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Volume 29

Number 1 *The Fourth Annual Fritz B. Burns
Lecture—Central Bank: The Methodology, The
Message, and the Future*

Article 12

11-1-1995

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Recommended Citation

Cheri L. Wood, *Childless Mothers?—The New Catch-22: You Can't Have Your Kids and Work for Them Too*, 29 Loy. L.A. L. Rev. 383 (1995).

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CHILDLESS MOTHERS?—THE NEW CATCH-22: YOU CAN'T HAVE YOUR KIDS AND WORK FOR THEM TOO

*Solomon's wisdom, after all, lay in the fact that he did not divide the child.*¹

I. INTRODUCTION

Are mothers being forced to choose between keeping a good job and living with their children? What happens when Mom forgoes the job? Who pays for food, clothing, medical care, education, and other ever-increasing expenses? Does child support, if ordered and collected,² cover such expenses?³ If Mom works outside the home, does this make her a less-than-suitable person to continue raising her children when Dad can provide an in-home mother substitute?

1. Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of Law: On Dividing the Child*, 92 MICH. L. REV. 1808, 1838 (1994).

2. "Three-quarters of custodial mothers in this country either lack child support orders or fail to receive full payments under such orders." Margaret Campbell Haynes, *Supporting Our Children: A Blueprint for Reform*, 27 FAM. L.Q. 7, 7 (1993) (citing BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-60, NO. 173, CHILD SUPPORT AND ALIMONY: 1989 (1991)).

The more than \$14 billion in past-due child support that was owed in 1987 rose to more than \$23 billion in 1990—even after collection of more than \$4 billion per year.

Today, more than 12 million child support enforcement cases are pending in the United States. The trend is for the caseload to increase by about 1 million cases per year despite the collection efforts of tens of thousands of dedicated people employed by government agencies throughout the nation.

Charles Drake & Jan L. Warner, *Child Support Collection—What's a Client to Do?*, FAM. ADVOC., 1993, at 38, 38. Moreover, when child support is ordered, the awards vary across racial lines—to the detriment of minority women. *Women in Poverty*, 15 CLEARINGHOUSE REV. 925, 928 (1982) (revealing that child support is awarded to 71% of Caucasian women, 44% of Hispanic women, and 29% of African American women).

3. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323 (1985) ("When income is compared to needs divorced men experience an average 42 percent rise in their standard of living in the first year after the divorce, while divorced women (and their children) experience a 73 percent decline."); *infra* note 126.

In an era when over fifty percent of all mothers⁴ and almost eighty percent of divorced mothers⁵ are working outside the home, media accounts of women losing custody of their children because of their working-mother status abound.⁶ Working mothers⁷ appear to be in a lose-lose situation. "Either you're a bad mother because you work and are away from your children, or you're a bad mother because you haven't taken sufficient financial responsibility for yourself and your family."⁸ According to Roberta Cooper Ramo, president-elect of the American Bar Association, "It's a crazy double

4. *Burchard v. Garay*, 42 Cal. 3d 531, 540, 724 P.2d 486, 492, 229 Cal. Rptr. 800, 806 (1986) (citing Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 15 (1984)); Edward L. Raymond, Jr., Annotation, *Mother's Status as "Working Mother" as Factor in Awarding Child Custody*, 62 A.L.R.4TH 259, 264 (1994).

5. *Burchard*, 42 Cal. 3d at 540, 724 P.2d at 492, 229 Cal. Rptr. at 806 (citing Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 740 (1983)); Raymond, *supra* note 4, at 264-65. It has been reported that the Department of Labor has determined that 23 million mothers are working. LynNell Hancock et al., *Putting Working Moms in Custody*, NEWSWEEK, Mar. 13, 1995, at 54, 55.

6. Karen Nussbaum, *Why Should Working Moms Lose Kids?*, ARIZ. REPUBLIC, Dec. 26, 1994, at B19 ("Over the past several months a number of legal cases have gained public attention, all involving mothers who lost custody because they took time away from their children to work or study."). See, e.g., Bettina Boxall, *Marcia Clark's Husband Cites Trial in Custody Fight*, L.A. TIMES, Mar. 2, 1995, at A1 (revealing that lead prosecutor Marcia Clark's ex-husband is seeking custody of their two children based upon her increased work load in Simpson trial); Susan Chira, *Working Mom in D.C. Loses Custody Fight to Ex-Husband*, HOUS. CHRON., Sept. 20, 1994, at A4 (discussing court order compelling Sharon Prost, counsel to Senator Orrin Hatch, to surrender custody of her two sons to her former husband because she was "more devoted to and absorbed by her work and her career than . . . her children"); Hancock et al., *supra* note 5, at 54; Carol Kleiman, *Judge Should Check in with Reality, Not Rail on Career Moms*, CHI. TRIB., Oct. 20, 1994, (Business), at 3 (reporting on Michigan case in which judge removed daughter from custody of mother who won college scholarship and relied on campus day care, and placed child with father because father's mother would babysit); Cameron Stauth, *Why a Good Mother Lost Custody of Her Child*, MCCALL'S, Oct. 1992, at 115, 115 (relating true story of Eileen Adams's battle for custody of her son for which NBC movie, *Because Mommy Works*, was inspired); *Oprah: The Oprah Winfrey Show: Marcia Clark on Trial as a Mother*, at 1 (ABC television broadcast, Mar. 31, 1995) (transcript on file with the *Loyola of Los Angeles Law Review*) [hereinafter *Oprah Transcript*] ("[H]e filed for temporary custody of the children, claiming they were starved for attention because Marcia Clark is never home and never has any time to spend with them."); *infra* part II.

7. This Author, a single mother of two children, appreciates and wishes to acknowledge that *all* mothers are working mothers. This is true regardless of whether they work inside the home, outside the home, or, as in the majority of cases, both. For clarification and efficiency in this Comment, however, when the term "working mother" is used, it is meant to refer to mothers who, in addition to their child-care responsibilities, also work outside the home.

8. Nussbaum, *supra* note 6, at B19.

standard The . . . bizarre thing is that while we're telling welfare mothers to work, we're also telling professional women not to. I haven't figured this out.'"⁹

Should a mother's working status determine whether she should remain the primary caretaking or custodial parent after (1) a custody proceeding in conjunction with dissolution, (2) any initial proceeding where custody had occurred by default, or (3) a modification proceeding brought by the noncustodial parent? And, should a father's ability to provide an in-home mother substitute ever factor into such a child-custody decision?

This Comment addresses the phenomenon of women who are denied or lose custody of their children because they work outside the home. It necessarily analyzes conditions in the current climate in which custody decisions are made in order to reveal how those conditions produce results detrimental to a child in the context of determining whether a working woman should become or remain the primary custodial parent. The subjectivity inherent in the current "changed circumstances" rule and the "best interests of the child" standard, used in these custody decisions, lends itself to uncertainty, instability, and increased litigation particularly when one parent has been the primary caretaker for a significant period of time. This Comment illustrates how that very subjectivity becomes a useful tool when the primary custodial parent or caretaker's—usually the mother's¹⁰—newly acquired, continued, or expanded working status—and ironically, sometimes her lack thereof—is wielded in any custody battle.

This Comment begins with contemporary examples of mothers whose working status determined whether they would continue as the

9. Hancock et al., *supra* note 5, at 55 (quoting Roberta Cooper Ramo, president-elect of the American Bar Association); see also *Oprah* Transcript, *supra* note 6, at 21 ("Newt Gingrich says if they don't work, they lose their kids. Now the judges are saying, 'If you do work, you do lose your kids.'" (quoting Lynne Gold-Bikin, Chair of the Family Law Section, American Bar Association)).

10. Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 14 WOMEN'S RTS. L. REP. 175, 177 (1992) (indicating that statistic of 90% of all children of divorce are in custody of their mothers is "frequently cited"); see also ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 78 (1992) (stating that in California study of 1124 couples, fathers had custody in only 9.5% of cases); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *CURRENT POPULATION REPORTS, SERIES P-20, NO. 458, HOUSEHOLD AND FAMILY CHARACTERISTICS: MARCH 1991*, at 9 (1992) (finding that only 14% of children living in single-parent homes lived with their father).

primary caretaker or custodial parent of their children.¹¹ To lay the groundwork for exploring how this phenomenon operates under current custody laws, this Comment examines the history of how child-custody determinations have been made in this country.¹² Thereafter, the use of the current best interests standard and changed circumstances rule in custody decisions is analyzed—with a focus on how they have negatively affected working women.¹³ This Comment recommends that when two otherwise fit parents cannot reach or maintain an agreement concerning the custody disposition of their children, a presumption favoring—as much as possible—previously established patterns of care should be applied. This Comment explains how such a presumption would afford parties greater predictability, alleviate the problems inherent in the current speculative and indeterminate nature of custody decisions, offer stability and resolution, and inspire both parents to take as active a role as possible in their child's care. Such a presumption would be comparable, for the most part, to the primary-caretaker presumption that has been adopted in some jurisdictions.¹⁴ The Author argues that a presumption in favor of previously established patterns of care, reinforced by the requirements set forth by the California Supreme Court,¹⁵ should

11. See *infra* part II.

12. See *infra* part III.

13. See *infra* part IV.

14. See, e.g., *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). "It is clear that under *Garska v. McCoy* . . . [t]he best interests of the children can best be served by preserving their primary relationship with the parent who has provided their primary care." Polikoff, *supra* note 10, at 183. Although the *Garska* court dealt with an initial custody proceeding, *Garska*, 278 S.E.2d at 358-59, the same issue arises in actions to modify the initial custody order; see *id.* Custody proceedings also arise when a modification from the initial order is sought. In either case the court must still consider whether to preserve the child's relationship with the parent who had provided the primary nurturance and care—regardless of whether that care was provided during an ongoing marriage, by circumstance when no marriage or relationship existed between the parents, or after a custody order had been issued. Thus, the primary-caretaker presumption can be applied to a custody decision arising immediately upon dissolution, when there was no marriage or cohabitation but one or both parties seek court-ordered custody after childcare responsibility patterns have been established, or in a later modification proceeding. For a detailed discussion of this principle, see *infra* part IV.A.

15. For a detailed discussion of this standard, see *Burchard v. Garay*, 42 Cal. 3d 531, 724 P.2d 486, 229 Cal. Rptr. 800 (1986). Simply put, the court declared that (1) a child's emotional bonds with the primary caretaking parent must be the first consideration, *id.* at 536, 724 P.2d at 489, 229 Cal. Rptr. at 803, (2) a parent may very well be the primary caretaker while working, studying, using daycare and babysitting, and otherwise "successfully coping with the many difficulties encountered by single working mothers," *id.* at 541, 724 P.2d at 493, 229 Cal. Rptr. at 807, and (3) reasoning "that care by a mother

be the majority rule.¹⁶ Finally, this Comment concludes that such a presumption would discourage litigation, promote fairer negotiations and settlements, secure finality in decision making, and encourage co-parenting throughout a child's life.¹⁷

II. THE NEW "CATCH-22"

Jennifer Ireland thought that by attending college and studying hard she was obeying the rule of society that young, unmarried mothers should stay off welfare.¹⁸ In order to attend college, Ireland placed her daughter in day care for part of each day while she went to class.¹⁹ As a result, Jennifer Ireland lost custody of her three-year-old child.²⁰ Ironically, Maranda's father, Steve Smith, did not intend to care for his daughter; rather, he planned to have his mother look after Maranda while he himself attended college.²¹ Judge Raymond Cashen, a Michigan circuit court judge, awarded custody of the child to her father, saying that he didn't want Maranda "raised . . . by strangers."²² To top it off, it seems that Steve Smith had not initially sought custody of the child.²³ Rather, Smith asked for custody after Ireland went to court seeking the previously ordered twelve dollars per week of child support for Maranda—something Maranda's father had never provided.²⁴

In November 1994, NBC aired the television movie *Because Mommy Works*.²⁵ The film was inspired by the true story of Eileen Adams, a working mother who lost custody of her son when her ex-husband, who had married a stay-at-home wife, sued for custody in an

who, because of work and study, must entrust the child to daycare centers and babysitters, is per se inferior to care by a father who also works, but can leave the child with a stepmother at home *is not a suitable basis for a custody order*," *id.* at 540, 724 P.2d at 492, 229 Cal. Rptr. at 806 (emphasis added). Thus, the California Supreme Court in *Burchard* used the best interests of the child standard, but considered stability and continuity in the life of a child to be of paramount importance to other factors that are "insignificant compared to the fact that [one parent] has been the primary caretaker." *Id.* at 541, 724 P.2d at 492, 229 Cal. Rptr. at 806.

16. *See infra* part V.

17. *See infra* part VI.

18. Kleiman, *supra* note 6, at 3.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* (quoting Judge Cashen).

23. *Id.*

24. *Id.*

25. *Because Mommy Works* (NBC television broadcast, Nov. 21, 1994).

Oregon court.²⁶ Adams was a schoolteacher. At the time of the trial in 1991, her son, Keith, had spent the majority of time with her following her divorce from Keith's father, Steve McCracken, in 1987.²⁷

Before the trial, Eileen Adams's attorney, Michael Wells of Eugene, Oregon, explained to her that a new phenomenon was occurring in courts: Judges were taking custody from single working mothers and awarding it to ex-husbands with new wives who did not work.²⁸ Eileen replied, "So being a mother's just a matter of milk and cookies after school?"²⁹

Ever mindful of the toll it would take on Keith, but believing that her relationship with her son entailed much more than being home each afternoon, she decided to defend and undergo the emotional and financial expense of the custody suit.³⁰ At trial, witnesses called on behalf of Adams "portrayed her as a superb mother who'd made countless sacrifices to be with her son and give him opportunities she'd lacked."³¹ In court Eileen testified, "Personally, I think I'm a *better* mother when I work—more fulfilled, happier. And part of my responsibility as a mother is to be a role model for Keith. And let's not lose sight of one thing: Keith loves me. The way I am."³² In giving custody of Keith to his father, the court relied heavily on a psychologist's custody evaluation giving great weight to the fact that Steve's new wife did not have a job and could be home with Keith after school.³³ Lost in the court's decision was the fact that Eileen Adams worked at the school Keith would attend if she had custody, which would have allowed them to increase their time together during the commute³⁴ and spend their day at the same place.

After the birth of her second child, Eileen began a "job-share" program whereby she shared her class with another teacher, allowing each to work a part-time week.³⁵ However, when the judge awarded custody to Steve McCracken, he also ordered Eileen Adams to pay

26. Telephone Interview with Christine Berardo, Screenwriter, *Because Mommy Works* (Mar. 23, 1995) [hereinafter Berardo Interview]; see Nussbaum, *supra* note 6, at B19.

27. Stauth, *supra* note 6, at 115-16.

28. *Id.* at 116.

29. *Id.*

30. *Id.*

31. *Id.* at 124.

32. *Id.*

33. *Id.* at 124-25.

34. *Id.* at 122.

35. See *id.*; Berardo Interview, *supra* note 26.

child support in an amount based upon what she would have earned had she been teaching full time.³⁶ The judge's reasoning? Because it was Eileen's choice to work part time, she should not thereby benefit from a reduction in support when she could be working full time.³⁷

Most recently, in the shadow of the headlines over the O.J. Simpson trial in Los Angeles, Marcia Clark's custody case stirred opinions and emotions.³⁸ She was thrust into the media limelight due to her role as the lead prosecutor in the notoriously complex Simpson case. Marcia filed for divorce in June 1994, just days before Nicole Brown Simpson and Ronald Goldman were murdered.³⁹ Her ex-husband "contend[ed] that her grueling workload [harmed] their two young sons."⁴⁰ University of Southern California law professor Scott Altman, speculated: "'I don't see why a court would regard this temporary period [of the Simpson trial] as a basis for a permanent change in custody.'"⁴¹ However, this issue fired up a heated, nationwide debate.⁴² For example, a caller to Bill Handel's KFI

36. Berardo Interview, *supra* note 26.

37. *Id.*

Had Eileen Adams appealed the judgment of the trial court she *might* have met with success. Consider Ms. Polikoff's discussion of *In re Marriage of Handy*, 605 P.2d 738 (Or. 1980):

[A]n Oregon trial court judge awarded custody of a six-year-old girl and a three-year-old boy to their father, based upon his plan to remarry and the judge's high opinion of the father's future wife. Because Oregon case law specifically mandated consideration of who [had] provided primary care for the children, and because the mother had performed that role, the appellate court reversed.

Polikoff, *supra* note 10, at 182 (footnote omitted). Eileen Adams has since agonized on a daily basis over her decision not to appeal. Berardo Interview, *supra* note 26. However, at the time of the trial court's judgment, Ms. Adams weighed her belief that Keith's best interests would be served by his remaining in her custody versus the heavy toll that it would take on him if she prolonged the custody fight. *Id.* She also considered the needed continuity and stability Keith could begin to have if left in the care of his father and stepmother. *Id.* Adams's actions couldn't parallel any closer the phenomenon demonstrated in front of King Solomon—that the person who is truly most attached to the child will be willing to accept an inferior bargain in accordance with the child's best interests. See 1 *Kings* 3:16; *Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981).

38. See, e.g., Robin Abcarian, *As Standards Go, This One's a Double*, L.A. TIMES, Mar. 8, 1995, at E1; Bettina Boxall & Frank B. Williams, *Marcia Clark's Custody Case Stirs Opinions, Emotions*, L.A. TIMES, Mar. 3, 1995, at A30; Hancock et al., *supra* note 5, at 54; Judith Regan, *An Open Letter to Mr. Clark*, NEWSWEEK, Mar. 13, 1995, at 57, 57.

39. Hancock et al., *supra* note 5, at 55.

40. Boxall, *supra* note 6, at A1. Apparently Gordon Clark's bid for custody followed on the heels of Marcia Clark's request for additional child support. *Id.* at A14.

41. Boxall, *supra* note 6, at A14 (quoting Professor Scott Altman).

42. See *supra* note 38.

radio morning show said, "The general consensus is what's good for the goose is good for the gander If things were reversed, the judge would have taken like six seconds to turn the kids over to her."⁴³

These cases and the underlying issue of whether a mother's working status should be determinative of whether she remains the primary caretaker or custodial parent raise numerous questions. To begin with, historically, has a gender bias operated in favor of mothers in custody decisions? And, is a gender bias operating against mothers now?

III. REVELATIONS IN CHILD CUSTODY DETERMINATIONS: THE LESS-THAN-MATERNAL HISTORY

Despite popular belief to the contrary,⁴⁴ men have been awarded custody of children throughout most of modern time.⁴⁵ "Preference for the mother in awarding custody . . . is actually an extremely limited doctrine of historically short duration."⁴⁶ "The father was the 'natural' guardian and overseer of the child's religious training, education, and was the beneficiary of the child's labor and services."⁴⁷ Custody of the child served merely as a natural extension of the man's exclusive right to control his property.⁴⁸ In fact, under the common law "[t]he father even had the power to appoint a guardian

43. Boxall & Williams, *supra* note 38, at A31.

44. See, e.g., Richard A. Warshak, *Father-Custody and Child Development: A Review and Analysis of Psychological Research*, 4 BEHAV. SCI. & L. 185, 185 (1986) ("The tradition of awarding custody to mothers following divorce is so entrenched in our culture that, until recently, a father was awarded custody only if the mother was proved exceptionally unfit."); Lynn Smith, *A Custody Battle Plan That Takes No Prisoners*, L.A. TIMES, Mar. 22, 1995, at E3 (reviewing Michael Brennan's self-published tactical manual *Custody for Fathers: A Practical Guide Through the Combat Zone of a Brutal Custody Battle*, which Smith says refers to mothers as "adversaries who hold all the cards in court because they have spent years developing tricks such as crying on demand [and] using . . . melodrama and innuendo" and, while acknowledging that "brutal custody fights can be incredibly damaging to children," "argues that men can't wait for laws to change").

45. J. Ranier Twiford, *Joint Custody: A Blind Leap of Faith?*, 4 BEHAV. SCI. & L. 157, 158 (1986); see also Henry H. Foster & Doris Jones Freed, *Life with Father: 1978*, 11 FAM. L.Q. 321 (1978) (reviewing history of child custody trends).

46. Polikoff, *supra* note 10, at 176.

47. Twiford, *supra* note 45, at 158-59 (citing Foster & Freed, *supra* note 45, at 321-22).

48. See Jay Einhorn, *Child Custody in Historical Perspective: A Study of Changing Social Perceptions of Divorce and Child Custody in Anglo-American Law*, 4 BEHAV. SCI. & L. 119, 120-23 (1986).

other than the mother to have charge of the children in the event of his death."⁴⁹

During the nineteenth century a father enjoyed the rebuttable presumption of an absolute right to custody unless he was found unfit.⁵⁰ Even the tender years presumption, a short-lived doctrine of American family law that presumed that young children were better off in the custody of their mothers,⁵¹ was not the equivalent of a maternal preference custody standard for children of all ages.⁵² State statutes expressed a paternal preference when older children were involved.⁵³ Even when the tender years presumption was applied, "[t]he father was frequently appointed the legal guardian while physical custody of young children was awarded to the mother."⁵⁴

Late in the nineteenth century, the industrial revolution and compulsory education devalued children from an economic standpoint.⁵⁵ During this time "awards to mothers became [slightly] more common."⁵⁶ However, by the 1900s only fourteen states had enacted legislation deviating from the common-law paternal preference rule.⁵⁷ Moreover, what was "[e]specially notable during this period [was] the fact that the father was relieved of the duty to support children in their mother's custody."⁵⁸ In those situations the benefit of the tender years presumption inured only to women who had independent financial resources to draw upon, as employment opportunities for women were limited at that time.⁵⁹

The best interests of the child standard began to develop while the tender years presumption was still in place.⁶⁰ It had been noted that the "preference for the mother of young children, when all things

49. Robert F. Cochran, Jr., *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; 6 (1985); see also Einhorn, *supra* note 48, at 123 ("If the child's father died, the mother was by no means the next logical guardian. Guardianship in common law came from the father, from the court, from the king—not from the mother.").

50. Jerry Behnke, Comment, *Pawns or People? Protecting the Best Interests of Children in Interstate Custody Disputes*, 28 LOY. L.A. L. REV. 699, 701 (1994).

51. See *infra* note 61 and accompanying text.

52. Polikoff, *supra* note 10, at 176.

53. *Id.* (citing OKLA. STAT. tit. 30, § 11 (1971 & Supp. 1978)).

54. Twiford, *supra* note 45, at 159.

55. Polikoff, *supra* note 10, at 176.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

were equal, was a shorthand means of expressing what was in the child's best interests."⁶¹ However, the contrasting notion that the tender years presumption "obscured the real issue, the best interests of the child"⁶² soon replaced that line of thought.

During the 1970s critics claimed that the maternal preference "unfairly discriminated against men."⁶³ Studies proliferated showing the importance of the father-child relationship, and it was argued that mothers "could not provide the benefits the traditional mother's role had afforded the children . . . because the divorce forced the mother to assume roles . . . that formerly had been filled by the father."⁶⁴ The fact that ninety percent of children went to the custody of their mothers was cited as statistical evidence of discrimination and "'sexual stereotyping.'"⁶⁵ Considering it violative of the Equal Protection Clause of the Fourteenth Amendment, courts no longer applied the maternal custody preference for children of tender years.⁶⁶ Thus, "[i]n the 1970's, the maternal preference was rejected by an overwhelming majority of states."⁶⁷ Hence, "judges were to determine custody based on the best interests of the individual child without a preference for either parent."⁶⁸

IV. THE CHANGED CIRCUMSTANCES RULE AND THE BEST INTERESTS OF THE CHILD STANDARD—FEEDING GROUND FOR "OUTMODED NOTIONS [RESULTING] IN HARSH JUDGMENTS WHICH UNFAIRLY PENALIZE WOMEN"⁶⁹

Who could argue with the concept that a court, or anyone, ought to do what is in a child's best interests? In practice, however, all kinds of questions are raised when someone other than a child's parents must decide what is in that child's best interests.⁷⁰ The right

61. *Id.* at 177 n.10 (citing UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 197-201 (1970)).

62. Cochran, *supra* note 49, at 11.

63. *Id.*

64. *Id.*

65. *Id.* at 12 (quoting Foster & Freed, *supra* note 45, at 333).

66. Stephen J. Bahr et al., *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247, 250 (1994) (citing cases that "eliminated the use of gender as a formal criterion in determining custody decisions").

67. Cochran, *supra* note 49, at 13.

68. *Id.*

69. *Burchard v. Garay*, 42 Cal. 3d 531, 542, 724 P.2d 486, 493, 229 Cal. Rptr. 800, 807 (1986) (Bird, C.J., concurring).

70. Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455,

of parents to exercise almost complete autonomy in decisions regarding their children is constitutionally recognized, hallowed territory in this country.⁷¹ In the context of a custody battle, given the parents' current inability to reach a decision jointly, a custody arrangement modeled after the parents' past decisions as to who would be responsible for primary childcare best preserves that hallowed territory.⁷² However, when divorced or divorcing parents no longer agree on what is best for their children, including with whom the child should be living, it is a virtual stranger who then has the power and the discretion to make those decisions—by attempting to predict the future.

In theory the goal of furthering a child's best interests seems laudable. In reality, however, basing any custody decision on an indeterminate standard proves to have several weaknesses. These weaknesses create uncertainty, instability, and protracted litigation. In particular they have proven to operate against working mothers and their children.

A. *How the Existing Law Applies the Changed Circumstances Rule and Best Interests of the Child Standard When Parents Dispute Custody*

When no custody order exists and a change in a previously established arrangement is sought,⁷³ or when parties are newly divorcing and there has been a preexisting pattern of childcare, courts

466 (1984) ("While the best interest standard embodies an admirable ideal, its application may present substantial difficulties . . .").

71. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (ruling that parents have fundamental interest in "the care, custody and management of their child"); *Parham v. J.R.*, 442 U.S. 584 (1979) (deciding that Georgia statute allowing parents to voluntarily commit their children to state mental hospitals was not unconstitutional); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (stating that parents have "the liberty . . . to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding that law prohibiting teaching foreign languages to children violated parents' rights "to control the education of their own").

72. See discussion *infra* part V.B.; see also *Oprah* Transcript *supra* note 6, at 19 (quoting Lynne Gold-Bikin, Chair of the Family Law Section, American Bar Association, as commenting that parents' choices, not judges', should dictate what is best for their children: "[T]o have some guy they've never seen before, who is trained in law school to read the law . . . sitting on the bench . . . [They will] never see him again. And now he decides on the future of [their] children? Excuse me?").

73. See, e.g., *Burchard v. Garay*, 42 Cal. 3d 531, 536-37, 724 P.2d 486, 489-90, 229 Cal. Rptr. 800, 803-04 (1986).

consider what is in the best interests of the child.⁷⁴ However, many courts require that the person seeking modification of an adjudicated order demonstrate that a different arrangement would be in the child's best interests due to a change in circumstances.⁷⁵ In theory, the changed circumstances rule "not only changes the burden of persuasion but also limits the evidence cognizable by the court"⁷⁶ to considering the circumstances upon which the prior decision was based and then inquiring whether the alleged new circumstances represent a significant change requiring a re-evaluation of the child's custody under the best interests standard.⁷⁷ In practice, however, even the changed circumstances rule allows for indeterminate and speculative results when a judge must not only decide *which* criteria under the relevant statutes to use, but also determine the *weight* to be given to each of them.⁷⁸

Perhaps recognizing that practical distinctions between the best interests standard and the changed circumstances rule is a somewhat futile exercise because the same inquiry and net result may occur, Pennsylvania simply gravitated to a direct best interests of the child standard instead of a changed circumstances rule for modifications.⁷⁹ In that vein the California Supreme Court aptly recognized that

[i]n most cases, of course, the changed-circumstance rule and the best interest test produce the same result. When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that

74. See, e.g., CAL. FAM. CODE § 3011 (West 1994).

75. See, e.g., Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM. L.Q. 515, 595-99 (1994).

76. *Burchard*, 42 Cal. 3d at 536, 724 P.2d at 489, 229 Cal. Rptr. at 803.

77. *Id.* at 534, 724 P.2d at 488, 229 Cal. Rptr. at 802.

78. Compare *Gulyas v. Gulyas*, 254 N.W.2d 818 (Mich. Ct. App. 1977) (finding that change in custody to father was reasonable given mother's working status) with *Anderson v. Anderson*, 863 S.W.2d 325 (Ark. Ct. App. 1993) (finding that despite suicide attempts of mother and her present husband, mother's promiscuity, mother's inability to hold job, and mother's violent nature, evidence supported trial court's decision not to change custody); compare also *Dabill v. Dabill*, 514 N.W.2d 590 (Minn. Ct. App. 1994) (holding that child visitation interference does not establish grounds to modify custody) with *Shunk v. Walker*, 589 A.2d 1303 (Md. Ct. Spec. App. 1991) (holding that court may modify custody when one parent sabotages visitation rights of other parent).

79. *Moore v. Moore*, 634 A.2d 163 (Pa. 1993) (holding that change in circumstances need not be shown for modification); *McMillen v. McMillen*, 602 A.2d 845 (Pa. 1992) (holding that best interests rather than change in circumstances is appropriate standard in modification proceedings).

maintenance of the current arrangement would be in the best interests of that child.⁸⁰

The court in *Burchard v. Garay*⁸¹ clarified that while it was not extending the changed circumstances rule to protect a "de facto"⁸² custody arrangement,⁸³ it was affirming "the importance of protecting established modes of custody, *however created*, not by limiting the breadth of the evidence, but by requiring the noncustodial party to show that a change would be in the best interests of the child."⁸⁴

80. *Burchard*, 42 Cal. 3d at 538, 724 P.2d at 490-91, 229 Cal. Rptr. at 804-05 (footnote omitted).

81. 42 Cal. 3d 531, 724 P.2d 486, 229 Cal. Rptr. 800 (1986).

82. "De facto" as referred to here, and in the *Burchard* opinion, means custody established without a court order. *Id.* at 537 n.3, 724 P.2d at 490 n.3, 229 Cal. Rptr. at 804 n.3.

83. In a concurring opinion in *Burchard*, Justice Mosk disagreed with the majority on this principle. He stated:

The majority's reading [of prior case law] as not extending the protection of the changed-circumstances rule to so-called "de facto" as well as "de jure" custody is sheer sophistry. [We have] expressly held that the rule applied "regardless of how custody was originally decided upon. . . . It is difficult for me to conceive how we could have established the point more clearly. . . . [F]amily law would have been better served if [the majority] had followed the principle declared therein.

Id. at 547, 724 P.2d at 497, 229 Cal. Rptr. at 811 (Mosk, J., concurring).

84. *Id.* at 537, 724 P.2d at 490, 229 Cal. Rptr. at 804 (emphasis added). Justice Mosk addressed the fact that "[t]he child whose custody was established by means other than judicial decree has the same need for and right to stability and continuity." *Id.* at 547, 724 P.2d at 497, 229 Cal. Rptr. at 811 (Mosk, J., concurring). "[W]e may nevertheless presume that such custody [established by agreement or by default] is in the child's best interest." *Id.* at 548, 724 P.2d at 498, 229 Cal. Rptr. at 812 (Mosk, J., concurring). Justice Mosk opined that the presumption was justified because when parents agree to an arrangement it is based upon their love, genuine concern for the child's welfare, and access to better information. *Id.* at 548-49, 724 P.2d at 498, 229 Cal. Rptr. at 812 (Mosk, J., concurring). In the case of custody established by default, Justice Mosk observed that as "between the parent who undertakes to provide care and the parent who fails or refuses to do so, custody with the former must be deemed to serve the child's best interests." *Id.* at 549, 724 P.2d at 498, 229 Cal. Rptr. at 812 (Mosk, J., concurring). Thus, changing any custodial arrangement that was based upon the child's best interests without "impos[ing] on the noncustodial [parent] the burden of proving that a substantial change had occurred," *id.* at 547, 724 P.2d at 497, 229 Cal. Rptr. at 811 (Mosk, J., concurring), frustrates a child's well-recognized right to stability and continuity. The same concern is apparent when courts (1) apply a presumption for continuity and stability, or (2) consider as a factor which parent provided primary care for the child during the marriage, in determining what is in the best interests of a child in a custody decision upon dissolution. See Andrea G. Nadel, Annotation, *Primary Caretaker Role of Respective Parents as Factor in Awarding Custody of Child*, 41 A.L.R.4TH 1129 (1985). Thus, "the importance of stability and continuity in the life of a child, and the harm that may result from disruption of established patterns of care and emotional bonds," *Burchard*, 42 Cal. 3d at 541, 724 P.2d at 493, 229 Cal. Rptr. at 806-07, can be addressed in a custody determination by

Thus, according to the California Supreme Court, when a party seeks a change in an adjudicated court order or when a custody pattern was established by stipulation or default, the inquiry and outcome as to whether there should be a change will be essentially the same.⁸⁵ Once a parent seeks custody at an initial proceeding, that parent will have to show that it would be in the best interest of the child; this would necessitate that the court examine the "established patterns of care and emotional bonds."⁸⁶ Similarly, when a court modifies a preexisting order, it must examine the conditions under which, and reasons that, the current arrangements were ordered.⁸⁷ In either case, the court must make the initial inquiry and then apply the best interests of the child standard to determine whether a change in the custody order or previous de facto arrangement is warranted. Consequently, the speculativeness, indeterminacy, and related problems that the best interests standard and the changed circumstances rule bring to custody determinations are present either when custody or a change in custody is sought.⁸⁸ And as the cases reveal, when a mother's working status is a factor, it has only exacerbated the problems outlined below.

B. Current Child Custody Law Allows Judges to Choose and Weigh Which Factors Are Relevant—Facilitating Discriminatory Decisions

When a court must determine whether to modify the status quo by either changing an existing custody arrangement or imposing an arrangement on a newly separated family that must have had an established child-care pattern, the best interests standard that ultimately comes into play "allows the judge to consider *any* fact that may be deemed relevant to the child's welfare."⁸⁹ In California a

considering which parent primarily provided those needs for the child either during *or* after marriage.

85. See *Burchard*, 42 Cal. 3d at 538-39, 724 P.2d at 490-91, 229 Cal. Rptr. at 804-05.

86. *Id.* at 541, 724 P.2d at 493, 229 Cal. Rptr. at 806-07.

87. See, e.g., IND. CODE ANN. § 31-1-11.5-22(d) (Burns Supp. 1994) (mandating that courts not modify child custody orders unless it is in child's best interest and there has been substantial and continuing change in one or more statutory factors rendering existing custody order unreasonable).

88. See *infra* part IV.B.

89. Scott & Derdeyn, *supra* note 70, at 466 (emphasis added); see also Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 519 (1988) (stating that problems with best interests standard are "exacerbated by the multitude of factors that judges typically are directed to consider in ascertaining a child's best

court may consider the health, safety, and welfare of the child; any history of abuse by one parent against the child or against the other parent; and the nature and amount of contact with both parents.⁹⁰ And, during the pendency of a proceeding or anytime thereafter, the judge may make a custody order “that seems necessary or proper.”⁹¹ In other jurisdictions courts may consider the following statutory factors: (1) the love, affection, and other emotional ties between the parties and the child; (2) the capacity and disposition of the parents to give the child love, affection, guidance, food, clothing, and medical care; (3) the length of time a child has lived in a stable environment and the desirability of maintaining continuity; (4) the moral fitness of the parties; and (5) *any* other factor considered by the court to be relevant.⁹²

While the statutes *attempt* to specify criteria for the judge to consider—although most have “any other factor” or “necessary and proper” loopholes—the statutes also allow the judge to determine the *weight* to give each criterion.⁹³ Even when a court has a presumption in front of it, such as the primary caretaker presumption, or a preference in favor of continuity and stability, a judge has the discretion to find that other factors are more compelling—factors, in other words, based upon the judge’s own values.⁹⁴

Determining custody, initially or in a modification proceeding, necessarily requires a substantial degree of judicial forecasting.⁹⁵ Proponents of the best interests standard, however, “believe that if there is sufficient factual investigation, the court generally can

interests”).

90. CAL. FAM. CODE § 3011 (West 1994).

91. *Id.* § 3022.

92. *See, e.g.*, MICH. COMP. LAWS ANN. § 722.23.3 (West Supp. 1983).

93. Scott & Derdeyn, *supra* note 70, at 466-67 nn.51-52.

94. *Id.* at 467 n.52 (“The judge’s response to different lifestyles, . . . child care patterns, and the needs of the child for a mother’s care or a father figure may affect the outcome of the custody dispute.”); *see also* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 622 (1992) (“The eventual determination can be speculative and value-laden, as the standard encourages courts to assess the character of the contestants . . .”).

95. In *Coles v. Coles*, 204 A.2d 330 (D.C. 1964), Judge Hood identified some of the weaknesses of putting the best interests of the child standard into practice when he noted that its

principle is easily stated but its application in a particular case presents one of the heaviest burdens that can be placed on a trial judge. Out of a maze of conflicting testimony . . . the judge must make a decision which will inevitably affect materially the future life of an innocent child.

Id. at 331-32.

determine the custody placement that will be in the best interests of the individual child."⁹⁶ And experts point out that in performing requisite factual investigations in individual cases, "judges sometimes [defer generously] to the preferences of guardians *ad litem*, the recommendations of social workers,"⁹⁷ or evaluations performed by private mental health professionals.⁹⁸ This is believed to be important because "[w]ithout the objective input of professionals . . . the needs of the child . . . will be lost in the battle."⁹⁹ Dr. Lionel Margolin aptly pointed out that "lawyers cannot sift through all of the psychological permutations when presenting a custody case on behalf of their client."¹⁰⁰

Certain problems, however, inevitably arise when a judge relies on mental health evaluations in a custody decision, either initially or during a modification proceeding. These include the following: (1)

96. Cochran, *supra* note 49, at 25.

97. Carl E. Schneider, *The Tension Between Rules and Discretion in Family Law: A Report and Reflection*, 27 *FAM. L.Q.* 229, 242 (1993).

98. Cochran, *supra* note 49, at 27; see also Barbara A. Weiner et al., *The Child Custody Dispute*, in *EMERGING ISSUES IN CHILD PSYCHIATRY AND THE LAW* 59, 60-61 (Diane H. Schetky & Elissa P. Benedek eds., 1985) (indicating that evaluator's points of involvement in custody suit may arise "when the family first separates," "[w]hen a contested custody case goes to trial," or "[a]fter the decree has been entered [and] one party . . . seek[s] a change in custody"). Dr. Lionel Margolin, Senior Consultant, Family Law Department, Superior Court, Los Angeles County, California, indicated that when parents cannot agree as to who should have custody or whether a change in custody should be made, the best interests of the child are necessarily determined by looking at multiple factors such as the following: (1) how the child is doing under the current scheme; (2) the parents' motivations for wanting custody; (3) the child's psychological attachment to each parent; (4) the parents' relative care-taking abilities; (5) the personalities of each parent; and (6) the age of the child. Interview with Dr. Lionel Margolin, Senior Consultant, Family Law Department, Superior Court, Los Angeles County, California, in Los Angeles, Cal. (Mar. 9, 1995) [hereinafter Margolin Interview].

99. Weiner et al., *supra* note 98, at 59-60.

100. Margolin Interview, *supra* note 98. Dr. Margolin distinguished one of the most important questions to ask when conducting a custody evaluation as, "Why are these parents fighting?" *Id.* According to Dr. Margolin, "[w]hen you answer that question you usually find out what the parenting plan should be." *Id.* In fact, one commentator has even proposed that rather than using the vague and problematic best interests standard, the proper inquiry in a custody decision should be "limited to a determination of the reasons that the custody dispute has not been resolved through negotiation." Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, in *CHILD, PARENT, & STATE* 3, 13 (S. Randall Humm et al. eds., 1994). Charlow suggests that "[i]f the inquiry in contested child custody cases is confined to determination of which parent is best able to place the child's interests above his or her own in order to reduce conflict," *id.* at 18, "[i]t follows logically that the parent who is best able to separate parental discord from his or her relations with the child should have custody," *id.* at 12; see *supra* note 37.

The abnormal stress experienced during a custody dispute and evaluation may cause a parent to behave differently than he or she would under normal circumstances, thus complicating the evaluation;¹⁰¹ (2) assuming that there is a consensus among experts with respect to the relevant aspects of psychological development—when the experts agree there is not—courts may rely too heavily on one opinion;¹⁰² (3) the difficulties fraught in translating the mental health professional's opinions and findings into a workable court order require lawyers and judges to capably reduce to writing complex issues;¹⁰³ (4) the money that could be used to directly benefit the children in custody disputes might instead be “diverted to lawyers, court fees and expert witnesses”;¹⁰⁴ and finally, (5) even if a judge has “all” of the “right” facts, he or she must ultimately “make an individualized prediction about the future—with which parent will this

101. See Robert A. Burt, *Experts, Custody Disputes, & Legal Fantasies*, 14 PSYCHIATRIC HOSP. 140, 141 (1983) (“The real question is whether any third party, judge or expert can identify truly important differences . . . and whether this identification of differences is possible in the overheated context of a divorce custody dispute.”); see also Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986) (stating that indeterminacy of best interests standard “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”). According to Justice Richard Neely, the effect of a custody evaluation on the parents is likened to “the Heisenberg uncertainty principle—which refers to Werner Heisenberg’s discovery that it is impossible to measure both the speed and the location of an electron simultaneously because the measuring devices themselves affect the speed and location being measured.” RICHARD NEELY, *THE DIVORCE DECISION: THE LEGAL AND HUMAN CONSEQUENCES OF ENDING A MARRIAGE* 67 (1984).

102. See NEELY, *supra* note 101, at 27; see also Sheila Rush Okpaku, *Psychology: Impediment or Aid in Child Custody Cases?*, 29 RUTGERS L. REV. 1117, 1140 (1976) (“Empirical findings directly or indirectly relevant to questions for which judges deciding difficult [custody] cases need answers are virtually nonexistent.”).

103. According to Judith Wallerstein, “[t]he subtleties of psychological thinking and shadings of individual difference that are so critical to the perspective of the behavioral scientist translate poorly into the arenas of court and legislature.” Judith S. Wallerstein, *Children of Divorce: An Overview*, 4 BEHAV. SCI. & L. 105, 117 (1986).

104. Singer & Reynolds, *supra* note 89, at 520. Dr. Margolin estimates that the average cost of a private mental health custody evaluation is between \$3000 and \$4000. Margolin Interview, *supra* note 98. There are less costly alternatives to private mental health evaluations in some jurisdictions. For instance, some family courts offer those services based upon sliding fee scales or fee waivers. *Id.* However, parents may find that they are placed on long waiting lists and that they have little or no choice in the evaluators—who are sometimes student workers. *Id.* Thus, cost and other factors prevent courts and most parents from obtaining what is considered by mental health professionals to be an adequate evaluation. Cochran, *supra* note 49, at 27-28.

child be better off in the years to come?"¹⁰⁵ In this regard Judge Hood recognized the indeterminacy and speculativeness of judicial forecasting in custody decisions. The judge's wisdom would naturally apply to determining custody in a modification setting as well. He stated:

*After attempting to appraise and compare the personalities and capabilities of the two parents, the judge must endeavor to look into the future and decide that the child's best interests will be served if committed to the custody of the father or mother. . . . When the judge makes his decision, he has no assurance that his decision is the right one. He can only hope that he is right. He realizes that another equally able and conscientious judge might have arrived at a different decision on the same evidence.*¹⁰⁶

C. *Indeterminate Standards Encourage Nonprimary Caretaking Parents to Litigate Custody and Noncustodial Parents to Seek Modifications—Creating Harm and a Lack of Finality in the Child's Life*

"Because each parent can often make plausible arguments why a child would be better off with him or her, the [best interests] test creates a greater incentive to litigate than would a more determinate custody standard."¹⁰⁷ Not only do the changed circumstances rule and best interests standard provide parents with an opportunity to prove up their relative value as the custodial parent, they also encourage parents to publicly find fault with each other¹⁰⁸ whenever

105. Singer & Reynolds, *supra* note 89, at 519; *see also* Garska v. McCoy, 278 S.E.2d 357, 361 (W. Va. 1981) ("[I]n the average divorce proceeding intelligent determination of relative degrees of fitness requires a degree of precision of measurement which is not possible given the tools available to judges."); Cochran, *supra* note 49, at 25 ("One of the major sources of disagreement between those who advocate the case-by-case rule and those who oppose it is the question of whether a judge actually can determine what placement will be in the best interests of the child in a significant number of cases.")

106. Coles, 204 A.2d at 332 (emphasis added); *see, e.g., infra* part V.B.

107. Singer & Reynolds, *supra* note 89, at 520.

108. Scott, *supra* note 94, at 622 ("The wide-open inquiry that the [best interests] standard invites often devolves into a destructive contest in which each parent competes to expose the flaws of the other.") On this point Professor Jon Elster argued "that the best interest principle is usually indeterminate when both parents pass the threshold of absolute fitness." Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 21 (1987); *see also* Burt, *supra* note 101, at 141 ("[T]he attempt to determine which parent is the better child custodian depends on such fine-grained distinctions as to make this, in the context of a custody dispute, a choice between two

they may feel there is any benefit to the child—or to themselves¹⁰⁹—to do so. Thus, litigation is invited at any time when there is no other standard¹¹⁰ but that a court must determine what is in the child's best interests by measuring, according to the judge's values, the relative worth to the child of two fit parents.¹¹¹

Additionally, because “[s]ettlement takes place in light of what the parties expect to happen if there is litigation,”¹¹² the indeterminate and speculative nature of custody decisions under current child custody law leaves the parties' expectations up in the air¹¹³—and with it, in some cases, the prospect of settlement.¹¹⁴ In other words, rather than reaching a settlement or maintaining the status quo, a parent—for any reason, at any time—may choose to roll the dice. And what is essential to consider is that a custody battle, at any time in the

essentially indistinguishable alternatives, between Tweedle-Dee and Tweedle-Dum.”).

109. See, e.g., discussion *infra* note 126 (revealing that nonprimary caretaker may dispute custody, or noncustodial parent may bring modification proceeding, in order to shift child support burden).

110. Recall that even in situations where a court must first consider a changed circumstances rule, the analysis still ultimately boils down to whether the proposed change is in the child's best interests. See discussion *supra* part IV.A-B. Once the court begins to consider whether there has been a significant change in circumstances, and then what is in the child's best interests, it has the discretion to determine the weight to be given to the different factors considered under both the rule and the standard. Scott & Derdeyn, *supra* note 70, at 466-67 n.51. Put another way, in determining whether a custody change is in the best interests of a child, a judge can determine the weight to be given—according to his or her values—to the proposed change versus other factors. In the end the judge can weigh, for example, the effects of a custody change on a child in light of the custodial parent's need to place the child in daycare versus the noncustodial parent's ability to provide an in-home mother substitute.

111. See Elster, *supra* note 108, at 24 (“By virtue of its finely tuned character, the [best interests] principle invites protracted litigation.”).

112. Cochran, *supra* note 49, at 18. Settlement negotiations have been described as “bargaining in the shadow of the law.” Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

113. Bahr et al., *supra* note 66, at 248. “Every negotiation is influenced and constrained by the negotiators' perceptions of the legal system.” *Id.* (citing Robert H. Mnookin, *Divorce Bargaining: The Limits of Private Ordering*, 18 U. MICH. J.L. REF. 1015 (1985); see MACCOBY & MNOOKIN, *supra* note 10, at 48).

114. See Cochran, *supra* note 49, at 18; see also Glendon, *supra* note 101, at 1181 (stating that best interests standard's “vagueness provides maximum incentive to those who are inclined to wrangle over custody”). “Under the case-by-case best interests rule it is more difficult for the parents to determine what custody arrangement will be ordered if there is litigation. Parents do not know which of the numerous criteria that a judge might consider will be most influential on the judge.” Cochran, *supra* note 49, at 18 (footnote omitted).

child's life, is the thing furthest from what is in the best interests of a child.¹¹⁵

Inherent—and harmful—in the indeterminacy and speculativeness of current child custody law is that it also promotes a lack of resolution and finality in custody decisions. “As changes occur in the lives of children and parents, one party may [at any time] seek legal modification of [custody].”¹¹⁶ Additionally, one study indicated:

Among the 10 percent of our total sample who filed a motion to modify custody . . . [i]n the 1990-93 period, 83 percent of those who sought a custody modification were granted the request by the judge. Thus, most divorced persons did not return to court to change custody, but those who did were usually successful.¹¹⁷

115. *E.g.*, *Garska v. McCoy*, 278 S.E.2d 357, 361 (W. Va. 1981) (“[I]t is emphatically the case that [full-blown hearings on child custody between two fit parents] do not enhance justice, particularly since custody fights are highly destructive to the emotional health of children.”); *see also* Bahr et al., *supra* note 66, at 262 (“Research has consistently shown that the adjustment of children of divorce is better if children . . . are not caught between or imbued in the conflicts of their parents.”); Cochran, *supra* note 49, at 17-19 (stating that “increased parental conflict is emotionally destructive to children, especially when the conflict occurs after the parents separate” (footnote omitted)); Singer & Reynolds, *supra* note 89, at 520 (stressing that “increased potential for litigation causes substantial psychological harm to children”); Wallerstein, *supra* note 103, at 105 (indicating that significant numbers of children of divorce show lasting difficulties from stress related to marital breakdown and are at risk of suffering subsequent psychological problems); Judith S. Wallerstein, *The Overburdened Child: Some Long-Term Sequelae of Divorce*, 30 SOC. WORK 116 (1985) (recognizing that burden of supporting structure of family during litigation between parents often falls heavily on children). One expert noted the following, which is true of any custody battle:

The adversarial nature of the legal process . . . can be disastrous to families contesting custody. The adversarial viewpoint presumes a zero-sum game mentality according to which one parent “wins,” one parent “loses,” and the child loses a parent in the process. . . .

...
The child who is the subject/object of a custody contest faces crises at the personal, interpersonal and existential levels. The contested child's attention and emotions are diverted from developmentally appropriate interests to the family crisis at hand. Children's needs and concerns are eclipsed by those of distraught adults. Normally devoted, consistent mothers and fathers may regress under the strain of their losses and find themselves exhausted to the point of virtual emotional unavailability.

Richard Wolman & Keith Taylor, *Psychological Effects of Custody Disputes on Children*, 9 BEHAV. SCI. & L. 399, 406 (1991).

116. Bahr et al., *supra* note 66, at 259.

117. *Id.* at 261. Moreover, according to Nancy Polikoff,

[w]hen fathers do want custody, their chances of winning are substantial. . . . [T]he statistics that have been gathered do not support the claims of the “fathers' rights” movement. Lenore J. Weitzman and Ruth B. Dixon found in a study

The likelihood of success when requesting a change in custody, coupled with the lack of a more determinate standard upon which parents may rely and possibly reach settlement without court intervention, could make litigation more likely when a conflict of any nature arises between divorced or divorcing parents. Such litigation, or the bargaining that may take place in anticipation of it, has proven to be uniquely harmful to working mothers.¹¹⁸ This in turn means that even if a custody determination is finally made, the prospect of another change always remains within the realm of possibility—and indeed quite likely in cases where some conflict arises between the parents.¹¹⁹

In recommending that all custody decrees be final, the authors of *Beyond the Best Interests of the Child*¹²⁰ stressed the importance of safeguarding “the child’s need for continuity.”¹²¹ Other commentators agree:

Children who are the objects of custody disputes live in a limbo in which adjustment is not possible because there is no resolution to which to adjust. The custody dispute may drag on for months or years, *and once decided, may be re-*

limited to Los Angeles County that in 1977, 63% of all fathers who requested custody in court papers were successful. A study of 196 Minneapolis cases showed fathers winning 45% of the time. One New York family court judge awarded custody to men as often as to women during a five-year period in the 1970s. Two researchers who surveyed North Carolina judges in 1979 found that fathers prevailed in almost one-half of the cases.

Polikoff, *supra* note 10, at 177 (footnotes omitted). These statistics refer to custody decisions made at an initial proceeding, as opposed to the study discussed above. In either case, it is readily apparent that the incentive to litigate custody at any point by attempting to use the primary caretaker’s working status as a determinative factor is increased under the best interests standard.

118. See *infra* part IV.D.

119. It has been pointed out that “[f]ormal attempts to modify custody are most likely to occur if there is a conflict between the parents.” Bahr et al., *supra* note 66, at 259. Moreover, for both obvious and numerous reasons, “[t]he intensity of conflict is likely to be greater in child custody cases than it is in other types of litigation,” Cochran, *supra* note 49, at 18-19, thereby directly harming the children involved.

120. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 38 (1984).

121. *Id.* at 37. Accordingly, the authors stated that “[t]he lack of finality [in child placement proceedings in divorce], which stems from the court’s retention of jurisdiction over its custody decision, invites challenges by a disappointed party claiming changed circumstances. This . . . concomitant increase in opportunities for appeal are in conflict with the child’s need for continuity.” *Id.*

opened upon petition by either party The threat of loss or unwelcome change is constant¹²²

Moreover, indeterminate standards, manifested in the wide discretion the current custody laws grant judges,¹²³ force primary caretaking or custodial working mothers to live with—and gauge their familial and career decisions upon—“the certainty of uncertainty.”¹²⁴

D. Indeterminate Standards Affect Parents' Pre- and Post-Divorce Financial Bargaining Power and Their Relative Post-Divorce Economic Positions

“[C]ustody is often used as a bargaining tool to obtain more advantageous financial settlements.”¹²⁵ Courts have recognized that this phenomenon operates to the detriment of both the child and the parent who has been primarily responsible for caring for the child. In modification cases a change in custody often means a shift in the child-support obligation.¹²⁶ In other words, when the primary

122. Wolman & Taylor, *supra* note 115, at 407 (emphasis added).

123. Schneider, *supra* note 97, at 229 (stating that “[t]he best-interests-of-the-child standard has long been understood to give judges acres of room to roam”).

124. Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2282 (1991).

125. Polikoff, *supra* note 10, at 182-83.

126. “Most child support guidelines are based on the assumption that one parent will have custody of the children most of the time.” Victoria M. Ho, *Support for Second Families*, FAM. ADVOC., 1993, at 40, 43. Thus, the parent with whom the child lives will be the recipient of the child-support award. *See id.* In a study of joint custody situations, where two-thirds of fathers paid support, “lower child-support awards were . . . related to increasing numbers of overnight visits.” Teitelbaum, *supra* note 1, at 1825. Therefore, with a joint custody decree, child support may also vary in direct relation to where the child spends most of its time. *See id.* “The movement toward gender equality . . . has made it possible for mothers to be ordered to pay alimony and child support.” Bahr et al., *supra* note 66, at 264. While fathers still pay the majority of child support “due to the [relatively] low[er] earning capacity of divorced women,” *id.*, it is “expect[ed] that the number of women [who will be] required to pay child support will increase” if women’s relative earning capacity does likewise over time. *Id.* Clearly, the financial benefits of obtaining—or effecting bargaining by seeking to obtain—custody currently favors fathers. Reviewing the research of Maccoby and Mnookin, cited *supra* note 10, one commentator noted the following:

At divorce, the standard of living for both parties declined. However, the situation of mothers with primary custody was worse than that of fathers. Within six months after separation, employed mothers earned an average salary of \$18,000; their husbands were earning \$34,000, almost twice as much. Almost all of these custodial mothers received child support, averaging \$300 per month. Removing this amount from the father and giving it to the mother, the former’s income fell to \$30,400 and the mother’s rose to \$21,600, reducing the income gap. However, the mother’s adjusted income supported both herself and her child.

caretaking or custodial parent with "deep ties to a child and a strong desire for custody"¹²⁷ is "[f]aced with the uncertainty of child placement,"¹²⁸ under an indeterminate custody standard, that parent—usually the mother¹²⁹—is "likely to sacrifice fair child support, spousal support, and property division for custody."¹³⁰

Typically, the needs of the child and the financial resources of the parties provide the basis for child support.¹³¹ However, when the primary caretaker or custodial parent is not confident that he or she will win in a custody fight or modification proceeding, "there is a great danger that another factor will enter into the settlement decision:"¹³² fear. "The case may be settled out of court, but not until one parent has forfeited valuable rights in order to avoid a

Teitelbaum, *supra* note 1, at 1825 (citations and footnotes omitted); *see also* WEITZMAN, *supra* note 3, at 323 (revealing studies that show that after divorce women tend to experience significant decline while men experience substantial increase in their relative economic living standards).

Consider also how the issue of child support triggered the child custody cases of Jennifer Ireland and Marcia Clark, and how child support was affected in the case of Eileen Adams. *See supra* part II. Tony Award-winning actress Tonya Pinkins shared this personal observation on network television:

Suddenly men are seeing that if they get custody, they get money. My ex was awarded \$25,000 a year in child support, half of that for child care for 50 hours a week. I don't work 50 hours a week, but I'm not allowed to see my children and I have to pay for someone else to take care of them.

Oprah Transcript, *supra* note 6, at 11.

127. Cochran, *supra* note 49, at 16.

128. *Id.*

129. *See supra* note 10.

130. Cochran, *supra* note 49, at 16.

The loss of children is a terrifying specter to concerned and loving parents; however, it is particularly terrifying to the primary caretaker parent who, by virtue of the caretaking function, was closest to the child *before the divorce or other proceedings were initiated*. . . .

Since the parent who is not the primary caretaker is usually in the superior financial position, the subsequent welfare of the child depends to a substantial degree upon the level of support payments which are awarded in the course of a divorce. Our experience instructs us that uncertainty about the outcome of custody disputes leads to the irresistible temptation to trade the custody of the child in return for lower alimony and child support payments.

Garska v. McCoy, 278 S.E.2d 357, 360 (W. Va. 1981) (emphasis added); *see also* Singer & Reynolds, *supra* note 89, at 520 ("Uncertainty about the outcome of custody disputes . . . is particularly damaging to the primary caretaker parent who may be willing to sacrifice everything in order to avoid the terrifying prospect of losing custody through the unpredictable process of litigation.").

131. *See* UNIFORM MARRIAGE AND DIVORCE ACT § 309, 9A U.L.A. 167 (1979); Margaret Campbell Haynes, *Understanding the Guidelines and the Rules*, FAM. ADVOC., 1993, at 14, 14.

132. Cochran, *supra* note 49, at 15.

custody battle."¹³³ The parent who was not the primary caretaker during the marriage or by default, or who was not the primary custodial parent after marriage, can threaten a custody fight—even if that parent does not want custody—"in order to obtain concessions . . . on financial issues."¹³⁴ This result directly harms a child's best interests because "[w]hen such bargaining takes place, child support is not based on the proper factors"¹³⁵—most importantly, the child's needs.¹³⁶

Moreover, "by virtue of being the primary caretaker, such a parent [is] likely to be the economically disadvantaged one."¹³⁷ Thus, not only is "the bargaining process particularly unfair, but . . . the high costs of contested litigation [make it] less accessible to that parent."¹³⁸ The *Garska v. McCoy*¹³⁹ court recognized that "it is likely that the primary caretaker will have less financial security than the nonprimary caretaker and, consequently, will be unable to sustain the expense of custody litigation."¹⁴⁰

Child support awards that are not based upon the child's needs and the relative financial resources of the parties reduce the material standard of living of the custodial parent and the child.¹⁴¹ Because mothers are most often the primary custodial parent,¹⁴² women and children are affected the most. Well documented research attests to the reduced standard of living of mothers and children following divorce.¹⁴³ The reduced standard of living—caused in part by ini-

133. Charlow, *supra* note 100, at 15. "Since trial court judges generally approve consensual agreements on child support, underlying economic data which bear upon the equity of settlements are seldom investigated at the time an order is entered." *Garska*, 278 S.E.2d at 360.

134. Cochran, *supra* note 49, at 15. Lenore Weitzman found that one-third of the mothers in divorce situations reported that their husbands had used the threat of a custody dispute in financial negotiations. WEITZMAN, *supra* note 3, at 310.

135. Cochran, *supra* note 49, at 16-17.

136. *See id.*

137. Polikoff, *supra* note 10, at 183 (discussing *Garska*, 278 S.E.2d at 362).

138. *Id.*; *see also* Singer & Reynolds, *supra* note 89, at 520 ("[I]t is likely that the primary caretaker, who has traded career for childraising, will be less able financially to sustain the expense of a custody fight.").

139. 278 S.E.2d 357 (W. Va. 1981).

140. *Id.* at 362.

141. *See* discussion *supra* notes 125-40 and accompanying text.

142. *See supra* note 10.

143. *E.g.*, Herma Hill Kay, *New Directions in Divorce Reform*, in *DIVORCE REFORM AT THE CROSSROADS* 18-34 (Stephen D. Sugarman & Herma Hill Kay eds., 1990); WEITZMAN, *supra* note 3, at 337-40.

tially unequal bargaining power and resources,¹⁴⁴ in part by womens' overall lower earning capacity,¹⁴⁵ and in part by the fact that the primary caretaker or custodial parent's income will support herself and her children¹⁴⁶—forces only the primary caretaker or custodial parent to face the Catch-22. The mother may presently have little or no choice about working more hours or working at all, yet by doing so she risks losing custody.¹⁴⁷ The Chief Justice of the California Supreme Court commented on the unfair burden that would fall most heavily on women should a "court's ruling . . . assum[e] that there is a negative relation between a woman's lack of wealth or her need or desire to work and the quality of her parenting."¹⁴⁸ Chief Justice Bird concluded: "To force women into the marketplace and then to penalize them for working would be cruel."¹⁴⁹

E. Working Mothers and Fathers Have Been Held to Different Standards When Courts Evaluate Whether They Are Serving Their Child's Best Interests

"Are working mothers held to a higher standard of parenting than working fathers?"¹⁵⁰ Some commentators have observed that this double standard exists in society. "Women are supposed to be home with the children, and when they are not, it is proof they are poor parents. Men are not supposed to be home with their children, and when they show minimal devotion, it is proof they are superior parents."¹⁵¹ But when courts hold working mothers to a different standard than working fathers,¹⁵² the result is harmful to children,

144. See discussion *supra* notes 125-40 and accompanying text.

145. See *supra* note 126; see also Polikoff, *supra* note 10, at 179 n.34 ("Recent government data reveals that there is no job category in which women earn more than or as much as men. The total ratio of female to male earnings is 64.7%. Women sales workers earn 52% of what male sales workers earn. Even in the nursing profession, which is 90.9% female, women earn only 94.7% of what men earn.").

146. See *supra* notes 3, 126.

147. *Burchard v. Garay*, 42 Cal. 3d 531, 544-45, 724 P.2d 486, 495, 229 Cal. Rptr. 800, 809 (1986) (Bird, C.J., concurring) ("If she did not work . . . [s]he would risk losing custody to a father who could provide [more material advantages for the child]. . . . If she did work, she would face the prejudicial view that a working mother is by definition inadequate, dissatisfied with her role, or more concerned with her own needs than with those of her child.").

148. *Id.* at 541-42, 724 P.2d at 493, 229 Cal. Rptr. at 807 (Bird, C.J., concurring).

149. *Id.* at 546, 724 P.2d at 496, 229 Cal. Rptr. at 810 (Bird, C.J., concurring).

150. Abcarian, *supra* note 38, at E1.

151. *Id.* at E1, E4.

152. In *Burchard v. Garay*, Chief Justice Bird cited numerous examples of cases where

devastating to the primary caretaking or custodial mother, and "a custody award [that] is of dubious constitutionality."¹⁵³

"Sharon Prost, chief counsel to U.S. Senator Orrin Hatch of Utah, lost custody of her two sons when a judge found her to be 'devoted to and absorbed by her work and career'"¹⁵⁴ The judge made this decision even though the evidence in the case revealed that "Prost rose at 5:30 a.m. each day to play with the boys, often took them to school and participated in many school activities."¹⁵⁵ "By contrast, the judge praised Prost's husband for being with the boys in the evenings before they went to bed, for being involved in the older boy's school and generally displaying a more nurturing demeanor."¹⁵⁶ A court-appointed psychologist, however, found both parents to be "very genuinely and deeply involved with the children."¹⁵⁷ Finally, the court record revealed that the judge made no mention of the fact that Prost's husband had been unemployed "for better than a year and during that time, the children were mostly in the care of others."¹⁵⁸ In an amicus brief filed with the

mothers' working status was found to be a negative factor in a child custody decision, whereas fathers' working status either was not, or was held to be a factor that favored him as the custodial parent. *Burchard v. Garay*, 42 Cal. 3d 531, 543-46 & nn.5-6, 724 P.2d 486, 494-96 & nn.5-6, 229 Cal. Rptr. 800, 808-09 & nn.5-6 (1986) (Bird, C.J., concurring). In one case "the reviewing court affirmed a custody award to a working father because 'he is in a position to lend more stability and guidance. . . . As the wife had forsaken a career during the marriage to care for the children, the husband's earning capacity was substantially greater than hers.'" *Id.* (Bird, C.J., concurring) (quoting *Porter v. Porter*, 274 N.W.2d 235, 241-42 (N.D. 1979)). Chief Justice Bird observed that "[i]t was this greater earning capacity which apparently was the source of his 'stability and guidance.'" *Id.* (Bird, C.J., concurring) (quoting *Porter*, 274 N.W.2d at 246). The Chief Justice also noted a case in which a court of appeal "dismissed the notion that the father's performance as an 'excellent custodial parent' was impaired by placing the child in nursery school at the minimum age of two years on a nearly full-time basis." *Id.* (Bird, C.J., concurring) (citing *In re Marriage of Levin*, 102 Cal. App. 3d 981, 983 n.1, 162 Cal. Rptr. 757, 758 n.1 (1980)). In yet another case, "[t]he reviewing court made no negative comments about the child's placement in day care, but rather emphasized that the father often prepared the child's breakfast and dinner and picked her up from the day care center himself." *Id.* (Bird, C.J., concurring) (citing *In re Marriage of Estelle*, 592 S.W.2d 277 (Mo. Ct. App. 1979)). Chief Justice Bird remarked, "It is difficult to imagine a mother's performance of these chores even attracting notice, much less commendable comment." *Id.* (Bird, C.J., concurring).

153. *Id.* at 543, 724 P.2d at 494, 229 Cal. Rptr. at 808 (Bird, C.J., concurring).

154. Betty Holcomb, *Working Mothers on Trial*, WORKING MOTHER, Jan. 1995, at 29, 29 (quoting Judge Harriet Taylor).

155. *Id.* at 30.

156. *Id.*

157. *Id.*

158. *Id.*

court, the Women's Legal Defense Fund noted that the father's "decision not to care for his own children received no criticism from the court Had the situation been reversed, and Ms. Prost been the one home alone and unemployed, it is unlikely that the court would have found it acceptable."¹⁵⁹

Nancy Polikoff opined that when courts place a priority on the economic circumstances of the parties in determining which parent can provide for the child's material needs, the obvious result "almost preclude[s] mothers from obtaining custody of their children."¹⁶⁰ In *Dempsey v. Dempsey*,¹⁶¹ the trial court awarded custody of three children to their working father because he was in the better financial position to provide for them.¹⁶² "The facts revealed not only that the mother had been the children's primary caretaker, but that the youngest child needed home therapy for epilepsy which only the mother knew how to give."¹⁶³ "She had also done all the housework, chauffeuring, and parent-teacher activities during the marriage. As a result, her earning ability was low."¹⁶⁴ "The trial court judge, in reserving a ruling on the mother's obligation to pay child support, suggested that she might fulfill this obligation by serving as the children's regular babysitter!"¹⁶⁵

159. *Id.*

160. Polikoff, *supra* note 10, at 178.

Attaching such importance to economic capacity is not only an obvious burden upon most mothers seeking custody, but it is also a departure from the customary concept that, first, custody is decided according to the best interests of the child and, then, to equalize the financial burden, child support payments are ordered.

Id. at 179; *see also Burchard*, 42 Cal. 3d at 539, 724 P.2d at 492, 229 Cal. Rptr. at 805-06 ("If in fact the custodial parent's income is insufficient to provide proper care for the child, the remedy is to award child support, not to take away custody."). *But see Porter v. Porter*, 274 N.W.2d 235 (N.D. 1979) (awarding custody to working father based upon his ability to provide economic stability as opposed to primary caretaking mother with substantially less earning power).

161. 292 N.W.2d 549 (Mich. Ct. App. 1980).

162. *Id.* at 553-54. It should be noted that the record revealed that "the mother's impetus for the divorce was the father's lack of interest in family life. The father . . . frequently missed dinner with the family . . . and spent his leisure time bowling and on snowmobile trips without the family." Polikoff, *supra* note 10, at 178 (discussing *Dempsey*).

163. Polikoff, *supra* note 10, at 178.

164. *Burchard*, 42 Cal. 3d at 544 n.5, 724 P.2d at 495 n.5, 229 Cal. Rptr. at 809 n.5 (Bird, C.J., concurring) (discussing *Dempsey*).

165. Polikoff, *supra* note 10, at 178; *see Burchard*, 42 Cal. 3d at 544 n.5, 724 P.2d at 495 n.5, 229 Cal. Rptr. at 809 n.5 (Bird, C.J., concurring). Ms. Polikoff commended the insightful reasoning of the *Dempsey* appellate court in that it wanted to reverse the trial

Ms. Polikoff's observation that "[t]he flip side of penalizing working mothers with limited financial resources due to sporadic or part-time employment is penalizing mothers who work full-time for not being sufficiently available to their children"¹⁶⁶ exposes the double-edged sword working mothers face. For example, the *Gulyas v. Gulyas*¹⁶⁷ decision demonstrates, once again, the differing standards to which courts have held working mothers and fathers in custody disputes.¹⁶⁸

In *Gulyas* the father worked a standard forty-hour week; the mother, a regional manager for H & R Block, worked forty to fifty hours per week during tax season and ten to thirty hours per week at other times.¹⁶⁹ The mother was able to leave her work during the day if necessary; she was home when her daughter left for school and picked her up at a neighbor's home one and one-half hours after school ended.¹⁷⁰ The father, a full-time pipe coverer at Ford Motor Company, was unable to leave work during the day and was already at work when his daughter left for school.¹⁷¹ At trial "there was no evidence that the father spent more time with his daughter than the mother did. The record offered no factual support for an implicit finding that the mother's career, and not the father's, interfered with [caring for the child]."¹⁷² The trial judge noted that the mother, with whom the child had resided for over one and one-half years since the marital separation, was an "ambitious career woman."¹⁷³ "Research into the lower court record showed that in a five page opinion, the trial judge mentioned the mother's working eleven times."¹⁷⁴ And, "[i]n a revealing comment, this judge stated that the marriage

court. Polikoff, *supra* note 10, at 178. However, rather than reversing and awarding custody to the mother, the appellate court remanded the case to the trial judge for a new determination. *Id.*

166. Polikoff, *supra* note 10, at 179.

167. 254 N.W.2d 818 (Mich. Ct. App. 1977).

168. *Burchard*, 42 Cal. 3d at 545 n.6, 724 P.2d at 496 n.6, 229 Cal. Rptr. at 809-10 n.6 (Bird, C.J., concurring) (stating that *Gulyas* is another example of double standard where working "mother—and not the father—[is] penalized for working out of the home"); Polikoff, *supra* note 10, at 180-81.

169. *Burchard*, 42 Cal. 3d at 545 n.6, 724 P.2d at 496 n.6, 229 Cal. Rptr. at 809-10 n.6 (Bird, C.J., concurring); Polikoff, *supra* note 10, at 180.

170. *Burchard*, 42 Cal. 3d at 545 n.6, 724 P.2d at 496 n.6, 229 Cal. Rptr. at 810 n.6 (Bird, C.J., concurring); Polikoff, *supra* note 10, at 180.

171. Polikoff, *supra* note 10, at 180.

172. *Id.*

173. *Id.*

174. *Id.*

was 'normal until the wife felt compelled to go to work to help support the family.'"¹⁷⁵

On appeal, the dissenting judge in *Gulyas* observed "that the mother's offer to quit her job would disadvantage her in her ability to provide for the material needs of her daughter, thus placing her in a 'Catch-22' situation."¹⁷⁶

V. RECOMMENDATION

This Comment recommends that when two otherwise fit parents cannot reach or maintain an agreement as to the custody disposition of their children, the court should apply a presumption favoring—as much as possible—previously established child-care patterns.¹⁷⁷ It is essential to the underlying purposes of the presumption that it be rebutted only by an objective standard of fitness. Anything less would thwart the desired goal of alleviating the indeterminacy in custody decisions by maintaining the same wide-open, value-laden inquiry currently in place.¹⁷⁸ A deficiency in care that results in neglect would of course be a proper consideration for a court. But if the primary caretaking or custodial parent began working or went back to school, then absent actual neglect it would not be in the best interests of the children to allow a wide-open inquiry into "who is the better parent now," further disrupting the children's lives.¹⁷⁹

175. *Id.* (emphasis added) (quoting trial judge).

176. *Id.*

177. This standard is very similar to the primary-caretaker standard found, for example, in *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981). A similar approach was taken in *Burchard v. Garay*, 42 Cal. 3d 531, 724 P.2d 486, 229 Cal. Rptr. 800 (1986). In *Burchard*, the California Supreme Court enunciated, inter alia, a preference for continuity, stability, and preservation of patterns of care and emotional bonds in custody arrangements. *Id.* at 535, 724 P.2d at 488, 229 Cal. Rptr. at 802; see also *In re Carney*, 24 Cal. 3d 725, 731 n.4, 598 P.2d 36, 41 n.4, 157 Cal. Rptr. 383, 388 n.4 (1979) (stating that established mode of custody should be preserved unless significant change in circumstances indicates that different arrangement would be best, "regardless of how custody was originally decided upon"). For a discussion of another "rose by any other name" standard or presumption valuing past patterns of care, see the argument for the "Approximation Approach" advanced by Elizabeth S. Scott in Scott, *supra* note 94.

178. See *supra* part IV.A-C. "[I]n the interest of removing the issue of child custody from the type of acrimonious and counter-productive litigation which a procedure inviting exhaustive evidence will inevitably create" the court adopted "a presumption in favor of the primary caretaker parent, if he or she meets the *minimum, objective standard for being a fit parent* . . ." *Garska*, 278 S.E.2d at 362 (emphasis added).

179. See discussion *infra* part V.A, C.

While the California Supreme Court did not define “an actual deficiency in care,” it absolutely created a bright-line rule as to what is not an actual deficiency.¹⁸⁰ The primary caretaker’s working, studying, and relying on daycare and babysitting—even when the other parent can provide an in-home mother substitute—are insufficient reasons to remove custody of the child from the primary caretaker.¹⁸¹ Thus, to ensure certainty in the outcome of custody disputes for the numerous reasons outlined in this Comment, the primary caretaker’s work, school, or reliance on day care would not be a proper consideration for courts absent a showing of neglect.¹⁸²

In addition to requiring a showing of unfitness, to warrant a disruption in the child’s life, courts applying a presumption favoring previously existing patterns of care must take care not to allow proceedings to become an opportunity for the wide-open, value-laden choice between two fit parents on another level. The argument exists that it is all but impossible to recreate “previously established patterns of care” in any postdissolution situation, much less when the primary caretaker goes back to work or school. That issue is squarely addressed in this Comment.¹⁸³ However, there is also the possibility that circumstances in a child’s life may change on a permanent and substantial basis. In that situation, court intervention may be warranted. For example, a child would be significantly deprived of contact with the noncustodial parent if the primary caretaker or custodial parent needed or wanted to make a residential move. Or the situation could arise in which the primary caretaking or custodial parent were unable to provide care for extended and regular periods of time. In those cases, the presumption is defeated because previously existing patterns of care are not replicated at all. Courts must be careful to distinguish among these cases as discussed in this Comment.¹⁸⁴ Moreover, the proper inquiry then is to begin not by weighing “who is the better parent now,” but by asking how the child is doing in the current situation.¹⁸⁵

Naturally, if circumstances changed on a substantial *and* permanent basis, *and* parents could not agree on how to address those

180. *Burchard*, 42 Cal. 3d at 540, 724 P.2d at 492, 229 Cal. Rptr. at 806; *see infra* notes 232-35 and accompanying text.

181. *Burchard*, 42 Cal. 3d at 540, 724 P.2d at 492, 229 Cal. Rptr. at 806.

182. *See supra* part IV; *infra* part V.

183. *See infra* part V.A.

184. *See supra* notes 98, 100; *infra* note 227.

185. *See infra* note 227.

changes in terms of child custody, court intervention might be warranted. Examples of permanent changes might include: (1) The primary caretaker's job requires a residential move such that the child's regular contact with the other parent is deprived; (2) the primary caretaker takes an employment position in which he or she must make *frequent and lengthy* trips away from home such that he or she cannot provide actual care for *extended, regular periods of time*; or (3) the primary custodial parent decides to put the children in boarding school. Certainly, one could theorize over definitions—how often is *frequent* or *regular*?, how long is *lengthy* or *extended*?—until the cows come home. Realistically, however, *significant and permanent* disruptions to previously existing child-care patterns are readily distinguishable from situations in which the primary caretaker or custodial parent must begin working but still comes home each night,¹⁸⁶ or experiences a *temporary* situation that disrupts the child's routine, such as an illness or a uniquely taxing job assignment like Marcia Clark's role in the O.J. Simpson trial. Moreover, it has been argued that “[w]hatever harm a mechanical application of the rule [favoring continuity and stability] poses in unusual circumstances . . . can readily be prevented by permitting a pragmatic exception. The rule therefore should not be discarded; it should simply be modified if and when the need arises.”¹⁸⁷

Attorney Stacy D. Phillips has practiced Family Law in Los Angeles, California for approximately eleven years.¹⁸⁸ She suggests, in some situations, that parents have a mutual “first right of refusal” plan allowing one parent to fill in as the child's caretaker should the other parent be unavailable.¹⁸⁹ In situations involving a temporary disruption—for example, when the primary custodial parent has a temporary job assignment, is taking a class two nights a week, or becomes ill, a first right of refusal plan would allow the nonprimary caretaking parent to fill in as the child's caretaker during those hours that the primary caretaking parent is unavailable. This Author would add to that suggestion that if the nonprimary caretaker were to rely in turn on other child care arrangements, the child would not enjoy

186. See *infra* part V.A.

187. *Burchard*, 42 Cal. 3d at 551, 724 P.2d at 500, 229 Cal. Rptr. at 814 (Mosk, J., concurring).

188. Interview with Stacy D. Phillips, Family Law Attorney, in Los Angeles, Cal. (Mar. 17, 1995) [hereinafter Phillips Interview].

189. *Id.*

the benefit of being with one of its parents—and the whole point to the parent's first right of refusal concept would be defeated. In other words, the first right of refusal opportunity would attach only to the child's parent personally. Moreover, Ms. Phillips added words of wisdom about the first right of refusal proposition that one of her clients, a divorced father with primary caretaking responsibility for his child, shared with her: "Arranging for the nonprimary caretaker to pinch hit when child care is needed must be subject to practicality, workability, and the convenience of all parties."¹⁹⁰ Thus, if the two parents did not live close together, or their relationship were such that transitioning the child from household to household would be disruptive in itself, such an arrangement might be impractical or unworkable.¹⁹¹

An important distinction to bear in mind is that when a change in the primary caretaker's situation is permanent, it still might not properly be deemed significant enough to further alter child-care patterns and modes of living. To reason that certain permanent changes necessitate changing child care routines even further flies in the face of common sense¹⁹² and subverts the reasoning of the California Supreme Court.¹⁹³

In the divorce context, the presumption in favor of previously existing child-care patterns is a healthy step away from a judge's highly discretionary pick between two parents¹⁹⁴ or splitting custody

190. *Id.*

191. *Id.* Another client of Ms. Phillips' told her that he did not care for the first right of refusal plan. He felt that it would be less disruptive for the children when he was away if they knew that they could remain at home, in their own environment, whether or not he was there. *Id.*

192. *See infra* part V.A.

193. *See Burchard*, 42 Cal. 3d at 540-41, 724 P.2d at 492-93, 229 Cal. Rptr. at 806-07 (stating that altering bonds because primary caretaking parent begins working or studying is unreasonable absent neglect); *In re Carney*, 24 Cal. 3d 725, 740, 598 P.2d 36, 44, 157 Cal. Rptr. 383, 391 (1979) (noting that altering established modes of living because primary caretaking parent became permanently disabled is unreasonable).

194. *See, e.g., supra* part IV.A-B.

By contrast, "[a] custody decision rule that seeks to approximate past patterns of care will demand a narrower, more quantitative inquiry than the best interests standard requires. In most cases, only factual evidence relating to parental participation in the child's life during the marriage will be relevant under the framework." Scott, *supra* note 94, at 637. Thus, rather than relying on expert opinion chock full of future speculation and judicial forecasting, the presumption in favor of previously established child-care patterns employs a retrospective, forensic review of parents' interactions and responsibilities. Put another way, it looks to the past caretaking functions performed by each of the parents. It focuses on "the extent to which the parent engaged in tasks that contributed to the

of the child.¹⁹⁵ If both parents have been active caretakers, the child should not be made to suffer a disruption from the previous child-care pattern by being denied equal access to each parent. On the other hand, if one parent has had more involvement in caring for the child, the bonds that have thereby been established should be valued and preserved.¹⁹⁶ And in those cases in which there is clearly a primary caretaker, the role of the nonprimary caretaking parent should of course be recognized.¹⁹⁷

In a modification proceeding, when one parent has been the custodial parent for some time, established patterns of care are more readily apparent. Just as in the initial adjudicated decision upon

child's basic care and development, and the parent's participation in decisions relevant to the child." *Id.* at 637-38. Thus, this evidence does not provide a basis for choosing one parent over the other because of who is "best," but rather uses as a basis the parents' prior roles when allocating future time between each parent and the child. *Id.* at 638. As a result the "incentive to exhume every vestige of unsavory evidence," *id.*, about the other spouse's character is reduced—to the benefit of everyone, most importantly the child. See *supra* part IV.C.

195. Absent parental discord, and assuming that factors such as geographics are in place, truly sharing joint physical custody of the child may actually be best. See, e.g., Scott & Derdeyn, *supra* note 70; Singer & Reynolds, *supra* note 89, at 518 (stating that "sharing, unaccompanied by strife" may benefit child); *infra* notes 211, 225, 218. This Comment, however, discusses only those situations in which parents cannot reach or maintain an agreement as to the custody disposition of their children. Professors Singer and Reynolds point out that parents who are caring, motivated, and of sufficient wealth to manage truly sharing custody of their children do not need a judicial order to achieve joint custody. Singer & Reynolds, *supra* note 89, at 518. By definition when parents no longer agree, a joint award is probably unworkable, and it thereby becomes more important to have a standard that establishes a degree of certainty in the outcome of custody proceedings. See, e.g., *id.* at 518-23. Moreover, even when there is an absence of dispute, joint physical custody arrangements do not seem to be favored by parents. See *infra* notes 213-19 and accompanying text. For a discussion of the value versus the viability of joint custody, see Singer & Reynolds, *supra* note 89, and Scott, *supra* note 94; *infra* note 211. Additionally, to the extent that joint custody and a co-equal relationship benefit children, the presumption in favor of previously existing patterns of care encourages co-parenting throughout a child's life. See *infra* part VI. And, for aeons feminists have pointed out the drawbacks of women bearing primary responsibility for childcare. See, e.g., Martha Albertson Fineman, *The Neutered Mother*, 46 U. MIAMI L. REV. 653 (1992).

196. See, e.g., *infra* note 231 and accompanying text.

197. In the case of an initial order upon dissolution, nothing about the presumption favoring previously established patterns of care suggests that the child should be denied reasonable, even liberal, visitation with the nonprimary caretaking parent. Although the idea behind the presumption is to maintain continuity and stability in the child's routine, a visitation plan can be fashioned to emulate those routines where feasible and may even ensure that the child has more consistent contact with the nonprimary caretaker. To be sure, the nonprimary caretaker will become exclusively responsible for the child during the time the child is in his or her care.

dissolution or after a de facto arrangement, a presumption in favor of previously existing child-care patterns values the stability, continuity, and routine in the child's life.¹⁹⁸

A. *The Presumption Preserves Continuity and Stability
in the Child's Life*

Many factors *must* change due to the very nature of the dissolution itself. Changes may include the following: (1) One parent will move out of the home; (2) the parties and joint income will be divided to support two households, possibly requiring one of the parties to begin working, or one or both parties to begin working longer hours;¹⁹⁹ (3) parents will no longer split the tasks that they had previously divided between themselves; and (4) each parent will now bear 100% of the responsibility for child care while the child is in that parent's physical custody.

Similarly, in the context of a modification proceeding, changes *will* occur throughout the child's life and a number of events may constitute such a change. Those changes or events may include the following: (1) Either parent may remarry²⁰⁰ or have another child; (2) either parent may begin working outside the home, change jobs, start working fewer or increased hours, or attend school;²⁰¹ (3) either parent may become ill; (4) the child will grow older; and (5) the child may develop special educational or medical needs. *Perfect*

198. "[I]t is *desirable* that there be an end of litigation and *undesirable* to change the child's established mode of living.'" *Carney*, 24 Cal. 3d at 730-31, 598 P.2d at 38, 157 Cal. Rptr. at 385 (emphasis added) (quoting *Connolly v. Connolly*, 214 Cal. App. 2d 433, 436, 29 Cal. Rptr. 616, 618 (1963)).

199. Of course, if the primary caretaker had not previously worked outside the home or must now work full time, the physical hours spent with the children will be decreased. This is a change. But it is illogical to assume that changing fundamental roles even further would be better. See discussion *supra* notes 202-05 and accompanying text. Moreover, using employment as a factor will in practice discriminate against women. *Burchard v. Garay*, 42 Cal. 3d 531, 540 n.10, 724 P.2d 486, 492 n.10, 229 Cal. Rptr. 800, 806 n.10 (1986); see *supra* part IV.E; *infra* part V.C.

200. It is irrelevant with regard to the continuity and maintenance of the child's relationship and bonds with the primary caretaking or custodial parent, and would result in a discriminatory effect on women, to consider as a factor in a custody dispute whether the nonprimary custodial parent remarries or can provide an in-home mother substitute when the primary caretaking parent works outside the home. See *infra* part V.D. Moreover, such a consideration is misleading. It does not emphasize the nonprimary caretaking parent's role or relationship with the child, since a change in custody would be based upon a third party's ability to provide care—not the parent's. See *infra* notes 242-46 and accompanying text.

201. See *infra* part V.C.

replication of the previously existing pattern of child care would be impossible. However, a custody award that patterns, *as closely as possible*, parents' past involvement with the child is to be desired over the indeterminate and speculative standards upon which the current child custody laws rely.

Given that the child in a postdissolution environment *will* be subject to numerous changes and that thereafter a child *will* continue to undergo a myriad of changes throughout its life—including a probable decrease in the quantity of time spent with the primary caretaker²⁰²—common sense dictates that patterning custody as closely as possible to previous modes of child care attempts to maintain as much regularity and routine *as possible* in the child's life. According to the California Supreme Court, “[s]tability, continuity, and a loving relationship are the most important criteria for determining the best interests of the child. Implicit in this premise is the recognition that *existing emotional bonds between parent and child are the first consideration* in any best-interests determination.”²⁰³ The proper emphasis must be on the qualitative relationship that has developed between the primary caretaking or custodial parent and the child—not on the breakdown in hours each parent can spend with the child later on.²⁰⁴ The California Supreme Court placed paramount

202. The decrease in the *quantity* of time the primary caretaker spends with the child is an event that will occur naturally over time as well. For instance, the child will eventually go to kindergarten in the mornings or afternoons. Thereafter, school hours usually increase in relation to grade level. Thus, the child's needs will undergo a constant metamorphosis throughout its life. Considering the amount of time the parent who had been previously responsible for primary caretaking or custody of the child will be able to spend in the future disregards, among other things, the emotional bonds established in favor of other indeterminate, discretionary factors. See *infra* notes 204, 231 and accompanying text; *infra* note 218 and accompanying text.

203. *Burchard*, 42 Cal. 3d at 542, 724 P.2d at 494, 229 Cal. Rptr. at 808 (Bird, C.J., concurring) (emphasis added) (citation omitted).

204. Practically speaking, a standard that allows courts to consider the quantity of time the primary caretaking or custodial parent can spend with the child absent neglect leads parties to engage in absurd inquiries, parental spying, and further disruption of children's lives. For example, Jeff Jones appeared on *The Oprah Winfrey Show* claiming that his ex-wife Eleanore Meals put her career before their children. *Oprah* Transcript, *supra* note 6, at 5. Jeff was seeking a change in custody although Eleanore had primary responsibility during their marriage and primary custody of their two daughters for the four years since. *Id.* at 5-7. Although Jeff acknowledged that the children were well adjusted and doing fine under the present arrangement, he wanted custody because Eleanore worked later than he and because his new stay-at-home wife could care for their children. *Id.* at 6-7. Jeff admitted that he got home from work most nights around 5:15 p.m. *Id.* at 8. Eleanore said that she got home most nights by 6:00 p.m. *Id.* When asked “Why are you fighting over an hour?” Jeff replied, “She—she—she can tell you that she gets home at 6:00. She

importance on the emotional relationship between a parent and child,²⁰⁵ a relationship which the court acknowledged would be devalued and used discriminatorily if a parent's work status were treated as a detriment to that relationship.²⁰⁶ Moreover, a *further* restructuring of family roles ordered upon a dissolution or a change in circumstances might well *increase the instability* in the child's life over and above the disruption already brought on by the dissolution or changed circumstances themselves.

Finally, allowing a judge to weigh among the various options he or she thinks are the important factors in terms of the care and custody of a child presumes that by simply deciding that it ought to be so, a court could in reality successfully alter previously entrenched family patterns.²⁰⁷ Moreover, by not looking to previously established, internally defined patterns of child care for guidance, current child custody laws do not address "the costly task of future monitoring and enforcement necessary if the parties do not readily adjust to their externally defined roles."²⁰⁸

can say it here and there's no way to verify it otherwise *unless you've been—you've been tracking it like I have . . .*" *Id.* at 21 (emphasis added). Thus, allowing time inquiries to become a factor in a balance between two fit parents can lead to such behavior as the nonprimary caretaking parent documenting the other's schedule, the constant possibility of disruption, and the primary caretaking parent being forced to base career decisions on what the person keeping tabs might think and do.

Pure time considerations are not distinguished in the following factors enumerated in *Garska* as comprising, at least in part, primary parenting:

- (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (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 v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981). The *Burchard* and *Carney* courts placed particular emphasis on the importance of the existing emotional bonds between the parent and child. See *Burchard*, 42 Cal. 3d at 541, 724 P.2d at 493, 229 Cal. Rptr. at 806-07; *In re Carney*, 24 Cal. 3d 725, 739, 598 P.2d 36, 44, 157 Cal. Rptr. 383, 391 (1979).

205. *Burchard*, 42 Cal. 3d at 541, 724 P.2d at 493, 229 Cal. Rptr. at 806-07; *Carney*, 24 Cal. 3d at 739, 598 P.2d at 44, 157 Cal. Rptr. at 391.

206. *Burchard*, 42 Cal. 3d at 539-41 & n.10, 724 P.2d at 492-93 & n.10, 229 Cal. Rptr. at 805-07 & n.10; see *supra* part IV.E.; *infra* part V.C.

207. See *supra* notes 202-06 and accompanying text.

208. Scott, *supra* note 94, at 670.

B. The Presumption Favors Parents' True Choices—Not Judges' Opinions

Absent the parents' present ability to agree²⁰⁹ to new or different arrangements concerning the custody and care of their children—either in a dissolution or modification context—the presumption favoring previously established child-care patterns is more likely to reflect both parents' true choices, as manifested by their past behaviors regarding child care and lifestyle choices.²¹⁰ In other words the presumption looks to what each parent in fact did with regard to child care, rather than what each parent now says that he or she will do in the future. While this is not to say that the parents' child-care choices during marriage were necessarily the “best,”²¹¹ society has never reached a consensus on what are the best methods of child care. The presumption in favor of established child-care patterns properly leaves those individual choices to parents by attempting to replicate their choices at the time they were making them jointly. Parents in intact families have broad decision-making leeway regarding their children.²¹² This presumption is the closest way to preserve individual parents' constitutionally recognized right to control their children in separated families.

209. If the parties are able to agree, as they do in 90% of the cases, Mnookin & Kornhauser, *supra* note 112, at 951 & n.3, there is no need for the presumption. Moreover, in the 90% of the cases where settlement as to custody is reached, the bargaining process would result in fairer outcomes for the primary caretaker and child under the more determinate presumption recommended here. See discussion *supra* part IV.D.

210. “[P]rivate ordering by divorcing couples is preferable to judicial ordering” *Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981).

211. Dr. Margolin stated that a primary caretaker presumption is a bizarre notion because it presumes that it is in the best interests of the child to have one parent. Margolin Interview, *supra* note 98. In the context where both parents can agree and cooperate in a joint-custody effort, this point has oodles of merit. On a common-sense level as well as from an emotional perspective, it is difficult, if not impossible, to argue that a relationship allowing a child as much contact as possible with both parents is not best. Moreover, scholarship supporting that point abounds. See, e.g., Singer & Reynolds, *supra* notes 89, 181. However, scholarship also abounds with regard to how a joint physical custody award is rarely workable when parents cannot reach agreements on child rearing, in high conflict situations, or when there are imbalances of power or financial inequities. See, e.g., The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 200-01 (1995); Singer & Reynolds, *supra* note 89.

212. See *supra* note 71 and accompanying text.

In the modification proceeding context, however, it may be fair to say that preexisting court-ordered arrangements, if not ordered by the court based upon previously existing child-care patterns, do not *necessarily* preserve parents' child-care choices. However, child-care patterns will have been established nonetheless by the time the modification is sought. It is also important to realize that the desire to change the custody plan usually occurs when *one* parent wants the change and the other simply desires to maintain the status quo. Moreover, it is also interesting to note that the majority of cases settle²¹³ and that, also in the majority of cases, mothers have primary custody of their children.²¹⁴ Furthermore, in a study of 1000 California families in which joint custody was ordered, approximately seventy-five percent of parents had joint legal custody, while approximately nineteen percent had joint physical custody.²¹⁵ According to Professor Elizabeth S. Scott, these statistics "suggest that parents resist radically altering patterns of care and authority established in the intact family."²¹⁶ Additionally, the California study revealed a significant "drift" toward de facto mother custody in cases where the father was awarded primary physical custody²¹⁷ and in joint physical custody cases.²¹⁸ These figures suggest that even when the preexisting court order was entered, the child-care patterns were based on, or tended to work their way back to, the primary caretaker having physical custody of the children.²¹⁹

213. See *supra* note 209.

214. See *supra* note 10.

215. Scott, *supra* note 94, at 635 n.66; see also Polikoff, *supra* note 10, at 183 ("Under mandatory joint custody provisions, mothers usually continue to do primary or almost sole parenting, with less control over their children and their own lives, and less child support."); *id.* at 183 n.64 ("One Los Angeles trial court judge suggested that 95% of all joint custody awards involved joint *legal* but not joint *physical* custody."). "Although joint childrearing by mothers and fathers should be encouraged, joint presumptions are not carefully tailored to do this." *Id.* at 183.

216. Scott, *supra* note 94, at 635.

217. *Id.* at 635 n.67. A drift of nearly 23% was found in these cases. *Id.*

218. *Id.* A drift of nearly 40% was found in these cases. *Id.* Moreover, Scott argues that "[b]ecause the drift is systematically in the direction of mother custody, it probably cannot be explained simply as resulting from a difficulty in maintaining joint custody arrangements." *Id.* at 635 n.68.

219. Stacy Phillips said that when she is advising a primary caretaking parent with regard to a potential custody battle in the general case—naturally her advice is fine-tuned to the individual case—she sometimes has the following suggestion: Rather than engage with the nonprimary caretaker in a costly and emotionally destructive fight, thereby harming the children at issue, it might be better to let the nonprimary caretaking parent *begin* to have a more active role vis-a-vis a joint arrangement. Phillips Interview, *supra*

Arguably, if we are really trying to give parents what they want, should we not pay heed to the preferences they state at the initiation of the custody suit or modification proceeding? It could be said that “[p]arents are directly expressing their preferences when they pursue their custody claims [and] this would seem to be a more accurate measure of the value they place on custody than are inferential claims about ‘real’ preferences.”²²⁰ However, according to Professor Scott, the fact that the parents are each seeking custody “might tell . . . less about [their] preference[s] or [their] probable performance[s] as . . . caretaker[s] than does [their] past relationship with the child.”²²¹ Potential motivations for the nonprimary caretaker to seek custody may include the following: (1) strategic reasons such as affecting economic bargaining²²² or effecting economic gain through a shift in the support obligation;²²³ (2) spiteful reasons borne from the emotional context in which the custody proceeding transpires; (3) simply wanting proportionately more time than previously enjoyed with the child; and (4) valuing the idea of “custody” more than the remaining alternative of “visitation.”²²⁴ In short Professor Scott maintains that “[m]ore important than the desires parents verbalize . . . are the deeper preferences revealed by their *behavior* before divorce and their adaptation afterwards.”²²⁵ Thus, a presumption favoring previously established patterns of child care provides the “best available

note 188. According to Ms. Phillips one of two things would then occur. *Id.* The first is that the child would begin to benefit by the increased role of the nonprimary caretaker, giving the child two active parents where there once had been one. *Id.* The second possibility is that the nonprimary caretaker would eventually gravitate back to his or her previous role of lesser involvement, and the primary caretaker would have custody—but without the fight. *Id.*; see Scott, *supra* note 94, at 635 & nn.66-68 (suggesting that drift toward de facto mother custody is common after joint award or sole award to father). For this to be effective, it assumes that the parents could reach a level of cooperation. While it would not preserve the continuity and stability of the previously existing patterns of child care, that idea provides a solution *absent* the two parents’ ability to agree. In the case suggested by Ms. Phillips, both parents would necessarily agree—and parents in agreement as to how best to share their children in a postdissolution context could only constitute the best of all worlds for everyone involved.

220. Scott, *supra* note 94, at 636.

221. *Id.*

222. See *supra* part IV.D.

223. See *supra* note 126.

224. Scott, *supra* note 94, at 636 & n.70.

225. *Id.* at 637 (emphasis added).

guide for predicting . . . which arrangement will be most stable [a]nd also in the best interests of the child."²²⁶

C. Parental Employment is Not a Relevant Consideration Under the Presumption Favoring Previously Established Child-Care Patterns

Under the presumption favoring previously established child-care patterns, parental employment is an irrelevant consideration.²²⁷ While newly obtained or increased employment creates a "change" in the quantity of hours the primary caretaker or custodial parent can spend physically caring for the child, basing a custody determination on such a change is inappropriate. It assumes that the bonds between

226. *Id.*

[F]actors about which conclusions can be made for the future [are] most intelligently [based] upon a course of conduct in the past. At least with regard to the primary caretaker parent there is a track record to which a court can look and where that parent is fit he or she should be awarded continued custody.

Garska, 278 S.E.2d at 364.

227. See *Burchard v. Garay*, 42 Cal. 3d 531, 540, 724 P.2d 486, 492, 229 Cal. Rptr. 800, 806 (1986); Polikoff, *supra* note 10, at 183.

The usefulness in dual-career marriages of a presumption that favors previously existing patterns of care, like the primary caretaker presumption, has been questioned. See, e.g., Elster, *supra* note 108, at 37-38. However, such questioning ignores that "[i]n most families . . . including those in which both parents are employed, mothers function as primary and fathers as secondary caregivers." Scott, *supra* note 94, at 661-62; see also *supra* note 229 (citing numerous authorities stating that research indicates that working mothers perform primary caretaking of children more so than fathers). It also ignores many of the day-to-day decision making, planning, scheduling, and guidance functions that courts favoring presumptions in favor of primary caretaking or continuity and stability examine. See *supra* note 190.

Cases where parental employment results in actual neglect or harm to the child are distinguished and beyond the scope of this Comment. See *supra* part V.A. While, again, one could argue until the cows come home about what number of working hours or types of schedules *do* result in actual neglect, the California Supreme Court has clearly stated that a primary caretaker's employment and educational pursuits—even in light of the nonprimary caretaker's ability to provide an in-home mother substitute—do *not* constitute neglect. *Burchard*, 42 Cal. 3d at 540, 724 P.2d at 492, 229 Cal. Rptr. at 806.

And even if the primary caretaking or custodial parent's employment were considered, which this Comment argues is improper, the proper initial inquiry would be "How are the kids doing under the current arrangement?" See *supra* note 98; see also *Witmayer v. Witmayer*, 467 A.2d 371 (Pa. 1983) (holding that evidence that primary caretaker who worked was also occasionally absent from home in evenings without evidence of deleterious effect on child does not support reason to change custody); *Oprah Transcript*, *supra* note 6, at 22 ("I'm just trying to understand, if the kids are really doing OK, then what is the point? . . . What is the issue here?" (quoting Oprah Winfrey)); *id.* at 23 ("If it ain't broke, why fix it[?]" (quoting Lynne Gold-Bikin, Chair of the Family Law Section, American Bar Association)).

the primary caretaking parent and child are fungible with the bonds the child has developed with the other parent. Such a determination devalues the emotional attachments developed and places primary importance on the quantity of time spent with the child. It also ignores the fact that the nonprimary caretaker participated with less quantity in the first place. Using the primary caretaker's new employment status as a factor warranting a modification in custody or caretaking arrangements assumes that change on top of change would be desirable.²²⁸ Moreover, it overlooks the statistics that most mothers work outside the home *and* that "[t]ypically, it is the mother who provides most day-to-day care, whether or not she works outside the home."²²⁹ Finally, it uniquely discriminates against primary caretaking or custodial parents who must return to work—by essentially treating their employment as a change or negative factor and ignoring or regarding favorably the employment status of the nonprimary caretaker.²³⁰ The California Supreme Court stated:

A custody determination must be based upon a true assessment of the emotional bonds between parent and child It must reflect also a factual determination of how best to provide continuity of attention, nurturing and care. It cannot be based upon an assumption, unsupported by scientific evidence, that a working mother cannot provide such care—an assumption particularly unfair when . . . the mother has in fact been the primary caregiver.²³¹

228. See *supra* part V.A.

229. *Burchard*, 42 Cal. 3d at 543, 742 P.2d at 494, 229 Cal. Rptr. at 808 (citing scholarship on this subject); Polikoff, *supra* note 10, at 183; Scott, *supra* note 94, at 661-62; Scott & Derdeyn, *supra* note 70, at 461 n.28 ("Empirical research indicates that working mothers continue to perform most child care responsibilities and spend far more time with their children than do fathers."); Singer & Reynolds, *supra* note 89, at 522 (stating that in reality women in most families still bear primary responsibility for child care—even in two-career families); see *supra* note 227.

230. See *supra* notes 160-65 and accompanying text.

231. *Burchard*, 42 Cal. 3d at 540, 724 P.2d at 492, 229 Cal. Rptr. at 806. The reasoning in *Burchard* relied in great part upon the California Supreme Court's prior ruling in *In re Carney*, 24 Cal. 3d 725, 739, 598 P.2d 36, 44, 157 Cal. Rptr. 383, 391 (1979). In *Carney* the court considered what was at the "heart of the parent-child relationship." *Id.*

Contemporary psychology confirms what wise families have perhaps always known—that the essence of parenting is not to be found in the harried rounds of daily carpooling endemic to modern suburban life, or even in the doggedly dutiful acts of "togetherness" committed every weekend by well-meaning fathers and mothers across America. Rather, its essence lies in the ethical, emotional, and intellectual guidance that the parent gives to the child throughout his formative years, and often beyond. The source of this guidance is the adult's

The court went on to say that “[a]ny actual deficiency in care, whether due to the parent’s work or other cause, would of course be a proper consideration in deciding custody.”²³² Although the court did not articulate what would constitute an “actual deficiency,” it clearly and definitively stated what would *not* be considered a deficiency. The fact that a primary caretaking or custodial parent, “because of work and study, must entrust the child to daycare centers and babysitters . . . is not a suitable basis for [changing custody orders].”²³³ In a concurring opinion, Chief Justice Bird wrote

separately to underscore that [it is] an abuse of discretion . . . [to] assum[e] that there is a negative relation between a woman’s . . . need or desire to work and the quality of her parenting. . . . [O]utmoded notions such as these result in harsh judgments which unfairly penalize working mothers.

....

When it is no longer the norm for children to have a mother home all day, courts cannot indulge the notion that a working parent is ipso facto a less satisfactory parent. Such reasoning distracts attention from the real issues in a custody dispute and leads to arbitrary results.

....

Moreover, there is no accepted body of expert opinion that maternal employment per se has a detrimental effect on a child. . . . Public policy needs to move in the direction of more flexible work arrangements for mothers, towards enhancing the quality of the environment for children, towards enhancing the personal satisfaction of careers for women, and towards promoting the view that maternal employment has no negative influence on children’s development.²³⁴

own experience of life; its motive power is parental love and concern for the child’s well-being; and its teachings deal with such fundamental matters as the child’s feelings about himself, his relationships with others, his system of values, his standards of conduct, and his goals and priorities in life.

Id. In other words the proper inquiry regarding each parent’s child-care contribution is not necessarily quantitative, but rather qualitative in nature. *See id.*; *see also supra* note 204 (arguing from practical standpoint that quantitative inquiries may even be disruptive).

232. *Burchard*, 42 Cal. 3d at 540, 724 P.2d at 492, 229 Cal. Rptr. at 806.

233. *Id.*

234. *Id.* at 541, 724 P.2d at 493, 229 Cal. Rptr. at 807 (Bird, C.J., concurring).

Moreover, the majority also stated that “any presupposition that single working parents provide inferior care to their child [would] in practice discriminate against women.”²³⁵

D. Considering the Nonprimary Caretaker's Ability to Provide a Stepparent or Other In-Home Mother Substitute Is Irrelevant to the Child's Need for Continuity and Discriminates Against Women

Factoring in-home mother substitutes into a custody decision devalues the emotional bonds between the child and primary caretaking or custodial parent and places a higher value on the traditional notion of having a woman—any woman—in the home to care for the child.

[T]he . . . assumption that such care [by a second wife or a relative of the father] is the equivalent of that which a nonworking mother would provide “comes dangerously close to implying that mothers are fungible—that one woman will do just as well as another in rearing any particular children.”²³⁶

The California Supreme Court found that the fact that a father's new wife would be home to provide constant care for the child, rather than relying on babysitters and day care as the mother would have to do, was *insignificant* compared to the fact that the mother had been the primary caretaker of the child.²³⁷ The court stated that reasoning that a working, studying mother who relies on “day care centers and babysitters[] is per se inferior to care by a father who also works, but can leave the child with a stepmother at home[,] [is] reasoning . . . not suitable [as a] basis for a custody order.”²³⁸

Considering a nonparent's role would belie any goal of increasing the nonprimary caretaking parent's role or relationship with the child, since a change in custody would be based upon the nonparent's ability to provide care—not the parent's. Thus, considering a stepparent or other in-home mother substitute would be an irrelevant and mislead-

235. *Id.* at 540 n.10, 724 P.2d at 492 n.10, 229 Cal. Rptr. at 805 n.10.

236. *Id.* at 546, 724 P.2d at 496, 229 Cal. Rptr. at 810 (Bird, C.J., concurring) (emphasis added) (quoting Nancy D. Polikoff, *Why are Mothers Losing: A Brief Analysis of Criteria Used in Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 241 (1982)).

237. *Id.* at 540, 724 P.2d at 492, 229 Cal. Rptr. at 806.

238. *Id.*

ing factor when addressing the child's need for continuity. Additionally, it would discriminate against women.

The double standard appears again when . . . the father is permitted to rely on the care which someone else will give to the child. It is not uncommon for courts to award custody to a father when care will actually be provided by a relative, second wife, or even a babysitter.²³⁹

Moreover, "[d]ivorced men are more likely to remarry than divorced women, and far more likely to marry a nonworking spouse."²⁴⁰ And even if the mother could find a nonworking spouse to stay home with the kids, she is less likely to be able to support one.²⁴¹ When a decision to remove a child from the working primary caretaking or custodial parent is based upon the ability of a stepparent to care for the child, the reasoning for that decision flies in the face of the parental preference doctrine²⁴² and its underlying policy.²⁴³

239. *Id.* at 545-46, 724 P.2d at 496, 229 Cal. Rptr. at 810 (Bird, C.J., concurring). Recall that in Jennifer Ireland's situation, the change in custody was based upon the fact that the paternal grandmother would be home with the child. *See supra* part II. In Eileen Adams's case, custody was transferred from the primary caretaking and custodial mother to the father based upon his new wife's ability to be home with the child. *See supra* part II; *see also supra* note 204 (discussing situation in which father wants custody of children whom he admits are happy and adjusted in their current situation with their working mother because his new wife is home to care for them).

240. *Burchard*, 42 Cal. 3d at 540 n.10, 724 P.2d at 492 n.10, 229 Cal. Rptr. at 806 n.10; *see also* Polikoff, *supra* note 10, at 182 ("[Because] divorced men remarry twice as often as divorced women, the consideration of remarriage can actually have a devastating effect on women in custody proceedings." (footnote omitted)).

241. *See supra* notes 143-46 and accompanying text.

242. *See, e.g.*, CAL. FAM. CODE § 3040 (West 1994) (ordering preference of child custody to parents first); *see also* Linda D. Elrod, *A Review of the Year in Family Law*, 28 FAM. L.Q. 541, 555 (1995) (stating that parental preference doctrine requiring child to be placed with parent unless parent is unfit remains in effect); Brooke Ashlee Gershon, Comment, *Throwing Out the Baby with the Bath Water: Adoption of Kelsey S. Raises the Rights of Unwed Fathers Above the Best Interests of the Child*, 28 LOY. L.A. L. REV. 741, 746 (1995) (stating that "[i]n determining best interests, each jurisdiction applies a 'parental presumption'—that the placement of a child with his or her biological parents is generally in the best interests of that child").

243. The preference for giving biological parents control of their children arose from the reasoning that "[e]mpowering parents [with control of their children absent unfitness] represents a means of ensuring that [child-rearing] decisions will be made by someone who presumably will act in the children's best interests." Martin Guggenheim, *The Best Interests of the Child: Much Ado about Nothing?*, in CHILD, PARENT, & STATE 27, 28 (S. Randall Humm et al. eds., 1994).

Guggenheim stated that "[j]udging parents when they have not fallen below minimal standards of parenting is just not worth the time, effort, and uncertainty." *Id.* at 29. That same reasoning, this Comment argues, should be applied when *one* parent seeks to modify

VI. CONCLUSION

Laws that establish a degree of certainty in the outcome of custody disputes will go a long way toward ensuring less litigation, fairer negotiations and settlements, and the finality of custody decisions. The knowledge that custody awards would be based upon each parent's past participation with child care renders the noncaretaker unable to brandish a potential custody dispute as a bargaining chip. Further, laws that perpetuate the parents' chosen child-rearing practices during marriage—not what a court thinks is best after the fact—extend to postdissolution cases the constitutionally backed reluctance in this country to intervene in the parent-child relationship except in cases of abuse or neglect.

A presumption favoring previously existing child-care patterns, like the primary caretaker presumption, would be a gender-neutral standard "placing paramount value on preserving the child's relationship with the parent who has provided primary nurturance and care."²⁴⁴ While at this point in time such a presumption may actually result in maternal custody, "it would do so not because of sex-stereotyped notions about a mother's love, but because the child's needs for nurturance and continuity are still legitimate needs."²⁴⁵ "A father filling that role would, of course, also be entitled to the presumption."²⁴⁶

A presumption favoring previously existing child-care patterns will encourage coparenting from the beginning of a child's life because parents will know that custody orders will reflect their past participation in child care. In the postdissolution context, then, the presumption will ensure that the parents' respective roles relating to the children's care are inspired rather than ordered. If it is best for the child to have two parents, then logic dictates that it would be best for the child to have both parents *throughout* its life. If there was co-equal caretaking during marriage, the presumption ensures that the custody determination will mirror that image. Standards favoring joint custody regardless of who had provided care previously actually *discourage* coparenting by sending a clear message to the noncaretaker that the possibility of obtaining a "windfall" right to

status quo child-care arrangements in the postdissolution context.

244. Polikoff, *supra* note 10, at 177-78.

245. *Id.* at 178 (footnote omitted).

246. *Id.*

custody of the children exists whenever he or she brings a proceeding for dissolution or modification.

Parents who truly are concerned by the thought of losing custody of their children under such a presumption can address those concerns not by going to court, but by changing “where childcare begins—in the home.”²⁴⁷ When men and women truly act in the best interests of their children *before and after* divorce—as co-parents—the presumption will become a thing of the past.²⁴⁸

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247. *Id.* at 184; Singer & Reynolds, *supra* note 89, at 523.

248. See Singer & Reynolds, *supra* note 89, at 523.

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