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Stumbling beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference

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*To embarrass justice by a multiplicity of laws or to hazard it by confidence in judges, are the opposite rocks on which all civil institutions have been wrecked.***

INTRODUCTION

In memoria for a lost cause. In 1985, the Minnesota Supreme Court assessed the suitability of legal standards to promote fair determination of child custody disputes. Consistent with developments in case law and literature, the court, in *Pikula v. Pikula*,[1] announced a firm preference for placement of custody with a child's primary caretaker.[2] The court emphasized the importance of the stability of the child's relationship to a primary caretaker as a measure of the child's best interests.[3] The Minnesota legislature, however, subsequently attempted to reject the preference, in 1989[4] and again in 1990,[5]

** Quotation from Samuel Johnson engraved outside chambers of the Minnesota Supreme Court, State Capital Building, St. Paul.

1. 374 N.W.2d 705 (Minn. 1985).

2. *Id.* at 711-12. The court deferred to appellate decisions in Ohio, Oregon, Pennsylvania and West Virginia. *See infra* notes 27, 30, 31, 38, 41 (developments in these four states).

3. Reasoning that the child's relationship to a primary caretaker provides "emotional and psychological stability," the court deferred to an observed agreement of child psychologists on the importance of this stability in meeting the child's best interests. *Pikula*, 374 N.W.2d at 711. The court cited J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31-35 (1979); Leonard & Provence, *The Development of Parent-Child Relations and the Psychological Parent*, 53 CONN. B.J. 320 (1979); Okpaku, *Psychology: Impediment or Aid in Child Custody Cases?*, 29 RUTGERS L. REV. 1117, 1121-22 (1976); Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335, 348 (1982).

4. Act of May 22, 1989, ch. 248, § 2, 1989 Minn. Laws 835-36 (codified at MINN. STAT. § 518.17 (1990)). In 1969, the Minnesota Legislature mandated gender neutrality in selecting a custodial parent, declaring that the court should consider "all facts in the best interests of the children" to decide custody cases. MINN. STAT. § 518.17 (1970). In 1974, the legislature announced 10 factors to be considered in evaluating the child's best interests — a statutory pattern following the format of section 402 of the Uniform Marriage and Divorce Act of 1973. 9A U.L.A. 561 (1990). *See infra* note 24 (10 factors of Minnesota law before 1989). In *Pikula*, the supreme court announced a firm preference in spite of the statutory best interests factors, explaining that the preference coincided with four of the factors, and observing that other factors were "both inherently resistant of evaluation and difficult to apply in any particular case." 374 N.W.2d at 711-12. The legislature's 1989 amendment adds two best interest considerations of "the child's primary caretaker" and "the intimacy of the relationship between each parent and the child." 1989 Minn. Laws 835, ch. 248, § 2. The legislature added this further declaration: "The court may not use one factor to the exclusion of all others." *Id.* at 836, ch. 248, § 2.

5. Act of May 3, 1990, ch. 574, § 13, 1990 Minn. Laws 2131 (codified at

declaring that primary caretaking is only one of several factors to consider in deciding custody disputes. Responding to the same pressures that led to the 1989 and 1990 legislation, the Minnesota Supreme Court in 1988 had retreated from its own earlier strong support of the preference.[6] More recently, however, the court, while acknowledging the state's multi-factor statute, renewed its support for the standard.[7] Thus, although the Minnesota legislature has rejected the primary caretaker standard, the supreme court has not fully permitted the preference to die.

Minnesota's experience exemplifies the tension in child custody law between a need for predictable results and an equally compelling need to freely consider variations in each family situation.[8] The supreme court intended for the primary caretaker preference to provide a "bright line" standard for child custody decisionmaking and to thereby reduce litigation and provide more predictable results. The court's intent, however, conflicted with desires for trial court discretion sufficient to serve the varied, best interests of children.

MINN. STAT. § 518.17 (1990)). Restating its 1989 prohibition against exclusive use of any statutory factor, the legislature declared: "The primary caretaker factor may not be used as a presumption in determining the best interests of the child." *Id.* at 2132.

6. Sefkow v. Sefkow, 427 N.W.2d 203, 212 (Minn. 1988) (acknowledging that Minnesota's multifactor statute, *supra* note 4, which says the child's best interests means "all relevant factors," mandates a "multifaceted inquiry" into all statutory factors).

7. Reviewing a trial court decision made before the 1989 legislature acted on the caretaker preference, the court noted having said in *Pikula* that all statutory factors were "plainly relevant," but disregarded the context of that language and declared of a more objective, precise standard. Maxfield v. Maxfield, 452 N.W.2d 219, 222 (Minn. 1990). Reflecting on *Pikula*, the *Maxfield* court wrote, "It was never intended, however, that custody be awarded to whomever scored the most points on the *Pikula* caretaker scale (who bathed the child, who put the child to bed at night, etc)." *Id. Maxfield*, however, also appeared to breath some trace of new life into the primary caretaker consideration. *See infra* text accompanying note 99, notes 233-35. This facet of *Maxfield* produced the legislative reiteration in 1990 of its intent to terminate a caretaker preference. *See supra* note 5.

8. Thus, child custody adjudication "poses a genuine dilemma." Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 292 (Summer, 1975). *See also* R. NEELY, THE DIVORCE DECISION 39-40 (1984) (predictability gives way to flexibility); Pearson & Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 704-05, 718-23 (1983) (detailing the conflicting needs for rules and discretion in child custody cases); Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 463-69 (1984) (contrasting application costs of loose standard with "definition" errors of more precise standard).

This dilemma is perhaps the foremost, recurrent example of the struggle in Anglo-American law to reconcile a preference for decisionmaking according to the rule of law with a conflicting desire for trial court discretion sufficient to meet the interests of justice. Generations of Americans have ceremonially honored a long history of dedication to the rule of law,[9] a tradition begun in the seventeenth century[10] in England.[11] American dedication to a system of rigid laws, however, has been willingly diminished to permit discretionary resolution of an exploding number of legal conflicts.[12] This desire for discretionary justice reflects a tentative faith in the ability of decisionmakers to carefully assess individual situations while

9. The sentiment is by all means alive in the twentieth century. One voice among many declares: "Absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions." United States v. Wunderlich, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting).

10. English lawyer John Selden highlighted problems with unlimited discretion in his celebrated condemnation of the equity courts, where he found the law as predictable as the length of the Chancellor's foot. J. SELDEN, TABLE-TALK 46 (E. Arber rev. ed. 1985) (1689). In 1705, Lord Camden reportedly described the discretion of a judge as "The Law of Tyrants." Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 926 (1960). Of discretionary decisionmaking, Camden is said to have observed: "It is always unknown; it is different in different men; it is casual and depends upon constitution, temper, and passion. In the best it is often times caprice; in the worst it is every vice, folly and passion to which human nature is liable." *Id.* Two millennia earlier, Aristotle gave us the notion that "it is better that all things be regulated by law, than left to be decided by judges." ARISTOTLE, RHETORIC, Bk. 1, Ch. 1.

11. Early in the 19th century, Lord Chancellor Eldon proclaimed a reform discipline — a determination to respect fixed principles. Gee v. Pritchard, 36 Eng. Rep. 670, 674 (1818). "Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor's foot." *Id.* Even in this century, England's A.V. Dicey observed that the rule of law in England "excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government." A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 198 (8th ed. 1915). In the shadow of these developments, the American states shunned courts of equity. Chief Justice John Marshall confirmed the emphatic recognition of government in the United States as "a government of laws, and not of men." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

12. In this century, with the mushrooming of special judicial problems, especially on matters of personal and family welfare, and the emergence of administrative proceedings, discretionary authority has been given its place based on a theory of necessity. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 24-27 (1959). If this defies the rule of law, it has been observed, "then the rule of law is inapplicable to any modern constitution." *Id.* at 25 (quoting E. WADE & G. PHILLIPS, CONSTITUTIONAL LAW 54 (5th ed. 1955)).

avoiding undisciplined abuse of general principles.[13] The resulting tension between the conflicting goals of discretion and certainty is apparent in many family law matters[14] and has become more troubling as courts increasingly assume the responsibility of settling such cases.[15]

This Article examines Minnesota's experience with the primary caretaker preference. Part I describes the origins of the standard and the attention given to primary caretaking by scholars and by the appellate courts of sixteen states. Part II examines the rationales for a legal preference or presumption favoring a child's primary caretaker. These include concern for child stability and desire for a system free of the pain and injustice of child custody litigation. Part III studies the potential ineffectiveness of a caretaker preference as demonstrated in Minnesota. This section describes three developments that contributed to the failure of the standard to curb litigation: an overly broad definition of caretaking, expansive exceptions to the general presumption, and a narrow standard of appellate review. Part IV examines the cost of the caretaker preference to child and parental interests that might be sacrificed to achieve more certainty. It presents criticisms of the standard, many of them overstated, and possible explanations of why opponents rejected the standard.

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13. To Dean Pound, the dilemma of rules and discretion required an undefined balancing, "a standing problem of the science of law." Pound, *supra* note 10, at 937. Pound found a case for discretion "until experience developed by reason or legislation can work out and formulate a principle of law." *Id.* at 929. Although finding discretion necessary, Pound pleaded for a discipline of "caution," the "just and wise exercise of discretion," a "reasoned decision in the light of principles." *Id.* at 926-29. He viewed the exercise of discretion as a demonstration of a "disciplined" feeling of judges, a process that was "part of the every day apparatus of justice" and "not outside of the legal order." *Id.*

14. The friction will be found prominently on other issues within the topic of family law. *See, e.g.*, Garfinkel & Melli, *The Use of Normative Standards in Family Law Decisions: Developing Mathematical Standards for Child Support*, 24 FAM. L.Q. 157 (1990). Courts encounter a similar dilemma in child protection proceedings, delinquency dispositions — especially for so-called status offenses — and hospitalization of children for psychological treatment. *See, e.g.*, Weithorn, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773 (1988).

15. A study on family law standards is no longer a matter on the fringes of the American judicial experience. For calendar year 1987, in an unpublished report, the Minnesota State Court Administrator recorded 4880 Minnesota trials in family, juvenile and commitment matters — 48% of all trial proceedings for the year. These fields accounted for 73,484 filings — 52% of the total number. This report excludes only misdemeanor and conciliation court cases.

Twenty years ago, when reporting on proposed custody standards to the National Conference of Commissioners on Uniform State Laws, Professors Levy and Ellsworth observed that "the interdisciplinary millennium — for custody adjudication at any rate — is not at hand."[16] As Minnesota's experience with the primary caretaker preference demonstrates, the millennium is no nearer today than it was in 1969.[17] Minnesota's experience can, however, hasten the arrival of the millennium: it teaches the need for proponents to more carefully evaluate the risk that the preference might compromise important child and parent interests, to acknowledge the price to be paid for a more certain standard, and to effectively demonstrate that the value of the preference justifies its cost. It also suggests the need for alternatives other than standards to resolve custody disputes.

I. ORIGINS AND CURRENT SUPPORT FOR THE PRIMARY CARETAKER PREFERENCE

Until the nineteenth century, American law rarely denied custody to a child's father.[18] The vehicle for breaking this rigid

16. Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC'Y REV. 167, 202 (1969). Dean Pound observed in 1960: "[T]he life of today is too complex and its circumstances are too varied and too variable to make possible, in practice, reduction to rules of everything with which the regime of justice according to law must deal." Pound, *supra* note 10, at 927-28, 931, 936. Without discretion, Pound observed, decisionmakers inevitably resort to fictions, which he described as "authoritative presumptions that certain exceptional cases are within the appointed rule or that what is done under certain special facts is what the rule calls for, although it is not so in fact but is so only 'in the eyes of the law.' " *Id.* at 927. Likewise, the process of interpretation "is made to give a meaning within the rule to facts not within it so as to reach the result required by the rule." *Id.*

17. Professor Mnookin, in his 1975 study of standard-setting, likewise found the prospect for identifying a usable standard "very problematic," at the present time. Mnookin, *supra* note 8, at 292. *See also* Scott & Derdeyn, *supra* note 8, at 498 (goal to design a satisfactory legal rule on custody placements "will probably never be realized"). In one of his last contributions to America's legal literature, Dean Pound surveyed the custody issue and gave us what still looks to be a final analysis. He categorized child custody proceedings as among those in which compelling considerations "cannot be reduced to rules." Pound, *supra* note 10, at 929. In these cases, Pound added, "judicial determination must be left, to no small extent, to the disciplined but no less personal feeling of the judge for what justice demands." *Id.*

18. The history of child custody law has been frequently recorded. *See, e.g.*, Cochran, *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1, 6-14 (1985); Mnookin, *supra* note 8, at 232-37; O'Kelly, *Blessing the Tie that Binds: Preference for the Primary Caretaker*

rule was the doctrine of serving the child's best interests, a principle that developed chiefly out of conflicts between parents and alternative caretakers. This doctrine views the child's welfare as superior to any inconsistent interests of either parent. Thus, the primary goal of courts is to secure the best interests of the child. Commentators frequently trace the predominance of best interests law in dissolution cases to the declarations of Judge Cardozo in *Finlay v. Finlay*.[19] Also most important toward establishing the standard, however, was the 1895 *Flint* opinion,[20] authored by Justice William Mitchell, in which the Minnesota Supreme Court declared that a child's interests were superior to the then absolute statutory rights of the father.[21]

Early in the twentieth century, most courts adopted a new parental preference derived from the child's best interests. This preference, the tender years doctrine, presumed that children of tender years should be in the custody of their mother.[22] It provided a standard for decisionmakers, thereby avoiding substantial trial court discretion. By 1970, however, most states abolished the tender years doctrine; citing evidence that parenting patterns no longer supported the tender years rationale,

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as Custodian, 63 N.D. L. REV. 481, 486-89 (1987); Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 235-36 (1982); Scott & Derdeyn, *supra* note 8, at 464-69; Note, *A Step Backward: The Minnesota Supreme Court Adopts a "Primary Caretaker" Presumption in Child Custody Cases:* Pikula v. Pikula, 70 MINN. L. REV. 1344, 1347-51 (1986).

19. 240 N.Y. 429, 148 N.E. 624 (1925).

20. State *ex rel.* Flint v. Flint, 63 Minn. 187, 65 N.W. 272 (1895).

21. *Id.* at 189, 65 N.W. at 273. In *Flint*, the Minnesota Supreme Court affirmed placement of custody with the child's mother. *Id.* The court subscribed to an arrangement most beneficial for the child, in spite of a state statute declaring the absolute custodial rights of the father. *Id.* Thus, the court honored the doctrine on child welfare as one tantamount to a constitutional principle, the basis for judicial prerogative to contradict a legislative act. Justice Mitchell explained:

> Now, while, under our statutes, the father is given the right to the custody of his minor children, yet this right is not an absolute legal right, beyond the control of the courts. The cardinal principle in such matters is to regard the benefit of the infant paramount to the claims of either parent. While courts will not lightly interfere with what may be termed the "natural rights of parents," yet the primary object of all courts, at least in America, is to secure the welfare of the child, and not the special claims of one or the other parent.

Id.

22. *See* Crippen & Hatling, *Is There Gender Neutrality in Minnesota Custody Decisions?*, 9 HAMLINE L. REV. 411, 413-14 (1986); O'Kelly, *supra* note 18, at 487; Scott & Derdeyn, *supra* note 8, at 465.

they determined that custody decisionmaking should favor neither parent.[23] In addition, many states enumerated factors other than gender to govern the custody decision.[24] As a consequence of these developments, trial courts exercised greater discretion in child custody disputes.

As the tender years preference died, appellate courts inevitably sought more specificity to guide child custody decisionmaking. Courts in at least sixteen states have identified and showed some favor for the parent who had been the primary caregiver before the couple separated.[25] Furthermore, courts from at least seven of these states have identified primary caretaking as a significant factor in assessing the child's best interests.[26] Courts from five states, although declaring the

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23. *See* Crippen & Hatling, *supra* note 22, at 413; Mnookin, *supra* note 8, at 235-36; Scott & Derdeyn, *supra* note 8, at 466. The Minnesota Legislature determined in 1969 that the judiciary "shall not prefer one parent over the other" in custody decisions. Act of June 6, 1969, ch. 1030, § 1, 1969 Minn. Laws 2081 (codified at MINN. STAT. § 518.17 (1969)).

24. *See* Mnookin, *supra* note 8, at 236-37. The Uniform Marriage and Divorce Act prescribed best interests factors in 1973. UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 561 (1990). Minnesota enacted statutory factors in 1974. Act of Mar. 28, 1974, ch. 330, § 2, 1974 Minn. Laws 555, 556 (codified at MINN. STAT. § 518.17, subd. 1 (1974)). A child's best interests, the Minnesota Legislature declared, "means the sum total of [enumerated] factors to be considered and evaluated by the court." *Id.* As amended prior to 1989, these factors were as follows:

> (a) the wishes of the child's parent or parents as to custody;
> (b) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
> (c) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;
> (d) the child's adjustment to home, school, and community;
> (e) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
> (f) the permanence, as a family unit, of the existing or proposed custodial home;
> (g) the mental and physical health of all individuals involved;
> (h) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any;
> (i) the child's cultural background; and
> (j) the effect on the child of the actions of an abuser, if related to domestic abuse, . . . that has occurred between the parents.

MINN. STAT. § 518.17, subd. 1 (1988).

25. *See infra* notes 26-30, 34, 41-42.

26. *California*: Burchard v. Garay, 42 Cal. 3d 531, 535, 540, 724 P.2d 486, 488, 492, 229 Cal. Rptr. 800, 802, 806 (1986) (numerous additional considerations deemed insignificant compared to fact that mother had always been the child's primary caretaker); Catherine D. v. Dennis B., 220 Cal. App. 3d 922, 269 Cal. Rptr. 547, 554 (Cal. Ct. App. 1990) (primary caretaker unsuccessful where

importance of primary caretaking, have rejected it as a presumptive determinant of custody.[27] In North Dakota, this rejection has been a repeated response to a single justice's

strong evidence of mother's open and hostile efforts to destroy child's relationship with father).

Delaware: Maureen F.G. v. George W.G., 445 A.2d 934, 935-36 (Del. 1982) (primary parenting deemed a proper consideration).

Florida: Agudo v. Agudo, 411 So. 2d 249, 250 (Fla. Dist. Ct. App. 1982) (affirms placement with primary caretaker).

Massachusetts: Rolde v. Rolde, 12 Mass. App. Ct. 398, 405, 425 N.E.2d 388, 392 (1981) (primary caretaking considered "highly significant," a "critical" consideration); Angelone v. Angelone, 9 Mass. App. Ct. 728, 730, 404 N.E.2d 672, 673 (1980) (primary caretaking a special consideration).

Missouri: Riaz v. Riaz, 789 S.W.2d 224, 227 (Mo. Ct. App. 1990) (appellate court begins best interests analysis with observation of substantial evidence that mother had been primary caretaker of children); Leach v. Leach, 660 S.W.2d 761, 763 (Mo. Ct. App. 1983) (court cites father's primary care of three-year-old as basis for exception from tender years doctrine).

Montana: Burleigh v. Burleigh, 200 Mont. 1, 6, 650 P.2d 753, 755 (1982) (affirms placement where trial court recites primary caretaking as consideration).

New York: Crum v. Crum, 122 A.D.2d 771, 771, 505 N.Y.S.2d 656, 657 (N.Y. App. Div. 1986) (primary caretaking a factor to be considered, but overridden here by other considerations); Kilpatrick v. Kilpatrick, 119 A.D.2d 945, 945-46, 501 N.Y.S.2d 216, 217 (N.Y. App. Div. 1986) (trial court's singular reference to primary caretaking found to be a proper indication of child's best interests); Dodd v. Dodd, 93 Misc.2d 641, 648, 403 N.Y.S.2d 401, 406 (N.Y. Sup. Ct. 1978) (trial court highlights primary caretaking role).

See also Annotation, *Primary Caretaker Role of Respective Parents as Factor in Awarding Custody of Child*, 41 A.L.R. 4TH 1129, 1138-64 (1985).

27. *Iowa*: *In re* Marriage of Bevers, 326 N.W.2d 896, 898 (Iowa 1982) (custody reversed with notation that mother had been child's primary parent); *In re* Marriage of Ertmann, 376 N.W.2d 918, 921 (Iowa Ct. App. 1985) (affirming primary caretaker's custody, but insisting that decision not rest "solely on past parenting behavior").

North Dakota: *See infra* note 28.

Pennsylvania: Commonwealth *ex rel.* Jordan v. Jordan, 302 Pa. Super. 421, 425-26, 448 A.2d 1113, 1115 (1982) (declaring that role as primary caretaker is a "substantial factor" that must be weighed in adjudicating custody); Moore v. Moore, 393 Pa. Super. 256, 574 A.2d 105, 108 (1990) (father's primary caretaking cited to explain reversal of modification); Michael T.L. v. Marilyn J.L., 363 Pa. Super. 42, 525 A.2d 414, 420-21 (1987) (stating that positive weight must be given to the primary caretaker factor); Beers v. Beers, 342 Pa. Super. 465, 493 A.2d 116, 119 (1985) (primary caretaking highlighted in affirming custody award); Brooks v. Brooks, 319 Pa. Super. 268, 277, 466 A.2d 152, 156-57 (1983) (determining that primary caretaking is "only one factor to be considered").

Utah: Pusey v. Pusey, 728 P.2d 117, 120 (Utah 1986) (primary caretaking is prominent among child custody considerations, but other factors permit disregarding this evidence); Jensen v. Jensen, 775 P.2d 436, 438 (Utah Ct. App. 1989) (trial court's identification of primary caretaker is not alone sufficient to sustain denial of modification); Deeben v. Deeben, 772 P.2d 972, 973 (Utah Ct. App. 1989) (considers several factors, including primary caretaking, as promi-

strenuous advocacy for a stronger preference.[28] In 1989, the Minnesota legislature became the first state to expressly include primary caretaking as a factor to be considered in child custody disputes.[29]

Except for Minnesota, no state has engaged in more appellate discussion about primary caretaking than Ohio. In 1982, the Ohio Court of Appeals held that primary caretaking was entitled to strong consideration, but not presumptive status.[30] Ohio cases decided after 1985 show a disregard for the factor.[31]

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nent); Myers v. Myers, 768 P.2d 979, 983 (Utah Ct. App. 1989) (considers primary caretaking merely one of various relevant facts).

Vermont: Harris v. Harris, 149 Vt. 410, 418, 546 A.2d 208, 214 (1988) (although primary caretaking presumption would be inconsistent with statute, factor should be given "great weight"); Peckham v. Peckham, 149 Vt. 388, 389, 543 A.2d 267, 268 (1988) (although significance of primary caretaking "must not be underemphasized," it remains one of many considerations under statute enumerating best interest factors).

28. Heggen v. Heggen, 452 N.W.2d 96, 101 (N.D. 1990) (affirming trial court's highlighting of primary caretaker evidence); Dinius v. Dinius, 448 N.W.2d 210, 213 (N.D. 1989) (majority finding that mother's primary caretaking does not require correcting a placement of four children with father; dissent of Justice Levine contends majority overlooks trial court's complete disregard of primary caretaking, and thus gives only lip service to the matter of law that caretaking is a factor meriting consideration under North Dakota's statutory scheme); Von Bank v. Von Bank, 443 N.W.2d 618, 620 (N.D. 1989) (with Justice Levine concurring only in result, majority rejects giving presumptive weight to caretaking factor); Kaloupek v. Burfening, 440 N.W.2d 496, 497 (N.D. 1989) (primary caretaker argument disregarded); Roen v. Roen, 438 N.W.2d 170, 174 (N.D. 1989) (finding child's relationship "with nurturing parent" a "very important aspect of stability"); Branson v. Branson, 411 N.W.2d 395, 400 (N.D. 1987) (recognizing primary caretaking as only one of many considerations, over dissent advocating adoption of primary caretaker preference); Gravning v. Gravning, 389 N.W.2d 621, 622 (N.D. 1986) (same).

29. *See supra* note 4 (Minnesota Legislature includes primary caretaking as one of many factors, declaring that none are to be exclusive). A 1986 Massachusetts legislative enactment, unique in the nation but applicable only in paternity cases, specifically mandates preservation of a child's primary caretaker parent relationship. MASS. GEN. LAWS ANN. ch. 209C § 10 (West 1989). Multi-factor statutory provisions have prompted some courts to reject giving preferential weight to primary care. *See infra* note 27. For a review of the variations in statutory standards, see Mnookin, *supra* note 8, at 235-37.

30. *In re* Maxwell, 8 Ohio App. 3d 302, 304-06, 456 N.E.2d 1218, 1220-23 (1982).

31. Loncaric v. Loncaric, No. 462 (Ohio Ct. App. May 12, 1988) (LEXIS, States library, Ohio file) (observing primary caretaker factor as "an important phrase," but only one part of the broader consideration of the child's relationships); Kowalski v. Kowalski, No. 1834 (Ohio Ct. App. May 6, 1988) (LEXIS, States library, Ohio file) (although primary caretaker analysis may be employed, rejects primary caretaker argument because standard is not presumptive); Crout v. Crout, No. CA86-09-014 (Ohio Ct. App. Mar. 30, 1987) (LEXIS, States library, Ohio file) (treating primary caretaking as "only one factor");

Notwithstanding these developments, however, the Ohio Court of Appeals appears to have created a de facto preference in many recent cases, including three decisions since March 1990;[32] in addition to affirming at least five decisions evidently premised on primary caretaking, the court has issued at least seven reversals to restore custody with a primary parent.[33]

Thompson v. Thompson, 31 Ohio App. 3d 254, 257, 511 N.E.2d 412, 415 (1987) (primary caretaking treated as an unwritten "part" of the statutory scheme, but not a "magical" factor and one the trial court need not specifically address); Watson v. Watson, No. 3692 (Ohio Ct. App. Feb. 13, 1985) (LEXIS, States library, Ohio file) (stating that primary caretaking is "certainly a factor," but not presumptive).

In addition, at least twenty other cases reject the alleged primary caretaker's claims of error, only sometimes with an explanation of unusual circumstances. *See, e.g.*, Harris v. Harris, No. E-87-11 (Ohio Ct. App. Dec. 11, 1987) (LEXIS, States library, Ohio file) (trial court finding that unsuccessful appellant was a primary caretaker); Young v. Young, No. 4165 (Ohio Ct. App. June 3, 1987) (LEXIS, States library, Ohio file) (George, J., concurring) (finding it nearly an abuse of discretion to neglect a determination of primary caretaking, especially where other factors are relatively equal, and that primary caretaking is entitled to "considerable weight" with younger children).

32. Glover v. Glover, No. CA89-09-015 (Ohio Ct. App. June 11, 1990) (LEXIS, States library, Ohio file) (error to ignore importance of primary caretaking); Berry v. Berry, No. CA88-11-081 (Ohio Ct. App. Mar. 12, 1990) (LEXIS, States library, Ohio file) (evidence of equal caretaking shows error in trial court finding that father was primary parent, and holds trial court abused its discretion in not treating tender years of child as a factor, one that "may be the determinative factor," when issue close); Seibert v. Seibert, No. CA89-05-040 (Ohio Ct. App. Mar. 12, 1990) (LEXIS, States library, Ohio file) (finds abuse of discretion where primary caretaking given too little importance relative to other factors).

33. A half dozen affirmances include Gruebel v. Gruebel, No. 85-CA-39 (Ohio Ct. App. July 20, 1987) (LEXIS, States library, Ohio file) and Biller v. Biller, No. CA89-05-036 (Ohio Ct. App. Mar. 12, 1990) (LEXIS, States library, Ohio file).

Reversals include Townsend v. Townsend, No. 1876 (Ohio Ct. App. June 5, 1989) (LEXIS, States library, Ohio file) (reversing on a clear record that appellant was the primary caregiver); Masters v. Masters, No. 88-CA-7 (Ohio Ct. App. Feb. 7, 1989) (LEXIS, States library, Ohio file) (error to disregard undisputed evidence that one parent was the primary caretaker); Dom v. Dom, No. CA87-07-099 (Ohio Ct. App. Sept. 30, 1988) (LEXIS, States library, Ohio file) (although deferring to the totality of the circumstances and a "multitude of factors" favoring the appellant, court observes that removing the child from the primary caretaker "makes no sense"); Bechtol v. Bechtol, No. CA88-02-014 (Ohio Ct. App. Sept. 6, 1988) (LEXIS, States library, Ohio file), *rev'd*, 49 Ohio St. 3d 21, 550 N.E.2d 178 (1990) (reversing because appellant has always been the custodian and caretaker for the child). In 1990, the Ohio Supreme Court reversed the *Bechtol* decision, finding that the intermediate court offended its standard of review. Bechtol v. Bechtol, 49 Ohio St. 3d 21, 23, 550 N.E.2d 178, 180 (1990). The *Bechtol* court noted, however, that tender years of children is an appropriate consideration in assessing primary caretaking. *Id.*, 550 N.E.2d at 181.

In 1977, the Oregon Court of Appeals recognized the importance of primary caretaking, although without creating a presumption or preference.[34] In *Derby*,[35] the court held that a mother's primary parenting "dictate[d]" reversal of the trial court's placement with the father.[36] The Oregon Court of Appeals also reported elements of physical caregiving by a primary parent that became the basis for the definition of primary parenting in West Virginia and Minnesota.[37] Subsequently, the Oregon intermediate appellate court twice more reversed on a primary parent's appeal,[38] but an inconsistent decision occurred during the same period of time.[39] Inexplicably, the issue did not arise again in an Oregon appellate review after 1983.[40]

West Virginia[41] and Minnesota[42] are the only states in which state appellate courts have specifically prescribed a primary caretaker preference. No states have adopted the standard since the Minnesota Supreme Court decided *Pikula* in

34. *In re* Marriage of Derby, 31 Or. App. 803, 807, 571 P.2d 562, 564 (1977), *modified on other grounds*, 31 Or. App. 1333, 572 P.2d 1080 (1977).

35. *Id.* at 807, 571 P.2d at 564.

36. *Id.*

37. Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981); Pikula v. Pikula, 374 N.W.2d 705, 713-14 (Minn. 1985). *See* text accompanying *infra* note 45 (discussing *Garska*).

38. *In re* Marriage of Tuttle, 62 Or. App. 281, 285, 660 P.2d 196, 199 (1983) (reversal premised on observer's testimony that mother had "slight edge as the primary parent," a factor the court considered relevant and important); *In re* Marriage of Van Dyke, 48 Or. App. 965, 969, 618 P.2d 465, 467 (1980) (reversal premised solely on mother's role as primary parent — a "dominant consideration").

39. *In re* Marriage of Jewell, 49 Or. App. 903, 620 P.2d 967 (1980) (within months after *Van Dyke*, the majority affirms disregard for primary caretaker, premising its decision on evidence extraneous to parent-child relationship).

40. Save for an inconsequential 1987 amendment, Oregon's multifactor custody statute, enacted in 1975, has remained unchanged. OR. REV. STAT. § 107.137 (1987).

41. *Garska*, 278 S.E.2d at 361. *See* David M. v. Margaret M., 385 S.E.2d 912, 923-25 (W. Va. 1989) (reaffirms preference and clarifies rationale); *see also* Heck v. Heck, 301 S.E.2d 158, 160 (W. Va. 1982) (reverses placement of two children where trial court refused to follow *Garska*, finding it "clearly wrong").

42. *Pikula*, 374 N.W.2d at 712. Neither Commonwealth *ex rel.* Jordan v. Jordan, 302 Pa. Super. 421, 448 A.2d 1113 (1982), nor *In re* Maxwell, 8 Ohio App. 3d 302, 456 N.E.2d 1218 (1982), both cited by the Minnesota Supreme Court, stand for the strong preference adopted in *Pikula*. *See* discussion of *Jordan* and Brooks v. Brooks, 319 Pa. Super. 268, 466 A.2d 152 (1983), *supra* note 27, and discussion of *Maxwell* and progeny, *supra* notes 30-33 and accompanying text. On the other hand, *Garska* and *Van Dyke*, cited in *Pikula*, were duly supportive. *See also supra* notes 38-39 and accompanying text (Oregon); *supra* note 41 and accompanying text (West Virginia).

1985. Following subsequent developments in Minnesota, West Virginia now alone retains a firm preference. Notwithstanding this relatively limited judicial support, numerous legal articles advocate the preference.[43]

The elements of a primary caretaker preference are not complicated on their face. Primary caretaking, according to the formula set forth by the West Virginia Supreme Court in *Garska v. McCoy*,[44] and subsequently adopted in *Pikula*, is measured by examining prior patterns of care, with a focus on physical care of the child. The *Garska* court associated the following functions with primary caretaking: preparing and planning of meals; bathing, grooming and dressing; purchasing and cleaning clothing; providing medical care; providing transportation for after-school activities; arranging alternative care, such as babysitting; putting the child to bed at night, attending to the child in the middle of the night, and waking the child in the morning; disciplining the child; educating the child in areas such as religion and culture; and teaching elementary skills.[45]

The West Virginia court attributed identification of these

43. J. GOLDSTEIN, A. FREUD, A. SOLNIT & S. GOLDSTEIN, IN THE BEST INTEREST OF THE CHILD 68 n.25 (1986) (recommending drawing of lots to decide dispute between parents where both have psychological bond with child); R. NEELY, *supra* note 8, at 79-83 (elaborating on rationale for primary caretaker preference); Cochran, *supra* note 18, at 42, 46-65 (preference balanced with provision for extensive contact with secondary caretaker and recommended for children of all ages); Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 770-74 (1988) (pronounced criticism of practices without preference and suggesting that preference extend to children of all ages); Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 180-86 (1984) (author of *Garska* explains West Virginia standard); O'Kelly, *supra* note 18, at 483 (complimenting North Dakota Supreme Court Justice Levine's advocacy of primary caretaker standard); Polikoff, *supra* note 18, at 242 (early endorsement of *Garska*, observing utility of preference as alternative to joint custody by parents engaged in shared childrearing); Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107 (1978) (insightful view of feminist advocacy for gender neutrality); *see also* Ellsworth & Levy, *supra* note 16, at 203 (1969 call for preference of mothers, based on rationale subsequently identified as primary caretaker preference); Klaff, *supra* note 3, at 342-48 (proposing merit for tender years doctrine or primary caretaking variation); *cf.* Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 480 (1984) (author's recommendations for custody rules — that children remain with the primary caretaker and that court power to impose joint custody be limited — made with "disturbing tenuousness," and supported by research pointing at result with a "quivering finger").

44. 278 S.E.2d 357, 363 (W. Va. 1981).

45. *Id. See also* Pikula v. Pikula, 374 N.W.2d 705, 713 (Minn. 1985).

factors to the Oregon Court of Appeals.[46] In *Derby*, the Oregon court had held that the mother was the primary caretaker.[47] During the marriage, she had been a homemaker. She cleaned the house, cooked, nursed and cared for the family, and counseled and disciplined the children. The husband worked outside the home for eight to ten hours a day. Although the husband dedicated much time and attention to the children, the court found that the mother performed primary caretaking functions.[48] The Oregon court also emphasized the "close and successful emotional relationship" that the mother enjoyed with the children, independent of her role as the primary caretaker.[49]

II. THE RATIONALE FOR A PRIMARY CARETAKER PREFERENCE

Interest in a caretaker preference constitutes the current stage in a well-developed body of thought on placement of children after divorce. Although potential defects in the standard are apparent, the underlying rationale is thoughtful and important. Proponents of a preference assert that such a standard benefits all interests involved in the custody decision, including interests of the judiciary.[50] 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 with gender neutrality and the child's many interests.

A. PROTECTION OF PARENT-CHILD BONDING

A broad, unlimited custody standard has existed for nearly two decades.[51] During this period, legal authorities have in-

46. *Garska*, 278 S.E.2d at 363.

47. *In re* Marriage of Derby, 31 Or. App. 803, 806-07, 571 P.2d 562, 564, *modified on other grounds*, 31 Or. App. 1333, 572 P.2d 1080 (1977).

48. *Id.*

49. *Id.* Previewing a problem discussed later in this article, it is evident that *Garska* and *Pikula* disregarded the Oregon court's significant emphasis on the mother's "close and successful emotional relationship" with the children.

50. Professor O'Kelly comprehensively reviews the reasons for the preference in her 1987 article. O'Kelly, *supra* note 18, at 524-33. Justice Beryl J. Levine, in the minority opinions of North Dakota, reviews the rationale employed in other courts. *See supra* note 28. West Virginia Chief Justice Richard Neely offers a restatement of the rationale in David M. v. Margaret M., 385 S.E.2d 912, 916-18 (W. Va. 1989).

51. *See supra* notes 23, 24 and accompanying text.

creasingly emphasized the child's interest in preserving its stronger parent-child bond — an identifiable interest "beyond" the child's general "best interests."[52] Many commentators,[53] including the Goldstein-Freud-Solnit group,[54] support the primary caretaker preference as an effective means to protect bonded relationships. Several appellate courts have also associated caretaking with bonding.[55]

The primary caretaker preference is not unique in its attempt to protect bonded relationships; other legal rules recognize this rationale. For much of this century, for example, nonparents have succeeded in custody claims for children based on their long-term care of a child.[56] More recently, some statutes,

52. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 3 at 31-34, 53-64 (1973); *cf.* Mnookin, *supra* note 8, at 283-87 (challenging whether experts or decisionmakers can normally measure the relative psychological worth of alternative parental relationships).

53. *See* Chambers, *supra* note 43, at 527-38 (reviewing support and misgivings for protecting child's most bonded relationships); Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 274-75 (1987) (Goldstein's psychological parent "doctrine" a sophisticated variation on the legal presumption for primary caretakers); Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 11 (1987) (importance of preserving strong relationship is part of conventional wisdom underlying primary caretaker preference); O'Kelly, *supra* note 18, at 484-85, 511-17 (contention for primary caretaker preference grounded in bonding concepts associated with Goldstein and his colleagues); Reidy, Silver & Carlson, *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75, 83, 85 (1989) (even without legal presumption, bonding and primary caretaking high among criteria actually employed by judges); Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 803-18 (1985) (discussing constitutional dimensions in protecting existing relationships).

54. The authors of the 1973 volume, J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 3, later herald the primary caretaker preference. J. GOLDSTEIN, A. FREUD, A. SOLNIT & S. GOLDSTEIN, *supra* note 43, at 66-67. In 1973, the authors proposed a standard (the "least detrimental alternative"), which would prompt decisionmakers to dwell on avoiding harm. This concept, however, had little utility for lawmakers attempting to express a useable standard for custody decisions. *Id.* at 70-71, 84-85. *Cf. infra* note 120 (tenuous link between physical care and bonded relationship).

55. *See* Burchard v. Garay, 42 Cal. 3d 531, 535, 540, 724 P.2d 486, 488, 492, 229 Cal. Rptr. 800, 802, 806 (1986) (connecting primary caretaking with judicial recognition that stability and continuity for child are important); Pikula v. Pikula, 374 N.W.2d 705, 711 (Minn. 1985) (Minnesota court finds foundation for preference in literature on child's need for stability); Beers v. Beers, 342 Pa. Super. 465, 493 A.2d 116, 119 (1985) (recognizing utility of primary caretaker "doctrine" to preserve bonded relationship).

56. *See* J. GOLDSTEIN, A. FREUD, A. SOLNIT & S. GOLDSTEIN, *supra* note 43, at 57-62, 188-89 (discussing Chapsky v. Wood, 26 Kan. 650 (1881), which contains language prophetic of the primary caretaker preference); O'Kelly, *supra* note 18, at 549-54 (North Dakota law); Painter v. Bannister, 258 Iowa 1390, 1400, 140 N.W.2d 152, 158 (preservation of long period of care is the unpub-

following a provision of the Uniform Marriage and Divorce Act, have enlarged longstanding judicial doctrines against modification of original custody decisions.[57] Other statutory provisions contain a strong presumption against change of custodial arrangements in *ex parte* proceedings upon commencement of a divorce case.[58] The tender years doctrine, as well as other formulations of a preference for mothers, also reflects this desire to protect strong parent-child relationships.[59]

Supporters also contend that, in addition to preserving important relationships, a primary caretaker preference might promote the development of stronger parent-child bonding.[60] Their rationale is that knowing that the more active caretaker will receive custody in the event of a divorce might prompt both parents to become more involved with their children.[61]

B. PROMOTION OF CERTAINTY

The justification for a primary caretaker preference, however, includes more than a desire to preserve bonded parent-child relationships. Supporters also propose the preference as a needed reform for a flawed process of decisionmaking. Their criticism reflects the historic political and legal concern about

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licized premise of a much-publicized case), *cert. denied*, 385 U.S. 949 (1966); State *ex rel.* Anderson v. Anderson, 89 Minn. 198, 201, 94 N.W. 681, 682 (1903) (first in long line of Minnesota cases protecting continuance of a child's established custodial care by a non-parent); Richards v. Collins, 45 N.J. Eq. 283, 17 A. 831 (1889) (protection of longstanding non-parent custody).

57. UNIF. MARRIAGE & DIVORCE ACT § 409, 9A U.L.A. 628 (1973) (absent change by consent of already implemented custody decree, the proponent of the modification must show health of child endangered in present circumstances). *See Pikula*, 374 N.W.2d at 712-14. The *Pikula* court recognized an exception where strong evidence shows that the primary parent is unfit and where placement with this parent is likely to endanger the child's health. Thus, the court employs the modification language of MINN. STAT. § 518.18 (1984), which is modeled after Uniform Act § 409. *See also* Commonwealth *ex rel.* Jordan v. Jordan, 302 Pa. Super. 421, 448 A.2d 1113, 1115 (1982) (introducing primary parent preference as a basis for reversing modification); Wexler, *supra* note 53, at 760, 779 (limit on modification is aimed at stability, finality of judgments and avoidance of litigation but courts tend to loosely permit modification, especially following consent decrees); Note, *supra* note 18, at 1371-72 (modification standard, like primary caretaker preference, reflects concern for stability).

58. *See, e.g.*, MINN. STAT. § 518.131, subd. 3(b) (1988).

59. *See* Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 24-25 (1990) (discussing proposition of legal preference for mothers as custodians).

60. *See Pikula*, 374 N.W.2d at 712 n.2; *cf.* Elster, *supra* note 53, at 9 (although fathers discouraged by tender years doctrine, best interests rule gives them incentive for caregiving); Fineman, *supra* note 43, at 773.

61. *Pikula*, 374 N.W.2d at 712 n.2.

broad legal rules that provide virtually unlimited discretion to decisionmakers. Proponents of the preference contend that it is a means to avoid delegation of a dangerous breadth of discretion.[62]

Broad legal standards present a serious problem to an American judicial system committed to the rule of law. The narrow standard of appellate review present in many states intensifies the problem.[63] It leaves the trial courts with nearly unbridled discretion to decide child custody disputes. The record of appellate review in Minnesota, for example, demonstrates remarkably little interference with trial court custody decisions,[64] despite the supreme court's obvious endeavor to fa-

62. *See supra* notes 9-14 and accompanying text. Criticism of judicial discretion includes consideration of: (1) the special tendencies of judges to err in family matters — a topic that must take into account the capacity of judges in terms of their ability to assess personal needs, (2) their interest in personal and family welfare cases, (3) their temperament toward personal and family conduct — especially when in conflict with the court's will, and (4) their proclivity, due to the judicial role in civil and criminal litigation, to dwell more on choice of winners (and losers) than on solving problems in human relationships. J. GOLDSTEIN, A. FREUD, A. SOLNIT & S. GOLDSTEIN, *supra* note 43, at 62-68 (reviewing pitfalls for decisionmakers, especially in employing personal values); S. KATZ, WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN 81 (1971) (enormity of power in exercising discretion to "reorganize families according to their own values, biases, and prejudices"); R. NEELY, *supra* note 8, at 39, 168 (deploring consequence of action by the inevitable judges who misuse discretionary power); Charlow, *supra* note 53, at 271-73 (tendency of decisions to reflect judges' personal values, or interests of parents); Fair, *Family Law — 'Whither Now?'*, 1 J. DIVORCE 31, 40 (1977) (discretion exercised according to personality, temperament, background, interests, and prejudices); Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 61-70 (1969) (characteristics of moralizing, seeking "completely correct" solutions, inability to understand child's needs or to solve problems); *see also infra* note 66 (quoting *Pikula*, 374 N.W.2d at 713); *infra* note 73 (tension for decisionmakers).

63. In Minnesota and many other states, a narrow standard of review, guaranteeing deference to the trial court absent an abuse of discretion, has governed appellate review of custody decisions. Wallin v. Wallin, 290 Minn. 261, 267, 187 N.W.2d 627, 631 (1971) (initiating the demand for particularized findings in the exercise of broad discretion). *See* Mnookin, *supra* note 8, at 254 (narrow standard of review); Pound, *supra* note 10, at 932-33 (defining abuse of discretion as the "failure to exercise the granted power conscientiously and advisedly — without considered judgment, offhand, carelessly, hastily, or with bad motives" and observing the tendency of reviewing courts to upset only "clearly" unreasonable decisions); Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1210 (1978) (general low rate of reversal in family law cases); *cf. infra* note 237 (in 1990, Minnesota Supreme Court called for careful examination of trial court rationale where misapplication of law may have occurred).

64. The record underscores the *Pikula* court's opinion. 374 N.W.2d at 713. *See supra* note 66 (quote from *Pikula*). Except for cases premised on saving

cilitate appellate review by insisting on highly particularized trial court findings of fact.[65]

The Minnesota Supreme Court has expressed concern with the ineffectiveness of such appellate review.[66] The court's fear is that applications of the best interest standard might reflect the individual beliefs of the decisionmaker rather than the best interests of the child.[67] This presents a particular hazard: If

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the child's relationship with a primary caretaker, Minnesota's appellate courts have never reversed or even remanded an original child custody decision during the era of gender neutral decisionmaking, beginning in 1969. *See* 1969 statutory amendment, *supra* note 23. The volume of such appeals is unknown for the years 1969 through 1983, when the state's intermediate court of appeals was formed. Between 1983 and 1985, however, when *Pikula* was decided, the court of appeals had approximately twelve appeals per year from original custody decisions.

65. A line of supreme court cases mandates highly particularized trial court fact finding, expressly prescribed to "facilitate appellate review of the family court's custody decision." Rosenfeld v. Rosenfeld, 311 Minn. 76, 81-83, 249 N.W.2d 168, 171 (1976) (among other reasons for the mandate, particularized findings were expected to compel consideration of statutory factors and to satisfy the parties that the trial court's decision was fairly rendered). *See* Note, *supra* note 18, at 1376 (confidence that findings mandate produces effective appellate review, without caretaker preference).

66. *See Pikula*, 374 N.W.2d at 713 (citations omitted).

> The inherent imprecision heretofore present in our custody law has, in turn, diminished meaningful appellate review. We have repeatedly stressed the need for effective appellate review of family court decisions in our cases, and have required specificity in written findings based on the statutory factors. We are no less concerned that the legal conclusions reached on the basis of those findings be subject to effective review. We recognize the inherent difficulty of principled decisionmaking in this area of the law. Legal rules governing custody awards have generally incorporated evaluations of parental fitness replete with ad hoc judgments on the beliefs, lifestyles, and perceived credibility of the proposed custodian. It is in these circumstances that the need for effective appellate review is most necessary to ensure fairness to the parties and to maintain the legitimacy of judicial decisionmaking.

Id. See also Ellsworth & Levy, *supra* note 16, at 203 (presumptive standard may provide, "possibly for the first time," a basis for "meaningful appellate review of trial court awards"); O'Kelly, *supra* note 18, at 530-33 (reviewing merit of caretaker preference in permitting effective review).

67. Chambers, *supra* note 43, at 481-85, 568 (open standard produces decisions often "arbitrary or overreaching"); Charlow, *supra* note 53, at 267-70 (standard "more a vague platitude" than a legal standard, a "euphemism for unbridled judicial discretion," a legal rule inviting decision by "guesswork"); Ellsworth & Levy, *supra* note 16, at 202 (absent presumptive rule, standard on best interests is "abstract and valueless"); Elster, *supra* note 53, at 28-32 (litany of prospective distortions of best interests standard); Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1169 (1986) (multi-factor standard produces arbitrary outcomes, incoherent governing principles); Mnookin, *supra* note 8, at 229, 257-61, 263 (standard produces "indeterminate and speculative" results, wholly dependent

personal values are the measuring device for custody decisions, fault inevitably becomes a determinative factor, and the child custody decision focuses on parental conduct rather than the best interests of the child.

In addition, few decisions involve greater judicial authority than the choice of a child's custody.[68] Critics express concern that the current system grants too much discretion to judges who already have the awesome power to decide a child's custody. Added to this concern is an awareness that error in a custody decision impacts immensely on the lives of parents, children and the community.

Efforts have been proposed for many years to diminish litigation in divorce cases.[69] The high correlation between broad

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on individual decisionmaker); Sharp, *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?*, 68 VA. L. REV. 1263, 1289 (1982) (judicial custody decisions, because they are unreliable under general standard, entitled to less finality than stipulated results); Uviller, *supra* note 43, at 124 (best interests standard "high-tone and well-intended" but "devoid of substance" and open to all childrearing prejudices); Wexler, *supra* note 53, at 779-80 (noting criticism of best interests standard as "resulting in an indeterminacy perhaps unparalleled in any other area of the law"); *see also* Perkins v. Courson, 219 Ga. 611, 628, 135 S.E.2d 388, 399 (1964) (Duckworth, C.J., dissenting) (child's best interests are as definable as the expression " 'as long as a rope' "). In the words of one Minneapolis judge, responding to a survey on the issue: "Either legislatively or judicially, some simplicity should be returned to the child rearing question, not to mention the entire family law field." *Surveys of Minnesota Lawyers* [hereinafter *Minnesota Surveys*], conducted in October and November 1989 by this author (on file with *Minnesota Law Review*), called for a response of marked choices, *see infra* notes 106, 108 and 135, but responses included numerous volunteered statements.

68. *See supra* note 62 (discussing role of judges). Rarely has the issue been addressed more concisely and clearly than by Dean Pound, 53 years ago:

> Child placement involves administrative authority over one of the most intimate and cherished of human relations. The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts and courts of domestic relations. The latter may bring about a revolution as easily as did the former. It is well known that too often the placing of a child in a home or even in an institution is done casually or perfunctorily or even arbitrarily. Moreover effective preventive work through these courts requires looking into much more than the bad external conditions of a household, such as poverty or neglect or lack of discipline. Internal conditions, a complex of habits, attitudes, and reactions, may have to be dealt with and this means administrative treatment of the most intimate affairs of life. Even with the most superior personnel, these tribunals call for legal checks.

R. Pound, *Foreword* to P. YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY at XXVII (1937). *See also* Lowery, *Child Survey of Judges*, 12 PROF. PSYCHOLOGY 492 (1981) (personal standards employed by judges in deciding custody issues); Pearson & Ring, *supra* note 8, at 716-22 (same); Reidy, Silver & Carlson, *supra* note 53, at 78-80, 83-86 (same).

69. *See, e.g.*, UNIF. MARRIAGE & DIVORCE ACT § 102(3), 9A U.L.A. 149, 158

uncertain custody standards and increased divorce litigation has intensified the search for certainty.[70] Critics of the best interest standard argue that a more definite rule will provide less incentive for parents to go to court to resolve child custody disputes. The West Virginia and Minnesota Supreme Courts both considered this issue and determined that a need for certainty should predominate over competing concerns.[71] The Minnesota Supreme Court, in fact, predicted that the primary caretaker preference would largely remove custody issues from the arena of dissolution disputes.[72]

A desire to reduce custody litigation arises from a concern for the adjudication burden on the courts and the cost and pain of litigation to the parties.[73] For the courts, control of litigation

(1973) (uniform legislation aimed at promoting amicable dispute settlements between marriage partners and voluntary provisions for custody).

70. *See* Chambers, *supra* note 43, at 562 (effect of certain rule in discouraging litigation is clear, signalling to the parents the probable outcome); Charlow, *supra* note 53, at 270, 273 (uncertain standard encourages litigation); Cochran, *supra* note 18, at 17-20, 61 (increased litigation with imprecise standard); Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257, 265 (1974) (analysis of effects of uncertain rules on parties as well as decisionmakers showing a positive correlation of certainty with settlement, and less expensive proceedings); Fineman, *supra* note 43, at 772 (precise test reduces litigation); Glendon, *supra* note 67, at 1179-82 (best interests standard gives "maximum incentive" for litigation); Mnookin, *supra* note 8, at 284 (although predictable rules reduce litigation, they may have detrimental effect of changing the spouses' bargaining power in private negotiations); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (reviewing laws as framework for settlement); Scott & Derdeyn, *supra* note 8, at 469 (uncertain standard encourages litigation).

71. *See infra* notes 73-74, 81, 82, 84 (discussing West Virginia and Minnesota cases); *see also* Gravning v. Gravning, 389 N.W.2d 621, 625 (N.D. 1986) (Levine, J., dissenting); *In re* Maxwell, 8 Ohio App. 3d 302, 304-05, 456 N.E.2d 1218, 1221 (1982) (recitation of language of Garska v. McCoy, 278 S.E.2d 357, 360-61 (W. Va. 1981)); David M. v. Margaret M., 385 S.E.2d 912, 915 (W. Va. 1989).

72. *Pikula*, 374 N.W.2d at 713.

73. *See* David M. v. Margaret M., 385 S.E.2d 912, 915, 919 (W. Va. 1989) (trauma for all litigation participants); R. NEELY, *supra* note 8, at 73-77, 81 (deploring cost and observing uselessness of expensive expert testimony in litigation under imprecise standard); Elster, *supra* note 53, at 22-26 (reviewing cost of deciding cases with imprecise standard for decisionmakers, parents, and children); Ellsworth & Levy, *supra* note 16, at 202 (literature shows judges find role in custody cases "onerous and frustrating"); Mnookin & Kornhauser, *supra* note 70, at 956, 972 (settlement avoids parental cost and pain); Pearson & Ring, *supra* note 8, at 722 (judicial dislike for domestic relations cases); Watson, *supra* note 62, at 62-64 (litigation harm, borne especially by children, also taxing on finances and emotions of parents); *see also* Note, *Parental Custody of Minor Children*, 5 MEM. ST. U.L. REV. 223, 227 (1974) (burden for decisionmaker includes pain and regret felt upon interference with parent-child

is critical. The *Garska* court observed that, without substantial settlements, "the understaffed judiciary would topple like a house of cards."[74] For families, custody litigation results in tremendous emotional and financial harm for all participants. The welfare of children is a special concern.[75] Many studies show that parental conflict, which intensifies with the delay and stress of litigation, harms a child's adjustment and development.[76] Worsening the problem, other studies indicate a corre-

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relationship) (quoting State *ex rel.* Paine v. Paine, 23 Tenn. 513, 523, 4 Hum. 523, 533 (1843)).

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

75. *See* H. KRAUSE, FAMILY LAW CASES, COMMENTS, AND QUESTIONS 711 (2d ed. 1983) (reprinting 1982 N.Y. Times report regarding fight of a pair of California condors over their egg, ending in accidental destruction of the egg); O'Kelly, *supra* note 18, at 523 (quoting trial court observation reported in a 1972 Oregon appellate decision: "The chances of a child developing emotional problems as they grow up increases in direct proportion to the thickness of the file involved in a divorce case") (quoting King v. King, 10 Or. App. 324, 328, 500 P.2d 267, 268 (1972)); *see also* R. NEELY, *supra* note 8, at 66, 77-79 (risk that litigation will "destroy" the child); Elster, *supra* note 53, at 24 (citing social and medical reports that show child bears largest cost in litigation); Mnookin & Kornhauser, *supra* note 70, at 956-58 (negotiated settlement diminishes damage to child's relationship with each parent and is more credible than judicial decisions); Uviller, *supra* note 43, at 126 ("[v]itriolic and extended court battle may be worse for the child than custody with the 'less desirable' parent"); Watson, *supra* note 62, at 63-64, 71-72 (prolongation of proceedings devastating for child therefore finality an important consideration in child custody decisionmaking); Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1129-34 (1978) (noting twin dangers of litigation process and prolonged uncertainty). Responding to a survey, an active Minnesota family law practitioner observed that, given the inevitability of litigation in some dysfunctional relationships, the primary need is to try cases "as quickly as possible" and to "keep children out of the middle" of the proceedings. *Minnesota Surveys*, *supra* note 67. *But cf.* Fulton, *Parental Reports of Children's Post-Divorce Adjustment*, 35 J. SOC. ISSUES 126, 131-32 (1979) (parents report stress of children resulting from divorce, but deny long term problems in relationship resulting from custody contest); Scott & Derdeyn, *supra* note 8, at 475-76, 495 n.100 (noting experts who deemphasize importance of parental conflict and suggesting that tighter standard, if perceived by one spouse as unfair, also enlarges parental conflict).

76. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 3, at 37-38, 50, 113-33 (consequential suffering of children supports a premise for severe limitation on modification of visitation proceedings); Chambers, *supra* note 43, at 503-41 (review of research on needs of children in divorce, downplaying relative harm of "bad" custody choice); Charlow, *supra* note 53, at 275, 280-83 (reviewing social and medical research on correlation between control of conflict and later child development); McDermott, *Divorce and Its Psychiatric Sequelae in Children*, 23 ARCHIVES GEN. PSYCHIATRY 421, 426 (1970) (dangers of negative example by parents in conflict, and hazard of hostilities turned directly on child); Scott & Derdeyn, *supra* note 8, at 490-92 & n.190, 494-96 (evidence that continuing parental conflict more damaging than divorce itself or loss of contact with

lation between litigation and relitigation, thus extending the child's agony through the course of repeated judicial reviews of the custody decision.[77]

Although commentators generally emphasize the child's interest in controlling courtroom disputes, mothers also benefit from decreased litigation. Courts[78] and other observers[79] have found that mothers are more frequently the primary parent and are more often the party with fewer resources for a courtroom proceeding. Thus, although the caretaker standard is facially gender-neutral, by promoting less litigation, it actually favors mothers. Some observers praise this result, reasoning that the caretaker preference is necessary to avoid gender

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one parent); Johnston, *Ongoing Post-Divorce Conflict in Families Contesting Custody: Does Joint Custody and Frequent Access Help?*, (paper presented at meeting of American Orthopsychiatric Association, March 30, 1988) (high incidence of emotional and behavioral problems tied to severe parental conflict or prolonged conflict associated with permanent shared child custody arrangements).

77. Berger, Madakasira & Roebuck, *Child Custody and Relitigation: Trends in a Rural Setting*, 58 AM. J. ORTHOPSYCHIATRY 604 (1988) (study of 884 child custody cases in which only 10 of the 171 relitigated cases followed original agreement on custody); Scott & Derdeyn, *supra* note 8, at 493 (custody issues often relitigated); Watson, *supra* note 62, at 63, 80 (threat of continued litigation causes custodial parent to be defensive and ultimately harms child); Wexler, *supra* note 53, at 758, 802 (more trials on modification than on original awards and suggesting need for more study on tendency of initial litigation to promote relitigation).

78. The *Garska* court acknowledged that the primary caretaker in most cases is still the mother. Garska v. McCoy, 278 S.E.2d 357, 360 (W. Va. 1981). In *David M.*, the West Virginia court noted, citing studies, "Shared responsibility for child care would seem more a cosmopolitan pretension than a reality in most settings." David M. v. Margaret M., 385 S.E.2d 912, 917 (W. Va. 1989). The court added that application of the *Garska* factors "usually, but not necessarily, spells 'mother'." *Id.* at 923 (citations omitted).

79. Several commentators agree with the West Virginia court. *See* R. NEELY, *supra* note 8, at 15, 60-62 (reviewing literature on mother care); Chambers, *supra* note 43, at 534 (even working mothers spend more time with children than fathers); Fineman, *supra* note 43, at 769 n.166, 772-73 (vast majority of working women are primary parents); Mason, *supra* note 59, at 25 n.117 (citing literature showing that working women perform more child care functions than fathers); O'Kelly, *supra* note 18, at 540 (primary caretaker preference beneficial for mothers although justifications for preference are gender neutral); Scott & Derdeyn, *supra* note 8, at 460-61, 483 (reviewing evidence that mothers commonly are primary caretakers, even if they work); Uviller, *supra* note 43, at 111-12, 117-23, 130 (feminist support for gender neutrality gives way to preference favoring mothers, after taking into account unjust economic circumstances of women and hazard of gender neutral custody standard for poor, disadvantaged women). A Minnesota family court referee observed, late in 1989: "We see very few house-husband cases anymore." *Minnesota Surveys*, *supra* note 67.

abuse under the general best interests standard.[80]

Increased opportunities for litigation also increase the risk that the non-caretaker parent will use the threat of litigation to compel costly concessions by primary parents who lack the economic means or personal strength to defend their claims.[81] Both courts[82] and scholars[83] have found that one party will threaten the other with litigation even when the familial circumstances strongly show that the child's closer parental relationship should be preserved. The primary parent, because of preoccupation with needs of the family home, is especially vulnerable to such intimidation. This parent often cannot afford litigation expenses and must be concerned with meeting future economic needs.[84] Thus, a primary parent who lacks the means

80. Uviller, *supra* note 43, at 130.

81. The strategic threat of litigation "cannot in any sense be viewed as in the best interests of the children involved." Pikula v. Pikula, 374 N.W.2d 705, 712 (Minn. 1985) (citing Mnookin & Kornhauser, *supra* note 70). The West Virginia court warns that litigation may wound or destroy children. *Garska*, 278 S.E.2d at 361; *David M.*, 385 S.E.2d at 920-21.

82. "Parents already estranged may be tempted to use a threatened custody contest strategically when neither parent can predict with any certainty which parent will ultimately be awarded custody." *Pikula*, 374 N.W.2d at 712. "[W]hen the uncertainty in the outcome of a trial is necessarily high," the threat of custody litigation may be used to reduce the child support obligation or determine other issues in the case. *Id.* at 713. Similarly, the *Garska* court observed, "[o]ur experience instructs us that uncertainty about the outcome of custody disputes leads to the irresistible temptation to trade the custody of the child in return for lower alimony and child support payments." 278 S.E.2d at 360. The court labels this phenomenon the "Solomon syndrome." *Id.* at 362. *See* R. NEELY, *supra* note 8, at 62-64 (West Virginia chief justice observes "sinister" bargaining approaches under imprecise custody standard); O'Kelly, *supra* note 18, at 521-22 (reviewing *Garska* rationale); *see also In re* Marriage of Welby, 89 Or. App. 412, 415-17, 749 P.2d 602, 603-05 (1988) (Rossman, J., dissenting) (calling for more openness in modification of consent decrees and reporting familiarity with improper custody decisions due to unequal bargaining positions).

83. *See* Cochran, *supra* note 18, at 15-17, 61 (imprecise standard creates bargaining problem detrimental to mothers and children); Glendon, *supra* note 67, at 1170, 1180-81 (incentive for dispute under vague custody standard); Mnookin & Kornhauser, *supra* note 70, at 950, 978 (discussing previous formation of divorce law as framework for bargaining and noting enhanced bargaining power of fathers under gender neutral custody law); Scott & Derdeyn, *supra* note 8, at 465 & n.44, 468 & nn.56-57 (fathers have incentive under best interest standard to demand custody).

84. The *Pikula* court saw both sides to the vulnerability of the primary parent. First, the primary parent has greater need for economic support if he or she has "remained at home throughout a marriage to raise the children" and has "sacrificed economic and educational opportunities in order to perform that role." *Pikula*, 374 N.W.2d at 712-13. Second, "in practical fact, many primary caretakers may simply be unable to afford the expense of litigation at

to bargain[85] might make unwarranted concessions on financial issues to avoid costly litigation.[86] This parent might also make concessions on custody or visitation rights, thereby risking the child's welfare and safety.[87] In states that defer to original parental agreements, the risk of such concessions is especially great because the concessions might be irreversible.[88] The escalating cost of legal services,[89] along with the potential for relitigation and complex trials, exacerbates this problem.

C. COMPATIBILITY WITH GENDER NEUTRALITY AND THE MULTIPLE INTERESTS OF THE CHILD

Proponents of the primary caretaker preference assert that, in addition to protecting strong parent-child bonds and discouraging litigation, the preference preserves gender neutrality and the general best interests of the child. They stress

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all." *Id.* at 713. The West Virginia court also made these observations, and added repeatedly that the threatened loss of custody is "particularly terrifying" to the primary parent. Garska v. McCoy, 278 S.E.2d 357, 360-62 (W. Va. 1981); *see also* David M. v. Margaret M., 385 S.E.2d 912, 915, 917-24 (W. Va. 1989) (mothers especially willing to sacrifice excessively to preserve their ties with children); *In re* Maxwell, 8 Ohio App. 3d 302, 304-06, 456 N.E.2d 1218, 1221-22 (1982) (employing *Garska* language).

85. R. NEELY, *supra* note 8, at 64-65 (relative financial disabilities of mothers); Chambers, *supra* note 43, at 499-503, 541-49 (prospect of trauma for primary caretaker in loss of custody); Mnookin & Kornhauser, *supra* note 70, at 971, 978-80 (uncertain standard harms position of mother, who is most "risk-averse"); Scott & Derdeyn, *supra* note 8, at 478 (primary caretaker most prone to make concessions to save child custody).

86. R. NEELY, *supra* note 8, at 62-73, 80 (hazard of concessions upon threat of litigation); Meyer & Schlissel, *Child Custody Following Divorce: How Grasp the Nettle?*, 1982 N.Y. ST. BAR J. 496, 497 (uncertain custody standard changes settlement of other issues).

87. Scott & Derdeyn, *supra* note 8, at 477-81, 496-97 (litigation risks unwanted joint custody concessions); *see also* Mnookin & Kornhauser, *supra* note 70, at 980-84 (implications of tie between visitation and likelihood of settlement).

88. *See, e.g.*, Karon v. Karon, 435 N.W.2d 501, 504 (Minn. 1989) (deferring to original agreement for permanent waiver of maintenance); *see also* Mnookin, *supra* note 8, at 288 (reasons for judicial deference to parental settlements); Mnookin & Kornhauser, *supra* note 70, at 958, 994-96 (theoretical and practical problems in control of bargaining by scrutiny of agreements); *cf.* Meyer & Schlissel, *supra* note 86, at 499-501 & n.12 (stating obligation for scrutiny upon request for ratification of agreement).

89. Meyer v. Meyer, 441 N.W.2d 544, 548 (Minn. Ct. App. 1989) (stating imperative need for reform due to escalation of legal costs); R. NEELY, *supra* note 8, at 66 (hazard of costly proceedings); Scott & Derdeyn, *supra* note 8, at 468 (extraordinary "application costs" in custody litigation). A local Minnesota family bar group, in an unsolicited response to a survey on child custody law, reported that "the escalating costs of divorce are pricing custody litigation out of reach for most parents." *Minnesota Surveys*, *supra* note 67.

that the standard is facially neutral and permits fathers to change their parenting patterns to establish themselves as prospective custodial parents.[90] Moreover, some commentators argue that the benefits of the preference in terms of decreased litigation outweigh any deterrent effect the standard might have on fathers who wish to seek custody.[91] Three courts have found the caretaker preference gender neutral,[92] but others have found it no different then the discarded tender years doctrine.[93]

Supporters of the preference also defend it against claims that such a presumption impermissibly sacrifices qualitative decisionmaking. Few proponents assert that the preference preserves all of the child's best interests.[94] The Minnesota Supreme Court, however, found the standard compatible with child welfare concerns, even in the face of numerous interests

90. *See supra* note 23-24 and accompanying text (gender neutral law development); Charlow, *supra* note 53, at 274 (primary caretaker preference gender neutral, unlike tender years doctrine); Fineman, *supra* note 43, at 773 (primary caretaker preference gender neutral "on its face"); O'Kelly, *supra* note 18, at 495-99, 537-42 (caretaker preference gender neutral contrasted with tender years doctrine, which involves gender bias of constitutional significance).

91. *See* Ellsworth & Levy, *supra* note 16, at 203 (deterring litigation through use of the presumptive standard outweighs the disadvantage of discouraging fathers who wish to seek custody).

92. All three courts faced legislative mandates for gender neutrality, but none elaborated on the concept. The Minnesota Supreme Court noted that either parent may be the primary parent and that the standard might promote co-parenting. Pikula v. Pikula, 374 N.W.2d 705, 712 n.2 (Minn. 1985). Somewhat similarly, the West Virginia Supreme Court observed: "[N]ow that sex roles are becoming more flexible and high-income jobs are opening to women, it is conceivable that the primary caretaker may also be the father." Garska v. McCoy, 278 S.E.2d 357, 360 (W. Va. 1981). In 1980, the Oregon Court of Appeals rejected as apparent error a trial court opinion that preference for the mother as primary caretaker violated the mandate for gender neutrality. Van Dyke v. Van Dyke, 48 Or. App. 965, 969, 618 P.2d 465, 466 (1980).

93. Cunningham v. Cunningham, No. 1281 (Ohio App. Nov. 17, 1986) (LEXIS, States Library, Ohio file) (Grey, J., dissenting) (favors restoring custody with mother consistent with the tender years presumption, now "couched in modern day jargon of 'primary care giver' "); Haag v. Haag, 336 Pa. Super. 491, 498, 485 A.2d 1189, 1192 (1984) (primary caretaker standard "a sort of tender years doctrine in disguise"); *supra* note 33 (instances of Ohio deference to primary caretaker show repeated emphasis on legitimacy of tender years of child as a consideration). *See also* State *ex rel.* Watts v. Watts, 77 Misc.2d 178, 350 N.Y.S.2d 285, 290-91 (N.Y. Fam. Ct. 1973) (reviewing constitutional dimension of objections to tender years doctrine).

94. *See infra* notes 119-22 and accompanying text (observations on tie between primary parenting and vital bonded relationship); *cf.* Mnookin, *supra* note 8, at 282-87 (caretaking standard omits qualitative considerations and uses indefensible prediction of future care).

identified in the state's multi-factor custody statute.[95] The court emphasized the importance of the child's bond to a primary parent and reasoned that four of the nine statutory best interests factors were central to primary caretaking.[96] It found the remaining factors "inherently resistant of evaluation and difficult to apply."[97] Critics have directly questioned the court's reconciliation between the statutory factors and the primary caretaker relationship.[98] Nevertheless, a majority of the court still asserts that "the golden thread running through any best interests analysis is the importance, for a young child in particular, of its bond with the primary parent as this relationship bears on the other criteria."[99]

III. FLAWS AND FAILURES OF THE CARETAKER PREFERENCE IN MINNESOTA

In almost every aspect of its rationale, the primary caretaker preference proved ineffective in Minnesota, and other states show evidence of similar difficulties. The failure is principally the result of the lack of a usable definition of primary caretaking, which is necessary to achieve any of the standard's asserted benefits. This section documents the increase in litigation in Minnesota following adoption of the caretaker standard and discusses the factors that led to this unexpected development.

A. UNIMPEDED PATTERNS OF LITIGATION

The primary caretaker preference, contrary to the expectations of its supporters, caused an explosion of litigation in Minnesota. Two family law commentators observed that *Pikula* "spawned an incredible amount of litigation concerning who changed more diapers, the unfitness of parents and the thresh-

95. Pikula v. Pikula, 374 N.W.2d 705, 711-12 n.1 (Minn. 1985).

96. The court premised its view on the four statutory best interests factors central to primary caretaking: (1) the child's relationships with others, (2) adjustment to home and community, (3) length of time in a satisfactory placement, and (4) permanence of family unity. *Pikula*, 374 N.W.2d at 711 n.1. *See* MINN. STAT. § 518.17, subd. 1 (c), (d), (e), (f) (1988), discussed *supra* note 24.

97. *Pikula*, 374 N.W.2d at 712. Even when custody evaluations occur, they may not adequately furnish needed insight for decisions. *Id.* *See infra* note 199 (concession that interests sacrificed by caretaker preference); *see also supra* notes 62, 67-68 (best interests decisions unpredictable, factors unmeasurable); *infra* notes 123, 201-02 (best interests considerations unmeasurable).

98. *See* Note, *supra* note 18, at 1359-68; *infra* note 203.

99. Maxfield v. Maxfield, 452 N.W.2d 219, 223 (Minn. 1990).

old age at which a child is old enough to express a preference."[100] This comment must be read in perspective, with the knowledge that the vast majority of custody placements are still made pursuant to parental agreements, and most placements, including children of all ages, are made with the children's mothers.[101] Nevertheless, further scrutiny of the facts confirms such observations of increased litigation in the state following adoption of the primary caretaker standard.

Appellate court records demonstrate this rise in litigation. In 1984, before the *Pikula* decision, the Minnesota Court of Appeals decided nine original custody decisions.[102] For each of the years 1986 through 1988, however, the court decided an average of thirty such cases.[103] Trial court records also provide evidence of an increase in litigation. Although these records are for divorce litigation generally and do not classify cases accord-

100. Freed & Walker, *Family Law in the Fifty States: An Overview*, 22 FAM. L.Q. 367, 460 (1989). *See Pikula*, 374 N.W.2d 705.

101. As one Twin Cities judge volunteers, "very few families litigate custody." *Minnesota Surveys*, *supra* note 67. Thus, this judge concludes that most of the time litigation is avoided under both precise and imprecise standards. *Id. See* Ellsworth & Levy, *supra* note 16, at 202 (reciting historic estimate that custody is placed with child's mother in 90% of cases, including contested matters); Fulton, *supra* note 75, at 128 (in study of over 400 cases, sole custody with mother in 87%, with father in 8%); Scott & Derdeyn, *supra* note 8, at 468 n.58 (evidence that mothers obtain custody in 90% of cases and enjoy personal preference of decisionmakers); *see also* Rettig, Yellowthunder, Christensen & Dahl, Economic Consequences of Divorce for Men, Women, and Children in Minnesota: A Preliminary Report 2-3 (available from U. of Minn. Dept. of Family Social Science, 1985 Buford Ave., St. Paul, MN 55108). Among 1153 Minnesota cases studied in 1986, only 24 of which went to trial, mothers received sole custody in 81% of the cases, while fathers received custody in 10%. *Id.* These researchers reported elsewhere that mothers received custody in only 12 of the 24 tried cases, and fathers in eight cases, meaning that custody was placed with the mother in 81.7% of settled cases. MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT 24 (1989) (available from Minnesota Supreme Court Information Office, St. Paul, MN) [hereinafter GENDER REPORT]. Notwithstanding this evidence, there is ample room for doubt whether the number of consent placements with mothers corresponds with the high incidence of mothers furnishing primary care for children. *See supra* notes 78-79.

102. *See* Ebnet v. Ebnet, 347 N.W.2d 840 (Minn. Ct. App. 1984); Chambard v. Chambard, 348 N.W.2d 821 (Minn. Ct. App. 1984); Pikula v. Pikula, 349 N.W.2d 322 (Minn. Ct. App. 1984); Heard v. Heard, 353 N.W.2d 157 (Minn. Ct. App. 1984); Flinck v. Flinck, 351 N.W.2d 401 (Minn. Ct. App. 1984); Kotila v. Kotila, 351 N.W.2d 661 (Minn. Ct. App. 1984); Morey v. Peppin, 353 N.W.2d 179 (Minn. Ct. App. 1984); Stangel v. Stangel, 355 N.W.2d 489 (Minn. Ct. App. 1984); Schultz v. Schultz, 358 N.W.2d 136 (Minn. Ct. App. 1984).

103. Although no formal state recordkeeping system classifies court of appeals cases according to subject matter, a comprehensive Westlaw search revealed an average of 30 original custody cases in the years 1986-1988.

ing to the issues involved, they do show an increase in divorce litigation since 1984.[104] Other sources provide a mixed picture of the volume of custody trial activity in Minnesota during the late 1980s.[105]

Because of the imprecision of state trial court records and the difficulty of precisely measuring settlement trends, the author surveyed Minnesota's trial judges and active family law practitioners to obtain more information about the impact of the primary caretaker standard on child custody litigation. The survey asked the respondents to evaluate the effectiveness of the primary caretaker preference in avoiding litigation and the threat of litigation.[106] Table 1-1 shows the responses of 121 at-

104. Records of the Minnesota State Court Administrator show 799 Minnesota divorce trials for 1984, and an average of 891 in the four succeeding years. The 1988 volume, however, was 815 — only 2% higher than 1984. These figures include trials on post-judgment motions. Filings of divorce appeals follow a similar pattern, 279 cases (13% of volume) in 1985, and an average of 358 cases (16% of volume) in subsequent years.

105. *See* Rettig, Yellowthunder, Christenson & Dahl, *supra* note 101, at 2. These researchers found 6117 cases involving child custody, comprising 42.4% of all Minnesota divorce cases in 1986. A more detailed study of 1153 of these custody cases showed that 2.1% were tried. *Id.* Projecting Minnesota's experience to the nation, based solely on population, one might estimate that some 7500 custody cases are tried annually, from among over 350,000 cases involving children. This trial figure is about 10% of a popularized recitation of some 75,000 custody "disputes" each year, a figure used in a Chicago Tribune columnist's report in September 1989. The portion of Minnesota divorces involving children, 42.5%, contrasts with various national estimates of up to 75% of all cases. *See* Fulton, *supra* note 75, at 126 (children involved in one half to three-quarters of recent divorces); Glendon, *supra* note 67, at 1172-73 (estimating that children involved in nearly 60% of divorces); Glick, *Children of Divorced Parents in Demographic Perspective*, 35 J. SOC. ISSUES 170, 174 (1979) (census official reports children involved in close to 60% of divorces in each of the years between 1960 and 1978).

106. The survey questionnaire and the responses are on file with the author. The author directed the survey to 162 active participants in the Family Law Section of the Minnesota State Bar Association. Seventy-five percent, or 121 attorneys, responded.

The form asked the lawyers to respond to a number of questions, including:

> In *Pikula*, the Minnesota Supreme Court concluded: "The rule we fashion today should largely remove the issue of custody from the arena of dispute over such matters, and prevent the custody determination from being used in an abusive way to affect the level of support payments and the outcome of other issues in the proceeding." Pikula v. Pikula, 374 N.W.2d 705, 713 (Minn. 1985). Some feel the preference worked for primary parents, leading not only to settlement of cases but to settlements placing custody with the primary parent. On the other hand, custody litigation has been unabated; it has been observed that the standard induced competing claims of caretaking; and appellate cases indicate many judges had serious diffi-

torneys, seventy-five percent of those surveyed. Fifty-four percent of the respondents found the standard rarely or only sometimes effective, and slightly more than one-half also agreed that the standard induced contests on identification of the primary caretaker.[107]

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culties identifying a primary caretaker. In your experience, how well did the preference serve to induce settlements shaped by a clear recognition of the correct custody award, favoring the "primary parent?" Check the observation you think most accurate:

a. Preference clearly spared primary parents unnecessary litigation.
b. Litigation was avoided most of the time.
c. Sometimes the standard produced settlements as expected.
d. Rarely did the preference avoid litigation among parents.

Some say the standard frequently backfired, inducing claims, especially by fathers, that they did a worthy and equal service in caretaking. Do you think this is true?

a. Yes
b. No

Minnesota Surveys, supra note 67. Regrettably, the definition of the issue tends to be suggestive by including the conclusion from other evidence that custody litigation had not abated. Arguably, the danger of suggestion is offset by the sophistication of the persons surveyed and the range of choice permitted in the response.

107. A group of Minnesota lawyers volunteered that "those people who were intent on fighting were not dissuaded; their focus merely shifted to demonstrating either ambiguity in the caretaking roles or unfitness on the primary caretaker's part." *Id.* "To be blunt," one family law specialist noted, "although well-intended, *Pikula* was a disaster in practice. It resulted in more trials and more appeals than under the former or present standards." *Id.* Also, this lawyer added:

> Trial courts become so focused on counting diaper changes, even at temporary hearings, that the kids get lost along the way. Thus, the hearings and trials get longer, dirtier. There are reams of paper in affidavits where parents exaggerated facts in order to win custody. Already bulging family court filing spaces overflowed.

Id. On the issue of strategic threats of litigation, this lawyer stated:

> Many "primary parents" were blackmailed into accepting joint custody, even where it was inappropriate, because the ought-to-be-custodial parent did not have the financial and/or emotional resources to engage in a full trial. This was particularly true where that parent was the victim of psychological abuse during the marriage and would do anything to escape the abuser. Interestingly, many of these "joint custody" cases are back before the court because they are unworkable and perpetuate the abuse.

Id.

TABLE 1-1
Effectiveness of Primary Caretaker Standard in Reducing Litigation — Responses of Attorneys

	Number	Percent
a. Clearly effective	11	9%
b. Effective "most" cases	45	37%
c. Effective "some" cases	50	41%
d. Effective "rarely"	15	13%
Total	121	100%
Total, c. — d.	65	54%
Standard frequently induced litigation	62	51%

Table 1-2 shows the responses of attorneys who devoted more than one-half of their practice to family law. This group found the preference even less effective in promoting settlements. Fifty-eight percent responded that the standard was rarely or sometimes effective and fifty-nine percent responded that it frequently induced litigation.

TABLE 1-2
Effectiveness of Primary Caretaker Standard in Reducing Litigation — Responses of Active Family Law Practitioners

	Attorneys Whose Practice is More Than 50% in Family Law	
	Number	Percent
a. Clearly effective	7	8%
b. Effective "most" cases	28	34%
c. Effective "some" cases	40	48%
d. Effective "rarely"	8	10%
Total	83	100%
Total, c. — d.	48	58%
Standard frequently induced litigation	49	59%

Table 2-1 shows the responses of 151 trial court judges.[108] Thirty-seven percent of the judges found the standard was

108. In addition to surveying practicing attorneys, the author surveyed all Minnesota trial judges, including full time Twin Cities family court referees. Sixty-two percent, or 151 judges, responded. Nineteen of those who did not respond declined because of their lack of experience with the issue.

This survey listed the "backfire" effect of the preference as one of five measures of its effectiveness. *Cf. Minnesota Surveys*, *supra* note 67.

rarely effective or was counterproductive. An additional thirty-eight percent of the respondents found the standard only sometimes effective.[109] Table 2-2 then breaks down the responses of trial court judges between judges in the Twin Cities metropolitan area and those outside this area. The breakdown shows that the former group, who practice in Minnesota's two largest counties, were especially critical of the standard's effectiveness. Sixty percent of the judges in the Twin Cities described the preference as rarely or sometimes effective, and twenty percent described it as counterproductive. Outside the metropolitan area, fifty-four percent of the judges responded that the standard was rarely or sometimes effective, and sixteen percent responded that it was counterproductive.

TABLE 2-1
Effectiveness of Primary Caretaker Standard in Reducing Litigation — Responses of Trial Judges

	Number	Percent
a. Clearly effective	4	3%
b. Effective "most" cases	29	22%
c. Effective "some" cases	50	38%
d. Effective "rarely"	26	19%
e. Adverse effect, inducing claims	24	18%
Total	133	100%
Total, c. — e.	100	75%

TABLE 2-2
Effectiveness of Primary Caretaker Standard in Reducing Litigation — Assessment by Twin Cities Judges Versus Other Judges

	Twin Cities Judges		Other Judges	
	Number	Percent	Number	Percent
a. Clearly effective	1	1%	3	5%
b. Effective "most" cases	13	19%	16	25%
c. Effective "some" cases	27	39%	23	37%
d. Effective "rarely"	15	21%	11	17%
e. Adverse effect, inducing claims	14	20%	10	16%
Total	70	100%	63	100%
Total, c. — e.	56	80%	44	70%

109. A Twin Cities judge, finding the preference rarely effective, suggested it "simply changes the terminology, not the essence of the dispute." *Id.*

Finally, Table 2-3 shows the responses of Minnesota judges who heard the most family law cases. These judges, who presumably have the greatest knowledge of custody litigation out of all the groups surveyed, were the most critical of the standard's effectiveness. Thirty-seven percent of the judges whose caseload was at least seventy-five percent comprised of family law matters found the standard counterproductive. Fifty percent of those judges found the standard was somewhat or rarely effective. Similarly, of the judges whose caseload included at least fifty percent family law matters, thirty-two percent described the preference as counterproductive. Fifty-two percent described it as somewhat or rarely effective.

TABLE 2-3
Effectiveness of Primary Caretaker Standard in Reducing Litigation — Responses of Active Family Law Judges

	Family Law Assignments 75% or More*		Family Law Assignments 50% or More**	
	Number	Percent	Number	Percent
a. Clearly effective	0	0%	0	0%
b. Effective "most" cases	2	13%	5	16%
c. Effective "some" cases	6	37%	11	36%
d. Effective "rarely"	2	13%	5	16%
e. Adverse effect, inducing claims	6	37%	10	32%
Total	16	100%	31	100%
Total, c. — e.	14	87%	26	84%

* These judges spent more than 75% of their working time in family law matters during at least one year since 1985, when the primary caretaker standard was adopted.

** These judges spent more than 50% of their working time in family law matters during at least one year since 1985.

The observations that the preference did not effectively reduce litigation are especially significant because they refer to a period when additional developments were believed to discourage contests. Such developments include the preference for joint custody, the use of mediation for dispute resolution, and the skyrocketing cost of litigation.[110] On the other hand, the

110. *See* MINN. STAT. § 518.17, subd. 2 (1988) (rebuttable presumption upon request of at least one party for joint legal custody); MINN. STAT. § 518.619 (1988) (mandatory statewide mediation program for custody cases); *see also supra* notes 73-74, 89 (custody litigation costs).

increase in litigation cannot be completely attributed to flaws in the primary caretaker standard. Parents might desire to contest custody for a variety of reasons, such as the hostility of a divorce, the vulnerability felt from loss of the marriage, and the pressure imposed by some attorneys.[111] Furthermore, because divorce laws do little to mitigate the strong wish of an injured husband or wife to punish an unfaithful spouse, a parent might litigate custody as a substitute means of imposing punishment and seeking justice.[112] Finally, parties will inevitably pursue litigation to test the limits of a newly announced standard.

Thus, evidence of increased litigation should be evaluated with a view toward all possible sources of the development. Nevertheless, the increase in Minnesota is significant. It differs from results reported in West Virginia, where Justice Neely stated that the preference there "reduced the volume of domestic litigation over children enormously."[113] The West Virginia report, lacking substantiating evidence, is questionable in light of Minnesota's experience. The question remains, however, why the primary caretaker preference failed to meet the optimistic goals of the Minnesota Supreme Court[114] and other supporters of the standard.[115] The following observations provide

111. Changing social conditions are altering the vitality of these factors. Three influences are commonly identified: (1) hostility of separating parents; (2) defensiveness of parent threatened with loss of marriage, parenting, economic security, or self-respect; and (3) the interest of some lawyers in litigation. *See supra* notes 82-83 (use of custody claim as strategy for other gain); *see also* R. NEELY, *supra* note 8, at 85 (fathers motivated by perception that losses are punishment); Bishop, *When Custody is Not the Issue*, 1989 FAM. ADVOC. 14 (Summer 1989) (custody pursued to show dedication to child, or to marriage, to gain advantage on other issues); Scott & Derdeyn, *supra* note 8, at 492-93 (review on factor of "hostility and sadness" of separating spouses); Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 757 (1983) (parents' and children's emotional states and interaction upon marital separation may be a response to divorce crisis and are not indicative of future relationships).

112. Commenting for a Twin Cities newspaper, one active family law practitioner observed, "[n]o-fault divorce took away from spouses the option of dueling head-on over each other's misdeeds. Now, if your husband leaves you for another woman, what do you do? You don't let him see the kids." Minneapolis Star Tribune, Feb. 18, 1990, at 15A, col. 1. *See infra* notes 224-26 (sense of injustice as source of opposition to caretaker preference).

113. R. NEELY, *supra* note 8, at 83. *See* Glendon, *supra* note 67, at 1182 (observing Justice Neely's report and concluding that West Virginia has "gone far" in eliminating the strategic threat of custody litigation).

114. *See supra* note 72 (projection of *Pikula* court).

115. Chambers, *supra* note 43, at 561-64 (a strong version of the caretaker preference expected to discourage litigation and the strategic threat of litiga-

some answers.

B. An Imprecise Definition of Caretaking

Imprecision of the broad best interests standard, according to proponents of a primary caretaker preference, contributes to litigation and the threat of litigation.[116] This criticism, however, overlooks the question of whether the preference itself is imprecise.[117] To counteract the alleged vagueness of the best interests standard, a higher level of exactness is necessary in defining "primary caretaking."

Few observers, judges or scholars, suggest that the "*Garska* factors"[118] are a perfect measure of the child's more vital parent-child relationship.[119] In fact, some directly question the suitability of the factors.[120] Undoubtedly, the volume of care is

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tion); *cf.* Crippen & Hatling, *supra* note 22, at 418 (finding it "conceivable, perhaps even predictable" that disputes will occur on proof of primary parent status and become "a new avenue of hostile litigation in dissolution cases").

116. *See supra* notes 70-89 and accompanying text.

117. *See* Mason, *supra* note 59, at 25 (employment of both parents makes identity of primary caretaker unclear). Some Minnesota practitioners volunteered criticism on the general vagueness of the primary caretaker preference declared in *Pikula*. An experienced judge found that the standard had limited success as a "rule" because it may be "avoided, evaded, excepted or otherwise gotten around." *Minnesota Surveys*, *supra* note 67. A family court referee found that "vagueness" of the standard amplified the vagueness of the entire topic of the child's best interests. An active family law attorney observed that the preference permitted some argument for almost all caring parents. *Id.*

118. *See supra* text accompanying note 45; *see also supra* note 46 (omission of Oregon reference to "close and successful emotional relationship").

119. Pikula v. Pikula, 374 N.W.2d 705, 711-12 n.2 (Minn. 1985) (preference recognizes the importance of the bond formed between the primary caretaker and the child); Berndt v. Berndt, 292 N.W.2d 1, 2 (Minn. 1980) (intimate relationship "assumed" after suitable care and affection given for three and one-half years); Patzer v. Glaser, 396 N.W.2d 740, 743 (N.D. 1986) (psychological parent relationship develops from daily care); *In re* Maxwell, 8 Ohio App. 3d 302, 304, 456 N.E.2d 1218, 1221 (1982) (choice to protect "the close and successful emotional relationship between the primary parent and the children"); David M. v. Margaret M., 385 S.E.2d 912, 916 (W. Va. 1989) (observes that young children "form a unique bond with their primary caretaker"); Garska v. McCoy, 278 S.E.2d 357, 364 (W. Va. 1981) (equates primary caretaking with the giving of "love, affection, concern, tolerance, and the willingness to sacrifice"); *cf. supra* notes 51-55 and accompanying text (preference viewed as an outgrowth of the bonded relationship concept); Chambers, *supra* note 43, at 528-29 (tie between caretaking and attachment to parent); Fineman, *supra* note 43, at 771 (preference "assumes" bonding accompanies physical care); O'Kelly, *supra* note 18, at 509-17, 528 ("tangible nurturing" normally leads to psychological bonding).

120. The Minnesota State Bar Association Family Law Section asserted in an amicus brief to the Minnesota Supreme Court in 1988 that:

> While time spent on these tasks [the *Garska-Pikula* factors] may very

not always indicative of quality parenting.[121] Activities in the presence of the child are likely to be more valuable than tasks, such as washing clothes, that are done for the child.[122]

Recognizing these shortcomings, supporters of the primary caretaker preference emphasize the advantage of the preciseness of the standard.[123] They assert that an examination of caretaking involves a somewhat easy look at concrete behavior,[124] in contrast to the almost futile task of identifying the loosely defined best interests of the child. Thus, proponents of the caretaker preference intended it to substitute simplicity and certainty for a more thorough evaluation of the child custody issue. Evidence, however, shows that this expectation has not been achieved and that, in practice, application of the preference involved substantial uncertainty.

The initial evidence of complications and uncertainty appears in Minnesota's high level of custody litigation.[125] This trial activity is at least partially due to an indeterminate definition of primary caretaking. Also, because the *Garska* factors, which include preparing meals, giving baths and washing clothes, focus on past parental conduct, they invite acrimonious conflict and leave room for the type of litigation that usually accompanies vague standards. Some courts worsen the problem

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likely contribute to bonding between a parent and his or her child, no empirical evidence has been presented to support the proposition that, in and of themselves, these factors alone produce the intimate bond between parent and child.

Brief for Amicus Curiae Minnesota State Bar Association Family Law Section at 10, Sefkow v. Sefkow, 427 N.W.2d 203 (Minn. 1988) (No. CX-87-403). *See also infra* note 202 (criticism of tie between physical care and bonding).

121. Elster, *supra* note 53, at 38; Mnookin, *supra* note 8, at 284.

122. Elster, *supra* note 53, at 37-38; Chambers *supra* note 43, at 538.

123. *See David M.*, 385 S.E.2d at 925 (stating an aim that, if fit, the primary caretaker parent of very young children will have no chance of losing custody); J. GOLDSTEIN, A. FREUD, A. SOLNIT & S. GOLDSTEIN, *supra* note 43, at 66-67 (West Virginia primary caretaker guidelines give explicit identity to child custody factors); O'Kelly, *supra* note 18, at 529 (standard on quantity of care "objective, easily applicable, functional"); *supra* notes 62-89 and accompanying text (concern for certainty); *supra* note 95; *infra* notes 201-02, 208, 213 (disregard of unmeasurable factors); *infra* note 199 (choice of certainty over conflicting interests).

124. *See David M.*, 385 S.E.2d at 924 (anticipating that primary caretaker can be quickly designated in most cases); *see also* Fineman, *supra* note 43, at 772 (because courts traditionally adjudicate on past events, past caretaking role is one "judges can comfortably apply," and is predictable for lawyers and parents); O'Kelly, *supra* note 18, at 524 (primary caretaking can be easily identified and therefore provides a workable judicial standard). *But see* Mnookin, *supra* note 8, at 284-85 (caretaking standards difficult to apply).

125. *See supra* notes 100-15 and accompanying text.

by emphasizing the importance of past actions. They view caretaking not in terms of a relationship, but as evidence of a propensity to furnish future care.[126] Others encourage still more contention by citing the need to reward past caretaking.[127]

Understandably, studies of past parenting behavior include evaluation of the character of the caregiver and the quality of care, not just the quantity of care. The investigation of parental care patterns, aimed at identifying concrete actions, often produces self-serving claims intended to establish that one party is the more caring, giving and sacrificial parent. As in litigation of the child's wide-ranging best interests, the actual inquiry tends to focus on identifying the "best" parent. Thus, inquiry into past patterns of behavior often produces bitter disputes,[128] along with the distorted claims, accusations and denials that are common in divorce conflicts.[129]

In addition, evaluations of parental roles inevitably introduce distortions based on gender stereotyping. Stereotyping of family relationships commonly favors mothers. In fact, the caretaker preference is often described as a presumption for mothers.[130] A recent Minnesota task force report identified

126. *See* Commonwealth *ex rel.* Jordan v. Jordan, 302 Pa. Super. 421, 426, 448 A.2d 1113, 1115 (1982) (concern for predicting future commitment); Garska v. McCoy, 278 S.E.2d 357, 364 (W. Va. 1981) (prediction of future care can best be based on past course of conduct). Contending the preference "makes sense," one Minnesota trial judge characterized as a "practical observation" that "those who bear major custodial responsibilities before marital break-up are most likely to continue to do so, therefore best care for, young children after divorce." *Minnesota Surveys*, *supra* note 67.

127. *See* Elster, *supra* note 53, at 17-18, 30; Fineman, *supra* note 43, at 771 (reward for mother's sacrifice appropriate).

128. Scott & Derdeyn, *supra* note 8, at 468 (custody litigation "seems designed to promote acrimony" between parents where standard permits probe on character and lifestyle of parties). A local bar group in Minnesota volunteered the observation that litigation on past experiences of parents is "generally negative, increasing their hostility toward one another." *Minnesota Surveys*, *supra* at 67.

129. *See* Fulton, *supra* note 75, at 129-31 (analysis of parents constructing overbroad views of their contribution to child care); Mnookin, *supra* note 8, at 284-85 (caretaking standard invites exaggeration and dishonesty in litigation); *supra* note 107 ("reams" of affidavits containing "exaggerated facts"); *see also* Novotny v. Novotny, 394 N.W.2d 256, 258 (Minn. Ct. App. 1986) (noting that unfitness exception to preference prompted exchange of accusations at trial).

130. Gender stereotyping encompasses assumptions that mothers are more able custodial parents. *See* O'Kelly, *supra* note 18, at 499 n.87 (surveys on bias for mothers); Scott & Derdeyn, *supra* note 8, at 468-69 (pattern of custody placements with mothers); *supra* notes 62, 68 (personal values employed by judges); *supra* notes 78-79 (caretaker preference viewed as presumption for mothers); *infra* note 222 (standards intimidate fathers).

such gender biases.[131] On the other hand, as the task force report also stated,[132] application of the preference often results in the celebration of caretaking contributions of fathers and the criticism of shortcomings of mothers.[133] The nature of the pri-

131. GENDER REPORT, *supra* note 101. The report analyzed a sampling of responses from Minnesota's registered attorneys and found that:

> [Sixty-nine percent] of the state's male lawyers and 40% of the female lawyers think that judges always or often seem to assume that children belong with their mother. Ninety-four percent of the male attorneys and 84% of the female attorneys think that judges make this assumption at least some of the time . . . .

Id. at 23. Many lawyers pointed out the dangers of oversimplification in this area; judicial reluctance to award fathers custody is not always the result of stereotypical thinking:

> I tend to discourage fathers from seeking physical custody because they seldom are successful. Generally, they are not successful because their motivations are poor — i.e., seek custody to spite wife, not for best interests of children. (Male attorney, suburban.)
>
> I believe that it is very difficult for a man to obtain custody, but I believe this is due to the fact that, in this culture, men traditionally do much less of the caretaking during the marriage, even if the woman works outside the home. When I do an initial interview with men in a custody case, I am amazed with their lack of involvement with and knowledge of their children's day-to-day needs. Most of these men love their children and are well-intentioned, but they don't have the background to pursue custody . . . . So I don't perceive this as "gender bias," but as reality. Why would a judge take children away from a person who has been providing day to day care of the children? (Female attorney, Twin Cities.)

Id. at 24.

132. *See* GENDER REPORT, *supra* note 101, at 24. The Minnesota task force included this anecdotal evidence on stereotyping harmful to women:

> A male family law practitioner wrote, for example, that in his experience the most flagrant examples of gender bias in Minnesota's courts involve "certain male judges who believe it is inappropriate for custodial mothers to pursue a career."

Id.

In [another] category of cases judges sometimes overestimate the father's parenting contributions. A respondent to the lawyers' survey observed that: "Fathers seem to get more weight given to their direct care activities than do mothers. Mothers may do 90-95% of the actual caretaking, but if father does anything at all then he often gets credit for more than his 5-10%." (Male attorney, Greater Minnesota.) *Id.* Participants in the Twin Cities lawyers' meeting described it as giving fathers extra "parenting points" for doing things like changing the baby's diapers or putting the children to bed. Several people observed that this tendency to exaggerate the father's involvement may be due to the fact that in our culture women are still expected to care for children and men are not. *Id.* at 24-25.

133. Mason, *supra* note 59, at 25-26 (special credit given to fathers for daytime childcare activity); O'Kelly, *supra* note 18, at 519-21 (novelty of father care leads to overstatement of significance; corresponding criticism of mothers not exclusively preoccupied with child care; North Dakota and Kansas case illustrations); Polikoff, *supra* note 18, at 239-41 (contrasting view toward "dedicated" father and "half" mother); Uviller, *supra* note 43, at 108-09, 130

mary parent examination, involving a study of multiple factors, provides almost all parents with some credible basis for exaggerating the significance of their efforts.[134] Thus, parents who before the adoption of the primary caretaker preference would not have attempted to contest custody might now consider what factors they could apply or formulate to claim custody.

The high levels of litigation in Minnesota suggest the existence in the state of the above-described deficiencies in the primary caretaker definition. To inquire further into these definitional flaws, however, judges and attorneys were surveyed on their observations of whether conflicts under the standard became "fault-based," or characterized by an exchange of claims on virtue and fault.[135] The inquiry has two purposes: it provides some indication of whether the caretaker definition invites contentious posturing, and it suggests whether the standard promotes an inquiry that focuses predominantly on justice for parents rather than the interests of children.[136]

(feminist goal of discarding material preference before women have made substantial headway in nondomestic area may put women at a disadvantage in custody disputes because of women's inferior earning capacity and an enduring social bias against working mothers); *see also infra* note 162 (prevalence of successful fathers in litigated cases); *cf. supra* note 101 (overall success of mothers).

134. A family law specialist, commenting on the impact of the caretaking preference, reported that "some parents who would never have thought of contesting custody in the other parent began to consider what factors they could apply" to claim custody. *Minnesota Surveys*, *supra* note 67. In Minnesota, the scope of inquiry was enlarged by the uncertainty of whether the *Garska* factors were exclusive. *See* Pikula v. Pikula, 374 N.W.2d 705, 713 (Minn. 1985) (opinion silent on exclusivity of factors); Regenscheid v. Regenscheid, 395 N.W.2d 375, 379 (Minn. Ct. App. 1986) (strong emotional bond equalizes physical care by other parent); Sheeran v. Sheeran, 401 N.W.2d 111, 114 (Minn. Ct. App. 1987) (following *Regenscheid*).

135. The pertinent question was posed to both groups in this form:

> 3. Minnesota decided on no-fault dissolution in 1978. Child custody was to be decided solely in terms of the child's best interests. In *Pikula*, it was emphasized it serves the child to protect stable relationships. However, the primary caretaking "factors" seem to invite weighing the virtues of good caretaking and the fault connected with gaps in caretaking. As litigation on the primary caretaker occurred, how prevalent was the problem of a fault-based conflict, an exchange of claims of virtue and fault? Circle the degree of the problem from 0 (not at all fault-based) to 5 (completely fault-based) as you observed it:
>
> 0 1 2 3 4 5

Minnesota Surveys, *supra* note 67. Here, also, the question may tend to be suggestive, a problem inherent in defining the issue addressed. *See supra* note 106 (comment on suggestiveness and offsetting considerations).

136. Charlow, *supra* note 53, at 270-72 (reviewing literature on parent in-

Table 3-1 shows the responses of 121 attorneys who actively practice family law in Minnesota. Fifty-nine percent assessed the prevalence of fault-based conflict at a level of three or greater on a scale of zero to five, with five indicating complete fault-based conflict. Thirty-three percent chose a score of four or five. Table 3-2 presents the responses of Minnesota attorneys whose practice was more than fifty percent comprised of family law matters. Sixty-two percent of these attorneys described the prevalence of fault-based conflict at a level of three or greater. Forty percent indicated a score of four or five.

TABLE 3-1
Tendency Under Primary Caretaker Standard to Focus on Claims of Parent Fault and Virtue — Responses of Family Law Practitioners

	Number	Percent
0 (Not fault-based)	3	3%
1	15	12%
2	32	26%
3	31	26%
4	30	25%
5 (Completely fault-based)	10	8%
Total	121*	100%
Total, 3 - 5	71	59%
Total, 4 - 5	40	33%

* Of the 162 active participants in the Family Law Section of the Minnesota State Bar Association, 121, or 75%, responded.

terest factors that tend to be most determinative in court adjudications). *See In re* Marriage of Ertmann, 376 N.W.2d 918, 921 (Iowa Ct. App. 1985) (stating that proper focus for custody determination should not be solely on past parenting behavior but on the long-range best interests of the child). Purists on this issue may forget that parent behavior is not irrelevant to the child's future interests, and parent interests are not a wholly illegitimate factor in deciding a custody placement. *See* Elster, *supra* note 53, at 16-21, 28-32; *see also infra* notes 193-94 (distinguishing this child welfare concern, one appropriately considered by proponents of the preference, from criticism that decisions under the standard overlook significant interests of children and fathers).

TABLE 3-2
Tendency Under Primary Caretaker Standard to Focus on Claims of Parent Fault and Virtue — Responses of Active Family Law Practitioners

	Lawyers Whose Practice is more than 50% in Family Law	
	Number	Percent
0 (Not fault-based)	3	3%
1	10	12%
2	20	23%
3	19	22%
4	26	30%
5 (Completely fault-based)	9	10%
Total	87	100%
Total, 3 - 5	54	62%
Total, 4 - 5	35	40%

Table 3-3 breaks down the responses of attorneys on whether conflicts under the standard are fault-based into two groups: attorneys who found the standard effective in reducing litigation, and those who found it had limited effectiveness. The Table shows a correlation between attorneys who described the caretaker preference as somewhat or largely ineffective in discouraging litigation, and those who strongly assessed the presence of the fault factor. Eighty percent of those who found the standard at most sometimes effective also highly assessed the prevalence of a fault-based conflict under the standard; almost fifty percent indicated a score of four or five. Among those attorneys who found the standard effective and who were thus less likely to witness custody disputes, relatively few perceived a fault factor.

TABLE 3-3
Tendency Under Primary Caretaker Standard to Focus on Claims of Parent Fault and Virtue — Correlation with Attorneys' Responses on Effectiveness of Primary Caretaker Standard in Reducing Litigation

	Lawyers Who Found Standard Had Limited Effect in Reducing Litigation*		Lawyers Who Found Standard Effective in Reducing Litigation**	
	Number	Percent	Number	Percent
0 (Not fault-based)	0	0%	2	4%
1	3	5%	13	23%
2	10	15%	22	39%
3	21	32%	10	18%
4	22	34%	8	14%
5 (Completely fault-based)	9	14%	1	2%
Total	65	100%	56	100%
Total, 3 — 5	52	80%	19	34%
Total, 4 — 5	31	48%	9	16%

* These attorneys observed that the primary caretaker standard reduced settlement without litigation only rarely or sometimes, or even induced litigation. See Table 1-1.

** These attorneys observed that the primary caretaker standard clearly reduced litigation or did so most of the time. See Table 1-1.

Tables 4-1 through 4-4 show responses of 151 trial court judges to the same issue. Table 4-1 shows that seventy percent of all judges surveyed assessed the prevalence of fault-based conflict with a score of three or greater. Thirty-eight percent chose a score of four or five. Table 4-2 separates the total responses between judges from the Twin Cities metropolitan area and those outside this area. The results show that Twin Cities judges, who practice in Minnesota's two largest counties, perceived a greater amount of fault-based conflict. Seventy-four percent of judges from the Twin Cities ranked the amount of fault-based conflict at a level of three or greater. Fifty percent of these judges indicated a score of four or five.

TABLE 4-1
Assessment by Trial Judges — Tendency Under Primary Caretaker Standard to Dwell on Claims of Parent Fault and Virtue

	Number	Percent
0 (Not fault-based)	0	0%
1	22	16%
2	18	14%
3	43	32%
4	46	35%
5 (Completely fault-based)	4	3%
Total	133*	100%
Total, 3 – 5	93	70%
Total, 4 – 5	50	38%

* The survey encompassed all Minnesota trial judges, including full time Twin Citites family court referees, although many do not hear dissolution cases. Sixty-two percent, or 151 judges, responded. Nineteen of those who did not respond chose to do so because of their lack of experience with the issue.

TABLE 4-2
Tendency Under Primary Caretaker Standard to Focus on Claims of Parent Fault and Virtue — Twin Cities Judges versus Other Judges

	Twin Cities Judges		Other Judges	
	Number	Percent	Number	Percent
0 (Not fault-based)	0	0%	0	0%
1	12	17%	10	16%
2	6	9%	12	19%
3	17	24%	26	41%
4	34	49%	12	19%
5 (Completely fault-based)	1	1%	3	5%
Total	70	100%	63	100%
Total, 3 – 5	52	74%	41	65%
Total, 4 – 5	35	50%	15	24%

Table 4-3 shows the responses of Minnesota judges who heard the most family law cases. These judges indicated the highest amount of fault-based conflict of all the groups surveyed. Eighty-one percent of the judges whose caseload was at least seventy-five percent comprised of family law cases assessed the prevalence of fault-based claims at a level of three to

five. Sixty-nine percent of this group chose a score of four or five. Of the judges whose caseload was at least fifty percent comprised of family law matters, seventy-seven percent indicated a score of three or greater and forty-five percent chose a score of four or five.

TABLE 4-3
Tendency Under Primary Caretaker Standard to Focus on Claims of Parent Fault and Virtue — Responses of Active Family Law Judges

	Family Law Assignments 75% Time or More*		Family Law Assignments 50% Time or More**	
	Number	Percent	Number	Percent
0 (Not fault-based)	0	0%	0	0%
1	1	6%	4	13%
2	2	13%	3	10%
3	2	12%	10	32%
4	11	69%	11	35%
5 (Completely fault-based)	0	0%	3	10%
Total	16	100%	31	100%
Total, 3 — 5	13	81%	24	77%
Total, 4 — 5	11	69%	14	45%

* These judges spent more than 75% of their working time in family law matters during at least one year since 1985, when the primary caretaker standard was adopted.

** These judges spent more than 50% of their working time in family law matters during at least one year since 1985.

Finally, Table 4-4 divides the responses of judges as to whether conflicts under the standard are fault-based between judges who found the standard effective in reducing litigation and those who found it had limited effectiveness. The table shows a correlation between judges who described the caretaker preference as somewhat or largely ineffective in discouraging litigation and those who strongly assessed the presence of a fault factor. The correlation, however, was not as strong as that among the attorneys in Table 3-3.

TABLE 4-4
Tendency Under Primary Caretaker Standard to Focus on Claims of Parent Fault and Virtue — Correlation with Judges' Responses on Effectiveness of Primary Caretaker Standard in Reducing Litigation

	Judges Who Found Standard Had Limited Effect In Reducing Litigation*		Judges Who Found Standard Effective In Reducing Litigation**	
	Number	Percent	Number	Percent
0 (Not fault-based)	0	0%	0	0%
1	16	16%	6	18%
2	10	10%	8	24%
3	32	32%	11	34%
4	38	38%	8	24%
5 (Completely fault-based)	4	4%	0	0%
Total	100	100%	33	100%
Total, 3 — 5	74	74%	19	58%
Total, 4 — 5	42	42%	8	24%

* These judges observed that the primary caretaker standard reduced litigation only rarely or sometimes, or induced litigation. See Table 2-1.

** These judges observed that the primary caretaker standard clearly reduced litigation or did so most of the time. See Table 2-1.

C. Broad Interpretations of Exceptions to the Caretaker Preference

In addition to the imprecise definition of caretaking, several exceptions to the primary caretaker preference have contributed to increased litigation. Although some litigation invariably accompanies the initial refinement of exceptions to any rule, in Minnesota enlargements to and vague definitions of the exceptions led to excessive disputes. As the exceptions were expanded, the preference was narrowed, thus allowing more litigation under the broad best interests standard. These developments also promoted the use of threats of litigation as a bargaining strategy.[137]

The primary caretaker preference has three express excep-

137. *See supra* notes 82-89 (hazard of strategic threats under best interests standard); *cf.* Scott & Derdeyn, *supra* note 8, at 477-79, 497 (analysis of precise rule with regard to bargaining consequences).

tions and leaves room for two more. The preference is expressly inapplicable to older children,[138] to an unfit parent[139] and to parents who are equal caretakers.[140] Furthermore, although the stated subject of the preference is care before separation, an exception has developed in practice for temporary caretaking following the separation.[141] Finally, an exception to the preference could arise in favor of joint physical custody arrangements.[142]

Evolution of the primary caretaker standard in Minnesota led to enlargements and vague definitions of these exceptions.

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138. *Garska* called for the preference in placing children of tender years, but permitted deference to the opinions of older children. Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981). In 1989, the court made a more precise declaration that trial courts could give weight to actual preferences of children over age five. David M. v. Margaret M., 385 S.E.2d 912, 924 (1989). *See* discussion *infra* notes 147-48. The Minnesota Supreme Court confined the rule to cases of children "too young to express a preference," leaving unclear the need for an actual expression of the child's opinion. *Pikula*, 374 N.W.2d at 713.

139. The West Virginia court first described the condition of fitness as a "minimum, objective standard" of behavior. *Garska*, 278 S.E.2d at 362-63. Explaining this concept, the court cited a definition from an earlier decision: "[W]here the primary caretaker fails to provide: emotional support; routine cleanliness; or nourishing food." *Id.* at 362 n.9. Eight years later, the court further clarified its standard:

> To be a fit parent, a person must: (1) feed and clothe the child appropriately; (2) adequately supervise the child and protect him or her from harm; (3) provide habitable housing; (4) avoid extreme discipline, child abuse, and other similar vices; and (5) refrain from immoral behavior under circumstances that would affect the child.

David M., 385 S.E.2d at 914.

140. The *Garska* court prescribed the preference for cases where one parent is "clearly" the primary caretaker. *Garska*, 278 S.E.2d at 363. Somewhat inconsistently, the court confined the shared parenting exception to cases in which care was shared in an "entirely equal way." *Id.* The *Pikula* court called for no such clear picture of primary care, and adopted confinement of the exception to cases where care was shared in an "entirely equal way." *Pikula*, 374 N.W.2d at 713-14. The Minnesota court added: "We would expect that, as between any two parents, one will be the primary parent even if neither conforms to the more traditional pattern of one parent working outside the house and one within it." *Id.*

141. *Pikula*, 374 N.W.2d at 714 (care when "the family relationships were physically disrupted by events leading to the dissolution of the marriage"); *Garska*, 278 S.E.2d at 363 (care "before the domestic strife giving rise to the proceeding began"). This determination can be subsequently altered by practice and by formal recognition of an exception for long-term post-separation placement. *See infra* note 153.

142. When announcing a firm preference, neither the West Virginia nor the Minnesota court spoke of claims for joint physical custody. The two opinions, however, speak unequivocally about an award of custody to one parent — the primary caretaker. *See Pikula*, 374 N.W.2d at 713-14; *Garska*, 278 S.E.2d at 363.

This section examines these developments and especially compares them to developments in West Virginia, the only other state with a stated primary caretaker preference. The comparison illustrates the contrasting response of appellate courts in West Virginia, where the supreme court has frequently corrected loose application of the preference,[143] and in Minnesota, where no such corrections have occurred.[144] It suggests the development of broad exceptions to the preference in Minnesota and comparatively ineffective appellate review by Minnesota courts, an issue more thoroughly discussed in the following section.

Initially, the exception to the preference for older children greatly minimizes the standard's potential impact.[145] The rationale for this exception is presumably that the placement wishes of children old enough to express a preference should receive deference. Several commentators, however, have criticized this reasoning, arguing for abolition of the exception or restriction of its application to older children.[146] Conversely,

143. *See infra* note 161 (reversals of trial court findings on equal caretaking). In West Virginia, announcement of the standard began with a reversal. *See Garska*, 278 S.E.2d at 364. There, the court reversed placement of a one-year-old with the father, based on the conclusion that the mother was primary caretaker. Because the standard was newly announced, the trial court had made no finding regarding the primary caretaker. In subsequent years, the West Virginia Supreme Court reversed trial court findings that the father was the primary caretaker. *See, e.g.*, Wagoner v. Wagoner, 310 S.E.2d 204, 206 (W. Va. 1983) (per curiam) (custody awarded to working mother on finding of four significant evidentiary items: (1) mother's attention given to child when both parents present, (2) father's use of babysitter when at home, (3) observation of father's primary role in upkeep of home, and (4) admission that mother spent most time with children); *cf. infra* notes 145-50 (mixed message on exception for child's choice); notes 153-55 (broadening of exception for temporary loss of custody).

144. *See supra* note 134 (broadening of caretaking factors); *infra* notes 147, 152, 161, 165-66 (expansion of exceptions); *infra* notes 177-78 (application not reversed).

145. *Cf.* Polikoff, *supra* note 18, at 235 (age of seven frequently cited as ceiling for tender years doctrine); Reidy, Silver & Carlson, *supra* note 53, at 78-79, 83-85 (in practice judges give little attention to wishes of child at age five, and moderate attention even at age ten).

146. One Twin Cities family law specialist volunteered support for the caretaker preference, but asked, "what do we do about children aged 5-18?" *Minnesota Surveys*, *supra* note 67. *See* Chambers, *supra* note 43, at 532 (evidence supporting continuity of care of children as late as age 10); Cochran, *supra* note 18, at 62 (suggesting caretaker preference application to all contested custody cases); Fineman, *supra* note 43, at 771-72 (same). Fineman reasons as follows:

> I believe that limiting the rule to children under the age of seven unrealistically assumes that nurturing ends when a child begins school.

Minnesota expanded the exception beyond its rationale by applying it to all children over seven years old, whether or not they actually expressed a placement choice.[147] In West Virginia, where the exception covers only express preferences,[148] the appellate court has further suggested that a child's preference should control only when the child is thirteen years or older. The West Virginia court, however, once set aside the preference based on a six-year-old's placement desire, which was evidently detected without reference to any declaration.[149] Except for West Virginia, no state has defined the age beyond which a child's preference will displace the caretaker standard,

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> This limitation would also send the message that if a parent fails to nurture during a child's early years, he need not worry, because there will be no negative consequences with respect to later custody determinations.

Id.

147. *See Pikula*, 374 N.W.2d at 712. *See supra* note 41 (employing phrase "too young to express a preference" as a condition of the primary caretaker preference); Sefkow v. Sefkow, 427 N.W.2d 203, 212 (Minn. 1988) (*Pikula* analysis inapplicable because eight-year-old child is old enough to express a preference). *But cf.* Roehrdanz v. Roehrdanz, 410 N.W.2d 359 (Minn. Ct. App. 1987) (primary caretaker preference employed for placement of children ages 6, 10, and 12 even where there was evidence of express preference); Imdieke v. Imdieke, 411 N.W.2d 241, 243 (Minn. Ct. App. 1987) (reversing placement preferred by 12-year-old, although premised on avoiding a split of siblings).

148. *See* David M. v. Margaret M., 385 S.E.2d 912, 924 (W. Va. 1989). The *David M.* court suggested infrequent solicitation of the preference of children ages six through thirteen:

> In exceptional cases 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. Such an interview, because of the problems in asking children about their parental preference, should not, however, be routine and neither party may demand such an interview as a matter of right. . . . The judge is not, however, required to hear the testimony of the children, and will usually not do so, particularly if he or she suspects bribery or undue influence. Nonetheless, by allowing the children to be acceptable experts in our courts, an escape valve is provided in unusually hard cases.

Id. at 924. *See also* S.H. v. R.L.H., 169 W. Va. 550, 552-53, 289 S.E.2d 186, 188-90 (1982) (affirming change of custody from primary caretaker mother to father, based on preferences of children ages 11, 13, and 14).

149. Graham v. Graham, 326 S.E.2d 189, 191 (W. Va. 1984) (per curiam) (affirming joint custody of six-year-old child with father based on equal caretaking by parents); *see also* Michael R. v. Sandra E., 378 S.E.2d 840, 842-43 (W. Va. 1989) (per curiam) (reviewing denial of change from divided custody to placement with non-primary parent; reversal premised on preference of 10-year-old and primary parent drug abuse and "erratic" behavior); *cf.* Rose v. Rose, 340 S.E.2d 176, 180 (W. Va. 1985) (McGraw, J., dissenting) (contending vigorously that *Garska* presumption not rebutted by evidence of bright 10-year-old's preference).

thereby leaving the potential for litigation.[150]

A second significant exception to the standard is for temporary placements created shortly before or after separation of the parents.[151] This exception has developed through case law in both Minnesota[152] and West Virginia.[153] Trial judges cite the desire to avoid disturbing the continuity of any care arrange-

150. *See supra* note 148 (West Virginia clarifies standard in 1989); Terdan v. Terdan, No. C7-90-62 (Minn. Ct. App. July 25, 1990) (LEXIS, States library, Minn file) (if maturity and expression properly assessed, choice of seven-year-old child may be determinative); Mowers v. Mowers, 406 N.W.2d 60, 69 (Minn. Ct. App. 1987) (preferences of seven-year-old children defeat caretaker preference); Petersen v. Petersen, 394 N.W.2d 586, 588-89 (Minn. Ct. App. 1986); *cf.* Speltz v. Speltz, 386 N.W.2d 264, 267 (Minn. Ct. App. 1986) (children ages six and four too young to express preference therefore caretaker preference prevails).

151. It is evident that the primary parent preference, as implemented to date, has not eliminated this competing preference or the bargaining abuse that accompanies it. One Minnesota trial judge volunteered the opinion that appellate court uncertainty on this issue significantly explains the continued pattern of custody litigation after adoption of the caretaker preference. *Minnesota Surveys*, *supra* note 67.

152. *See* McCabe v. McCabe, 430 N.W.2d 870, 874 (Minn. Ct. App. 1988) (upholding father as primary caretaker based on care for 17-month period beginning five or six months before separation, notwithstanding the caring role of mother during that period); Gorz v. Gorz, 428 N.W.2d 839, 841 (Minn. Ct. App. 1988) (upholding father as primary caretaker although mother cared for children until six or seven months before separation); Sucher v. Sucher, 416 N.W.2d 182, 184-85 (Minn. Ct. App. 1987) (affirming placement of children with father who shared care during year before couple separated although mother was primary parent for preceding six years); Heim v. Heim, 394 N.W.2d 254, 255 (Minn. Ct. App. 1986) (affirming father as primary caretaker even though mother was primary caretaker until shortly before separation). *But cf.* Roerhdanz v. Roerhdanz, 410 N.W.2d 359, 361-62 (Minn. Ct. App. 1987) (rejecting plea of father that he cared for children during year before separation).

153. *See* J.E.I. v. L.M.I., 314 S.E.2d 67, 73 (W. Va. 1984) (affirming placement with father who provided care for two-year-old for six months after separation); Dempsey v. Dempsey, 306 S.E.2d 230, 231 (W. Va. 1983) (per curiam) (affirming son's placement with father who had custody for eleven months before trial although mother was primary parent for seven years); *see also In re* Marriage of Maddox, 56 Or. App. 345, 348, 641 P.2d 665, 667 (1982) (affirming father's custody premised on his significant contribution to caretaking for eight months between separation and trial); Brooks v. Brooks, 319 Pa. Super. 268, 274-77, 466 A.2d 152, 156-57 (1983) (stating that primary caretaking is only one factor to be assessed at the time of hearing); Gallagher v. Adkins, No. 87-342-II (Tenn. Ct. App. Apr. 15, 1988) (LEXIS, States library, Tenn file) (affirming custody to father premised on his care for 10 months pending motion proceedings); Davis v. Davis, 749 P.2d 647, 649 (Utah 1988) (father's care of three-year-old during one year pendency of case establishes him as primary caretaker); Paryzek v. Paryzek, 776 P.2d 78, 82 (Utah Ct. App. 1989) (establishing father as the primary caretaker due to two and one-half year temporary custody before trial).

ment, including a short term placement.[154] Defenders of the primary caretaker standard acknowledge the need for an exception for longstanding custodial relationships,[155] but allege that expansion of the exception risks the greater use of temporary custody as a threat in both the bargaining process and in actual contests.[156] Considering the already widespread recognition and use of the "foot in the door" advantage of temporary arrangements, however, confinement of the exception to long term placements appears unlikely.

A third exception to the preference is for situations in which both parents are equal caretakers.[157] Both the West Virginia and Minnesota Supreme Courts have stated that the exception only applies when the parents shared caretaking duties in an "entirely equal way."[158] Despite this narrow language, however, Minnesota courts have broadly construed the exception to produce strained findings of equal caretaking. Minnesota appellate courts affirmed trial court findings of equal caretaking in at least twelve cases.[159] Several other state courts have also interpreted the exception expansively.[160] Only West

154. *See* CHAMBERS, *supra* note 43, at 533-38 (observing active parenting role of secondary parent at progressive stages of child development); O'Kelly, *supra* note 18, at 543 (noting disadvantages of strict regard to care before separation); Pearson & Ring, *supra* note 8, at 720 (struggle of younger judges to avoid changing temporary custody arrangement).

155. Sefkow v. Sefkow, 427 N.W.2d 203, 212 (Minn. 1988) (care after separation defeats preference for earlier caretaker where trial not reasonably close to separation date); Sinsabaugh v. Heinerscheid, 428 N.W.2d 476, 479 (Minn. Ct. App. 1988) (applying *Sefkow* rationale for three-year litigation period); Grimm v. Grimm, No. C3-88-1600 (Minn. Ct. App. Feb. 14, 1989) (LEXIS, States library, Minn file) (similar application, 26-month delay period).

156. Adding to the breadth of this issue, according to volunteered comments of a Twin Cities family law specialist, is the easy access of parents to domestic abuse proceedings, and the use of these actions "to remove a custody competitor prior to commencement of the divorce action." *Minnesota Surveys*, *supra* note 67.

157. Application of the equal parenting exception involves a variation on the problem of how to define primary caretaking. *See supra* notes 128-36 and accompanying text (difficulties in evaluating caretaking evidence). The equal parenting exception is the most likely focus for advocates or decisionmakers who doubt the evidence of a primary caretaking pattern. If the preference is to be compromised, this is the most natural device to employ.

158. Pikula v. Pikula, 374 N.W.2d 705, 714 (Minn. 1985); Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981); Note, *supra* note 18, at 1359 (regards exception of *Pikula* as one requiring finding of "exactly" equal caretaking).

159. *See infra* notes 165-66.

160. *Arkansas*: Riddle v. Riddle, 28 Ark. App. 344, 346 S.W.2d 513, 515 (1989) (although no state precedent on caretaking factor, court affirms placement with father based on closer bond and recites his active caretaking role).

Ohio: *See supra* notes 30-31 (ample precedent in Ohio to disregard pri-

Virginia, where the supreme court has reversed three trial court findings of equal caretaking, has made an effort to limit the scope of the exception.[161] Casting some suspicion over liberal findings of equal caretaking, observers generally did not anticipate this expansive application of the exception; they believed that equal caretaking would be a rare circumstance.[162]

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mary caretaking); Summers-Horton v. Horton, No. 88AP-622 (Ohio Ct. App. Mar. 30, 1989) (LEXIS, States library, Ohio file) (without rejecting contention that the mother was the primary caretaker, court affirms trial court finding that both parents have "excellent interaction and interrelationship" with their children and affirms placement of children with father); *see also* Michel v. Michel, No. 6-87-5 (Ohio Ct. App. Mar. 6, 1989) (LEXIS, States library, Ohio file) (affirming placement of children with father where employed mother was the primary caregiver but father substantially assisted).

Oregon: *See supra* note 39 (in the midst of three reversals favoring primary caretakers between 1977 and 1983, factor simply disregarded in 1980 decision); *In re* Marriage of Maddox, 56 Or. App. 345, 347-48, 641 P.2d 665, 667 (1982) (affirming custody of father for two children where homemaker mother was the primary caretaker based on a significant amount of time father devoted to the children).

Pennsylvania: *See supra* note 27 (primary caretaking one factor or perhaps a substantial factor); Haag v. Haag, 336 Pa. Super. 491, 498-99, 485 A.2d 1189, 1193 (1984) (finding working mother's claim of primary caretaking unproven where evidence shows both parents were involved in caretaking).

Utah: Deeben v. Deeben, 772 P.2d 972, 974 (Utah Ct. App. 1989) (court ordered split custody, ignoring mother's primary caretaking role and emphasizing that father spent equal time caretaking "when he was in the home") (emphasis omitted).

Vermont: Peckham v. Peckham, 149 Vt. 388, 389, 543 A.2d 267, 268 (1988) (among many factors entitled to weight, including mother's primary caretaking, is evidence that father actively participated in the child's care).

161. There are no Minnesota cases to parallel three decisions of the West Virginia Supreme Court that reversed trial court findings on equal caretaking. In Lounsbury v. Lounsbury, 296 S.E.2d 686, 688-89 (W. Va. 1982) (per curiam), the trial court found that neither parent had "clearly taken primary responsibility for the caring and nurturing duties." The appellate court reversed, finding it "obvious" that the mother was the primary caretaker. That conclusion was briefly explained by reference to an admitted high level of physical caretaking by the mother. *Id.* *See also* Isaacs v. Isaacs, 358 S.E.2d 833, 835 (W. Va. 1987) (per curiam) (reversing finding that neither parent was primary caretaker premised in part on trial court's wrongful use of evidence on mother's sexual conduct); Gibson v. Gibson, 304 S.E.2d 336, 338-39 (W. Va. 1983) (per curiam) (concluding that the evidence clearly shows that the mother was the primary caretaker even though both parents worked); *cf.* Graham v. Graham, 326 S.E.2d 189, 191 (W. Va. 1984) (per curiam) (affirming equal caretaking); J.E.I. v. L.M.I., 314 S.E.2d 67, 72 (W. Va. 1984) (same); Dempsey v. Dempsey, 306 S.E.2d 230, 231 (W. Va. 1983) (same).

162. A finding of equal parenting is typically a finding that the mother is not the primary caretaker. Because observers believe this situation is so rare, any significant number of findings of an equal care arrangement are suspicious. *See* Pikula v. Pikula, 374 N.W.2d 705, 714 (Minn. 1985) (confidence in preference even where both parents employed); Polikoff, *supra* note 18, at 237

Furthermore, true equal caretakers are probably the least likely persons to litigate custody, principally due to the strong interests of both parents in joint custody.[163]

Commentators have observed that mothers who work outside the home are most vulnerable to this exception because a primary caretaker is more difficult to identify when both parents work.[164] However, although Minnesota appellate courts often applied the exception when a mother worked outside the home,[165] they were equally likely to make a finding of equal

(evidence that fathers winning custody have not been exceptionally involved in child care); Uviller, *supra* note 43, at 129 (weighing the prospective strength and weakness of a maternal preference and concluding that the only exception should be for primary caretaker father); *supra* note 124 and accompanying text (expectations that identification of primary caretaker is easy task). Similarly, commentators have viewed with suspicion the more general pattern that mothers fare poorly in contested cases. Under the imprecise best interests standard, observers have found that custody was placed with the mother in only one-third of contested cases. Polikoff, *supra* note 18, at 236-37 (summary of data); Note, *supra* note 18, at 1373 n.142. In Minnesota, under *Pikula*, mothers fared only somewhat better, getting custody in half of tried cases. Rettig, Yellowthunder, Christensen & Dahl, *supra* note 101 (study of 1153 cases decided in 1986).

163. Fineman, *supra* note 43, at 773; Polikoff, *supra* note 18, at 242.

164. *See In re* Marriage of Shepherd, 588 S.W.2d 174, 176 (Mo. Ct. App. 1979) (en banc) (observing that mother who works gives no more care than father); Elster, *supra* note 53, at 37-38, 40 (contending primary caretaking finding genuinely difficult where both parents work); *Minnesota Surveys*, *supra* note 67 (Twin Cities family law specialist volunteers that the singular problem with the caretaker preference is that with two wage-earners the "lines are blurred"); *see also* Polikoff, *supra* note 18, at 241. *But see* Pikula v. Pikula, 374 N.W.2d 705, 714 (Minn. 1985) ("[w]e would expect that, as between any two parents, one will be the primary parent even if neither conforms to the more traditional pattern of one parent working outside the home and one within it"); O'Kelly, *supra* note 18, at 539 n.227 (reviewing Minnesota cases affirming findings that working mother was primary parent); *supra* notes 78-79 (literature on caretaking role of working mothers); *supra* notes 130-31 (stereotyping exaggerates gaps in mothers' care); *supra* notes 114-15, 124 (general confidence in applicability of caretaker preference).

165. *See* Lenz v. Lenz, 430 N.W.2d 168, 169 (Minn. 1988) (affirms finding neither parent a significant caretaker); Randall v. Steward, 426 N.W.2d 465, 469-70 (Minn. Ct. App. 1988) (affirms placement of two children with father, premised on equal caretaking by two working parents); Sheeran v. Sheeran, 401 N.W.2d 111, 114-15 (Minn. Ct. App. 1987) (affirms placement of three sons with father, premised on equal caretaking and bond with father); Kerkhoff v. Kerkhoff, 400 N.W.2d 752, 756 (Minn. Ct. App. 1987) (affirms finding mother unfit and only an equal caretaker); Schwamb v. Schwamb, 395 N.W.2d 732, 735-36 (Minn. Ct. App. 1986) (affirms placement of two children with father, where mother's employment uncertain); Regenscheid v. Regenscheid, 395 N.W.2d 375, 378-80 (Minn. Ct. App. 1986) (affirming placement of two children with father citing mother's part-time work and the children's emotional bond with father as explanation for equal caretaking finding).

caretaking when a parent worked inside the home.[166]

The final two exceptions to the caretaker standard have not been problematic. Consistent with historic judicial skepticism of joint physical custody dispositions,[167] Minnesota courts have not compromised the caretaker preference in favor of joint physical custody.[168] Similarly, West Virginia case law

166. Ristvedt v. Ristvedt, No. C8-89-386 (Minn. Ct. App. Sept. 19, 1989) (LEXIS, States library, Minn file) (affirms finding of equal care at time of separation because, while mother of three children was primarily responsible for some child-caring duties, her mental health began to deteriorate at the time of separation); Sucher v. Sucher, 416 N.W.2d 182, 184-85 (Minn. Ct. App. 1987) (equal caretaking where father also at home); Kennedy v. Kennedy, 403 N.W.2d 892, 898 (Minn. Ct. App. 1987) (affirms finding of equal caretaking where mother at home for all but six months of the last seven years of marriage); Hemingsen v. Hemingsen, 393 N.W.2d 414, 416 (Minn. Ct. App. 1986) (placement of children with father affirmed based on equal parenting finding even though mother was a traditional homemaker). *See* Sydnes v. Sydnes, 388 N.W.2d 3, 7 (Minn. Ct. App. 1986) (affirming joint physical custody, premised on equal care finding, where mother's employment unclear); Pekarek v. Pekarek, 384 N.W.2d 493, 497 (Minn. Ct. App. 1986) (affirms equal parenting finding, mother's work history unclear); *see also* Veit v. Veit, 413 N.W.2d 601, 607 (Minn. Ct. App. 1987) (affirms joint custody where trial court found equal parenting, but no indication caretaking preference argued on appeal); Jorschumb v. Jorschumb, 390 N.W.2d 806, 812 (Minn. Ct. App. 1986) (affirms placement with homemaker mother where trial court opted for equal parenting finding instead of resolving conflicting claims of primary parenting).

167. Joint legal custody is a presumptive choice of disposition in Minnesota. MINN. STAT. § 518.17, subd. 2 (1988). Although consenting parents now choose it somewhat more frequently, courts have long disfavored joint physical custody. *See* Kaehler v. Kaehler, 219 Minn. 536, 539, 18 N.W.2d 312, 314 (1945) (stability defeated when child is shunted back and forth between two houses); McDermott v. McDermott, 192 Minn. 32, 36, 255 N.W. 247, 248 (1934) (divided custody rarely serves child's interests and is appropriate only in exceptional cases). *But see* Scott & Derdeyn, *supra* note 8, at 469-71, 495-98 (rationale summarized); *infra* note 219 (literature on joint physical custody).

168. On numerous occasions since 1985, the Minnesota Court of Appeals upheld the primary parent preference against the "secondary" parent's contention that courts should favor joint physical care. Ozenna v. Parmelee, 407 N.W.2d 428, 432-33 (Minn. Ct. App. 1987), *pet. for rev. denied* (Minn. Aug. 12, 1987) (joint physical custody placement reversed where the trial court acknowledged father's primary caretaking); Ohm v. Ohm, 393 N.W.2d 411, 413 (Minn. Ct. App. 1986) (similar reversal in favor of mother); Gerardy v. Gerardy, 391 N.W.2d 915, 918-19 (Minn. Ct. App. 1986), *pet. for rev. denied* (Minn. Oct. 17, 1986) (reversal in favor of mother); Brauer v. Brauer, 384 N.W.2d 595, 598 (Minn. Ct. App. 1986) (affirming sole custody placement over father's plea for joint physical custody); *cf.* Veit v. Veit, 413 N.W.2d 601, 607 (Minn. Ct. App. 1987) (affirming joint physical custody where no indication that primary caretaker preference was claimed on appeal).

It is unclear at what point liberal visitation — a natural element of a sole custody placement — becomes joint physical custody. *See, e.g.*, MINN. STAT. § 518.003, subd. 3(d) (1990) (joint physical custody defined as care "structured between" parents). This problem may explain Gorz v. Gorz, 428 N.W.2d 839,

shows no preference for joint physical custody placements.[169] In addition, contrary to the expectations of some observers,[170] the exception for unfit parents has not become a significant avenue for defeat of the preference in Minnesota[171] or in other

842-43 (Minn. Ct. App. 1988), where the court affirms "joint physical" custody with the father as the primary parent, but where the mother cared for child every summer.

169. *See infra* note 149 (discussing Michael R. v. Sandra E., 378 S.E.2d 840 (W. Va. 1989)).

170. *See* Chambers, *supra* note 43, at 562 (an unfitness exception invites focus on moral qualities of parent); O'Kelly, *supra* note 18, at 534 (pressure to avoid rigid rule risks trial court efforts to stretch unfitness exception). Observations of the tendency for finding fault with care of mothers has prompted concern on the unfitness issue. *See also* Fineman, *supra* note 43, at 766-69 (systematic criticism of mothers); Note, *supra* note 18, at 1375 (anticipates trial court freedom to employ personal notions of fitness).

Much of the fear of a broad unfitness exception may trace to comparisons between general notions of comparative fitness and the more limited legal doctrine of unfitness for custodial care, tantamount to neglect sufficient to permit public intervention. *See* Garska v. McCoy, 278 S.E.2d 357, 361 (W. Va. 1981) (courts unable to measure relative degrees of fitness); J. GOLDSTEIN, A. FREUD, A. SOLNIT & S. GOLDSTEIN, *supra* note 43, at 24 (inability of decisionmakers to determine comparative fitness).

171. *See* Tanghe v. Tanghe, 400 N.W.2d 389, 392 (Minn. Ct. App. 1987) (holding that isolated discipline errors and emotional problems "fall short" of unfitness). On six occasions the court of appeals affirmed findings of fitness. *See* Digatono v. Digatono, 414 N.W.2d 498, 501 (Minn. Ct. App. 1987); Uhl v. Uhl, 413 N.W.2d 213, 217 (Minn. Ct. App. 1987); Peterson v. Peterson, 408 N.W.2d 901, 904 (Minn. Ct. App. 1987); Surrett v. Surrett, 396 N.W.2d 870, 874 (Minn. Ct. App. 1986); Haasken v. Haasken, 396 N.W.2d 253, 258 (Minn. Ct. App. 1986); Novotny v. Novotny, 394 N.W.2d 256, 259 (Minn. Ct. App. 1986); *cf.* Rusin v. Rusin, No. CX-89-874 (Minn. Ct. App. Dec. 5, 1989) (LEXIS, States library, Minn file), *pet. for rev. denied*, (Minn. Jan. 23, 1990) (affirms endangerment finding based on evidence of rage and related misconduct toward children); Kerkhoff v. Kerkhoff, 400 N.W.2d 752, 756 (Minn. Ct. App. 1987) (affirms disregard of caretaking preference on findings of emotional abuse and neglect of medical and educational needs).

Interestingly, after the Minnesota caretaker preference was defeated by 1989 legislation, the court of appeals found additional circumstances constituting unfitness, including at least one case that appears to employ the concept loosely. *See* Lind v. Lind, No. CX-89-1880 (Minn. Ct. App. Apr. 13, 1990) (LEXIS, States library, Minn file) (affirmance where primary parent found to "lack a consistent ability to distinguish between her own needs and those of [the child]"); *see also* Burandt v. Burandt, No. C2-89-1887 (Minn. Ct. App. Mar. 13, 1990) (LEXIS, States library, Minn file) (trial court properly disregarded primary parenting on evidence this parent so unskilled as to risk impairing emotional health of children).

The unfitness standard of Pikula v. Pikula, 374 N.W.2d 705, 714 (Minn. 1985), employing the concept of dangerousness, parallels one condition for modification of custody under Minnesota law. *See supra* note 57. Thus, modification cases may be instructive, and they include at least three cases affirming findings of endangerment. Keith v. Keith, 429 N.W.2d 276, 278 (Minn. Ct. App. 1988) (joint physical custody terminated on finding that continuing

states.[172]

D. A Lack of Meaningful Appellate Review

The final factor that contributed to the increase in litigation in Minnesota following adoption of the preference was the lack of meaningful appellate review. Minnesota appellate courts rarely corrected trial court decisionmaking and provided little guidance to the trial courts in limiting the definition of the caretaker preference or its exceptions. This phenomenon is surprising because the Minnesota Supreme Court expressly recognized the importance of meaningful review toward making the preference successful.[173]

The lack of significant appellate review contrasts with developments in West Virginia, where the appellate courts provided more meaningful review of trial court decisions.[174] These

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changes impaired the child's emotional development); Coady v. Vi Ray, 407 N.W.2d 710, 713 (Minn. Ct. App. 1987) (finding adequate evidence to support trial court finding that conflict of mother with children harmed mental and emotional health of children); Bettin v. Bettin, 404 N.W.2d 807, 809-10 (Minn. Ct. App. 1987) (danger due to mother's association with person charged with criminal sexual conduct with his four-year-old daughter).

Some alarm over the unfitness exception in Minnesota might be prompted by a single reversal on a fitness finding, but the facts of the case reflect an unusually threatening condition of the primary parent. Jones v. Jones, 377 N.W.2d 38 (Minn. Ct. App. 1985).

172. *Pennsylvania*: Michael T.L. v. Marilyn J.L., 363 Pa. Super. 42, 525 A.2d 414, 421 (1987) (restoring custody of primary caretaker notwithstanding trial court's concerns that primary caretaker was promiscuous, had used marijuana, and would be preoccupied with a newly expected child).

West Virginia: In 1989, the West Virginia Supreme Court of Appeals reversed an application of the unfitness exception to sexual misconduct unrelated to child care, emphasizing that the exception is very narrow. David M. v. Margaret M., 385 S.E.2d 912, 915 (W. Va. 1989). *See also* Bickler v. Bickler, 344 S.E.2d 630, 632 (W. Va. 1986) (per curiam) (reversing determination founded on unfitness of primary caretaker); Allen v. Allen, 320 S.E.2d 112, 118 (W. Va. 1984) (noting that unfitness of primary caretaker must be shown "by a clear preponderance of the evidence") (Neely, J., dissenting).

173. *See supra* notes 63-65 and accompanying text (problem of meaningful review); *supra* note 66 (Minnesota Supreme Court position on meaningful review).

174. *See, e.g.*, Heck v. Heck, 301 S.E.2d 158 (W. Va. 1982) (reversing placement of two children with father where trial court refused to employ caretaker preference); Garska v. McCoy, 278 S.E.2d 357, 364 (W. Va. 1981) (reversing placement with father); *supra* notes 143, 161.

A pattern of reversals in other states should also be noted. *See supra* note 27 (Iowa, Pennsylvania); *supra* note 33 (Ohio); *supra* notes 34, 38 (Oregon). Given, however, that none of those states expressly employs a primary caretaking preference, their appellate decisions are not a measure of the strength and integrity of the preference.

differences in appellate review between Minnesota and West Virginia exist even though both states employ a standard of deference to trial court custody decisionmaking in the absence of a clear abuse of discretion.[175] The differing approaches in the two states provide some support to the conclusion in a West Virginia report that the preference produced a substantial reduction in strategic threats of custody litigation and an "enormous" decrease in the volume of litigation.[176]

A study of custody appeals in Minnesota demonstrates the lack of meaningful review by appellate courts in the state. All but three reversals by the court of appeals occurred in cases in which the trial court did not dispute identification of the primary caretaker but nevertheless awarded custody to the other parent.[177] In each of the three cases in which the court of appeals did reverse a trial court's effort to dispute or minimize a primary caretaker's role, the Minnesota Supreme Court subse-

175. *See supra* note 63 (standard of review); Graham v. Graham, 326 S.E.2d 189, 191 (W. Va. 1984) (per curiam) (reluctance to remand for findings where merit found in trial court results); *cf.* Michael R. v. Sandra E., 378 S.E.2d 840, 842 (W. Va. 1989) (per curiam) (notes appellate role of scrutinizing record where trial court disagrees with finding of master's commissioner); Gibson v. Gibson, 304 S.E.2d 336, 339 (W. Va. 1983) (per curiam) (noting special divorce commissioner's finding that appellant was primary caretaker).

Ohio's appellate courts also subscribe to the abuse of discretion standard. Michel v. Michel, No. 6-87-5 (Ohio Ct. App. Mar. 6, 1989) (LEXIS, States library, Ohio file); *In re* Maxwell, 8 Ohio App. 3d 302, 303, 456 N.E.2d 1218, 1219 (1982). Pennsylvania appellate courts do not defer to inferences drawn from facts found by the trial court. Commonwealth *ex rel.* Jordan v. Jordan, 302 Pa. Super. 421, 427, 448 A.2d 1113, 1116 (1982). Oregon practices de novo review, but nevertheless with a rule of deference. *In re* Marriage of Van Dyke, 48 Or. App. 965, 968, 618 P.2d 465, 466 (1980). Iowa practices de novo review. *In re* Marriage of Bevers, 326 N.W.2d 896, 897 (Iowa 1982).

176. *See supra* note 113 and accompanying text (West Virginia report).

177. In the course of more than one hundred appellate reviews, eight trial court decisions were reversed with finality. None of these decisions involved problematic definitions of primary care or decisions premised on evidence of temporary care or equal caretaking; all of these latter trial court decisions were affirmed. *See supra* notes 134, 152, 165-66. Minnesota upheld the preference only in those instances where the trial court did not dispute the identification of the primary caretaker but the consideration was evaded, usually on the basis of an erroneous consideration. *See* Maxfield v. Maxfield, 439 N.W.2d 411, 414-16 (Minn. Ct. App. 1989) (reversing twisted observation that caretaker preference was inapplicable because of long-term temporary care during the proceedings, where that care was given by the same parent who had previously been the primary caretaker), *aff'd*, 452 N.W.2d 219 (Minn. 1990); Johnson v. Johnson, 424 N.W.2d 85, 88-89 (Minn. Ct. App. 1988) (restoring custody of three children to mother based on trial court's erroneous considerations); Tanghe v. Tanghe, 400 N.W.2d 389, 392-94 (Minn. Ct. App. 1987) (reversing on erroneous finding of unfitness); Rimer v. Rimer, 395 N.W.2d 390, 393 (Minn. Ct. App. 1986) (trial court ignored *Pikula* primary caretaker standard); *supra*

quently reinstated the original placement.[178] Although this course of appellate review prevented flagrant evasion of the preference, it failed to define primary caretaking or to clarify troublesome exceptions to the caretaker role.

The ineffectiveness of appellate review in Minnesota arises partially from a hidden weakness in *Pikula*, the state's landmark caretaker decision. The flaw exists in the supreme court's remand to the trial court for further findings.[179] The

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note 168 (*Gerardy*, *Ohm* and *Ozenna* reverse erroneous regard for joint physical custody).

In only one of the eight reversals, Speltz v. Speltz, 386 N.W.2d 264, 294 (Minn. Ct. App. 1986), did an appellate court recognize primary caretaking without a record showing the trial court acknowledged that relationship. There, the court reversed a pre-*Pikula* decision and restored custody to a traditional homemaker, where the father unsuccessfully argued that he was heavily involved in his farm business, but also participated significantly in caretaking. *Id.* at 294-95.

178. These cases include *Pikula*, where the intermediate court restored custody to the mother, premised on a primary caretaker rationale, prior to the decision announcing the preference. *See* Pikula v. Pikula, 349 N.W.2d 322, 326 (Minn. Ct. App. 1984), *aff'd in part, rev'd in part*, 374 N.W.2d 705 (Minn. 1985).

In Sefkow v. Sefkow, 427 N.W.2d 203, 212, 217 (Minn. 1988), the supreme court reversed a decision to restore custody of an eight-year-old child to her mother. The court of appeals had determined that, because the evidence was inadequate to conclude that the father was the primary caretaker, the case required a general determination of the child's best interests. Charging that the trial court disregarded the mother's primary parenting role and finding no support for that court's decision to split custody, the appellate court placed the children with the mother to avoid splitting the siblings. Sefkow v. Sefkow, 413 N.W.2d 127, 134-36 (Minn. Ct. App. 1987) (en banc), *rev'd*, 427 N.W.2d 203 (Minn. 1988).

Finally, in Lenz v. Lenz, 430 N.W.2d 168, 169 (Minn. 1988), the supreme court reversed an intermediate court decision that the trial court erred in its finding that neither parent had given enough care to qualify as a primary parent.

179. The trial court in *Pikula* placed custody of two daughters, ages three and four, with their father. On appeal, the intermediate appellate court concluded the placement was erroneously premised on care by the father's extended family and wrongfully ignored evidence, including a social study clearly showing that the mother was the primary caregiver and that her care was best for the children. Thus, the court called for a judgment placing custody of the children with their mother. *Pikula*, 349 N.W.2d at 326. The supreme court affirmed reversal of the choice of the father, but reversed in part the appellate court's award of custody to the mother. The court then remanded the case for a primary caretaker determination. *Pikula*, 374 N.W.2d at 714.

See also Sefkow, 374 N.W.2d 733 (Minn. 1985) (remanding to the court of appeals for reconsideration "in light" of *Pikula*). The appellate court then remanded for trial court findings. *Sefkow*, 378 N.W.2d 72 (Minn. Ct. App. 1986). *Cf. supra* note 174 (review of West Virginia reversals).

court's decision to remand rather than to reverse the case established two propositions for future custody disputes. It suggested that the primary caretaker determination was a finding based on an observable fact,[180] not a matter of judgment founded on the facts.[181] Consequently, as a matter of fact finding, the subject was uniquely the prerogative of the trial court. In addition, *Pikula* reflected the supreme court's desire to implement a decidedly narrow standard of review for Minnesota's appellate courts. The *Pikula* court, while reversing the Court of Appeals, stated that the court of appeals decision applied an "inappropriate" de novo review.[182] Two later supreme court cases confirmed this preference for very narrow appellate review of trial court decisions.[183]

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180. *See infra* note 183 (*Sefkow IV* court declares that evidence would support a determination that either or neither parent was the primary caretaker); *cf. infra* notes 184-85 and accompanying text (pre-*Pikula* supreme court identification of primary caretaker); *infra* note 237 (altered standard of review announced in 1990).

181. The Pennsylvania standard of review distinguishes between facts and judgments. *See supra* note 175 (for purposes of appellate review, facts distinguished from inferences drawn from them). The different language employed to state the standard of review on fact finding ("clearly erroneous") and judgment (abuse of discretion) implies the different standards. *See* FED. R. CIV. P. 52(a) (clearly erroneous standard); *supra* note 63 (definition of abuse of discretion). Although these concepts are not easily distinguished, a distinction may be necessary to avoid excessive deference to the initial decisionmaker.

182. *Pikula*, 374 N.W.2d at 710.

183. After remand to the trial court, the court of appeals reviewed the *Sefkow* case again in 1987. Sefkow v. Sefkow, 413 N.W.2d 127, 130 (Minn. Ct. App. 1987) (en banc) (*Sefkow III*), *rev'd* , 427 N.W.2d 203 (Minn. 1988) (*Sefkow IV*). On remand, the trial court avoided splitting the children by placing custody of both with their father; change of custody of the youngest daughter contravened Minnesota modification law and both Minnesota appellate courts determined the error. *Sefkow III*, 413 N.W.2d at 131-33. The *Sefkow III* court repeated its 1985 reversal of placement of the oldest daughter, reversing a finding that the father was the primary parent and concluding caretaking was equal at best; thus, it determined custody principally in the interest of keeping the children together. *Id.* at 134-36. In *Sefkow IV*, the supreme court criticized the appellate court for rejecting the trial court's primary parent finding, stating that this rejection was a breach of the appellate standard of review. *Sefkow IV*, 427 N.W.2d at 210-11. In a noteworthy declaration, the court observed that the evidence would have supported a designation of *either* or neither parent as primary caretaker. *Id.* at 211. The Minnesota Supreme Court criticized the court of appeals even though the record showed (1) the trial court premised its finding on care after the parents separated; and (2) the court of appeals followed a *Pikula* instruction to measure caretaking for the period before separation, a rule not modified until *Sefkow IV* was decided. *See supra* note 155 (*Sefkow IV* on long-term temporary custody). In addition, the *Sefkow I* conclusion that the mother was primary caretaker of both children, a decision not challenged by the supreme court in *Sefkow IV*, influenced the

Ironically, because of the decisionmaking freedom given to the trial courts in *Pikula* and later decisions on the standard of appellate review, the *Pikula* preference might have weakened pre-existing primary parent law in Minnesota. Minnesota courts first identified primary caretaking as a relevant factor in custody decisionmaking in 1974.[184] During the next decade, in contrast to almost all post-*Pikula* decisions, the supreme court twice cited the importance of primary caretaking to support its reversal of lower court placements that severed primary parent-child relationships.[185] In both cases, the appellate court found a primary caretaking relationship without the support of a trial court finding.

A policy of unrestricted deference to trial court decisionmaking inevitably eliminates meaningful appellate review. When appellate courts automatically defer to the sound discretion of the trial judge, they surrender a responsibility to promote coherence, continuity and predictability in the law.[186]

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court of appeals's examination of pre-separation evidence. *Sefkow III*, 413 N.W.2d at 135. The supreme court reiterated the abuse of discretion standard of review and implied the existence of a special, narrower standard of review for an intermediate appellate court.

A biting dissent by three judges in *Maxfield* reiterated the *Sefkow III* position on appellate review. Maxfield v. Maxfield, 452 N.W.2d 219, 224 (Minn. 1990) (Yetka, J., dissenting), *aff'g* 439 N.W.2d 411 (Minn. Ct. App. 1989).

184. Erickson v. Erickson, 300 Minn. 559, 560, 220 N.W.2d 487, 489 (1974) (per curiam) (affirming placement with mother who was primary caretaker since child's birth).

185. Weatherly v. Weatherly, 330 N.W.2d 890, 892 (Minn. 1983) (reversing placement of two-year-old with father because of evidence that mother had been the primary caretaker until the parents separated); Berndt v. Berndt, 292 N.W.2d 1, 2 (Minn. 1980) (affirming reversal of four-year-old child's placement with father because mother had been the primary parent since the child's birth). *See also* Sefkow v. Sefkow, 378 N.W.2d 72, 75-76 (Minn. Ct. App. 1986) (*Sefkow II*) (synopsis of Minnesota precedents reversing trial court custody decisions); *supra* note 64 (importance of caretaker standard for appellate role since 1969).

186. *See* Glendon, *supra* note 67, at 1196, observing as follows:

> As case law begins to develop under a grant of discretion, appellate courts also have an important role to play. Rather than automatically deferring to the "sound discretion" of the trial judge, they should, especially in the early application of a new statutory grant of discretion, carefully examine lower court decisions to promote coherence, continuity and predictability in the case law.

A study of appellate court review of primary parenting decisions may invite a dispute on whether meaningful review increases the volume of appellate litigation, explaining some of the volume increase in Minnesota after 1985. *See supra* notes 111-12 and accompanying text (explanations for increased volume). That meaningful review would increase litigation is doubtful, at least in the long term, because of the effect of a precise rule, to discourage litigation and the threat of litigation. *See supra* note 70. The steady increase in num-

Likewise, the policy of remanding cases for further trial court findings of fact does little to improve appellate court effectiveness. The results of appellate demands for particularized findings[187] become illusory because remands for additional findings are not likely to change the end result.[188]

A study of the "*Pikula* remands" in Minnesota illustrates these consequences of broad trial court discretion. Appellate courts reversed and remanded five custody cases because the trial courts erred in discounting the primary caretaking factor.[189] The trial courts, however, only changed the initial placement in one of these cases.[190] In a second case, the parties agreed to change the placement after the court held that the parents were equal caretakers, thereby requiring a custody decision under the general best interests test.[191] The trial courts reiterated their original placement in the three remaining remands, and two of those decisions were subsequently affirmed

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bers of appeals after 1985 in Minnesota is more reasonably explained as a consequence of announcing or permitting development of imprecise rules.

187. *See* Wallin v. Wallin, 290 Minn. 261, 267, 187 N.W.2d 627, 631 (1971) (mandating highly particularized fact finding in custody cases); *supra* note 65 (requirement designed to facilitate appellate review and to discipline the reasoning of the trial court); *see also* Mnookin, *supra* note 8, at 253-54 (implying that findings mandate narrows trial court discretion); Wexler, *supra* note 53, at 819 (prescribing findings mandate as tool to control trial court discretion).

188. At best, the value of additional findings of fact on remand is often illusory. As the West Virginia Supreme Court observed in 1984, a remand for more findings "would probably not change the end result." Graham v. Graham, 326 S.E.2d 189, 191 (W. Va. 1989). *See infra* notes 189-92 and accompanying text (a study of *Pikula* remands in Minnesota). *See generally* Pound, *supra* note 10 (analysis of use of fictions as a device to avoid fixed rules in special cases).

189. For three of the five cases, this summary reflects a reading of the official trial court file after completion of proceedings on remand. The list of cases excludes remands (seven) of a completely open-ended nature, where the trial court's position on an issue could not be ascertained from its findings.

190. Steinke v. Steinke, 428 N.W.2d 579, 584 (Minn. Ct. App. 1988) (reversing due to primary error employing joint physical custody to evade caretaker preference).

191. Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985) (reversing appellate court determination that mother is primary parent and remanding for trial court findings). In January 1986, the trial court on remand issued an order for a hearing and updating of home studies. The court observed in the order, based on its review of record, that caretaking was equal when the parties separated, even though the mother "quite naturally for the age of the children was the primary supplier of food, clothing, bathing, and daily needs of the children." *Id.* In June 1986, the judgment was amended premised on a stipulation of the parties that the mother should be custodian and the father would enjoy specific and liberal visitation benefits.

on appeal.[192]

Thus, even in the beginning, the primary caretaker standard in Minnesota failed to meet expectations. The supreme court's desire for limited appellate review compromised the goals set for the standard. A willingness to loosely permit deviations quickly defeated the court's announced purpose of achieving predictable placement decisions. This narrow standard, combined with an imprecise definition of caretaking and expansive exceptions to the general rule, made the preference ineffective in Minnesota.

IV. CRITICISMS OF THE PREFERENCE

Minnesota opponents of the caretaker preference believe that it has compromised gender neutrality and sacrificed children's interests. They assert that the standard threatens gender neutrality because, although it is facially neutral, in practice the standard is biased against fathers. The preference allegedly threatens children's interests by focusing on parental conduct rather than the best interests of the child.[193] Other criticisms of the preference reflect a general dislike for resolv-

192. Kennedy v. Kennedy, 403 N.W.2d 892, 896-900 (Minn. Ct. App. 1987) (affirming trial court reinstatement of split placement of three children with father on finding that caretaking was "essentially equal" after remand for primary parent determination). *See* O'Kelly, *supra* note 18, at 533 & nn. 208-09 (citing the *Kennedy* remand as an example of meaningful review).

Sefkow v. Sefkow, 378 N.W.2d 72, 76-77 (Minn. Ct. App. 1986) (*Sefkow II*) (remanding for primary caretaker findings, where court found compelling evidence that mother was primary parent); Sefkow v. Sefkow, 413 N.W.2d 127, 135-36 (Minn. Ct. App. 1987) (en banc) (*Sefkow III*); Sefkow v. Sefkow, 427 N.W.2d 203, 217 (Minn. 1988) (*Sefkow IV*) (review of trial court decision on remand to reinstate placement of older child and change placement of youngest child from mother to father; change of youngest child reversed, but supreme court affirms placement of oldest child under general best interests rationale, recognizing four and one-half years temporary placement with father).

Rosen v. Rosen, 398 N.W.2d 38, 40-41 (Minn. Ct. App. 1986) (remanding pre-*Pikula* placement of three children with father for findings on primary caretaking premised on finding of equal caretaking).

193. These attacks are intended to refute the assertion that the caretaker preference deals safely with gender neutrality concerns and vital interests of children, both of which are part of the rationale for the preference. *See supra* notes 90-99 and accompanying text. This criticism refers to results of the preference in terms of substantive decisions on custody. So long as caretaking is defined in conduct-related language that begs for acrimonious disagreements, the standard directs attention toward the justice interests of the parents and away from the child's interests. *See supra* note 136 and accompanying text (child welfare concern suggested by survey results on custody disputes under Minnesota caretaker preference). Proponents of the preference suggest correcting this problem by producing a definition of caretaking that is less prone

ing individual custody cases with a precise principle.[194]

These opponents are not concerned with the ineffectiveness of the standard. Rather, they contend that injustices result from the zealous application of a mechanical standard. Opponents, for example, criticize appellate courts not because of their failure to define the preference, but because of their affirmance of its application.[195] The assertion of these concerns has produced much litigation relating to the preference; as advocates of a best interests standard engage in successful attacks on the preference, its clarity diminishes, thus encouraging more litigation.[196] In Minnesota, this opposition eventually led to a legislative rejection of the primary caretaker preference.[197]

Part of the reason for the defeat of the preference is the Minnesota Supreme Court's failure to acknowledge that application of the standard does compromise some conflicting interests.[198] Because the court did not acknowledge any sacrifices, their eventual appearance signified that supporters had failed to anticipate such adverse effects. Thus, the discovery that the standard compromised the interests of children and fathers undermined its pretended certainty and safety.

In contrast, other advocates of the preference, notably the West Virginia Supreme Court, concede that the preference

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to acrimony and distortion. There is no evidence that this criticism has advocated weakening or abolishing the caretaker preference. *Id.*

194. Professor Elster analyzed the tendency of decisionmakers to adopt "an irrational belief in the possibility of a rational preference." Elster, *supra* note 53, at 2-3. *See* Pearson & Ring, *supra* note 8, at 723 (common opposition of trial judges to any standards narrowing the decisionmaking discretion).

195. *See, e.g.*, Bear v. Bear, 415 N.W.2d 389, 390 (Minn. Ct. App. 1987) (placement with mother where primary caretaking disputed and evaluators recommended custody with father); Goose v. Goose, 406 N.W.2d 4, 6 (Minn. Ct. App. 1987) (trial court finds mother is primary caretaker of nine-month-old child notwithstanding father's contribution in the last month before separation, hence custody awarded to mother even though father offered more stability and cooperation with other parent and thus would be best for child).

196. These concerns frequently account for decisions refusing to strictly adhere to the caretaker preference. *See, e.g.*, Sheeran v. Sheeran, 401 N.W.2d 111, 114 (Minn. Ct. App. 1987) (custody awarded to father based on finding that neither parent functioned as the primary caretaker); Regenscheid v. Regenscheid, 395 N.W.2d 375, 379 (Minn. Ct. App. 1986) (custody awarded to father based on finding that both parents shared equally in the caretaker role); *In re* Marriage of Maddox, 56 Or. App. 345, 348, 641 P.2d 665, 667 (1982) (neither parent functioned as primary caretaker; custody awarded to father based on his ability to provide a more stable environment). A Minnesota trial judge observed that cases like these "reflect a belief [of trial judges] that we can decide who will do a better job." *Minnesota Surveys*, *supra* note 67.

197. *See supra* notes 4-5 and accompanying text.

198. *See supra* notes 95-97 and accompanying text.

compromises certain interests,[199] but knowingly accept such consequences to avoid the greater dangers of excessive litigation. They contend that, although the preference might threaten the interests of some fathers and children, the alternative risk of unabated litigation poses a greater danger to parents and children who suffer from prolonged court disputes.[200] Thus, any injustice in the primary caretaker preference has less social cost than injustice in the best interests standard.

Defenders of the caretaker preference further argue that interests compromised by the preference are those general "best interests" considerations that cannot be reliably measured, if they are measurable at all. Therefore, any efforts to protect these interests lead to increased litigation, strategic threats of litigation, and results that only reflect the personal sentiments of the decisionmaker.[201] As the *Garska* court observed, "[c]ertainly if we believed from our experience that full-blown hearings on child custody between two fit parents

199. The *David M.* court has most emphatically expressed this view to date:

> Our rule inevitably involves some injustice to fathers who, as a group, are usually not primary caretakers. There are instances when the primary caretaker will not be the better custodian in the long run. . . .
>
> Although the primary caretaker parent presumption may appear cut-and-dried and insufficiently sensitive to the needs of individual children, it serves the welfare of the child by achieving stability of care in the child's life, reducing the uncertainty of custody decisions, limiting the invasiveness of the custody determination process and reducing the expense of domestic litigation. Because litigation *per se* can be the cause of serious emotional damage to children (and to adults), we consider the primary caretaker parent presumption to be in the best interests of children. Even more important, children cannot be used as pawns in fights that are actually about money because a lawyer can tell a primary caretaker parent that, if fit, that parent has *absolutely no chance* of losing custody of very young children. The result is that questions of alimony, property distribution, and child support are settled on their own merits.

David M. v. Margaret M., 385 S.E.2d 912, 923, 925 (W. Va. 1989). *See* Uviller, *supra* note 43, at 130 (acknowledgment that caretaker preference rewards mothers, at the expense of more financially secure fathers, for their past commitment to child care); *supra* notes 90-99 (mostly undeveloped rationale on gender neutrality and full response to needs of children).

200. *Cf.* Ellsworth & Levy, *supra* note 16, at 203 (presumption that mother is entitled to custody has a lower "social cost" than statutory alternative that results in more contested cases and increased risk of custody award to unfit parent).

201. *See* R. NEELY, *supra* note 8, at 24, 60, 66, 73-76, 80 (function of caretaker preference not for choice of parent alone, but also to improve the process of choosing the custodial parent); *supra* notes 62, 67-68 (best interests decisions unpredictable and factors unmeasurable); *see, e.g.*, Mnookin, *supra* note 8, at 286-87 (problematic to measure child's psychological relationships).

would afford more intelligent child placement than an arbitrary rule, we would not have adopted an arbitrary rule."[202]

Critics of the caretaker preference, however, contend that the preference disregards at least five primary child interests.[203] First, they argue that application of the standard can imperil important parent-child bonds.[204] They dispute the preference's presumption that a child's more valuable parental bond is with the primary caretaker.[205] Opponents suggest the need for an examination of the intimacy of each parent's rela-

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202. Garska v. McCoy, 278 S.E.2d 357, 361 (W. Va. 1981). In *David M.*, 385 S.E.2d at 923, the West Virginia court observed:

> Yet there is no guarantee that the courts will be able to know, in advance and based on the deliberately distorted evidence that characterizes courtroom custody proceedings, when such is the case. And, notwithstanding its theoretical imperfections, the primary caretaker parent presumption acknowledges that exhaustive hearings on relative degrees of parenting ability rarely disclose any but the most gross variations in skill and suitability.

Id. at 923. Discussing judicial decisionmaking, the court added:

> No issue is more subject to personal bias than a decision about which parent is "better." Should children be placed with an "open, empathetic" father or with a "stern but value-supporting" mother? 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.

Id. at 919. A Minnesota judge volunteered the observation that "no precise standard will gain acceptance unless judges acknowledge that we can't always tell who will do best as a parent for a particular child." *Minnesota Surveys*, *supra* note 67.

203. Mnookin, *supra* note 8, at 282-87 (custody standards omit qualitative considerations); *see* Note, *supra* note 18, 1360-68 (indictment of best interest rationale in *Pikula*, 374 N.W.2d 705 (Minn. 1985), and reciting omitted interests of the child: protection of sibling relationships; physical, social and intellectual development; adequate guidance; protection of background in culture; housing; school and community contact; and predictably stable post-divorce care). For a wide-ranging and thoughtful list of subtle best interests factors, see Beaber, *Custody Quagmire: Some Psycholegal Dilemmas*, J. PSYCHIATRY & L. 309, 325-26 (1982).

204. *See* Baland, *supra* note 242, at 32 (contending primary caretaker relationship is distinguishable from psychological parenting relationship); Chambers, *supra* note 43, at 533 (weakest part of preference is that "it exaggerates the importance of the bond to the primary-caretaker parent in comparison to the bond with the other parent"); O'Kelly, *supra* note 18, at 534-37 (preference generally fails to consider whether the non-primary caretaker is the "primary psychological parent").

205. *See supra* notes 51-55 (literature and cases on ties between primary caretaking and bonding); *supra* notes 119-21 (ties between bonding and *Garska* factors); *see also* Seymour v. Seymour, 180 Conn. 705, 711-12, 433 A.2d 1005, 1008 (1980) (concept of psychological parent "not a fixed star by which custody decisions can invariably be guided"); Mnookin, *supra* note 8, at 286-87 (highly problematic to evaluate psychological bonding).

tionship with the child.[206] Furthermore, critics argue that the preference inaccurately measures bonding by focusing on the quantity of care provided. Rather, they contend that the proper focus should be on the quality of care, such as a parent's "ethical, emotional, and intellectual guidance."[207] Supporters of the preference, however, respond that the bonding factor may be the least measurable of the best interests factors[208] and that it invites acrimonious disagreement on the quality of past parenting.[209]

Second, opponents of the caretaker preference criticize the standard's inevitable emphasis on the past. They believe that in some situations, the past should be discounted to properly look ahead, because of the opportunity for new or changed relationships.[210] They also challenge the utility of past conduct as a predictor of future behavior.[211] Proponents of the preference, however, contend that past caretaking patterns are the most reliable indicator of a good future relationship[212] and that subjective predictions of future relationships are unreliable.[213]

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206. Crippen & Hatling, *supra* note 22, at 419-21.

207. Burchard v. Garay, 42 Cal. 3d 531, 540, 229 Cal. Rptr. 800, 806, 724 P.2d 486, 492 (1986); *see also* Bashus v. Bashus, 393 N.W.2d 748, 752 (N.D. 1986) ("there is more to being a primary caretaker than the time spent in primary care"); Mnookin, *supra* note 8, at 282-87 (custody standards should consider quality of care issues); *supra* notes 121-22 (other authorities on quality of care issue).

Several Minnesota lawyers and judges volunteered criticism of the *Garska* factors. One suggested that the factors omitted the "real issue" of identifying the parent sought out by the child in stressful issues. *Minnesota Surveys*, *supra* note 67. Another called for determining the parent who gives the most emotional support. *Id.*

208. *See supra* notes 201-02 and accompanying text.

209. *See supra* notes 128-29 and accompanying text; *see also supra* notes 130-33 and accompanying text (risks of gender stereotyping).

210. The issue of changing relationships centers mostly on the problem of temporary custody arrangements. *But see supra* notes 151-57 and accompanying text (legal pitfall in rewarding spouse who gains temporary custodial advantage).

211. In addition, there are concerns regarding the need for more reliable prediction of future relationships. *See* O'Kelly, *supra* note 18, at 543 (advocating consideration of "confusing and complicating conduct" after the separation in determining which parent is the primary caretaker); Note, *supra* note 18, at 1366-67 (challenging utility of past conduct as a predictor of future behavior).

212. *See* Commonwealth *ex rel.* Jordan v. Jordan, 302 Pa. Super. 421, 448 A.2d 1113, 1115 (1982) (that future caretaking is most sensibly premised on past behavior); Fineman, *supra* note 43, at 771 (past care best predictor of future care); Uviller, *supra* note 43, at 130 ("past commitment should be reflected in custodial priority"); *supra* note 126 (explaining *Garska* reasoning).

213. *See supra* note 201 (setting forth subjective, unmeasurable considerations). It is very difficult to predict behavior after divorce. *See* Chambers,

A third criticism is that greater consideration should be given to which parent is the better provider of certain types of critical care, such as health care, education and religious training.[214] Critics argue that the preference does not sufficiently emphasize these special needs of children. Proponents of the preference, however, again respond that a child's primary caretaker is the parent who is more likely to supply such needs in the future.[215]

Fourth, some critics dislike the preference because it might imperil close child contact with both parents. They contend that children need active contact with both parents, contact that can be best guaranteed through arrangements such as shared custody, divided custody and joint physical custody.[216] Concern for preserving a child's relationship with both parents has led to numerous discussions of alternative preferences, including the friendly parent preference, which favors the parent who is more likely to support the child's relationship with the other parent.[217] Such proposals, however, are complex and controversial. Commentators have observed that children might be adversely affected by both the friendly parent preference[218]

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supra note 43, at 483-84; Mnookin, *supra* note 8, at 229; Scott & Derdeyn, *supra* note 8, at 467. This observation casts doubt on the reliability of primary caretaking as a predictor, but even more doubt on other, less measurable means of prediction.

214. *See* Note, *supra* note 8, at 1361 n.80 (suggesting that consideration of these developmental factors is mandated by Minnesota's multi-factor statute).

215. *See supra* note 212. Another offsetting consideration is the interest in omitting factors that give preference to the most financially able parent. *See* Chambers, *supra* note 43, at 538-41.

216. The primary caretaker preference has been treated as a preference for sole custody, leaving only the topic of visitation to deal with the non-custodial parent-child relationship. *See supra* notes 167-68 and accompanying text; *see also* Scott & Derdeyn, *supra* note 8, at 468-71, 495-98 (rationale for the expansion of the joint custody preference and summary of effects of implementing joint custody preference).

217. *See* Randall v. Steward, 426 N.W.2d 465, 469-70 (Minn. Ct. App. 1988) (finding that father more likely to support child's relationship with mother); Ryan v. Ryan, 393 N.W.2d 511, 515 (Minn. Ct. App. 1986) (finding that mother more likely to support child's ongoing relationship with the father); *see also* Charlow, *supra* note 53, at 281-88 (supporting a preference favoring parent most willing and able to reduce parental conflict and who puts the child's interests ahead of other concerns); Fineman, *supra* note 43, at 751 n.104 (statutes favoring friendly parent).

218. *See* R. NEELY, *supra* note 8, at 38 (when friendly parenting becomes subject of rule, distortions rid it of utility); Elster, *supra* note 53, at 6 (noting "Catch-22" of friendly parent approach — the tendency to penalize parents seeking sole custody); Schulman & Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 539, 554-56 (1982) (dangers of friendly parent pref-

and joint physical custody.[219] A complete discussion of the merits of these alternative custody preferences and arrangements is beyond the scope of this Article. It is sufficient to recognize that alternatives exist and receive support from some critics of the preference.

Finally, opponents of the primary caretaker preference argue that it fails to provide some children with protection against harmful caretaking that does not constitute unfitness or clearly dangerous conduct. Thus, the preference might favor a parent who provides the greater quantity of caretaking, but whose nurturing skills are inadequate.[220] Proponents of the standard, however, allege that a loose unfitness standard would introduce more uncertainty and acrimony and would likely promote increased litigation.[221]

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erence in promoting insincere joint custody requests and continuing contact with abusive parent); Scott & Derdeyn, *supra* note 8, at 474-77, 479-81 (friendly parent preferences, like cooperation condition of joint custody preference, impairs assertiveness and induces distorted pictures of friendliness).

219. Controversy is growing on joint physical custody placements. *See* Charlow, *supra* note 53, at 280 (interest in reduction of conflict more critical than interest in contact with both parents); Reidy, Silver & Carlson, *supra* note 53, at 81, 85 (trial judges disfavor joint physical custody in disputed cases and favor sole custody for primary caretaking parent); Steinman, *The Experience of Children in a Joint-Custody Arrangement: A Report of a Study*, 51 AM. J. ORTHOPSYCHIATRY 403, 412 (1981) (pain of separation from one parent less than sense of loss of original family arrangement); Steinman, *supra* note 111, at 751 (higher risk of failure where joint custody is court-imposed); *supra* note 167 (Minnesota case law disfavoring moving children back and forth between houses); *see generally* J. WELLARSTEIN & S. BLAKESLEE, SECOND CHANCES 282-94 (1989) (researchers document long-term danger to children in continuous changes of living environment); Elster, *supra* note 53, at 458, 471-74, 484, 490-98 (joint custody should be confined to cases where arrangement volunteered by both parents); Scott & Derdeyn, *supra* note 8, at 40 (danger in court-imposed joint custody).

Similar controversy exists concerning the preservation of sibling relationships. *See supra* notes 178, 183 (discussing Sefkow v. Sefkow, 427 N.W.2d 203 (Minn. 1988) (*Sefkow IV*) (regarding the uncertainty of Minnesota law on significance of splitting custody of siblings); Note, *supra* note 8, at 1361 n.80 (relationship between siblings should be considered in awarding custody).

220. As one rural Minnesota judge expressed his concern, the preference may compel care by a parent who "is not good at it." *Minnesota Surveys*, *supra* note 67. A local bar group complained that the preference could favor a parent with little capacity for "nurturing." *Id.* *See* Seymour v. Seymour, 180 Conn. 705, 712, 433 A.2d 1005, 1008 (1980) (although recognizing psychological parenting as a best interests factor, court notes that "a court has an independent responsibility to assure itself of the suitability of the parent to whom the child is primarily attached"); Goose v. Goose, 406 N.W.2d 4, 5 (Minn. Ct. App. 1987) (primary caretaker preference favors parent thought by trial court to offer less stability and less willingness to cooperate on visitation).

221. *See supra* notes 128-34 and accompanying text (bitterness and distor-

Critics of the preference frequently emphasize these five concerns to support their opposition to the caretaker standard. In addition, fathers criticize the preference because of its disregard for their caretaking efforts and contributions of earnings and labor for the general welfare of the family.[222] They argue that courts should have the discretion to place custody with a secondary parent or at least to eliminate the preference in cases in which the secondary parent has made a substantial caretaking contribution.[223] Many of these critics believe that the primary caretaker preference is merely a pretext to support mothers rather than fathers.[224] In response, proponents of the preference argue that fathers desire broad, vague standards as tools to advance unwarranted custody claims.[225]

In Minnesota, criticism of the caretaker preference by fathers and their defenders generally did not include a specific

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tion in primary caretaker disputes); *supra* note 170 (concerns over litigation on unfitness exception to caretaker preference); *supra* note 199 (aim of caretaker preference to stick with measurable factor). In fact, courts often express concern over care by the primary parent by a more general statement that the other parent would be a "better" custodian.

222. A Twin Cities family law specialist asks rhetorically: "Should a father be denied custody because a mother works part-time or does not work at all due to a mutual decision on the part of both parents at a time when divorce was not considered by either of them?" *Minnesota Surveys*, *supra* note 67. "Many fathers," a family court referee adds, "view the preference as penalizing them for providing for their family." *Id.* *See* Wexler, *supra* note 53, at 818 (recommending an initial custody decision "that gives something to both parties").

223. *See supra* notes 158-66 (equal care exception); *supra* notes 204-19 (relationship with second caretaker; uncertainty and danger of loose standard).

224. *See* O'Kelly, *supra* note 18, at 540 (suspicion of bias in caretaker preference hinders acceptance of standard); *supra* notes 78-79 (caretaker preference beneficial for mothers); *supra* note 93 (perception of preference as tender years presumption for mothers); *supra* notes 130-31 (bias reports on favor for mothers). A Minnesota lawyer adds that if caretaking cannot be equated with the child's best interests, its application is pure gender bias. *Minnesota Surveys*, *supra* note 67; *see also* Charlow, *supra* note 53, 273-74 (observing prospect for bad settlements by fathers who should challenge custody placements but are intimidated by belief that court will not deviate from preference for mother).

225. *See supra* notes 78-79, 162 (courts and commentators have asserted that the reality of mothers' role in childrearing accounts for vast majority of decisions awarding custody to the mother; consequently, equal care arrangements reflect bias against women); *supra* notes 82-88 (discussion of settlements by mothers). This issue was brought to life in David M. v. Margaret M., 385 S.E.2d 912, 923 (W. Va. 1989), where the West Virginia court stated that practices under an imprecise standard are partial to men: "[A]ny rule concerning custody matters will be gender-biased, in effect if not in form. An allegedly gender-neutral rule that permits exhaustive inquiry into relative degrees of paternal fitness is inevitably going to favor men in most instances." *Id.* at 923.

analysis of shortcomings in the formulation of the standard. Rather, they proposed eliminating the standard to recognize paternal interests. Critics feared that application of the preference would frequently lead to a loss of custody for fathers, followed by inadequate protection of the noncustodial parent's visitation rights. Minnesota's liberal allowance for a custodial parent to move a child to another state exacerbated the fear that fathers might lose any meaningful relationship with the child following the custody placement.[226]

Inevitably, expression of the foregoing concerns created much debate concerning the merits of the primary caretaker preference. In Minnesota, however, opposition to the standard caused more than mere debate: political[227] and legal[228] arguments ultimately produced legislation defeating the preference prescribed by the supreme court in *Pikula*. Several factors sug-

226. *See* Auge v. Auge, 334 N.W.2d 393, 397 (Minn. 1983) (noncustodial parent opposing move has burden of showing that change hurts the child or is designed to interfere with visitation). Clearly, fathers' concerns do not stop at eliminating the unfair advantage for the mother under the primary caretaker preference. Rather, fathers also unite on the issue of any standard leading to sole custody placements. *See* Scott & Derdeyn, *supra* note 8, at 462, 495-96 (legislative efforts of fathers for joint custody preference); *see also* Wexler, *supra* note 53, at 765-73 (trend is for more permissive laws on modification of prior custody placements).

227. *See supra* note 4. The 1989 Minnesota legislation responded affirmatively to the remarkably solid position of the Minnesota State Bar Association, determined at a February 1989 meeting of the group's House of Delegates. The bar initiative evolved from a recommendation of the organization's Family Law Section, which spoke without dissent on the subject. Members of the bar noted the largely unchallenged rationale for eliminating the preference: fathers among the clientele of family law practitioners were oppressed by a standard that overlooked their strong parent-child relationship. These lawyers also came to believe that children were hurt by placements. Litigation occurred only where fathers demonstrated significant relationships with their children. Observers of the 1989 legislative event noted only one voice in favor of the primary caretaker preference, a modest lobbying effort by battered womens' groups.

228. Legal criticism of the *Pikula* rationale along with a push for a multifactor test partially precipitated the legislative defeat of Minnesota's preference. *See* MINN. STAT. § 518.17, subd. 1 (1990); Maxfield v. Maxfield, 452 N.W.2d 219, 222 (Minn. 1990) (acknowledging statute); Sefkow v. Sefkow, 427 N.W.2d 203, 211 (Minn. 1988) (*Sefkow IV*) (same); *supra* note 94 (indictment of preference, citing omitted considerations on child's best interests); *supra* notes 67-68, 199 (judicial explanations for narrowing considerations). Even without reference to inconsistent legislation, the basis for judicial imposition of a substantive standard has been questioned. One Minnesota trial judge active in family law litigation noted: "It is very disturbing that this entire theory was given us by edict of the supreme court without legislative debate, without development by litigants, without testimony of experts or any other thorough look at all aspects of the theory." *Minnesota Surveys*, *supra* note 67.

gest explanations for the opposition's remarkable success. Certainly, critics of the preference demonstrated skillful advocacy. In addition, the legislative approach prevented direct confrontation with the supreme court, and thereby successfully avoided facing serious proponents of the preference. On the other hand, critics of the rule had already argued their case to the supreme court and had successfully gained that court's partial retreat from the preference.[229] More significantly, the supreme court's own desire for limited appellate review[230] and its allowance of broad definitions and exceptions to the standard[231] contributed to efforts to defeat the preference. In addition, the court's failure to acknowledge that the preference would compromise certain interests caused the preference to later appear as misconceived. Perhaps demographic factors also contributed to the rejection; paternal care might be unusually active in the relatively progressive Minnesota families. Finally, the perceived weakness in enforcement of visitation rights in Minnesota was a significant factor in the political defeat of the preference in 1989.

V. AN EPILOGUE TO MINNESOTA'S EXPERIENCE

A recent Minnesota Supreme Court decision signals a possible resurrection of some form of the primary caretaker preference, despite the legislature's repeated rejection of the standard. In *Maxfield v. Maxfield*[232] the court decided its first child custody case since the 1989 legislative enactment that attempted to abolish the primary caretaker standard. The majority, although recognizing the legislature's retreat from a legal preference, stated that "the golden thread running through any best interests analysis is the importance, for a young child in particular, of its bond with the primary parent."[233] The supreme court approved the court of appeals reversal of a deci-

229. *See supra* notes 178, 183 (discussing decision in *Sefkow*).

230. *See supra* notes 63-66, 173-92.

231. *See supra* notes 116-34, 145-66 and accompanying text.

232. 452 N.W.2d 219 (Minn. 1990), *aff'g* 439 N.W.2d 411 (Minn. Ct. App. 1989).

233. *Id.* at 223. After contending its prior decisions already reflected the declarations of the legislature, the supreme court addressed *Maxfield* under the rubric of a multi-factor analysis — a different approach than that taken by the court of appeals. Because the trial court also made findings on all statutory best interests factors, this review was feasible. *See supra* notes 4-5 and accompanying text (developments in abolishing prior deference to primary caretaker).

sion to place four children with their father[234] and concluded that the trial judge erred in disregarding, "or at least severely discount[ing]" the mother's status as primary parent.[235]

The *Maxfield* decision presents another irony in Minnesota's experience with the primary caretaker preference. As discussed earlier, implementation of the caretaker standard unexpectedly resulted in judicial decisions that provided less support for strong parent-child relationships than those decided before implementation of the standard.[236] *Maxfield*, a bold reversal decided after legislative defeat of the preference, demonstrates yet another irony. The court applied the new, multifactor Minnesota statute, which the legislature apparently intended to provide less protection for the preservation of a child's relationship with a primary caretaker. Yet, in its application of the law, the court strengthened, rather than weakened, its support for preservation of this relationship. In doing so, the majority restored its will for appellate decisionmaking, thus returning to the forcefulness of pre-*Pikula* law and departing from *Pikula*'s remand discipline.[237]

234. *Maxfield*, 452 N.W.2d at 223. *See* Maxfield v. Maxfield, 439 N.W.2d 411, 417 (Minn. Ct. App. 1989) (reversing trial court's decision because exception to preference was used wrongfully). After this decision and before discretionary review by the supreme court, 1989 legislation prohibited giving priority to primary caretaking or any other best interest factor to the exclusion of the other factors. MINN. STAT. § 518.17 subd. 1(a) (1989). *See supra* note 4 (components on the 1989 act).

235. *Maxfield*, 452 N.W.2d at 222. In spite of a resolve to apply no preference, the supreme court addressed the topic of primary caretaking. The court noted that the trial judge not only disregarded the old preference, but erred by entirely discarding the consideration of prior care. This so skewed the entire best interests inquiry that reversal was appropriate. The supreme court proceeded to discuss and refute all six of the major best interests considerations the trial court offered to favor placing the children with their father. *Id.* at 222-23.

236. *See supra* notes 184-85 (examining pre-*Pikula* cases).

237. In sharp contrast with an earlier indication that custody decisionmaking was a matter of factfinding, *see supra* text accompanying note 180, the court made this remarkable declaration:

> Our concern here is not with the findings of fact but with the conclusions drawn from those facts. Particularly in cases of this kind, where the trial court is weighing statutory criteria in light of the found basic facts, the trial court's conclusions of law will include determination of mixed questions of law and fact, determination of "ultimate" facts, and legal conclusions. In such a blend, the appellate court may correct erroneous applications of the law. As to the trial court's conclusions on the ultimate issues, mindful of the discretion accorded the trial court in the exercise of its equitable jurisdiction, the reviewing court reviews under an abuse of discretion standard. *See, e.g., Berndt v. Berndt*, 292 N.W.2d 1, 2 (Minn. 1980). When the trial court's treat-

The three dissenting judges strongly contested the appellate court's reversal of the trial court decision.[238] They accused the court of appeals of substituting its own findings of fact for those of the trial court.[239] Furthermore, the dissenters harshly criticized the majority for circumventing the clear intent of the legislature to eliminate presumptions in child custody cases.[240] The divided opinions are a classic illustration of the continuing debate between the need for a rule of law and the competing desire for more individualized justice.[241]

Maxfield provoked strong criticism, including an outspoken published response of the trial judge in the case.[242] The Minnesota legislature also responded to the decision, restating that Minnesota law does not allow for a primary caretaker presumption.[243] This legislative action, however, was an ineffective response to the supreme court's opinion; the *Maxfield* court itself had acknowledged the legislature's elimination of the preference.[244] In fact, the court had recognized in a 1988 decision that the Minnesota statute mandated a "multifaceted inquiry" to determine a child's best interests.[245] Moreover, in emphasizing the importance of the relationship between a child and a pri-

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ment of mixed questions of law and fact and its treatment of the ultimate issues may involve a misapplication of the law, the appellate court should carefully review the trial court's "expla[nation of] how the factors led to its conclusions and to the determination of the best interests of the child."

Maxfield, 452 N.W.2d at 221 (quoting MINN. STAT. § 518.17, subd. 1 (1990)). *See supra* notes 184-85 (examining pre-*Pikula* cases); *supra* notes 179-83 and accompanying text (weakness built into original decision on strong preference). The *Maxfield* court restated concepts illustrated by pre-*Pikula* cases, quoting from *Berndt*. *Maxfield*, 452 N.W.2d at 221, 223. *See also supra* note 185 (*Berndt* discussed).

238. *Maxfield*, 452 N.W.2d at 224 (Yetka, J., dissenting).

239. *Id.*

240. *Id.*

241. *See supra* notes 8-15 and accompanying text (discussing the competing notions of desire for clear rules and the need for discretionary flexibility in individual cases).

242. Baland, *Maxfield's Silver Hammer: New Shape for Child Custody?*, 47 BENCH & BAR MINN., No. 4, 31 (1990). The author finds "a curious blend of lip service and double talk" in the high court majority's treatment of the 1989 legislation. *Id.* at 33. He suggests that the majority was guilty of "abuse and usurpation of the trial court's discretion" in the pursuit of its "gospel" of concern for the primary caretaker. *Id.* Calling for the supreme court to admit its mistake, and protesting the current uncertainty of Minnesota child custody law, the author advises the supreme court to reconsider its opinion and deliver a "decision that answers more questions than it raises." *Id.* at 34.

243. *See supra* note 5.

244. *Maxfield*, 452 N.W.2d at 222.

245. Sefkow v. Sefkow, 427 N.W.2d 203, 212 (Minn. 1988) (*Sefkow IV*).

mary caretaker, the court did not expressly adopt a caretaker preference. Rather, it identified primary caretaking as a "thread" woven through the useable best interests factors set forth in the statute.[246] Thus, *Maxfield* is a plausible application of Minnesota statutory law, inclusive of the 1990 amendment.

The divisiveness of the *Maxfield* opinions and the majority's departure from its usual support of narrow standards of appellate review make it difficult to predict whether *Maxfield* is a fascinating case study or the beginning of a new era of primary caretaking law.[247] Certainly, trial courts may make primary caretaking the decisive factor in close cases in which all other factors between the parties are equal.[248] Moreover, a lower court's disregard of a primary caretaker's role may provide a basis for reversal on appeal.[249]

Among the nation's appellate courts, the West Virginia Supreme Court now alone remains committed to achieving certainty in child custody decisionmaking and to establishing a workable caretaker preference. A similar commitment in Minnesota failed because of the opposition's fight to protect competing interests and because of the Minnesota Supreme Court's reluctance to actively establish a rule of law on child custody adjudication. Nevertheless, the desire to avoid litigation through more certain standards, an aim rooted in history, remains on the scene for discussion in Minnesota.

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246. *Maxfield*, 452 N.W.2d at 223.

247. The dissent in *Maxfield* concluded that the majority opinion "will encourage more appeals in family law matters." *Maxfield*, 452 N.W.2d at 224 (Yetka, J., dissenting). Given the litigation flowing from this supposedly precise standard, the prediction seems accurate.

The dissent next observed that the majority opinion would encourage more reversals. *Id.* This prophecy, however, is much more in doubt. Will the *Maxfield* concern on primary care evidence be a new tool for appellate review? *See supra* note 185 (reversals under pre-*Pikula* law). Even if this tool exists, will it consistently be evaded by trial court comments or findings suggesting that caretaking has been considered, even if discarded?

248. *See* Enget v. Enget, No. CX-90-315 (Minn. Ct. App. June 26, 1990) (LEXIS, States library, Minn file) (suggesting that *Maxfield* primary caretaker role may be determinative where other factors are equal).

249. *See* Terdan v. Terdan, No. C7-90-62 (Minn. Ct. App. July 9, 1990) (LEXIS, States library, Minn file) (absent validity of child's choice, it is reversible error under *Maxfield* to disregard primary caretaker factor); *cf.* Montgomery v. Montgomery, No. CX-90-458 (Minn. Ct. App. July 24, 1990) (LEXIS, States library, Minn file) (approves giving weight to primary caretaking as only one of numerous other factors).

CONCLUSION

The Minnesota experience provides guidance for proponents of many conflicting approaches to the resolution of custody disputes. For defenders of a caretaker preference, it is increasingly evident that the ends they envision will not be easily achieved. Advocacy for the preference will require a careful assessment of its potential to sacrifice interests of fathers and children,[250] an acknowledgement of the likely resistance from supporters of such interests, and a strategy to minimize conflict that will inevitably destroy the effectiveness and acceptability of the more precise standard. Defenders of the preference might also recognize the need for a much tighter standard to significantly discourage litigation and unfair bargaining.[251] If caretaking is to be determinative, it must be defined so as to narrow the inquiry and focus on matters of fact least likely to invite bitter disputes and distortion of facts.[252] Furthermore, the exceptions for equal caretaking[253] and temporary custody arrangements following separation[254] should be narrowly interpreted, and a child's express custody preference should not govern unless it is clear and convincing.[255] Finally, an effective preference will require informed and determined appellate review.[256]

For opponents of the preference, integrity demands a recognition of the rationale for the standard. They must face criticism of the broad best interests standard, which risks unwise results,[257] stimulates litigation,[258] permits manipulation and

250. *See supra* notes 83-99, 199 (although most proponents imprecisely identify effects of a more precise standard, some recognize the issues).

251. *See* Mason, *supra* note 59 (defending more straightforward preference for mothers as custodians).

252. *See supra* notes 116-36 and accompanying text. What are the safe issues of fact, those likely to be objectively observed? This is a difficult question that literature in the area has not yet addressed. An example of a less-emotionally charged factor might be the measure of family schedules and identification of the parent who enjoyed the most time or activity with the child; even where both parents work, one might expect a significant variation on this factor. What seems most appropriate now is for others to examine the practicality of the *Garska* factors. *See supra* text accompanying note 45.

253. *See supra* notes 158-66 and accompanying text.

254. *See supra* notes 151-56 and accompanying text.

255. *See supra* notes 145-50 and accompanying text.

256. *See supra* notes 63-64, 173-92, 232-47 and accompanying text.

257. *See supra* notes 62, 67-68 (best interests decisions unpredictable, factors unmeasurable); *supra* notes 201-02 (best interests considerations unmeasurable).

258. *See supra* notes 70-81, 100-15 and accompanying text.

abuse, and allows a level of judicial discretion that is difficult to reconcile with an historic commitment to the rule of law.[259] The costs of this system, especially for children, mothers and those with the least resources to resist threats of litigation, are readily apparent.[260] In addition, critics, along with defenders of the preference, should carefully assess the interests sacrificed through application of the primary caretaker preference.

Finally, for the more neutral student of this issue, the Minnesota experience emphasizes the tension between a need for predictable results and a desire for individualized decisionmaking.[261] It provides little hope for resolution of the debate among opponents and supporters of the preference. The recent *Maxfield* decision, in which the Minnesota Supreme Court sharply and equally divided on the fundamental question of the merits of a discretionary approach to child custody decisionmaking, illustrates the intensity of the debate.[262]

The Minnesota experience thus does not resolve the child custody dilemma. It does, however, suggest several proposals for future decisionmaking. A complete discussion of these propositions is beyond the scope of this Article. Alternative standards and practices are the subject of voluminous scholarly studies, as well as numerous appellate decisions and legislative enactments. This Article merely suggests that these reforms might be more helpful than mere argument on the merits of the caretaker preference.

First, researchers should more carefully examine the merits of the caretaker preference dispute, with a focus on discovering empirical evidence of the effects of various types of parent care on patterns of child development and studying the costs associated with precise and imprecise standards. For example, evidence is needed on whether past caretaking is an accurate predictor of future care and whether certain care

259. *See supra* notes 10-16, 62-68 and accompanying text.

260. *See supra* notes 52-59, 73-89 and accompanying text. The reality of these problems under an imprecise standard accounts for a school of thought, not wholly tongue-in-cheek, that a coin-flip decision would be a reasonable alternative if no other is found. *See* Elster, *supra* note 53, at 40 n.21 (citing five other discussions of the coin-flipping alternative); Fineman, *supra* note 43, at 773 (noting that the coin-flip alternative is the ultimate recognition that equality is an unrealistic goal in decisionmaking); *see also* Klaff, *supra* note 3, at 358-59 (discussing problems inherent in the coin-flip alternative); Uviller, *supra* note 43, at 127 (stating that a coin-flip may be preferable to a best interests test).

261. *See supra* notes 8-17 and accompanying text.

262. *See supra* notes 232-47 and accompanying text.

patterns correlate with strong parent-child bonding. Further study should also address how frequently threats of litigation actually result in unfair stipulations and settlements. In addition, researchers should determine whether and to what extent fathers and children suffer measurable sacrifices from application of a precise caretaker standard. Studies of these questions are necessary to critically evaluate arguments for and against the caretaker preference, which so far have been premised on theory, speculation and anecdotal evidence.[263] At the same time, consideration should continue for alternative preferences that incorporate a precise standard, but also promote shared parenting.[264]

Further studies of standards, however, should not displace efforts to identify procedural strategies that might avoid destructive litigation. Researchers, for example, should continue to test the effectiveness of the mediation process, although critics frequently question its usefulness.[265] A more promising alternative, based on the author's personal observations,[266] is a

263. *See supra* note 94 (question on likelihood of future provision for care); *supra* note 120 (absence of evidence tying caretaking with bonding); *supra* note 250 and accompanying text (need to assess potential risks in applying preference). Indeed, the lack of empirical evidence causes advocates to take uncertain positions:

> In the end, there is a disturbing tenuousness about the recommendations I am able to make. The research points with only a quivering finger toward the rules that I recommend — indeed, the suggested rules rest in large part not on hard evidence but on theory, clinical observations, and even hunch — an educated hunch but a hunch nevertheless.

Chambers, *supra* note 43, at 480.

264. *See supra* notes 216-22.

265. Minnesota's extensive commitment to mediation in custody cases has been an ingredient in the state's litigation experience in recent years, casting some tentative doubt on mediation's ability to reduce conflict. *See supra* note 111. A Twin Cities practitioner volunteers the disturbing observation that mediation has served largely to resolve cases in a category always previously settled, thus relieving lawyers in the negotiation process but not reducing litigation. *Minnesota Surveys*, *supra* note 67. *See also* Chambers, *supra* note 43, at 480 n.5 and accompanying text (discussing mediation as an alternative to custody litigation, and therefore, an alternative to any custody standard); Mnookin, *supra* note 8, at 287-89 (cautious assessment of prospects for using mediation to resolve custody disputes).

266. *See* Crippen & Hatling, *supra* note 22, at 427 (recommending that children be afforded counsel). Between 1975 and 1984, during the author's stint as a Southwestern Minnesota trial judge, a professional guardian program was founded and developed for a smaller jurisdiction, a three-county rural area with a population of about 50,000. This process cost over $100,000 per year for five active guardians, including three masters-level social workers. In addition, attorneys for the guardian were appointed where they needed legal ser-

successful guardian ad litem program, whereby properly educated and compensated individuals advocate children's interests in custody disputes.[267] Professional guardians can skillfully avoid litigation because of their allegiance to the interest of the child, their unique ability to assemble facts, and their opportunity to facilitate parental agreement.[268] A careful assessment of the costs and benefits of a professional guardian ad litem program, however, is a prerequisite to its widespread use.[269]

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vice, for trial proceedings or otherwise. The guardians were paid an hourly rate set according to public welfare salaries for comparable staff; they served by appointment, and their billing procedure paralleled those used by counsel appointed by the court.

267. Further inquiry is needed on this alternative process, one which is aimed at dealing more effectively with the custody issue. It is beyond the scope of this Article to report on literature regarding professional guardians. Much of the material comes from Canada and Great Britain, where the concept is better known, and much literature deals with the topic of child protection proceedings. *See, e.g.*, O. STONE, THE CHILD'S VOICE IN THE COURT OF LAW (1982). For discussion of issues relevant to the guardian issue, *see* Chambers, *supra* note 43, at 482-83 (examining problems that result from courts' inability to obtain reliable information from mental health professionals); Meyer & Schlissel, *supra* note 86, at 497-99 (discussing proposals for involvement of behavioral scientists in custody decisionmaking); Mnookin, *supra* note 8, at 254-55 (although the child's interests are the essential custody issue, the child normally has no participatory role in the decision process); Pearson & Ring, *supra* note 8, at 704-05, 723 (discussing alternatives to traditional decisionmaking and noting judges' common disregard for role of guardian); Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1187 (1978) (discussing the ability of child's attorney to act as a mediator); *see also* Pound, *The Place of the Family Court in the Judicial System*, 5 NAT'L PROBATION & PAROLE A.J. 161, 166-67 (1959) (asserting that judicial decisionmaking in the family context must strive to preserve balance between justice and security).

268. In the author's trial court experience, professional guardians did three things better than other combinations of service aimed at resolution of custody cases. First, they advocated with authority, having the right balance of information at hand and skill to assert recommendations. Second, they uncovered more beneficial facts and reported to the court more thoroughly and with less equivocation than public employees assigned the investigating task. Finally, they achieved noteworthy success producing settlements, using the process of investigation and advocacy to elicit the most conciliatory propositions of parents in conflict. Essentially, the magic of a professional guardian program is its leveling of the singular authority of the judge and the parents to dominate the decisionmaking process. At the same time, the role leaves the court process intact as a measure to protect all conflicting interests. In a real sense, some ownership of the process is placed with the child.

269. Unfortunately, empirical data was not assembled on the Southwestern Minnesota project. This observer has the clear impression that a great deal of litigation, at and after the time of divorce, was avoided by the work of these professionals. In addition, they gave strength and stability to children during the course of the storm. Most of the guardians were tested early by a trial with vigorous cross-examination, a natural process of counsel to search for vul-

Finally, if the flood of litigation does not subside, more effort must be invested to reduce its destructive effects. Especially important in this regard is the need for reforms to shorten the litigation process,[270] both in the trial courts and on appeal.[271] Delay not only increases litigation expenses, but also prolongs the suffering of parents and children.

Indeed, the millennium is not near in determining an appropriate child custody standard.[272] Even today, the longstanding debate between a rule of law and individualized decisionmaking remains unsettled. Nevertheless, the past decade has produced important developments in custody dispute resolution and alternative approaches to standard-setting. It has also demonstrated the need for other approaches to accomplish a reduction in litigation. Minnesota's experiment with the primary caretaker preference has contributed significantly to this learning process.

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nerability. All but a few survived this process and gained the respect of counsel. Continuously, in a showing of confidence and praise, lawyers and their clients endorsed the merit of the guardians' services. Funding officials, mostly conservative rural county commissioners, consistently came to the conclusion that this program was valuable to the community. For all its value, however, a professional guardian program costs money. But in dollars and pain saved, the arrangement is much less costly than suggested by its budgets.

270. Litigation expense, as well as the agony of uncertainty, is complicated greatly by delay. *See supra* notes 73-81 (perils for parents and children). In addition, studying application of the caretaker preference makes it evident that temporary placements, prolonged by delay, complicate the custody decision and distort placement standards. *See supra* notes 151-56 (success of temporary custodian in final placement decisions). In Sefkow v. Sefkow, 427 N.W.2d 203, 207, 209 (Minn. 1988) (*Sefkow IV*), the Minnesota Supreme Court addressed custody placement standards in a situation made much more complex by the passing of nearly five years between separation of the parents and final resolution of the case. In fact, the Minnesota law addressing custody issues, MINN. STAT. § 518.168(a) (1990), demands priority for custody disputes in scheduling of trial court hearings, and the *Sefkow IV* court urged the trial courts to bifurcate proceedings to expedite trial of the custody question where that issue is "vigorously contested." *Sefkow IV*, 427 N.W.2d at 212.

271. As in many cases, much delay in *Sefkow* occurred in the appellate process; the trial court's initial decision occurred nearly four years before the final supreme court decision. *See also, e.g.*, Maxfield v. Maxfield, 452 N.W.2d 219 (Minn. 1990) (nearly seventeen months passed between the trial court's judgment — which was stayed, and which moved custody from the home of the parent who succeeded on appeal — and the supreme court's final disposition). Proper fast-tracking of custody appeals will come about only through new rules that require (1) an unusually early decision to appeal; (2) priority preparation of transcripts; (3) simplified briefing; (4) emergency scheduling of oral arguments; and (5) prompt appellate decisionmaking.

272. *See supra* notes 16-17.