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The Ethics of Judicial Decision-Making Regarding Custody of Minor Children: Looking at the Best Interests of the Child" and the "Primary Caretaker" Standards as Utility Rules

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I. INTRODUCTION

Divorce is at epidemic proportions. In 1993, there were 1.2 million divorces, about one-half of which involved at least one minor child, according to the National Center for Health Statistics.[1] In 1993, "[t]wenty-nine percent of all minor children were living in a single parent home, a total of 17.3 million children. Each year an additional 1 million children experience the divorce or separation of their biological parents."[2] Scholars and statisticians project that forty percent of children born during a marriage will experience the divorce of their parents.[3]

Upon a divorce, parents and children must reorganize their lives. A custodian for the children must be chosen, visitation for the non-custodial spouse must be arranged, and child support must be determined. We need precise and workable standards to help divorcing parties and the courts make these arrangements.

Custody decision-making has been historically characterized by rule-based, gender-specific outcomes. For centuries, fathers received custody of their children after a divorce. "The patriarch's right to

1. Stephen J. Bahr, et al., *Trends In Child Custody Awards: Has The Removal Of Maternal Preference Made A Difference?*, 28 FAM. L.Q. 247, 247 (1994).
2. *Id.*
3. *Id.* at 247-48.

custody and control over his minor children was near absolute as the nineteenth century opened and was the uniform rule in American jurisdictions."[4] Then, during the late 1800s and early 1900s, custody decision-making shifted with the rise of the cult of womanhood. As one commentator noted, "[b]y the end of the nineteenth century . . . the patriarch's right was replaced by a maternal preference at divorce: a presumption that children of tender years were best off in the custody of their mother."[5] Thus, prior to 1970, the restructuring of the divorced family was facilitated by the maternal preference — mothers would get custody of their children, fathers would visit and pay child support.

Around 1970, gender-based decision-making began to disappear.[6] The maternal preference was effectively challenged as unconstitutional on equal protection grounds. Within a decade nearly all jurisdictions turned their attention to the child, rather than to the gender of the parent.[7] The maternal preference was replaced by the "best interests of the child" standard. Under the ostensibly neutral best interests standard, the judge could consider a series of factors to determine the child's custodians. Factors typically include the child's wishes, the child's attachment to school and her environment, the past care taking practices of each parent, the significance of the child's interaction and inter-relationship with each parent, siblings, with other relatives, and the physical and mental health of all persons involved in the potential custody arrangement.

The best interests standard was adopted in part to provide a gender neutral standard to evaluate which parent should get custody after a divorce.[8] Therefore, "[c]hild custody would be decided only by reference to what is best for the individual child, and not by the gender of the parents. Because every family is different, decisions would be made on a case-by-case basis to ensure that each child was placed with the best custodian."[9] Utilizing the best interests standard, family law courts sought to achieve individualized justice in every case.

Within the last decade, the predominant best interests standard has come under increasing attack by legal commentators as being indeterminate and unduly influenced by the courts' unbridled discre-

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4. Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 168 (1992).
5. *Id.*
6. *Id.*
7. *Id.* at 169.
8. *Id.* at 172.
9. *Id.*

tion and bias. In response, a few alternative custody standards have emerged.

This article will examine how a judge's ethical framework can influence the outcome of a custody award, even where the same "child-centered" standard is ostensibly being used. This article uses three cases from the Supreme Court of Nebraska to demonstrate that the "best interests of the child" standard can be used: 1) to award a parent custody because parents have near absolute rights (an example of rule deontology); 2) to deny a parent custody because the parent is unfit (an example of rule utilitarianism); or 3) to deny a parent custody because the child's life needs stability (an example of act utilitarianism).

The three case illustrations come from different time periods. Thus, they show how Nebraska's understanding and interpretation of the best interest of the child standard has changed over the years. Equally, they suggest that any court using the best interest standard may vary the interpretation of the standard to fit an ethical posture or belief system, if not checked by more specific decision-making guidelines.

Part II of this article briefly looks at some ethical options which would facilitate determinate custody decision-making. Finally, part III of this article explores the evolution of the primary caretaker standard as a reaction to the indeterminacy of the best interests standard and as an attempt to limit judicial discretion.

II. LIMITATIONS AND BARRIERS TO UTILIZING THE BEST INTERESTS STANDARD IN ETHICAL DECISION-MAKING

A. Competing Ethical Frameworks Permitted By the Best Interests Standard

The evolution of custody decision-making can be seen as a progression from rule deontology to rule utilitarianism to act utilitarianism.[10] Custody law began with the natural law view that father was

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10. To simply define these ethical stances and their differences:

1) *Deontologists* claim that certain actions and results are inherently right or good, or right or good as a matter of principle. WILLIAM K. FRANKENA, ETHICS 16-17 (2d ed. 1973). *Rule deontology* operates from these principles.

2) A second ethical philosophy, *teleology*, proposes that actions and results should be favored not because they are intrinsically good, but rather because they promote the better good. The moral value of an action is a function of its consequences. Teleologists advocate actions which are good because of their consequences. *Id.* at 14-15.

Utilitarianism, which holds that an action is right if it promotes the maxi-

the pre-ordained and only legal custodian of children.[11] It then moved from this deontological perspective to a utilitarian ranking based on which parent offered the most value to society as custodian. Rule utilitarianism is reflected in the tender years presumption which dominated the twentieth century until 1970.[12] Finally, custody law moved predominantly to act utilitarianism when it adopted a best interest standard dependant on the weighing of factors — for example, the quality of the child's environment; the child's relationship with each parent and siblings; the child's wishes, adjustment to school, etc. — which could be summed up to find the custodian who offered the greatest good for the child.[13]

Arguably, the best interests standard promotes a utilitarian resolution to a custody problem. Because there are four competing stakeholders in a best interests custody decision, using an act-utilitarian strategy, the interests of the father, mother, child and state should be weighted and summed for each custody award to discover the greatest utility to all concerned.

However, even though the best interests standard seems to propose act utilitarianism, in reality the court has favored rule utilitarianism as presenting a more simple analysis. The past seventy years has seen the predominance of the state's and the parents' interests as having greater utility than the child's. Although theoretically the best interests analysis was fostered to protect a child's welfare, practically, the decision-making often ignores the child itself. With the advent of the tender years doctrine, the natural deontological-law presumption of the father as the primary custodian was converted to a teleological rule of the mother providing the most utility. As courts had uniformly awarded custody to the father prior to 1820, throughout the 1920s to the 1960s, courts uniformly gave custody to the mother. The glimmer of a genuine "best interests" determination that

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mum good for everyone, or at least the greatest number, is a form of teleology. *Id.* at 37-38.

Rule utilitarianism formulates the rules which tend to produce the greatest good. *Id.* at 39.

Act utilitarianism focuses on choosing the acts which tend to produce the greatest good without any guidance of rules. *Id.* at 35-36.

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

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

13. *See generally,* David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce,* 83 MICH. L. REV. 477, 481 (1984).

was seen between 1820 and 1920 yielded to an overriding presumption of "Mom" as best parent. Although "best interests" terminology was frequently used, the monotony of custody decisions showed that it had little real meaning and impact.

In the last twenty years, most jurisdictions have moved away from the presumption that Mom is the better custodian. Instead, they have focused their attention on the child's needs, the child's relationships, and the child's right to personal growth.

In reality, none of the competing ethical perspectives has been entirely abolished. Rule deontology, rule utilitarianism and act utilitarianism survive and flourish under the nebulous best interests of the child standard. Given the discretion inherent in the standard, a judge is often free to apply his or her own ethical standard while reiterating the "best interests" test. Furthermore, we find that sometimes all ethical perspectives are being used, even in the same jurisdiction, to justify conflicting custody awards. When the best interests of the child is not defined, it is up to the judge to impose her or his own ethical framework on the decision-making.

B. Case Examples of the Influence Rule Deontology, Rule Utilitarianism, and Act Utilitarianism Have on Best Interests Custody Decisions

Three cases from Nebraska demonstrate how the indeterminate best interests standard can be used to support widely different judicial decision-making and, consequently, different results. All three cases involve a custody dispute between the child's parents and grandparents. In each case, the issue is whether the grandparents can be given custody of the child over the child's parents. All three cases ostensibly use the "best interests of the child" standard. Nonetheless, all use unbridled judicial discretion to impose different ethical postures on the custody decision.

Raymond v. Cotner[14] uses rule deontology to find that a father has an absolute right to custody of his daughter. *Osterholt v. Osterholt*[15] uses rule utilitarianism to find that a mother can be deprived of custody where she is found unfit. *Haynes v. Haynes*[16] uses act utilitarianism to evaluate the emotional and physical well-being of the child and the suitability of the environments the grandparents and parent offer.

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14. 120 N.W.2d 892 (Neb. 1963), *overruled by* Bigley v. Tibbs, 225 N.W.2d 27, 29 (Neb. 1975).

15. 114 N.W.2d 734 (Neb. 1962).

16. 286 N.W.2d 108 (Neb. 1979).

1. Best Interests Standard Used to Promote Rule Deontology — *Raymond v. Cotner*

In *Raymond*, a father who was a stranger to his daughter because he had not seen her in the last nine years,[17] was awarded custody over the grandparents with whom the girl had resided for ten years.[18] The court mentioned that the child was well cared for, in good health, happy with her grandparents, and did not want to leave them.[19] Further, both the father and the grandparents desired the custody of the child, had suitable homes to care for her, and adequate means of support.[20] The court suggested that the resolution to this custody suit involved a "determination of what is best for Lin Dee Raymond under such circumstances."[21] However, the court rejected this balancing approach to decision-making.[22] Instead, the court found that the father had a natural and superior custody right to his child.[23] The court concluded, "We think the evidence shows that plaintiff is a fit and proper person to have the custody of his child and that he has done nothing that would sustain a finding that he had forfeited his superior right to her custody."[24] It was right or good to give the father custody simply because of the nature of the parent-child relationship.

The dissent in *Raymond* objected to the deontological rule that a father has a superior custody right. "We believe that parental rights in child custody proceedings are preferential, not absolute; and that the rights, desires, and wishes of parents should be considered and respected in such proceedings except where they conflict with the welfare of the children involved."[25] The dissent suggested that although the majority claimed it was doing what was best for the girl, moving her to a virtual stranger's home after ten years with her grandparents, would be a severe disruption and would be emotionally

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17. *Raymond*, 120 N.W.2d at 895 ("[The father] has not visited [his daughter] during the last 9 years, although he has resided less than 100 miles distant. [The father] said he did not visit the child for the reason that he was requested by [the child's mother] not to do so because she did not believe it to be in the best interests of the child.").

18. *Id.* at 896.

19. *Id.* at 894.

20. *Id.*

21. *Id.* at 894-95.

22. *See id.* at 896.

23. *Id.* at 895.

24. *Id.* at 896.

25. *Id.* (White, C.J., dissenting).

damaging.[26] The dissent complained that the majority had used a near absolute rule, giving parents superior rights over the child's best interests.[27]

Rather, the dissent suggested a utilitarian balancing of the child's best interests on a case-by-case basis:

> [A] case involving the custody of a child, deals with a matter of an equitable nature; [the court] is not bound by any mere legal right of parent or guardian, but is to give his or her claim to the custody of the child due weight as a claim founded on human nature and generally equitable and just . . . . [A] court is in no case bound to deliver a child into the custody of any claimant or of any person but should, in the exercise of a sound discretion, after a careful consideration of the facts, leave it in such custody as the welfare of the child at the time appears to require.[28]

The concurrence explicitly rejected the dissent's suggestion of a utilitarian best interest analysis.[29] Instead, the concurrence in *Raymond* used a deontological ranking of natural rights in order to agree with the decision reached by the majority, but to offer a different reason why custody of the child should be awarded to the father.[30] A deontological ordering requires that

> an exception to a rule can only occur when it has to yield the right of way to another rule . . . . [R]ules proposed may be ranked in a hierarchy so that they never can conflict or dispute the right of way. One might also say that the rules may have all the necessary exceptions built into them, so that, fully stated, they have no exceptions.[31]

Following this logic, the concurring opinion suggested that the best interests of the child are presumptively with the parent. It finds that "a fit, proper and suitable parent" has an "absolute right" to custody.[32]

Furthermore, the concurrence argued that it was the parent, not the state, who should properly decide what is in the child's best inter-

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26. *Id.* at 897-98.
27. *Id.*
28. *Id.* at 897.
29. *Id.* at 899 (Messmore, J., concurring).
30. *Id.* at 899-900 (Messmore, J., concurring).
31. FRANKENA, *supra* note 10, at 25-26.
32. *Raymond*, 120 N.W.2d at 899 (Messmore, J., concurring).

ests.[33] A utilitarian best interests analysis improperly gives state rights priority over parental rights. The concurrence "assert[ed] that the rights of the state, exercised by the powers of a court of equity, are subordinate to the rights of a parent."[34] To prevent the state from usurping parental rights, the only proper interpretation of "what is best for the child" would be to award custody to the natural parent.[35]

2. Best Interests Standard Used to Promote Rule Utilitarianism — *Osterholt v. Osterholt*

Similar to the ranking of deontological rules in *Raymond, Osterholt* also suggests the centrality of rules. However, the rationale for ranking the rules emanates from which rule has the greater utility and the greater possibility of promoting the general good. Rule utilitarianism suggests that action should be guided by conformance to moral, legal and social rules adopted for their utility.[36] The two competing utility rules in *Osterholt* are: 1) that "the court will always consider the best interests of the children and will make such order for their custody as will be for their welfare without reference to the wishes of the parties;"[37] and 2) that "the court may not deprive parents of such custody unless they are shown to be unfit to perform the duties to be imposed by that relationship, or they have forfeited their right."[38]

In *Osterholt*, natural parents sought to reclaim custody of their children who had resided with the paternal grandparents for more than two years.[39] The mother had visited them three times during this period, bringing two different men with her during these visits, one who was alleged to be the father of an additional sibling.[40]

Utilizing the first *Osterholt* rule, the court examined the present surroundings of the children and their physical and mental condition.[41] It found that "[t]o take these children from an environment of stability and security to try an experiment elsewhere does not appear to us as being for the best interests of the children."[42] Using the sec-

33. *Id.* at 899-900 (Messmore, J., concurring).
34. *Id.* at 900 (Messmore, J., concurring).
35. *Id.* (Messmore, J., concurring).
36. FRANKENA, *supra* note 10, at 39.
37. Osterholt v. Osterholt, 114 N.W.2d 734, 736 (Neb. 1962).
38. *Id.*
39. *Id.* at 736.
40. *Id.* at 735.
41. *Id.* at 736.
42. *Id.*

ond *Osterholt* rule to further calculate the greatest utility, the court found "the indifference of the mother on occasion, her willingness to let others assume her burden, her recent moral dereliction, coupled with the instability and irresponsibility of the father, certainly would sustain a finding of present unfitness to perform the duties of parenthood."[43] In light of these two rules, the court gave the grandparents custody.[44]

3. Best Interests Standard Used to Promote Act Utilitarianism — *Haynes v. Haynes*

The last case, *Haynes v. Haynes*,[45] takes the most discretionary stance of judicial decision-making by using the best interests standard on a case-by-case basis.[46] Act utilitarianism assesses the impact of an act in this situation on the general good without benefit of guiding rules.[47] In *Haynes*, a father sought custody of his children three months after his ex-wife died.[48] Prior to her death, the mother and children had resided with the maternal grandparents since she and the children's father divorced.[49] The court consulted the wishes of the children, looked at the comparable home environments offered by the parties, and concluded that the grandparents should get custody rather than the father.[50] "[O]ur examination of all the evidence in light of the prevailing circumstances convinces us that the children have suffered sufficient trauma for the time being and that a period of certainty, tranquility, and security would indeed be in the children's best interests."[51] The dissenting opinion criticized this act utilitarian approach to best interests decision-making, complaining that the trial court had made no finding of unfitness or forfeiture so as to preempt the parent's custody right.[52]

III. PROPOSALS FOR RETURNING TO RULE VERSUS ACT UTILITARIANISM TO ELIMINATE UNBRIDLED JUDICIAL DISCRETION

43. *Id.*
44. *Id.*
45. 286 N.W.2d 108 (Neb. 1979).
46. *Id.* at 110.
47. FRANKENA, *supra* note 10, at 35-37.
48. *Haynes*, 286 N.W.2d at 109.
49. *Id.*
50. *Id.* at 109-10.
51. *Id.* at 110.
52. *Id.* at 111 (White, J., dissenting).

Three criticisms characterize the prevalent view of the best interest standard: 1) that the judicial discretion under the best interests standard must be limited; 2) that children must be given an increased voice in the custody decision; and 3) that the tender years doctrine must be rejected because of the social and political climate which demands the neutralization of the gender distinctions. In response to these criticisms, several proposals have been made to change the way custody awards are made. The Primary Caretaker Standard is one of those proposals.

A. Keeping the Best Interests Standard But Making It More Specific

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

A few states attempted to limit judicial discretion by codifying specific guidelines to be adhered to in a best interests custody determination. Michigan's statute is an example:

> "[B]est interests of the child" means the sum total of the following factors to be considered, evaluated and determined by the court:
>
> (a) The love, affection and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties to give the child love, affection and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school and community record of the child.
>
> (i) The reasonable preference of the child, if the court

considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(l) Any other factor considered by the court to be relevant to a particular child custody dispute.[53]

This long list of utility rules guides information-gathering as well as decision-making. The Michigan standard gives the court a more complete basis upon which to make a custody determination and could be used as a guide by the judge to request additional information that is not being provided by the parents' counsel (i.e., psychologicals, expert witnesses, etc.).

B. Eliminating the Best Interests Standard in Favor of Less Complex Utility Rules Decisions - A Recognition of Their Natural Rights

The criticism of the best interests standard as an arbitrary standard remained in spite of these improvements in the law. Underlying this attack is again the sense that court discretion has gone too far. Courts, using the "best interests" justification, leave the door open for re-evaluation and reshuffling of family relationships. The modification of a custody award is an alternative available to parents and other interested parties. Critics find this manifestation of continued judicial discretion over families damaging to the continuity crucial to child development.

Professor Mary Ann Glendon argues that the discretion judges exercise under the best interests test is futile, even if the judge has the best of intentions to reach the optimum result:

> The "best interests" standard is a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge or other third party. Its vagueness provides maximum incentive to those who are inclined to wrangle over custody, and it asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt

53. MICHIGAN COMP. LAWS ANN. § 722.23 (West Supp. 1996).

> to be most distorted by the stress of separation and the divorce process itself. Arguing that the idea that a judge can determine the best interests of a child under such circumstances is a fantasy, and that efforts for legal reform should concentrate on the effect of custody law on private ordering, . . . that almost any automatic rule would be an improvement over the present situation.[54]

Three options to eliminate judicial discretion have been proposed: 1) emancipating children--that is, giving them a voice in the custody decision; 2) using the least detrimental alternative standard; or 3) using the Primary Caretaker Standard.

In an effort to solve the judicial discretion problem, one state, West Virginia, has adopted the primary caretaker standard.[55] Other states have used the primary caretaker standard as one factor in their best interests standard.[56] Judge Crippen reports that, "[c]ourts in at least sixteen states have identified and showed some favor for the parent who had been the primary caregiver before the couple separated.[57] Furthermore, courts from at least seven of these states have identified primary caretaking as a significant factor in assessing the child's best interests.[58] Courts from five states, although declaring the importance of primary caretaking, have rejected it as a presumptive determinant of custody."[59]

Currently, only one state, West Virginia, has singled out primary caretaking as the sole factor indicating a child's best interests.[60] The presumption behind the primary caretaker standard is that children need consistent day-to-day care, and the parent who performed this care during the marriage should get custody.

An example of how the presumption is used to determine custody is provided by the Oregon Court of Appeals in *In re Marriage of Der-*

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54. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986).

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

56. *See, e.g.*, Jordan v. Jordan, 448 A.2d 1113, 1115 (Pa. Super. Ct. 1982); *In re* Marriage of Derby, 571 P.2d 562, 564 (Or. Ct. App. 1977).

57. Crippen, *supra* note 12, at 434 (including California, Delaware, Florida, Iowa, Massachusetts, Minnesota, Missouri, Montana, New York, North Dakota, Ohio, Oregon, Pennsylvania, Utah, Vermont and West Virginia).

58. *Id.* (including California, Delaware, Florida, Massachusetts, Missouri, Montana and New York).

59. *Id.* at 434-35. (including Iowa, North Dakota, Pennsylvania, Utah and Vermont).

60. *Id.* at 439.

by,[61] one of the earliest cases to articulate the presumption. There the court used the primary caretaker standard to award a mother custody of her five year old and nine year old children:

> The undisputed evidence in this case was that the wife was not merely the mother, but was also the primary parent. During the marriage she was not working and performed the traditional and honorable role of homemaker. She cleaned the house, cared for the children, fed the family, nursed them when sick and spent those countless hours disciplining, counseling and chatting with the children that every homemaker should. For some families the husband may perform this role and be the primary parent. In other families the parents evenly divide the role and there is no primary parent. In this family the husband played the traditional role of breadwinner, working eight to ten hours a day. In his off-hours he dedicated much time and attention to the children, but the lion's share of the child raising was performed by the wife. It is undisputed that the children were happy and well-adjusted and that the relationship between the wife and children was close, loving and successful. Although the same relationship unquestionably existed to a degree with the husband, the close and successful emotional relationship between the primary parent and the children coupled with the age of the children dictate the continuance of that relationship.[62]

As this passage demonstrates, the primary caretaker standard is based on a rule which presumes that the greatest good for the child will be secured if the child is placed in the custody of the parent who has provided continuous care. Thus, it is a rule utilitarian standard. Custody decision-making is simplified. The judge can focus on discovering which parent provides daily child care, rather than focus on all the acts which favor the best interests of the child.

Proponents of the primary caretaker preference suggest that the standard

> benefits all interests involved in the custody decision, including the interests of the judiciary. They provide three justifications for the primary caretaker preference: protection of the child's most vital parent-child relationship, avoidance of error, litigation and abusive threats of litigation, and compatibility

61. 571 P.2d 562 (Or. Ct. App. 1977).
62. *Id.* at 564.

with gender neutrality and the child's many interests.[63]

Marcia O'Kelly lists six reasons why courts have adopted a primary caretaker presumption:

1) it promotes the continuity of the primary psychological relationship;

2) it provides an objective basis for predicting future parenting — past care taking;

3) it deters litigants from misusing the custody issue — making a custody request, not to gain custody, but to strengthen unrelated interests in the negotiation process;

4) it encourages private settlement and thereby avoids the impact of protracted custody litigation and relitigation;

5) it is judicially manageable because primary caretaking can usually be identified easily, and there should be adequate, readily-available information to find out which parent has this role; and

6) it permits effective appellate review of the trial court's decision: "[D]id the trial judge report having considered all the relevant factors, and is there some evidence in the record to support her conclusion?"[64]

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

1. The Birth of the Primary Caretaker Presumption

Prior to 1981, West Virginia courts awarded custody of a child of tender years to the mother. While the majority of states abandoned the maternal preference doctrine in the 1960s and 1970s, West Virginia maintained its gender bias. In 1978, the maternal preference came under public attack due to a much criticized decision where the West Virginia Supreme Court applied the maternal preference rule to award custody to a mother presumably found unfit by the trial court.[65] In response, the West Virginia Legislature abolished the maternal preference and established a best interest standard. The relevant statute, enacted in 1980, states:

> In making any such order respecting custody of minor children, there shall be no legal presumption that, as between the natural parents, either the father or the mother should be

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63. Crippen, *supra* note 12, at 440.

64. Marcia O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, 511-33 (1987).

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

> awarded custody of said children, but the court shall make an award of custody solely for the best interest of the children based upon the merits of each case.[66]

The purpose behind the amendment to section 48-2-15 "was merely to correct the inherent unfairness of establishing a gender-based, maternal presumption which would defeat the just claims of a father if he had, in fact, been the primary caretaker parent."[67] The Supreme Court of West Virginia, in 1981, shifted to a gender-neutral, rule-based standard for determining the best interests of the child—the primary caretaker standard. In *Garska v. McCoy*,[68] a mother sought custody of her minor child from the child's father. The lower court awarded the child's father custody because he was better educated, earned more money and offered a preferable social environment than the mother.[69] The supreme court reversed and awarded the mother custody, finding that the mother was the primary caretaker.[70] The court held, where the child is of tender years, "there is a presumption in favor of the primary caretaker parent, if he or she meets the minimum objective standard for being a fit parent."[71]

The West Virginia Supreme Court justified the primary caretaker standard by scientific research which indicates that "young children, as a result of intimate interaction, form a unique bond with their primary caretaker" which "is an essential cornerstone of a child's sense of security and healthy emotional development."[72]

The primary caretaker standard has been used in West Virginia for the past thirteen years. It is the only jurisdiction to currently retain a firm custody preference for this parent. Some jurisdictions have discussed the standard in best interests decision-making as one of many considerations.[73] Oregon, Ohio and Minnesota have experimented with giving the standard more weight relative to other best interests factors.[74] But none of these jurisdictions has made the standard authoritative and determinative of a custody award as West Virginia has.[75] In essence, in spite of numerous articles advocating

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66. Garska v. McCoy, 278 S.E.2d 357, 360 (W. Va. 1981) (citing W. VA. CODE § 48-2-15 (1980)) (historical statute).
67. *Id.* at 361.
68. *Id.*
69. *Id.* at 359.
70. *Id.* at 364.
71. *Id.* at 362-63.
72. David M. v. Mary M., 385 S.E.2d 912, 916-17 (W. Va. 1989).
73. *See generally* Crippen, *supra* note 12.
74. Crippen, *supra* note 12, at 436-39.
75. *Id.* at 438-39.

adoption of the presumption, West Virginia is the only jurisdiction which recognizes that the "the best interests of the child" is coextensive with residing with the primary caretaker.[76]

2. Custody Decision-Making Using the Standard

Richard Neely, Chief Justice of the West Virginia Supreme Court, created the primary caretaker standard in 1983 when he wrote the majority opinion in *Garska v. McCoy*.[77] Under this standard, the first step in making a custody award in West Virginia is to determine which parent is the primary caretaker. The court created the following criteria for determining the primary caretaker:

> In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for, *inter alia*, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl 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.[78]

All ten factors are to be reviewed quickly by the court based on the parties' testimony. There should be no need to turn to experts for the information.[79] Judge Neely explains: "Under West Virginia's scheme, the question of which parent, if either, is the primary caretaker is proved with lay testimony by the parties themselves, and by that of teachers, relatives and neighbors. Which parent does the lion's share of the chores can be demonstrated satisfactorily in less than an hour of the court's time in most cases."[80]

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76. *Id.* at 439.

77. Garska v. McCoy, 278 S.E.2d 357, 368 (W. Va. 1981).

78. *Id.* at 363.

79. *But cf.* the best interest standard which requires expert testimony as to the child's welfare in most jurisdictions.

80. Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and*

After identifying a primary caretaker, the court must consider whether that parent is fit before a custody award is made. "Once the primary caretaker has been identified, the only question is whether that parent is a 'fit parent.' In this regard, the court is not concerned with assessing relative degrees of fitness between the two parents, but only with whether the primary caretaker achieves a passing grade on an objective test."[81]

Fitness as primary caretaker is determined by showing that the parent: 1) provided proper nourishment and clothing to the children; 2) adequately supervised and controlled the children; 3) provided habitable housing; 4) avoided extreme discipline, or child abuse or other vices; and 5) refrained from immoral behavior which would deleteriously affect the child.[82] Again lay testimony is to be used for ease and quickness. Judge Neely comments, "Whether a primary caretaker parent meets these criteria can be determined through nonexpert testimony, and the criteria themselves are sufficiently specific that they discourage frivolous disputation."[83] Finally, where neither fit parent is the primary caretaker, the court will consider the best interest of the child on a case by case basis.[84]

The primary caretaker standard only applies as an irrefutable presumption to children of tender years. Children under six years old are usually considered of tender years.[85] "When, however, we come to those children who may be able to formulate an intelligent opinion about their custody, our rule becomes more flexible."[86]

Under section 44-10-4 of the West Virginia code, children fourteen or older have the right to declare a guardian.[87] The only limitation on this right is that the named parent must be fit. "Often, as might be expected, this means that the parent who makes the child's life more comfortable will get custody; there is little alternative, however, since children over fourteen who are living where they do not want to live will become unhappy and ungovernable anyway."[88]

Children between age six and fourteen are dependent on their parents, but they can usually articulate their preference as to their

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the Dynamics of Greed, 3 YALE L. & POL'Y REV. 168, 181 (1984).

81. *Id.*

82. Moses v. Moses, 421 S.E.2d 506, 508 (W. Va. 1992).

83. Neely, *supra* note 80, at 181-82.

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

85. Neely, *supra* note 80, at 175.

86. *Id.* at 182.

87. W. VA CODE § 44-10-4 (Supp 1996).

88. *Id.*

custody arrangement. The judge may ask these children their preference and consider the child's wishes as part of his or her determination.[89] "When the trial judge is unsure about the wisdom of awarding the children to the primary caretaker, he or she may ask the children for their preference and accord that preference whatever weight he or she deems appropriate."[90] "The judge is not, however, required to hear the testimony of the children, and will not usually do so, particularly if he or she suspects bribery or undue influence."[91] However, "mature" and "intelligent" children are "acceptable experts" who may act as "an escape valve . . . in unusually hard cases."[92]

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

> Although this method for handling child custody may appear overly cut-and-dried and insufficiently sensitive to the needs of individual children, it has reduced the volume of domestic litigation over child custody tremendously. Because litigation *per se* can be the cause of serious emotional damage to children (and to adults), we consider this to be in the best interests of our state's children. Even more importantly, children in West Virginia cannot be used as pawns in fights that are actually about money . . . . The result is that questions of alimony and child support are settled on their own merits.[93]

However, the standard may not be as simple as Judge Neely would suggest. Courts have struggled in several situations. For example, in determining who the primary caretaker is when parents have shifted their roles during different periods of the child's life, *Garska* suggests that the court should focus on which parent was the primary caretaker "before the domestic strife giving rise to the proceeding began."[94] Other cases have disagreed and have focused on the entire parenting period. "A determination of who is the primary caretaker of a child however, cannot be determined simply by reference to any one moment of time . . . . The determination of primary caretaker is a task which must encompass, to some degree, an inqui-

89. *See* David M. v. Margaret M., 385 S.E.2d 912, 924 (W. Va. 1989).
90. Neely, *supra* note 80, at 182.
91. *David M.*, 385 S.E.2d at 924.
92. *Id.*
93. Neely, *supra* note 80, at 182 (emphasis in original).
94. Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981).

ry into the entirety of each child's life."[95] Finally, still other courts have refused to look to who is the primary caretaker immediately before the initiation of the divorce proceedings at all. Instead these cases look at who was the primary caretaker *before* the parents' life began to shift with the breakdown of the marriage. "Under circumstances where the status of primary-caretaker parent is lost as the result of circumstances that are beyond the control of the parent, it is inappropriate for a court to look to who the primary caretaker parent was immediately before the initiation of divorce proceedings."[96]

Also, the length of time a parent is the primary caretaker is not always determinative of a custody award. In *Dempsey v. Dempsey,* where the mother was the primary caretaker of the children for the first six years of the marriage, and the father was the primary caretaker for only one year, the court said, "[c]ertainly [Mrs. Dempsey] had assumed these duties for a longer period of time, but we feel that length of time alone is not determinative of whether the presumption should attach."[97] Thus, using the primary caretaker standard may not be as easy as it looks or as it is reported by Judge Neely.

3. Policy Reasons Behind West Virginia's Adoption of the Primary Caretaker Standard

The Supreme Court of West Virginia adopted the primary caretaker standard: 1) to increase the predictability of and standardize custody decisions; 2) to give parents less incentive to litigate than to settle their custody cases; and 3) to eliminate the use of children as bargaining chips in the process.[98]

First, in the absence of a simple, reliable presumption to determine the "best interests of the child," the *Garska* court worried that custody awards would become unpredictable.[99] The legislature left a void when it overruled the maternal preference doctrine in 1980. Absent this objective presumption, custody decisions after 1980 would have to rest on the court's subjective assessment of each parent's character and lifestyle and what each parent offered to the child. Judges, who normally lack the ability to "measure minute gradations

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

96. J.E.I. v. L.M.I., 314 S.E.2d 67, 68 (W. Va. 1984) (syllabus by the court) (holding that a mother who is not the primary caretaker right before the divorce due to her mental illness is denied custody).

97. 306 S.E.2d 230, 231 (W. Va. 1983).

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

99. *Id.* at 360.

of psychological capacity between two fit parents" would unwisely be called upon to determine relative parental fitness with scientific "precision."[100]

Second, *Garska* suggests that the unpredictability in the custody award process, which results when the best interests test is applied, encourages parents to engage in costly and lengthy litigation when they should settle out of court.[101] In contrast, the criteria for selecting the primary caretaker are clear enough that generally parents would be able to predict the custody award prior to litigation.[102] This predictability would then reduce the need for litigation and would eliminate the best interests "battle of experts." Third, *Garska* worried that parents would use the unpredictable custody battle "as a coercive weapon to affect the level of support payments and the outcome of other issues in the underlying divorce proceeding."[103]

Some may argue that the primary caretaker standard does not provide "justice" however, the furtherance of justice is not one of the articulated policies behind the primary caretaker standard. In fact, Judge Neely admits that "[t]he primary caretaker parent rule may strike some as unsatisfactory because it does not attempt to arrive at precisely the correct decision in each case."[104] However, he notes that adjudication in general is imprecise.

> The greatest frustration in lawmaking is that there is never a choice between systems that work and systems that do not; the choice is always between two systems that are both unsatisfactory in some manner. The best that can be hoped for is a system that works better than others in most cases, and which doesn't do too much damage in the instances where it doesn't. By this test, the primary caretaker parent rule is a success: Although there is some unfairness to parents who do not take a preeminent role in caring for their children before divorce, that unfairness is more than balanced by the effectiveness of the rule in preventing the trading of children for money and in reducing drastically the need for complex and damaging inquiry into family life and parental fitness.[105]

To satisfy the three policies behind the primary caretaker standard, the standard must be easy to apply and lead to certain, pre-

100. *Id.* at 361-62.
101. *Id.* at 360-61.
102. *Id.* at 361.
103. *Id.*
104. Neely, *supra* note 80, at 186.
105. *Id.*

dictable results. Thus, one of the main purposes behind reverting to an objective, rule-based standard is to limit judicial discretion and uncertainty inherent in a utilitarian based best interest analysis.

4. Judges Balance Discretionary and Rule-Bound Decision-Making

American law has continually struggled to reconcile a preference for rule-bound, determinate decision-making with the trial court's desire to look at an issue on a case-by-case basis and provide individualized justice in each case. "This desire for discretionary justice reflects a tentative faith in the ability of decisionmakers to carefully assess individual situations while avoiding undisciplined abuse of general principles."[106]

Professor Schneider explains the continuum between rules and discretion in judicial decision-making:

> [T]here is a continuum between rules and discretion . . . . Toward the 'rule' end of the continuum are a series of devices that are intended to limit decision-makers but are less directive than rules. These include the principles, policies, guidelines, presumptions, and list of factors in which family law abounds.
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> At the other end of the continuum is discretion . . . in a smorgasbord of forms. There is, for instance, discretion to find facts, discretion to chose rules, discretion to interpret rules, and discretion to apply the rules to the facts.[107]

Arguably, discretion is inherent in any judicial decision, even one that is constrained by rules. Greenawalt writes that "discretion exists if there is more than one decision that will be considered proper by those to whom the decision-maker is responsible, and whatever external standards may be applicable either cannot be discovered by the decision-maker or do not yield clear answers to the questions that must be decided."[108] In any one case, a judge may be ostensibly bound by a list of rules, but forced to chose which rules to apply or concentrate on. Judges could decide a case by intuition as to what seems "just" or "fair" in the situation, and then adapt the rules to fit the result desired. The judge has the power/discretion to decide how

106. Crippen, *supra* note 12, at 430-31.

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

108. Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 368 (1975).

to apply the rule to the facts — the power to interpret the law. Discretion has its benefits.

However, discretion has its detriments as well. The "greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made."[109]

Although some judges may enjoy broad discretion, others abhor it. Judge Crippen questions the ability of decision-makers to carefully assess situations while avoiding "undisciplined abuse of general principles."[110] Judge Neely comments on the impossibility of a judge properly exercising discretion in deciding which parent is "better": "The decision may hinge on the judge's memory of his or her own parents or on his or her distrust of an expert whose eyes are averted once too often. It is unlikely that the decision will be the kind of individualized justice that the system purports to deliver."[111] Finally Professor Peggy Davis writes: "As a former judge who has experienced the freedom granted by this permissive view, I have had cause to doubt its wisdom."[112]

To avoid the dangers of unlimited discretion, judges and society favor rules. Schneider identifies two advantages that rules have over discretion.[113] First, the results under rules are more predictable and their public nature serves the planning function of society. Planning/predictability is one of the main goals of the law.

> People need to know what the law says so that they can organize their lives rationally. Rules seem likelier than discretion to inform people what the law is and what courts will do. Rules are, after all, publicly stated and thus are, relatively, accessible to perspective litigants. And rules are precisely an attempt to state in advance how cases should be decided.[114]

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

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109. Glendon, *supra* note 54, at 1181 (citations omitted).

110. Crippen, *supra* note 12, at 431.

111. Neely, *supra* note 80, at 174.

112. Peggy C. Davis, *"There Is a Book Out . . . ": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1541 (1987).

113. Schneider, *supra* 107, at 237-40.

114. *Id.* at 237.

> Rules may serve better than discretion the goal of treating like cases alike. If each decision-maker has discretion to decide case by case what principles to apply and how to apply them, cases that are essentially similar are likely to be decided differently. Rules, on the other hand, work to suppress differences of opinion among decision-makers. Furthermore, rules serve as record-keeping devices, so that decision-makers can more easily coordinate their rulings over time and among themselves.[115]

Schneider identifies four additional advantages of rules over discretion: 1) rules contribute to legitimacy of a decision by making the decision more public; 2) rules allow a judge to focus on a problem and not be distracted by irrelevant circumstances; 3) rules can enforce social norms because the public nature of rules allows individuals to plan for the consequences of their actions and to change their behavior, if needed to avoid negative consequences; and 4) rules are more efficient because they relieve the decision-maker from reinventing the wheel.[116]

The history of child custody law can be seen as a struggle between rules and discretion:

> For decades we have lived with an abundantly discretionary way of resolving child custody disputes: The best-interests-of-the-child standard has long been understood to give judges acres of room to roam. Yet in recent years scholar after scholar has inveighed against the discretionary scope that standard permits judges, and jurisdiction after jurisdiction has adopted one or another standard — the primary caretaker presumption . . . for instance — intended to cabin, crib, and confine the range of judicial discretion.[117]
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> . . . .
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> In short, family law has recently been roiled by much debate and many changes in which the contest between rules and discretion features centrally. This contest is hardly resolved. Every day lawyers argue in courts and legislatures around the country about whether a court should adopt a discretion-limiting rule, about whether a legislature should preempt judicial discretion by devising authoritative stan-

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115. *Id.* at 240.

116. Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best Interest Standard*, 89 MICH. L. REV. 2215, 2249-52 (1991).

117. Schneider, *supra* note 107, at 229-30.

dards.[118]

West Virginia's adoption of the primary caretaker standard can be viewed as this jurisdiction's resolution of the rule-discretion debate.

5. Is The Primary Caretaker Standard Living Up To Its Goals?

The primary caretaker standard purports to curtail judicial discretion, the emotional and monetary costs of litigation, and the opportunities for using child custody as a bargaining chip, all which result from an unpredictable individualized approach. By according an explicit, almost absolute preference to the primary caretaker, West Virginia law arguably encourages early out-of-court settlements in divorce cases.[119] It is championed for these virtues. But is it living up to its billing?

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

But has discretion been eliminated? Carl Schneider suggests that "even as simple a rule as the primary caretaker standard cannot be applied mechanically, without an exercise of discretion in finding and interpreting the facts. And that discretion can greatly affect the ultimate decision."[120] Does the judge's discretionary application of facts using the standard lead to inconsistent results and unpredictable outcomes given similar situations? If it does, should not the benefit of the primary caretaker standard be questioned? The standard purposefully errs on the side of determinacy versus individualized justice. Is this standard worth this cost? Perhaps only if it leads to predictable decisions.

In contrast to the best interests of the child standard, which provides virtually unlimited discretion to decision-makers, it is argued that the primary caretaker standard is a workable custody standard which will properly limit the judges' ability to use their own bias, values, and prejudices to decide the case.

But the standard has not been expressly adopted as a irrebuttable presumption, except in West Virginia. Commentators continue to sing the benefits of the standard, but the courts and legislatures are

118. *Id.* at 231.
119. Neely, supra note 80, at 182.
120. Schneider, *supra* note 116, at 2287-88.

not listening. Perhaps this is because the literature is void of an analysis on how the standard is used by judges and whether it is indeed "workable."[121]

121. The author has completed a dissertation which attempts to answer the question of whether the primary caretaker standard is workable. Kathryn L. Mercer, A Content Analysis of Judicial Decision-Making-- How Judges Use the Primary Caretaker Standard to Make a Custody Determination (1997) (unpublished Ph.D. dissertation, Case Western Reserve University) (on file with the Case Western Reserve University Library).