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From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?

Phyllis T. Bookspan*

I. INTRODUCTION

The American family is under stress. About one in every four American children live with only one parent.¹ Scholars and social pundits are currently re-emphasizing such topics as family configurations, divorce, and child custody. Single parent families are the subject of much negative commentary,² and no-fault divorce laws appear to be suffering from severe backlash.³ The cover story of the April issue of *The Atlantic Monthly* is titled *Dan Quayle Was Right*.⁴ The author, Barbara Dafoe Whitehead, asserts that divorce weakens and undermines society by harming the children involved.⁵ She comprehensively details economic disadvantages and lasting social, psychological, and societal problems faced by large

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1 Ronald Smothers, *The Post Nuclear Family: Tell It to Mom, Dad and the Authorities*, N.Y. TIMES, Nov. 14, 1993, § 4, at 4.

2 See, e.g., *id.*; CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED (1977) (idealizing the patriarchal family and condemning "modern" family structure as alienated and isolated).

3 Margaret F. Brinig & Stephen M. Crafton, Marriage and Opportunism (June 10-12, 1993) (paper presented at the International Society of Family Law Conference); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1441, 1478 (stating that no-fault divorce presumptively ends not only the parties legal union, but also their financial responsibilities toward each other); LENORE J. WEITZMAN, THE DIVORCE REVOLUTION (1985).

4 Barbara D. Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47.

5 See *id.* (noting that children in divorced or single parent families do worse than children in intact families).

numbers of children from disrupted families.⁶ Children of divorce often fare worse in school, are more likely to become delinquents, and frequently have problems throughout life.⁷ Ms. Whitehead makes a compelling argument that family relationships should be permanent and binding.⁸ Former Education Secretary William J. Bennett recently advocated rescinding no-fault divorce law for parents with children.⁹ Harvard Professor Mary Ann Glendon says that once a couple has children, there is "something like a moral mortgage" on their property and income until all the children's needs are met.¹⁰ In the shadow of these challenges to divorce, I will explore how we can best protect children when, unfortunately, families do restructure.

Child custody decision making has plagued society since the days of King Solomon.¹¹ The topic is laden with social,

6 See *id.* at 84 (noting that broken families have produced the first generation in history that will do worse psychologically, socially, and economically than its parents).

7 See *id.* at 47 (noting that children in divorced or single-parent families are more likely to drop out of high school, get pregnant as teenagers and abuse drugs); see also *id.* (noting that children's difficulties associated with family breakup often persist into adulthood).

8 *Id.* at 84.

9 Charles Green, *The Effects on Children Prompt a New Look at Divorce*, PHILA. INQUIRER, May 4, 1993, at A1, A6.

10 MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 94-95 (1987).

11 Two women came before King Solomon, each claiming to be the mother of the same baby. To decide the case, Solomon ordered that the child be cut in two, each mother to receive half. Solomon found that the woman who objected was the true mother and awarded her custody. 1 *Kings* 3:16-18.

In Bertolt Brecht's *The Caucasian Chalk Circle*, the Governor's Wife left behind her child as she hurriedly abandoned her home, escaping a proletariat mob. Grusha, a palace kitchen maid, saved the baby and took care of him and raised him. When the Governor's wife returns and wants the child back Judge Azdak determines custody:

FIRST LAWYER: High Court of Justice! Blood, as the popular saying goes, is thicker than water. This old adage . . .

AZDAK (*interrupting*): The Court wants to know the lawyers' fee.

FIRST LAWYER (*surprised*): I beg your pardon? (*Azduk, smiling, rubs his thumb and index finger.*) Oh, I see. Five hundred piasters, Your Honor, to answer the Court's somewhat unusual question.

AZDAK: Did you hear? The question is unusual. I ask it because I listen to you in quite a different way when I know you are good.

FIRST LAWYER (*bowing*): Thank you, Your Honor, High Court of Justice, of all ties the ties of blood are strongest. Mother and child—is there a more intimate relationship? Can one tear a child from its mother? High Court of Justice, she has conceived it in the holy ecstasies of love. She has carried it in her womb. She has fed it with her blood. She has borne

political, and sexual overtones, and we have yet to find a widely accepted and fitting solution. This article will discuss why custody decisions should be private rather than public. It will then briefly trace the development of determinative custody decision making from the tender years presumption to a primary parent/caretaker presumption. Finally, I will argue that the primary caretaker presumption should be utilized when families resort to the adversarial arena.

II. CHILD CUSTODY DECISIONS SHOULD BE PRIVATE

When marriages dissolve, the fate of children of that union should not be decided in the adversarial arena.¹² Mothers and fathers usually come to court with angry agendas and unequal bargaining power. Meanwhile, the best interests of children languish with protracted, contested custody fights.¹³ As in

it with pain. High Court of Justice, it has been observed that even the wild tigress, robbed of her young, roams restless through the mountains, shrunk to a shadow. Nature herself . . .

AZDAK (*interrupting, to Grusha*): What's your answer to all this and anything else that lawyer might have to say?

GRUSHA: He's mine.

AZDAK: Is that all? I hope you can prove it. In any case, I advise you to tell me why you think I should assign the child to you.

GRUSHA: I brought him up like the priest says "according to my best knowledge and conscience." I always found him something to eat. Most of the time he had a roof over his head. And I went to such trouble for him. I had expenses too. I didn't look out for my own comfort. I brought the child up to be friendly with everyone, and from the beginning taught him to work as well as he could. He's still a very little thing.

BERTOLT BRECHT, *THE CAUCASIAN CHALK CIRCLE* 180-81 (Oxford Univ. Press 1947). To decide the case, Azdak creates a test. A chalk circle is drawn on the floor, the child is placed in the center, and the judge orders that "the true mother is she who has the strength to pull the child out of the circle toward herself." The Governor's wife complains that she is not as strong as Grusha, a working maid, and is at a disadvantage. Grusha doesn't pull. In despair Grusha exclaims, "I brought him up! Am I to tear him to pieces? I can't do it!" Azdak determines that Grusha is the true mother. *Id.* at 186-87.

12 See, e.g., Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POLY REV. 168, 174-75 (1984) (stating that court-determined custody under best interest of the child standard necessitates endless expert testimony, psychological probing of parents and children, and even intentional creation of painful situations by the "experts" in order to prove one or the other parent is more fit).

13 *Id.* at 177-78. This is demonstrated by the hypothetical case of a father of two who, despite having no desire for custody, vowed to fight his wife every step of the way to gain custody of the children in a jurisdiction where he had virtually no chance of getting custody. The wife, however, was unwilling to accept even the slightest risk of losing her children, and agreed to accept minimal alimony and

other areas of the law, better and cheaper results can be attained if the parties are able to resolve their disputes without state intervention.¹⁴ Parents, not judges or helping professionals, are best suited to decide the fate of their children. Empirical evidence suggests that many families are able to resolve their disputes without state intervention.¹⁵ The challenge is to create incentives for all parents to keep custody decisions private.¹⁶

III. THE DEVELOPMENT OF DETERMINATIVE CUSTODY DECISIONMAKING

A. *Tender Years Presumption*

Historically custody decisions were determinative. English common law considered children to be paternal property and automatically granted custody to the father in the event of divorce.¹⁷ This rule was reversed in The Custody of Infants Acts of 1839 and 1873.¹⁸ The Acts established a maternal preference that awarded custody of young children to the mother, unless she was morally impure or unfit.¹⁹ This rule became known as the tender years presumption. For women and children, the tender years presumption was a great ideological and

child support to avoid a custody battle. See Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 26-27 (1990).

14 See generally ROGER FISHER & ROGER UHRY, *GETTING TO YES STRATEGIES OF SUCCESSFUL NEGOTIATION* (Bruce Patton ed., 1981); Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 RUTGERS L. REV. 1133 (1988); Neely, *supra* note 12, at 184.

15 See, e.g., ELEANOR MACCOBY ET AL., *DIVIDING THE CHILD* 98-104 (1992) (noting that out of 933 custody cases filed in Santa Clara and San Mateo Counties, only 14 needed to be adjudicated). In 1990 in West Virginia, 14,582 domestic relations cases were filed. Only 53 of those went to trial; 45 of those 53 were appealed. STATE COURT CASELOAD STATISTICS: 1990 ANNUAL REPORT 18 (1992); see also Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REF. 1015, 1016 (1985).

16 Eliminating uncertainty in custody determinations would serve to eliminate both the cost of litigation and the possibility that a custody fight could be threatened simply to gain a more favorable settlement. Most importantly, however, it would benefit the children. Parents who best know their children's needs and personalities would have to determine their children's living arrangements, not leave this critical decision to a judge—a neutral stranger.

17 Andre P. Derdeyn, *Child Custody Contests in Historical Perspective*, 133 AM. J. PSYCHIATRY 1369, 1370 (1978).

18 An Act to Amend the Law Relating to the Custody of Infants, 1839, 2 & 3 Vict., ch. 54 (Eng).

19 *Id.*

practical victory.²⁰ The presumption severed the notion that children were marital property,²¹ acknowledged that women could be heads of households,²² and allowed women to leave bad marriages without losing their children.²³ Nevertheless, the maternal tender years presumption also was a practical and ideological defeat.²⁴ It virtually guaranteed lower economic status for women and children.²⁵ It also formalized the cult of domesticity—the notion that a woman's place is in the home caring for others.²⁶

The maternal presumption was adopted by most American states and went essentially unchallenged for nearly a century.²⁷ However, with growing societal pressure for sexual equality and gender neutrality, the maternal preference succumbed to attacks by fathers' rights groups and some feminists.²⁸ At least two states found that the tender years presumption violated the Equal Protection Clause of the Fourteenth Amendment.²⁹ Although it is unlikely the Supreme Court would rule similarly,³⁰ most states have abandoned this "non-politically correct" preference.³¹

20 Fran Olsen, *The Politics of Family Law*, 2 LAW & INEQ. J. 1, 13-14 (1984).

21 See generally 1 WILLIAM BLACKSTONE, COMMENTARIES 435-38 (Layston Press 1966) (1765).

22 Olsen, *supra* note 20, at 13.

23 *Id.* at 14.

24 Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 296 (1992).

25 See *id.*

26 See *id.*

27 Mason, *supra* note 13, at 20.

28 But see Judith B. Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 RUTGERS L. REV. 1141 (1991) (arguing that despite the technical elimination of the maternal preference rule, in practice it is still applied in most courts today).

29 Mason, *supra* note 13, at 27 n.124. See *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973); *Ex parte Devine*, 398 So. 2d 686 (Ala. 1981); see also *King v. Vancil*, 341 N.E.2d 65 (Ill. 1975) (maternal preference rule violates state's Equal Protection Clause).

30 See *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (finding that it was not a violation of equal protection for California only to prosecute males under its statutory rape law). Since gender classifications are not subject to strict scrutiny and since men and women are necessarily not similarly situated with respect to childbirth and pregnancy, the maternal preference would likely not constitute an equal protection violation. Mason, *supra* note 13, at 8, 27.

31 Jennison, *supra* note 28, at 1146. But see, Sheri A. Ahl, Note, *Minnesota Developments, a Step Backward: The Minnesota Supreme Court Adopts a "Primary Caretaker" Presumption in Child Custody Cases: Pikula v. Pikula*, 70 MINN. L. REV.

B. *The Best Interests Standard*

The best interests standard abolished custodial preference for the mother and focused instead upon the needs of the children. Experts such as Joseph Goldstein, Anna Freud, and Albert Solnit proposed that when parents could not resolve custody, courts should use a best interests of the child test to determine who best meets the child's needs.³² The problem with this standard is obvious. A judge, who knows virtually nothing about the emotionally traumatized family before her, cannot simply step in and decide what is best for the child.³³

To assist judges in their decisions, a battery of experts may be added to the custodial picture.³⁴ Room for error expands as judges, saddled with personal bias,³⁵ are persuaded by child welfare professionals who also are not immune from prejudice or mistake. Psychologists hired to perform custody evaluations are ostensibly neutral and only should consider the child's best interests. Unfortunately, like other expert witnesses, they are subject to both their own preference and their clients' persuasions. Such experts can characterize a set of facts so that a particular conclusion follows.³⁶

A case involving an evaluation performed by a licensed psychiatric social worker who specialized in custody evalua-

1344, 1350 n.25 (1986) (detailing decisions in which the Minnesota courts continued to apply the maternal preference rule despite a statute abolishing the preference and setting forth factors which must be considered in determining custody).

32 JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1979).

33 Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 952-58 (1979).

34 Neely, *supra* note 12, at 173. As Justice Neely points out:

[W]hen hiring an expert witness, parties generally want a person of the lowest possible integrity, one who will lie, or at least mislead, under oath. Expert witnesses are, after all, very much like lawyers: They are paid to take a set of facts from which different inferences may be drawn and to characterize those facts so that a particular conclusion follows.

Id. Thus, even if the judge truly has the child's best interests at heart, the experts often do not, and will mold a family's situation to fit the needs of their clients, exposing the child to unnecessary harm. *Id.*

35 Sack, *supra* note 24, at 310-11. This article describes the opinion of one West Virginia judge who awarded custody to the non-primary caretaker father because the mother shared her home with an unmarried man. *Id.* The judge went so far as to appear on national television, airing his view that the mother was morally unfit because she was sleeping with a man who was not her child's father. *Id.*

36 Neely, *supra* note 12, at 173-74.

tions highlights the danger of biased psychological evidence.³⁷ This case involved an unmarried couple who were not living together when the child was born.³⁸ When the child was eight months old, the mother moved in with the father and remained in his home for eleven months.³⁹ Without notice, the mother left the father's home and took their son with her to a domestic abuse shelter in a neighboring state. She asserted that the father was emotionally abusive.⁴⁰ The father petitioned for custody, and the court ordered a custody evaluation.

The court-appointed social work expert recommended that legal and primary custody should be with the father.⁴¹ Among the various items in support of her conclusion, the evaluator wrote: "The relationship between J. and his father is far less dependent upon strict schedules and long day care."⁴² Throughout the report, the evaluator repeatedly referred to the child's day care and expressed serious concern about the child (now two years old) being in day care from 7:30 a.m. to 5:00 p.m.⁴³ The report omits the fact that J. was in day care be-

37 This evaluation was performed upon order of the court in Delaware County, Pennsylvania. A student in the Widener University School of Law's Pennsylvania Domestic Relations Clinic represented the mother in this dispute. The psychologist who authored this report is female. She works for an agency that routinely is hired by the court to perform psychological assessments in domestic relations cases. Since the case has not yet reached adjudication, no further identifying information is appropriate at this time. The report will be referred to as "Custody Evaluation" and is on file with the author.

38 Custody Evaluation, *supra* note 37, at 3.

39 *Id.*

40 *Id.*

41 Although the parties in this case were not married, the expert's recommendation is consistent with recent empirical evidence that documents among other things that: 1) fathers who are plaintiffs in divorce petitions are more likely to receive custody; and 2) if a court-ordered investigation occurs, fathers are more likely to receive physical custody. Greer L. Fox & Robert F. Kelly, Socioeconomic and Legal Determinants of Maternal and Paternal Physical Custody Arrangements at Divorce (1993) (unpublished manuscript, on file with the *B.Y.U. Journal of Public Law*).

42 Custody Evaluation, *supra* note 37, at 19.

43 There actually is some discrepancy in the custody evaluation about the actual hours the child is in day care; however, what is almost immediately apparent is the evaluator's bias against day care. The evaluator scatters reference to day care throughout the report, including:

[The mother] immediately applied for subsidized housing, *day care*, public assistance, food stamps, etc. . . . She chose a *day care center* 20 minutes ride from the shelter . . . J attends *full day care* from 7:30 to 5:00 p.m. . . . It was not clear whether she [mother] was working full-time or part-time, although she indicated that J *attends day care* between 7-7:30 a.m. and 5:00 p.m. daily . . . J's *day care teacher* said that J is there

cause his mother was working to enable herself to earn enough money to move out of the shelter. Moreover, although the father worked, the evaluator expressed little concern over the day care situation if the father were given custody.⁴⁴ The evaluator also expressed concern about a two year old with a fifty word vocabulary and "delayed toilet training."⁴⁵

The evaluator concluded that the father is:

[A] man overly trusting and who tried to build a relationship even where there never had been one, offering his home . . . to support [the mother] and boy. His only failing was that he allowed himself to be used, and was not self-protective enough and probably passive for too long.

. . . .
I believe that the Court needs to concern itself with a two year old boy being raised by a disturbed mother who has such deeply entrenched negative, mistrustful and paranoid positions towards men and who views them as dangerous and abusive. The question needs to be raised of the deleterious effect of a child being raised from birth with the notion that his father abused his mother, and forced her to leave him and move to a shelter⁴⁶

The evaluator conducted no independent evaluation of the abuse allegations. Yet, without such objective facts, she concluded that the mother made up the abuse claim and used it to obtain entry into a shelter where she could "take advantage of the system."⁴⁷

Contrary to the evaluator's conclusion that the mother's goal was to "reap the benefits" of shelter care, as soon as the mother found a better job she moved out of the shelter to a nice, two bedroom apartment. Her lawyer, herself a former child welfare specialist for twenty years, concluded that the

daily from 8:00 a.m.-4:30 p.m. . . . Ms. [mother] is utilizing the shelter system, where she describes getting *free day care* . . . She [mother] appears to have a strict schedule for a two year old who spends almost 10 hours each day in *day care* . . . The relationship between J and his father is far less dependent upon . . . *long day care*.

Id. at 4-19.

44 "Mr. has access to the same caretaker they had when he and Ms. lived together If he uses formal day care, he gets out of work at 3:15 p.m.: thus J's days in day care would not have to be so long." *Id.* at 12.

45 *Id.* Many, if not most, parents might be in "big trouble" if judged upon whether their two year old is toilet trained. *See id.*

46 *Id.*

47 *Id.* at 17.

mother "seems very nurturing and the child is happy, well-adjusted, and has a close relationship with his mother."⁴⁸ However, even if the mother's lawyer is able to challenge the evaluator's biased and unsubstantiated report, the outcome remains unpredictable. The court most likely will place undue weight on the professional judgment of the court appointed evaluator—an expert the court has trusted and relied upon in the past. Thus, while the best interests standard is a noble ideal, it can be a practical nightmare.

C. *Joint Custody Preference*

To avoid parental distinctions, many states adopted preferences for joint custody. While ideally children benefit from continued contact with both parents, judicially imposed joint custody (in all its various permutations) often is not a just solution. Statutorily mandated joint custody fails to recognize the irreconcilable differences in the marriage itself. Forcing a continuing relationship between ex-spouses can establish unworkable relationships that cause more stress for parents and children.⁴⁹ Joint custody also may create unnecessary dual responsibility for most decisions and can generate situations that are not in the children's best interests.⁵⁰ Finally, recent research suggests that joint legal custody fails to live up to its promise. "[I]t appears that joint legal custody is neither the solution to the problems of divorce nor a catalyst for increasing conflict in divorcing families."⁵¹ Families are not like loaves of bread—they cannot be sliced up and neatly shared.

D. *Primary Caretaker Presumption*

This brings us to the most recent reform—the primary parent or primary caretaker presumption. The presumption, initiated by the West Virginia Supreme Court in *Garska v. McCoy*,⁵² is a fact-based, ostensibly gender-neutral test.⁵³ In

48 Conversation between student attorney and the author.

49 Andre P. Derdeyn & Elizabeth Scott, *Joint Custody: A Critical Analysis and Appraisal*, AM. J. ORTHOPSYCHIAT., Apr. 1984, at 199.

50 Jennison, *supra* note 28, at 1180-82.

51 Catherine R. Albiston et al., *Does Joint Legal Custody Matter?*, 2 STAN. L. & POLY REV. 167, 176 (1990).

52 278 S.E.2d 357 (W. Va. 1981).

53 Although as Justice Neely readily admits, the list of criteria used to determine the primary caretaker parent usually spells "mother." Neely, *supra* note 12, at 180.

custody cases, the court favors the parent who has performed the bulk of nurturing/maintenance activities such as providing meals, bathing, grooming, taking the child for medical appointments, planning the child's social activities, etc.⁵⁴ The rule applies only to children too young to express an opinion and, like the tender years presumption, may be rebutted upon a showing of unfitness.⁵⁵ Although only two jurisdictions formally have adopted the rule,⁵⁶ a 1982 study of appellate court decisions found the idea of a primary caretaker increasingly popular in determining custody disputes. Professor Jeff Atkinson found a preference for the primary caretaker second only to a stable environment in the initial determination of custody.⁵⁷

Although the primary caretaker presumption is a nurturing based test, it has been harshly criticized as favoring women, and as a thinly disguised version of the tender years presumption rule.⁵⁸ Part of this criticism is true. Women generally do fare better under this test. Even in dual career households, most mothers perform the majority of care-giving tasks and thus they are the primary parent.⁵⁹ But this need not be the case since nurturing is not inherently a gender-based trait. (Recall the underlying premise of joint custody—that mothers and fathers are similarly capable of performing parental roles.)

54 The *Garska v. McCoy* test includes the following ten factors:

- 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 . . . ; 6) arranging alternative care, i.e. babysitting . . . ; 7) . . . waking child in the morning; 8) disciplining, i.e. teaching general manners and toilet training; 9) educating, i.e. religious, cultural, social, etc.; and 10) teaching elementary skills, i.e. reading, writing and arithmetic.

Garska, 278 S.E.2d at 273.

55 Under West Virginia's scheme, children six and under are automatically subject to the primary caretaker rule. Children between six and 14, if they have a stated preference, are given greater flexibility. And a child over the age of 14 is usually permitted to make her own custody decision. See *Garska*, 278 S.E.2d at 361-63.

56 Minnesota followed West Virginia in *Pikula v. Pikula*, 374 N.W.2d 705 (Minn. 1985). In 1989, however, Minnesota's legislature adopted a statutory scheme which enumerated 12 factors, including the primary caretaker, to be determined in awarding custody. Thus, the primary caretaker presumption was eliminated as a formal preference in that state. MINN. STAT. § 518.17 (1990).

57 Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 9 (1984).

58 Jennison, *supra* note 28, at 1153.

59 See ARLIE HOCHSCHILD, *THE SECOND SHIFT* (1989) (finding that in only 20% of dual-career families, men share housework equally with women).

Rather, nurturing is a choice that men and women make.⁶⁰ To the extent the primary caretaker rule is attacked because it is based upon caretaking activity, nurturing is devalued as a decisional factor. Professor Martha Fineman goes even further and suggests that subordinating the facially gender-neutral primary caretaker test to further neutral factors is anti-maternal and not gender-neutral in impact.⁶¹

Conversely, critics also attack the primary caretaker preference because it creates a gender-free alternative to maternal preference.⁶² Professor Mary Ann Mason argues for a return to the maternal preference because men and women are neither similarly situated biologically, nor in terms of social reality.⁶³ She says that while "fathers can, in the right circumstances, be turned into mothers, the social reality is that mothers are *already* mothers It is surely in the best interests of children to recognize this social reality and guarantee the continuity of care which will be most protective of young children."⁶⁴

IV. HAS ANYTHING REALLY CHANGED?

This all brings us to the question of whether anything really has changed. Except for the advent of the tender years presumption, which radically altered custody and women's and children's rights, very little is different. Empirical studies confirm this. After an eight year longitudinal study of 1100 divorcing families in Santa Clara and San Mateo Counties, Professors Catherine Albiston, Robert Mnookin and Eleanor Maccoby concluded that there is remarkable and widespread persistence of substantial gender role differentiation following divorce.⁶⁵ Women are still overwhelmingly the physical custodians, and even in joint custody arrangements, children live primarily with their mothers.⁶⁶

60 *Id.*

61 Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 773 (1988).

62 Mason, *supra* note 13, at 23.

63 *Id.* at 25.

64 *Id.*

65 Albiston et al., *supra* note 51, at 176.

66 *Id.* at 170. Since California does not have a tender years presumption, and has not adopted the primary caretaker presumption, the present advantage that the nurturer standard gives to women had no identifiable impact on these results.

V. SHOULD ANYTHING CHANGE?

In a restructuring family, children's interests must be paramount. States are not the best protectors of children—families are. Thus, states should distance themselves from the custody process and actively encourage private decisionmaking. If parents could effectively predict a court's custody decision from the outset of marital breakdown, there would be less incentive to resort to litigation.⁶⁷ Further, the demand for state intervention would diminish if courts could impose penalties for failure to privately negotiate custody disputes.⁶⁸

A. *A Determinative Standard, Such as the Primary Caretaker Presumption, Should Be Broadly Adopted*

The public adversarial arena is not suitable for determining the fate of children. To reduce litigation, society needs a broader adoption of a determinative custody standard. Further, since the best interests standard may encourage rather than discourage litigation, we should rethink its suitability as a sole determinative measure. The primary caretaker presumption should be adopted because it has the potential to lessen litigation, and because it awards custody where, in most cases it should be. This is in the family's best interest.

A determinative standard for custody decisions is in the best interest of children because it removes the incentive for parents to threaten adjudication.⁶⁹ A fixed standard encour-

67 See Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules and Transaction Costs*, 8 OHIO ST. J. ON DISP. RESOL. 279 (1993). The authors conducted an empirical study looking at economic bargaining principles and negotiations at the time of divorce in two differing jurisdictions. Their data suggest that in the jurisdiction where the outcome is determinate there is less litigation. The authors conclude that legal statutes and precedents do affect private negotiations. If an anticipated judicial outcome bears little relationship to what the parties really want, the threat of litigation is not credible, and the parties are more likely to resolve their disputes themselves. *Id.* at 290-91.

68 Chief Justice Neely of the West Virginia Supreme Court of Appeals forcefully argues that parties to a custody dispute (usually fathers) may engage in the dispute to gain a financial advantage. Neely, *supra* note 12, at 177. If, in fact, allowing a dispute to proceed to adjudication results in a financial penalty, those cases otherwise destined to burden the courts and taxpayers, and to harm the children, might be resolved without state intervention.

69 The unpredictability of outcome under the vague best interest standard only encourages litigation, causing further harm to the children in the process.

ages parents—who know their children best—to privately negotiate child custody. The standard also saves children from the trauma of protracted psychological interviews, evaluations, and court proceedings. Finally, it protects them from becoming pawns in their parents' war.

One determinative standard which serves the children's best interests is the primary caretaker preference. The primary caretaker preference merits greater attention than it presently receives in most states. Admittedly, this standard presently favors women, but, although we strive for sexual equality, it is not necessarily best for children. While judicially-imposed joint custody arrangements may meet the needs of the parents, they may provide the worst of both worlds for the child.⁷⁰ The parent who has most accommodated to the demands of parenthood is the parent with whom the children have had the most physical contact.⁷¹ Although not universal, children probably have the greater psychological bond with the primary nurturer.⁷² When families cannot work out custody by themselves, the court should give preference to the primary caretaker. This will provide stability and continuity for the child.

B. A Determinative Standard Can Encourage Private Negotiation

Since continuity and contact with both parents is in the children's best interests, parents must be encouraged to arrange for their children's needs by themselves without judicial or other public intervention.⁷³ When forced to decide their children's fate without outside intercession, parents hopefully will put their children's needs before their own anger or hurt, and recognize their children's need for time with both parents. If a public outcome were essentially pre-determined, the threat of a custody battle would be toothless, and the unequal bargaining power that often accompanies such custody battles is eliminated. The courtroom becomes a less attractive arena.⁷⁴

Neely, *supra* note 12, at 174.

70 Fineman, *supra* note 61, at 761.

71 See GOLDSTEIN ET AL., *supra* note 32, at 27 (discussing the importance of the psychological parent).

72 *Id.*

73 Albiston et al., *supra* note 51, at 168.

74 See generally Neely, *supra* note 12, at 180.

Although a determinative primary caretaker standard is designed to encourage parents to resolve their disputes privately, it might also create a presumption that may discourage negotiation by the primary caretaker. Ideally, the primary caretaker will recognize the children's interest in a continuing relationship with both parents and work to establish a mutually acceptable custodial arrangement. However, a primary caretaker who cannot, or does not, perceive any benefit from the children's contact with the other parent, may have little incentive to negotiate with the other parent.

With sufficient inducement, however, even uncooperative primary parents can be encouraged to negotiate. The primary caretaker who is unable or unwilling to consider the children's best interests must be given some incentive to negotiate. One way to create such an incentive is to admit the failure to negotiate as evidence in the divorce property settlement. Upon receipt of such evidence, the court may impose a financial penalty on the non-negotiating spouse, so long as the children's financial well-being is not threatened.⁷⁵ The court must have discretion to determine when penalties for failure to negotiate should be assessed. If, for example, the primary parent alleges that contact with the non-primary parent may be harmful to the children, and the court makes a similar finding, no penalties should be assessed. If the non-negotiating spouse is also the greater wage-earner, then other incentives should be permitted, such as ordering him/her to forfeit a dependent child tax exemption. With both the opportunity to predict the results of custody case litigation and sufficient financial disincentives to state intervention, divorcing spouses can be motivated to privately "work out" custody arrangements in the best interests

⁷⁵ Since the primary caretaker's custody is not threatened, this system does not have the same pitfalls of the best interests standard, where a parent could use a custody challenge to obtain financial concessions from the parent unwilling to risk losing custody. Here the non-negotiating primary caretaker might suffer a financial penalty, but custodial presumption remains firm. Moreover, the non-primary parent would have no financial windfall from alleging his or her spouse's failure to negotiate.

of the children they love.

*C. Secondary Benefits of a Determinative Primary
Caretaker Standard*

Finally, the primary caretaker standard may have larger social benefits as well. While the rule currently supports women, this need not be the case. Indeed, the prevalence of women as primary caretakers suggests that women still may be discouraged from pursuing their own professional goals. The failure of more men to qualify as primary caretakers also is troubling. For economic and social reasons, men, who otherwise would enjoy nurturing, may be prohibited from spending more time with their children. To the extent a primary caretaker rule acknowledges and rewards the parent who performs the lion's share of maintenance and nurturing activity, it may encourage more equal sharing.⁷⁶ If mother no longer is automatically seen as the primary caretaker, this may also have a subtle impact on professional socialization.⁷⁷ As more fathers take on family maintenance responsibility, the work place may better accommodate family needs and view fathers as parents too.

⁷⁶ See, e.g., *Pikula v. Pikula*, 374 N.W.2d 705, 707 (Minn. 1985) (defining clearly the primary caretaker standard might encourage more active participation by fathers in child rearing).

⁷⁷ "We cannot stand by and let the family as child rearer be depleted, diminished or undermined by decisionmakers who do not take into account such costs when fashioning work and career paths." Sonja Goldstein & Joseph Goldstein, *Families that Work: What's Good For Children is Good for the Country* 16 (June 10-12, 1993) (presented at the International Society of Family Law Conference, copy on file with the *B.Y.U. Journal of Public Law*).