



## Santa Clara Law Review

Volume 26  
Number 3 *Combined Issues No. 3-4*

Article 10

1986

# The Changing Family and the Child's Best Inate Against Single Working Mothers in California Custody Modification Cases-Current Standards Discrimi

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### Recommended Citation

Charles N. Trudrung-Taylor, *The Changing Family and the Child's Best Inate Against Single Working Mothers in California Custody Modification Cases-Current Standards Discrimi*, 26 SANTA CLARA L. REV. 759 (1986).

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# THE CHANGING FAMILY AND THE CHILD'S BEST INTERESTS: CURRENT STANDARDS DISCRIMINATE AGAINST SINGLE WORKING MOTHERS IN CALIFORNIA CUSTODY MODIFICATION CASES

## I. INTRODUCTION

Following a divorce in California, custody is awarded to the parent who can provide the more suitable home.<sup>1</sup> The court decides the custody issue based on "the best interests of the child."<sup>2</sup> The standard is sex-neutral; neither parent is to be preferred on the basis of sex.<sup>3</sup> Under this standard, the courts have broad discretion to decide which parent can provide the better environment for the child.<sup>4</sup> However, custody is to be awarded in light of the recognition that a child's established environment should not be changed unnecessarily.<sup>5</sup> This standard also applies in custody modification cases.<sup>6</sup>

Judges look to various factors to determine the best interests of the child in these cases. One major consideration is economics: judges often award custody to the parent who can supply the highest degree of financial security for the family.<sup>7</sup> Another important consideration is the availability of a female caretaker in the home.<sup>8</sup> However, current research demonstrates that these factors may not address the basic needs of young children.<sup>9</sup> Research on child development has established that the most important requirement for a child's emotional well-being is a continuing and nurturing relationship with a

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1. CAL. CIV. CODE § 4600 (West 1983). *See, e.g.*, *Taber v. Taber*, 209 Cal. 755, 290 P. 36 (1930).

2. CAL. CIV. CODE § 4600(b) (West 1983).

3. *See infra* note 32.

4. CAL. CIV. CODE § 4608 (West 1983). *See Gudelj v. Gudelj*, 41 Cal. 2d 202, 259 P.2d 656 (1953).

5. *In re Marriage of Carney*, 24 Cal. 3d 725, 730-31, 598 P.2d 36, 38, 157 Cal. Rptr. 383, 385 (1979).

6. *Id.*

7. *See Burchard v. Garay*, 2 Civ. 66559 (Cal. Ct. App. 1984), *hearing granted*, L.A. 31957 (Cal. Aug. 29, 1984); *Gould v. Gould*, 116 Wis. 2d 493, 342 N.W.2d 426 (1984) (trial court changed custody of child from mother to father based on economics and more traditional lifestyle).

8. *See infra* text accompanying notes 158-62.

9. *See infra* notes 156-60 and accompanying text.

primary caretaker.<sup>10</sup> Research also shows that constant availability of the primary caretaker is not necessary to establish this relationship.<sup>11</sup>

Reliance on economic factors puts single mothers with custody in an inferior position. Most single mothers must work to support themselves and their children.<sup>12</sup> Many women do not have the skills needed to qualify for well paying jobs,<sup>13</sup> so these mothers must support their families on a very low income.<sup>14</sup> They must also rely on day-care facilities while they are at work.<sup>15</sup> Therefore, although they may provide their children with a healthy and loving environment, the father may prevail in a custody modification action because he earns more money than the mother.<sup>16</sup> In addition, the father can argue that the mother is not providing an adequate home because the children are in day care while she is working. This argument is particularly effective when the father has remarried.<sup>17</sup>

Moreover, statistics show that the structure of the American family is changing. The traditional family, in which the father works and the mother stays home and cares for the children, no longer exemplifies the majority of families.<sup>18</sup> In most families, both parents work and most married women with children are currently working.<sup>19</sup> The divorce rate in California is high and continuing to climb.<sup>20</sup> In addition, approximately one in five families are headed

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10. See *infra* notes 93-101 and accompanying text.

11. See *infra* notes 93-101 and accompanying text.

12. See *infra* notes 75-83 and accompanying text.

13. WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, BULLETIN NO. 298, TIME OF CHANGE: 1983 HANDBOOK ON WOMEN WORKERS 24-26 (1983) [hereinafter cited as WOMEN'S BUREAU NO. 298].

14. *Id.*; BUREAU OF CENSUS, CURRENT POPULATION REPORTS, U.S. DEP'T OF COMMERCE, SERIES P-23, NO. 107, FAMILIES MAINTAINED BY FEMALE HOUSEHOLDERS 1970-1979, at 33-34 (Oct. 1980) [hereinafter cited as BUREAU OF CENSUS NO. 107].

15. BUREAU OF CENSUS, CURRENT POPULATION REPORTS, U.S. DEP'T. OF COMMERCE, SERIES P-23, NO. 129, CHILD CARE ARRANGEMENTS OF WORKING MOTHERS: JUNE 1982, at 2-8 (Nov. 1983) [hereinafter cited as BUREAU OF CENSUS NO. 129]; WOMEN'S BUREAU NO. 298, *supra* note 13, at 22.

16. See *infra* text accompanying notes 85-87.

17. See *infra* text accompanying notes 156-60.

18. BUREAU OF CENSUS, CURRENT POPULATION REPORTS, U.S. DEP'T OF COMMERCE, SERIES P-23, NO. 117, TRENDS IN CHILD CARE ARRANGEMENTS OF WORKING MOTHERS 1 (June 1982) ("Future generations may someday describe the 'traditional' American family of the 1980's as one where both the husband and wife are employed and their young children are cared for by a nonfamily member while the mother and father are at work.").

19. See *infra* text accompanying notes 74-84.

20. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181, 1183 (1981); DEP'T OF

by single mothers.<sup>21</sup>

In California, the best interests of the child standard does not provide judges in custody modification cases with effective guidelines to help them decide which parent can provide the better care.<sup>22</sup> In addition, cases indicate that the guidelines which have been adopted are inadequate.<sup>23</sup> Therefore, judges may use any factors they deem relevant to determine the best interests of the child. Their decisions often rest on financial status and constant availability of a female caretaker in the home.<sup>24</sup> Decisions founded on these factors do not recognize the real needs of the children for love and nurturance from a bonding parent who has been the primary caretaker. Moreover, decisions based on these factors produce unfair results and do not achieve the best interests of the children.

This comment addresses the lack of guidelines in the current best interests of the child standard. Section II of this comment examines the development of California law in custody modification actions. Current research on children's needs, the changing nature of the modern family, and the impact of child care on child development will be examined in section III. The problems that are created by an indeterminate standard will be analyzed in section IV of this comment. *Burchard v. Garay*,<sup>25</sup> an unpublished 1984 decision, will be used to illustrate those problems. Finally, section V of this comment offers three proposals that will limit judicial discretion and ensure that custody modification decisions are made in the best interests of the child. In addition, this comment makes practical suggestions for attorneys who litigate these cases.

## II. MODIFICATION OF CUSTODY: THE STANDARDS USED

Until 1969, California custody cases were governed by laws that had not changed significantly for over one hundred years.<sup>26</sup> In 1969 the Legislature enacted the Family Law Act<sup>27</sup> to update these laws.

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HEALTH SERVICES, HEALTH AND WELFARE AGENCY, STATE OF CAL., VITAL STATISTICS OF CAL. 10 (Nov. 1983) (140,473 dissolutions of marriage in California in 1981).

21. WOMEN'S BUREAU NO. 298, *supra* note 13, at 3.

22. *See infra* text accompanying notes 59-71.

23. *See infra* text accompanying notes 66-71.

24. *Scott v. Superior Court*, 156 Cal. App. 3d 577, 202 Cal. Rptr. 920 (1984).

25. 2 Civ. 66559 (Cal. Ct. App. 1984), *hearing granted*, L.A. 31957 (Cal. Aug. 29, 1984).

26. CAL. ASSEMBLY COMM. ON ASSEMBLY BILL NO. 530 and SENATE BILL NO. 252 (THE FAMILY ACT), 4 ASSEMBLY J. 8053, 8054 (Reg. Sess. 1970) [hereinafter cited as ASSEMBLY COMM. REPORT].

27. CAL. CIV. CODE §§ 4000-5188 (West 1983).

The Family Law Act reflects the Legislature's intent to give greater recognition to current behavioral science research<sup>28</sup> and to reduce acrimonious litigation by eliminating the issue of fault in family law proceedings.<sup>29</sup> The Legislature also sought to strengthen family unity and to encourage the financial support of family members.<sup>30</sup>

California custody modification cases are currently controlled by the Family Law Act which is embodied in the California Civil Code. Under subsection 4600(a),<sup>31</sup> a parent may seek to modify the original custody order at any time during the child's minority. Subsection 4600(b)<sup>32</sup> provides that custody must be awarded according to "the best interests of the child" and that neither parent is to be preferred as custodian on the basis of sex. Section 4608<sup>33</sup> provides that the court must consider the child's "welfare" in making a determination of the child's best interests.

Case law in California requires that a parent must show "changed circumstances" before the custody of a child may be relitigated between natural parents.<sup>34</sup> Once a sufficient change of circumstances has been established, the court must determine if a change in

28. Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 PAC. L.J. 156, 156-57 (1970).

29. *Id.*

30. *Scott*, 156 Cal. App. 3d at 583, 202 Cal. Rptr. at 921.

31. Subsection 4600(a) provides in pertinent part:

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or any time thereafter, make such an order for the custody of the child during minority as may seem necessary and proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification thereof.

CAL. CIV. CODE § 4600(a) (West 1983).

32. Subsection 4600(b) provides in pertinent part:

Custody should be awarded in the following order of preference according to the best interests of the child: (1) To both parents jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex.

CAL. CIV. CODE § 4600(b) (West 1983).

33. Section 4608 provides:

In making a determination of the best interest of the child in any proceeding under this title, the court's determination shall include, but shall not be limited to, consideration of the health, safety, and welfare of the child.

CAL. CIV. CODE § 4608 (West 1983).

34. *Corney*, 24 Cal. 3d at 730, 598 P.2d at 38, 157 Cal. Rptr. at 385; *Goto v. Goto*, 52 Cal. 2d 118, 338 P.2d 450 (1959).

custody is in the child's best interest.<sup>35</sup> Thus, a parent must meet a two-step test when seeking to modify an existing custody arrangement.

### A. *Change of Circumstances Rule*

In order to justify modifying custody, there must be a showing of "changed circumstances" that affect the welfare of the child.<sup>36</sup> The change in circumstances must substantially affect the child so that it is "essential or expedient for the welfare of the child that there be a change."<sup>37</sup> The parent seeking the modification has the burden to show that the change in circumstances is sufficiently important to justify a change in custody.<sup>38</sup>

Two policy considerations were established that underlie the change of circumstances requirement. There should be an end of litigation for the sake of the child's emotional stability.<sup>39</sup> The child's established lifestyle should not be changed in order to protect that stability.<sup>40</sup>

In *In re Marriage of Carney*,<sup>41</sup> the California Supreme Court reaffirmed the change of circumstances rule that was originally adopted in *Connolly v. Connolly*.<sup>42</sup> The court also established two policy considerations to limit the discretion of judges in all change of custody cases. The court stated that it was "undesirable" to change the child's "established mode of living" after a significant period of

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35. *Carney*, 24 Cal. 3d at 730, 598 P.2d at 38, 157 Cal. Rptr. at 385.

36. *Id.*

37. *Id.* (quoting *Washburn v. Washburn*, 49 Cal. App. 2d 581, 588, 122 P.2d 96, 102 (1942)).

38. *Carney*, 24 Cal. 3d at 731, 598 P.2d at 38, 157 Cal. Rptr. at 385.

39. *Id.* at 730-31, 598 P.2d at 38, 157 Cal. Rptr. at 385.

40. *Id.*

41. 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979). In *Carney*, the parents separated but did not divorce. They agreed that the father would have custody of their two sons. Five years later, the father was injured in a jeep accident, and became quadriplegic. Although she had not seen the children since she and the father had separated, the mother sought custody of her two sons in a dissolution of marriage proceeding. The court determined that the father's physical condition would have a negative effect on the best interests of the children, and awarded custody to the mother. *Id.* at 729, 598 P.2d at 37, 157 Cal. Rptr. at 384. The trial court found that the father's disability was sufficient to establish a change of circumstances because it would prevent him from having a "normal" relationship with his children. *Id.* at 735, 598 P.2d at 42, 157 Cal. Rptr. at 389.

The California Supreme Court reversed the decision because it was based on "outdated" stereotypes and stated that the trial court failed to determine if the father's handicap would "in fact" have a negative effect on the children. The supreme court found that the trial court had abused its discretion by basing its decision on the father's inability to participate in sporting activities with his sons. *Id.* at 736, 598 P.2d at 38, 42, 157 Cal. Rptr. at 385, 389.

42. 214 Cal. App. 2d 433, 29 Cal. Rptr. 616 (1963).

time in one parent's home no matter how custody was first determined.<sup>43</sup> The court also found that it was "desirable that there be an end of litigation."<sup>44</sup> The *Carney* court found that while judges have broad discretion in deciding custody cases, the judge's decision must be made in light of these important policy considerations when a complete change in custody is involved.<sup>45</sup> The court also noted that appellate courts often had to reverse decisions that were not guided by those policies.<sup>46</sup>

Following *Carney*, some trial courts ignored these guidelines. For instance, in *Speelman v. Superior Court*,<sup>47</sup> the mother sought to gain physical custody of her five year old son. The trial court never addressed the issue of changed circumstances and determined that it was in the best interests of the child to live with his mother. The judge stated that although he did not find that the child's home with the father and stepmother was unnurturing, he preferred the mother's "less rigid" home and was not in favor a "military upbringing for a child."<sup>48</sup> The appellate court reversed because the trial court's decision to change custody without finding changed circumstances violated the *Carney* rule.<sup>49</sup>

In *Burchard*, the father of a three-year-old boy sought to gain custody of his son. The parents of the child dated infrequently and had never married. The mother informed the father that she was pregnant, but the father denied paternity and suggested that she get an abortion. After the child was born, the mother brought a paternity action against the father. A blood examination indicated that he was the father of the child, and he stipulated to paternity.<sup>50</sup> The court awarded child support to the mother.<sup>51</sup>

The father saw his son for the first time when the child was fifteen months old. The father then moved in with the mother and child for six weeks, but the relationship failed. Three months later, the father married a woman to whom he had been engaged before he

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43. *Carney*, 24 Cal. 3d at 731 n.4, 598 P.2d at 38 n.4, 157 Cal. Rptr. at 385 n.4.

44. *Id.* at 730-31, 598 P.2d at 38, 157 Cal. Rptr. at 385 (quoting *Connolly v. Connolly*, 214 Cal. App. 2d 433, 436, 29 Cal. Rptr. 616, 619 (1963)).

45. *Carney*, 24 Cal. 3d at 740-41, 598 P.2d at 44-45, 157 Cal. Rptr. at 391-92.

46. *Id.* at 731, 598 P.2d at 38, 157 Cal. Rptr. at 385-86.

47. 152 Cal. App. 3d 124, 199 Cal. Rptr. 784 (1983).

48. *Id.* at 127, 199 Cal. Rptr. at 785.

49. *Id.* at 133, 199 Cal. Rptr. at 789.

50. Appellant's Opening Brief at 2-3, *Burchard v. Garay*, 2 Civ. 66559 (Cal. Ct. App.), hearing granted, L.A. 31957 (Cal. Aug. 29, 1984) [hereinafter cited as Appellant's Opening Brief].

51. Appellant's Reply Brief at 3, *Burchard v. Garay*, 2 Civ. 66559 (Cal. Ct. App.), hearing granted, L.A. 31957 (Cal. Aug. 29, 1984).

moved in with the mother, and he then sought custody of the child. Before the trial, the child had resided solely with the mother except for the six week period when the father lived with them.<sup>52</sup>

The trial court did not require a change of circumstances and awarded custody to the father based on the best interests of the child.<sup>53</sup> The appellate court unanimously affirmed the trial court's decision noting that "in the continuum of life conditions are constantly changing."<sup>54</sup> The court indicated that several significant changes in circumstances had occurred, any one of which might have met the changed circumstances requirement. These changes included: the failure of the parent's cohabitation, the stipulation of the father's paternity, the father's remarriage, the mother's attempt to improve herself and seek a career by attending nursing school, and the mother's decision to hold two jobs.<sup>55</sup> Neither the trial court nor the appellate court found any likelihood of present or future harm to the child if he were to stay with the mother. Such harm might have made the change in custody essential or expedient to the child's welfare. In consideration of the effects of a change in custody on the child, the court noted:

[T]he potential trauma to a child inherent in any change of physical custody, . . . creates an obstacle that the party seeking the change must surmount. Nevertheless, this fact does not, per se, require a "change of circumstances," for if it did no father could ever hope to be awarded custody of a child born out of wedlock of originally uncertain parentage for nature pays no regard to Civil Code section 4600, and always awards initial custody to the mother.<sup>56</sup>

The court stated that the change of circumstances rule did not apply here because the rule was designed to prevent repeated litigation of an issue that had already been decided, and that was not the case here.<sup>57</sup>

The change of circumstances rule was established to add substance to the best interests standard by limiting judicial discretion in custody modification cases.<sup>58</sup> Under the *Carney* rule, once a change of circumstances is found, the court must deter-

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52. Appellant's Opening Brief, *supra* note 50, at 2-3.

53. *Burchard v. Garay*, No. EAD 64669, slip op. at 1-3 (Cal. Super. Ct. May 18, 1984).

54. *Burchard v. Garay*, 2 Civ. 66559, slip op. at 6 (Cal. Ct. App. May 18, 1984).

55. *Id.*

56. *Id.* slip op. at 5-6 (footnote omitted).

57. *Id.* slip op. at 5.

58. *Carney*, 24 Cal. 3d at 731, 598 P.2d at 38, 157 Cal. Rptr. at 385.



mine whether modifying the current custody arrangement serves the best interests of the child.

## B. *Best Interests of the Child Standard*

### 1. *Background*

In the late nineteenth century, the California Legislature established the best interest of the child standard to protect the child's welfare; all other interests were made subordinate to the child's needs.<sup>59</sup> At the same time, the Legislature established a "tender years" presumption to guide custody awards. The tender years presumption stated that "if the child is of tender years it should be given to the mother."<sup>60</sup> The best interests of the child standard and the tender years presumption were contained in section 246 of the Civil Code.<sup>61</sup> This presumption was based on the widely held notion that young children thrived best under the constant care of the mother.<sup>62</sup> The presumption, thus, expressed the Legislature's view that the child's best interests were fulfilled when the mother was awarded custody. The presumption also limited the judge's discretion in custody awards.

In the last twenty years, the tender years presumption has been criticized. Critics charged that the standard reflected an outdated view of women.<sup>63</sup> The presumption was also criticized as discriminatory against fathers.<sup>64</sup> In 1972, the Legislature responded to these

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59. CAL. CIV. CODE § 246 (1872).

60. Civil Code section 246 provides in pertinent part:

In awarding the custody of a minor, or in appointing a general guardian, the Court or officer is to be guided by the following considerations:

1. By what appears to be in the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a significant age to form an intelligent preference, the Court may consider that preference in determining the question.

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child is of tender years it should be given to the mother; if it is of an age to require education and preparation for labor or business, then to the father.

*Id.*

61. *Id.*

62. *See, e.g., Washburn*, 49 Cal. App. at 584, 122 P.2d at 100.

63. *Final Report of the California Assembly Interim Committee on Judiciary*, 23 ASSEMBLY INTERIM COMMITTEE REPORTS No. 6 at 161 (1965) [hereinafter cited as INTERIM COMMITTEE REPORT]; THE REPORT OF THE CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY 39 (1966) [hereinafter cited as GOVERNOR'S COMMISSION REPORT]. Former Governor Edmund G. Brown formed the commission to investigate the high rate of divorce and its often devastating consequences on the family. Krom, *supra* note 28, at 163-70.

64. GOVERNOR'S COMMISSION REPORT, *supra* note 63 at 39; Fain, *Our Children* —

critics, and repealed the tender years presumption.<sup>65</sup> The Legislature found that because of the changing role of women in society and the discriminatory impact on fathers, the presumption should be abolished.

## 2. *Current Standard*

Although the Legislature abolished the tender years presumption, it preserved the best interests of the child standard. The current standard contains no presumption on which judges can rely in making custody determinations. The standard is sex-neutral: it provides that neither parent is to be preferred as the custodial parent on the basis of sex.<sup>66</sup>

Under the current standard, trial judges have broad discretion to determine the meaning of the best interests rule. California Civil Code section 4608 states that the judge must consider the child's welfare when determining the child's best interests. However, the statute prescribes that the court may consider other unspecified factors in addition to the child's best interests.<sup>67</sup> The decision of the trial judge will not be disturbed unless there is a clear abuse of discretion.<sup>68</sup>

Courts use many different factors to determine the best interests of the child. After the tender years presumption was repealed, economic factors such as job stability, home ownership, and a more affluent lifestyle have been used to determine the child's best interests in custody modification cases.<sup>69</sup> A lifestyle preference based on the presence of a nonworking stepmother and a traditional home environment have also been used.<sup>70</sup>

For instance, in *Burchard*, the trial judge found both economic factors and the father's traditional home environment persuasive. The judge noted the father owned his own home, and that he had held the same job for five years. The court also noted that the father and stepmother could provide constant care without the use of caretakers, and that the father and stepmother had more relatives who lived in the area than did the mother.<sup>71</sup>

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*Citizens of Tomorrow*, 1963-65 A.B.A. SEC. OF FAMILY PROC. 27, 30-31.

65. CAL. CIV. CODE § 4600 (West 1983) (repealing statutory preference for maternal custody of young children in 1972).

66. *Id.* See *supra* note 32.

67. CAL. CIV. CODE § 4608 (West 1983).

68. *Marriage of Russo*, 21 Cal. App. 3d 72, 86, 98 Cal. Rptr. 501, 511 (1971).

69. See *infra* text accompanying notes 153-55.

70. See *infra* notes 156-62 and accompanying text.

71. *Burchard*, No. EAD 64669, slip op. at 1-3.

In the past, the child's interests were believed to be best served by awarding custody to the mother. California abandoned sex-role preferences in recognition of the changing roles of women in society. Trial judges, however, have continued to modify custody arrangements based on traditional notions of the child's need for constant care by a female caretaker. Due to the sharp increase in the number of working mothers and their reliance on child care services, this comment next examines the current data on the caretaking needs of children.

### III. CURRENT DATA ON CARETAKING NEEDS OF CHILDREN AND THEIR PRIMARY CARETAKERS

#### A. *The Changing Family*

The traditional nuclear family was composed of a father, a mother and the children. Typically, the father was the sole wage-earner, and the wife stayed home to take care of the children.<sup>72</sup> This traditional model has begun to change.<sup>73</sup>

Since 1950, the number of mothers in the job market has increased three hundred percent.<sup>74</sup> This increase has been caused almost exclusively by the influx of married women into the job market. The greatest increase has occurred among mothers with preschool age children.<sup>75</sup> Thus, the number of families in which both parents work now exceeds the number of families with only one wage earner.<sup>76</sup> The increasing number of families with two working parents represents one of the most significant socio-economic developments of the 1970's.<sup>77</sup> Currently, the wife works at least part time in more than fifty percent of the two-parent families in the United States.<sup>78</sup> Married women with children between the ages of six and seventeen were the most likely out of all married women to be working in 1981.<sup>79</sup> In addition, forty-nine percent of married women with preschool age children are also working.<sup>80</sup> Thus, mothers are more likely to work now than at any other time in United States history.<sup>81</sup>

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72. See *supra* note 18 and accompanying text.

73. *Id.*

74. WOMEN'S BUREAU NO. 298, *supra* note 13, at 17.

75. *Id.*

76. *Id.*

77. *Id.* at 16-17.

78. *Id.* (68% of families with children under 18 had two working parents in 1978).

79. *Id.* at 20-21.

80. *Id.*

81. *Id.*

The number of single mothers maintaining families rose seventy percent between 1970 and 1981.<sup>82</sup> This rise was largely due to the increased rate of divorce in the United States.<sup>83</sup> By 1982, one out of five families was maintained by a woman. Most of these women had children under eighteen years of age.<sup>84</sup>

Single mothers are generally poor, and they often lack both employment skills and education.<sup>85</sup> Many are divorced homemakers who raised children and did not pursue careers.<sup>86</sup> Because of their lack of employment skills, they generally do not qualify for jobs that pay adequate wages. One survey conducted in 1979 found that seventy-five percent of divorced homemakers made less than \$5,000 a year.<sup>87</sup>

The mother must rely on someone to care for her children while she works. This need for child care caused enrollment in nursery schools to increase by more than eighty percent from 1970 to 1980.<sup>88</sup> This rise occurred even though there was a significant drop in the number of three and four-year-old children in the population.<sup>89</sup>

As more parents used child care facilities, a concern grew over the potential negative impact of an absent mother on the child's emotional well-being. Since mothers had traditionally been constantly available to provide for their children's needs, many people believed that the mother's constant availability was necessary.<sup>90</sup> Research conducted in the last fifteen years has led to new knowledge of what a child needs for healthy emotional development.

## B. *Requirements for Healthy Emotional Development*

Researchers have investigated the needs of children in ensuring

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82. *Id.* at 24.

83. *Id.* at 15. See also BUREAU OF CENSUS NO. 107, *supra* note 14, at 1.

84. WOMEN'S BUREAU NO. 298, *supra* note 13 at 3, 24.

85. *Id.* at 25. See BUREAU OF CENSUS NO. 107, *supra* note 14, at 14, 33 (median income was less than half of the median income of families overall); WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEPT OF LABOR, THE EARNINGS GAP BETWEEN MEN AND WOMEN 1 (1979).

86. WOMEN'S BUREAU NO. 298, *supra* note 13, at 25-26.

87. *Id.*

88. *Id.* at 22. See also BUREAU OF CENSUS NO. 129, *supra* note 15, at 1.

89. WOMEN'S BUREAU NO. 298, *supra* note 13, at 22.

90. INTERIM COMMITTEE REPORT, *supra* note 63, at 153-55. See also UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 197-201 (1970) (the tender years presumption was thought to be a shorthand way of determining child's best interest). *But see* RUTTER, MATERIAL DEPRIVATION REASSESSED 15 (1972) (noting that research has often been misinterpreted to support the notion that mothers must be constantly available and that use of day care is harmful to children).

healthy emotional development. They conclude that the quality of the relationship between the primary caretaker and the child is far more important to healthy development than the constant availability of the caretaker.<sup>91</sup> The gender of the primary caretaker is not an important factor: fathers and mothers are equally capable of providing quality care.<sup>92</sup> It is necessary that the child form an attachment bond with a caretaker who can provide a continuous and unbroken relationship with the child during his or her formative years.<sup>93</sup>

The quality of the relationship determines whether bonding takes place. A mother who plays with her child and is attentive to the child's needs has a much more strongly attached child than a mother who provides only routine care. If the father is the more attentive parent, the child is more likely to become attached to him. It is the intensity or quality of the care which is crucial in developing the attachment bond.<sup>94</sup>

The continuity of the relationship between the primary caretaker and the child is also a critical factor in the child's development. Continuity is established through daily contact over time and should be distinguished from constant availability.<sup>95</sup> Therefore, a mother who spends part of her day working does not affect the continuity of the relationship. These findings undermine the belief that a child needs constant access to the mother.<sup>96</sup>

The increased use of child care by working mothers has led researchers to investigate long term effects of day care on children. Studies show that children who are cared for by baby sitters or day-care centers do not develop emotional problems so long as good care is provided.<sup>97</sup> Good care means that the child's basic health, safety, and emotional needs are met. Those children whose needs are not met because of a long succession of poor caretakers may suffer long-term consequences.<sup>98</sup> These studies found that if good care is pro-

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91. RUTTER, *supra* note 90, at 18 (compilation of current research on the effects of maternal deprivation).

92. *Id.* at 125; Modlin, *Child Custody: Standards and Considerations in Determining or Modifying Orders Re Same*, 1963-65 A.B.A. SEC. OF FAMILY PROC. 38, 41. *But see* Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335, 343-48 (1982).

93. Klaff, *supra* note 92, at 347. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 31-34 (1973) [hereinafter cited as GOLDSTEIN]; RUTTER, *supra* note 90, at 18-23.

94. RUTTER, *supra* note 90, at 18.

95. *Id.*

96. *Id.*

97. *Id.* at 60-61.

98. *Id.* at 101 ("In a study of working mothers, [one researcher] found that the only group to suffer were the children who went from 'pillar to post' in a succession of unsatisfac-

vided, the main drawback to day-care centers is that very young children are more likely to contract common childhood illnesses.<sup>99</sup>

Current research has found that the quality and continuity of care by a primary caretaker over time is essential to the child's emotional well being and development.<sup>100</sup> Constant availability of the primary caretaker is not required to achieve these results. Moreover, research indicates that the constant availability of the primary caretaker may actually be detrimental to the child in some cases.<sup>101</sup>

A few jurisdictions have recognized the need for an unbroken relationship between the child and the primary caretaker.<sup>102</sup> In response, these jurisdictions have created a presumption which protects the relationship.<sup>103</sup>

### C. Primary Caretaker Presumption

Most states have the best interests standard for determining custody awards.<sup>104</sup> At least two jurisdictions have adopted a primary caretaker presumption to aid judges in finding what is in the child's best interests.<sup>105</sup> The primary caretaker presumption assumes that the parent who has a history of providing for the child's needs will continue to do so and should be awarded custody. The presumption also recognizes the child's need for a continuous relationship with the primary parent.<sup>106</sup> An examination of the factors used in jurisdictions which have adopted a primary caretaker presumption demonstrates how the determination of custody awards is affected when there is a presumption protecting the relationship of the child and its primary caretaker.

In *Marriage of Handy*,<sup>107</sup> the Oregon Court of Appeals reversed a decision by the circuit court which changed physical custody

tory and unstable child-minding arrangements.").

99. *Id.* at 61-62.

100. Klaff, *supra* note 92; GOLDSTEIN, *supra* note 93 (continuity with caretaker should be the guide in custody disputes); RUTTER, *supra* note 90, at 18.

101. RUTTER, *supra* note 90, at 61 (children of mothers who work may be less likely to become delinquent than those whose mothers don't work).

102. See *Garska v. McCoy*, 278 S.E.2d 357 (W.Va. 1981); *Gould v. Gould*, 116 Wis. 2d 493, 342 N.W.2d 426 (1984); *Marriage of Handy*, 44 Or. App. 225, 605 P.2d 738 (1980).

103. See *Garska*, 278 S.E.2d 357; *Gould*, 116 Wis. 2d 493, 342 N.W.2d 426; *Handy*, 44 Or. App. 225, 605 P.2d 738.

104. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 236-37 (Summer 1975).

105. *Garska*, 278 S.E.2d 357; *Gould*, 116 Wis. 2d 493, 342 N.W.2d 426.

106. Pollikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RIGHTS L. REP. 235, 241-43 (1982).

107. 44 Or. App. 225, 605 P.2d 738 (1980).

of the children from the mother to the father because he was soon to remarry.<sup>108</sup> The court of appeals stated that if there were no persuasive evidence of harm to the children in their present environment, the children should remain with the parent who has provided the primary care of the children.<sup>109</sup>

In *Garska v. McCoy*,<sup>110</sup> a West Virginia trial court changed custody of the child from the mother and primary caretaker to the putative father based on the father's superior economic position and education.<sup>111</sup> The court of appeals reversed the trial court's decision, but acknowledged that when both parents are fit custodians, it is impossible for a judge to decide who is the better caretaker.<sup>112</sup> The court found that custody proceedings can have a destructive impact on the emotional health of the children.<sup>113</sup> In addition, the court stated that a primary caretaker may bargain away needed support payments when faced with the possibility of losing his or her child.<sup>114</sup> To avoid these results, the court held that when the child is of tender years, custody will be awarded to the parent who has taken primary responsibility for the care of the children.<sup>115</sup> The court of appeals found that economic and educational factors alone "pale in comparison to love, tolerance, and the willingness to sacrifice."<sup>116</sup> The court also noted that the primary caretaker parent has a child-rearing history to which the court can look to determine his or her fitness as a parent. If fit, the primary caretaker should continue as the custodial parent.<sup>117</sup>

#### IV. ANALYSIS OF THE CURRENT STANDARDS

In California, the change of circumstances requirement and the best interests standard do not provide judges in custody modification cases with guidelines to help them decide which parent can provide the better care. Currently, judges may use any factors they deem relevant to determine whether to change an existing custody arrangement. Their decisions often rest on financial status and constant

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108. *Id.* at 227, 605 P.2d at 739-40.

109. *Id.* at 235-36, 605 P.2d at 742-43.

110. 278 S.E.2d 357 (W. Va. 1981).

111. *Id.* at 359.

112. *Id.* at 361-62.

113. *Id.* at 361.

114. *Id.* at 362.

115. *Id.*

116. *Id.* at 364.

117. *Id.*

availability of a female caretaker in the home.<sup>118</sup> Decisions founded on these factors do not recognize the real needs of the children for love and nurturing from the bonding parent who has been the primary caretaker.<sup>119</sup> Moreover, decisions based on these factors produce unfair results and do not achieve the best interests of the children.

Currently, the courts have not adequately defined the standards which trial judges should follow when deciding whether a change of circumstances has occurred.<sup>120</sup> The next section examines the current change of circumstances rule.

### A. *Change of Circumstances Rule*

The California Supreme Court set out three standards for judges to follow when determining whether a change of circumstances has occurred. First, a trial judge should not find changed circumstances unless the litigation will have a substantial impact on the child's welfare. Second, judges should consider the effects of disrupting the child's established homelife. Third, the possible adverse effects of protracted litigation on the child should be considered.<sup>121</sup> However, cases indicate that many trial courts do not follow these guidelines. Either they do not require a change of circumstances at all, or they use factors unconnected with the child's welfare to find the required change. The *Carney* court noted that trial judges have broad discretion in deciding custody modification cases. However, the court recognized the need to limit this discretion.<sup>122</sup>

In *Speelman v. Superior Court*,<sup>123</sup> the trial court did not require any change in circumstances to change the custody of the child. The case was decided merely on what the judge considered to be in the child's best interest.<sup>124</sup>

In *Burchard*, the trial court also neglected to find a change of circumstances before it changed the custody of the child. On appeal, the appellate court affirmed and noted that circumstances are constantly changing, and that almost anything could constitute a change

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118. See Pollikoff, *supra* note 106; Woods, Been & Schulman, *Sex and Economic Discrimination in Child Custody Awards*, 16 CLEARINGHOUSE REV. 1130, 1130-33 (1983).

119. Klaff, *supra* note 92, at 347 n.71.

120. Mnookin, *supra* note 104, at 262-68 ("Custody disputes are now decided on broad, person-oriented principles that ask for highly individualized determinations.").

121. *Carney*, 24 Cal. 3d at 730-31, 598 P.2d at 38, 157 Cal. Rptr. at 385.

122. *Id.*

123. 152 Cal. App. 3d 124, 199 Cal. Rptr. 784 (1983).

124. *Id.* at 126-28, 199 Cal. Rptr. at 785-86.



in circumstances sufficient to warrant a change in custody.<sup>125</sup> The court reasoned that the change of circumstances rule was designed to prevent repeated litigation arising from minor changes in the custodial parent's life.<sup>126</sup>

The lack of definition in the standard has several undesirable consequences. First, although the standard is sex-neutral, the courts prefer remarried fathers over single working mothers as custodians. Judges tend to award custody to remarried fathers because there is a female available who can provide constant care. For instance, in *Burchard*, despite the fact that the mother had been the sole caretaker of the child since its birth, the trial court found that the mother, father and stepmother were equally bonded with the child. The court also found that the father and stepmother could provide constant care for the child without relying on baby sitters.<sup>127</sup>

Second, because the rule is so vague, custody modification decisions are often overturned for abuse of discretion.<sup>128</sup> These frequent reversals demonstrate that the standard fails to provide adequate guidelines to help judges reach proper decisions. Thus, judges are able to substitute personal preferences for the limits and policies set out by the supreme court.<sup>129</sup> This is illustrated by *Speelman*, where the judge decided he liked one environment better than the other.<sup>130</sup> The judge did not consider the effect of a change on the child, nor did he consider the possibility of an extended custody battle. The judge simply applied his own preference for a less restrictive lifestyle.

Third, a single working mother faces severe risks if she must take her case to an appellate court in order to protect her child's welfare.<sup>131</sup> A single working mother probably cannot afford to appeal the trial court's decision. Even if she can afford an appeal, the appellate court may be influenced by the fact that the child has already experienced one change of environment under the trial court's decision. The child may also have lived with the father for one or

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125. 2 Civ. 66559, slip op. at 6.

126. *Id.* slip op. at 5.

127. No. EAD 64669, slip op. at 2-3.

128. *See, e.g., Speelman*, 152 Cal. App. 3d 124, 199 Cal. Rptr. 784; *Carney*, 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383; *In re Marriage of Kern*, 87 Cal. App. 3d 402, 150 Cal. Rptr. 860 (1978); *Denham v. Martina*, 214 Cal. App. 2d 312, 29 Cal. Rptr. 377 (1963); *Ashwell v. Ashwell*, 135 Cal. App. 2d 211, 286 P.2d 983 (1955); *Bemis v. Bemis*, 89 Cal. App. 2d 80, 200 P.2d 84 (1948).

129. *See Mnookin*, *supra* note 104, at 263.

130. 152 Cal. App. 3d at 127-28, 199 Cal. Rptr. at 786.

131. *See Mnookin*, *supra* note 104, at 262-68.

two years by the time the appeal is adjudicated. Thus, the court may hesitate to change the child's environment again.<sup>132</sup>

The standard is also not guaranteed to be adjudicated any more equitably merely because it is being tried in an appellate court. The standard is indeterminative, and, therefore, the outcome is unpredictable.<sup>133</sup>

The *Burchard* case demonstrates the unpredictability of the change of circumstances rule. The father suggested that the mother have an abortion when she told him of her pregnancy. The mother declined to have an abortion, and the father refused to stipulate to paternity until fifteen months after the child's birth. Several months later he married another woman and sued for custody of the child. He was awarded custody, and the mother appealed.<sup>134</sup> The appellate court affirmed the trial court's decision and did not require a change of circumstances. The court also noted that the child had been in the custody of the father for two years, and the court did not want to disrupt the child's established lifestyle.<sup>135</sup>

#### B. *Best Interests of the Child Standard*

The standard governing all custody actions in California is the best interests of the child.<sup>136</sup> The best interests standard has even fewer limits than the change of circumstances rule.<sup>137</sup> The best interests standard sets no limits on judges who make custody determinations.<sup>138</sup> Commentators and experts in the family law field have strongly criticized the best interest standard.<sup>139</sup> One report, prepared for the California Legislature, found that the best interests standard was "given more passing mention than real effect."<sup>140</sup> The report stated that "the standard is too often applied as a mere generalization, without real inquiry into whether the disposition actually fulfills the child's best interest."<sup>141</sup> Another study noted:

Too often these so-called generalizations or cliches are used by our lawyers and judges with basically no real investigation or

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132. See, e.g., *Burchard*, 2 Civ. 66559, slip op. at 7.

133. Mnookin, *supra* note 104, at 263.

134. Appellant's Opening Brief, *supra* note 50, at 2-3.

135. 2 Civ. 66559, slip op. at 7.

136. CAL. CIV. CODE § 4608 (West Supp. 1986).

137. *Carney*, 24 Cal. 3d at 731, 598 P.2d at 38, 157 Cal. Rptr. at 385.

138. CAL. CIV. CODE § 4608 (West Supp. 1986).

139. See, e.g., GOVERNOR'S COMMISSION REPORT, *supra* note 63, at 38.

140. *Id.*

141. *Id.*

thought given to what actually is in the best interests of the child. Moreover, there are often honest differences of opinion concerning a fit custodial parent or the best interests of children. Individual discretion of judgment is not always a sure guide to custody matters. When one considers the fact that our divorce judges have a wide and almost uncontrolled discretion in these matters, the problem is compounded. The exercise of this discretion cannot be considered simply as a legal function, no matter how learned in the law a judge may be. We must recognize that the discretion exercised by a trial judge is far less a product of his learning than of his personality and temperament, his background and interests, his biases and prejudices, conscious or unconscious. Hence, it is both necessary and practicable to attempt to give more definite substance to the generalizations that creep into our laws and into our cases.<sup>142</sup>

The solution proposed by the Interim Committee<sup>143</sup> and the Governor's Commission on the Family<sup>144</sup> was to increase the use of child welfare experts to help trial judges make custody determinations. Cases indicate, however, that the use of experts has not curbed the discretion of the trial judge.<sup>145</sup> Moreover, studies reveal that experts are susceptible to the same biases as are judges.<sup>146</sup> Thus, judges often make determinations based on recommendations from evaluators who share inconsistent views about single mothers and their ability to provide adequate care for their children. Thus, these determinations do not always reflect the research regarding the child's best interest.<sup>147</sup>

Many factors have been used by trial court judges in determining the best interests of the child. Judges generally rely on two major factors: economic factors and a traditional lifestyle preference.<sup>148</sup> When economic factors are used in guiding the judge's decision, custody is determined by examining which parent is more financially secure and can offer more material benefits to the child. Economic factors are important in custody determinations because the judge

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142. INTERIM COMMITTEE REPORT, *supra* note 63, at 152-53.

143. *Id.* at 161.

144. GOVERNOR'S COMMISSION REPORT, *supra* note 63, at 41.

145. *See supra* note 123-39 and accompanying text.

146. Three child welfare professionals, each with at least five years of experience, participated in a study where they had to determine whether a child should be removed from its home. Ninety-four actual cases were used in the study. Out of 94 cases, the experts agreed on only 45. More importantly, they did not rely on the same factors when they were in agreement. Mnookin, *supra* note 104, at 263.

147. *See supra* notes 90-101 and accompanying text.

148. *See supra* notes 103-121 and accompanying text.

must ensure that the custodial parent can provide the child with the basic necessities of life.<sup>149</sup> However, the earning power of a single mother is usually inferior to that of the father.<sup>150</sup> When a judge uses economic factors to determine which parent will be awarded custody of the child, the father will have an advantage in most cases.

In *Burchard*, the trial court found the father was more stable in his job than the mother and that he was "better equipped economically" to care for the child. The court also found that the father owned his own home, where the child would have a "content environment."<sup>151</sup>

The use of economic factors results in an inadvertent preference of giving fathers custody in modification cases. This result directly contradicts the requirement of a sex-neutral standard.

The second major factor applied by courts is a preference for a traditional lifestyle.<sup>152</sup> Many trial court judges favor custody awards to the parent who can provide the most traditional lifestyle for the child. These judges prefer a family structure involving a working father and a non-working mother which no longer exists in over half the families in the United States.<sup>153</sup> This attitude fails to recognize the great increase in families with two working parents, and it also fails to acknowledge the substantial increase in single parent households, especially those headed by women.

The preference for a traditional two-parent family is based on the belief that a "mother's place is in the home" where she can provide constant care for her children.<sup>154</sup> If a single mother works and must rely on day care, the judge may decide that she is not providing a good home for the child. The judge may also feel that the mother is subordinating her child's needs to her own.<sup>155</sup> Thus, when a remarried father seeks a change in custody, the judge may award custody to the father because he can provide a home with a constant female caretaker.<sup>156</sup>

The trial court in *Burchard* was persuaded by the fact that the father and stepmother could provide constant care without relying on

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149. *Assembly Comm. Report, supra* note 26, at 8061.

150. *See supra* notes 85-87 and accompanying text.

151. No. EAD 64669, slip op. at 2-3.

152. Pollikoff, *supra* note 106, at 241.

153. *See supra* text accompanying notes 75-83.

154. *See, e.g., Washburn*, 49 Cal. App. 2d 581, 588, 122 P.2d 96, 100.

155. For instance, one trial court stated that the mother was more interested in being an attorney than in being a mother. *Career or Child? Mom Would Have to Choose*, 69 A.B.A. J. 1808 (1982) [hereinafter cited as *Career or Child*].

156. *Burchard*, No. EAD 64669, slip op. at 2.

baby sitters. The appellate court stated that the stepmother's acceptance of the child was a significant factor.<sup>157</sup>

Further, the traditional lifestyle factor results in a view of women as "fungible" caretakers. Under this view, any woman, regardless of her relationship with the child, becomes an equally desirable caretaker simply because she is female and available.<sup>158</sup> The fact that the trial court in *Burchard* found that the child was bonded equally with the stepmother after a period of only a few months of visiting the father's home would seem to evince the notion of women as fungible caretakers.

When judges base custody decisions on a preference for a non-working mother figure in combination with economic factors, an unspoken double standard for single working mothers inadvertently results. The father's dedication to his work is seen as providing for the child's best interests, but the mother who works is seen as failing to provide a good home life.<sup>159</sup> In addition, the father generally earns more money, so the mother appears to offer a less desirable home in this way as well.<sup>160</sup> Thus, the mother who works to provide for the needs of her children faces a "Catch-22" situation in a custody modification proceeding. Her dilemma is a direct result of the lack of limits on judicial discretion.

Most importantly, basing custody modification decisions on a traditional lifestyle preference and economic factors fails to serve the best interests of the child as we now understand them. Research shows that children need quality care from a primary caretaker. The constant availability of a parent and the presence of a female caretaker are not necessary. The need for an unbroken relationship is significant in the child's emotional development.<sup>161</sup> A new house and material benefits cannot replace the love and nurturance of the child's primary caretaker.<sup>162</sup> A stepmother cannot take the place of a mother who has been the child's primary caretaker since birth. The finding by the trial court in *Burchard* that the stepmother was equally bonded with the mother despite her limited contact with the child is controverted by available evidence on child development research.<sup>163</sup> Primary caretakers are not fungible. The continuity of the

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157. 2 Civ. 66559, slip op. at 6.

158. Pollikoff, *supra* note 106, at 241.

159. See *Career or Child*, *supra* note 155, at 1808.

160. *Garska*, 278 S.E.2d at 359.

161. Klaff, *supra* note 92, at 347 n.71.

162. ASSEMBLY COMM. REPORT, *supra* note 26, at 8061.

163. RUTTER, *supra* note 90, at 18-19.

relationship with the specific caretaker is significant.

Decisions based on economic and traditional lifestyle factors can have a damaging effect on the child's welfare. If custody is changed based on these factors and continuity with the primary caretaker is broken, the child may suffer emotional damage. This damage may not be able to be reversed on appeal.<sup>164</sup>

These results flow from the broad discretion given trial court judges in custody modification cases. Neither the change of circumstances rule nor the best interests standard provide judges with adequate guidance to make changes in custody decisions.

### C. Policy

The basic underlying concern in custody modification cases is promoting the child's welfare.<sup>165</sup> Views on what is important to the child's welfare, however, change as society changes. The history of the laws affecting child custody in California reflects these changes. The California Legislature has taken different approaches to implement the policy of protecting the welfare of children. First, the Legislature adopted the tender years presumption because it was believed that children needed the love and constant care only a mother could provide.<sup>166</sup> The presumption was in effect for one hundred years, and during this period, mothers were viewed as the preferred custodians for young children.<sup>167</sup> Next, the Legislature revamped the existing divorce laws by adopting the Family Law Act in 1969.<sup>168</sup> The Legislature intended to reduce the effects of divorce on children by using experts to decide difficult custody cases and end acrimonious litigation. Three years later, the Legislature recognized that the tender years presumption no longer reflected an accurate view of women's changing social roles.<sup>169</sup> They also recognized that the presumption resulted in discrimination against fathers in custody actions.<sup>170</sup> Thus, in 1972, the Legislature abolished the tender years presumption and adopted a sex-neutral standard for determining custody cases.<sup>171</sup> Next, the California Supreme Court in *Carney* at-

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164. Klaff, *supra* note 92, at 347.

165. CAL. CIV. CODE § 4608 (West Supp. 1986).

166. CAL. CIV. CODE § 246 (1872).

167. GOVERNOR'S COMMISSION REPORT, *supra* note 63, at 39.

168. CAL. CIV. CODE §§ 4000-5174 (West Supp. 1983).

169. CAL. CIV. CODE § 4600 (West 1983) (repealing statutory preference for maternal custody of young children in 1972).

170. GOVERNOR'S COMMISSION REPORT, *supra* note 63, at 39.

171. See *supra* note 169.

tempted to establish policy factors to guide judges in custody decisions.<sup>172</sup> The *Carney* court sought to end litigation in custody modification cases by requiring that the circumstances render a change in custody essential or expedient. The court also found that the child's established lifestyle should not be changed.<sup>173</sup> Thus, both the Legislature and the court recognized the value of certainty and stability for children.

Cases demonstrate that the policy of ending litigation in change of custody cases is not being realized.<sup>174</sup> The *Carney* court noted that reversals of trial court decisions were not uncommon. This is harmful to the child's welfare because the relationship with the primary caretaker has been broken. Reversals also adversely affect single working mothers who may litigate custody cases at the appellate level and then lose because judges do not want to change the child's environment.

Many judges do not follow the *Carney* guidelines and use other factors such as economics and a traditional lifestyle preference to determine custody modification cases.<sup>175</sup> However, current research shows that economic factors and a preference for a traditional lifestyle do not take the child's real developmental needs into account.

There is a genuine need to provide substantive guidelines for judges.<sup>176</sup> Without such guidelines, the policies articulated by the Legislature and in *Carney* cannot be implemented. These guidelines should be based on current behavioral science research and should ensure that trial courts take account of the child's need for a stable relationship with the primary caretaker parent. The changing structure of the family must also be recognized, so that judges can evaluate the family situations of litigants in a more realistic light.

In addition, proper guidelines will reduce the trend toward the father preference in custody modification actions. This will provide a more equitable result for single working mothers. Better substantive guidelines in custody modification cases would also make determinations more predictable. If parents can predict the outcome of custody awards, acrimonious litigation might be reduced.<sup>177</sup> This would allow the family a better opportunity to adjust to its new lifestyle. Thus, the stability of the child will be protected and cooperation be-

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172. 24 Cal. 3d at 730-31, 598 P.2d at 39, 157 Cal. Rptr. at 385-86.

173. *Id.* at 730-31 598 P.2d. at 38. 157 Cal. Rptr. at 385.

174. *See supra* note 128.

175. *See supra* text accompanying notes 122-35.

176. Mnookin, *supra* note 104, at 262-68.

177. *Id.*

tween parents will be more likely.<sup>178</sup>

## V. PROPOSALS

### A. *Require A Showing of Harm to Meet the Change of Circumstances Requirement*

In order to protect the child's best interests and promote the policy objectives of the California Legislature, an extraordinary change in circumstances should be required before a change in custody from one natural parent to the other can be made. Speculative harm should not satisfy the requirement of an extraordinary change in circumstances. The party seeking the change should be required to show that the child's present environment causes some actual harm to the child. The manner in which custody was first established should not affect the requirement.

The *Carney* court reaffirmed its commitment to two major policies in change of custody cases: protecting the child from unnecessary changes in their living situation and ending litigation.<sup>179</sup> However, the court did not set out clear guidelines to effect these policies, and appellate court reversals in child custody cases have not been uncommon.<sup>180</sup>

An extraordinary change in circumstances requirement would provide judges with a more objective standard to guide their decisions. Moreover, the proposed requirement would help prevent custody changes based on outdated stereotypes. An actual harm requirement would serve the best interests of the child because it would make it more difficult to take the child from its present home. This would help guarantee continuing contact between the child and the primary caretaker.<sup>181</sup>

The requirement of an extraordinary change in circumstances would ensure that the policy objectives of the California Legislature and the *Carney* court would be implemented. The Legislature's attempt to give greater recognition to behavioral science research would be satisfied because of the recognition that the child's continuity with its primary caretaker is paramount. The *Carney* court's policy considerations of bringing an end to litigation and allowing the child's environment to remain stable would be advanced by this proposal because parents would be able to predict the outcome of

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178. Krom, *supra* note 28, at 156-57.

179. 24 Cal. 3d at 730-31, 598 P.2d at 38, 157 Cal. Rptr. at 385.

180. See *supra* note 128.

181. GOLDSTEIN, *supra* note 93, at 31-34.



custody disputes. Judges would also have clear guidelines when deciding these cases and reversals would be less common.

The extraordinary change in circumstances requirement would also decrease discrimination against single working mothers by limiting judicial discretion. It would promote a sex-neutral custody determination because it favors the parent who has been the primary caretaker. A stricter standard would also protect the custody rights of fathers.<sup>182</sup>

### B. *Adopt a Primary Caretaker Presumption*

In its current form, the best interests of the child standard is too vague to guide judges when they decide which parent should have custody of the children. Custody cases are the most difficult family law cases for trial court judges to decide, and judges need clear guidelines to help them.<sup>183</sup> Therefore, California should establish a presumption favoring the primary caretaker for all custody disputes between natural parents where the child is of tender years.<sup>184</sup> The presumption is sex-neutral; it gives preference to the parent who has provided the primary care for the child. This standard would comport with modern understanding of the child's best interests.

The primary caretaker presumption can be objectively verified by judges by listing duties connected with child rearing and establishing which parent performed those duties.<sup>185</sup> If the parents shared equal responsibility for raising the child, the presumption would not apply.

Adopting the primary caretaker presumption would decrease acrimonious litigation over who is the better parent. Costs to the parties would also be reduced because the need to rely on experts would be decreased.<sup>186</sup> If the primary caretaker is a single mother,

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182. See *Garsha*, 278 S.E.2d at 362-63.

183. GOVERNOR'S COMMISSION REPORT, *supra* note 63, at 38.

184. The presumption would not apply in a dispute such as between a natural parent and a natural grandparent.

185. In *Garsha*, 278 S.E.2d at 363, the court noted the following factors in determining who provided the primary care for the child:

(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. baby sitting, day care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e., teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; (10) teaching elementary skills, i.e., reading, writing and arithmetic.

186. *Id.* at 362.

she would not be as tempted to sacrifice needed child support in order to gain custody.<sup>187</sup> A clear standard would also decrease the amount of time judges spend deciding each case.

Under the primary caretaker presumption, the parent with the best record of providing for the child's needs will be awarded custody in most cases. This would truly serve the best interests of the child.

The primary caretaker presumption would limit the judge's discretion to use economic factors and traditional lifestyle preferences. This presumption would reduce discrimination against single working mothers and would provide a clear standard on appeal.

### C. *Judicial Notice*

In order to provide for the equitable and consistent disposition of cases involving a change in child custody, judicial notice should be taken of the potential discrimination that has been recognized in other jurisdictions following the abrogation of the tender years presumption. Judicial notice should also be taken of the child's need for a stable and continuous relationship with its primary parent.

The recognition by the court of the change in the family structure would reduce discrimination against single working mothers because it would bring current social realities to the attention of judges who may inadvertently apply outdated biases for a traditional family. The recognition of the child's need for stability and continuity would decrease the adverse effects experienced by children due to court ordered changes in their environment.

### D. *Recommendations to Attorneys*

Until the California Supreme Court takes judicial notice of the way broad discretion affects single working mothers in custody modification cases, attorneys representing mothers bear the responsibility of informing the court about the effects of changing social realities on their clients. Information on contemporary family life and current behavioral science research is readily available.<sup>188</sup> Even if trial courts are not persuaded by these arguments, the information would be part of the record on appeal. The family law bar can help its clients and the efficiency of the legal system by focusing the court's attention on the essential components of a child's welfare: the need for love and continuing contact with the primary caretaker.

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187. *Id.*

188. *See supra* notes 72-100 and accompanying text.

## VI. CONCLUSION

When the California Legislature eliminated the tender years presumption in 1972, it took a giant step toward ending sex discrimination in custody disputes. However, eliminating the presumption without providing explicit guidelines has allowed trial judges to base custody decisions on factors that are not related to the best interests of the child. The use of outdated factors also reinforces sex-role stereotypes which discriminate against both mothers and fathers.

Establishing a primary caretaker presumption in conjunction with an extraordinary change of circumstances requirement in custody modification cases will reduce litigation and will help avoid upsetting the child's stable home environment and connection with the primary caretaker. Most important, these measures will serve the best interests of the children:

We have heard it said that beyond nourishing food, clothing and shelter, children need little further that is material. But their needs of the spirit, including love and just treatment, although simple, are absolute. If these needs are not met, and we deprive them of the consideration and justice they deserve, nothing else can serve in their place. On the other hand, if these needs are met, nothing else matters.<sup>189</sup>

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189. Fain, *supra* note 64, at 37.

[EDITOR'S NOTE: The Burchard v. Garay case discussed throughout this comment was subsequently decided by the California Supreme Court. 42 Cal. 3d 531, \_\_\_ P.2d \_\_\_, \_\_\_ Cal. Rptr. \_\_\_ (1986). The court, in an opinion by Justice Broussard, held that the trial court had correctly used the best interest of the child standard and had correctly refused to apply the changed circumstances rule because there had been no prior custody decision. Although the correct standard was used, the court reversed the trial court decision because the trial court erred in applying that standard. The "relative economic position" of the parties should not be analyzed, and continuity and stability of custody should weigh heavily in the decision. 42 Cal. 3d at 535, \_\_\_ P.2d at \_\_\_, \_\_\_ Cal. Rptr. at \_\_\_. Further, the court stated that the trial court's "reliance upon the asserted superiority of William's child care arrangement [with constant care by the child's stepmother] suggests an insensitivity to the role of working parents." *Id.* This decision directly supports the analysis set forth by the author of this comment.]