government are not able to provide competent and convenient food and raiment for their Children,' the latter might be taken in hand by local officials and placed in foster families where they would be more 'comfortably provided for.'"⁴⁸ Second, although paternal authority continued to reign, the colonial authorities set up the courts as the final arbiter of familial disputes.⁴⁹ This was to say that the authorities, not the parents, should evaluate the family relationship and chastise the disobedient child if necessary.⁵⁰

*b. Children as Chattel Become Children as Potential
Citizens Protected by the State (1740-1840)*

The issue of child custody in the post-Revolutionary era (1779-1840) might be classified as a battle between competing stakeholders for the right to the child's earnings. The stakeholders at this point were the child as an emerging adult, the state with its welfare and utilitarian concerns, and the father.

Children were regarded primarily as revenue-generating property during the infancy of the United States. Parents farmed their children out between the ages of seven and fourteen; they were apprentices thereafter.⁵¹ Most youth were incorporated fully into the work force by age fifteen.⁵² Ironically, children of the post-Revolutionary period "enjoyed" greater responsibility and independ-

46. *See id.*

47. *See* JOHN DEMOS, *A LITTLE COMMONWEALTH* 105 (1970) (quoting BRIGHAM, *THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH* 245).

48. *Id.*

49. *See id.* at 101.

50. *See id.* If a child grossly disobeyed his parents, "his Father and Mother, . . . [shall] lay hold on him, and bring him before the Magistrates assembled in Court, and testify unto them, that their Son is Stubborn and Rebellious, and will not obey their voice and chastisement." *Id.*

51. *See* JOSEPH F. KETT, *rites of passage* 18 (1977).

52. *See id.*

ence from parental and state control than did children of subsequent eras, up until the present time.⁵³

At this time, utilitarian concepts continued to influence judicial decisions. Courts seemed to have had the power not only to make custodial determinations, but also to evaluate the parent-child relationship, to provide for the welfare of the child, and to ensure the betterment of society.

One ephemeral utility or value which was to be maximized by the courts when making a custody determination was:

the promotion of human interests or welfare. The most significant difference between this conception and both the happiness and desire [utility] conceptions is that what is in a person's interests or promotes his welfare need not solely depend on what he happens now to want or enjoy. . . . The interest or welfare conception, with its appeal to some normative theory of human nature, avoids [this] commitment to the status quo and the preferences fostered there. . . .⁵⁴

If the status quo could be ignored in order to promote social welfare, the court could reach a decision which ignored the paternal preference. Therefore, the view of the father as sole custodian increasingly could be questioned. The interests of society may have been to have a child emancipated, raised by the mother, or raised in a institution. Judicial discretion thus became a popular concept.

The *patria potestas* doctrine, making the father the sole custodian, continued, however, both in statutory and common law. Yet, by 1840, the courts were subordinating this principle to the interests of the infant, giving the mother custody under this justification.⁵⁵ In *Green*, Justice Story explains:

53. See *id.* at 111. Kett concludes that:

Flight from farm to city, the spread of commercial opportunities, and exposure to intense moralism all rendered the period between 1790 and 1840 a distinctive era for young people. The condition of coming of age in 1840 differed radically from those of 1740 or 1640. Yet, viewed from a different perspective, the entire period between 1640 and 1840 had an underlying unity, for prior to 1840 the immediate environment of young people was likely to be casual and unstructured rather than planned or regulated. In families, frequent departures from home put a limit on direct applications of parental discipline. In schools, brutality and burlesque mixed with slackness and informality.

Id.

54. Dan W. Brock, *Utilitarianism*, in *AND JUSTICE FOR ALL: NEW INTRODUCTORY ESSAYS IN ETHICS AND PUBLIC POLICY* 217, 223 (Tom Regan & Donald Van De Veer eds., 1982).

55. See *U.S. v. Green*, 26 Fed. Cas. 30 (1824), reprinted in 1 *CHILDREN AND YOUTH IN AMERICA* 372 (Robert Bremner ed., 1970).

As to the question of the right of the father to have custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant . . . When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all circumstances, and ascertain whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes. . . . It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody.⁵⁶

c. *The Birth of Best Interests Policy* (1840-1870)

The period from 1840 to 1870 is characterized by the emergence of a child-centered focus to custody decision-making and increased judicial discretion. The child became a recognized stakeholder in its own welfare. Additionally, the child's welfare was seen less in terms of economic productivity and more in terms of personal growth and development.

The ante-bellum and post-Civil War eras significantly changed the lives of middle- and upper-class youngsters. The decline of apprenticeships and the rise of lengthened academic and professional education made these youths more dependent on familial support for longer periods of time.⁵⁷ Only working-class children remained in much the same situation as their predecessors. "At a time when increasing numbers of middle-class parents were sacrificing the labor of the children in favor of prolonged education, most working-class parents and children remained caught up in the sort of productive-contractual relationship that had once characterized family life in all social classes."⁵⁸

Nineteenth century psychiatrists recommended that parents protect their sons and daughters until adolescence from excessive pressures, undue academic acceleration, and early labor requirements, while also maintaining structure and discipline in their offspring's lives.⁵⁹ The absence of a well-regulated environment for

56. *Id.*

57. See KETT, *supra* note 51, at 171-72.

58. *Id.* at 170.

59. See *id.* at 134-35.

the child and the adolescent would lead to disease, hysteria and insanity.⁶⁰

Starting about 1840, a mother became a recognized stakeholder in the custody of her children.⁶¹ The "cult of womanhood" proclaimed woman to be the prime nurturer of children, and, hence, a suitable custodian.⁶² Women, it was recognized, could shield children from the harshness of the world.

Simultaneously, the State increased its paternalistic efforts to regulate children's welfare. In 1840, Jeremy Bentham spoke of the "feebleness of infancy," referring to children from birth through adolescence as demanding:

a continual protection. Everything must be done for an imperfect being, which as yet does nothing for itself. The complete development of its physical powers takes many years; that of its intellectual faculties is still slower. At a certain age, it has already strength and passions, without experiencing enough to regulate them. Too sensitive to present impulses, too negligent of the future, such a being must be kept under an authority more immediate than that of the laws⁶³

Society's response to the words of Bentham, and others like him, called for a "rising importance attached to the total regulation of the child's environment."⁶⁴ The State could, and should, intervene to promote the development of good citizens. Thus, by 1850, a duality existed between the growing state intervention and the laissez-faire approach to private family maintenance. "One strand emphasized the private family, including the responsibility of parents for children, the primary role of mothers, and the separation of the child-centered family from the harsh world outside. The second stressed the responsibility of the state when families failed to meet their responsibilities. . . ."⁶⁵

60. *See id.*

61. *See* MICHAEL GROSSBERG, *GOVERNING THE HEARTH* 238-42 (1985).

62. *See generally* CATHERINE BEECHER, *TREATISE ON DOMESTIC ECONOMY* (1841).

63. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 135 n.2 (1979) (citing JEREMY BENTHAM, *1 THEORY OF LEGISLATION* 248 (1840)) [hereinafter *BEYOND THE BEST INTERESTS*].

64. KETT, *supra* note 51, at 112.

65. W. NORTON GRUBB & MARVIN LAZERSON, *BROKEN PROMISES* 19 (1982). Interestingly, this value duality continues to divide the implementation of best interests policy today.

d. *Conflicting Moral Values from 1850s on—Natural Rights vs. Utilitarian Concerns*

As early as the 1850s, judicial applications of natural rights competed with the more utilitarian concerns of society.⁶⁶ On the one hand, the court was to apply the dictates of natural law—"father must get custody," "mother must get custody," or "the State has a right to decide with whom the child should live."⁶⁷ On the other hand, the court could weigh the utilitarian concerns of society—"what would be best for the child and society?"⁶⁸

With increased judicial discretion and the new child-centered focus came a conflict of moral decision-making. Three conflicting natural rights concepts evolved from a best interests approach to custody decisions: (1) a child's right to financial support; (2) a child's right to choose which parent with whom to live; and (3) the mother's and father's equal rights to request custody of a child.

First, New York courts pioneered the parental legal obligation to support children throughout their minority in the 1850s.⁶⁹ As courts recognized a child's legal right to support, they recognized children as individuals with rights that must be protected and enforced.⁷⁰ This recognition represents a natural rights moral stance in that the child is seen as an entity of worth, dignity and intrinsic value to be respected.⁷¹

Second, children were occasionally given a voice in deciding with which parent they should live.⁷² As to the child's right to choose either parent, an author wrote:

It seems that where the child is old enough to choose for himself, the law allows him to do so, but when too young to give evidence of any choice, the Courts exercising a high discretionary power, although far from disregarding the abstract right of the father, compel this right to give way when the public good and best interest of the child absolutely demand it.⁷³

66. See MAXWELL H. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY* 119 (1976).

67. See *supra* notes 42-50, 55-62 and accompanying text.

68. See *supra* notes 54-56 and accompanying text.

69. See BLOOMFIELD, *supra* note 66, at 119.

70. See *id.* at 117-20.

71. See *id.*

72. See *The Rights and Liabilities of Parents in Respect of Their Minor Children*, 1 AMER. L. REG. 641, 644-45 (1853).

73. *Id.* at 645.

The third natural rights concept which emerged consisted of the belief that mothers and fathers had an equal claim to custody.⁷⁴ The natural law presumption that the father was the ideal custodian faded as the best interests of the child doctrine gained momentum.⁷⁵ For example, the Massachusetts Legislature codified the basis on which a custody award should be made in 1855. "[T]he rights of the parents to their children, in the absence of misconduct, *are equal*, and the happiness and welfare of the children are to determine the care and custody."⁷⁶

At the same time as the rise in a greater variety of natural laws operating in and shaping custody decisions occurred, the State began claiming discretionary control of families in the name of the best interests of children.⁷⁷ The shift from the father's absolute right to custody to the best interests test can be characterized "as a shift in principles governing the distribution of property interests in children by way of the state's asserting its own proprietary interest in them as future citizens."⁷⁸ The advancement of children's rights through the best interests standard can be seen, then, as a by-product of a utilitarian approach, rather than purely an acknowledgment of a child's intrinsic values. The court opinion in *Mercein v. Barry*,⁷⁹ supports this theory.

The interest of the infant is deemed paramount to the claims of both parents. . . . By the law of nature, the father has no paramount right to the custody of his child. . . . There is no parental authority independent of the supreme power of the state. . . . The moment a child is born, it owes allegiance to the government of the country of its birth, and is entitled to the protection of that government. And such government is obligated by its duty of protection, to consult the welfare, comfort and interests of such child in regulating its custody during the period of its minority.⁸⁰

On the other hand, the viewpoint reflected in this quotation perhaps is not a utilitarian one. Maybe it reflects yet another natural law—the State as the supreme arbiter of all relationships.

74. See BLOOMFIELD, *supra* note 66, at 118.

75. See *id.* at 119.

76. Reprinted in BLOOMFIELD, *supra* note 66, at 119 (emphasis added) (footnote omitted).

77. See MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY* 82 (1991).

78. *Id.* at 83.

79. 25 Wend. 64 (1840), reprinted in BLOOMFIELD, *supra* note 66, at 118-19.

80. *Id.*

Either way, by the 1870s, four recognized value stakeholders existed in custody decisions—the mother, the father, the child and the State. The next 100 years would witness the balancing of their competing interests.

e. Courts Engage in a Utilitarian Cost-Benefit Analysis Which Balances the Competing Parents' Custody Rights and Wishes of the Child (1870-1900)

When Joel Bishop surveyed custody law in 1873, he found that the “leading doctrine” was to “consult the good of the children rather than the gratifications of the parents.”⁸¹ Nonetheless, a father’s primary custody right to his children—*patria potestas*—continued to pervade much of the law. In the 1870s, courts actively screened custody cases, voluntarily exercising their discretionary prerogatives and awarding custody to the father for the “good of the child.”⁸² A tender-years concept also was emerging—that is, “[d]uring the very young years, especially in the case of girls, the mother can best take care of [children] in ordinary circumstances. But in later years they still need the sterner discipline of the father.”⁸³

Bishop quotes from an English case, *Anonymous*,⁸⁴ to explain when the father’s primary right of custody should yield.

When the court refuses to give possession of his children to the father, it is the paramount duty of the court to do so for the protection of the children themselves; and the court will perform that duty if the father has so conducted himself, as that it will not be for the benefit of the infant that they should be delivered to him,—or if their being with him affects their happiness,—or if they cannot associate with him without moral contamination,—or if, because they associate with him, other persons will shun their society.⁸⁵

In a utilitarian manner, the court here is engaged in weighing the costs and benefits to the child of being with the father. Bishop’s words also reflect the patriarchal norm of the time: men had to

81. JOEL BISHOP, 2 BISHOP ON MARRIAGE 446 (1873) (footnote omitted).

82. *Id.*

83. *Id.* at 457.

84. *Anonymous*, 2 Sim. N.S. 54, 11 Eng. L. & Eq. 281, 290, reprinted in JOEL BISHOP, 2 BISHOP ON MARRIAGE 444 (1873).

85. *Id.*

relinquish some custody over the private/domestic sphere where women reigned and were sheltered.

Assigning women care of younger children in the home was consistent with the notion that women needed to be sheltered and protected so that they could fulfill their destiny and reproduce and nurture the species. Both the social and legal systems recreated Motherhood in a manner which enhanced women's position concerning their children both in marriage and at divorce, provided they did not violate patriarchal norms such as fidelity, temperance, and so on.⁸⁶

The best interests standard had developed more fully by 1890.⁸⁷ As custody law evolved, the law "reduced the rights of parenthood generally."⁸⁸ Indeed, the "judicially created standards of child welfare and parental fitness" took "the ultimate decision of child placement out of the hands of both parents."⁸⁹ Children, although not seen as parties to a divorce, were allowed the opportunity to voice an opinion, if of sufficient maturity.⁹⁰ Children fourteen and older were consulted as to which parent they wished to live with.⁹¹

An ambivalent conception of children also surfaced through Freudian psychology and subsequently impacted the custody law and when a child could voice an opinion.

Freudian theories, for example, resurrected the view of the child as antisocial and dominated by a mass of uncontrolled impulses that had to be firmly redirected in order to achieve a healthy adult. But even more often, Freud was interpreted as calling for greater freedom for children if their personalities were not to be repressed.⁹²

Consequently, a child's age became the critical indicator of the weight (in terms of utility) to be accorded a child's wish.⁹³

However, the child's wish was not the ultimate determinant in a custody decision; rather, it was merely a utility factor to be added

86. FINEMAN, *supra* note 77, at 83 (footnote omitted).

87. See GROSSBERG, *supra* note 61, at 281.

88. *Id.* at 248.

89. *Id.*

90. See *id.* at 259 n.56.

91. See JAMES SCHOUER, 2 MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS 2025 (1870).

92. GRUBB & LAZERSON, *supra* note 65, at 86.

93. See SCHOUER, *supra* note 91, at 2025.

to a scale of "greater benefits."⁹⁴ The "true interest of each child," as ascertained by the court, continued to govern the custody decision.

Fault of one or the other spouse, and the obvious unfitness of either or both to be guardian of the child's morals or maintenance, are considerations; so is the sex of the child. An equal, or nearly equal, division of the offspring is appropriate where blame is not great on either side; tender infants and young children to the mother, boys to the father. The common-law preference of father to mother . . . all these furnish suggestions, variable to the circumstances, and calling for both a humane and just exercise of this painful judicial discretion.⁹⁵

f. Expansion of the State's Interest in Retaining the Discretionary Best Interests Standard and Entrenchment of the Tender Years Presumption (1900-1960)

The first two decades of the 1900s "witnessed the appearance of both the institutions and psychology that were to govern the social treatment of youth for much of the twentieth century. . . . A biological process of maturation became the basis of the social definition of an entire age group."⁹⁶ The prevailing child rearing ideology lengthened the dependent, non-productive relationship between parent and child. Leaders of the day advocated for a "republican household in which child rearing had become the most vital responsibility. As legislators and judges subscribed to this idea of the home, they circumscribed parental (particularly paternal) sovereignty, and expanded filial and maternal rights."⁹⁷ The decline of paternal authority and the increase of authority over children at the beginning of the new century led to an increase "in judicial discretion over child placement."⁹⁸

The widespread desire to use the law to encourage proper family life led to statutory directives and judicial decisions that subjected parents and children to ever-tightening controls. . . . The standards placed all parents—including mothers—and

94. See GROSSBERG, *supra* note 61, at 259 n.56.

95. SCHOUER, *supra* note 91, at 2025-26.

96. KETT, *supra* note 51, at 215 (footnote omitted).

97. GROSSBERG, *supra* note 61, at 281.

98. *Id.* at 283.

custodians at the mercy of judicial assessments of their capacity to rear the nation's free citizens.⁹⁹

The rise of a family court system, beginning in Buffalo in 1909, allowed for further expansion and entrenchment of the best interests standard.¹⁰⁰ "Early in the twentieth century, most courts adopted a new parental preference derived from the child's best interests."¹⁰¹ Indeed, as courts looked for simpler rules to apply to guide decision-making, they increasingly applied the tender years doctrine. This doctrine offered a presumption that children of young years would be better off residing with their mother who was,¹⁰² at that time, the recognized best provider of love and nurturing.

i. Widespread Use of Judicial Discretion to Promote Citizenship

A unique, specialized court system facilitated the wide-spread use of the best interests of the child standard as the penultimate inquiry in nearly all custody decisions—neglect and divorce cases alike. With the creation of the juvenile court system came the justification for the extension of state control into all aspects of family life, under the umbrella of *parens patriae*.¹⁰³ "The welfare of future generations is not a private but a social matter. It is a proper task of society, acting through its government, to ensure that the members of the next generation are not physical or psychological cripples due to the ignorance, negligence or even indifference of parents."¹⁰⁴ Also, the best interests concept of the twentieth century, "though vague, suggested for the first time that a child has rights and needs independent of those of his parents and that it is not only in children's interests but in society's long-range interests to raise healthy citizens and, therefore, to make custody decisions based on children's needs."¹⁰⁵

99. *Id.*

100. See SUSAN TIFFIN, IN WHOSE BEST INTEREST?: CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 160 (1982).

101. Gary Crippen, *Stumbling Beyond the Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 433 (1990).

102. See Marcia O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, 495 (1987).

103. See GROSSBERG, *supra* note 61, at 254-55.

104. Michael D. Bayles, *Marriage, Love, and Procreation*, in CONTEMPORARY READINGS IN SOCIAL AND POLITICAL ETHICS 424, 431 (Brodsky et al. eds., 1984).

105. SUZANNE RAMOS, THE COMPLETE BOOK OF CHILD CUSTODY 35 (1979).

The court's intuition, based on cultural norms as to how to raise responsible citizens, played a key role in custody determinations.

Intuition should not be regarded as a quasi-miraculous flash of insight standing by itself and not essentially linked with any other thought process at all. It presupposes at least a rational selection between different aspects of the situation, whether this is done instantaneously or gradually, and it is certainly affected deeply by our previous experience, thought and action.¹⁰⁶

A judge's intuition is a judge's discretion to decide, independent of the parties' wishes or the dictates of a pre-ordained law.

In sum, the best interests standard could be viewed as a form of ethical egoism—serving the greatest good of the State. “Universal egoism maintains that everyone (including the speaker) ought to look after his own interests and to disregard those of other people except in so far as their interests contribute towards his own.”¹⁰⁷ The State's own egocentric interest is to foster responsible citizenship. Accordingly, judges should wield their discretion to foster the making of model citizens by awarding custody to the “fit” parent, or even to third parties, if both parents were unsuitable for the custodial role.

In the 1970s, the model of the State as parent and as maker of model citizens was increasingly rejected by liberals and conservatives alike as being overly paternalistic. It was suggested that the courts focused on the utility of their own interests (ethical egoism) instead of actually looking at the good of the whole (ethical universalism).

To characterize this transformation in summary fashion, there now exists a wide-spread and acute suspicion of the very notion of doing good among widely divergent groups on all points of the political spectrum. To claim to act for the purposes of benevolence was once sufficient to legitimate a program; at this moment it is certain to create suspicion. To announce that you are prepared to intervene for the best interests of some other person or party is guaranteed to provoke the quick, even knee-

106. A.C. Ewing, *Ethical Intuitionism*, in AN INTRODUCTION TO ETHICS 161, 164 (Robert Dewey & Robert Hurlbutt III eds., 1977).

107. Brian Medlin, *Ultimate Principles and Ethical Egoism*, in AN INTRODUCTION TO ETHICS 209 (Robert Dewey & Robert Hurlbutt III eds., 1977).

jerk, response that you are masking your true, self-interested, motives.¹⁰⁸

ii. Rise and Death of the Tender Years Presumption

The mother became a valued stakeholder of increasing importance as the twentieth century progressed.¹⁰⁹ "Early in the twentieth century, most courts adopted a new parental preference derived from the child's best interests. This preference, the tender years doctrine, presumed that children of tender years should be in the custody of their mother. It provided a standard for decision-makers, thereby avoiding substantial trial discretion."¹¹⁰ From an economic viewpoint, the tender years presumption is characterized as a "reward" to mothers whose societal role was to raise socially productive future citizens. "[G]ood mothers had 'paid for' or 'earned' their children through continuous and systematic care of them."¹¹¹

The classic case of *Ullman v. Ullman*¹¹² articulates the tender years presumption that dominated custody decisions until the 1970s.

I consider that the [common law] rule in its entirety is not stated . . . if it be intended to say that only this misconduct or incapacity of the father or a cause of action for divorce in the mother authorizes the court to give the mother custody of the child. The mother may have been at fault and the father blameless, and yet the age or condition of the child may require a mother's care The child at tender age is entitled to have care, love and discipline as only a good and devoted mother can usually give.¹¹³

However, by 1970, the maternal preference had been challenged as sex discrimination. Feminists attacked gender-specific legal tests as inherently discriminatory.¹¹⁴ Father's rights groups successfully challenged the tender years doctrine as having a "pro-mother" bias.

108. David J. Rothman, *The State as Parent*, in CONFLICT AND CONSENSUS IN MODERN AMERICAN HISTORY 257, 264 (Allen P. Davis & Harold D. Woodman eds., 1980).

109. See Crippen, *supra* note 101, at 433.

110. *Id.*

111. FINEMAN, *supra* note 77, at 83.

112. 135 N.Y.S. 1080 (N.Y. App. Div. 1912).

113. SHIRLEY KRAM & NEIL FRANK, THE LAW OF CHILD CUSTODY: DEVELOPMENT OF THE SUBSTANTIVE LAW 23-24 (1982) (quoting *Ullman v. Ullman*, 135 N.Y.S. 1080 (N.Y. App. Div. 1912)).

114. See FINEMAN, *supra* note 77, at 81.

Consistent with the goal of gender neutrality, any preference based on motherhood . . . was to be eliminated. This had to be accomplished for important symbolic reasons, no matter how accurately a gendered rule seemed to conform to either intuitive or empirical evidence as to which parent actually was most likely to invest time and effort into child care in a systematic and continuous manner.¹¹⁵

In response, most states abolished the doctrine. “[C]iting evidence that parenting patterns no longer supported the tender years rationale, they determined that custody decisionmaking should favor neither parent. . . . As a consequence of these developments, trial courts [again] exercised greater discretion in child custody disputes.”¹¹⁶

g. *Renewed Recognition of Children’s Rights in Custody Decisions (1960-1980): Change or the Illusion of Change?*

The twenty years between 1960 and 1980 saw the rights of the child championed. In 1967, the *Gault* decision gave a child the right to legal counsel in a delinquency proceeding.¹¹⁷ In 1972, *A Bill of Rights for Children* was written.¹¹⁸ In addition, jurisdictions throughout the country created *guardians ad litem*, a spokesperson or legal representative for the child.¹¹⁹ This era had a growing recognition that a child was an individual with distinct legal rights and opinions, or was it?

i. *Changing Definition of the Situation: From Children as Chattel to Children as Entities to be Protected by the State*

The sixties began with a renewed interest in the quality of American life—an increased focus on children and heightened governmental intervention in the name of state responsibility for maturation. In the *Gault*¹²⁰ decision of 1967, the United States Supreme Court mandated that a child has the right to legal repre-

115. *Id.* at 93.

116. Crippen, *supra* note 101, at 433-34 (emphasis added).

117. See *In re Gault*, 387 U.S. 1 (1967).

118. See Henry Foster & Doris Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972).

119. See text accompanying note 105.

120. *In re Gault*, 387 U.S. 1 (1967).

sentation and due process rights in a delinquency case.¹²¹ This case created a "myth" that "children were being brought back to a Golden Age of constitutional rights that they lost at the turn of the century,"¹²² and suggested the intrinsic value of children apart from their utility. Thus, by the end of the 1960s, the model of the State as parent was increasingly rejected by both liberals and conservatives for a renewed recognition of children's rights.

In reality, however, society has and continues to view children not as individuals, but as "instruments for achieving other goals—economic growth, the reduction of welfare costs, stable and fluid labor markets, a high level of profits, and social peace."¹²³ The "preoccupation with anticipated potential rather than with the present realities of the child's life is symbolic of a more general tendency . . . not to view children as functionally whole until they become productive members of the economic structure."¹²⁴ These views hamper the recognition of children's rights.

In 1972, Professors Foster and Freed drew up *A Bill of Rights for Children* to give children a voice in divorce proceedings and to guide custody determinations.¹²⁵ Advocacy for increased children's rights is perhaps a response to the rampant judicial discretion

121. *Id.* at 41.

122. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1238 (1970).

123. GRUBB & LAZERSON, *supra* note 65, at 53.

124. SARA L. LIGHTFOOT, *WORLDS APART: RELATIONSHIP BETWEEN FAMILIES AND SCHOOLS* 84 (1978).

125. See Foster & Freed, *supra* note 118, at 347. The proposal states:

A child has the moral right and should have the legal right:

1. To receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult;
2. To be supported, maintained, and educated to the best of parental ability, in return for which he has the moral duty to honor his father and mother;
3. To be regarded as a *person*, within the family, at school, and before the law;
4. To receive fair treatment from all in authority;
5. To be heard and listened to;
6. To earn and keep his own earnings;
7. To seek and obtain medical care and treatment and counseling;
8. To emancipation from the parent-child relationship when that relationship has broken down and the child has left home due to abuse, neglect, serious family conflict, or other sufficient cause, and his best interests would be served by the termination of parental authority;
9. To be free of legal disabilities or incapacities save where such are convincingly shown to be necessary and protective of the actual best interests of the child; and
10. To receive special care, consideration, and protection in the administration of law or justice so that his best interests are always a paramount factor.

Id.

under the utilitarian best interests standard. Instead, society should recognize children as having certain intrinsic rights simply because of their nature, not their utility.

ii. *Proposals for Recognizing a Child's
Deontological Interest in the Custody Award*

During the 1970s and the early 1980s, many jurisdictions adopted statutes allowing for the separate legal representation of children in custody proceedings. At least thirty-six jurisdictions have adopted statutes explicitly authorizing the appointment of a *guardian ad litem* (G.A.L.) in custody, visitation and support disputes.¹²⁶

Why the sudden urgency to give children a voice in the custody decision process? Proponents advocated that, as the subject of the custody dispute, the child has immediate and lasting interests in the decision which may differ significantly from the interests of her parents.¹²⁷

The call for separate legal representation for children also demonstrates the pervasive concern that children's rights continued to be ignored by the fighting parents and the judiciary. Advocates

126. See ALASKA STAT. § 25.24.310 (Lexis 1998); ARIZ. REV. STAT. ANN. § 25-321 (West 1991); CAL. FAM. CODE §§ 3150, 3151 (West Supp. 1998); COLO. REV. STAT. § 14-10-116 (1998); CONN. GEN. STAT. ANN. § 46b-54 (West 1995); DEL. CODE ANN. tit. 13, § 721(c) (1993); D.C. CODE ANN. § 16-918(b) (1997); FLA. STAT. ANN. § 61-401 (West 1997); HAW. REV. STAT. § 571-46(8) (Supp. 1997); 750 ILL. COMP. STAT. ANN. 5/506 (West Supp. 1998); IND. CODE ANN. § 31-15-6-1 (Michie 1997); IOWA CODE ANN. § 598.12 (West 1996); KY. REV. STAT. ANN. § 403.090(1) (Michie 1996); MD. CODE ANN., FAM. LAW § 1-202(1) (1991); MASS. GEN. LAWS ANN. ch. 215, § 56A (West 1989); MICH. COMP. LAWS ANN. § 722.27(1)(e) (West 1993); MINN. STAT. ANN. § 518.165(1) (West 1990); MO. ANN. STAT. § 452.423 (West 1997); MONT. CODE ANN. § 40-4-205 (1991); NEB. REV. STAT. § 42-358(1) (1993 & Supp. 1997); N.H. REV. STAT. ANN. § 458:17-a (1992); N.J. STAT. ANN. § 9:2-4(c) (West 1993 & Supp. 1998); N.M. STAT. ANN. § 40-4-8(A) (Michie 1994); N.Y. FAM. CT. ACT § 241 (McKinney 1983); N.D. CENT. CODE § 14-09-06.4 (1997); OHIO R. CIV. P. 75(B)(2) (Banks-Baldwin 1995 & Supp. 1997); OR. REV. STAT. § 107.425(3) (1989); PA. R. CIV. P. 1915.11 (West 1987 & Supp. 1998); R.I. GEN. LAWS § 15-5-16.2(c) (1996 & Supp. 1997); S.D. CODIFIED LAWS § 25-4-45.4 (Michie 1992); TEX. FAM. CODE ANN. § 107.001 (West 1996 & Supp. 1998); UTAH CODE ANN. § 30-3-11.2 (Lexis 1998); VT. STAT. ANN. tit. 15, § 594(a)(b) (1989); VA. CODE ANN. § 16.1-266 (Michie 1988 & Supp. 1991); WASH. REV. CODE ANN. §§ 26.09.110, 26.10.070 (West 1997); WIS. STAT. ANN. § 767.045 (West 1993 & Supp. 1997), § 757.48(1) (West 1981 & Supp. 1997).

127. See MICHAEL WHEELER, NO FAULT DIVORCE 84 (1974). The author quotes Judge Ross W. Campbell of Michigan who suggests that children not only need a voice in their future, but also need the right to *contest* a divorce.

The time has come to recognize the right of a child to continuation of its parents' marriage relationship during the period of both physical and emotional growth and development of the child until it reaches an age where separation from the parent who leaves the home will not substantially damage the growth and development of the child.

Id.

pointed to the growing awareness that the best interests of children in contested custody proceedings were neither consistently considered, nor always brought to the attention of the court.¹²⁸ Separate representation would ensure that the child's best interests were represented.¹²⁹

Proponents of separate representation for children during a custody decision proclaim that the addition of a G.A.L. to the proceeding will protect the minor child from manipulation by parents and attorneys, promote workable parent-child, post-custody relationships, while also fostering a genuine best interests determi-

128. See KENNETH KENISTON & THE CARNEGIE COUNCIL ON CHILDREN, *ALL OUR CHILDREN: THE AMERICAN FAMILY UNDER PRESSURE* 184 (1977). The author states:

The right of children to be viewed as legal "persons" capable of interests and deserving representation independent of their parents has emerged only recently, clearly inspired by many of the attitudes of the 1960s—erosion of faith in any authority, parents' included; the movements that view all consumers, including children, as having some right to determine what happens to them; and the generally increased awareness of civil rights and civil liberties. Furthermore, the new belief in children's rights may have been partly inspired by a general recognition of the capability, intelligence, and maturity of children at a young age to make decisions on their own. Whatever the cause, in recent years the legal trend has been decidedly in the direction of granting children greater legal rights and responsibilities both by statute and by court decisions.

Id.

129. See M.J.J. McHale, *The Proper Role of the Lawyer as Legal Representative of the Child*, 18 ALBERTA L.R. 216, 219-20 (1980). The author states that drafters of legislation which gives children separate legal counsel continue to debate which of these roles the G.A.L. should assume. Some variations include:

1. [T]he traditional advocate role: The lawyer in this role is characterized as adversarial in orientation. His major concerns include: protection of the client, observance of proper procedures, arguing technical questions of law, testing of evidence, representation of the child's wishes, and rigorous promotion of the child's strict legal rights.
2. [T]he neutral, officer of the court role: The lawyer shifts his position from champion of the child's rights to intermediary between the child and the court. He interprets court procedures and dispositions to the child and his family, while advising the judge on points of law. He is responsible for the accuracy and completeness of information put before the court for purposes of disposition. He puts the child's opinions and wishes before the court, as he does all other evidence, from a neutral position for the judge's determination without argument or comment. He is a legal resource person who plays a facilitative role in court proceedings.
3. [T]he guardian role: The lawyer shifts from a neutral officer of the court position to a "helping" role aimed at promoting the "best interests" of the child, or finding the "least detrimental" disposition. He adopts the treatment philosophy of the court, not unlike a social worker, and acts in consideration of the child's needs (i.e., needs not necessarily as seen by the child but as perceived by the lawyer in his informed opinion). He submits reports and makes recommendations.

Id.

nation by the court.¹³⁰ Thus, "[i]n part, the creation of the advocacy role was a result of family court personnel's and judges' early recognition that the best-interest test was not functioning well in the traditional adversarial court context."¹³¹

Opponents of separate representation for children complain that the G.A.L. addition will only add confusion to the complicated task of a custody determination.¹³² Other opponents question whether it is proper to characterize children as victims of divorce whose interests are sacrificed—and therefore cannot be adequately represented—by their parents.¹³³ These same opponents point out that with this characterization of "child-as-victim" comes a shift in the locus of custody decision-making. Martha Fineman writes:

The net result of the uncritical acceptance of the child-as-victim construct is state-sponsored substitution of informal, non-legal, professional decision making for that of parents or that of the courts I am far from convinced that this development benefits children and have serious doubts as to whether it is even desirable.¹³⁴

2. *Limitations and Barriers to Utilizing the Best Interests Standard in Ethical Decision-Making*

Custody law came under attack during the seventies for favoring the best interests of parents, rather than the best interests of children.¹³⁵ Although the best interests of the child standard was articulated in judicial opinions, critics found that the phrase was used to justify *any* decision reached.¹³⁶

The concept of "children's best interests," unlike such concepts as distance or mass, has no objective content. Whenever the word "best" is used, one must always ask "according to whom?" The state, the parents, and the child might all be sources of views, worthy of consideration, about the child's interests and how best to serve them. The child's view might take either of two forms—the child's stated preference as to custody or a view of what we would expect this child, or children

130. See FINEMAN, *supra* note 77, at 100-01.

131. *Id.* at 98 (footnote omitted).

132. See *id.* at 98-106.

133. See *id.* at 101.

134. *Id.* at 102.

135. See WHEELER, *supra* note 127, at 75.

136. See *id.* at 76.

in general, to choose for themselves either now or from the hindsight of their own adulthood.¹³⁷

In order to deal with the indeterminacy promoted by the best interests standard, many jurisdictions developed "rules of thumb," predominantly the tender years doctrine, to facilitate judicial decision-making.¹³⁸ This judicial swing from discretionary to rule-based decision-making mirrors the shift that had occurred in the 1800s when courts abandoned the *pater familias*¹³⁹ (father has an absolute right to custody) doctrine in favor of the best interests of the child standard.

Scholars generally recognized that by 1970 the courts were failing to adequately consider a child's best interests, notwithstanding the welfare of the child goal.¹⁴⁰ Reasons for this failure include: (1) administrative overload; (2) lack of professional assistance from psychiatrists and social workers due to the escalating costs of professional help; and (3) lack of input from the child.¹⁴¹ Rather, courts based custody awards on: (1) the negotiation or litigation abilities of the parents and attorneys; (2) immediate impressions gained from a party's dress or speech; (3) the preference for the wife as custodian; or (4) one party's more sound financial condition.¹⁴²

Custody determinations, therefore, continued to be at the judge's unbridled discretion.¹⁴³ Personality, background, and prejudices all impacted the decision-making process.¹⁴⁴ Consequently, from one courtroom to the next, wide chasms existed between custody considerations.¹⁴⁵ The best interests standard was too vague and subjective.¹⁴⁶

137. David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 488-89 (1984).

138. See FINEMAN, *supra* note 77, at 82.

139. See *supra* notes 42-46 and accompanying text.

140. See *supra* notes 89-95 and accompanying text.

141. See Robert Epstein, *The Rights of Children and the Law: The Role of the Child in a Divorce Action*, 1 CHILD ABUSE & NEGLECT INT'L J. 153, 153-55 (1977).

142. See *id.* at 154-55.

143. See Kathryn L. Mercer, *The Ethics of Judicial Decision-Making Regarding the Custody of Minor Children: Looking at the "Best Interests of the Child" and the "Primary Caretaker" Standards as Utility Rules*, 33 IDAHO L. REV. 389, 391 (1997).

144. See Epstein *supra* note 141, at 154-55.

145. See Mercer, *supra* note 143, at 392-94.

146. See MNOOKIN, *supra* note 39, at 118. The author states:

Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. And yet, where is one to look for the set of values that should guide decisions concerning what is best for the child? Normally judges look to statutes, but custody statutes do not themselves give content or relative weight to the pertinent values. Moreover, if one looks to our

The best interests analysis is unsatisfying at best. Judge Gary Crippen of the Minnesota Court of Appeals summarizes the infirmities of the approach with his observation that it "risks unwise results, stimulates litigation, permits manipulation and abuse, and allows a level of judicial discretion that is difficult to reconcile with a historic commitment to the rule of law."¹⁴⁷

a. The Impact of the Divorce Process

Historically, the divorce court system looks backward. It focuses on terminating relationships, rather than on transforming them or starting new ones. The end result of a divorce custody decision is a change in family structure. Parents and children maintain their former relationships in different settings. Although the husband-wife relationship is usually terminated, the parent-parent relationship continues. Thus, the battleground for custody skirmishes outlasts the preliminary court decision.

The common issues of divorce relitigation are visitation rights, child support obligations and custody modifications. The divorce order and its terms are rarely satisfactory to the parties. Since the court retains perpetual jurisdiction over these matters, relitigation is quite possible.

An exposure to any divorce court quickly reveals some of the weaknesses of the structure. Divorcing couples, with or without children, arrive at the court with unresolved problems, looking to the court for a just and wise solution. Their lawyers, however, are entrenched in the adversary system. The Model Rules of Professional Responsibility prevent the lawyers from representing both a

society at large, one finds neither a clear consensus as to the best child-rearing strategies, nor an appropriate hierarchy of ultimate values. The answer, in short, is indeterminate.

Id. See also MICHAEL WHEELER, *DIVIDED CHILDREN: A LEGAL GUIDE FOR DIVORCING PARENTS* 29 (1980) [hereinafter *DIVIDED CHILDREN*]. Wheeler also noted the uncertainty about where to find guidance in custody determinations.

Ordinarily, society leaves such broad questions of value to the family to decide for itself. Aside from laws which compel some kind of formal education and inoculation for certain childhood diseases, parents have broad latitude to choose for themselves what is in their children's best interests. Yet when families split up and the parents cannot agree about raising the children, courts are called on to settle the deadlock. This, however, raises a dilemma: if judges strive for uniform results by applying values which are acceptable to the widest segment of society, those parents with somewhat different ideas will be penalized, yet if judges try to accommodate a great range of opinions about what is good for children, then custody decisions inevitably will be subjective.

Id.

147. Crippen, *supra* note 101, at 499-500.

party and their children where their interests conflict.¹⁴⁸ As each lawyer works solely for her client's best interests, potential reconciliation desires or the post-divorce child-parent relationship are often ignored.

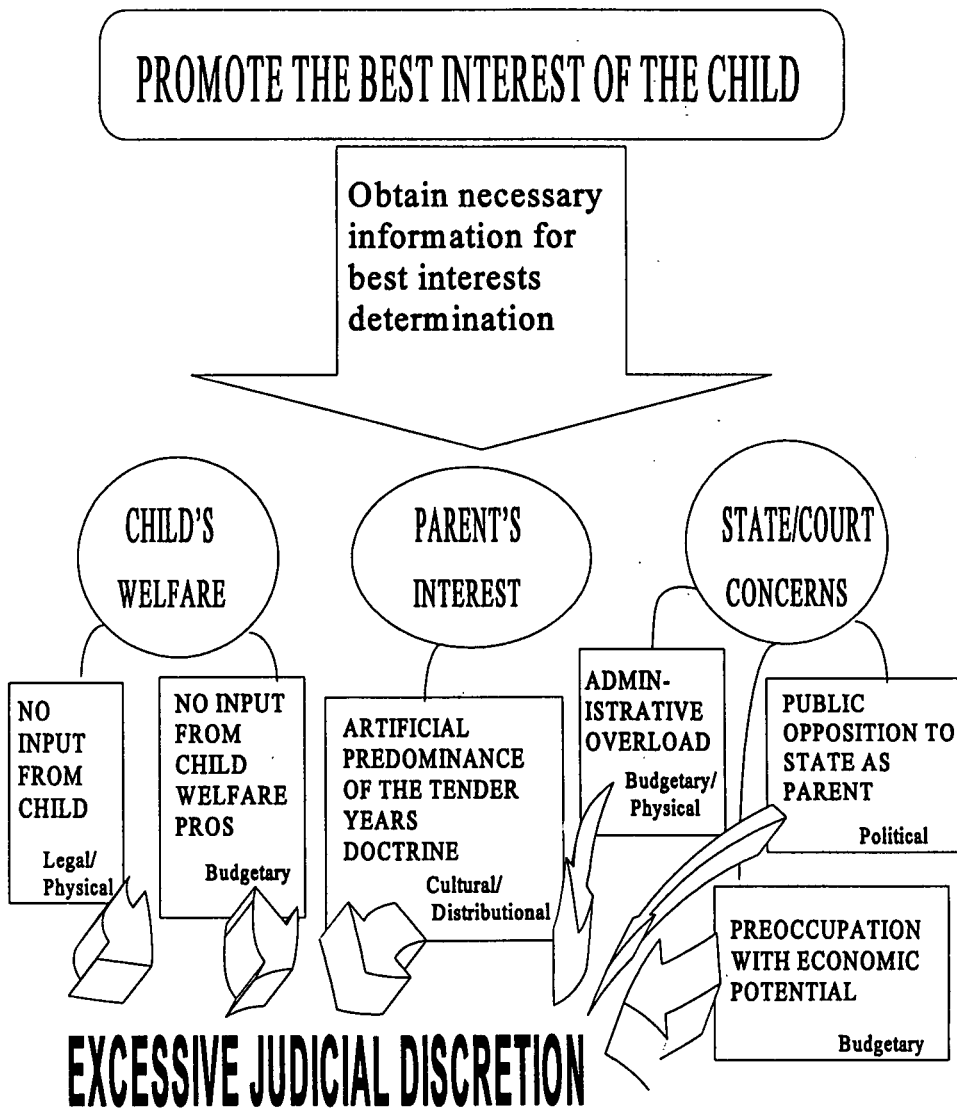
Children, unhappily, are often used as pawns in the bargaining process. What might be an uncontested settlement becomes a contested custody battle because a parent or attorney will ask for the children in order to pressure the other party into a more favorable property settlement.¹⁴⁹ The parties of genuinely contested custody suits experience the same delay, uncertainty and expense of the custody process. Court dockets are backlogged and the actual time and expense of a full blown custody trial is prohibitive to most couples.¹⁵⁰ Pressure exists, therefore, to settle out of court. The benefits of settling out of court are overshadowed by specters of individual coercion and feelings of powerlessness.¹⁵¹ Parties are almost forgotten as the lawyers haggle over property rights, out of the earshot of their clients. The halls of the courthouse hardly seem the best environment for decision-making which so drastically affects all family members. Figure 1 identifies and classifies the limitations and barriers to utilizing the ostensibly utilitarian best interests standard.

148. See MODEL RULES OF PROFESSIONAL RESPONSIBILITY Canon 5 (1983).

149. See WILLIAM F. HODGES, INTERVENTIONS FOR CHILDREN OF DIVORCE 93 (1986).

150. See *id.* at 87.

151. See *id.* at 68.

Figure 1

b. *The Emotional and Psychological Impact of Parental Divorce and the Custody Decision-Making Process on the Child*

Under the best interests of the child standard, the court must determine which parent will do the better job of child rearing and which parent will best fulfill the child's emotional and physical needs. To predict who is the better parent, the court generally relies on opinions of expert witnesses such as psychiatrists, psychologists, and social workers. Unfortunately, however, "[d]ays or weeks of testimony must be heard from experts whose opinions are likely to do little more than cancel each other out."¹⁵²

Determining the best interests of the child is a formidable and time-consuming task:

Given the complexity of family relationships, the problem of predicting future stability in the midst of upset over the divorce, and the problem of changing developmental needs over time, the judge or referee needs the wisdom of Solomon. Remember, however, Solomon was wise only because his strategy worked! What would he have done if both mothers had agreed to split the baby in half?¹⁵³

Consequently, some commentators have called the best interests custody decision futile.¹⁵⁴

Children are profoundly affected by their parents' divorce and by the entire divorce process. Accordingly, the courts need to continue to consider the effects of divorce on children. Children grieve over the loss of the family, feel intensely rejected, get angry at their parents for splitting up, are lonely, feel guilty, and generally suffer.¹⁵⁵ The majority of empirical studies suggests the temporary

152. Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 297 (1992).

153. HODGES, *supra* note 149, at 140.

154. See, e.g., Chambers, *supra* note 137, at 480-86. See also WHEELER, *supra* note 127, at 50. Michael Wheeler comments:

Even with the most careful and objective judges, some inquiries are bound to be futile. Our capacity to predict needs of children and the ability of parents to meet them is so imprecise that it simply cannot resolve close cases. Where both parents have strong claims, a custody case can easily be a game of judicial chance.

Id.

155. See J.S. WALLERSTEIN & S. BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 10-15 (1989). The authors state:

Divorce is a different experience for children and adults because the children lose something that is fundamental to their development—the family structure.

deleterious effects of parental divorce on children's personal adjustments, self-concepts, cognitive functions, interpersonal relationships and antisocial behavior.¹⁵⁶

Literature on divorce reveals the "broad effect" that separation and divorce play on child development.¹⁵⁷ "Young children are likely to demonstrate aggression and other acting out behavior. Teenagers may show more withdrawal and depression."¹⁵⁸ In addition, children who experience their parents' divorce have more problems than children who have intact, two-parent families, including: "lower academic achievement, more behavioral problems, poorer psychological adjustment, more negative self-concepts, more social difficulties, and more problematic relationships with both mothers and fathers."¹⁵⁹ These differences continue as the children grow into adulthood:

Compared with those raised in intact two-parent families, adults who experienced a parental divorce had lower psychological well-being, more behavioral problems, less education, lower job status, a lower standard of living, lower marital satisfaction, a heightened risk of divorce, a heightened risk of being a single parent, and poorer physical health.¹⁶⁰

The intrusion of the State by engaging in a case-by-case best interests analysis, and the resulting inquiry into the personal lives of each family member, can lead to more stress and can cause the child to become insecure.¹⁶¹ It has also been found that a best interests custody decision can have a negative impact on a child's emotional stability.¹⁶² Limited research on the long-term effects of high-

The family comprises the scaffolding upon which children mount successive developmental stages, from infancy into adolescence. It supports their psychological, physical, and emotional ascent into maturity. When that structure collapses, the children's world is temporarily without supports. And children, with a vastly compressed sense of time, do not know that the chaos is temporary. What they do know is that they are dependent on the family. Whatever its shortcomings, children perceive the family as the entity that provides the support and protection that they need. With divorce, that structure breaks down, leaving children who feel alone and very frightened about the present and the future.

Id. at 11-12.

156. See generally David H. Demo & Alan C. Acock, *The Impact of Divorce on Children*, in MARRIAGE AND FAMILY IN TRANSITION 403-27 (John N. Edwards & David H. Demo eds., 1988).

157. See HODGES, *supra* note 149, at 36.

158. *Id.*

159. Paul R. Amato, *Life-span Adjustment of Children to Their Parents' Divorce*, in 4 THE FUTURE OF CHILDREN 143, 145 (1994).

160. *Id.* at 146.

161. See GOLDSTEIN ET AL., *supra* note 8, at 25.

162. See *id.* The authors state:

conflict divorce suggests that a child's maladjustment increases with the level of parental conflict in a divorce.¹⁶³

The best interests of the child standard can increase parental conflict, and subsequently, the adverse effect on the child, as each side prepares a case that the child would be better off with them. The more fiercely the parents battle for custody, the longer the best interests litigation lasts. The longer the custody litigation, the more stress and uncertainty the child faces. Thus, it can be extrapolated that the more stress the child experiences in the divorce and after, the greater the adverse impact on the child's well-being.

*c. Competing Ethical Frameworks Permitted by the Best Interests Standard*¹⁶⁴

The historical evolution of custody decision-making can be seen as a progression from rule deontology to rule utilitarianism to act utilitarianism.¹⁶⁵ Custody law began with the natural law view that

Children, on their part, react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control. The younger the child, and the greater his own helplessness and dependence, the stronger is his need to experience his parents as his lawgivers—safe, reliable, all-powerful, and independent.

Id.

163. See Janet R. Johnston, *High-Conflict Divorce*, in 4 *THE FUTURE OF CHILDREN* 165 (1994). The author reviewed research studies of high-conflict divorces, characterized in part by ongoing legal disputes over custody, visitation and parenting practices, concluding that:

In each of the studies where standardized measures of maladjustment were reported, these children [of high-conflict divorce] scored as significantly more disturbed and were two to four times more likely to have the kinds of adjustment problems typically seen in children being treated for emotional and behavioral disturbance as compared with national norms.

Id. at 176.

164. See Mercer, *supra* note 143, at 392-94 (presenting a similar analysis to this section).

165. *Id.* at 392 n.10 (footnotes omitted). The terms are defined as follows:

(1) *Deontologists* claim that certain actions and results are inherently right or good, or right or good as a matter of principle. *Rule deontology* operates from these principles.

(2) A second ethical philosophy, *teleology*, proposes that actions and results should be favored not because they are intrinsically good, but rather because they promote the better good. The moral value of an action is a function of its consequences. Teleologists advocate actions which are good because of their consequences.

Utilitarianism, which holds that an action is right if it promotes the maximum good for everyone, or at least the greatest number, is a form of teleology.

Rule utilitarianism formulates the rules which tend to produce the greatest good.

Act utilitarianism focuses on choosing the acts which tend to produce the

the father was the pre-ordained and only legal custodian of children.¹⁶⁶ It then moved from this deontological perspective to a utilitarian ranking based on which parent offered the most value to society as custodian of children.¹⁶⁷ Rule utilitarianism is reflected in the tender years presumption which dominated the twentieth century until 1970.¹⁶⁸ Finally, custody law predominantly moved to act utilitarianism when it adopted a best interests standard, dependent on the weighing of factors—for example, the quality of the child's environment, the child's relationship with each parent and siblings, the child's wishes, adjustment to school, etc.—which could be summed to find the custodian who offered the greatest good for the child.¹⁶⁹

Even though the best interests standard seems to propose act utilitarianism, however, in reality the court has favored rule utilitarianism for presenting a more simple analysis. The past seventy years has seen the predominance of the State's and the parents' interests as having greater utility than the child's.¹⁷⁰ In theory the best interests analysis was fostered to protect a child's welfare; in practice, the decision-making often ignores the child.

With the advent of the tender years doctrine, the natural deontological-law presumption of the father as primary custodian was converted to a teleological rule of the mother providing the most utility. As courts had uniformly awarded custody to the father prior to 1820, from the 1920s until the 1960s, courts uniformly gave custody to the mother.¹⁷¹ The glimmer of a genuine best interests determination that was seen between 1820 and 1920 yielded to an overriding presumption of the mother as the best parent later in the century.¹⁷² Although the best interests terminology was frequently used, the majority of custody decisions showed that it had little real meaning or impact. The majority of jurisdictions statutorily allowed courts to base their decisions on what was right, just, proper, reasonable, necessary and expedient.¹⁷³ In the last twenty years, most jurisdictions have moved away from the presumption that the mother is the better custodian. Instead, they have focused their

greatest good without any guidance of rules.

Id. (citations omitted).

166. *See supra* notes 42-44 and accompanying text.

167. *See supra* notes 53-54 and accompanying text.

168. *See supra* notes 109-13 and accompanying text.

169. *See supra* notes 136-37 and accompanying text.

170. *See, e.g., supra* notes 107, 109-11 and accompanying text.

171. *See supra* notes 109-113 and accompanying text.

172. *See supra* notes 109-10 and accompanying text.

173. *See* CHESTER G. VERNIER, 2 AMERICAN FAMILY LAWS 191-213 (1932).

attention on the child's needs, the child's relationships, and the child's right to personal growth.¹⁷⁴

In reality, none of these competing ethical perspectives have been entirely abolished. Rule deontology, rule utilitarianism and act utilitarianism survive and flourish under the nebulous best interests of the child standard. Given the wide discretion inherent in the standard, a judge is often free to apply her own ethical standard while reiterating the best interests test.¹⁷⁵ Furthermore, sometimes all ethical perspectives are used, resulting in subjective judicial outcomes, in order to justify conflicting custody awards.¹⁷⁶ When the best interests of the child are not clearly defined, the judge must impose her own ethical framework on the decision-making process.

3. *The Primary Caretaker Standard as One of Several Proposals for Facilitating Judicial Decision-Making and Reducing Judicial Discretion*¹⁷⁷

Criticism of the best interests standard leads to three proposed changes: "(1) that judicial discretion under the best interests standard must be limited; (2) that children must be given a greater voice in the custody decision; and (3) that the tender years doctrine must be rejected because of the social and political climate which demands the neutralization of the gender distinctions."¹⁷⁸ In response to these criticisms, several proposals have been made to change the method by which custody awards are made. The primary caretaker standard is one of these proposals.

a. *Keeping the Best Interests Standard but Making It More Specific*

As suggested above, using the best interests standard without the guidance of rules promotes unwanted variability in custody decisions.¹⁷⁹ This variability would be curtailed if the court returned to rule utilitarianism, rather than using act utilitarianism. More specific rules would help guide the courts' decisions and would facilitate the predictability of a result.

174. See *supra* notes 120-29 and accompanying text.

175. See *supra* notes 140-45 and accompanying text.

176. See *supra* notes 146-47 and accompanying text.

177. See Mercer, *supra* note 143, at 398-403 (presenting a similar analysis to this section).

178. *Id.* at 398.

179. See *id.*

[S]ince people's capacities of judgment are highly fallible, each person deciding each case on its own utilitarian merits would likely produce disastrous results, and would also undermine the coordination and predictability that social and legal rules provide Thus because we often lack sufficient time and information, are biased in favor of our own interests, etc., the act utilitarian goal of always acting so as to maximize utility may be better served in the long run by adopting certain more specific rules as guides to decision and action, rather than appealing directly to the principles of utility each time we act.¹⁸⁰

A few states have attempted to limit judicial discretion by codifying specific guidelines for a best interests custody determination. For example, Ohio originally modeled its statute¹⁸¹ after the *Uniform Marriage and Divorce Act of 1974*.¹⁸²

These specific statutes can be considered utility rules which guide information-gathering, as well as decision-making. Best interests custody statutes are useful because they give the court a more complete basis upon which to make a custody determination. They can also be used as a guide by the judge to request additional information that is not being provided by the parents' counsel (i.e., psychological studies, expert witnesses, etc.).

180. Brock, *supra* note 54, at 226.

181. OHIO REV. CODE ANN. § 3109.04(c) (Baldwin 1983) (historical statute).

182. UNIF. MARRIAGE & DIVORCE ACT § 402, 9 U.L.A. 561 (1990). *See also* OHIO REV. CODE ANN. § 3109.04(c) (Baldwin 1983) (historical statute). The Ohio statute states:

In determining the best interest of a child pursuant to this section, whether on an original award of custody or modification of custody, the court shall consider all relevant factors, including:

- (1) The wishes of the child's parents regarding his custody;
- (2) The wishes of the child regarding his custody if he is eleven years of age or older;
- (3) The child's interaction and interrelationship with his parents, siblings, and any other person who may significantly affect the child's best interest;
- (4) The child's adjustment to his home, school, and community;
- (5) The mental and physical health of all persons involved in the situation;

Id. Missing from the Ohio Code, however, is a segment of the Uniform Marriage and Divorce Act that instructs that: "the court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." UNIF. MARRIAGE & DIVORCE ACT § 402, 9 U.L.A. 561 (1990). This omission demonstrates that the Ohio Code does not completely reiterate the Uniform Statute.

b. *Eliminating the Best Interests Standard in Favor of Less Complex Utility Rules*

The criticisms of the best interests standard as being an arbitrary standard have remained, in spite of improvements in the law. Critics condemn the best interests doctrine as being confusing and questionable in its promotion of the child's continued welfare.¹⁸³

Underlying this criticism is the sense that court discretion has gone too far. "Courts, using the 'best interests' justification, leave the door open for re-evaluation and for reshuffling of family relationships."¹⁸⁴ The modification of a custody award is an alternative available to parents and other interested parties under this doctrine. Excessive judicial discretion and authority over families is seen as being damaging to the continuity crucial for child development.¹⁸⁵ It is also argued that the discretion judges exercise under the best interests test is misguided, even if the judge has the best intentions to reach the optimum result.¹⁸⁶

183. See, e.g., BEYOND THE BEST INTERESTS, *supra* note 63, at 54. The authors explain:

Even though we agree with the manifest purpose of the "in-the-best-interest-of-the-child" standard, we adopt a new guideline for several reasons. First, the traditional standard does not . . . convey to the decisionmaker that the child in question is already a victim of his environmental circumstances, that he is greatly at risk, and that speedy action is necessary to avoid further harm being done to his chances of healthy psychological development. Secondly, the old guideline, in context and as construed by legislature, administrative agency, and court, has come to mean something less than what is in the child's best interests. The child's interests are often balanced against and frequently made subordinate to adult interests and rights. Moreover, and less forthrightly, many decisions are "in-name-only" for the best interests of the specific child who is being placed. They are fashioned primarily to meet the needs and wishes of competing adult claimants or to protect the general policies of a child care or other administrative agency. But, even if the child's rights were, in fact and policy, determinative and thus unequivocally superior to adult interests, the guidelines would remain inadequate.

Id.

184. Mercer, *supra* note 143, at 400.

185. See *id.*

186. See Mary Ann Glendon, *Fixed Rules in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986) (footnote omitted). The author states:

The "best interests" standard is a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge or other third party. Its vagueness provides maximum incentive to those who are inclined to wrangle over custody, and it asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and the divorce process itself. Arguing that the idea that a judge can determine the best interests of a child under such circumstances is a fantasy, and that efforts for legal reform should concentrate on the effect of custody law on private ordering, [Robert Burt has suggested] that almost any

i. *Emancipation of Children from Custody
Decisions—A Recognition of Their Natural
Rights*

Critics of the best interests standard propose that this standard be discarded altogether in order to reduce judicial discretion, with the exception of matters involving child abuse and neglect.¹⁸⁷ Rather, an emancipation statute under which all children a certain age (thirteen or older) could "be freed of both parental and court control in determining their legal care needs,"¹⁸⁸ is considered. This idea could be the ultimate answer in giving children legal rights in custody proceedings and removing them from the whims of the judiciary. The authors caution, however, that they

do not recommend any such provisions because we do not believe that there are or can be circumstances which justify emancipating children to meet their own legal care needs in the child placement process. Indeed, it is the purpose of the process to secure or restore for every child an uninterrupted opportunity to be represented by "parents." Because they are children, they require representation by parents or by some other adult upon the disqualification of their parents. They are persons in their own right but are not adults in their own right. Children by definition cannot be free of an adult's control in determining either their need for legal assistance or what lawyers must seek on their behalf in the process of their placement.¹⁸⁹

This answer is a deontological natural rights position which recognizes the ultimate moral independence of the child.

The deontological natural rights of the child position was partially recognized by the 1989 United Nations Convention on the Rights of the Child.¹⁹⁰ The Convention affirmed that children have the capacity for growth toward autonomy, and deserve to be treated accordingly.¹⁹¹ Law and social policy, therefore, should permit children who are capable of expressing their own views to voice them expressly or through a representative. "The Convention's

automatic rule would be an improvement over the present situation.

Id.

187. See generally GOLDSTEIN ET AL., *supra* note 8, at 127.

188. *Id.*

189. *Id.*

190. See Barbara B. Woodhouse, "Out of Children's Needs, Children's Rights:" *The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 331 (1994).

191. See *id.*

norms are an amalgam of both connection and autonomy, combining notions of children as dependent members of families and communities with notions of children as individuals with unique personalities and emerging moral and social lives which parents and governments are explicitly charged with acknowledging."¹⁹²

The 1989 Convention's emphasis on children's voices, their personal dignity and their membership in their family and in their community was a progression from the 1959 United Nations Declaration on the Rights of the Child which was concerned primarily with meeting children's material and developmental needs.¹⁹³ It has been proposed that the next phase in this progression is a "generist perspective" to thinking about revising custody law.

A generist perspective views nurturing of the next generation as the touchstone of the family. . . . This perspective views an adult's relationship with children as one of trusteeship rather than as one of ownership. Adult 'rights' of control and custody yield to the less adversarial notions of obligation to provide nurturing, authority to act on the child's behalf, and standing to participate in collaborative planning to meet the child's needs.¹⁹⁴

This vision for the future is a compelling one.

ii. *The Least Detrimental Available Alternative Standard*

Some critics of the best interests of the child standard have suggested a new standard—the least detrimental available alternative standard.¹⁹⁵ They suggest that custody determinations are based on three utility rules. First, the importance of safeguarding the child's need for continuity should be employed in custody decisions.¹⁹⁶ The psychological parent should be identified in a custody award and the custodial parent should have the sole say over all caretaking responsibilities. Visitation should be encouraged, but not a judicially enforceable right. The custody award should also be final and irreversible, except in abuse situations, in order to protect the child from being dragged back and forth

192. *Id.*

193. *See id.* at 332.

194. *Id.* at 321.

195. *See BEYOND THE BEST INTERESTS*, *supra* note 63, at 53.

196. *See id.* at 31.

between different homes. Second, a child's sense of time must be given priority in the custody determination.¹⁹⁷ The trial must be expedient in order to avoid further harm done to the psychological development of the greatly-at-risk child. Third, the court must fully recognize the limitations of ascertaining the best interests of the child when arriving at a perfect, long-term solution for a divided family.¹⁹⁸

The new standard proposed is: "the least detrimental available alternative for safeguarding the child's growth and development."¹⁹⁹ These critics note that using "detrimental," as opposed to "best interests," should "serve to remind decisionmakers that their task is to salvage as much as possible out of an unsatisfactory situation."²⁰⁰ The use of "available alternatives" is designed to focus the decisionmakers on the limited nature of their choices.²⁰¹

If the choice, as it may often be in separation and divorce proceedings, is between two psychological parents and if each parent is equally suitable in terms of the child's most immediate predictable developmental needs, the least detrimental standard would dictate a quick, final, and unconditional disposition to either of the competing parents.²⁰²

The least detrimental available alternatives proposal is radical. Yet, it clearly emphasizes the ineffectiveness of the best interests standard, the questionable continued jurisdiction of the court over custody matters, the often court-encouraged attractiveness of child kidnapping, the rampant return of divorced couples to the court system, and the detrimental effect these factors have on the development of the children involved. Adoption of the least detrimental standard would definitely hinder judicial discretion while drastically reducing custody litigation.

iii. The Primary Caretaker Standard

No state has adopted the least detrimental standard. Closest to it is the primary caretaker standard, which has been adopted in West Virginia, and is used as one factor in a best interests determi-

197. *See id.* at 40.

198. *See id.* at 49.

199. *Id.* at 53.

200. *Id.* at 62.

201. *See id.*

202. *Id.* at 62-63.

nation in several other states.²⁰³ "Courts in at least sixteen states have identified and showed some favor for the parent who had been the primary caregiver before the couple separated,"²⁰⁴ and "courts from at least seven of these states have identified primary caretaking as a significant factor in assessing the child's best interests."²⁰⁵ Finally, "[c]ourts from five states, although declaring the importance of primary caretaking, have rejected it as a presumptive determinant of custody."²⁰⁶

Currently, only one state, West Virginia, has singled out primary caretaking as being the sole factor for indicating a child's best interests.²⁰⁷ Prior to 1981, West Virginia courts awarded custody of a child of tender years to the mother.²⁰⁸ While the majority of states abandoned the maternal preference doctrine in the 1960s and the 1970s, West Virginia maintained its gender bias.²⁰⁹ In 1978, the maternal preference came under public attack due to a much criticized decision when the West Virginia Supreme Court applied the maternal preference rule and awarded custody to a mother presumably found unfit by the trial court.²¹⁰ In response, the West Virginia Legislature abolished the maternal presumption and established a best interests standard. The relevant statute, enacted in 1980, states:

In making any such order respecting custody of minor children, there shall be no legal presumption that, as between the natural parents, either the father or the mother should be awarded custody of said children, but the court shall make an award of custody solely for the best interests of the children based upon the merits of each case.²¹¹

203. See, e.g., *Jordan v. Jordan*, 448 A.2d 1113, 1115 (Pa. Super. Ct. 1982) (explaining that when the two natural parents are fit and the child is of tender years, "positive consideration" must be given to the primary caregiver); *In re Marriage of Derby*, 571 P.2d 562, 564 (Or. Ct. App. 1977) (noting that the mother's role as "primary parent" was a factor in determining her award of custody as being in the children's best interest).

204. Crippen, *supra* note 101, at 434 (footnote omitted) (listing the sixteen states as: California, Delaware, Florida, Iowa, Massachusetts, Minnesota, Missouri, Montana, New York, North Dakota, Ohio, Oregon, Pennsylvania, Utah, Vermont and West Virginia).

205. *Id.* (footnote omitted) (listing the following seven states: California, Delaware, Florida, Massachusetts, Missouri, Montana and New York).

206. *Id.* at 434-35 (footnote omitted) (listing the five states as: Iowa, North Dakota, Pennsylvania, Utah and Vermont).

207. See *id.* at 439.

208. See W. VA. CODE § 48-2-15 (Michie 1980) (historical statute).

209. See *id.*

210. See *J.B. v. A.B.*, 242 S.E.2d 248 (W. Va. 1978).

211. W. VA. CODE § 48-2-15 (Michie 1988) (reflecting the 1980 amendment in response to the decision in *J.B. v. A.B.*, 242 S.E.2d 248 (W. Va. 1978)). The court in *J.B.* established a strong maternal presumption with regard to children of tender years. The 1980 statutory

The purpose behind amending the statute "was merely to correct the inherent unfairness of establishing a gender-based, maternal presumption which would defeat the just claims of a father if he had, in fact, been the primary caretaker parent."²¹²

In its 1981 *Garska v. McCoy* decision,²¹³ the West Virginia Supreme Court followed the sex-neutral, rule-based standard for determining what the best interests of the child would be—the primary caretaker standard.²¹⁴ In *Garska*, a mother sought custody of her minor child from the child's father.²¹⁵ The lower court awarded the child's father custody because he was better educated, earned more money and offered a better social environment than did the mother.²¹⁶ The Supreme Court reversed the decision and awarded the mother custody, finding that the mother was the primary caretaker.²¹⁷ The court held, where the child is of tender years, "there is a presumption in favor of the primary caretaker parent, if he or she meets the minimum objective standard for being a fit parent"²¹⁸

The primary caretaker standard presumes that the greatest good for the child would be secured if the child is placed in the custody of the parent who has provided continuous care. Thus, it is a rule utilitarian standard, and custody decision-making is simplified. The judge can focus on discovering which parent provides daily child care, rather than focus on all of the acts which favor the best interests of the child—the child's relationships to school, peers, family members; the comparable home environments; and the psychological makeup and parenting competence of each parent. The presumption behind the primary caretaker standard is that children need consistent day-to-day care, and the parent who performed this care during the marriage should get custody; indeed, the standard "singles out continuity of care—a standard proposed by the authors of *Beyond the Best Interest of the Child*—to trump all others."²¹⁹

amendment answered the *J.B.* decision by eliminating any gender based presumption when awarding custody.

212. *Garska v. McCoy*, 278 S.E.2d 357, 361 (W. Va. 1981).

213. *Id.*

214. *See id.* at 362.

215. *See id.* at 358.

216. *See id.* at 359.

217. *See id.* at 364.

218. *Id.* at 362.

219. Sanford Katz, "That They May Thrive" Goal of Child Custody: Reflections on the Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker

In West Virginia, the primary caretaker is defined as the "natural or adoptive parent who, until the initiation of divorce proceedings, has been primarily responsible for the caring and nurturing of the child."²²⁰ West Virginia law has fleshed out the primary caretaker definition as being the parent who:

(1) prepares the meals; (2) changes the diapers and dresses and bathes the child; (3) chauffeurs the child to school, church, friends' homes and the like; (4) provides medical attention, monitors the child's health, and is responsible for taking the child to the doctor; and (5) interacts with the child's friends, school authorities, and other parents engaged in activities that involve the child.²²¹

Advocates of the primary caretaker standard have found several justifications for the preference. Judge Crippen, a proponent of the primary caretaker preference, suggests that the standard:

benefits all interests involved in the custody decision, including the interests of the judiciary. [Proponents] provide three justifications for the primary caretaker preference: protection of the child's most vital parent-child relationship, avoidance of error, litigation and abusive threats of litigation, and compatibility with gender neutrality and the child's many interests.²²²

Marcia O'Kelly notes that the judicial preference for the primary caretaker standard is because: (1) it promotes the continuity of the primary psychological relationship;²²³ (2) it provides past caretaking as an objective basis for predicting future parenting;²²⁴ (3) it deters litigants from misusing the custody issue—making a custody request, not to gain custody, but to strengthen unrelated interests in the negotiation process;²²⁵ (4) it encourages private settlement and thereby avoids the impact of protracted custody litigation and relitigation;²²⁶ (5) it is judicially manageable because primary caretaking can usually be identified easily, and therefore should be adequate, readily-available information—easy to find out which

Presumption, 8 J. CONTEMP. HEALTH L. & POL'Y 123, 133 (1992).

220. *Garska v. McCoy*, 278 S.E.2d 357, 358 (W. Va. 1981) (syllabus by the court).

221. Neely, *supra* note 27, at 180.

222. Crippen, *supra* note 101, at 440.

223. See O'Kelly *supra* note 102, at 511-17.

224. See *id.* at 517-21.

225. See *id.* at 521-23.

226. See *id.* at 523-24.

parent has this role;²²⁷ and (6) it permits effective appellate review of the trial court's decision.²²⁸

Approval for the primary caretaker standard exists because of its constraint on judicial speculation about the psychological makeup of parents and the relative degrees of parental competence.²²⁹ First, proponents assert that, as professionals, judges must recognize the limits of their knowledge.²³⁰ Since judges are not trained as psychologists, with a specialty in child welfare, they should not engage in an attempt to determine what would be in the best interests of the child or what constitutes the parents' psychological capacity for parenting.²³¹ Second, proponents congratulate West Virginia for using a standard that explicitly identifies "the factors to be considered in terms of their function—assuring continuity of care for the child," and which enables "judges and lawyers to achieve a degree of literacy in child development—to gain some understanding of the reasons for the preference."²³²

Finally, the standard has been commended as using factors which are "relatively objective" and which are highly visible and open to challenges in courts and legislatures.²³³ Thus, an added benefit of the primary caretaker standard as a form of rule utilitarianism is that the primary caretaker factors can be "selected, maintained, revised, and replaced on the basis of their utility and not on any other basis."²³⁴

The primary caretaker standard has been used in West Virginia for the past seventeen years. It is the *only* jurisdiction to currently retain a firm custody preference for this parent. Some jurisdictions have discussed this standard in best interests decision-making as one of many considerations. Oregon, Ohio and Minnesota have experimented with giving the standard more weight, relative to other best interests factors, but none of these jurisdictions has made the standard authoritative and determinative of a custody award, as has West Virginia.²³⁵ In essence, in spite of numerous articles advocating adoption of the presumption, West Virginia

227. See *id.* at 524-30.

228. See *id.* at 530-33.

229. See JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD 24 (1986) [hereinafter IN THE BEST INTERESTS OF THE CHILD].

230. See *id.* at 24.

231. See *id.*

232. *Id.* at 67.

233. See *id.*

234. WILLIAM K. FRANKENA, ETHICS 39 (2d ed. 1973).

235. See generally Crippen, *supra* note 101, at 436-39.

is the only jurisdiction which recognizes that the best interests of the child is coextensive with residing with the primary caretaker.

B. Origins and Current Rationale for the Primary Caretaker Preference in West Virginia

1. The Influence of Attachment Theory on the Standard

The principle argument in support of a presumption which places the child with the primary caretaker is that the interaction of a primary caretaker with a young child produces an emotional bond that is more important for the child to sustain on a daily basis than whatever bond the child has formed with the other parent.²³⁶ The West Virginia Supreme Court justified the primary caretaker standard with scientific research which indicates that "young children, as a result of intimate interaction, form a unique bond with their primary caretaker. . . [which] is an essential cornerstone of a child's sense of security and healthy emotional development."²³⁷

The concept of bonding comes from ethological studies—the study of the behavior of animals, including humans. Ethological studies in the 1970s led to descriptions of the parent-child interactive behavior, where "ethograms" catalogued the mother-child and the father-child behavioral repertoire.²³⁸ Although the studies were telling, some were "limited to descriptions of overt or surface behavior, without extrapolation of hidden motivation or meaning,"²³⁹ thereby diminishing, somewhat, their possible impact. More current studies have moved away from the mere counting of parent-child interactions to looking at behavior clusters as stimuli and responses. One proposed model of cyclical parent-child behavior is broken into periods of initiation, regulation, maintenance and termination.²⁴⁰ Under such a model, both parent and child act on and shape the response of the other, mutually influencing the development of their relationship.²⁴¹

Two other fields, modern social learning and psychoanalytic theory, have contributed to the theory that maintenance of the

236. See *id.* at 440-42.

237. *David M. v. Margaret M.*, 385 S.E.2d 912, 916-17 (W. Va. 1989).

238. See T. BERRY BRAZELTON & BERTRAND G. CRAMER, *THE EARLIEST RELATIONSHIP* 88-91 (1990).

239. *Id.* at 90.

240. See *id.* at 97.

241. See *id.*

primary caretaker-child bond is crucial.²⁴² One of the main tenets of both modern social learning and psychoanalytic theory is that a special biological and psychological bond, an attachment, forms between the caretaker, usually the mother, and the infant.²⁴³

The substantial body of literature developed until the mid-sixties concerning the attachment theory suggests, among other things, a deprivation model which "underlined the powerful nature of the bond between mother and child."²⁴⁴ Other scholars formed similar conclusions about a child's attachment.

In 1958, Heintz Hartmann suggested that an infant's ego development is dependent on the child's attachment to the parent.²⁴⁵ That same year, John Bowlby wrote an influential paper on attachment theory entitled: *The Nature of the Child's Tie to His Mother*.²⁴⁶ D.W. Winnicott expanded Bowlby's work by suggesting in 1986 that the mother and child are "a single, interlocking unit."²⁴⁷ Early parent-offspring bonding was also reported in studies by M.H. Klaus and J.H. Kennell.²⁴⁸

Attachment theory, or "bonding," proposes that "[i]n the earliest hours and days of life a strong mutual emotional attachment or bond occurs between the newborn and an immediate nurturing adult. This bond tends to continue over the following years, even in the face of harsh treatment of the child by the adult."²⁴⁹ Thus, attachment behavior, the bonding behavior between the dependent child and the nurturing parent, although most noticeable in early childhood, can be observed throughout the life cycle.²⁵⁰

242. But see Chambers, *supra* note 137, at 560. Professor Chambers' review of the research concluded that "[o]n the basis of the current empirical research alone, there is . . . no solid foundation for concluding that children, even young children, will be typically better off if placed with their primary caretaker." *Id.*

243. See ERNA FURMAN, *HELPING YOUNG CHILDREN GROW* 11 (1987). The author explains: The young child's relationship with his mother indeed includes [the] fulfillment of bodily and emotional needs, maintenance of security, protection against excessive stimulation from within and harm from without, gratification of wants and relief from discomforts. Above all, it includes the assurance that all these "services" will be provided consistently and lovingly, in tune with the child's personality and adapted to the situation at hand.

Id.

244. BRAZELTON & CRAMER, *supra* note 238, at 87.

245. See *id.* at 88.

246. See *id.*

247. *Id.* at 89.

248. See KLAUS & KENNEL, *supra* note 11, at 37-40.

249. R. MURRAY THOMAS, *COMPARING THEORIES OF CHILD DEVELOPMENT* 455 (4th ed. 1996).

250. See *id.*

Separation-individuation theory, based on the work of Margaret Mahler, also recognizes the importance of the primary parent-child bond for successful maturation and development. "Separation refers to the child's movement from fusion with the mother; individuation consists of those steps that lead to the development of an individual's own personal and unique characteristics."²⁵¹ Again, the thought revolves around the belief that attachment is an on-going process, although the principle steps are achieved by the end of the child's third year.²⁵²

Dr. Mahler suggests that a sustained bond with the primary parent is desirable. To grow optimally, the child must have a "confident expectation" that her needs will be consistently met by a reliable and attuned parent.²⁵³ The parent is a "safe anchorage"—the child feels free to explore, knowing that a familiar and safe harbor to which she can return exists, should the challenge prove too much.²⁵⁴ In sum:

[s]eparation-individuation theory . . . confirms and gives specificity to the role of "nurture" in human development. The relationship between child and [nurturer] is critical for the negotiation of this developmental progression. The nature of this growth-promoting relationship alters, over time, in accordance with the changing needs of the child. It is an early attuned, symbiotic relationship between infant and mother, or her substitute, that provides the firm foundation for all that follows. Through the subphases of separation-individuation, the physical and libidinal availability of "ordinarily devoted" parents fosters the child's growing capacity for separateness, and affords the child those opportunities for identification and the achievement of a sense of selfhood.²⁵⁵

If attachment to the primary caretaker is the cornerstone for a child's healthy development, then there is good reason for a custody standard to prioritize the preservation of the attachment figure-child bond. The primary caretaker standard does just that. Continuity of care with the attachment figure is the goal of the primary caretaker presumption. The premise of a custody decision based on this presumption is that records of past nurturing by

251. JOYCE EDWARD ET AL., *SEPARATION/INDIVIDUATION: THEORY AND APPLICATION* 1 (2d ed. 1991).

252. *See id.* at 2.

253. *See id.* at 23.

254. *See id.* at 24.

255. *Id.* at 3.

caregivers provide the court with a reliable basis for predicting future parenting and for identifying the child's strongest psychological bond.

2. *Custody Decision-Making Using the Standard*²⁵⁶

The author of the primary caretaker standard in West Virginia is Supreme Court Chief Justice Richard Neely. Neely created the standard in 1983 when he wrote the majority opinion in the *Garska* case.²⁵⁷ In 1984, he wrote an article describing the standard and detailing how it was to be used by the courts.²⁵⁸

The first step in making a custody award in West Virginia is to determine which parent is the primary caretaker. The court created the following criteria for determining the primary caretaker:

the trial court shall determine which parent has taken primary responsibility for, *inter alia*, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl and boy scout meetings; (6) arranging alternative care, i.e. baby-sitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplinary, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and (10) teaching elementary skills, i.e., reading, writing and arithmetic.²⁵⁹

All ten factors are to be reviewed quickly by the court, based on the parties' testimony. There should be no need to turn to experts for information.²⁶⁰ Judge Neely explains:

256. See Mercer, *supra* note 143, at 405-08 (providing a comparable analysis of how judges use the primary caretaker standard to reach custody decisions).

257. 278 S.E.2d 357 (W. Va. 1981).

258. See Neely, *supra* note 27, at 180-82.

259. David M. v. Margaret M., 385 S.E.2d 912, 923 (W. Va. 1989).

260. Note that the best interests standard necessitates expert testimony as to the child's welfare in most jurisdictions. See Neely, *supra* note 27, at 175. Some feminist scholars have suggested that women are disadvantaged under the best interests of the child standard because of the cost of expert testimony. See, e.g., FINEMAN, *supra* note 77, at 182 (suggesting that women generally cannot afford the cost of protracted litigation and fact development which often comes with a best interests of the child custody battle).

Under West Virginia's scheme, the question of which parent, if either, is the primary caretaker is proved with lay testimony by the parties themselves, and by that of teachers, relatives and neighbors. Which parent does the lion's share of the chores can be demonstrated satisfactorily in less than an hour of the court's time in most cases.²⁶¹

After identifying a primary caretaker, the court next considers whether that parent is fit for custody. In this regard, the court is not concerned with assessing relative degrees of fitness between the two parents, but only determining whether the primary caretaker achieves a passing grade on an objective test.²⁶²

Fitness as a primary caretaker is determined by showing that the parent: (1) provided proper nourishment and clothing to the children; (2) adequately supervised and controlled the children; (3) provided habitable housing; (4) avoided extreme discipline, or child abuse or other vices; and (5) refrained from immoral behavior which would deleteriously affect the child.²⁶³ Again, lay testimony is to be used for ease and quickness. "Whether a primary caretaker parent meets these criteria can be determined through nonexpert testimony, and the criteria themselves are sufficiently specific that they discourage frivolous disputation."²⁶⁴

Finally, when neither fit parent is the primary caretaker, the court will consider the best interests of the child on a case-by-case basis.²⁶⁵ That is, "[i]n those custody disputes where the facts demonstrate that child care and custody were shared in an entirely equal way, then . . . no presumption arises and the court must proceed to inquire further into the relative degrees of parental competence."²⁶⁶

The primary caretaker standard only applies as an irrefutable presumption—one that cannot be defeated—to children of tender years. Children under the age of six are usually considered to be of tender years.²⁶⁷ "When, however, we come to those children who

261. Neely, *supra* note 27, at 181 (emphasis added).

262. *See id.*

263. *See David M.*, 385 S.E.2d at 924.

264. Neely, *supra* note 27, at 181-82.

265. *See Garska v. McCoy*, 278 S.E.2d 357, 358 (W. Va. 1981) (syllabus by the court).

266. *Id.* at 363 (ruling that joint custody cannot be considered for the "equal parenting" case unless both parties consent to it). *See also Michael R. v. Sandra E.*, 378 S.E.2d 840 (W. Va. 1989).

267. *See Neely, supra* note 27, at 175.

may be able to formulate an intelligent opinion about their custody, our rule becomes more flexible."²⁶⁸

Children fourteen or older have the right to declare a guardian under West Virginia law.²⁶⁹ The only limitation on this right is that the named parent must be fit. "Often, as might be expected, this means that the parent who makes the child's life more comfortable will get custody; there is little alternative, however, since children over fourteen who are living where they do not want to live will become unhappy and ungovernable anyway."²⁷⁰

Children between ages six and fourteen are dependent on their parents, but they can usually articulate their preference as to their custody arrangement. The judge may ask these children their preferences and consider the child's wishes as part of her determination.²⁷¹ "When the trial judge is unsure about the wisdom of awarding the children to the primary caretaker, he or she may ask the children for their preference and accord that preference whatever weight he or she deems appropriate."²⁷² Although "the judge . . . is not required to hear the testimony of the children, and will not usually do so, particularly if he or she suspects bribery or undue influence,"²⁷³ it is appropriate to treat "mature" and "intelligent" children as "acceptable experts" who may act as "an escape valve . . . in unusually hard cases."²⁷⁴

Justice Neely praised the simplicity of the primary caretaker standard in his article, published one year after the standard was adopted in West Virginia.

Although this method for handling child custody may appear overly cut-and-dried and insufficiently sensitive to the needs of individual children, it has reduced the volume of domestic litigation over child custody tremendously. Because litigation *per se* can be the cause of serious emotional damage to children (and to adults), we consider this to be in the best interests of our state's children. Even more importantly, children in West Virginia cannot be used as pawns in fights that are actually about money. Under our system a mother's lawyer can tell her that if she has been the primary caretaker and is a fit parent, she has *absolutely no chance* of losing custody of very

268. *Id.* at 182.

269. See W. VA. CODE § 44-10-4 (1982).

270. Neely, *supra* note 27, at 182.

271. See *David M. v. Margaret M.*, 385 S.E.2d 912, 914 (W. Va. 1989).

272. Neely, *supra* note 27, at 182.

273. *David M.*, 385 S.E.2d at 924.

274. *Id.*

young children. The result is that questions of alimony and child support are settled on their own merits.²⁷⁵

But is the standard as simple as Neely would suggest?

Courts have struggled with this standard in several situations. For example, in determining who is a primary caretaker, where parents have shifted their roles during different periods of the child's life, *Garska* suggests that the court should focus on which parent was the primary caretaker "before the domestic strife giving rise to the proceeding began."²⁷⁶ Other cases have disagreed and have focused on the entire parenting period. "A determination of who is the primary caretaker of a child of tender years . . . cannot be determined simply by reference to any one moment of time. . . . The determination of primary caretaker is a task which must encompass, to some degree, an inquiry into the entirety of each child's life" ²⁷⁷ Finally, still other courts have refused to look to see who was the primary caretaker immediately before the initiation of the divorce proceedings at all. Instead, these cases look at who was the primary caretaker *before* the parents' lives began to shift with the breakdown of the marriage.²⁷⁸ "Under circumstances where the status of primary-caretaker parent is lost as the result of circumstances that are beyond the control of the parent, it is appropriate for a court to look to who the primary caretaker parent was immediately before the initiation of divorce proceedings."²⁷⁹ Such a focus would result in an errant decision because the totality of circumstances would not be considered.

In addition, the length of time a parent is the primary caretaker is not always determinative of a custody award. In *Dempsey v. Dempsey*, where the mother was the primary caretaker of the children for the first six years of the marriage and the father was the primary caretaker for only one year, the court said, "[c]ertainly [Mrs. Dempsey] had assumed these [primary caretaker] duties for a longer period of time, but we feel that length of time alone is not determinative of whether the presumption should attach."²⁸⁰ Thus, using the primary caretaker standard may not be as easy as it looks, or as it is reported by Justice Neely.

275. Neely, *supra* note 27, at 182 (emphasis in original).

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

277. *Starkey v. Starkey*, 408 S.E.2d 394, 398 (W. Va. 1991).

278. See *J.E.I. v. L.M.I.*, 314 S.E.2d 67, 68 (W. Va. 1984).

279. *Id.* (syllabus by the court) (describing a mother who was not the primary caretaker right before the divorce, due to her mental illness, who was denied custody).

280. *Dempsey v. Dempsey*, 306 S.E.2d 230, 224 (W. Va. 1983).

3. *The Reasons for West Virginia's Adoption of the Primary Caretaker Standard*

The Supreme Court of West Virginia adopted the primary caretaker standard: (1) to increase the predictability of and standardize custody decisions; (2) to give parents less incentive to litigate than to settle their custody cases; and (3) to eliminate the use of children as bargaining chips in the process.²⁸¹

First, in the absence of a simple, reliable presumption to determine the best interests of the child, the *Garska* court worried that custody awards would become unpredictable. The legislature left a void when it overruled the maternal preference doctrine in 1980. Absent this objective presumption, custody decisions after 1980 would have to rest on the court's subjective assessment of each parent's character and lifestyle and what each parent offered to the child. Judges, who normally lack the ability to "measure minute gradations of psychological capacity between two fit parents" would unwisely be called upon to determine relative parental fitness with scientific "precision."²⁸²

Fineman suggests that the primary caretaker standard eliminates this imprecision by focusing on concrete, past behavior which is a fact-finding task that judges are trained to do.²⁸³ "[A] major advantage of the primary-caretaker rule is that it is particularly susceptible to legal analysis because it involves past fact-finding, an inquiry traditionally performed by courts. It has the benefit, therefore, of being a rule that judges can comfortably apply and that lawyers can easily understand and use."²⁸⁴ In contrast, the best interests standard requires future-oriented speculation about which parent would produce the best environment and the quality or extent of emotional bonding between parent and child.²⁸⁵ "The primary-caretaker test assumes that these bonds exist between the primary caretaking parent and the child; they are evidenced by the caretaker's sacrifice and devotion to the child. The test also assumes that the child reciprocates this devotion."²⁸⁶

Second, *Garska* suggests that the unpredictability in the custody award process, which results when the best interests test is applied, encourages parents to engage in costly and lengthy

281. See *Garska v. McCoy*, 278 S.E.2d 357, 361-62 (W. Va. 1981).

282. See *Mercer*, *supra* note 143, at 408-14 (footnotes omitted).

283. See FINEMAN, *supra* note 77, at 182.

284. *Id.*

285. See *id.*

286. *Id.*

litigation where they should settle out of court. In contrast, the criteria for selecting the primary caretaker are clear enough that generally parents would be able to predict the custody award prior to litigation. This predictability would then reduce the need for litigation and would eliminate the best interests "battle of experts."

Third, the *Garska* Court worried that parents would use the unpredictable custody battle "as a coercive weapon to affect the level of support payments and the outcome of other issues in the underlying divorce proceeding."²⁸⁷

Fineman echoes these concerns, and further complains that the best interests battle disadvantages women.

The current set of rules, which requires individualized hearings to determine a plethora of facts and to parade a bevy of experts on the issue of what is in a child's best interest, does not provide 'justice,' particularly for women, who tend to be less well-off economically than their husbands, and who cannot afford such expensive procedures.²⁸⁸

To avoid this cost of litigation and the risk that they might lose custody in a protracted custody battle, women will negotiate away child support and property rights, subsequently leaving them destitute after the divorce.²⁸⁹ The furtherance of justice, however, is not one of the articulated policies behind the primary caretaker standard. In fact, "[t]he primary caretaker parent rule may strike some as unsatisfactory because it does not attempt to arrive at precisely the correct decision in each case."²⁹⁰ However, that adjudication in general is imprecise.²⁹¹

287. Mercer, *supra* note 143, at 409.

288. FINEMAN, *supra* note 77, at 182.

289. See generally Neely, *supra* note 27, at 164-65 (stating that men will argue over custody in order to avoid paying more child support and women, who are typically not as well-off economically, will be forced to accept it).

290. *Id.* at 186.

291. See *id.* Justice Neely argues that

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

Id.

To satisfy the three policies behind the primary caretaker standard, the standard must be easy to apply and must lead to certain, predictable results. One of the main purposes behind reverting to an objective, rule-based standard is to limit judicial discretion and uncertainty inherent in a utilitarian-based best interests analysis.²⁹²

Justice Neely reiterated concerns about the impartiality and the unpredictability of judicial custody decisions based on a best interests analysis as recently as 1994 in the dissent of a West Virginia case which was initially examined under the primary caretaker standard.²⁹³ In that case, the trial court held that neither parent could be accorded the primary caretaker presumption.²⁹⁴ Defaulting to a best interests determination, the court awarded the father custody.²⁹⁵ The West Virginia Supreme Court reversed the decision and gave the mother custody.²⁹⁶ In his dissent, Justice Neely asserted that

there is a rampant gender bias that has clouded the majority's ability to render impartial decisions in the area of family law. . . . Mr. Shearer sat on the 'nest' alone for the past two years, and this court sent him home empty handed. I have no doubt that 'but for' Mr. Shearer's gender, the outcome in this case would have been different.²⁹⁷

4. *Goal Achievement of the Primary Caretaker Standard*

The primary caretaker standard purports to curtail judicial discretion, the emotional and monetary costs of litigation, and the opportunities for using child custody as a bargaining chip, all of which result from an unpredictable individualized approach. By

292. *See id.* at 173-74.

The individualized [best interests] approach might be ideal if it were costless and if courts actually considered the relative merits of the parents in each case. In fact, however, the individualized approach is intrusive, time-consuming and inherently distortive in its effect . . . Under the "best interests of the child" standard, custody, when contested, goes to the parent whom the court believes will do a better job of child rearing . . . I cannot imagine an issue more subject to personal bias than a decision about which parent is "better" It is unlikely that the decision will be the kind of individualized justice that the system purports to deliver.

Id.

293. *See Shearer v. Shearer*, 448 S.E.2d 165 (W. Va. 1994).

294. *See id.* at 167.

295. *See id.*

296. *See id.* at 169.

297. *Id.* at 171.

according an explicit, almost absolute preference to the primary caretaker, West Virginia law arguably encourages early, out-of-court settlements in divorce cases. It is championed for these virtues. But is it living up to its billing?

The primary caretaker standard is designed to be a "bright line" standard for child custody decision-making in order to reduce litigation and provide more predictable results. But if the primary caretaker standard is to achieve its goal of predictable custody awards, it must eliminate judicial discretion.²⁹⁸

The primary caretaker standard must operate as "an authoritative, mandatory, binding, specific, and precise direction to a judge that instructs him how to decide a case."²⁹⁹ Given a similar custody problem, there should be a determinate preference for one parent—like cases should be decided in the same fashion. Moreover, the custody result should be able to be predicted, with accuracy, by divorcing litigants.³⁰⁰

Many legal scholars advocate the primary caretaker standard as "needed reform for a flawed process of decisionmaking."³⁰¹ In

298. See Mercer, *supra* note 143, at 413 (footnotes omitted).

299. Carl E. Schneider, *Discretion Rules and Law: Child Custody and the UMDA's Best Interest Standard*, 89 MICH. L. REV. 2215, 2226 (1991).

300. But see Mercer, *supra* note 143, at 413.

But has discretion been eliminated? Carl Schneider suggests that "even as simple a rule as the primary caretaker standard cannot be applied mechanically, without an exercise of discretion in finding and interpreting the facts. And that discretion can greatly affect the ultimate decision." Does the judge's discretionary application of facts using the standard lead to inconsistent results and unpredictable outcomes given similar situations? If it does, should not the benefit of the primary caretaker standard be questioned? The standard purposefully errs on the side of determinacy versus individualized justice. Is this standard worth this cost? Perhaps only if it leads to predictable decisions.

Id. (footnotes omitted).

301. Crippen, *supra* note 101, at 442. Research has identified eighteen commentators who extensively discussed the primary caretaker standard. See Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988) (advocating that custody be given to the "ordinary devoted parent," although no mention of the primary caretaker term was made); Becker, *supra* note 28, at 139 (identifying the standard's promise but arguing that a maternal deference standard would be even better); Phyllis P. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? Should It?*, 8 BYU J. PUB. L. 75, 86-87 (1993) (arguing for a determinate standard, like the primary caretaker standard, in order to remove the incentive for parents to threaten litigation); Chambers, *supra* note 137, at 561-62 (favoring the primary caretaker standard for children up to five years); Robert F. Cochran, *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1 (1985) (recommending that the primary caretaker become the primary physical custodian in joint custody awards); Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1 (1987) (criticizing the best interests standard as being indeterminate and recommending the primary caretaker standard as an alternative); FINEMAN, *supra* note 77, at 182 (urging adoption of the primary

contrast to the best interests of the child standard, which provides virtually unlimited discretion to decision-makers, the primary caretaker standard is a workable custody standard which will properly limit the judges' abilities to use their own bias, values, and prejudices to decide the case.³⁰² The standard will also properly limit the court's entry into a psychological arena where it has no expertise.³⁰³

This standard, however, has not been expressly adopted by the courts as an irrebuttable presumption, except in West Virginia.³⁰⁴ It has been used by courts in sixteen states as one of the factors to be considered when awarding custody.³⁰⁵ However, in five of those states, it was expressly rejected as a presumptive determinant of custody, and two states, Ohio and Minnesota, have retreated from the standard as not being as workable as it was purported to be.³⁰⁶

Commentators continue to sing the benefits of the standard,³⁰⁷ but the courts are not listening.³⁰⁸ Perhaps this is because the literature is void of an analysis on how the standard is used by judges and whether it is indeed "workable."

caretaker standard to balance the power relations in a custody dispute); Glendon, *supra* note 186, at 1180, 1182 (decrying the best interests standard as being open to the judge's bias and proposing a more determinate standard); Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335 (1982) (arguing that maternal preference should yield only if the father assumed the caretaking role during the marriage); Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1 (1990-91) (advocating either a presumption for mothers or for the primary caregiving parent); Neely, *supra* note 27, at 168 (advocating the primary caretaker standard, which he authored for West Virginia in *Garska v. Garska*); O'Hanlon & Workman, *supra* note 21, at 388 (supporting the primary caretaker standard and reporting how it works in West Virginia); O'Kelly, *supra* note 102, at 483 (suggesting the preference for children who are too young to express their wishes); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 (1982) (advocating the benefits of the *Garska* criteria); Sack, *supra* note 152, at 292-93 (arguing that the primary caretaker standard helps eliminate gender bias but needs a more narrowly defined fitness exception). *But see* Sheri A. Ahl, Case Commentary, *A Step Backward: The Minnesota Supreme Court Adopts "A Primary Caretaker" Presumption in Child Custody Cases: Pikula v. Pikula*, 70 MINN. L. REV. 1344 (1986) (arguing that the standard is unjustified); Crippen, *supra* note 101, at 428-29 (questioning whether the standard has achieved any of its goals); Judith Ferguson, *Is the Primary Caretaker Presumption in Custody Cases for Us?*, 7 OTAGO L. REV. 469 (1991) (arguing against the adoption of the standard in New Zealand); Katz, *supra* note 219, at 133 (finding the presumption to be gender biased); Bruce Ziff, *The Primary Caretaker Presumption: Canadian Perspectives on an American Development*, 4 INT'L J.L. & FAM. 186 (1990) (urging the rejection of the standard in Canada).

302. See GOLDSTEIN ET AL., *supra* note 8, at 24.

303. See *id.* at 67.

304. See Crippen, *supra* note 101, at 434-35.

305. See *id.*

306. See *id.* at 434-37.

307. See *supra* note 301.

308. See *supra* note 301.

III. REVIEW OF THE LITERATURE AND JUSTIFICATION FOR THIS STUDY

This article attempts to explore how judges are making custody awards in West Virginia, using the ten factors³⁰⁹ stated in the primary caretaker standard. In focusing on the "workability" of the standard, this article singles out one of the policy reasons advocating the use of the standard. It neither attempts to comment on whether the standard is leading to better custody decisions in West Virginia, nor to assess whether the standard serves the best interests of the child by preserving the caretaker-child bond after divorce. This study also does not assess whether the ten factors are an accurate measure of the intimate bond which they are supposed to promote between parent and child.

The issues addressed in this article fall into two categories: whether judges are using the standard appropriately and whether situations exist which render the standard inapplicable. This section will explore current theories discussing exactly how these judges have been assessing the standard with respect to child custody cases in West Virginia. Questions that have arisen from Justice Neely's factors include: are judges using these ten factors; are they predetermining who should get custody and then molding the standard; is one factor being used more frequently than other factors; and finally, are there situations where the court cannot determine who the primary caretaker is, and consequently, who should have custody?

For example, what happens when both parents are working or they share the duties of child-rearing? Justice Neely does not anticipate a need for joint custody awards when there is a tie between parents.³¹⁰ Instead, he specifically states that "[i]n West Virginia] we do not encourage court-ordered joint custody, although parents can agree to such an arrangement."³¹¹

Has West Virginia changed its approach to the standard since it was adopted by Neely in 1981? Does the standard lead to

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

310. See Neely, *supra* note 27, at 184-85 (arguing that alternative approaches such as joint custody are sure to be counterproductive in the end because what a court orders has little effect—but how the parents behave will be more determinative of how successful the attempt at joint custody will be). See, e.g., *David M. v. Margaret M.*, 385 S.E.2d 912, 924 (W. Va. 1989) (describing the court's concern, not with whether there were relative degrees of fitness between the two parents, but rather with whom was the primary caretaker and whether the primary caretaker achieved a "passing grade on an objective test").

311. Neely, *supra* note 27, at 183-84.

predictable results? Justice Neely suggests that a mother's lawyer in West Virginia can tell a full-time homemaker, a primary caretaker, that she will absolutely get custody of her children if she is fit.³¹² Does she get custody or have the courts been able to circumvent what appears to be the obvious conclusion that the ten factor list "usually, but not necessarily, spells 'mother.'"³¹³

This article will enrich the debate about whether the primary caretaker standard offers the best way to decide custody cases or whether courts and legislatures, proponents and opponents of the standard, need to move the debate to a new level.

A. *What Do We Know About How Judges Make Decisions?*

1. *Understanding the Judges' Three Tasks*

The judiciary has three tasks:³¹⁴ (1) the central task of judges is to allocate responsibility;³¹⁵ (2) the secondary task is to settle disputes;³¹⁶ and (3) the final task is to use the law as a measure of enduring social order and justice.³¹⁷

Divorce and custody decision-making involve all three of these tasks. In a fault-based divorce system, a judge concentrates on the task of allocating responsibility. The judge seeks to determine which spouse harmed the viability of the marriage through her actions of adultery, intemperance and abuse.³¹⁸ Similarly, a court's focus on parental fitness or unfitness for custody has an allocation of the responsibility element. The rationale is that the parent will realize the consequences of her actions by being denied custody.

Judges engage in the secondary task of dispute resolution when they resolve conflicts between two parties regarding their roles and relationships. The legal system "imposes a definition of what is in dispute" and "establishes parameters" for resolving the situation.³¹⁹ Any information not within the established parameters is irrelevant. For example, West Virginia has placed the child's parental

312. *Id.* at 182. See, e.g., *David M.*, 385 S.E.2d at 925 (determining that "if fit, the [primary caretaker] parent has absolutely no chance of losing custody of very young children").

313. *David M.*, 385 S.E.2d at 923.

314. See RICHARD LEMPART & JOSEPH SANDERS, *LAW AND SOCIAL SCIENCE* 5-7 (1986).

315. See *id.* at 5.

316. See *id.* at 7.

317. See *id.* at 135.

318. See generally *David M. v. Margaret M.*, 385 S.E.2d 912, 925 (W. Va. 1989) (discussing the relationship between a parent's adultery and parental conduct).

319. LEMPART & SANDERS, *supra* note 314, at 134.

preference in custody disputes outside of the parameter of the primary caretaker standard.³²⁰ While a judge in West Virginia may choose to hear the child's testimony in custody disputes involving children under fourteen, the primary caretaker standard is dispositive, unless rebutted by the child.³²¹ To promote dispute resolution, courts adopt rules to regulate the conduct between parties, which ensures the maintenance of social order and justice.³²² Laws "arrange a bargaining space in which parties negotiate" and "control the relative power" parties can exercise during settlement efforts.³²³ Whether acting as a substitute parent or echoing society's paternalistic concerns, the judge endeavors to protect the child and to ensure the child's well-being.³²⁴ In all three of these tasks, the judge acts from a nearly unassailable platform of authority—what is perceived in reality by outsiders, the parties, and even the court itself. Traditionally, judges, in their application of the law, have an "epistemic authority" which cannot be challenged by "social realities themselves, nor by common sense, nor by scientifically controlled observation."³²⁵ Judges decide cases from this power base: "[t]he law autonomously processes information, creates worlds of meaning, sets goals and purposes, produces reality constructions, and defines normative expectations—and all this quite apart from the world constructions in lawyer's minds."³²⁶ Both rule-based and discretionary decision-making operate from this autonomous pedestal. However, a rule-based law, such as the primary caretaker presumption, is more autonomous than a discretionary standard, such as the ad hoc, case-by-case, best interests of the child standard. For example, the latter (best interests of the child standard) can incorporate social science knowledge and delegate epistemic authority to child welfare experts or *guardians ad litem* who articulate to the court what they see as being in the child's best interests.

320. See *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981) (listing the ten factors).

321. See Neely, *supra* note 27, at 182.

322. See LEMPHART & SANDERS, *supra* note 314, at 6-7.

323. *Id.* at 7.

324. See *id.*

325. Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC'Y REV. 727, 743 (1989).

326. *Id.* at 739.

2. *Judges Balance Discretionary and Rule-Bound Decision-Making*

The American legal system struggled to reconcile a preference for rule-bound, determinate decision-making with the trial court's desire to look at an issue on a case-by-case basis, providing individualized justice in each case.³²⁷

[T]here is a continuum between rules and discretion. . . . Toward the 'rule' end of the continuum are a series of devices that are intended to limit decision-makers but that are less directive than rules. These include the principles, policies, guidelines, presumptions, and lists of factors in which family law abounds. At the other end of the continuum is discretion. There is, for instance, discretion to find facts, discretion to choose rules, discretion to make rules, discretion to interpret rules, and discretion to apply the rules to the facts.³²⁸

In any judicial decision, discretion, even the kind constrained by rules, is arguably inherent. A judge ostensibly may be bound by a list of rules for a particular case, but she may also be forced to choose which rules are necessary to apply or focus on. This leaves the judge the opportunity to decide the case as she sees fit, either by intuition, or by what she believes justice requires, and then adjust the rules to fit her desired result. Ultimately, the judge has the final power and, consequently, discretion to interpret the law.³²⁹

For the enigmas that it may invent, discretion also has its benefits. The virtue of discretion is the authority each judge has to do justice in each case. Discretion also allows "the judge to respond expeditiously to society's evolving preferences and practices."³³⁰

327. See Mercer, *supra* note 143, at 410-11 (footnotes omitted).

328. Carl E. Schneider, *The Tension Between Rules and Discretion in Family Law: A Report and a Reflection*, 27 FAM. L.Q. 229, 232-33 (1993-94) [hereinafter *Tension Between Rules*].

329. See Mercer, *supra* note 143, at 410-11 (footnotes omitted); see also Glendon, *supra* note 186, at 1195.

I think the greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made.

Id.

330. *Tension Between Rules*, *supra*, note 328, at 235.

Some scholars characterize the best interests of the child standard as being "rule-failure discretion."³³¹ Rule-failure discretion "is created where it is believed that cases will arise in circumstances so varied, so complex, and so unpredictable that satisfactory rules that will accurately guide decision-makers to correct results in a sufficiently large number of cases cannot be written."³³² However, it is this level of discretion that some judges abhor. Judge Crippen questions the ability of decision-makers to carefully assess situations while avoiding "undisciplined abuse of general principles."³³³ Justice Neely comments that it is impossible for a judge to properly exercise discretion in deciding which parent is better.³³⁴

To avoid the dangers of unlimited discretion, judges and society favor rules. Two primary advantages that rules have over discretion exist.³³⁵ First, the results under rules are more predictable, and their public nature serves the planning function of society. Planning/predictability is one of the main goals of the law.³³⁶

People need to know what the law says so that they can organize their lives rationally. Rules seem likelier than discretion to inform people what the law is and what courts will do. Rules are, after all, publicly stated and thus are, relatively, accessible to perspective litigants. And rules are precisely an attempt to state in advance how cases should be decided.³³⁷

Second, rules outweigh discretion in their ability to help the court decide similar cases according to the legal principle of *stare decisis*.³³⁸

331. Carl E. Schneider, *Discretion and Judicial Decision: A Lawyer's View*, in THE USES OF DISCRETION 47, 62 (Keith Hawkins ed., 1992) [hereinafter USES OF DISCRETION].

332. *Id.*

333. Crippen, *supra* note 101, at 431.

334. See Neely, *supra* note 27, at 174 (stating "[t]he decision may hinge on the judge's memory of his or her own parents or on his or her distrust of an expert whose eyes are averted once too often. It is unlikely that the decision will be the kind of individualized justice that the system purports to deliver."). See also Peggy C. Davis, "There Is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts, 100 HARV. L. REV. 1539, 1541 (1987) (commenting that "[a]s a former judge who has experienced the freedom granted by this permissive view, I have had cause to doubt its wisdom").

335. See Schneider, *supra* note 299, at 2249-51.

336. See *id.*

337. *Tension Between Rules*, *supra* note 328, at 237.

338. See *id.* at 240.

Rules may serve better than discretion the goal of treating like cases alike. If each decision-maker has discretion to decide case by case what principles to apply and how to apply them, cases that are essentially similar are likely to be decided differently. Rules, on the other hand, work to suppress differences of opinion among decision-makers. Furthermore, rules serve as record-keeping

Additional advantages of the use of rules over discretion exist in that: (1) rules contribute to legitimacy of a decision by making the decision more public; (2) rules allow a judge to focus on a problem and not be distracted by irrelevant circumstances; (3) rules can enforce social norms because the public nature of rules allows individuals to plan for the consequences of their actions and to change their behavior, if needed, to avoid negative consequences; and (4) rules are more efficient because they relieve the decision-maker from reinventing the wheel.³³⁹

The history of child custody law can be seen as a struggle between rules and discretion.³⁴⁰ West Virginia's adoption of the primary caretaker standard is somewhat of a resolution of this debate. The "ideal type"³⁴¹ of a rule "is an authoritative, mandatory, binding, specific, and precise direction to a judge which instructs him how to decide a case or to resolve a legal issue."³⁴² The presumption is that this "ideal type" rule will direct lower courts on how to decide a divorce custody case.³⁴³

3. *The Influence of Human Cognitive Processes on Judicial Decision-Making*

A social cognitive framework has been used to examine the potential for bias in the nature of the categories of information that judges use to make decisions. Human cognitive "processes guide decision making and person perceptions and are heavily influenced

devices, so that decision-makers can more easily coordinate their rulings over time and among themselves.

Id.

339. See Schneider, *supra* note 299, at 2249-52.

340. See *Tension Between Rules*, *supra* note 328, at 229-31.

For decades we have lived with an abundantly discretionary way of resolving child custody disputes: The best-interests-of-the-child standard has long been understood to give judges acres of room to roam. Yet in recent years scholar after scholar has inveighed against the discretionary scope that standard permits judges, and jurisdiction after jurisdiction has adopted one or another standard—the primary caretaker presumption . . . for instance—intended to cabin, crib, and confine the range of judicial discretion . . . In short, family law has recently been roiled by much debate and many changes in which the contest between rules and discretion features centrally. This contest is hardly resolved. Every day lawyers argue in courts and legislatures around the country about whether a court should adopt a discretion-limiting rule, about whether a legislature should preempt judicial discretion by devising authoritative standards.

Id.

341. LEMPHART & SANDERS, *supra* note 314, at 3.

342. USES OF DISCRETION, *supra* note 331, at 50.

343. See Glendon, *supra* note 186, at 1181-82.

by culturally determined expectancies."³⁴⁴ Thus, where judges have a great deal of discretion awarding custody, the potential for bias is great because the judges' own conceptions of what an adequate parent is may be based on their own racial-ethnic background, subsequently influencing their findings.

In general, humans develop schemas or cognitive structures, which organize knowledge and serve as prototypes for comparisons of new information.³⁴⁵ Schemas help humans synthesize thousands of pieces of information by assigning each information piece to a concept, classifying the concept's attributes and ordering the relationships between attributes.³⁴⁶ "When people's behavior fails to fit our schemas, we are likely to attribute fault to something internal to the person. If the schemas one holds are inappropriate, overly narrow, or inflexible, bias can be introduced into judgments made about others, resulting in faulty decision making."³⁴⁷

The reasoning processes that both judges and mental health professionals use are comparable.³⁴⁸ Both share two types of schemas for evaluating parent-child relationships and parental competency. These types of schemas for decision-making are "role schemas," which define the qualities or attributes which make up a social position in society, and "event schemas," which define how a person should act given a certain situation.³⁴⁹

By understanding general cognitive processes, one can understand how a judge's values and beliefs can shape her interpretation of the law. Common beliefs influence what meaning a judge ascribes to legal requirements.³⁵⁰ A judge can shape criteria for decision-making to fit the values she believes to be self-evident truths.³⁵¹ The judge's "culture provides [her] with [a] ready-made frame of reference,"³⁵² which gives her world "consistency and order, . . . but which can also lead to [an] error in judgment."³⁵³ For example, if a judge believes that it is morally harmful for children to reside with a gay or lesbian parent, she can ignore the West

344. Sandra T. Azar & Corina L. Benjet, *A Cognitive Perspective on Ethnicity, Race and Termination of Parental Rights*, 18 LAW & HUM. BEHAV. 249, 251 (1994).

345. *See id.*

346. *See id.*

347. *Id.*

348. *See id.* at 251.

349. *See id.*

350. *See generally id.* at 252 (arguing that "common beliefs shape interpretation of criteria in the law (i.e. the meaning ascribed to the words put forth in statutes)").

351. *See id.* (suggesting that a judge might use her personal beliefs in determining the meaning of a law).

352. *Id.* at 265.

353. *Id.*

Virginia primary caretaker presumption and find the primary caretaker unfit. That judge's idea of inappropriate parenting practices may simply reflect the different values she has, rather than the risk those practices pose to the child's health or well being.

Studies reviewing how judges decide abuse and neglect terminations of parental rights cases find that racial or ethnic biases may influence a judge's decision.³⁵⁴ The theories and models of appropriate parenting skills "are heavily rooted in the values of dominant, middle class, Anglo-American culture, and little attempt has been made to examine their validity for diverse groups."³⁵⁵ Consequently, when

[e]valuating the fitness of standard middle class American childrearing practices from the perspectives of other cultures, one realizes the subjectivity and vast possibilities for mislabeling parenting behaviors. . . . A few pieces of culturally misinterpreted information, may begin to color impressions formed and the processing of subsequent cues . . . which ultimately may tip the scales toward a judgment of "unfitness." ³⁵⁶

4. *Research on Child Custody Disputes and on Judicial Decision-Making*

Studies on the factors which influence judges and their decision-making processes in child custody disputes exist. In one study, a judge's "integrity"³⁵⁷ was significantly related to the amount of child support the court awarded to the custodial parent after a divorce adjudicated in Franklin County, Ohio.³⁵⁸

In another study, child custody decision-making was assessed through coding and statistically analyzing 282 investigation files from the San Diego courts to determine psychological factors and

354. See *id.* at 253-64 (detailing examples of cultural traditions often mistaken for bad parenting).

355. *Id.* at 259.

356. *Id.* at 263-64.

357. "Integrity" was rated by local attorneys who also considered the judge's temperament, courtroom management skills, legal ability and use of the Ohio 1987 Child Support Guidelines. See Walter L. Ellis, *The Effects of Background Characteristics of Attorneys and Judges on Decision Making in Domestic Relations Court: An Analysis of Child Support Awards*, in *THE CONSEQUENCES OF DIVORCE: ECONOMIC AND CUSTODIAL IMPACT ON CHILDREN AND ADULTS* 107, 111 (Craig A. Everett ed., 1991). Judges with low integrity scores deviated from the 1987 guidelines. See *id.* at 117.

358. See *id.* at 114-16.

factual information which influenced the judges' decisions.³⁵⁹ Only two factors were found that would predict the judges' awards. First, there was a significant relationship and agreement between the judge's decision and the recommendation of a counselor who was ordered to investigate the divorcing parties and children. In the 164 cases, sixty percent of the total number had a counselor recommendation, and seventy-five percent of those judges' decisions agreed with the counselor's recommendation.³⁶⁰ In cases where no counselor recommendation was obtained, the judge's decision was significantly predicted by the child's expressed preference to reside with one parent, which consisted of about fifteen percent of the cases.³⁶¹ Additionally, the study found that a decision which granted custody to the mother was more likely when the mother was described by the counselor as having "good" physical appearance, social skills and social adjustment.³⁶² Other predictors used in determining the mother's fitness included her maturity, the quality of the mother-child relationship, and whether she had custody of the children during the initial separation.³⁶³

In cases where the father was granted custody, the judge was influenced by "the father's maturity, his drug abuse history, whether he kept at least one child [after the separation], post-divorce living arrangements, and the father's wishes with respect to the custody decision."³⁶⁴ Fathers who co-habitated with a woman, be it a with a new wife, a girlfriend, or their mother, in the post-divorce home, had a fifty percent chance of gaining custody.³⁶⁵

Kunin and her colleagues arrived at a decision-making model which explained seventy-five percent of the cases. The model suggests that the counselor influences the judge's decision by highlighting "mother and father factors." The judge also considers the child's preference, as well as the father-child relationship.³⁶⁶ Figure 2 illustrates their proposed model.

359. See Carla C. Kunin et al., *An Archival Study of Decision-Making in Child Custody Disputes*, 48 J. CLINICAL PSYCHOL. 564 (1992).

360. See *id.* at 567.

361. See *id.* at 572.

362. See *id.* at 569.

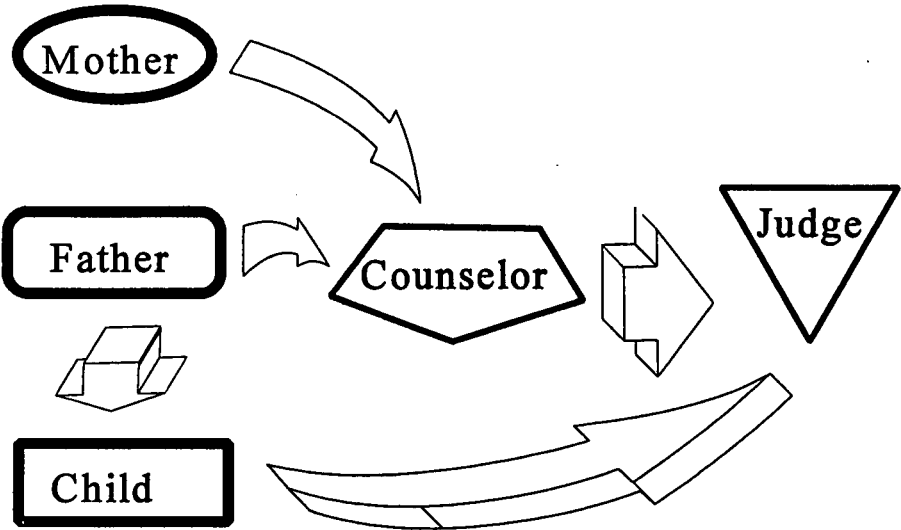
363. See *id.*

364. *Id.*

365. *Id.*

366. See *id.* at 570.

Figure 2
Decision-Making Model for the Resolution
of Child Custody Disputes³⁶⁷



367. *Id.* at 571.

In 1981, Carol R. Lowery conducted a study of judicial decision-making and concluded that each parent's responsibility, maturity and mental stability influenced the custody outcome.³⁶⁸ Other scholars used this preliminary study as a springboard for their own analysis of the criteria judges utilize in making custody awards.³⁶⁹ In their study, Reidy, Silver and Carlson distributed questionnaires to Superior Court judges in California. They found that the child's wishes were given increased weight in the decision as the child's age increased.³⁷⁰ The wishes of a fifteen-year old child had the greatest impact on judges' decisions (\bar{M} = 7.33, \bar{SD} = 1.48 on a 9 point scale, with 9 = extremely important and 1 = not at all important).³⁷¹ A custody investigation report had the second greatest impact (\bar{M} = 6.87, \bar{SD} = 1.63).³⁷² The direct testimony of the parents was moderately important to the judge (\bar{M} = 6.60, \bar{SD} = 1.79).³⁷³ The testimony of school personnel (\bar{M} = 5.45, \bar{SD} = 1.57) and the testimony of extended family (\bar{M} = 4.37, \bar{SD} = 1.57) were also moderately influential.³⁷⁴ The recommendations of attorneys (\bar{M} = 3.94, \bar{SD} = 1.86) and the testimony of friends (\bar{M} = 3.92, \bar{SD} = 1.68) received very little importance.³⁷⁵ The survey ranked the wishes of a five-year-old child as being the least influential factor of the available choices (\bar{M} = 2.82, \bar{SD} = 1.68).³⁷⁶

Peggy Davis investigated how judges use psychological theory to inform their decision-making.³⁷⁷ In this study,³⁷⁸ she focused on the judicial absorption of Goldstein, Freud and Solnit's psychologi-

368. See Carol R. Lowery, *Child Custody in Divorce Proceedings: A Survey of Judges*, 12 PROF. PSYCHOL. 492 (1981).

369. See Thomas J. Reidy et al., *Child Custody Decision: A Survey of Judges*, 23 FAM. L.Q. 75, 79 (1989). \bar{M} stands for the mean and \bar{SD} stands for the standard deviation.

370. See *id.*

371. See *id.*

372. *Id.*

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* Other criteria used in the process included: if a parent alienated the child from the other parent (\bar{M} = 6.92); if the child had a closer bond with a particular parent (\bar{M} = 6.72); which parent was the primary caretaker (\bar{M} = 6.59); whether a parent had better parenting skills (\bar{M} = 6.57); whether one parent was more psychologically stable than the other (\bar{M} = 6.56); whether a parent was in a homosexual relationship (\bar{M} = 5.48); whether a parent was angry and bitter (\bar{M} = 5.41); which parent was more economically stable (\bar{M} = 4.28); and whether a parent was co-habiting while the other had remarried (\bar{M} = 3.86). See *id.* at 85. Ranked as being less important or unimportant criteria were: whether one parent remarried while the other lived alone (\bar{M} = 3.14); which parent was more socially active (\bar{M} = 2.61); placing the child with the same sex parent (\bar{M} = 2.58); and placing the child with her mother (\bar{M} = 2.40). See *id.*

377. See Davis, *supra* note 334, at 1539-1604.

378. See *id.* at 1543.

cal parent theory which suggests that custody awards in the best interests of the child should preserve the bond between the child and the "psychological parent."³⁷⁹ After reviewing 179 appellate cases between 1963 and 1984, she found that courts used the theory in four ways: "as background for the determination of case-specific, adjudicative facts[;] . . . as legislative facts to support an interpretation or declaration of a common law rule; to support an interpretation of a statute; and to determine the reach or definition of a constitutional principle."³⁸⁰ She concluded that judges used the theory "incautiously."³⁸¹ In sum, judges respond inconsistently and with a great deal of confusion to the relevance of psychological theories.

One of the earlier studies discussing legal decision-making which affects children of divorce consists of a ten-year study of California divorce cases from 1968 to 1977.³⁸² During that period, California eliminated its fault-based divorce system and later eliminated its statutory maternal preference when awarding custody.³⁸³ In order to examine the attitudes and opinions of judges making custody decisions, the researchers interviewed 169 matrimonial attorneys and forty-four Superior Court judges in the San Francisco and Los Angeles counties between 1974 and 1976.³⁸⁴

379. GOLDSTEIN ET AL., *supra* note 8, at 17-20 (describing "the psychological parent-child relationship").

380. Davis, *supra* note 334, at 1547.

381. *See id.* at 1593-94 (emphasis in original).

Courts have frequently accepted the theory on the basis of one-sided presentations, rendering case-specific results of its acceptance questionable. Developments in the law based upon psychological parent theories have been far reaching, yet they too have resulted from one-sided deliberations. Moreover, they have resulted from deliberations in which the evolution of law was denied. In so easily accepting psychological parent theory while disregarding competing theories and the consequences of doctrinal evolution, courts have altered common law rules, ignored or transformed statutory language, given constitutional sanction to significant state incursions upon family autonomy, and diluted constitutional standards of scrutiny with respect to rights of biological family autonomy. At the same time, full implementation of *legislated* responses to psychological parent theory has been delayed by judicial rejection or misunderstanding of the theories. The sweeping effects of the various judicial reactions to this theory raise grave questions about how judges absorb and evaluate social science theories.

Id.

382. *See* Lenore J. Weitzman & R.B. Dixon, *Child Support Awards: Legal Standards and Empirical Patterns for Child Custody, Support, and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 473 (1979).

383. *See id.* at 475 (describing the elimination by the legislature of fault-based divorce in 1970 and the maternal preference in 1973).

384. *See id.* at 476-77.

They also "drew samples of divorce cases [from] three points in time: 1968, 1972 and 1977."³⁸⁵

In 1975, "two years after the presumption favoring the mother in custody decisions was removed from the law," ninety-eight percent of the Los Angeles attorneys interviewed said that judges continued to use a maternal preference when awarding custody of pre-school children.³⁸⁶ One-third of the attorneys suggested that judges still used the preference when making custody decisions for older children as well.³⁸⁷ The study also explored factors which led to fathers receiving custody of pre-school children. Interestingly, these factors had nothing to do with the father's conduct or living pattern, but rather were negative "mother factors."³⁸⁸

Comparing the pre- and post- maternal preference periods, fathers were no more likely to request custody in 1977 than they were in 1972.³⁸⁹ On the other hand, of the few fathers who requested physical custody, their success rates increased dramatically from thirty-five percent being "awarded [custody] in 1968, 37% in 1972, and 63% in 1977."³⁹⁰

Not as surprising, however, over the years examined in this study, insignificant changes in which a parent received custody existed. In both 1972 and 1977, mothers overwhelmingly received sole physical custody eighty-eight percent to ninety percent of the cases, respectively.³⁹¹

One explanation for the enduring maternal preference is that judges are still following the traditional standard: most judges, having spent the major portion of their legal careers in an era in which a mother's special nurturing abilities were unquestioned, may still be reluctant to "take little children away from their mothers." In fact, 81% of the Los Angeles judges we

385. *Id.* at 476.

386. *Id.*

387. *Id.* at 506.

388. *Id.* at 508 (footnote omitted).

The most frequently mentioned factors [by attorneys interviewed], in rank order, were: if the mother physically neglects the children (36%), is sexually promiscuous (33%), is an addict (31%), is mentally unstable (27%), or is an alcoholic (23%). It is only when we reach the seventh ranked factor, that the father had a better emotional relationship with the children, mentioned by 10% of the attorneys, that we reach the father's relationship with the children. These responses suggest that *custody issues are still framed in terms of the fitness or unfitness of the mother.*

Id.

389. *See id.* at 502-03.

390. *Id.* at 503.

391. *Id.*

interviewed said they thought that there was still a presumption in favor of the mother for preschool children, although most of them qualified their responses by noting that the presumption was an attitudinal predisposition rather than "the law."³⁹²

These findings were replicated in a 1990 Alabama study before and after that state's maternal preference rule was abolished.³⁹³ In the time period between 1976 and 1986, they found that the mother was awarded custody in ninety-one percent of the cases,³⁹⁴ and that no overall change in the percentage of fathers who either sought or were granted sole custody existed.³⁹⁵

Similarly, a 1992 study of 1000 California couples who had filed for divorce in 1984 and 1985 found that mothers received sole physical custody in two-thirds of the cases, and that fathers received sole physical custody in less than ten percent of the cases.³⁹⁶ Researchers did find a dramatic movement toward joint legal custody, an outcome often suggested by the parties' lawyers.³⁹⁷ About eighty percent of the sample families had joint legal custody—presumably shared decision-making in regard to the child—although the child predominantly lived with the mother.³⁹⁸ Nonetheless, they found this change toward joint custody largely symbolic.

The overwhelming majority of mothers still want sole physical custody of their children, and this is usually the outcome. . . . Many fathers do not file a conflicting [custody] request in their legal papers. . . . And in cases where they do, and the requests conflict, mothers succeed twice as often as fathers in securing their preferred outcome. In short, although gender stereotypes are no longer embedded in the statute books themselves, . . . the actual custodial outcomes still reflect profound gender differentiation between parents: the decree typically provides that the children will live with the mother.³⁹⁹

392. *Id.* at 504.

393. See Laura E. Santilli & Michael C. Roberts, *Custody Decision in Alabama Before and After the Abolition of the Tender Years Doctrine*, 14 LAW & HUM. BEHAV. 123 (1990).

394. *Id.* at 130.

395. See *id.* at 130-32.

396. ELEANOR E. MACCOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 112 (1992).

397. See *id.* at 113-14.

398. See *id.* at 112-13.

399. *Id.* at 113-14.

Court records and parental interviews were used to measure the level of conflict pertaining to custody and visitation issues. Only ten percent of the sample experienced a high conflict situation.⁴⁰⁰ Fifty percent of the sample had uncontested divorces,⁴⁰¹ close to thirty percent settled the case prior to intervention by a third party, and about eleven percent settled after court-ordered mediation.⁴⁰² Judges decided custody in only one and a half percent of the approximately 1000 cases examined.⁴⁰³

The two variables "most significantly related to legal conflict were the father's concern over the child's well-being in the mother's household and the father's hostility toward the mother."⁴⁰⁴ However, mothers continued to secure requested custody twice as often as fathers in these few high conflict cases.⁴⁰⁵

A surprising finding, which belies the perception that divorce decrees reflect a trade-off between custody and monetary issues, is that there was no evidence that mothers who experienced more legal conflict had to give up monetary support to win custody.⁴⁰⁶ Contrary to popular belief, custody battles were not being used by fathers as a bargaining chip to reduce support obligations or alter the property settlement.⁴⁰⁷

A Utah study of custody decisions from 1970 to 1993 replicates MacCoby and Mnookin's finding about the low percentage of contested custody battles.⁴⁰⁸ While during this twenty-three year period Utah eliminated the maternal preference, the percentage of contested custody situations remained relatively stable—parents contested between ten percent and 14.8% of the custody decisions.⁴⁰⁹ The proportion of fathers requesting custody did not significantly change in 1993, resting at thirteen percent.⁴¹⁰ Nor were fathers more likely to receive sole custody in 1993 than they were in 1970 (5.5%).⁴¹¹

Among the ten percent of couples who formally disputed custody, mothers received custody fifty percent of the time, fathers

400. *See id.* at 137.

401. *See id.*

402. *See id.*

403. *See id.* at 272 (stating that California has a mandatory mediation requirement for contested custody disputes).

404. *Id.*

405. *See id.* at 273.

406. *See id.* at 160.

407. *See id.* at 273.

408. *See Bahr et al., supra* note 31.

409. *See id.* at 255.

410. *See id.* at 256.

411. *See id.*

received custody twenty-one percent of the time, and the remaining twenty-nine percent of the cases had joint custody awards.⁴¹² The rise of joint custody awards, 0.9% between 1970-74 and 20.6% between 1990-93, constituted the major change noted by the researchers.⁴¹³ A significant increase in more specific visitation schedules was also noted. "In 1970-74 only 9 percent of the decrees had a partially defined or specific visitation schedule and this increased to 49 percent by 1990-93."⁴¹⁴ The researchers concluded:

Although the removal of the maternal preference was not followed by an increase in the proportion of fathers who were awarded sole custody, there was a decrease in the proportion of mothers who were awarded sole custody, an increase in joint legal custody awards, and an increase in specific visitation schedules. The net result of these changes appears to be greater opportunities for the involvement of fathers with their children after divorce.⁴¹⁵

In sum, the research on current custody awards indicates that although the advent of joint and shared custody arrangements has broadened the range of options available to divorcing parties, gender differentiation prevails—promulgated by the judiciary, attorneys and, most importantly, by the parties themselves.

By some estimates, 85% to 90% of children of formerly married parents reside with their mothers while only 10% live with their fathers. While joint physical custody arrangements alter these figures somewhat, children in joint custody are still much more likely to end up with their mothers than their fathers.

To a great extent, these arrangements reflect prevailing social realities concerning who cares for children. Despite recent evidence for enhanced paternal involvement with offspring (and the popularization of "involved dads"), the consensus of current research indicates that mothers assume primary responsibility for domestic labor and child rearing, even when they also work outside the home. Given that many mothers assume a disproportionate role in the lives of their children, it is reasonable that, when custody requires a choice between mothers and fathers, mothers are more often awarded physical custody of offspring. Indeed, because the large majority of custody arrangements are privately negotiated by parents

412. *See id.* at 257.

413. *See id.* at 256.

414. *Id.* at 262.

415. *Id.* at 267.

and judicially accepted, the predominance of maternal custody might be viewed as parents' consensual decisions rather than the outcome of judicial judgments.⁴¹⁶

When judges are asked by the parties to make a decision because the parties cannot agree, it is logical that they continue to focus on the mother, her fitness for custody and her relationship with the children, rather than the father.

B. What Don't We Know and How Will This Study Help Fill Some of Those Gaps

A review of literature indicates that mixed support exists for the belief that a primary caretaker preference leads to optimum child placement because either it predicts the better parent or it preserves the most important relationship/bond between parent and child.⁴¹⁷ Certainly, this is an area where research must be done if the preference is to gain wide-spread acceptance. It seems just as important to proponents of the standard that: it facilitates the custody decision process by having judges focus on concrete behavior and lay testimony versus expert testimony; it controls or hampers discretionary judicial decision-making by giving a list of ten caretaking tasks for the court to evaluate and sum up to find who provides primary caretaking; and it provides an opportunity for effective appellate review because the appellate court can judge whether the trial court properly evaluated the caretaking benchmarks.⁴¹⁸ There is an equal paucity of research to see if the preference is accomplishing these goals, as well as the optimum child placement goals.

The West Virginia rule has three "escape valves:" (1) fitness of the primary caretaking parent; (2) intelligent wishes of a child over

416. Ross A. Thompson, *The Role of the Father After Divorce*, 4 FUTURE OF CHILDREN 210, 215-16 (footnotes omitted).

417. See generally *Margaret M. v. David M.*, 385 S.E.2d 912 (emphasizing the importance of original bond with primary caretaker to child's growth and development); GOLDSTEIN ET AL., *supra* note 8 (discussing the psychological parent standard which asserts that children develop a stronger relationship with the parent who provides day-to-day care); KLAUSS & KENNEL, *supra* note 11 (supporting the crucial element of the infant-parent bonding tie and subsequent child-parent bonding). But see BECKER, *supra* note 28, at 192-201 (suggesting judicial bias pervades the primary caretaker standard); Schneider, *supra* note 299, at 287-88 (suggesting that the primary caretaker standard involves judicial decisionmaking that affects the ultimate decision).

418. See Bruce Ziff, *The Primary Caretaker Presumption: Canadian Perspectives on an American Development*, 4 INT'L J.L. & FAM. 186, 199-203 (1990).

six; and (3) when child care is shared in an entirely equal way.⁴¹⁹ These escape valves can be used by the parties to gain leverage, and, thereby, to introduce a level of unpredictability in a custody battle.⁴²⁰ This is just the leverage that the proponents of the standard hoped would be deterred by having a predictable result.⁴²¹

Parties can raise the ante and increase the litigiousness of a custody dispute by having the court focus on fitness issues, such as whether the presumptive primary caretaker had an extra-marital affair which would bring into question her fitness to be the child's custodian. Parties can also use the wishes of the child exception to suggest the child's stated, or unstated custody preference. This article attempts to answer the question of whether these two "escape valves" are being used to subvert a predictable award.

The third escape valve is the equal primary caretaker situation. *Garska* implies that the "equal parenting exception" to the presumption will be rare.⁴²² But, in a changing world where it is more common to find both parents substantially participating in parenting, is this exception as rare as *Garska* would have us believe? For example, do courts find identification of the primary caretaker easy and clear cut when major nurturing tasks have been delegated to a non-parent, such as a day-care center, a relative, a nanny? This study looks at this exception, when it arises, and how courts resolve that situation.

Possible computation errors can occur if the court uses parenthood factors, other than the ten listed in *Garska*. For example, the court could look at which parent emotionally supports the child. The court could also prioritize certain factors. The likelihood of more errors occurring is thus heightened when the time frame for examining the ten factors is uncertain. Courts may differ with regard to when to look and the length of time to look.

Finally, what happens when the court finds that different parents are primary caretakers to different children in the same family, or when an older child chooses to live with the non-primary caretaking parent? Is it predictable that the court will split the children up? This research will approach these types of questions and will try to address the concerns they may place on the courts and the persons involved.

419. *See id.*

420. *See id.* at 199-200.

421. *See id.* at 198.

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

IV. RESEARCH METHODOLOGY

A. *Research Questions and Hypotheses*

Quantitative Research Questions:

1. How do West Virginia trial and appellate courts use the primary caretaker standard and its ten criteria to determine custody?

HYPOTHESIS 1: In 100% of the forty-nine cases in the sample, the court will consider all ten *Garska* factors to determine which parent is the primary caretaker.

RATIONALE: To make a determination of who is the primary caretaker, trial courts should receive, and appellate courts should review, evidence on all ten *Garska* factors of primary caretaking.

- a. Which factors are being considered and, looking at the sample as a whole, to what degree?

HYPOTHESIS 1a: The frequency of use for each factor, looking at all forty-nine cases, will be 100%.

RATIONALE: Each factor should be considered in each case. All factors should be considered to an equal degree, as all ten tasks would be provided by at least one of the parents or a substitute caregiver to each child.

- b. Are other factors, not in the list of ten, being considered?

HYPOTHESIS 1b: Zero percent of the cases will use additional factors.

RATIONALE: No other factors should be considered as the list was intended to be exclusive and exhaustive for the court's inquiry.

- c. Have the courts' considerations of the factors changed over time?

HYPOTHESIS 1c: There will be no variation in the frequencies, showing in how many cases a factor is considered, when the cases are divided into three time periods (1981-85, 1986-90, 1991-95).

RATIONALE: The factors should be considered consistently over time, each factor being considered by the court in each case. Thus, the frequencies should continue to be 100%.

d. Are there any differences in the courts' uses of the factors when the cases are divided into four categories—cases where the primary caretaker is unfit, both parents are unfit, both parents are equal primary caretakers, and where a child under fourteen states a preference?

HYPOTHESIS 1d: There should be no variation in the frequency that each factor is considered when cases are divided by topic. Each frequency should remain at 100%.

RATIONALE: There should be no difference in the courts' original determinations of who is the primary caretaker. All ten factors should be summed first. Only after a court finds which parent is the primary caretaker, or finds that the parents share caretaking in an entirely equal way, does the court look at fitness, the child's best interests, or the child's preference.

Qualitative Research Questions:

2. Are there any predisposing factual situations that appear to alter the courts' routine determinations of the primary caretaker?

HYPOTHESIS 2: The standard does not anticipate that there are any unique situations that merit a different application or avoidance of the standard. However, situations exist which were not anticipated, where judges would struggle with applying the standard—the hard case.

3. Are there additional factors which would help explain any variances in the outcome (i.e., the age of the child, the child's preference, sibling relationships, the time period looked at to determine the parental status as primary caretaker)?

HYPOTHESIS 3: Again, the standard does not anticipate the impact of additional facts or factors, but there are likely to be additional considerations as the courts strive to bring individualized justice to each case.

B. Theoretical Framework for This Study

1. Weber's "The Ideal Type"⁴²³ as a Framework for Comparison

Max Weber's favorite methodological device, "the ideal type," is used to analyze the judicial opinions which employ the primary caretaker presumption.⁴²⁴ Weber understood law to be made according to either formal or substantive criteria. Formal criteria are those which are intrinsic to the legal system—"procedural" rules that mandate procedure for the courts and litigants to follow, as well as "substantive" legal rules which proscribe how a court must decide a case given a certain set of facts.⁴²⁵ The law is made by substantive criteria (not to be confused with substantive law) when the law turns outside of the legal system for the rules it applies; for example, when it uses a religious code to decide a case.⁴²⁶

Weber also classified law-making as either being rational or irrational.⁴²⁷ Law-making is rational if it leads to predictable outcomes because the judge follows a routine of formal and substantive norms to reach the decision. In other words, like cases are decided the same. Law-making is irrational when the outcomes are not predictable.⁴²⁸

The following classification scheme diagrams the relationship between formal/substantive and rational/irrational law-making.

423. See LEMPERT & SANDERS, *supra* note 314, at 3 (referring to MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES (Edward Shils & Henry Fitch eds. and trans., Free Press 1949)).

424. See *id.*

425. See *id.* at 9.

426. See *id.*

427. See *id.*

428. See *id.*

Table 1

The Typology of Legal Systems Classified by Formality and Rationality of Decision-making Process⁴²⁹

| <i>Degree of Differentiation of Legal Norms</i> | <i>Degree of Generality of Legal Norms</i> | |
|---|--|---------------------------|
| | <i>High</i> | <i>Low</i> |
| High | Logically formal rationality | Formal irrationality |
| Low | Substantive rationality | Substantive irrationality |

Lempert and Sanders explain:

A formally irrational procedure exists insofar as a process prescribed by the legal order yields results that do not seek to analyze the meaning of events and are unconstrained by reason Substantive irrationality exists when lawmakers and finders do not resort to some dominant set of general norms but, instead, act arbitrarily or decide upon the basis of an emotional evaluation of the particular case. . . . Substantive rationality exists when lawmakers and finders follow a consistent set of principles derived from some source other than the legal system. These may be religious, economic, or, God forbid, sociological. . . . Formal rationality could, for Weber, be of two types. The first, *extrinsic rationality*, exists when decisions turn upon perceptible external characteristics that have been made consequential by the legal system. For example, a case might depend on whether certain formal words were uttered or whether a seal was attached to a document. The second, *logically formal rationality*, exists when behavior is evaluated by reference to a theoretically gapless set of legal norms. Logical reasoning allows one, in principle, to determine the implications of the legal norms for any particular behavior.⁴³⁰

429. *Id.* (quoting David Trubek, *Max Weber on the Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 279).

430. *Id.* at 10.

Custody law can be classified into the following framework:

Table 2
The Typology of Custody Law Classified by Formality and
Rationality of Decision-Making Process

| <i>Source of the Legal Norms Involved</i> | <i>Method For Law-Making</i> | |
|---|---|---|
| | <i>Rationality</i> | <i>Irrationality</i> |
| Formal | Primary Caretaker Determination Which Follows Guidelines ----- Tender Year Presumption | Ad Hoc Primary Caretaker Analysis |
| Substantive | Best Interests Determination Which Follows Guidelines and Uses Expert Opinion ----- Irrebuttable Presumption that Fathers Have a Natural Right to Custody | Ad Hoc Best Interests Analysis |

Primary caretaker decision-making is formal-rational when it follows Neely's advice to, in essence, total the ten parenting tasks to determine which parent is the primary caretaker.⁴³¹ Then, the formal-rational process mandates that the judge determine whether the primary caretaker is fit. The choice of the fit primary caretaker is predictable where judges adhere to this "ideal type."

Primary caretaker decision-making is formal-irrational in those instances when the judge uses factors of her own, outside of the ten *Garska* factors,⁴³² to determine primary caretaking, or where the judge expands the "escape valves" and refuses to apply the presumption. She could do this for several reasons, such as unfitness, sibling concerns, the sexual activity of the parent, and a child's preference. It is in those instances when the decision against the primary caretaker is more unpredictable.

431. See Neely, *supra* note 27, at 180.

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

The traditional presumption that fathers have a natural right to custody is substantive and rational.⁴³³ The natural law presumption rests in part on the theocratic belief that a father is the ordained head of the family.⁴³⁴ The result is then predictable because it relies on a deontological principle that is consequently religious in nature.⁴³⁵ In contrast, the tender years doctrine⁴³⁶ is formal-rational because the legal system presumes that children need their mothers when they are young for nurturing and socialization.

Best interests of the child decision-making is substantive-rational when it relies on both expert testimony, as to what is in the child's best interests, and a set of psychological factors to determine the optimum parent-child relationship. This form of decision-making becomes irrational when the judge attempts to form an ad hoc psychological judgment about which parent is better.

Once we have the Weberian model⁴³⁷ for understanding the different standards of custody law-making, we can formulate the primary caretaker presumption "ideal type" as formal-rational decision-making. Next, we can compare this "ideal type" with the actual primary caretaker custody decisions to see if they are achieving the formal-rational goals. Because the ideal type is a perfect, generalized, and thus unreal, example, it becomes "[a]n analytical yardstick against which we might measure actual actions"⁴³⁸

This theoretical tool provides a frame of reference from which to analyze a situation, helps the researcher identify and order the empirical problem under investigation and to identify the dynamics

433. See LEMPHART & SANDERS, *supra* note 314, at 10 (explaining that substantive rationality exists when lawmakers and finders of fact follow a consistent set of principles derived from some source other than the legal system).

434. See Wilcox, *supra* note 43, at 920.

435. See LEMPHART & SANDERS, *supra* note 314, at 9 (explaining that substantive rationality "yields outcomes that are predictable from the facts of the case . . . [t]hese may be religious, economic, or, . . . sociological").

436. See SHIRLEY WOHLKRAN & NEIL A. FRANK, *THE LAW OF CHILD CUSTODY: DEVELOPMENT OF THE SUBSTANTIVE LAW* 19 (1982) ("[t]he rule of law that envisioned the mother as the preferred parent in most custody disputes"); see also Neely, *supra* note 27, at 175 (referring to the tender years as being children under six years of age).

437. See LEMPART & SANDERS, *supra* note 314, at 3. Weber used "ideal types" to assist research. An "ideal type" is a constructed paragon against which reality can be compared:

An ideal type is formed by the one-sided *accentuation* of one or more points of view and by the synthesis of a great many diffuse, discrete more or less present and occasionally absent *concrete individual* phenomena, which are arranged according to those one-sidedly emphasized viewpoint into a unified analytical construct.

See *id.* (quoting MAX WEBER, *THE METHODOLOGY OF SOCIAL SCIENCES* 90 (1949)).

438. *Id.*

of how a system operates, and serves as a standard against which given patterns of action can be measured. Justice Neely has supplied the "ideal type" for custody decision-making using the primary caretaker standard.⁴³⁹

In the best possible circumstances in West Virginia, a judge should elicit evidence on all ten indicators of primary caretaking.⁴⁴⁰ Next, the judge should also consider whether the primary caretaker was fit according to five requirements: "(1) [did she] feed and clothe the child appropriately; (2) [did she] adequately supervise the child and protect him or her from harm; (3) [did she] provide habitable housing; (4) [did she] avoid extreme discipline, child abuse, and other similar vices; and (5) [did she] refrain from *grossly* immoral behavior under circumstances that would affect the child."⁴⁴¹ The child's preference would be considered only if the child was over the age of six and only if intelligently made.⁴⁴² Taken one step further, the primary caretaker standard ideal type leads to rational, concrete decision-making, uninfluenced by outside factors or the judge's bias. The following figure is a representation of the primary caretaker decision ideal type:

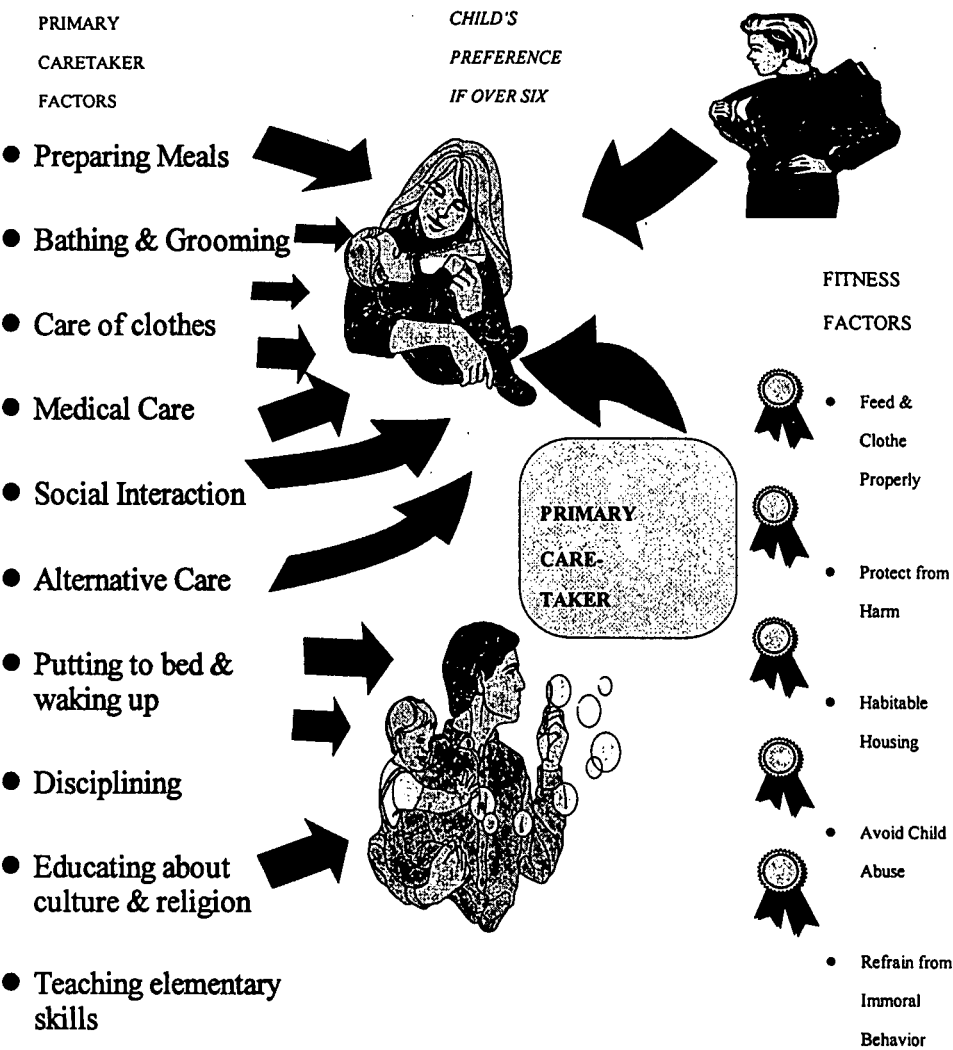
439. See *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981).

440. See *id.* (listing the ten factors used in the decision).

441. Neely, *supra* note 27, at 181.

442. See *id.* at 175, 182.

Figure 3
Webster's Ideal Type: Primary Caretaker Decision-Making



2. *Content and Map Analysis—Looking for Trends in Decision-Making*

"Content analysis is any technique . . . for making inferences. . . by objectively and systematically identifying specified characteristics of messages."⁴⁴³ It is a process which involves analyzing data as "symbolic entities,"⁴⁴⁴ and it is appropriate when the investigator's data are limited to documentary evidence, as it is here.⁴⁴⁵ It is an unobtrusive measure which permits the researcher to audit communication content against a standard.⁴⁴⁶ In this study, the court's primary caretaking decision-making process was monitored against the original ten factors proposed by *Garska* and the process mandated by Justice Neely.⁴⁴⁷ Using content analysis, the researcher could make inferences about the antecedents of communication, the encoding process, and the effect of the communication. Content analysis permitted the researcher to ask: are there any patterns of decision-making based on the facts of the case or predisposing factors; what will be the future impact of the court's use of the primary caretaker presumption; and does West Virginia's use of the primary caretaker presumption further the accomplishment of any of the stated goals? Ole Holsti claims that, "[q]ualitative content analysis, which has sometimes been defined as the drawing of inferences on the basis of appearance or nonappearance of attributes in messages, has been defended most often, though not solely, for its superior performances in problems of applied social sciences."⁴⁴⁸ Recursive qualitative context analysis was appropriate for this study as: "[t]his form of qualitative content analysis puts the researcher back into the research process, places emphasis on critical reflection, and rejects the linear, hypothetico-deductive model of positivistic research; it substitutes in its place a hermeneutic spiral of growing awareness."⁴⁴⁹

443. OLE R. HOLSTI, *CONTENT ANALYSIS FOR THE SOCIAL SCIENCES AND HUMANITIES* 25 (1969).

444. KLAUS KRIPPENDORF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* 10 (1980).

445. See HOLSTI, *supra* note 443, at 15.

446. See KRIPPENDORF, *supra* note 444, at 29.

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

448. HOLSTI, *supra* note 443, at 10.

449. Bryan Pfaffenberger, *Microcomputer Applications in Qualitative Research*, 14 SAGE U. PAPER SERIES ON QUALITATIVE RESEARCH METHODS 9, 60 (1988) (citing K. Lindkvist, *Approaches to Textual Analysis*, in *ADVANCES IN CONTENT ANALYSIS* (K.E. Rosengren ed., 1981)).

Lawyers are taught this type of analysis, which searches for meaning and relevance in judicial opinions beyond the judge's express words. To understand how to analyze the cases as both a researcher and a lawyer, one must first understand what a judge does. To resolve an issue which has been presented to a court, the judge must identify the rule to be applied, identify the key facts which fit within the rule and explain expressly or, more often, implicitly how the contention must be resolved. The lawyer's job is to identify the express and implied logical connections between the factual evidence and the conclusion (the holding) that the court reaches. "Much of what a qualitative researcher seeks to grasp "goes without saying". . . ,and it has to be uncovered by paying attention to the tacit dimension of social life—what the philosopher Alfred Schutz calls the common-sense, taken-for-granted world of everyday reality."⁴⁵⁰ To do this, the lawyer reads, highlights and rewrites the opinion, or briefs the opinion. She puts herself in the judge's shoes and asks why would she reach the same result as the judge and how would her result differ from the judge's, given the facts and the standard? Rewriting allows the researcher to add "the culturally provided, contextual knowledge"⁴⁵¹ that may be missing from the judge's statements.

Next, the factual information from each case was coded by attaching categories to similar facts. In particular, the ten primary caretaker factors were isolated for analysis. Then, analytic induction was used on the coded information—"all similarly coded instances of a category are examined together to determine which features of social behavior are always present when the coded phenomenon is present."⁴⁵² That is, the texts of similarly coded cases where the judges applied the primary caretaker standard were examined and a determination was made as to what factors and facts were being considered when the judges applied the standard. In particular, the following questions were repetitively asked: are there any outside behaviors or influences operating which interfered with the judges' use of the standard; did they affect the outcomes; are the results similar; and why or why not?

These comparisons were rewritten multiple times, continually reexamining the cases until trends or patterns appeared.

[I]t is a basic canon of qualitative data analysis that the meaningful patterns in the data emerge only after a deliberate

450. *Id.* at 56 (citation omitted).

451. *Id.* at 26.

452. *Id.* at 29 (emphasis in original).

(and human) confrontation with the data, in which the text is read, reread, and most importantly of all, *rewritten*. The rewriting process, in which the researcher reorganizes the material and amplifies it from memory, is crucial to the quality of the analysis.⁴⁵³

Map analysis was also used to visualize the relationships between the concepts and the patterns of decision-making. In sum, the research design includes an impressionistic, exploratory survey of the caselaw in West Virginia.

The research goal aims to illuminate the primary caretaker standard through description, not to test hypotheses. The hypotheses only provided the "ideal types" for data comparison and guided the content analysis of the cases. Additionally, "instead of seeking facts to prove or disprove an hypothesis, [a researcher is] simply recording details, each in itself too insignificant for [her] to be able to see—and thereby be biased by—its meaning. Only when [she] has all the facts can [she] see which are emphasized most, which least; only when all the facts are in can [she] see what *is not* there."⁴⁵⁴

Krippendorff created a pictorial representation of the framework which is shown by Figure 4.⁴⁵⁵

[This representation] suggests that data become dissociated from their source or from their surrounding conditions and are communicated one way to the analyst. The analyst places these data in a context that he constructs based on his knowledge of the surrounding conditions of the data including what he wishes to know about the target of the content analysis. Knowledge about the stable dependencies within the system of interest are formulated as analytical constructs which allow him to make inferences that are sensitive to the context of the data. Content analysis results must represent some feature of reality and the nature of this representation must be verifiable in principle.⁴⁵⁶

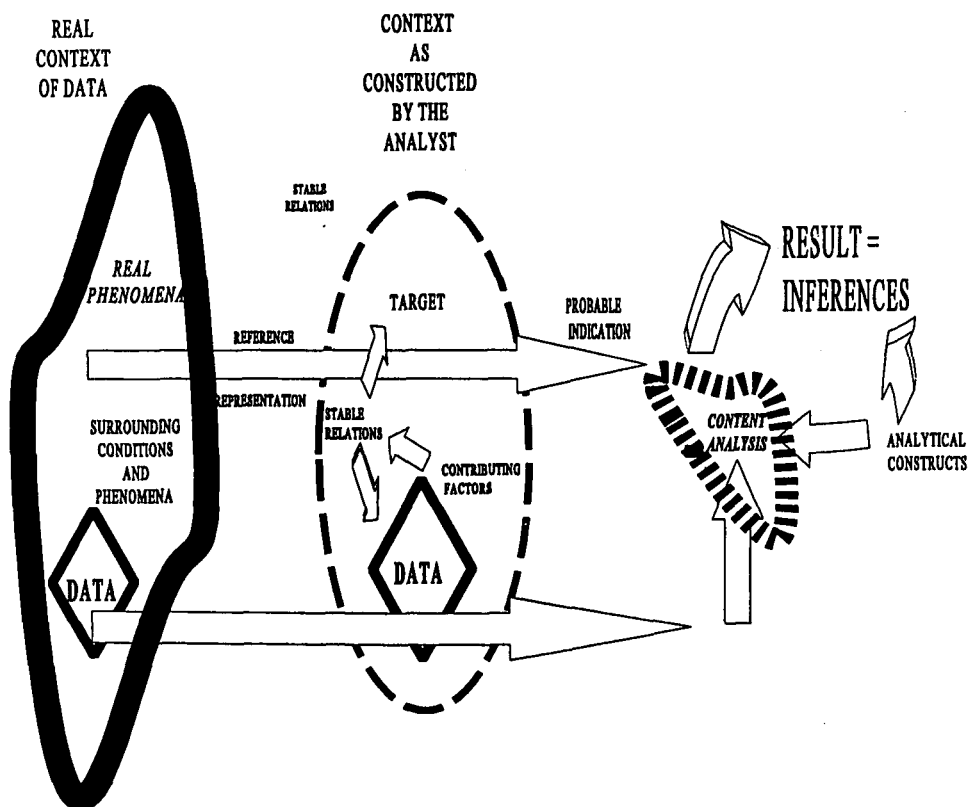
453. *Id.* at 41.

454. THOMAS F. CARNEY, CONTENT ANALYSIS: A TECHNIQUE FOR SYSTEMATIC INFERENCE FROM COMMUNICATIONS 17 (1972).

455. See KRIPPENDORFF, *supra* note 444, at 28.

456. *Id.*

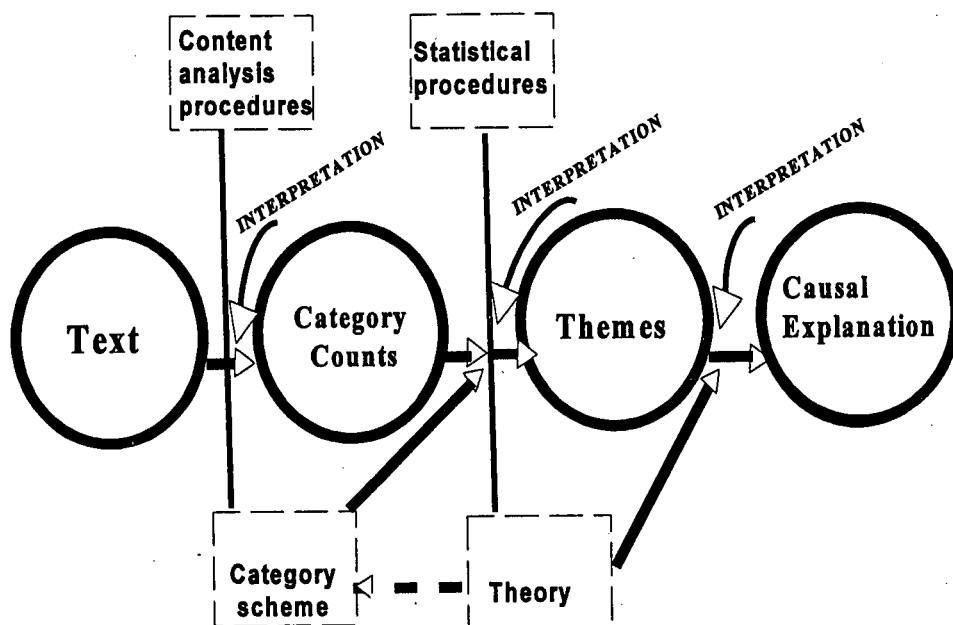
Figure 4
The Framework for Content Analysis



In content analysis, at least three interpretive moments exist: first, when variables or categories are chosen; second, when statistical procedures are applied; and third, when themes are derived and inferences made so as to create a causal explanation for the data.⁴⁵⁷ Figure 5 illustrates the process of content analysis.

457. See CARNEY, *supra* note 454, at 42, 44 (explaining that different decisions regarding these steps result in varying research designs and therefore different findings).

Figure 5
The Process of Content Analysis



3. *Limitations of the Sample and, Hence, the Study*

First, the sample was limited to the period after the adoption of the primary caretaker standard. It excludes cases decided under West Virginia's maternal preference standard or the one year period when courts used the best interests of the child standard without a presumption, prior to the primary caretaker standard's adoption in 1981. Thus, the study does not directly compare the content and decision-making criteria of custody appeals before and after the standard. The study does, however, cursorily look at whether the presumption's use has reduced litigation inherent in the indeterminate best interests analysis—one of the policy goals behind the presumption.

Second, the sample is limited to case appeals taken to the Supreme Court of West Virginia. Confined to appellate cases, the sample is not representative of all custody cases, merely those appealed. Decisions of appellate cases are not likely to be representative of either those cases which were negotiated prior to trial, or those which were litigated at the trial level, but never appealed. The study does not test how lower courts used the presumption

"properly" to reach a "right" and non-arguable/non-appealable result. Given that trial court cases are unreported (not published) and that they are generally not written down at all, except for the bottom-line result as to which party receives custody, (not why a party receives custody), this research is currently impossible. A review of trial transcripts would not be of much use either because the judge may ignore or refuse to consider evidence, even though it is presented by the parties.

So we are back to the need to use appellate decisions as a written record of what the court is doing, and there are only a few of these decisions. Why? Appeals are costly in West Virginia, as in all states: \$2000-\$3000 in 1991.⁴⁵⁸ They also take time, usually a year to a year-and-a-half after the trial court's entry of a custody award.⁴⁵⁹ Appeals are usually only pursued when a glaring error exists,⁴⁶⁰ and in West Virginia, divorce custody cases can only be reversed on appeal where the trial court abused its discretion in evaluating facts and reaching factual conclusions, or was clearly erroneous in making a custody award which was contrary to the evidence presented.⁴⁶¹

Because the study only focused on appellate cases, it only looks at those cases where arguably a mistake was made by the lower court when applying the law. Appellate cases provide us with a skewed vision of how trial courts are using the primary custody standard because generally a case would not be appealed unless there was a viable argument that the trial court erred in applying the law. However, appellate cases are useful to see how the standard is being used by the judges who drafted it. Justice Neely, the drafter of the *Garska* decision, has served on the West Virginia Supreme Court during the entire time period on which this study focuses. Thus, the study can show how the standard has evolved over time.

Another problem with the limited sample is that it probably over-predicts any finding that the standard is being used uniformly by the court. Because the study only focuses on one court, the West Virginia Supreme Court, and because there are five judges on that court at one time, only a limited number of drafters of opinions exists. Thus, eight authors drafted the appellate decisions over the sample period of time. Justices Neeley and McHugh remained on

458. See Becker, *supra* note 28, at 198.

459. See *id.*

460. See *id.*

461. See, e.g., *Marcum v. Marcum*, 395 S.E.2d 509 (W. Va. 1990) (describing amount of deference given to a lower court's decision about which parent is the primary caretaker).

the bench for the entire sample period. The other three justices were gradually replaced, one at a time—Justice Brotherton replaced Justice Harshbarger in 1985; Justice Workman replaced Justice McGraw in 1989; and Justice Cleckley replaced Justice Miller in 1994.⁴⁶² The reliability of the same person reaching the same result for the same reasons is higher than the reliability of different people from different courts reaching the same result. It would be less likely that different trial courts and judges would apply the primary caretaker factors in the same way when they are faced with the same circumstances. On the other hand, when inconsistencies in appellate decision-making exist, it would be reasonable to assume that different lower courts would be equally, if not more, inconsistent.

The sample allows an evaluation of when the Justices on the West Virginia Supreme Court agree to the application of the primary custody standard. When they do not agree on the standard, a dissent is filed, and it is apparent why the justices disagreed. These decisions also illustrate what evidence the trial court reviewed, and, consequently, what factors the trial court considered or should have considered. An appellate decision shows how the law is to be applied to a particular situation, and what evidence should be considered important to the trial court, if it were to apply the standard correctly. Finally, appellate decisions give insight as to the situations in which the trial courts are struggling the most when reaching a decision using the primary caretaker standard.

V. RESEARCH FINDINGS

A. *Quantitative Findings and Discussion*

A content analysis of the forty-nine primary caretaking custody cases since *Garska* reveals that none of the decisions included consideration of all ten of the *Garska* factors in the custody determination.⁴⁶³ Further, none of the decisions considered even nine factors in the custody determination.⁴⁶⁴ Rather, in 42.9% of the decisions ($n = 21$), the court considered no factors at all in the

462. See *infra* Part V.C.2. for a further discussion of this topic; see also *infra* Table 9 for the number of appeals filed on a yearly basis between 1978 and 1995.

463. See generally Kathryn L. Mercer, A Content Analysis of Judicial Decision-Making: How Judges Use the Primary Caretaker Standard to Make a Custody Determination (1997) (unpublished Ph.D. dissertation, Case Western Reserve University) (on file with the Case Western Reserve University Library).

464. See *id.*

custody decision.⁴⁶⁵ In sum, the West Virginia Supreme Court has only sporadically inquired about primary caretaker information.

The parent's planning and preparation of meals (factor one) is the factor most often looked at by the Court—nineteen of the forty-nine cases (38.8%) considered this factor.⁴⁶⁶ The parent's willingness to arrange medical care, including nursing and trips to physicians (factor four), and alternative care, i.e. babysitting, day-care, etc. (factor six), were discussed in 30.6% ($\underline{n} = 15$) of the cases.⁴⁶⁷ The Court routinely considered: factor three (purchasing, cleaning and care of clothes) in 28.6% of the cases ($\underline{n} = 14$); factor seven (putting the child to bed at night, waking the child in the morning) in 26.5% of the cases ($\underline{n} = 13$); and factor eight (disciplining the child, such as teaching general manners and toilet training) in 22.4 % of the cases ($\underline{n} = 11$).⁴⁶⁸

Interestingly, over thirty percent of the cases in the sample discussed other factors in addition to the ten *Garska* factors when determining which parent was the primary caretaker.⁴⁶⁹ In sum, the research rejected the hypothesis that the court would use all of the factors, all of the time, when reaching a custody decision, as *Garska* envisioned.⁴⁷⁰

465. See *infra* Table 4. See, e.g., *Channell v. Channell*, 432 S.E.2d 203 (W. Va. 1993) (illustrating a case in which the court found both parents shared caretaking responsibilities but did not discuss any of the *Garska* factors).

466. See *infra* Table 3.

467. See *id.*

468. See *id.*

469. See, e.g., *Moses v. Moses*, 421 S.E.2d 506 (W. Va. 1992) (using other factors, such as the amount of time a parent spends with the child during the day). See also *T.S.K. v. K.B.K.*, 371 S.E.2d 362, 366 (W. Va. 1988) (using evidence of greater emotional attachment to one parent as another factor in the primary caretaker standard analysis).

470. See *Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981). But see *Shearer v. Shearer*, 448 S.E.2d 166, 169 (W. Va. 1994) (explaining that all ten of the *Garska* factors are not applicable in every case because the specific primary caretaker factors vary with age and maturity of the child).

Table 3
PERCENTAGES AND FREQUENCIES OF PRIMARY CARETAKER
FACTOR CONSIDERATION

| FACTORS | % | (n) |
|----------------------------|------|------|
| PREPARE MEALS | 38.8 | (19) |
| BATHE, DRESS | 32.7 | (16) |
| BUY CLOTHES | 28.6 | (14) |
| ARRANGE MEDICAL CARE | 30.6 | (15) |
| ARRANGE SOCIAL INTERACTION | 8.2 | (4) |
| ARRANGE CHILD CARE | 30.6 | (15) |
| PUT TO BED | 26.5 | (13) |
| DISCIPLINE | 22.4 | (11) |
| TRAIN IN RELIGION | 10.2 | (5) |
| EDUCATE | 10.2 | (6) |
| OTHER VARIABLE | 32.7 | (16) |

Note: Each cell gives the percentage of cases in which the court used a factor to determine custody. The frequency is in parentheses. A Chi-Square comparison of actual and expected frequencies showed a non-significant difference between the frequencies reported by Coder One and Coder Two.

$\underline{n} = 49$; $\chi^2 = 6.34$, $df = 9$ (\underline{n} = number of cases in the sample; χ^2 = Chi Square; df = degree of freedom).

Table 4
PERCENTAGES OF CASES USING ONE OR MORE PRIMARY
CARETAKER FACTORS TO DETERMINE WHICH PARENT IS THE
PRIMARY CARETAKER

| NUMBER OF FACTORS USED | % | (n) |
|---------------------------|------|------|
| ZERO | 42.9 | (21) |
| ONE | 8.2 | (4) |
| TWO | 14.3 | (7) |
| THREE | 0 | (0) |
| FOUR | 6.1 | (3) |
| FIVE | 6.1 | (3) |
| SIX | 12.2 | (6) |
| SEVEN | 6.1 | (3) |
| EIGHT | 4.1 | (2) |
| NINE | 0 | (0) |
| TEN | 0 | (0) |

Note: Each cell gives the percentage of cases in which the court used that number of factors to determine custody. The frequency is in parentheses.

$n = 49$ (n = number of cases in the sample).

The research suggests that the trial courts are not specifically discussing the ten *Garska* factors either. If they were, the West Virginia Supreme Court's opinions which were analyzed by the study would discuss those facts relevant to each factor. It is possible the trial courts gathered facts on each of the ten factors, but then the West Virginia Supreme Court ignored those factors when it wrote its opinions. Either way, the lack of a written discussion of one factor does not automatically mean that a factor was not included in the court's deliberation process. The court simply could not be mentioning all of the facts in the written decision that are relevant to which parent provided the primary care for the child.

Assuming that the trial court is not gathering information on the caretaking duties, and which parent provided each duty, then

the trial court is violating the supreme court's original mandate that trial judges make specific factual findings about the ten factors in their custody decisions.⁴⁷¹ This assumption is well-founded as, in general, the West Virginia Supreme Court tends to give what appears to be a rather complete factual summary of the case, containing all of the facts that the lower court proceeding developed.⁴⁷² Moreover, the West Virginia Supreme Court has not remanded cases for failing to discuss all of the *Garska* factors. Rather, if some of the factors are being discussed, the court seems to be comfortable in assessing a primary caretaker award without all of the factual information. Arguably, the designated decision-making process, a summary of all ten factors to determine who is the primary caretaker and then a determination of whether the primary caretaker is fit, is not being followed by either the trial courts or the West Virginia Supreme Court.⁴⁷³

Perhaps the lack of information about each caretaking duty is due to the parties' failures to present evidence establishing which parent provides the duty. It is difficult to understand why parties would be unable to present evidence on each and every factor. I speculate that at the trial court level, parties do present such evidence. However, that evidence is not finding its way into the trial court decision. It is clear that a primary caretaker custody award can be deliberated, decided and appealed without factual information on each of the ten points.⁴⁷⁴

The research also inquires as to whether the West Virginia Supreme Court's consideration of the ten *Garska* factors has changed over time. The lower courts have been consistently reluctant to make factual findings on each of the ten primary caretaker factors over the three time periods.⁴⁷⁵

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

472. See, e.g., *S. v. S.*, 435 S.E.2d 6 (W. Va. 1993) (demonstrating a lengthy factual summary of a lower court's records).

473. See, e.g., *S.v.S.*, 408 S.E.2d 46 (illustrating a case in which the court discussed only the fitness standard and remanded to the lower court for further fact finding as to who was the primary caretaker, thereby indicating that the trial court never addressed this question either).

474. See *Burger v. Burger*, 345 S.E.2d 18 (W. Va. 1986); *Allen v. Allen*, 320 S.E.2d 112 (W. Va. 1984) (illustrating two cases in which the Supreme Court of West Virginia criticized the lower court for not conducting its fact finding task).

475. See *infra* Table 5 (showing the percentages of primary caretaker factor consideration over the time periods).

Table 5
PERCENTAGES AND FREQUENCIES OF PRIMARY CARETAKER
FACTOR CONSIDERATION OVER THREE TIME PERIODS

| FACTORS | 1981-85 ^a | | 1986-90 ^b | | 1991-95 ^c | |
|----------------------------|----------------------|--------------|----------------------|--------------|----------------------|--------------|
| | % | (<u>n</u>) | % | (<u>n</u>) | % | (<u>n</u>) |
| PREPARE MEALS | 42.9 | (6) | 30.8 | (4) | 40.9 | (9) |
| BATHE, DRESS | 50.0 | (7) | 23.1 | (3) | 27.3 | (6) |
| BUY CLOTHES | 21.4 | (3) | 30.8 | (4) | 31.8 | (7) |
| ARRANGE MEDICAL CARE | 35.7 | (5) | 30.8 | (4) | 27.3 | (6) |
| ARRANGE SOCIAL INTERACTION | 0 | (0) | 0 | (0) | 18.2 | (4) |
| ARRANGE CHILD CARE | 28.6 | (4) | 30.8 | (4) | 31.8 | (7) |
| PUT TO BED | 35.7 | (5) | 15.4 | (2) | 27.3 | (6) |
| DISCIPLINE | 28.6 | (4) | 15.4 | (2) | 22.7 | (5) |
| TRAIN IN RELIGION | 14.3 | (2) | 7.7 | (1) | 9.1 | (2) |
| EDUCATE | 7.1 | (1) | 15.4 | (2) | 13.6 | (3) |
| OTHER VARIABLE | 42.9 | (6) | 23.1 | (3) | 31.8 | (7) |

Note: Each cell gives the percentage of cases in which the court used a factor to determine custody. The frequency is in parentheses.

$\underline{n}^a = 14$, $\underline{n}^b = 13$, $\underline{n}^c = 22$ (\underline{n} = number of cases in the sample).

The raw numbers indicate that some variation exists in the West Virginia Supreme Court's consideration of factors, albeit an insignificant variation. For example, only in the last time period, 1991-1995, has the court specifically discussed a parent's ability to arrange social interaction among peers after school, such as transportation to friends' houses or transportation to girl and boy scout meetings (factor five).⁴⁷⁶ A decreased concern also exists over who bathes and dresses the child (factor two). Whereas fifty percent of the cases were interested in factor two between 1981-

476. See, e.g., *Reynolds v. Reynolds*, 433 S.E.2d 227 (W. Va. 1993) (giving a lengthy description of how the mother primarily arranged the children's social activities).

1985, only twenty-three percent and twenty-seven percent of the cases were interested in this factor between 1986-1990 and 1991-1995, respectively.⁴⁷⁷

Table 6 reports the percentage of cases which employed one or more factors to determine custody, while also comparing the three five year time periods.

477. Compare *Heck v. Heck*, 301 S.E.2d 158 (W. Va. 1982) with *S.v.S.*, 408 S.E.2d 46 (W. Va. 1991) (illustrating the decrease in the court's consideration of factor two. The earlier case places emphasis on who bathes the child, whereas the later case, despite an extensive consideration of the ten *Garska* factors, does not discuss factor two at all).

Table 6
**PERCENTAGES OF CASES USING ONE OR MORE FACTORS TO
 DETERMINE CUSTODY OVER THREE TIME PERIODS**

| NUMBER OF FACTORS USED | 1981-85 ^a | 1986-90 ^b | 1991-95 ^c |
|---------------------------|----------------------|----------------------|----------------------|
| | % (n) | % (n) | % (n) |
| ZERO | 35.7 (5) | 53.8 (7) | 40.9 (9) |
| ONE | 7.1 (1) | 15.4 (2) | 4.5 (1) |
| TWO | 21.4 (3) | 0 (0) | 18.2 (4) |
| THREE | 0 (0) | 0 (0) | 0 (0) |
| FOUR | 0 (0) | 0 (0) | 13.6 (3) |
| FIVE | 14.3 (2) | 7.7 (1) | 0 (0) |
| SIX | 14.3 (2) | 15.4 (2) | 9.1 (2) |
| SEVEN | 0 (0) | 7.7 (1) | 9.1 (2) |
| EIGHT | 7.1 (1) | 0 (0) | 4.5 (1) |
| NINE | 0 (0) | 0 (0) | 0 (0) |
| TEN | 0 (0) | 0 (0) | 0 (0) |

Note: A Chi-Square test comparing actual and expected frequencies over the three time periods and for each of the coders revealed no significant changes over time in the number of factors used by the court. Each cell gives the percentage of cases in which the court used that number of factors to determine custody. The frequency is in parentheses.

$n^a = 14$, $n^b = 13$, $n^c = 22$ (n = number of cases in the sample).

Thirty-five percent of the cases from 1981 to 1995 never looked at any of the factors.⁴⁷⁸ An even higher percentage of cases (53.8%)

478. See, e.g., *Dempsey v. Dempsey*, 306 S.E.2d 230 (W. Va. 1983) (illustrating an early case in which the court does not discuss any of the factors).

failed to look at any factors between 1986 and 1990.⁴⁷⁹ That percentage dropped to 40.9% from 1991 to 1995.⁴⁸⁰

The West Virginia Supreme Court, and the trial courts at the lower level who are developing the record,⁴⁸¹ either consider just a few factors or none at all, or they consider up to five or six factors. Once parties start developing evidence on primary caretaking, that evidence tends to be more complete. As reflected in Table 6, the majority of the cases do not develop evidence on primary caretaking at all, or at least that evidence is not being reported, and therefore, not considered by the West Virginia Supreme Court.

The final question of the quantitative portion of this study is whether any differences existed in the West Virginia Supreme Court's use of factors when the cases were divided into four categories: cases where the primary caretaker is unfit; cases where both parents are unfit; cases where both parents are equal caretakers (they share caretaking in an equivalent manner such that the trial court is unable to determine who is the primary caretaker) or neither parent is the primary caretaker (there is a substitute primary caregiver, such as a grandparent or a nanny); and cases where a child under the age of fourteen expresses a preference to live with one parent.⁴⁸²

Comparing the court's consideration of the ten *Garska* factors by these types of custody cases, some differences can be seen.

479. See, e.g., *Issacs v. Issacs*, 358 S.E.2d 833 (W. Va. 1987) (illustrating a case from the middle period of the study in which the court did not use any of the primary caretaker factors).

480. See, e.g., *Feaster v. Feaster*, 452 S.E.2d 428 (W. Va. 1994) (illustrating a case from the last period of the study in which the court does not discuss any factors).

481. A trial court record is a transcript of the testimony produced at the trial or hearing. It also includes motions and written arguments filed by the attorneys. Any comments made by the judge in the hearing are also recorded and become a part of the record. The transcript is then attached to a brief which argues why an appeal should be granted. At the appellate level, the court uses the record to familiarize itself with the case. Generally, during an appeal, there is no opportunity to call witnesses or develop additional facts. Nor is there an opportunity to test the credibility of the witnesses. Therefore, the appellate court gives great deference to the trial court's findings of fact.

482. See, e.g., *Richardson v. Richardson*, 415 S.E.2d 276 (W. Va. 1992) (finding primary caretaker to be unfit); *M.v.M.*, 453 S.E.2d 661 (W. Va. 1994) (finding neither parent to be the primary caretaker); *Efaw v. Efaw*, 400 S.E.2d 599 (W. Va. 1990) (holding that both parents are equal caregivers); *Rose v. Rose*, 340 S.E.2d 176 (W. Va. 1985) (considering the child's explicitly stated preference). There were eighteen cases in the sample where the primary caretaker was alleged to be unfit. There were two cases where both parents were alleged to be unfit, seventeen cases where either both parents were equal caretakers, or neither parent was found to be the primary caretaker, and five cases where a child under the age of fourteen stated a preference. See also *Shearer v. Shearer*, 448 S.E.2d 166, 169 (W. Va. 1994) (explaining that all ten of the *Garska* factors are not applicable in every case because the specific primary caretaker factors vary with age and the maturity of the child).

Notably, for the cases in which the parents either shared caretaking or the parents were not functioning as primary caretakers at all, 58.8% of the cases considered many of the primary caretaker variables.⁴⁸³ When the court found the caretaker to be unfit, the court appears to have made this determination without considering the primary caretaker factors at all,⁴⁸⁴ even though the designated decision-making process for custody determinations mandates the finding of which parent is the primary caretaker, and then the determination of whether that caretaker is fit.

Ideally, under the *Garska* standard, the trial court should look at the primary caretaker factors first, and then at the parent's fitness.⁴⁸⁵ Maybe this phenomenon is occurring, but since there is little or no data showing that two-step deliberation, it is unlikely that this process is being followed. The statistics do reveal that at least at the West Virginia Supreme Court level, parental unfitness, not primary caretaking, is the focus for the cases where the parent was alleged unfit. In the very small sample in which the court reviewed allegations that both parents were unfit ($n = 2$), the court considered none of the primary caretaker factors.⁴⁸⁶

Table 7 reports the percentages and frequencies of the primary caretaker factors considered by the West Virginia Supreme Court, broken down into four classifications.⁴⁸⁷ Table 8 reports the percentages of cases using one or more variables to determine custody, divided by the four types of cases.⁴⁸⁸

483. See Mercer, *supra* note 463, at 216.

484. See *infra* Table 8; see also Mills v. Gorrick, 381 S.E.2d 273 (W. Va. 1983).

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

486. See Boarman v. Boarman, 459 S.E.2d 395 (W. Va. 1995); Dottie S. v. Christopher S., 408 S.E.2d 46 (W. Va. 1991).

487. See *infra* Table 7; see also Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981).

488. See *infra* Table 8.

Table 7
PERCENTAGES AND FREQUENCIES OF PRIMARY CARETAKER
FACTOR CONSIDERATION
BY FOUR TYPES OF CUSTODY CASES

| FACTORS | Grp1 ^a | | Grp2 ^b | | Grp3 ^c | | Grp4 ^d | |
|----------------------------|-------------------|-----|-------------------|-----|-------------------|------|-------------------|-----|
| | % | (n) | % | (n) | % | (n) | % | (n) |
| PREPARE MEALS | 16.7 | (3) | 0 | (0) | 58.8 | (10) | 60.0 | (3) |
| BATHE, DRESS | 16.7 | (3) | 0 | (0) | 52.9 | (9) | 40.0 | (2) |
| BUY CLOTHES | 11.1 | (2) | 0 | (0) | 52.9 | (9) | 40.0 | (2) |
| ARRANGE MEDICAL CARE | 11.1 | (2) | 0 | (0) | 58.8 | (10) | 40.0 | (2) |
| ARRANGE SOCIAL INTERACTION | 0 | (0) | 0 | (0) | 5.9 | (1) | 40.0 | (2) |
| ARRANGE CHILD CARE | 16.7 | (3) | 0 | (0) | 47.1 | (8) | 60.0 | (3) |
| PUT TO BED | 5.6 | (1) | 0 | (0) | 41.2 | (7) | 60.0 | (3) |
| DISCIPLINE | 16.7 | (3) | 0 | (0) | 52.9 | (9) | 20.0 | (1) |
| TRAIN IN RELIGION | 0 | (0) | 0 | (0) | 11.8 | (2) | 60.0 | (3) |
| EDUCATE | 11.0 | (2) | 0 | (0) | 29.4 | (5) | 0 | (0) |
| OTHER VARIABLE | 33.3 | (6) | 0 | (0) | 47.1 | (8) | 60.0 | (3) |

Note: Group 1 contains cases where the primary caretaker was alleged to be unfit. Group 2 contains cases where both parents were alleged to be unfit. Group 3 contains cases where both parents were equal caretakers, or neither was the primary caretaker. Group 4 contains cases where a child under the age of fourteen stated a preference.

Each cell gives the percentage of cases in which the court used a factor to determine custody. The frequency is in parentheses.

$\underline{n}^a = 18$, $\underline{n}^b = 2$, $\underline{n}^c = 17$, $\underline{n}^d = 5$ (\underline{n} = number of cases in the sample).

Table 8
PERCENTAGES AND FREQUENCIES OF CASES USING ONE OR
MORE FACTORS TO DETERMINE CUSTODY BY FOUR
TYPES OF CUSTODY CASES

| NUMBER OF FACTORS USED | Grp1 ^a | | Grp2 ^b | | Grp3 ^c | | Grp4 ^d | |
|---------------------------|-------------------|------|-------------------|-----|-------------------|-----|-------------------|-----|
| | % | (n) | % | (n) | % | (n) | % | (n) |
| ZERO | 66.7 | (12) | 100 | (2) | 17.6 | (3) | 20.0 | (1) |
| ONE | 16.7 | (3) | 0 | (0) | 5.9 | (1) | 0 | (0) |
| TWO | 5.6 | (1) | 0 | (0) | 17.6 | (3) | 0 | (0) |
| THREE | 0 | (0) | 0 | (0) | 0 | (0) | 0 | (0) |
| FOUR | 0 | (0) | 0 | (0) | 0 | (0) | 20.0 | (1) |
| FIVE | 0 | (0) | 0 | (0) | 11.8 | (2) | 20.0 | (1) |
| SIX | 0 | (0) | 0 | (0) | 29.4 | (5) | 40.0 | (2) |
| SEVEN | 11.1 | (2) | 0 | (0) | 5.9 | (1) | 0 | (0) |
| EIGHT | 0 | (0) | 0 | (0) | 11.8 | (2) | 0 | (0) |
| NINE | 0 | (0) | 0 | (0) | 0 | (0) | 0 | (0) |
| TEN | 0 | (0) | 0 | (0) | 0 | (0) | 0 | (0) |

Note: Group 1 contains cases where the primary caretaker was alleged to be unfit. Group 2 contains cases where both parents were alleged to be unfit. Group 3 contains cases where both parents were equal caretakers, or neither was the primary caretaker. Group 4 contains cases where a child under the age of fourteen stated a preference.

Each cell gives the percentage of cases which used that number of factors to determine custody. The frequency is in parentheses.

$\underline{n}^a = 18$, $\underline{n}^b = 2$, $\underline{n}^c = 17$, $\underline{n}^d = 5$ (\underline{n} = number of cases in the sample).

B. Qualitative Findings and Discussion

The quantitative research discussed above reveals that a number of pre-disposing factual situations exist which influence the trial court's determination of the primary caretaker. These include the following situations in which: the mother is alleged to be unfit; both parents work; the father has a larger role in primary

caretaking than traditional breadwinners; the caretaking responsibilities shifted over a period of time from the mother to the father or visa versa; there have been allegations of parental abuse; an emotional bond exists between the father and the child; and one parent has maintained physical custody of the child for a long period of time prior to the conclusion of the appellate proceeding, due to procedural delays.

1. *The Impact of the Mother's Unfitness—Particularly Adultery*

In a large number of the forty-nine primary caretaker custody cases appealed to the West Virginia Supreme Court since *Garska*, a key issue at the trial court level was the mother's fitness as a custodian.⁴⁸⁹ Twenty-one of the forty-nine cases⁴⁹⁰ raised the mother's allegedly adulterous relationship with another man in the opinion but did not always directly suggest that this fact constituted a fitness issue.⁴⁹¹ The mother's sexual conduct was also implicitly raised in cases which discussed the following issues: the mother's

489. See *Boarman v. Boarman*, 459 S.E.2d 395 (W. Va. 1995); *Marilyn H. v. Roger Lee H.*, 455 S.E.2d 570 (W. Va. 1995); *Michael Scott M. v. Victoria L.M.*, 453 S.E.2d 661 (W. Va. 1994); *DiMagno v. DiMagno*, 452 S.E.2d 404 (W. Va. 1994); *Boarman v. Boarman*, 438 S.E.2d 876 (W. Va. 1993); *Moses v. Moses*, 421 S.E.2d 506 (W. Va. 1992); *Richardson v. Richardson*, 415 S.E.2d 276 (W. Va. 1992); *Starkey v. Starkey*, 408 S.E.2d 394 (W. Va. 1991); *Kenneth L.W. v. Tamyra S.W.*, 408 S.E.2d 625 (W. Va. 1991); *Dottie S. v. Christopher S.*, 408 S.E.2d 46 (W. Va. 1991); *Efaw v. Efaw*, 400 S.E.2d 599 (W. Va. 1990); *Marcum v. Marcum*, 395 S.E.2d 509 (W. Va. 1990); *Warner v. Warner*, 394 S.E.2d 74 (W. Va. 1990); *David M. v. Margaret M.*, 385 S.E.2d 912 (W. Va. 1989); *Mills ex rel. Gorrick v. Gorrick*, 381 S.E.2d 273 (W. Va. 1989); *Goetz v. Carpenter*, 367 S.E.2d 782 (W. Va. 1988); *Isaacs v. Isaacs*, 358 S.E.2d 833 (W. Va. 1987); *M.S.P. v. P.E.P.*, 358 S.E.2d 442 (W. Va. 1987); *Bickler v. Bickler*, 344 S.E.2d 630 (W. Va. 1986); *Stacy v. Stacy*, 332 S.E.2d 260 (W. Va. 1985); *Allen v. Allen*, 320 S.E.2d 112 (W. Va. 1984); *T.C.B. v. H.A.B.*, 317 S.E.2d 174 (W. Va. 1984); *J.E.I. v. L.M.I.*, 314 S.E.2d 67 (W. Va. 1984); *Mormanis v. Mormanis*, 296 S.E.2d 680 (W. Va. 1982).

490. See *Campbell v. Campbell*, 460 S.E.2d 469 (W. Va. 1995); *Boarman v. Boarman*, 459 S.E.2d 395 (W. Va. 1995); *Marilyn H. v. Roger Lee H.*, 455 S.E.2d 570 (W. Va. 1995); *DiMagno v. DiMagno*, 452 S.E.2d 404 (W. Va. 1994); *Feaster v. Feaster*, 452 S.E.2d 428 (W. Va. 1994); *Reynolds v. Reynolds*, 433 S.E.2d 277 (W. Va. 1993); *Cummings v. Cummings*, 426 S.E.2d 505 (W. Va. 1992); *Moses v. Moses*, 421 S.E.2d 506 (W. Va. 1992); *Richardson v. Richardson*, 415 S.E.2d 276 (W. Va. 1992); *Kenneth L.W. v. Tamyra S.W.*, 408 S.E.2d 625 (W. Va. 1991); *Dottie S. v. Christopher S.*, 408 S.E.2d 46 (W. Va. 1991); *Efaw v. Efaw*, 400 S.E.2d 599 (W. Va. 1990); *Marcum v. Marcum*, 395 S.E.2d 509 (W. Va. 1990); *Warner v. Warner*, 394 S.E.2d 74 (W. Va. 1990); *David M. v. Margaret M.*, 385 S.E.2d 912 (W. Va. 1989); *Mills ex rel. Gorrick v. Gorrick*, 381 S.E.2d 273 (W. Va. 1989); *Goetz v. Carpenter*, 367 S.E.2d 782 (W. Va. 1988); *Bickler v. Bickler*, 344 S.E.2d 630 (W. Va. 1986); *Rose v. Rose*, 340 S.E.2d 176 (W. Va. 1985); *Stacy v. Stacy*, 332 S.E.2d 260 (W. Va. 1985); *T.C.B. v. H.A.B.*, 317 S.E.2d 174 (W. Va. 1984).

491. See, e.g., *Campbell v. Campbell*, 460 S.E.2d 469, 471 n.1 (W. Va. 1995); *Feaster v. Feaster*, 452 S.E.2d 428, 429 n.2 (W. Va. 1994); *Cummings v. Cummings*, 426 S.E.2d 505, 510 n.1 (W. Va. 1992).

association with a homosexual;⁴⁹² the mother's new husband exposing himself to a teenager several years prior to their involvement;⁴⁹³ the mother moved into the home of a man with whom she claimed she did not have a sexual relationship;⁴⁹⁴ and the mother's sexual intercourse with a man on one occasion.⁴⁹⁵

In contrast, only one of the forty-nine cases mentioned the father's sexual conduct as an issue. In that case, *McDougal v. McDougal*,⁴⁹⁶ the West Virginia Supreme Court, and to a lesser degree the trial court, appeared to disapprove that the father had fathered twins with another woman while he was still married. Although the trial court awarded joint custody to the parents, the Supreme Court reversed and awarded custody to the mother.

The courts appear to have a preoccupation with a mother's sexuality and her sexual behavior.⁴⁹⁷ This trend is particularly true at the trial court level. When the husband introduced the mother's "questionable" sexual conduct, or adultery during the marriage, into evidence, she lost custody of her children to the father at the trial court level in seventeen of the twenty-one cases.⁴⁹⁸ In these cases, the trial court did not always decide that the mother was unfit for custody due to the adultery. However, the court's obvious preoccupation with the mother's sexual conduct suggests that it influenced the decision. Quite often, adultery was the only fitness issue raised by the court. Moreover, the Supreme Court repeatedly reprimanded the trial courts for being influenced by a mother's "improper sexual conduct" which was not shown to have any effect on the mother's ability to care for the child.⁴⁹⁹

492. See *M.S.P. v. P.E.P.*, 358 S.E.2d 442, 443 (W. Va. 1987).

493. See *Marilyn H. v. Roger Lee H.* 455 S.E.2d 570 (W. Va. 1995) (involving a case in which the mother's boyfriend was arrested for indecent exposure to a minor and pled no contest to a charge of disorderly conduct before dating the mother). See also *DiMagno v. DiMagno*, 452 S.E.2d 404 (W. Va. 1994).

494. See *Bickler v. Bickler*, 344 S.E.2d 630 (W. Va. 1986).

495. See *T.C.B. v. H.A.B.*, 317 S.E.2d 174 (W. Va. 1984).

496. 422 S.E.2d 636, 637 (W. Va. 1992).

497. See generally *supra* notes 489-95 and accompanying text (discussing the effect of the mother's sexuality on custody awards).

498. See *Campbell v. Campbell*, 460 S.E.2d 469 (W. Va. 1995); *DiMagno v. DiMagno*, 452 S.E.2d 404 (W. Va. 1994); *Feaster v. Feaster*, 452 S.E.2d 428 (W. Va. 1994); *Reynolds v. Reynolds*, 433 S.E.2d 277 (W. Va. 1993); *Cummings v. Cummings* 426 S.E.2d 505 (W. Va. 1992); *Moses v. Moses*, 421 S.E.2d 506 (W. Va. 1992); *Richardson v. Richardson*, 415 S.E.2d 276 (W. Va. 1992); *Kenneth L.W. v. Tamyra S.W.*, 408 S.E.2d 625 (W. Va. 1991); *Marcum v. Marcum* 395 S.E.2d 509 (W. Va. 1990); *Warner v. Warner*, 394 S.E.2d 74 (W. Va. 1990); *David M. v. Margaret M.*, 385 S.E.2d 912 (W. Va. 1989); *Mills ex rel. Gorrick v. Gorrick*, 381 S.E.2d 273 (W. Va. 1989); *Goetz v. Carpenter*, 367 S.E.2d 782 (W. Va. 1988); *Bickler v. Bickler*, 344 S.E.2d 630 (W. Va. 1986); *Rose v. Rose*, 340 S.E.2d 176 (W. Va. 1985); *Stacy v. Stacy*, 332 S.E.2d 260 (W. Va. 1985); *T.C.B. v. H.A.B.*, 317 S.E.2d 174 (W. Va. 1984).

499. See *L.W. v. S.W.*, 408 S.E.2d 625, 627 (W. Va. 1991).

A mother's adultery influences the trial court and the West Virginia Supreme Court's decision-making process and, therefore, the outcome in the determination of the primary caretaker. Almost uniformly, the trial court awarded fathers custody of children in cases where the mothers had had an adulterous relationship, even where that relationship occurred subsequent to the parties' separation.⁵⁰⁰ However, only half of the cases at the supreme court level found that fathers should get custody under these circumstances.⁵⁰¹ The earlier cases particularly favored awarding custody to the father.

Two general justifications are relied on by the supreme court for affirming the trial court award to the father. First, the supreme court routinely found children unsupervised, or that the mother's care of the children, including cleaning house and making meals, was questionable.⁵⁰² Second, the supreme court discussed a mother's abandonment of her maternal responsibility when she pursued an adulterous relationship.⁵⁰³

Relinquishment of maternal responsibility was also a consideration in *Marcum v. Marcum*,⁵⁰⁴ where the supreme court reviewed a custody decision in favor of the father. The Family Law Master (FLM) found at the trial level that the mother "waivered in her commitment" in an early hearing on the divorce when she insisted that a divorce be granted immediately.⁵⁰⁵ When the FLM refused an immediate divorce, she

stormed out of the room after asking. In so doing, she asked if a divorce would be granted, and if her husband would be granted custody of the child, if she did not show up at the next hearing.

When the family law master responded in the affirmative, the [mother] said something to the effect: "Well, by God, I just won't show up."⁵⁰⁶

500. See *supra* note 498; see also *Mercer*, *supra* note 463, at 222-38 (case narratives of primary caretaker decisions). But see *Efaw v. Efaw*, 400 S.E.2d 599 (W. Va. 1990).

501. See *Mercer*, *supra* note 463, at 232-33.

502. See, e.g., *T.C.B. v. H.A.B.*, 317 S.E.2d 175 (W. Va. 1984) (holding that because the mother had left the baby in the trailer to go next door to "smoke pot," the court denied her custody). See also *Richardson v. Richardson*, 415 S.E.2d 276 (W. Va. 1992) (suggesting that the mother's house was unclean); *Moses v. Moses*, 421 S.E.2d 506 (W. Va. 1992) (finding the mother to be a "poor housekeeper").

503. See, e.g., *Warner v. Warner*, 394 S.E.2d 74 (W. Va. 1990) (finding the mother's fitness discredited because of her adultery); *Efaw v. Efaw*, 400 S.E.2d 599 (W. Va. 1991) (noting that the mother wanted "freedom" and pursued her lover from Germany to Georgia).

504. 395 S.E.2d 509 (W. Va. 1990).

505. *Id.* at 509.

506. *Id.* at 511.

Substantial testimony also showed that she was dating an individual who, on occasion, spent the night in her home and who had been seen with her child.⁵⁰⁷ The FLM stated that the mother's involvement with this man was "contrary to the moral fiber of our society, and such an influence cannot promote the welfare of this child in any fashion."⁵⁰⁸

In *Marcum*, the West Virginia Supreme Court affirmed the award to the father and noted that in making its custody recommendation, the FLM was apparently influenced by the affair, apart from its impact on the child.⁵⁰⁹ Although the court noted that this reliance was erroneous,⁵¹⁰ the court stated that, "the real question in this case is whether the trial court erred in awarding custody of the infant child to the appellant's husband based on what is in the best interests of the child."⁵¹¹ The supreme court also explained that

[t]here was evidence that the man with whom the appellant was involved had violent propensities [he was twice arrested for an assault], and the appellant on two occasions, in the separation agreement and in an early hearing before the family law master, wavered in the commitment to the child.⁵¹²

The supreme court has also been more willing to find shared parenting when the mother committed adultery, in order to justify circumventing its general pronouncement that a parent's extramarital affairs are not relevant to a custody determination, unless they impact the children.⁵¹³ *Marcum*, in awarding the father custody, turned on this shared parenting escape valve.⁵¹⁴

In *Marcum*, the FLM had found that neither party had been the clear cut primary caretaker of the child prior to their separation,⁵¹⁵ especially as both parents worked. The mother testified that while she was married, she cared for her daughter in many

507. *See id.*

508. *Id.* at 510.

509. *See id.* at 512.

510. *See id.*

511. *Id.*

512. *Id.* Perhaps the custody decision also turned on the fact that the mother threatened to commit suicide if her husband did not grant her custody of the child, and she aimed a pistol and shot a round into a porch.

513. *See id.* (finding that shared parenting was appropriate when the mother had committed adultery).

514. *See id.*

515. *See id.*

ways, including: picking her up from daycare, reading her bedtime stories, rocking her daughter to sleep, taking her to the doctor, toilet training her, general disciplining, and usually changing diapers.⁵¹⁶ The mother also explained that she performed household chores like preparing dinner, doing the laundry and cleaning the house.⁵¹⁷ Although the mother testified that she bathed the child, she acknowledged that she shared this responsibility with her husband.⁵¹⁸

The father testified that he shared many of the responsibilities for his daughter with his wife while they were married, such as attending to the child in the evening, changing diapers, and caring for his daughter while she was sick.⁵¹⁹ He testified that he was solely responsible for bringing his child to daycare in the morning.⁵²⁰ Witnesses corroborated both the mother's and the father's testimonies.⁵²¹

The trial court found, and the West Virginia Supreme Court agreed, that:

[T]here was substantial evidence that the appellant's husband was deeply and integrally involved in the care of the infant child before the parties' separation . . . This evidence, in addition to the evidence that the appellant [mother] also provided substantial care to the child, supports the trial court's conclusion that neither party was the primary caretaker of the child.⁵²²

This case illustrates the two avenues the West Virginia Supreme Court uses to circumvent the traditional primary caretaker analysis and to make an award to the father in the child's best interests. First, the mother is unfit due to her questionable commitment to the children and her abandonment of her caretaking role for at least a temporary period. Second, the mother's current behavior as a "shared caregiver" draws into question her future ability to care for the child.

516. *See id.* at 511.

517. *See id.*

518. *See id.*

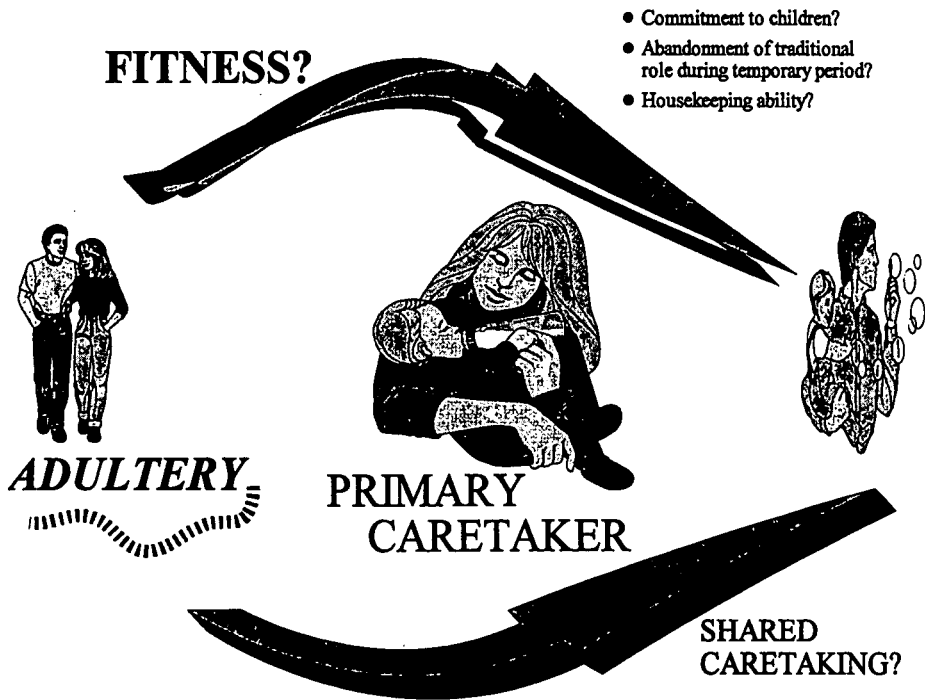
519. *See id.*

520. *See id.*

521. *See id.*

522. *Id.* at 512.

Figure 6
The Impact of Mother's Adultery on the Court's
Decision-Making Process



2. *The Shared Parenting Escape Valve*

A second factual permutation which influences the primary caretaker decision-making process is the tendency to revert to a best interests analysis where there are two working spouses on the basis that no primary caretaker can be ascertained.

In West Virginia, fourteen cases involved two working parents.⁵²³ In eleven of these cases, the trial court awarded custody to the father.⁵²⁴ Up to and including 1988, the supreme court uniformly awarded mothers custody, even if they were working mothers.⁵²⁵ Beginning in 1988, the supreme court shifted away from finding that working mothers were, nonetheless, primary caretakers and awarded fathers custody in several of the cases.⁵²⁶

523. See *Campbell v. Campbell* 460 S.E.2d 469 (W. Va. 1995); *Rhodes v. Rhodes*, 449 S.E.2d 75 (W. Va. 1994); *Lewis v. Lewis*, 433 S.E.2d 536 (W. Va. 1993); *Channell v. Channell*, 432 S.E.2d 203 (W. Va. 1993); *Cummings v. Cummings*, 426 S.E.2d 505 (W. Va. 1992); *Moses v. Moses*, 421 S.E.2d 506 (W. Va. 1992); *Brown v. Brown*, 403 S.E.2d 29 (W. Va. 1991); *Loudermilk v. Loudermilk*, 397 S.E.2d 905 (W. Va. 1990); *Marcum v. Marcum*, 395 S.E.2d 509 (W. Va. 1990); *T.S.K. v. K.B.K.*, 371 S.E.2d 362 (W. Va. 1988); *Wagoner v. Wagoner*, 310 S.E.2d 204 (W. Va. 1983); *Gibson v. Gibson*, 304 S.E.2d 336 (W. Va. 1983); *Heck v. Heck*, 301 S.E.2d 158 (W. Va. 1982); *Lounsbury v. Lounsbury*, 296 S.E.2d 686 (W. Va. 1982).

524. See *Campbell v. Campbell* 460 S.E.2d 469 (W. Va. 1995); *Rhodes v. Rhodes*, 449 S.E.2d 75 (W. Va. 1994); *Channell v. Channell*, 432 S.E.2d 203 (W. Va. 1993); *Cummings v. Cummings*, 426 S.E.2d 505 (W. Va. 1992); *Moses v. Moses*, 421 S.E.2d 506 (W. Va. 1992); *Brown v. Brown*, 403 S.E.2d 29 (W. Va. 1991); *Marcum v. Marcum*, 395 S.E.2d 509 (W. Va. 1990); *T.S.K. v. K.B.K.*, 371 S.E.2d 362 (W. Va. 1988); *Gibson v. Gibson*, 304 S.E.2d 336 (W. Va. 1983); *Heck v. Heck*, 301 S.E.2d 158 (W. Va. 1982); *Lounsbury v. Lounsbury*, 296 S.E.2d 686 (W. Va. 1982). In *Wagoner v. Wagoner*, 310 S.E.2d 204 (W. Va. 1983), custody was awarded to the father during the children's school year, and to the mother during the summer. In *Loudermilk v. Loudermilk*, 397 S.E.2d 905 (W. Va. 1990), the father received legal custody of the children. The parents alternated physical custody of the children on a weekly basis. In *Lewis v. Lewis*, 433 S.E.2d 536 (1993), the FLM found the father to be the primary caretaker. Nonetheless, the trial court awarded custody of the four year-old daughter to the mother, finding a young female child should be in the custody of her mother.

525. See, e.g., *Gibson v. Gibson*, 304 S.E.2d 336 (W. Va. 1983). In *Gibson*, the trial court concluded it was impossible to determine which parent was the primary caretaker because both parents were employed and shared many of the child rearing responsibilities. The court awarded the father custody. See *id.* at 338. The supreme court disagreed and awarded the mother custody. See *id.* at 338-39.

526. See, e.g., *Moses v. Moses*, 421 S.E.2d 506 (W. Va. 1992). In *Moses*, the mother took care of the children for a considerable period of time during the day, although the court noted that on a number of days each month she left the child in day-care. See *id.* at 509. On some evenings at 5:00 p.m., she left home to attend the Actor's Guild. See *id.* The physician father testified that he did all the laundry, did a lot of the cooking, and took care of the children "on frequent occasions" when his wife was in the hospital with premature contractions and during her deliveries. See *id.* He put the children to bed, bathed them, and brushed their teeth, maybe as many as five times a week. See *id.* He also coached a Little League baseball team, and when he was involved with coaching, would watch his children in the dugout until the game was over. See *id.*

By 1993, the supreme court was willing to find that a full-time homemaker, who spent her entire day with the children, was not the primary caretaker, and subsequently awarded custody to the wage-earning husband, using a best interests analysis.⁵²⁷ In that case, each parent organized and participated in social activities with the children.⁵²⁸ The father was responsible for disciplining the children⁵²⁹—he admitted he had used a belt to hit the boys but stated that he used his hand to hit the girl.⁵³⁰ The supreme court found ample evidence that the mother and father shared caretaking to an entirely equal degree, and therefore, neither parent was entitled to the status of the primary caretaker.⁵³¹

The case demonstrates that primary caretaking analysis shifts to emphasize different factors when parents work. This case further shows that the trial court and supreme court are using this category as an escape valve to find a way to reach a best interests analysis and to support a decision which would appear contrary to primary caretaking facts.

The trial court awarded custody to the father, and the supreme court affirmed, although it found the evidence on who was the primary caretaker contradictory. *See id.* at 511. Nonetheless, given the father's involvement with his children, the court could not say that the trial court clearly abused its discretion in finding that the father was the primary caretaker, and finding him fit to have custody. *See id.*

527. *See* Patricia Ann S. v. James Daniel S., 435 S.E.2d 6, 14-15 (W. Va. 1993) (per curiam). The court said:

[T]his Court has recognized that the length of time a parent has alone with a child is not determinative of whether the primary caretaker presumption should attach. . . . The [mother] was at home for the children when they would return from school while the [father] would work throughout the day. However, the [father] was also a substantial participant in the child care duties once he came home from work.

....
[The father] would be responsible for getting the boys ready for school and fixing their breakfast. Both parties further testified that the [mother] would primarily plan and prepare the evening meals on the weekdays, but on the weekends the [father] would often prepare the evening meals. The parties also testified that they shared the responsibility for getting the children ready for bed each night.

Id. at 10 (citation omitted).

528. *See id.*

529. *See id.*

530. *See id.*

531. *See id.*

3. *Fathers Are Given Credit for Role Shifting Activities*

The father's efforts to assist in caretaking *at all* has at times "bowled over" the court.⁵³² In *Patricia Ann S. v. James Daniel S.*, Chief Justice Workman, in a dissent, stated the following:

It is unfathomable that a woman who gives up her career (in this case, that of being a kindergarten teacher) to stay home to raise three children does not qualify as the primary caretaker, when as a full-time stay-at-home mother she breast-fed all three children; was so concerned about unnecessary additives and excess sugar that she processed her own baby food; was responsible for the majority of meal planning and preparation; was primarily responsible for laundering the family's clothing and housecleaning; was a Girl Scout troop leader; was a regular volunteer at her children's school and an active member of the parent-teacher organization; was responsible for scheduling and taking the children to their medical appointments; and was primarily responsible for managing the children's social activities. For some unarticulated reason, both the family law master and the circuit court appear to have been bowled over by the fact that the father helped in the evenings and weekends. Not unlike many modern fathers, the Appellee did participate in some of the household and childrearing responsibilities. . . . Given the father's admitted ten to twelve-hour work days combined with frequent business trips which took him away from home, it is difficult to conceive how he could ever qualify as having equal caretaking responsibility. The family law master and circuit court's [and Supreme Court's] conclusions that neither individual qualified as the primary caretaker has the effect of somehow elevating the father's necessarily limited hours with the children, given his lengthy work days, to accord him the same caretaker status as the full-time stay-at-home mother. *The majority in essence places a higher value on a father's time and contribution.*⁵³³

4. *The Impact of a Shift in Caretaking Responsibilities*

Courts at both the trial and supreme court levels are confused about the time period which should be considered when evaluating which parent should receive the primary caretaker presumption.

532. *Id.* at 16 (Workman, C.J., dissenting) (noting that the mere mention of a father participating in child-rearing seems to sway the lower courts to award custody to the father).

533. *Id.* (emphasis added).

This uncertainty is particularly apparent in cases where parents have shifted caretaking responsibilities.

In *Starkey v. Starkey*,⁵³⁴ the mother was the undisputed primary caretaker from 1971 until 1985.⁵³⁵ Her children were born in 1971, 1979, and 1980.⁵³⁶ In July of 1985, she left home for ten days without notice.⁵³⁷ Later, she claimed that she was afraid "she would lose control of her emotions and harm her children."⁵³⁸ She presented testimony that she was the daughter of an alcoholic, and it was uncontested that her husband's drinking problems contributed to their marital strife.⁵³⁹ From September of 1985, after the Starkeys agreed to separate, the children resided with their father.⁵⁴⁰ In May, the mother reclaimed custody of the two younger children.⁵⁴¹ The Starkeys filed for divorce in August, just a little over a year after her ten day disappearance.⁵⁴²

The FLM and the trial court found the father to be the primary caretaker and was thereby entitled to the presumption of custody.⁵⁴³ Further, the FLM suggested that the mother's "abandonment of the children in July of 1985 . . . abandoned any prior existing primary caretaker status"⁵⁴⁴ Upon the mother's petition for a review of the decision, the trial court vacated its award and gave custody to the mother by focusing on the parent who was the primary caretaker at the time of *the institution of the action*.⁵⁴⁵ At that time, the mother had physical custody of the children.

The supreme court reversed the trial court's determination of the appropriate time period for evaluating parental rules.⁵⁴⁶ Almost inexplicably, the court discussed that determining which parent is the primary caretaker "is a task which must encompass, to some degree, an *inquiry into the entirety* of each child's life, with obvious emphasis on the more recent period of time."⁵⁴⁷ In spite of this statement, the court ignored fifteen years of primary

534. 408 S.E.2d 394 (W. Va. 1991).

535. *See id.* at 396.

536. *See id.*

537. *See id.*

538. *Id.*

539. *See id.*

540. *See id.*

541. *See id.*

542. *See id.*

543. *See id.* at 397.

544. *Id.*

545. *See id.*

546. *See id.* at 398-400.

547. *Id.* at 398 (emphasis added).

caretaking by the mother, and instead, focused on the seven months prior to the filing for divorce, as well as the period where the father had custody at the time of that filing.

Perhaps the problem that the supreme court was struggling with is that, by the time this case was appealed, three years had passed, during which time the children lived with their father, due to the original temporary custody award. The supreme court did raise other factors which could have contributed to its decision. It suggested that the mother's ten day departure from the home could possibly be considered an abandonment of the children and of her status as primary caretaker (even after fifteen years of serving in this capacity).⁵⁴⁸ Alternatively, the court discussed that the best interests of the children would be served by placing them in the custody of their father because, since 1987, there were report cards and certificates of achievement which indicated that the children were thriving in his care.⁵⁴⁹ The court did not believe it would be in the children's best interests to disturb "their education and familial environment."⁵⁵⁰

Certainly, this justification sounds like the court is using unbridled judicial discretion to determine the children's best interests, which under the established standard, should not have been looked at where there was a primary caretaker. It would seem that in this case, the best interests analysis preceded the primary caretaker analysis. Finding it in the children's best interests to remain in the stable home in which they had resided since the FLM temporary award, the court then found the primary caretaker presumption defeated.⁵⁵¹

So, what is the appropriate period of time for the trial court to focus on to determine primary caretaking? The most recent case, *Campbell v. Campbell*,⁵⁵² suggests the proper period is prior to the separation and divorce. "As we explained in *Starkey* . . . , the determination of primary caretaker status cannot be made 'simply by reference to any one moment of time. It is not merely a snapshot in time taken on the day the divorce proceedings are initiated. . . .'⁵⁵³ In another case, *Michael Scott M. v. Victoria L. M.*,⁵⁵⁴ the court focused on the period after a temporary custody award was

548. See *id.* at 399.

549. See *id.*

550. *Id.*

551. See *id.* at 399-400.

552. 460 S.E.2d 469 (W. Va. 1995).

553. *Id.* at 473 (citation omitted).

554. 453 S.E.2d 661 (W. Va. 1994) (per curiam).

made to the father by the Family Law Master, but did not directly point this out.⁵⁵⁵ In *Shearer v. Shearer*,⁵⁵⁶ Justice Neely suggests in a dissent that the court should focus on the stable relationship the child has gained with the father by residing in his home for two years between *the divorce* and the supreme court hearing.⁵⁵⁷ Few of the cases look at the entire period of the child's life, as illustrated by the court in *Starkey*, which ignored fifteen years of the mother's caretaking.⁵⁵⁸ The court in *Moses v. Moses*⁵⁵⁹ ignored the first four years the couple had children, during which time the mother was the primary caretaker, and focused on the last two years, during which time the father was the primary caretaker.⁵⁶⁰ The court in *Efaw v. Efaw*⁵⁶¹ ignored six years of primary caretaking by the mother and focused on the most recent eighteen months, twelve months of which the father had custody under the FLM temporary award and during which time the father was the primary caretaker.⁵⁶² Finally, the court in *Dempsey v. Dempsey*⁵⁶³ looked at the period one year prior to the filing of the custody decision.⁵⁶⁴

5. Parental Abuse

Just a few of the cases discuss the parent's abuse of their children as a factor impacting the determination of primary caretaking, probably because this category is rather obvious, and these cases are not being appealed. In *Boarman v. Boarman*,⁵⁶⁵ the supreme court struggled to determine the primary caretaker where both parents were borderline fit to be the custodians of their children. The court split the children—six to the mother and the oldest son to the father.⁵⁶⁶ In this case, witnesses testified that the mother frequently verbally abused the children, called them various names, did not provide adequate clothing for the children in the winter months, and allowed them to catch mice and place

555. *See id.* at 665-66.

556. 448 S.E.2d 165 (W. Va. 1994) (per curiam).

557. *See id.* at 171 (Neely, C.J., dissenting). The majority in *Shearer* awarded an out-of-state mother custody of her son. *See id.* at 169-70.

558. *See Starkey v. Starkey*, 408 S.E.2d 394, 398-400 (W. Va. 1991) (per curiam).

559. 421 S.E.2d 506 (W. Va. 1992) (per curiam).

560. *See id.* at 508-11.

561. 400 S.E.2d 599 (W. Va. 1990) (per curiam).

562. *See id.* at 602-04.

563. 306 S.E.2d 230 (W. Va. 1983) (per curiam).

564. *See id.* at 231-32.

565. 459 S.E.2d 395 (W. Va. 1995) (per curiam).

566. *See id.* at 401.

them in the microwave until they exploded.⁵⁶⁷ A twelve year-old neighbor testified that children were permitted to play with knives and sticks and to watch pornographic films.⁵⁶⁸ The neighbor had also personally observed a specific incident in which case the children had seen their mother in bed with another man.⁵⁶⁹ The mother also did not cook properly for the children, neglected to clean the living area, allowed the children to use profanity, did not remove feces when changing diapers, drank straight whiskey in the morning while caring for the children, and had sexual relations in the presence of the children a second time.⁵⁷⁰

The father was not much better. Witnesses testified the father conveyed social and political ideas to his children which included the belief that "Jews and Negros" should be killed, and that Adolf Hitler's political principles were laudable.⁵⁷¹ The father allegedly shot at cows in order to change their direction, lost his temper easily, and threatened to physically harm the children.⁵⁷² He also shot cats, one of which was alleged to be the children's pet.⁵⁷³ The court noted that, amazingly, two home studies conducted by the Child Welfare Bureaus to assess the suitability of the mother's and father's homes, characterized these parents in almost glowing terms.⁵⁷⁴

The court was deeply concerned that "something here is awry. We cannot abandon the question of these children's well-being without further inquiry into the situation."⁵⁷⁵ On remand, no significant further facts were developed, and the supreme court later affirmed the split custody award.⁵⁷⁶

6. *The Child's Emotional Bond or Preference to Live with One Parent*

A child's emotional bond with a non-primary caretaker has appeared to influence the court's decision-making. For example, the court in *Michael Scott M. v. Victoria L. M.* stated: "[w]e have

567. See *Boarman v. Boarman*, 438 S.E.2d 876, 878 (W. Va. 1993), *aff'd*, 459 S.E.2d 395 (W. Va. 1995) (per curiam).

568. See *id.*

569. See *id.*

570. See *id.*

571. See *id.*

572. See *id.*

573. See *id.*

574. See *id.* at 879 n.3.

575. *Id.* at 880.

576. See *id.*

also emphasized the important consideration of the extent of the emotional bond between the child *and each parent*" when addressing the primary caretaker issue.⁵⁷⁷ In *Patricia Ann S. v. James Daniel S.*,⁵⁷⁸ the court emphasized the children's emotional bond with the father in justifying why he should have custody.⁵⁷⁹ The trial court used three psychological experts to provide information about the parent-child relationships,⁵⁸⁰ something that the court cautioned against in *David M. v. Margaret M.*⁵⁸¹ The supreme court, in its review of these cases, remarkably was not troubled by the violation of the rule that primary caretaking should be developed by lay (non-expert) testimony. The court emphasized that the children felt emotionally safe and more stable with their father.⁵⁸² It awarded the father custody of the two older boys, but remanded the case with directions to determine if the mother should have custody of the daughter.⁵⁸³

There have also been a few cases which have considered the child's preference. A sixteen year-old's preference was considered in *Boarman*,⁵⁸⁴ a four year-old's desire, as expressed via a licensed social worker who interviewed her, was mentioned in *DiMagno v. DiMagno*.⁵⁸⁵ In *S. v. S.*,⁵⁸⁶ as just explained, the trial court permitted two boys, thirteen and ten, to elect to live with their father. Their six year-old sister indicated she would like to live with her brothers, and the supreme court remanded the case for more information on whether that result would be in her best interests. In *Reynolds v. Reynolds*,⁵⁸⁷ an eight year-old chose to live with the father and the trial court agreed. The supreme court reversed since the mother was the primary caretaker.

577. 453 S.E.2d 661, 665 (W. Va. 1994) (emphasis added).

578. 435 S.E.2d 6 (W. Va. 1993).

579. *See id.* at 13.

580. *See id.* at 16-17 (Workman, C.J., dissenting).

581. 385 S.E.2d 912, 913 (W. Va. 1989).

582. *See Patricia Ann S.*, 435 S.E.2d at 13.

583. *See id.* Justice Workman's dissent sheds additional light on this case. She complains that:

[t]he majority opinion marks a sharp departure from the primary caretaker rule which has been a viable and working concept in West Virginia for more than a decade. More disturbing, however, is the determination that it is in the best interest of children to place them in the custody of a parent who has abused both the wife and the children. In doing so, the majority implicitly places its stamp of approval on physical and emotional spousal abuse.

Id. at 15 (Workman, C.J., dissenting).

584. *Boarman v. Boarman*, 459 S.E.2d 469 (W. Va. 1995).

585. 452 S.E.2d 404 (W. Va. 1994).

586. *Patricia Ann S. v. James Daniel S.*, 435 S.E.2d 6 (W. Va. 1993).

587. 433 S.E.2d 277 (W. Va. 1993).

As anticipated by *Garska*,⁵⁸⁸ the older the child, the more the court has given weight to her preference in the decision. Some indication exists that this factor is being used by courts in cases of younger children, as an opportunity to help circumvent a primary caretaker award—as is the child's emotional bonding with the father.

7. Procedural Delays

Some of the more recent cases noted how long it takes to get an appealed case through the West Virginia court system. In *Campbell v. Campbell*,⁵⁸⁹ almost three years elapsed between the filing of the divorce and the FLM's decision. An additional one-and-a-half years passed before the supreme court decision. The court's decision to leave custody with the father, based on a rather weak factual record, can be partially explained by the court's desire to promote the continuity and stability of the children's lives.⁵⁹⁰ They had resided with their father for the three years prior to the decision because the FLM had originally awarded him custody.⁵⁹¹

Other cases in the sample took from two to four years, from the filing of the divorce through the date of the appellate decision. This time period is not remarkable. However, what is interesting is the delay that would sometimes occur between the filing of the divorce and a FLM's review of the situation. In *Cummings v. Cummings*,⁵⁹² more than two years elapsed between the filing of the divorce and the trial court decision.

Due to the procedural delay in moving a custody battle through the West Virginia courts, temporary custody becomes a crucial issue. In thirty-two of the forty-nine cases, or sixty-five percent, the temporary custodian was eventually awarded custody by the West Virginia Supreme Court.⁵⁹³ The sample of forty-nine cases

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

589. 460 S.E.2d 469 (W. Va. 1995).

590. *See id.* at 472-73.

591. *See id.* at 471.

592. 426 S.E.2d 505 (W. Va. 1992).

593. *See Boarman v. Boarman*, 459 S.E.2d 395 (W. Va. 1995); *Marilyn H. v. Roger Lee H.*, 455 S.E.2d 570 (W. Va. 1995); *Michael Scott M. v. Victoria L. M.*, 453 S.E.2d 661 (W. Va. 1994); *DiMagno v. DiMagno*, 452 S.E.2d 404 (W. Va. 1994); *Rhodes v. Rhodes*, 449 S.E.2d 75 (W. Va. 1993); *Boarman v. Boarman*, 438 S.E.2d 876 (W. Va. 1993); *Patricia Ann S. v. James Daniels S.*, 435 S.E.2d 6 (W. Va. 1993); *Lewis v. Lewis*, 433 S.E.2d 536 (W. Va. 1993); *Reynolds v. Reynolds*, 433 S.E.2d 277 (W. Va. 1993); *Channell v. Channell*, 432 S.E.2d 203 (W. Va. 1993); *McDougal v. McDougal*, 422 S.E.2d 636 (W. Va. 1992); *Richardson v. Richardson*, 415 S.E.2d 276 (W. Va. 1992); *Starkey v. Starkey*, 408 S.E.2d 394 (W. Va. 1991); *Brown v. Brown*, 403 S.E.2d 29 (W. Va. 1991); *Efaw v. Efaw*, 400 S.E.2d 599 (W. Va. 1990);

includes seven cases in which it was impossible to determine which parent had original custody awards. By removing these seven from the total sample, seventy-six percent of the temporary custodians received custody from the supreme court. Continuity of care is clearly playing a role in the supreme court's decision, albeit not an explicit one.

8. *Other Factors Figuring into a Primary Caretaker Decision*

Other factors considered by the supreme court in primary caretaker decision-making include the child's exposure to secondary smoke;⁵⁹⁴ the child's interaction with the father's family;⁵⁹⁵ which parent takes the child to school;⁵⁹⁶ the parent's involvement in school board meetings and extracurricular activities;⁵⁹⁷ the parent's flexibility in addressing the children's needs and providing a "listening ear,"⁵⁹⁸ and reading books to the children.⁵⁹⁹

To return for a moment to the influence of the father's family, the court has found in several cases that the father's parents (the child's grandparents) were actually the primary caretakers, not the father. In three cases, *Michael Scott M. v. Victoria L. M.*,⁶⁰⁰ *Channell v. Channell*,⁶⁰¹ and *Isaacs v. Isaacs*,⁶⁰² the court made such a finding. In the most recent cases, fathers received custody nonetheless.⁶⁰³ However, in the earliest case, the supreme court

Loudermilk v. Loudermilk, 397 S.E.2d 905 (W. Va. 1990); Marcum v. Marcum, 395 S.E.2d 509 (W. Va. 1990); Warner v. Warner, 394 S.E.2d 74 (W. Va. 1990); Mills ex rel. Gorrick v. Gorrick, 381 S.E.2d 273 (W. Va. 1989); Goetz v. Carpenter, 367 S.E.2d 782 (W. Va. 1988); Isaacs v. Isaacs, 358 S.E.2d 833 (W. Va. 1987); M.S.P. v. P.E.P., 358 S.E.2d 442 (W. Va. 1987); Bickler v. Bickler, 344 S.E.2d 630 (W. Va. 1986); Stacy v. Stacy, 332 S.E.2d 260 (W. Va. 1985); Graham v. Graham, 326 S.E.2d 189 (W. Va. 1984); Allen v. Allen, 320 S.E.2d 112 (W. Va. 1984); T.C.B. v. H.A.B., 317 S.E.2d 174 (W. Va. 1984); J.E.I. v. L.M.I., 314 S.E.2d 67 (W. Va. 1984); Dempsey v. Dempsey, 306 S.E.2d 230 (W. Va. 1983); Lounsbury v. Lounsbury, 296 S.E.2d 686 (W. Va. 1982); Mormanis v. Mormanis, 296 S.E.2d 680 (W. Va. 1982); Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981); see also Mercer, *supra* note 463, at F-1 (case narratives), G-1 (chart of primary caretaker decisions).

594. See *Michael Scott M. v. Victoria L. M.*, 453 S.E.2d 661, 666 (W. Va. 1994).

595. See *Shearer v. Shearer*, 448 S.E.2d 165, 168 (W. Va. 1994).

596. See *Graham v. Graham*, 326 S.E.2d 189, 190 (W. Va. 1984).

597. See *Brown v. Brown*, 403 S.E.2d 29, 32 (W. Va. 1991).

598. See *T.S.K. v. K.B.K.*, 371 S.E.2d 362, 366 (W. Va. 1988).

599. See *Heck v. Heck*, 301 S.E.2d 158, 159 (W. Va. 1982).

600. 453 S.E.2d 661 (W. Va. 1994).

601. 432 S.E.2d 203 (W. Va. 1993).

602. 358 S.E.2d 833 (W. Va. 1987).

603. See *Michael Scott M.*, 453 S.E.2d at 663; *Channell*, 432 S.E.2d at 442.

reversed a trial court decision for the father because the court found the mother to be the primary caretaker.⁶⁰⁴

Yet another factor which repeatedly influences trial court and supreme court decision-making is deference to a custody evaluation made pursuant to Family Law Rule 34(b).⁶⁰⁵ This Rule permits a home study to be ordered. Nine of the cases in this study utilized custody evaluations or *guardian ad litem* (GAL) opinions to reach their decision, in spite of Justice Neely's mandate that primary caretaking should be presented primarily by lay witnesses.⁶⁰⁶ In *Patricia Ann S. v. James Daniel S.*,⁶⁰⁷ the supreme court found the trial court did not overly rely on the three experts.⁶⁰⁸ Similarly, in *DiMagno*,⁶⁰⁹ the court used the licensed social worker's court-ordered home study, which concluded the mother was a suitable custodian and that the children had a significant relationship with her, to reverse the trial court decision that the mother was unfit.⁶¹⁰ In *Marilyn H. v. Roger Lee H.*,⁶¹¹ the home study indicated that the mother's stable relationship with her current husband, who had previously exposed himself to a teenager prior to the current marriage, was dispositive.⁶¹² It appears that home studies were not being made prior to 1988, as no case mentions a custody evaluation before that time.

Another rather recent wrinkle in primary caretaking decision-making is the introduction of the FLM. When the supreme court has reversed trial court decisions which ran contrary to the recommendations of the FLM, the supreme court has sporadically indicated that deference must be accorded to the FLM's findings. In affirming a trial court award, the court has indicated that there was abundant evidence which the FLM ignored. The relevant standard is an abuse of discretion.

It seems there is no discernible pattern of when the supreme court gave deference to either the trial court or the FLM opinion. It appears that the court felt comfortable in reaching an independent determination and then used the standard of review to its benefit. In *Michael Scott M. v. Victoria L. M.*,⁶¹³ the court states

604. See *Isaacs*, 358 S.E.2d at 836.

605. W. Va. Fam. Law, Rule 34(b).

606. See Neely, *supra* note 27, at 181.

607. 435 S.E.2d 6 (W.Va. 1993).

608. See *id.* at 12.

609. 452 S.E.2d 404 (W. Va. 1994).

610. See *id.* at 408.

611. 455 S.E.2d 570 (W. Va. 1995).

612. See *id.* at 572.

613. 453 S.E.2d 661 (W. Va. 1994).

that some deference must be given to the FLM who was "in the unique position to hear the evidence presented and to assess the credibility of the witnesses."⁶¹⁴ But in *DiMagno v. DiMagno*,⁶¹⁵ the court ignored the FLM and the trial court's recommendation that, although the mother was the primary caretaker, she was unfit because she excessively disciplined her child, and she had a relationship with a boyfriend with whom the mother occasionally spent the night.⁶¹⁶ The supreme court reviewed the evidence, as well as testimony by the social worker, which indicated that the child had a closer bond with the mother and that it would be detrimental for her to be separated from her mother, and found the allegations that the mother had slapped or smacked the child to be unfounded.⁶¹⁷

C. Findings on Other Concerns

1. *Has the Rate of Appeals Decreased Since the Introduction of the Primary Caretaker Standard in 1980?*

One of the reasons that the supreme court adopted the primary caretaker standard was to give parents less of an incentive to litigate their custody cases.⁶¹⁸ If custody decision-making at the trial court level is concrete and clear using the primary caretaker standard, it should result in less appeals to the supreme court. Alternately, there may be more appeals because a primary caretaker award can be challenged when the lower court ignores the standard. Increased ability to appeal an award based on this presumption is another of its stated benefits. This study compared the rate of appeals from 1960 to 1981 when West Virginia courts were using the best interests of the child standard with a maternal preference versus the appeals rate under the primary caretaker standard used from 1981 to 1995 to see if there was a constant level of appeals.

The number of custody awards being appealed in West Virginia has increased.⁶¹⁹ There were only six custody appeals filed between

614. *Id.* at 661.

615. 52 S.E.2d 404 (W. Va. 1994).

616. *See id.* at 406.

617. *See id.*

618. *See Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981); *see also supra* Part II.B.3.

619. *See infra* Table 9; *see also* Crippen, *supra* note 101, at 443-44. Judge Gary Crippen briefly looked at the comparable rate of appeals when Minnesota used the best interests test with and without a primary caretaker presumption:

[e]xcept for cases premised on saving the child's relationship with a primary

1960 and 1977 to the West Virginia Supreme Court. These six include modification of custody cases, as well as appeals of original custody awards. Between 1978 and 1981, when *Garska* was decided, an additional nine appeals were filed—three in 1978, two in 1979, and four in 1980. Again, these figures include modification of custody cases. Looking at the number of appeals filed between 1981 and 1985, and 1986 and 1990, there were twenty-two and eighteen original and modification of custody appeals filed during these periods, respectively. Between 1991 and 1995, there were twenty-two original custody appeals filed. This information is reflected in Table 9.

caretaker, Minnesota's appellate courts have never reversed or even remanded an original child custody decision during the era of gender neutral decisionmaking, beginning in 1969. . . . The volume of such appeals is unknown for the years 1969 through 1983. . . . Between 1983 and 1985 [when *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1980) urged the primary caretaker preference] . . . the court of appeals had approximately twelve appeals per year from original custody decisions.

Id.

Table 9
NUMBER OF APPEALS FILED IN WEST VIRGINIA BETWEEN
1978 AND 1995

| | Original Custody Appeal Filed | Modification Of Custody Appeal Filed | Total |
|-------------|--|---|--------------|
| 1978 | | | 3 |
| 1979 | | | 2 |
| 1980 | | | 4 |
| 1981 | 1 | 1 | 2 |
| 1982 | 4 | 4 | 8 |
| 1983 | 3 | 2 | 5 |
| 1984 | 4 | 0 | 4 |
| 1985 | 2 | 1 | 3 |
| 1986 | 2 | 1 | 3 |
| 1987 | 2 | 0 | 2 |
| 1988 | 3 | 1 | 4 |
| 1989 | 2 | 2 | 4 |
| 1990 | 4 | 1 | 5 |
| 1991 | 4 | 0 | 4 |
| 1992 | 4 | 1 | 4 |
| 1993 | 6 | | |
| 1994 | 5 | | |
| 1995 | 3 Before July | | |

The increase of appeals of custody cases could be due to several factors. First, as noted above, increasing uncertainty exists about how the primary caretaker standard operates, and the standard is

beginning to erode as it is challenged by the lower courts in unusual circumstances. Since the supreme court appears to be willing to undertake a *de novo*, or brand new, review of the factual findings of the trial court in many cases, parties or their attorneys, could view an appeal as an opportunity for a second bite of the apple—a new chance to win custody. This certainly was not the result intended by Justice Neely when he drafted the *Garska* presumption.

The standard also prompts appeals in cases where parents appear to be sharing the primary caretaking duties, and courts are confused as to whether they can find that the primary caretaker presumption is defeated. Given the current changing gender roles in our society today, fathers have an opportunity to take increased responsibility for the caretaking of their children. As noted, the West Virginia courts appear to be willing to recognize even rather minimal caregiving contributions by fathers and appear to be willing to award them custody on that basis.⁶²⁰

Second, the fine-tuning of the distinction between when the primary caretaker presumption operates, and when it is defeated by the joint efforts of parents to care for their children, requires appellate litigation.

A third reason for increased appeals may be the situations where the trial court judges attempt to seek individualized justice for the parties or the child, and the result the judge desires contravenes a strict application of the presumption. Here, the judge's decision may violate the standard because the judge failed to make factual findings about which parent provides the primary caretaker duties. These awards will be appealed *if* there is a dissatisfied party, and if she has the resources and fortitude to continue the battle.

The maternal preference, which preceded the primary caretaker doctrine in West Virginia, did not require factual findings.⁶²¹ Therefore, it was often fruitless for appeals to be pursued. The appellate court would merely defer to the lower court's decision as, in essence, it was unable to be reviewed. The requirement of factual findings under the current standard is precisely why appeals can now be argued. Just like a best interests of the child standard which has been defined by a state legislature in an attempt to make it more determinate,⁶²² the primary caretaker

620. See *supra* Part V.B.3.

621. See *supra* Part II.A.2.c.

622. See *supra* Part II.A.3.a. See, e.g., OHIO REV. CODE ANN. § 3109.04(c) (West 1998).

standard requires a marching through of factors and fact determinations. These findings can then be challenged at a higher level as being not supported by the evidence. Alternatively, a party can argue that the court failed to make the requisite findings when deciding the case. Either way, appeals are fostered. The appellate court, having a complete fact record comparatively to pre-1981, (or, alternatively, a deficient one under the standard's requirement for factual findings), is in a situation to render an independent opinion about the merits of the case. Again, parties want to appeal if they believe they can get a second chance.

Finally, under the assumption that society has become increasingly litigious over the past two decades, there probably would be a natural rise in custody appeals regardless of the standard which is used.

2. *Who Decided the Cases During the Fifteen Year Period?*

Five judges sit on the West Virginia Supreme Court. The five who participated in the 1981 *Garska* decision were Justice Neely, the author of the opinion, and Justices McHugh, Harshbarger, McGraw, and Miller, all of whom are males. In 1985, Justice Harshbarger was replaced by Justice Brotherton. In 1989, Justice McGraw was replaced by Justice Workman, the sole female on the bench during the sample period, and the author of the article considered earlier.⁶²³ Justice Miller, although replaced by Justice Cleckley in 1994, continued to serve by temporary assignment through 1995 for Justice Brotherton (who may have become incapacitated due to illness or the like). During 1995, Judge Fox also occasionally sat by temporary assignment for Justice Brotherton.

Thirty-seven of the cases were decided by the Court as a whole (*per curiam*). Justice Neely authored the majority opinion in five of the cases. McGraw wrote three majority opinions; Workman wrote two; and Brotherton and Miller wrote one each. Nine dissents were filed: three by Neely, two by Brotherton, two by Miller, one by McGraw, and one by Workman.

623. See O'Hanlon & Workman, *supra* note 21.

3. *What Custody Outcomes Are Being Reached at the Trial Court and Supreme Court Levels?*

Custody cases being appealed to the supreme court are predominantly those where the father had been awarded custody of his children. Thirty-three of the forty nine cases in the sample (67.3%) made custody awards to the father.⁶²⁴ In contrast, the trial court only awarded the mother custody of her children in six cases (12.2%) in the sample.⁶²⁵

The finding that the overwhelming majority of cases being appealed were cases where the court awarded the father custody makes sense. Again, Justice Neely suggested that "[u]nder our system a mother's lawyer can tell her that if she has been the primary caretaker and is a fit parent, *she has absolutely no chance* of losing custody of very young children."⁶²⁵ If the mother has "no chance of losing custody" and then loses at the trial court level, naturally her lawyer might suggest that she should appeal the decision. Justice Neely's comments suggest that a father who lost custody at the trial court level may be encouraged not to appeal his case due to the unarticulated, but obviously implicit, gender preference of the standard. Therefore, the majority of cases appealed may be those that ran counter to the typical "mother-gets-custody" awards.

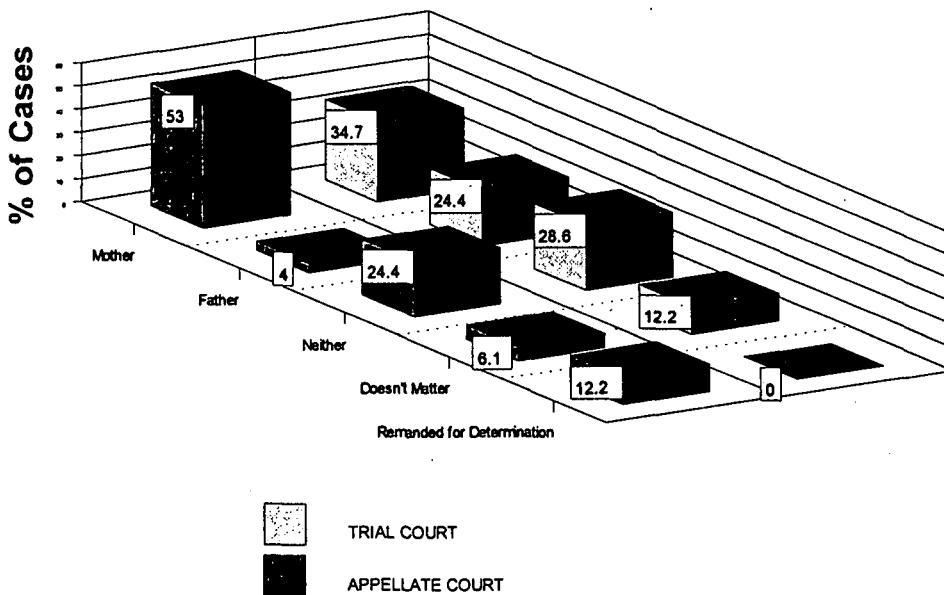
Simply because the mother is not being awarded custody at the trial court level in the overwhelming majority of cases appealed to the supreme court does not mean that she was not found to be the primary caretaker by the trial court. In seventeen of the cases (34.7%), the mother was found to be the primary caretaker by the trial court. In eleven of those cases, she then lost custody because she was found to be unfit. In twelve of the sample cases (24.4%), the father was found to be the primary caretaker. Fourteen of the cases (28.6%), found that neither of the parents were entitled to a primary caretaker presumption, either because they shared the task, or because there was a substitute caregiver. Six of the sample cases (12.2%) never discussed primary caretaking at all. In these cases, it appears that the trial court moved on to a discussion of parental fitness without a determination of who was the primary caretaker.

624. See *infra* Figure 8; see also Mercer, *supra* note 463, at F-1 (describing case narratives of primary caretaker decisions), G-1 (chart of primary caretaker decisions).

625. Neely, *supra* note 27, at 182.

At the appellate court level, the mother was found to be the primary caretaker in twenty-six of the cases (53%), and the father was found to be the primary caretaker in only two cases (4%). Twelve cases (24.2%) determined that neither parent was entitled to the presumption and six cases (12.2%) were remanded for further factual findings on the primary caretaker issue. In the remaining three cases (6.1%), the court indicated in two of the cases that analysis of primary caretaking was not needed because the parents were both unfit, and indicated in the other case that the parents had a joint custody relationship which was working.⁶²⁶

Figure 7
Who Is the Primary Caretaker



At the trial court level, final custody awards were made as follows:

- mother received custody in six cases (12.2%);
- father received custody in thirty-three cases (67.3%);
- where there was more than one child, the children were split between the parents in three cases (6%);

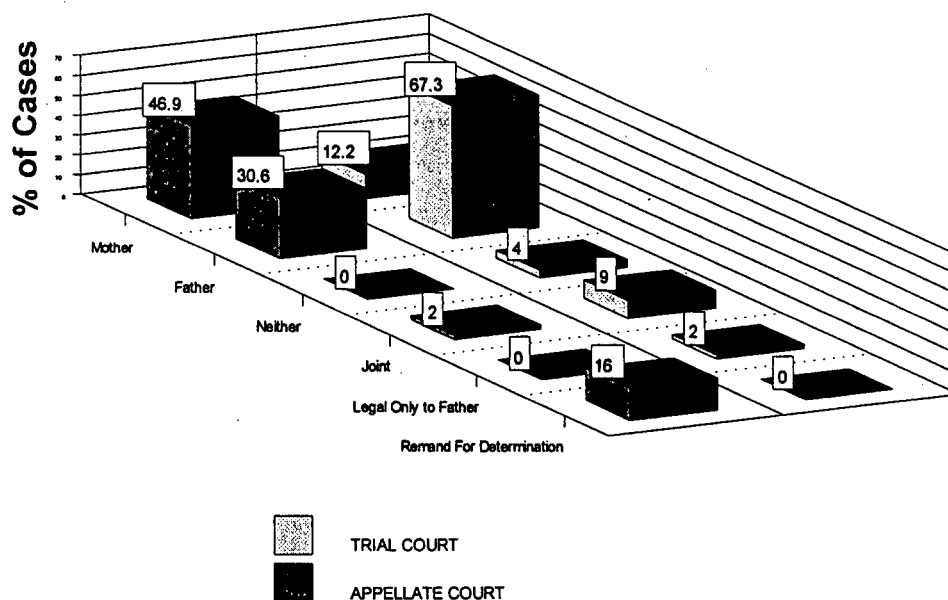
626. These statistics came from Professor Mercer's own study and the results are on file with the author.

- father received legal custody (decision-making authority), but the parents shared physical custody of the child in one case (2%); and
- parents had joint custody in six cases (9%): in two of these cases the father had physical custody of the children, in one case the mother had physical custody, and in three cases the parents shared physical custody.

At the appellate court level, final custody awards were made as follows:

- mother received custody in twenty-three cases (46.9%);
- father received custody in fifteen cases (30.6%);
- where there was more than one child, the children were split between the parents in two cases (4%);
- parents had joint custody in one case (2%); and
- the court remanded eight cases for further factual findings: three cases were remanded for findings on whether the mother was unfit, four cases were remanded with instructions that the trial court determine which parent was the primary caretaker, and one case was remanded to determine if the joint custody award was working.

Figure 8
Who Receives Custody



VI. DISCUSSION OF RESULTS AND IMPLICATIONS

A. *Noticeable Trends in Primary Caretaker Decision-Making*

The following eight trends show how trial courts and the West Virginia Supreme Court reach decisions as to the custody of children after a divorce: (1) a gender preference for women; (2) a mother's sexual conduct contributing to the divorce being a leading predictor of a supreme court decision; (3) trial courts in West Virginia being preoccupied with a mother's sexual behavior, even if it only tangentially touches the child; (4) the court's finding that more parents share the role of caretaking and subsequently reverting to best interests analysis under this exception; (5) the temporary physical custodian for the child receiving a custody presumption of continuity; (6) fathers tending to receive more favorable treatment if they can point to a female who will help care for the child; (7) there are increasing exceptions to the primary caretaker presumption as it erodes; and (8) lower courts occasionally feeling free to ignore the presumption and not always chastised for their efforts.

1. *Trend One: Supreme Court Gender Preference for Women*

The supreme court favors awarding custody to women. Mothers were awarded sole custody of their children at the supreme court level in twenty-three of the cases. Fathers were awarded sole custody in sixteen of the cases. Although in only six of the forty-nine original trial court decisions the mother received sole custody of all children, (12.2%), an additional seventeen mothers received custody after their appeal.⁶²⁷

627. See Marilyn H. v. Roger Lee H., 455 S.E.2d 570 (W. Va. 1995); Michael Scott M. v. Victoria L. M., 453 S.E.2d 661 (W. Va. 1994); Lewis v. Lewis, 433 S.E.2d 536 (W. Va. 1993); Starkey v. Starkey, 408 S.E.2d 394 (W. Va. 1991); Efaw v. Efaw, 400 S.E.2d 599 (W. Va. 1990); Burger v. Burger, 345 S.E.2d 18 (W. Va. 1986) (discussing cases where the mother received sole custody at the trial court level). See also Marilyn H. v. Roger Lee H., 455 S.E.2d 570 (W. Va. 1995); DiMagno v. DiMagno, 452 S.E.2d 404 (W. Va. 1994); Feaster v. Feaster, 452 S.E.2d 428 (W. Va. 1994); Shearer v. Shearer, 448 S.E.2d 165 (W. Va. 1994); Rhodes v. Rhodes, 449 S.E.2d 75 (W. Va. 1994); Reynolds v. Reynolds, 433 S.E.2d 277 (W. Va. 1993); Simmons v. Comer, 438 S.E.2d 530 (W. Va. 1993); Cummings v. Cummings, 426 S.E.2d 505 (W. Va. 1992); McDougal v. McDougal, 422 S.E.2d 636 (W. Va. 1992); Kenneth L.W. v. Tamyra S.W., 408 S.E.2d 625 (W. Va. 1991); Brown v. Brown, 403 S.E.2d 29 (W. Va.

FLMs shared this gender bias. They awarded mothers custody in fifty-three percent of the cases, and fathers custody in forty-six percent of the cases. On the other hand, the trial court often reversed the FLM award as they awarded custody to only 12.2% of the mothers.⁶²⁸ This trend merely shows that when mothers do not obtain custody, the likelihood of their success on appeal is good, and they might take a chance at rolling the dice. Justice Neely provides comments which support the suggestion that the supreme court favors mothers having custody. In his dissent in *Allen v. Allen*,⁶²⁹ he stated:

[A]lthough I strongly favor our primary-caretaker-parent presumption, I do not read that presumption as providing that mothers would invariably get custody. In the case before us the record obviously discloses the appellee father, as between the two natural parents, is superior and I would affirm the circuit court.⁶³⁰

In that case, an alcohol-drinking, marijuana-smoking mother received custody of her child after the supreme court reversed the trial court decision in favor of the father.⁶³¹ Evidence indicated that she had a criminal record which consisted of minor offenses and an indictment for armed robbery.⁶³² The supreme court suggested that since the time of these incidents, the mother had rehabilitated herself and was therefore entitled to the primary caretaker presumption.⁶³³ The supreme court objected to the trial court's comments which indicated that its finding in favor of the father was in part to make an example of the mother.⁶³⁴ The circuit judge indicated,

1991); *David M. v. Margaret M.*, 385 S.E.2d 912 (W. Va. 1989); *T.S.K. v. K.B.K.*, 371 S.E.2d 362 (W. Va. 1988); *Goetz v. Carpenter*, 367 S.E.2d 782 (W. Va. 1988); *Isaacs v. Isaacs*, 358 S.E.2d 833 (W. Va. 1987); *M.S.P. v. P.E.P.*, 358 S.E.2d 442 (W. Va. 1987); *Bickler v. Bickler*, 344 S.E.2d 630 (W. Va. 1986); *Wagoner v. Wagoner*, 310 S.E.2d 204 (W. Va. 1983); *Gibson v. Gibson*, 304 S.E.2d 336 (W. Va. 1983); *Heck v. Heck*, 301 S.E.2d 158 (W. Va. 1982); *Lounsbury v. Lounsbury*, 296 S.E.2d 686 (W. Va. 1982); *Mormanis v. Mormanis*, 296 S.E.2d 680 (W. Va. 1982); *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981) (describing the cases where the mother received sole custody at the supreme court level).

628. See *Mercer*, *supra* note 463, at G-1 (chart of primary caretaker decisions).

629. 320 S.E.2d 112 (W. Va. 1984).

630. *Id.* at 118 (Neely, C.J., dissenting).

631. See *id.*

632. See *id.* at 115.

633. See *id.* at 117.

634. See *id.*

I couldn't live with myself if I would take the chance on all of the many girls or friends or acquaintances of the plaintiff's who would think for one second that you can live that way and do these things and still wind up with your baby because you can't, not in Cable county. You just can't do it. If it will save one of them from getting married and having a baby too soon when they're really not capable of thinking about or dedicating their whole life to someone else, then it will be worth it as far as I'm concerned.⁶³⁵

2. *Trend Two: Mother's Adultery Is Main Predictor of Supreme Court Custody Award*

Before *Garska* in 1981, mothers received custody under the maternal preference standard, unless they were found to be unfit. A sampling of custody appeals between 1960 and 1981 reveals that most of these appeals alleged that the mothers had abandoned their children or had committed adultery, rendering them unfit custodians. These themes continue to survive after *Garska*. Just under half of the cases in the sample discussed the mother's sexual conduct, either prior to or after the divorce. There were twenty-one cases alleging the mother's adultery.⁶³⁶ Adultery appears to be the main predictor of the supreme court's affirming the trial court award to the father. This influence is seen the most during the first eight years after the primary caretaker standard was announced.

Twenty-three cases were heard at the trial court level between 1981 and 1989. Of these cases, the court awarded custody to the father in seventeen cases; the court awarded custody to the parents jointly in four cases; the court directed custody of the children be split between the parties in one case; and in one case, the court awarded custody to the mother. During this same eight year period, the supreme court struggled to give mothers custody. In twelve of the twenty-three cases, custody was changed from the father to the mother. Five additional cases were remanded, implying that the mother was fit or should be the primary caretaker. One case considered joint custody. Only five cases made an award to the father. Of those five, three were adultery cases.⁶³⁷ The supreme court generally prefers to give mothers custody, but is less

635. *Id.* at 118.

636. See *supra* note 490 (listing the twenty-one cases).

637. See Mercer, *supra* note 463, at G-1 (chart of primary caretaker decisions which compiles this information).

willing to do so if she has come to the divorce table with "unclean hands"—if she has contributed to the breakdown of the marriage through her adultery.

The supreme court struggled less with these adultery concerns after 1990. The court became more willing to award the mother custody even in cases where there were allegations of the mother's sexual misconduct. In addition, the supreme court appears to have had minimal problems awarding the mother custody when her alleged adultery consisted of a few adulterous acts. For example, in *Isaacs v. Isaacs*,⁶³⁸ the mother of an infant child committed one sexual act in a car parked in downtown Martinsburg,⁶³⁹ and the court awarded the mother custody.⁶⁴⁰ Nor has the supreme court struggled when there was speculative evidence about the mother's adultery. In the case of *Bickler v. Bickler*,⁶⁴¹ when it was pure speculation that the mother had a sexual relationship with her male roommate,⁶⁴² the court also awarded the mother custody.⁶⁴³ However, the court does have problems awarding custody to the mother when the mother's adulterous acts lead to the disintegration of the marriage. For example, in *Rose v. Rose*,⁶⁴⁴ the "trouble started" when the wife began attending social activities and met a man.⁶⁴⁵ Subsequently, she announced she was leaving the marital relationship.⁶⁴⁶ The court affirmed an award of custody to the father.⁶⁴⁷

3. *Trend Three: Trial Courts in West Virginia Are Preoccupied with a Mother's Sexual Behavior, Even When It Does Not Directly Impact the Child*

The mother's adulterous conduct is the focus in the majority of the trial court decisions which are appealed. The trial court favors giving the father custody when facts about adultery are alleged against the mother. To reach this result, it may use other avenues to circumvent a decision that the mother was the primary care-

638. 358 S.E.2d 833 (W. Va. 1987).

639. *See id.* at 835.

640. *See id.*

641. 344 S.E.2d 630 (W. Va. 1986).

642. *See id.* at 632.

643. *See id.*

644. 340 S.E.2d 176 (W. Va. 1985).

645. *See id.* at 177.

646. *See id.*

647. *See id.*

taker, such as the shared custody exception or the unfitness exception.

The supreme court initially responded to these early adultery-driven cases by affirming the father's award of custody. That trend changed in approximately 1991. Since then, mothers have won custody in these situations, in the great majority of the supreme court decisions.⁶⁴⁸

4. *Trend Four: Shared Caretaking Is No Longer a Rare Exception, But Is Becoming the Norm*

More courts are finding parents to be shared caretakers of their children, and that neither parent is entitled to the primary caretaker presumption. This trend often results in an award to the father. In the fourteen cases where the trial court found that primary caretaking had been shared, twelve custody awards went to the father, on the basis that it was in the child's best interest.⁶⁴⁹ Of the remaining two other cases, one case permitted the children to be split between the parents,⁶⁵⁰ and the other case made an award to the mother based on the best interests of the child.⁶⁵¹ The conclusion is obvious—shared caretaking favors fathers in West Virginia.

In evaluating a shared caretaking situation, courts receive and evaluate evidence on the highest number of the *Garska* factors, as was shown in Part I of the study. There is a high percentage of factors discussed because parties are developing a lot of information regarding their caretaking duties. A passage from *Shearer v. Shearer*⁶⁵² illustrates the tedious inquiry required.

648. See, e.g., *Marilyn H. v. Roger Lee H.*, 455 S.E.2d 570 (W. Va. 1995); *DiMagno v. DiMagno*, 452 S.E.2d 404 (W. Va. 1994); *Feaster v. Feaster*, 452 S.E.2d 428 (W. Va. 1994); *Cummings v. Cummings*, 426 S.E.2d 505 (W. Va. 1992); *Kenneth L.W. v. Tamyra S.W.*, 408 S.E.2d 625 (W. Va. 1991).

649. See *Campbell v. Campbell*, 460 S.E.2d 469 (W. Va. 1995); *Michael Scott M. v. Victoria L. M.*, 453 S.E.2d 661 (W. Va. 1994); *Shearer v. Shearer*, 448 S.E.2d 165 (W. Va. 1994); *Patricia Ann S. v. James Daniels S.*, 435 S.E.2d 6 (W. Va. 1993); *Channell v. Channell*, 432 S.E.2d 203 (W. Va. 1993); *Kenneth L.W. v. Tamyra S.W.*, 408 S.E.2d 625 (W. Va. 1991); *Brown v. Brown*, 403 S.E.2d 29 (W. Va. 1991); *Loudermilk v. Loudermilk*, 397 S.E.2d 905 (W. Va. 1990); *Marcum v. Marcum*, 395 S.E.2d 509 (W. Va. 1990); *Isaacs v. Isaacs*, 358 S.E.2d 833 (W. Va. 1987); *T.C.B. v. H.A.B.*, 317 S.E.2d 174 (W. Va. 1984); *Dempsey v. Dempsey*, 306 S.E.2d 230 (W. Va. 1983).

650. See *Graham v. Graham*, 326 S.E.2d 189 (W. Va. 1985).

651. See *Efaw v. Efaw*, 400 S.E.2d 599 (W. Va. 1990). Note that the supreme court reversed and awarded custody to the father in the absence of a determination of who was the primary caretaker.

652. 448 S.E.2d 165 (W. Va. 1984).

In the present case, the evidence adduced demonstrated that the appellant [mother], who was not married to the appellee until six or seven months after the infant child of the parties was born, remained at home and cared for the parties' infant child during the first six months of the child's life. The evidence on who was the primary caretaker of the child after the first six months of the child's life is somewhat conflicting. The appellant testified that she did approximately thirty percent of the cooking in the home, while the appellee [father] did approximately seventy percent of the cooking. However, the evidence also shows that the parties and the infant child seldom ate at home. Instead, it suggests that they ate most of their meals out. The appellant testified that she did the majority of the shopping, and the appellee did not refute this testimony, although there was evidence that he did, from time to time, stop at the grocery store to pick something up. Additional evidence showed that, for the first year or so after the birth of the infant child, the appellant did the bathing and grooming of the child. According to the appellant, during this period the appellee stated that "I don't do baths." When the child became older, the child would often take a shower with his father, but on these occasions the appellant would undress the child and hand him to his father, who was at the time in the shower.

In her testimony, the appellant did not mention the purchase of clothing for the child. The appellee, on the other hand, testified that he had bought clothing for the child. However, the testimony of Sarah Jo Scolopio, an individual who worked with the appellant, indicated that the appellant often left work early in the afternoons to go shopping for clothing. Testimony regarding who did the laundry was essentially conflicting.

The evidence relating to the medical care of the child showed that the appellant started taking the child to a pediatrician shortly after birth and later took the child to the pediatrician on a continuing basis. This testimony was given by Dr. Ferrari, the pediatrician. Dr. Ferrari did, however, acknowledge that the appellee had on occasion delivered the child.

The evidence relating to the social interaction of the child indicated that most of his social interaction was with the appellee's family. There is no question that the arranging of this interaction was done by the appellee. However, affecting the question of social interaction was the fact that the child was very young and was not, in fact, involved in the interaction-type of functions which slightly older children participate in. [The child was just under three at the filing of the divorce.]

The evidence also rather clearly showed that the appellee did most of the arranging of child care for the parties' child. The appellee's family had a financial interest or connection with a child care center, and this center was the primary place used for alternative child care.

The evidence on who put the child to bed at night and attended to him at night was sketchy. The evidence relating to discipline and toilet training was somewhat conflicting. It appears that the parties disagreed about disciplining and toilet training, but the testimony of the appellant was that until the child was toilet trained, she was the one who changed the infant's diapers, even when both parties were in the home.

The evidence on education was also somewhat conflicting. The appellee took the child to movies and read such material as sports magazines to him. The appellant, on the other hand, suggested that she was involved with the education of the child. When the divorce proceeding was initiated, the child had just reached the age of three years old. At that point, he obviously had not received much education in elementary skills.⁶⁵³

The majority awarded the mother custody as primary caretaker.⁶⁵⁴ She was the primary caretaker, at least exclusively for the first six months of the child's life. Thereafter she was at least as "deeply" involved as the father.⁶⁵⁵

Justice Neely filed a dissent to the majority's opinion which overturned the trial court's finding of shared caretaking and which found that custody with the father was in the child's best interests.⁶⁵⁶ Neely's dissent stated:

There is a disturbing lack of honesty about this Court's treatment of custody issues. The playing field is simply not level but is banked against fathers. . . . [T]his Court steps in and goes through elaborate contortions to reverse the lower court's ruling and grant custody to the mother. Yet, in a case argued before this court on the same day, *Dancy v. Dancy*, 191 W. Va. 682, 447 S.E.2d 883 (1994), the majority essentially deferred to the decision of the Circuit court in adopting another family law master's recommendation giving custody to Mrs. Dancy—a recovering alcoholic

. . . .

653. *Id.* at 168-69.

654. *See id.* at 169.

655. *See id.*

656. *See id.* at 170 (Neely, J., dissenting).

Mrs. Shearer admitted that Mr. Shearer did the grocery shopping, laundry, and cooking, as well as being actively involved in his son's toilet training, discipline, educational, and social activities. Mr. Shearer did all these things while completing a master's degree. . . .

....
The simple truth is that there is a rampant gender bias that has clouded the majority's ability to render impartial decisions in the area of family law. This case, and the majority decision in *Dancy*, are indicative of a disturbing trend that needs to be investigated by the newly formed West Virginia Task Force on Gender Bias.⁶⁵⁷

5. *Trend Five: Possession Is Half the Battle*

Temporary custody tends to lead to a permanent custody award by the West Virginia Supreme Court.⁶⁵⁸ The reasons behind this trend include a concern about the continuity of care a child who has been in the divorce/custody system receives.

6. *Trend Six: A Woman in a Man's Life Helps*

Fathers have an improved chance of gaining custody if there is a woman in their lives, particularly when grandparents are involved. In two of the cases where the father lived with the grandparents or next door to the grandparents, that factor figured prominently into the court's decision.⁶⁵⁹ In *Efaw v. Efaw*,⁶⁶⁰ the father had left his wife and child in a destitute situation.⁶⁶¹ Due to a lack of money, the mother asked the father's parents to take care of the child.⁶⁶² The father subsequently obtained custody.⁶⁶³

7. *Trend Seven: The Primary Caretaker Rule Is Eroding*

Courts are deviating from the primary caretaker presumption. Moreover, it is fading even at the appellate level. Much of the evidence of the erosion of the primary caretaker rule, however, comes from the language of the supreme court itself. In some

657. *Id.* at 170-71.

658. *See supra* note 593 and accompanying text.

659. *See Channell v. Channell*, 432 S.E.2d 203, 205-06 (W. Va. 1993).

660. 400 S.E.2d 599 (W. Va. 1990).

661. *See id.* at 603.

662. *See id.*

663. *See id.* at 600 (noting that the father had a new wife, implying an additional benefit to the child).

cases, the court has chastised the lower courts for ignoring the standard and not following its mandates. The prime example is the case of *David M. v. Margaret M.*,⁶⁶⁴ authored by Justice Neely in 1989. In this case, Justice Neely reiterated the mandates of the *Garska* primary caretaker presumption.⁶⁶⁵ He noted that,

[O]ur very narrow exception to the primary caretaker rule has of late developed a voracious appetite which, if left unchecked, will allow it to eat the rule. We write today to reaffirm and clarify the benefits of the primary caretaker parent rule to assist the family law masters and the circuit courts in reaching the best interests of the child by applying the primary caretaker parent presumption and its *limited* requirement of fitness.⁶⁶⁶

Neely's comment recognizes that the lower courts are using the escape valve of unfitness to bypass a primary caretaker award, usually in cases where there is sexual misconduct by the wife. In *David M.*, the evidence established that the mother was the primary caretaker of the child.⁶⁶⁷ Nonetheless, the lower court refused to give her custody on the basis of three acts of marital misconduct.⁶⁶⁸ Neely emphasized the mother's testimony. The mother testified that two of the instances occurred around midnight when the child was asleep, and that the third occurred after the child and his stepbrother left to visit a neighbor and was concluded before the child returned home.⁶⁶⁹ Neely then said:

Although evidence of marital misconduct, this restrained normal sexual behavior does not make Mrs. M. an unfit parent.

The circuit court was clearly wrong in its position that the three instances of sexual misconduct, occurring over two years, warranted a finding of unfitness, without evidence establishing that the child was harmed, or that the conduct per se was so outrageous, given contemporary moral standards, as to call into question her fitness as a parent.⁶⁷⁰

664. 385 S.E.2d 912 (W. Va. 1989).

665. *See id.* at 914-15.

666. *Id.* at 915 (emphasis added).

667. *See id.* at 927.

668. *See id.* at 927-28.

669. *See id.* at 928.

670. *Id.*

In one case, *Lewis v. Lewis*,⁶⁷¹ the trial court explicitly expressed its disapproval of primary caretaking decision-making. The FLM awarded the father custody of his five year-old daughter, concluding he was the primary caretaker.⁶⁷² Evidence revealed that the only time he did not perform primary caretaker duties was during the six month period while his daughter was two-and-one-half years old, and he was working in North Carolina.⁶⁷³ Both the mother and father worked outside the home. The father testified that he prepared bottles, changed diapers, cooked, bathed the child, and washed clothes.⁶⁷⁴ The circuit court refused to accept the FLM's findings. It stated,

The Court has thought long and hard about this case. The situation the mother now finds herself in does not add any weight to her argument.

However, the initial reaction of this Court to the question of custody has been thought and rethought, and this Court cannot escape the conclusion that a small child, especially a female child, should be in custody of that child's mother. Call it "best interests," [c]all it "polar star," call it anything you may, that is how this Court views the situation.⁶⁷⁵

The supreme court sent the case back and asked the trial court to do it again, and to do it right.

We caution the lower court upon remand to refrain from basing its conclusions on such unsteady ground as its own opinion that a female child should always be in the custody of her mother. This Court has endeavored to provide lower courts with a myriad of factors to be considered in making the difficult primary caretaker determination. We instruct the lower court to limit its discretion to the factors previously enunciated and to avoid any tendency to rely on its personal convictions regarding the proper placement of a female child.⁶⁷⁶

Other evidence of the erosion of the primary caretaker rule is the supreme court's own refusal to apply it in the increasing number of

671. 433 S.E.2d 536 (W. Va. 1993).

672. *See id.* at 538.

673. *See id.* at 539.

674. *See id.*

675. *Id.* at 538.

676. *Id.* at 540-41.

shared custody cases—which were supposed to be the exception, rather than the rule.⁶⁷⁷

Another indicator of erosion is the use of expert witnesses to decide custody cases. The ordering of home studies and the use of psychological testimony is evident in recent cases. The FLM in *Patricia Ann S. v. James Daniel S.*⁶⁷⁸ allowed the father to present three expert witnesses on fitness and best interests issues.⁶⁷⁹ Justice Workman, in her dissent, pointed out that in essence the FLM was admitting that the rule was being eroded.⁶⁸⁰ She quoted the FLM as saying, “and we should feel free to deviate from [the primary caretaker rule] if there is some real good reason for that.”⁶⁸¹ Further, she argued that the FLM and circuit court “bypassed the ‘threshold question’ of primary caretaker.”⁶⁸² She states: “In this case, both the trier of fact and the circuit judge ‘avoided’ the primary caretaker issue by prematurely infusing the issue with questions of relative fitness and relying on ‘experts.’”⁶⁸³

Finally, Workman also suggested that the rule is eroded when factors are manipulated to support decisions in which a working spouse who is abusive to his wife and children gets custody of the children over the objection of his homemaker wife who “fits the profile of what at least one member of the Court (Justice Neely) has said mothers should be.”⁶⁸⁴ She concludes, “[b]y upholding the circuit court’s ruling, the majority begins an erosion of primary caretaker rule, or at least sends a signal to domestic relations practitioners that it will be situationally ignored when expedient.”⁶⁸⁵ Figure 9 maps the key factors operating in the West Virginia Supreme Court’s primary caretaker/custody decision.

677. In *Efaw v. Efaw*, 400 S.E.2d 599 (W. Va. 1990), the trial court attempted to apply the primary caretaker standard, even though it felt uncomfortable about an award of custody to a mother who was having an affair with a military acquaintance and had left her children with the grandparents for three months. The supreme court stated that shared caretaking under these circumstances would be the logical factual finding and that the court could turn to a best interests analysis to award custody to the father. *See id.* at 600.

678. 435 S.E.2d 6 (W. Va. 1993).

679. *See id.* at 11-12.

680. *See id.* at 16 n.3 (Workman, C.J., dissenting).

681. *Id.*

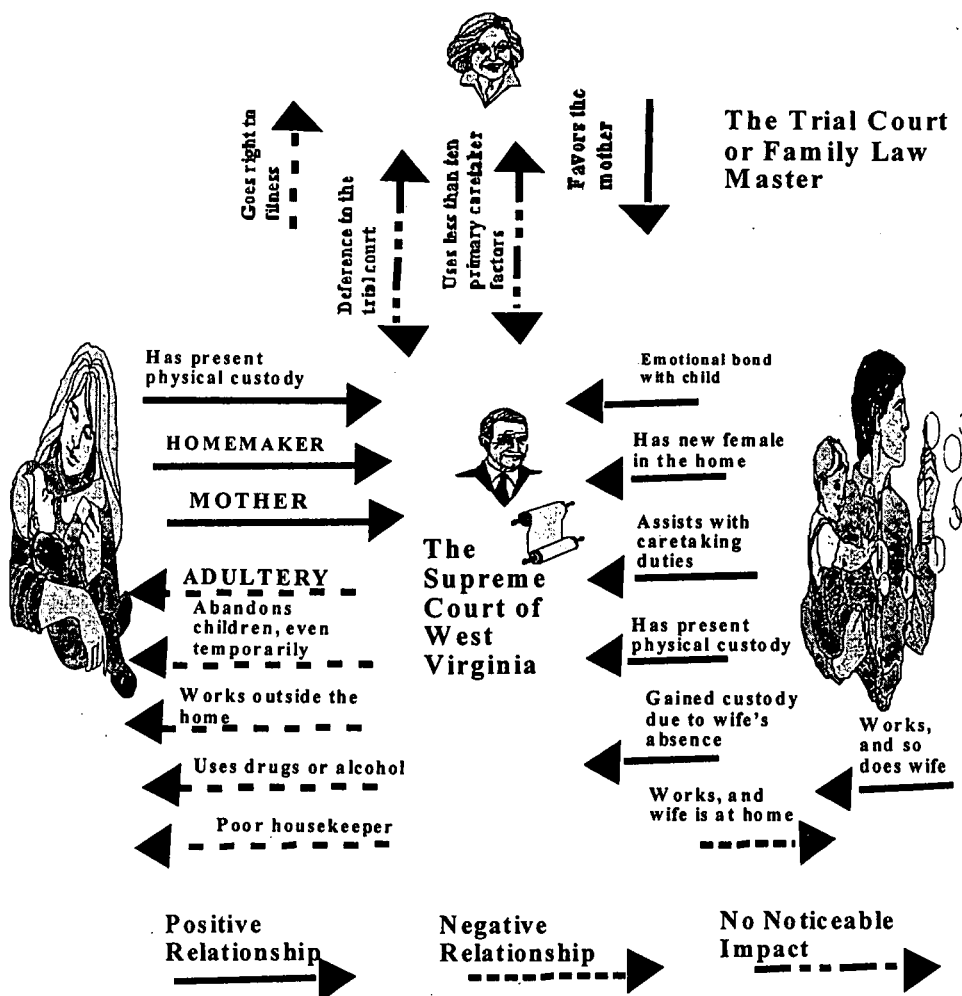
682. *Id.* at 17.

683. *Id.*

684. *Id.* at 16 n.1 (Workman, C.J., dissenting).

685. *Id.* at 16 (footnote omitted).

Figure 9
Map Analysis of Factors Influencing the Supreme Court's Choice
of a Child Custodian



B. Implications for Divorcing Parties and Attorneys in West Virginia

The primary caretaker standard is alive and well in West Virginia, as indicated by Justice Workman in her article.⁶⁸⁶ However, awards under this standard are not as consistent and predictable as *Garska* would suggest.⁶⁸⁷ This standard can be manipulated by the parties, attorneys, and the courts to reach whatever decision they desire.

The first recommendation is that, should divorcing parties want custody of their children, they should cooperate and attempt to arrive at an agreed-to decision, rather than roll the dice before the court. A court battle in West Virginia will lead to years of delay before a final decision can be reached. During this time, the custody of the children may switch as it goes through the three stages of interpretation of the rules—from the FLM, to the trial court, to the supreme court.

Where a mother has unclean hands coming to the table, she should attempt to distance herself from that relationship or stabilize it by remarrying, so as to reduce the impact that adultery has on a primary caretaker determination. Fathers have their best chance at being awarded custody if they introduce females into their new living situation, either the child's grandmother or a wife, although even a girlfriend may satisfy the court.⁶⁸⁸

Working parents should be ready to present evidence, not only on how each of them contributed to the primary caretaking of the child, but also on the child's best interests, as that is likely to be where the court will turn after finding that they are shared caretakers. More evidence on primary caretaking factors could be presented by the parties as a whole. Better developed cases allow increased opportunity for each side to make an argument that she is the primary caretaker.

Children should be prepared to be ignored during the custody decision-making process. Few of the cases discussed the child at all. Sometimes their ages were not presented. This result alone *does* show that the primary caretaker consideration is occurring *without* a best interests of the child consideration in most cases. The focus is on the parents and what they do for the child, not on

686. See O'Hanlon & Workman, *supra* note 21, at 380-88.

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

688. See Kunin, *supra* note 359, at 569 (describing that fathers who cohabited with a woman post-divorce had a fifty percent chance of gaining custody).

how the child's relationship is developed with the primary caretaking parent who provides those tasks. It is assumed that the relationship must be there.

C. Implications for Children

Earlier in this article, it was suggested that the primary caretaker standard was based on the ethological, psychological, and social science theories of bonding and attachment.⁶⁸⁹ The standard purports to examine the intensity of the relationship between the child and each parent, in order to determine who is the primary nurturer and attachment figure and in order to prioritize a custody award to that parent. "The intensity of the bondedness reflects the amount of involvement with the infant [or child] that has occurred."⁶⁹⁰

But if approximately forty-three percent of the cases are using *none* of the caretaking factors to determine custody, then we can assume that many custody decisions in West Virginia are based on *something other* than the child's psychological attachment to one parent.

Further, even if the courts were routinely examining all ten primary caretaker factors to determine custody, it is questionable whether the factors accurately identify which parent is the psychological parent. The standard never considers emotional caretaking.

The most serious problem with the use of the primary custody standard is that it ignores the quality of the relationship between the child and the primary caretaker in favor of counting hours and rewarding many repetitive, concrete behaviors.

Indeed the most important emotional and interactive behaviors promoting children's development and psychological, social, and academic adjustment, such as love, acceptance, respect, encouragement of autonomy, learning, and self-esteem, moral guidance, and the absence of abusive interactions, are not considered.⁶⁹¹

Indeed, who prepares meals, shops, purchases clothes for the child, arranges for baby-sitting, and transports the child to school

689. See *supra* Part II.B.1.

690. KLAUS & KENNEL, *supra* note 11, at 1 (discussing the bond between parent and child).

691. Kelly, *supra* note 42, at 130.

and friends' houses has little to do with reciprocal "attachment behavior"—characterized as the parent holding, caressing and touching the infant, and the infant "seeking to be near her, becoming distressed on separation from her, showing pleasure or relief on reunion with her, and orienting herself to her even when not in physical contact (listening for her voice, checking to make certain that she is not too far away)."⁶⁹² James Levine, father of two and director of the Fatherhood Project at the Families and Work Institute in New York City, is quoted by Mary Becker who posits that the

crucial question is "not who carries the baby in the backpack. It's who carries the baby in the mind." It is a high level of empathy with a child so that the child's needs tend to be felt as one's own, on almost a physical level that enables the primary caretaker to carry "the baby in the mind." Because, on some level, she is always thinking of the child and feels the child's needs as *her* own, primary caretaking mothers do the boring routine activities and all the organizing, planning, and emotional caretaking necessary for a child to flourish.⁶⁹³

Finally, under the primary caretaker standard, as used by West Virginia, the child's bond with the secondary caretaker is ignored as being unimportant.

And while there is an enormous body of research documenting the strong bond that develops between infants and primary-caretaking mothers, there is now a growing body of research that suggests that most children form a comparable, though probably not identical, bond with their secondary-caretaking fathers. On the basis of the current empirical research alone, there is no solid foundation for concluding that children, even young children, will be typically better off if placed with their primary caretaker.⁶⁹⁴

D. Implications for Other Jurisdictions

The primary caretaker standard is not living up to its billing as a discretion-free standard, at least in the cases which are being appealed. A quick survey of the various results reached in the

692. Chambers, *supra* note 137, at 529 (citing E. MACCOBY, SOCIAL DEVELOPMENT: PSYCHOLOGICAL GROWTH AND THE PARENT-CHILD RELATIONSHIP 46-54 (1980)).

693. Becker, *supra* note 28, at 202 (footnote omitted).

694. Chambers, *supra* note 137, at 560.

cases in the sample shows that the courts have a difficult time adapting the standard to "hard" cases. Perhaps decision-making is facilitated generally in all the cases which are decided in West Virginia, not just those being appealed. Maybe, too, the pain the divorcing parties experience is being reduced by the use of a standard which suggests a definite result. This study cannot suggest whether the standard is having that impact on divorcing parties at the trial court level.

However, at the supreme court level, the primary caretaker standard is not leading to any more predictable results than would occur using a best interests analysis. The supreme court's increasing use of the shared caretaking exception and the unfitness exception, coupled with the trial court's erosion of the standard by the use of expert witnesses in recent cases (moving away from mere lay testimony to expert testimony to have a broader educational basis on which to make a custody award) suggests that West Virginia may change its custody decision-making in the near future.

Relationships are the substance of life. A discussion of those relationships is interesting to the court, and it provides a richer basis on which to make a custody determination. The numbers game of how many diapers each parent changes, and evidence about who shops when and for what is boring to the court. Hearing this testimony and deciding a case on that basis must be frustrating to the lower courts, as it is certainly monotonous in the supreme court opinions which reiterate that evidence. It is no wonder that more factors are *not* being developed in each case.

Hearing this testimony on a daily basis can lead to little satisfaction that a custody award to one parent or the other is right for the child. The courts' tendency to ignore the factors suggests it doesn't want to hear this evidence, nor does it seem that the parties want to testify about such mundane activities. Thus, the court turns to other evidence to make the custody decision, thwarting the presumption's mandates.

The primary caretaker standard simplifies the connections between the child and the parents as being a list of tasks the parent performs for the child. It ignores the genuine emotional connection formed with the secondary, as well as the primary attachment figure, and the importance of that figure's presence in the child's life. It leads to a sole custody award where the non-primary caretaking parent is divorced from not only the spouse, but the child. It ignores the reality that removal of either parent will have a significant impact on the child. Again, perhaps to produce

subjectively better, fairer results, the courts turn away from the primary caretaker factors to reach a custody decision they feel is right for the unique situation.

It appears that courts desire to seek individualized justice, even where their discretionary decision-making is curtailed by a rule-based, determinate standard. *And maybe they should.* For each case brings one-of-a-kind relationships of father to child, mother to child, and parent to parent. Discretion, then, is an asset for the court to use to promote those relationships after a divorce. Thus, we need to recognize that discretion is an important and necessary part of custody decision-making.

However, with discretion comes bias. To eliminate bias, we attempt to reduce the amount of discretion a court can use, and we are back to an inflexible, bright-line standard which works an injustice in many cases. This is a vicious circle. Further, as long as the determinate custody standard leaves some window for circumventing the normal result, courts will use that exception to increase their discretion. The West Virginia cases using the primary caretaker standard have shown that. They have also demonstrated that judicial bias remains, even where discretion is presumptively curtailed. The only solution to this cycle is to return to an absolute rule *without exceptions* that one parent should receive custody after a divorce.

Alternatively, if we accept the fact that discretion is necessary for just decisions, and that bias will infiltrate the decision-making process, then we should refocus our efforts to educate the judiciary about what values should be prioritized. Education is the solution to ignorance and prejudice, not stricter rules which limit thinking.

Perhaps law reform efforts to find the optimal custody standard are misplaced. It is time to abandon the search for the magic formula for determining custody after a divorce, and admit no mechanical test for child placement exists. Instead, we could attempt to humanize the divorce process, and empower divorcing parties to compromise, and to agree, on a custody decision. Opportunities for alternative dispute resolution, other than litigation, must be made readily available to divorcing parents. Counseling and mediation must be mandated where couples disagree.

It is unlikely that we can ever find the perfect formula to settle custody disputes. Nor can the court accurately predict the impact of a future custody arrangement on the child and the parents. Thus, parents should stop turning to the court as an oracle or fortune teller of their future. They should decide their future

themselves. After all, who knows those family relationships better than the family members themselves.

APPENDIX: TOTAL CASES RETAINED FOR THE STUDY

1. *Campbell v. Campbell*, 460 S.E.2d 469 (W. Va. 1995).
2. *Boarman v. Boarman*, 459 S.E.2d 395 (W. Va. 1995).
3. *Marilyn H. v. Roger Lee H.*, 455 S.E.2d 570 (W. Va. 1995).
4. *Michael Scott M. v. Victoria L. M.*, 453 S.E.2d 661 (W. Va. 1994).
5. *DiMagno v. DiMagno*, 452 S.E.2d 404 (W. Va. 1994).
6. *Feaster v. Feaster*, 452 S.E.2d 428 (W. Va. 1994).
7. *Rhodes v. Rhodes*, 449 S.E.2d 75 (W. Va. 1994).
8. *Shearer v. Shearer*, 448 S.E.2d 165 (W. Va. 1994).
9. *Boarman v. Boarman*, 438 S.E.2d 876 (W. Va. 1993).
10. *Simmons v. Comer*, 438 S.E.2d 530 (W. Va. 1993).
11. *Patricia Ann S. v. James Daniel S.*, 435 S.E.2d 6 (W. Va. 1993).
12. *Lewis v. Lewis*, 433 S.E.2d 536 (W. Va. 1993).
13. *Reynolds v. Reynolds*, 433 S.E.2d 277 (W. Va. 1993).
14. *Channell v. Channell*, 432 S.E.2d 203 (W. Va. 1993).
15. *Cummings v. Cummings*, 426 S.E.2d 505 (W. Va. 1992).
16. *McDougal v. McDougal*, 422 S.E.2d 636 (W. Va. 1992).
17. *Moses v. Moses*, 421 S.E.2d 506 (W. Va. 1992).
18. *Richardson v. Richardson*, 415 S.E.2d 276 (W. Va. 1992).
19. *Starkey v. Starkey*, 408 S.E.2d 394 (W. Va. 1991).
20. *Kenneth L.W. v. Tamyra S.W.*, 408 S.E.2d 625 (W. Va. 1991).
21. *Dottie S. v. Christopher S.*, 408 S.E.2d 46 (W. Va. 1991).
22. *Brown v. Brown*, 403 S.E.2d 29 (W. Va. 1991).
23. *Efaw v. Efaw*, 400 S.E.2d 599 (W. Va. 1990).
24. *Loudermilk v. Loudermilk*, 397 S.E.2d 905 (W. Va. 1990).
25. *Marcum v. Marcum*, 395 S.E.2d 509 (W. Va. 1990).
26. *Warner v. Warner*, 394 S.E.2d 74 (W. Va. 1990).
27. *David M. v. Margaret M.*, 385 S.E.2d 912 (W. Va. 1989).
28. *Mills ex rel. Gorrick v. Gorrick*, 381 S.E.2d 273 (W. Va. 1989).
29. *T.S.K. v. K.B.K.*, 371 S.E.2d 362 (W. Va. 1988).
30. *Lowe v. Lowe*, 370 S.E.2d 731 (W. Va. 1988).
31. *Goetz v. Carpenter*, 367 S.E.2d 782 (W. Va. 1988).
32. *Isaacs v. Isaacs*, 358 S.E.2d 833 (W. Va. 1987).
33. *M.S.P. v. P.E.P.*, 358 S.E.2d 442 (W. Va. 1987).
34. *Burger v. Burger*, 345 S.E.2d 18 (W. Va. 1986).
35. *Bickler v. Bickler*, 344 S.E.2d 630 (W. Va. 1986).
36. *Rose v. Rose*, 340 S.E.2d 176 (W. Va. 1985).
37. *Stacy v. Stacy*, 332 S.E.2d 260 (W. Va. 1985).

38. *Graham v. Graham*, 326 S.E.2d 189 (W. Va. 1984).
39. *Allen v. Allen*, 320 S.E.2d 112 (W. Va. 1984).
40. *T.C.B. v. H.A.B.*, 317 S.E.2d 174 (W. Va. 1984).
41. *J.E.I. v. L.M.I.*, 314 S.E.2d 67 (W. Va. 1984).
42. *Wagoner v. Wagoner*, 310 S.E.2d 204 (W. Va. 1983).
43. *Gibson v. Gibson*, 304 S.E.2d 336 (W. Va. 1983).
44. *Dempsey v. Dempsey*, 306 S.E.2d 230 (W. Va. 1983).
45. *Heck v. Heck*, 301 S.E.2d 158 (W. Va. 1982).
46. *Bills v. Bills*, 296 S.E.2d 348 (W. Va. 1982).
47. *Lounsbury v. Lounsbury*, 296 S.E.2d 686 (W. Va. 1982).
48. *Mormanis v. Mormanis*, 296 S.E.2d 680 (W. Va. 1982).
49. *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981).