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THE ISSUE OF STABILITY IN THE MODIFICATION OF CUSTODY DECISIONS: FACTOR OR DETERMINANT?

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I. INTRODUCTION

THE ENTRY OF A DIVORCE DECREE does not necessarily mean the end of litigation. To the contrary, a significant number of custody decisions are relitigated.¹ The standard to be applied in deciding a modification petition has become a troublesome issue.

An original custody decision is usually based on the child's best interest.² Factors such as the wishes of the child and the parents, the child's relationship with his or her parents, the child's adjustment to home, school and community, the mental and physical health of the parties and the possibility of physical violence are considered in deciding custody under the best interest standard.³

When an original decree is being relitigated, however, two approaches are recognized. Most jurisdictions allow modification when required by a change of circumstances and the best interest of the child. This majority approach is embodied in both legislation⁴ and case law.⁵

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1. Commentators have expressed concern over the relitigation of custody decrees. *See, e.g.*, J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 37 (1973); Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495, 498 (1975); Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 80 (1969).

2. Most jurisdictions follow the best interest standard. *See generally* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 236-37 (1975).

3. *See, e.g.*, ILL. REV. STAT. ch. 40, § 602 (1980).

4. The change of circumstances standard may be expressly required by statute. *See, e.g.*, N.C. GEN. STAT. § 50-13.7 (Supp. 1983); W. VA. CODE § 48-2-15 (1980). Courts may also infer this standard from statutes that allow modification if in the "best interest" of a child. *See, e.g.*, HAWAII REV. STAT. § 571-46(6) (1976); KAN. STAT. ANN. § 60-1610 (Supp. 1984); MISS. CODE ANN. §§ 93-5-23 to -24 (Supp. 1983); OR. REV. STAT. § 107.137 (1981); VA. CODE § 20-108 (1983).

5. *See* notes 107-28 and accompanying text *infra*.

The Uniform Marriage and Divorce Act (UMDA)⁶ provision on modification, however, suggests a different approach. To further the goal of finality of custody decrees, section 409 provides that within two years of the entry of a decree, a modification petition will be denied without a hearing, unless the petitioner's affidavit establishes reason to believe that the child's present environment may seriously endanger his physical, mental, moral or emotional health.⁷ Section 409 also creates a presumption that the current custodian is to be retained unless the petitioner can establish that one of three conditions has been met. There may be no modification unless: (1) the custodian agrees to it; (2) the child has in fact been integrated into the non-custodian's family with the custodian's consent; or (3) the child's present environment seriously endangers his physical, mental, moral, or emotional health and the harm likely to be caused by a change of environment is outweighed by its advantages. The standards of change of circumstances and the best interest of the child

6. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 91 (1979). The UMDA was approved by the National Conference of Commissioners on Uniform State Laws in 1970. The Act has been adopted in substantial part in nine jurisdictions. See ARIZ. REV. STAT. ANN. §§ 25-311 to -339 (1976 & Supp. 1983); COLO. REV. STAT. §§ 14-2-101 to -113, 14-10-101 to -133 (1973 & Supp. 1983); DEL. CODE ANN. tit. 13, §§ 721-730 (1981) (part IV only); ILL. REV. STAT. ch. 40, §§ 101-802 (1980 & Supp. 1983); KY. REV. STAT. §§ 403.010, 403.110-350 (Supp. 1982); MINN. STAT. ANN. §§ 518.002-27 (West Supp. 1984) (parts III and IV); MO. REV. STAT. §§ 452.300-.415 (1977 & Supp. 1984); MONT. CODE ANN. §§ 40-1-101 to -404, 40-4-101 to -221 (1983); WASH. REV. CODE ANN. §§ 26.09.010-902 (Supp. 1983) (parts III and IV only).

7. UNIF. MARRIAGE AND DIVORCE ACT § 409, 9A U.L.A. 91, 211-12 (1979). Section 409 provides as follows:

(a) No motion to modify a custody decree may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health.

(b) If a court of this State has jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act, the court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interest of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless:

(1) the custodian agrees to the modification;

(2) the child has been integrated into the family of the petitioner with consent of the custodian; or

(3) the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

(c) Attorney fees and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment.

Id.

must also be met, but are addressed only if one of the three pre-conditions is found to exist. By its terms, then, the UMDA provision is more restrictive toward modification than the majority approach, which requires only a change of circumstances and a showing that a modification would be in the best interest of the child. For example, under the UMDA a modification petition would be denied in the absence of endangerment even if its grant would have been in the child's best interests.

Section 409 of the UMDA was explicitly founded upon the proposition, asserted by a number of authorities in the field, that finality in custody decisions is highly beneficial to a child's psychological and sociological development. According to the commissioners' note:

Most experts who have spoken to the problems of post-divorce adjustment of children believe that insuring the decree's finality is more important than determining which parent should be the custodian This section is designed to maximize finality (and thus assure continuity for the child) without jeopardizing the child's interest.⁸

This article will demonstrate that where the UMDA provision is in effect, a significant number of decisions have avoided its restraints through creative interpretation of the statutory requirements. One reason underlying this avoidance may well be that there are factual situations in which the UMDA's assumption that finality constitutes stability is questionable. It is submitted, moreover, that the psychological literature which is the basis for the UMDA's emphasis on stability may not be as strong or authoritative as the UMDA's drafters represent. While stability is admittedly an important factor to be considered in a modification proceeding, the majority approach properly recognizes the hazards of basing decisions on stability to the exclusion of all other vital concerns.

II. THE UMDA IN THE COURTS

Only eight jurisdictions have had experience with the UMDA's modification provision, and even some of these states' legislatures have not given the UMDA provision its full effect. Kentucky,⁹ Montana,¹⁰ and Ohio¹¹ have enacted substantially the UMDA language. Illinois did originally track the UMDA but has recently repealed that

8. *Id.* commissioners' note.

9. *See* KY. REV. STAT. § 403.340 (Supp. 1982).

10. *See* MONT. CODE ANN. § 40-4-219 (1983).

11. *See* OHIO REV. CODE ANN. § 3109.04(B) (Page 1980).

parts of its statute which created a presumption in favor of the original custodian.¹² Minnesota,¹³ Colorado,¹⁴ Delaware,¹⁵ and Washington¹⁶ have altered the UMDA language in ways that operate to weaken the presumption. For example, Minnesota and Colorado require only that endangerment, not *serious* endangerment, be shown before a modification petition can be granted.¹⁷ Washington requires only a showing of detriment to the child from the continuation of the existing custody.¹⁸

However, even when operating under a statute setting up a presumption for the original custodian, courts have resolved a number of interpretive issues in ways that tend to ease modification. One of these issues is whether the harm to be shown under subsection (b)(3) of section 409 must be actual and imminent or merely potential. Another involves the balancing of the benefit and harm resulting from modification. Finally, questions have arisen over what is to be considered the present environment and when that environment is to be tested.

The UMDA and state provisions, except that of Washington, require that some aspect of the child's well-being be endangered before a change of custody will be ordered. The operative word "endanger-

12. See ILL. REV. STAT. ch. 40, § 610 (Supp. 1984-1985).

13. MINN. STAT. ANN. § 518.18 (West Supp. 1984). The Minnesota provision differs from UMDA's § 409(b)(3) by requiring that the original custodian be retained unless "[t]he child's present environment endangers his physical or emotional health or impairs his emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." *Id.* § 518.18(d)(iii).

14. See COLO. REV. STAT. § 14-10-131 (1973 & Supp. 1983). The Colorado provision varies § 409(b)(3) by prohibiting a change in custody unless "[t]he child's present environment endangers his physical health or significantly impairs his emotional development" *Id.* § 14-10-131(2)(c).

15. DEL. CODE ANN. tit. 13, § 729 (1981). The language of the Delaware statute which defines the standards to be applied in making the modification decision is identical to that of the Colorado statute. *Id.* § 729(b)(3). For the relevant text of the Colorado statute, see note 14 *supra*.

16. WASH. REV. CODE ANN. § 26.09.260(1)(c) (Supp. 1984-1985). The Washington statute requires that the original decree remain unmodified unless "[t]he child's present environment is detrimental to his physical, mental or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child." *Id.*

17. For the relevant text of the Minnesota and Colorado statutes, see notes 13-14 *supra*. The elimination of moral injury as a basis for modification in these states, however, would tend to make modification more difficult than under the UMDA, which expressly provides for consideration of moral injury. See UNIF. MARRIAGE AND DIVORCE ACT § 409(b)(3), 9A U.L.A. 91, 211 (1979). For the text of § 409, see note 6 *supra*.

18. For the text of the Washington statute, which refers to the detriment of the child, see note 16 *supra*.

ment” is not defined in the statutes. The dictionary defines it as “the act of placing in danger or the state of being placed in danger.”¹⁹ “Detrimental,” the Washington standard, is defined as “harmful.”²⁰ But do the words “endangerment” and “detrimental” connote actual current injury or merely the potential of injury in the future? The words themselves arguably could be interpreted either way. It seems clear, however, that an interpretation that would allow modification on speculative evidence of future injury would significantly undercut the statute’s express policy favoring finality. Yet decisions in at least three states have taken just that approach.²¹

One of the most controversial modification decisions was made by the Illinois Supreme Court in *Jarrett v. Jarrett*.²² In *Jarrett*, custody of the divorced couple’s children had originally been granted to the mother. The father petitioned for a modification based on the mother’s non-marital cohabitation with a man. The modification was granted, but reversed on first appeal.²³ The Illinois Supreme Court reinstated the trial court’s decision. Although the evidence showed no adverse effect on the children from their mother’s living arrangement, the supreme court determined that no such proof must be made, interpreting the word “endangers” not to require a showing of present harm. The court refused to wait to see if the children’s moral values would be affected by those of their mother, and looked instead to the mere possibility of such harm.²⁴ Although *Jarrett* has been criticized,²⁵ some Illinois appellate decisions have explicitly followed its approach.²⁶

19. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 748 (1981).

20. *Id.* at 617.

21. *See, e.g., Jarrett v. Jarrett*, 78 Ill. 2d 337, 400 N.E.2d 421 (1979), *cert. denied*, 449 U.S. 927 (1980); *S. v. S.*, 608 S.W.2d 64 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981); *Myhervold v. Myhervold*, 271 N.W.2d 837 (Minn. 1978). For a further discussion of *Jarrett*, see notes 22-24 and accompanying text *infra*. For a discussion of the Illinois approach, see notes 25-29 and accompanying text *infra*. For a discussion of *S. v. S.*, see notes 30-32 and accompanying text *infra*.

22. 78 Ill. 2d 337, 400 N.E.2d 421 (1979), *cert. denied*, 449 U.S. 927 (1980).

23. *See Jarrett v. Jarrett*, 64 Ill. App. 3d 932, 382 N.E.2d 12 (1978), *rev’d*, 78 Ill. 2d 337, 400 N.E.2d 421 (1979), *cert. denied*, 449 U.S. 927 (1980). In reversing the lower court, the appellate court noted that the record had not shown any negative impact on the children as a result of the mother’s nonmarital cohabitation. *Id.* at 934, 382 N.E.2d at 16. However, the appellate court did not review the possible future deleterious effect of the cohabitation on the children. *See id.*

24. 78 Ill. 2d at 348-50, 400 N.E.2d at 425-26.

25. *See, e.g., Brandt v. Brandt*, 99 Ill. App. 3d 1089, 425 N.E.2d 1251 (1981) (cohabitation does not require custody change; court must evaluate totality of evidence along with relevant Illinois case law and statutes); *Willcutts v. Willcutts*, 88 Ill. App. 3d 813, 410 N.E.2d 1057 (1980) (court refused to apply *Jarrett* as per se rule; father’s occasional weekend cohabitation did not warrant change of custody).

26. *See, e.g., In re Marriage of Padiak*, 101 Ill. App. 3d 306, 427 N.E.2d 1372

The above cases specifically interpreted "endangerment" to mean potential harm, and Illinois courts have more frequently granted petitions without any discussion or finding of actual current harm. For example, in *In re Custody of McIntyre*,²⁷ although the court made general statements that the statutory requirements had been met, the only evidence before it was that the mother was unstable, volatile and adulterous and that the father was remarried, employed and stable. No evidence was presented regarding a harmful effect on the child, yet the grant of the father's petition to modify was affirmed.²⁸ It could be argued that the court in this case and in similar decisions²⁹ was merely applying the best interest standard under the guise of the UMDA language.

Courts in other jurisdictions have resorted to similar tactics. In the Kentucky case of *S. v. S.*,³⁰ there was psychiatric testimony that a lesbian mother's children showed no current abnormality. However, relying on another psychiatrist's testimony which described the social stigma attached to living in a lesbian household and which suggested that the children would have difficulty in reaching heterosexual identity, the appellate court reversed the trial court's denial of the father's

(1981) (statute contemplates potential harm); *In re Marriage of Nodot*, 81 Ill. App. 3d 883, 401 N.E.2d 1189 (1980) (child endangered by mother's instability and number of contemplated moves; court looked to long-range interests); *DeFranco v. DeFranco*, 67 Ill. App. 3d 760, 384 N.E.2d 997 (1978) (statute contemplates potential harm). In both *Padiak* and *DeFranco*, however, arguably there was evidence of current, actual harm. In *Padiak* there was testimony that the child was beginning to show signs of neurotic types of conflicts, of difficulty in developing a self-concept and in relating to others. In *DeFranco*, there was evidence that the child was high-strung.

27. 97 Ill. App. 3d 777, 423 N.E.2d 281 (1981).

28. *Id.* at 779-80, 423 N.E.2d at 283.

29. *See, e.g., In re Custody of Harne*, 77 Ill. 2d 414, 396 N.E.2d 499 (1979) (modification upheld because of mother's instability and her leaving the children with elderly grandparents); *Applegate v. Applegate*, 80 Ill. App. 3d 81, 399 N.E.2d 330 (1980) (modification upheld on evidence that wife's boyfriend mistreated the children, favored his own; wife did not spend sufficient time with children and shuffled them to babysitter); *Russell v. Russell*, 80 Ill. App. 3d 41, 399 N.E.2d 212 (1979) (modification upheld because of mother's frequent change of residence, her emotional condition, the instability of her marriage, the vagueness of her child care plans and anticipated social problems because of her interracial marriage); *Klitzing v. Gottemoller*, 76 Ill. App. 3d 783, 395 N.E.2d 193 (1979) (modification upheld because of presumed detriment resulting from separation from siblings); *In re Marriage of Farris*, 69 Ill. App. 3d 1042, 388 N.E.2d 232 (1979) (modification upheld because of mother's inability to devote sufficient time to her children, her lack of concern, and the advantages of the children living with the father), *cert. denied*, 449 U.S. 927 (1980); *Boggs v. Boggs*, 65 Ill. App. 3d 965, 383 N.E.2d 9 (1978) (modification upheld because of mother's having child out of wedlock, her immaturity, and her failure to comply with visitation schedules). In these cases there was no evidence of either the children's reactions to the above situations or of any actual ill effects.

30. 608 S.W.2d 64 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981).

modification petition.³¹ According to the court's interpretation, the words "may endanger" in the Kentucky statute did not require the injury either to be occurring or to have already occurred: the potentiality for damage was determined to be sufficient.³² Other decisions have affirmed modification orders when there was no evidence of current harm to the children.³³ It is thus clear that there has been at least some judicial resistance³⁴ to the legislative policy which made

31. *Id.* at 66.

32. *Id.* at 65. The court's reference to "may endanger" is disingenuous. That phrasing appears in the section which relates to when the petitioner must move by affidavit for a hearing. The part of the statute setting out the presumption for the current custodian does not modify "endanger" by the word "may". See KY. REV. STAT. § 403.340 (Supp. 1982).

33. See, e.g., *Myhervold v. Myhervold*, 271 N.W.2d 837 (Minn. 1978) (modification upheld based on visitation problems, deteriorating relationship between grandparents and children, and custodian's bad work schedule); *Timmons v. Timmons*, 94 Wash. 2d 594, 617 P.2d 1032 (1980) (modification affirmed because of custodian's instability and attempted suicide, crowded living conditions, and non-custodian's stability); *In re Marriage of Frasier*, 33 Wash. App. 445, 655 P.2d 718 (1982) (modification affirmed because the mother frequently changed residences and took the child on prison visits). All the above decisions were reached without evidence of a detrimental effect on the children.

34. Not all courts have been called upon to express this resistance. Where actual harm was apparent, the interpretive issue could be avoided. See, e.g., *In re Marriage of Agner*, 659 P.2d 53 (Colo. App. 1982) (molestation by step-relative); *In re Marriage of Friedman*, 100 Ill. App. 3d 794, 427 N.E.2d 261 (1981) (child depressed by current living situation); *Brandt v. Brandt*, 99 Ill. App. 3d 1089, 425 N.E.2d 1251 (1981) (child upset by mother's cohabitation); *Neeld v. Neeld*, 96 Ill. App. 3d 40, 420 N.E.2d 1080 (1981) (custodian was heavy drinker); *In re Custody of Yuhars*, 87 Ill. App. 3d 521, 409 N.E.2d 148 (1980) (stepmother struck child); *In re Marriage of Braje*, 85 Ill. App. 3d 744, 407 N.E.2d 1091 (1980) (young children were left alone by their mother); *Ross v. Ross*, 64 Ohio St. 2d 203, 414 N.E.2d 426 (1980) (child had speech problem which improved when with non-custodian).

Other decisions have affirmed denials of modifications or reversed grants thereof when there was no evidence of current harm. The following cases denied modification because the alleged inappropriate activities of the custodian were not accompanied by a perceivable harmful effect on the child: *Christian v. Randall*, 33 Colo. App. 129, 516 P.2d 132 (1973) (custodian-mother was undergoing transsexual operation, had married a woman and was suffering financial reverses); *In re Marriage of Pease*, 106 Ill. App. 3d 617, 435 N.E.2d 1361 (1982) (mother had had five different jobs, had moved several times and had employed 17 different babysitters); *In re Marriage of Gebis*, 100 Ill. App. 3d 710, 427 N.E.2d 360 (1981) (children had dirty clothing and lacked dental and medical care); *In re Marriage of Olson*, 98 Ill. App. 3d 316, 424 N.E.2d 386 (1981) (mother continued her sexual relationship with a man); *In re Custody of Farm*, 93 Ill. App. 3d 332, 417 N.E.2d 240 (1981) (deteriorating financial situation of mother and her inadequate parental supervision are insufficient grounds); *Willcutts v. Willcutts*, 88 Ill. App. 3d 813, 410 N.E.2d 1057 (1980) (custodian-father's fiancée stayed overnight several times); *Manley v. Manley*, 83 Ill. App. 3d 633, 404 N.E.2d 910 (1980) (mother frequently moved and had tumultuous relationship with boyfriend); *In re Custody of Potts*, 83 Ill. App. 3d 518, 404 N.E.2d 446 (1980) (mother removed children to another state without court's permission and failed to appear in court); *Hofmann v. Poston*, 77 Ill. App. 3d 689, 396 N.E.2d 576 (1979) (stepfather strictly disciplined child); *Wilcher v. Wilcher*, 566 S.W.2d 173 (Ky. Ct. App. 1978) (mother engaged in act of oral sex with third party in presence of

stability the utmost concern.³⁵

Courts have also ignored the statutory direction that the current custodian be retained unless there is, in addition to serious endangerment, a finding that the harm to the child likely to be caused by a change of environment is outweighed by the change's advantages.³⁶ In their note to the modification section of the UMDA, the commissioners emphasized the significance of this phrase:

The last phrase . . . is especially important because it compels attention to the real issue in modification cases. Any change in the child's environment may have an adverse effect, even if the noncustodial parent would better serve the child's interest. Subsection (b)(3) focuses the issue clearly and demands the presentation of evidence relevant to the resolution of that issue.³⁷

Despite the commissioners' note, it is extremely rare to find any discussion of the balancing issue in the cases. It has been infrequently cited as the reason for the denial of a petition for modification. In *In re Custody of Boyer*,³⁸ the father complained of the mother's nonmarital cohabitation. The evidence showed, however, that the mother centered her life on the child and that the child was well cared for. In one of the few cases to use the balancing criterion, the court specifically found that the father had not proved that the harm wrought by the requested change would be less than the benefits of the change.³⁹

child); *Foss v. Leifer*, 170 Mont. 97, 550 P.2d 1309 (1976) (mother cohabiting with man); *Wyss v. Wyss*, 3 Ohio App. 3d 412, 445 N.E.2d 1153 (1982) (mother engaged in sexual conduct with her paramour); *In re Rex*, 3 Ohio App. 3d 198, 444 N.E.2d 482 (1981) (mother gave birth to two illegitimate children since her divorce and continued her associations with two men); *Nolte v. Nolte*, 60 Ohio App. 2d 227, 396 N.E.2d 807 (1978) (detrimental home environment); *Anderson v. Anderson*, 14 Wash. App. 366, 541 P.2d 996 (1975) (mother immature and emotionally unstable). *Cf.* *Palmore v. Sidoti*, 104 S. Ct. 1879 (1984) (change of custody when custodian remarried person of different race reversed because effects of racial prejudice are not permissible considerations for removal).

35. This legislative policy is reflected in one report prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Laws. The author of that report suggests that the presumption should be overcome only in "extraordinary circumstances—e.g., that the child's physical health is seriously and immediately endangered by his present circumstances." R.J. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 237 (1968).

36. All of the states' enactments of the Uniform Act include this precise language. For a discussion of cases in which various courts have overlooked this statutory standard, see notes 40-43 and accompanying text *infra*.

37. UNIF. MARRIAGE AND DIVORCE ACT § 409 commissioners' note, 9A U.L.A. 91, 212 (1979).

38. 83 Ill. App. 3d 52, 403 N.E.2d 796 (1980).

39. *Id.* at 55, 403 N.E.2d at 798. The court also noted, however, that the child

Most of the appellate decisions upholding modification orders neither look to the relative merits of the proposed arrangements nor weigh the likely harm against the expected benefits as directed by the statute. No discussion of balancing appears in *Jarrett v. Jarrett*, for example.⁴⁰ The exclusive concern of the court in that and similar cases was whether serious endangerment had been proved.⁴¹ In *Myhervold v. Myhervold*,⁴² the Minnesota Supreme Court upheld a modification order without examining whether the balancing requirement had been satisfied. The Kentucky court, in *S. v. S.*, reversed a denial of a modification petition solely on the endangerment issue, and made no inquiry into the harm expected from the change of custody.⁴³

The effect of ignoring the balancing aspect of the modification provision is to allow modification more frequently than intended by the drafters of the UMDA.⁴⁴

For example, if one were to focus not only on the harm caused

was unaware of the mother's indiscretions. It could thus be argued that the court could have found no negative impact as well. See also *Christian v. Randall*, 33 Colo. App. 129, 516 P.2d 132 (1973) (one reason to deny modification is that the resultant trauma would not be outweighed by the benefits of modification); *Easton v. Easton*, 175 Mont. 416, 574 P.2d 989 (1978) (petitioner had not shown that the benefits from a change outweighed any harm suffered); *Venable v. Venable*, 3 Ohio App. 3d 421, 445 N.E.2d 1125 (1981) (no evidence that benefits outweighed detriment); *Roorda v. Roorda*, 25 Wash. App. 849, 611 P.2d 794 (1980) (although mother had had psychiatric problems, had moved many times, and child had nightmares, father failed to show that the benefits of change outweighed the harm).

40. 78 Ill. 2d 337, 400 N.E.2d 421 (1979), *cert. denied*, 449 U.S. 927 (1980). For a discussion of *Jarrett*, see text accompanying notes 22-24 *supra*. Similarly, the Illinois courts have made no allusions whatsoever to the balancing test. See, e.g., *In re Custody of Harne*, 77 Ill. 2d 414, 396 N.E.2d 499 (1979); *In re Marriage of Nodot*, 81 Ill. App. 3d 883, 401 N.E.2d 1189 (1980). For the bases for granting modification in *Nodot* and *Harne*, see notes 26 & 28 *supra*.

41. See *In re Marriage of Padiak*, 101 Ill. App. 3d 306, 427 N.E.2d 1372 (1981); *Klitzing v. Gottmoller*, 76 Ill. App. 3d 783, 395 N.E.2d 193 (1979); *In re Marriage of Scott*, 75 Ill. App. 3d 710, 394 N.E.2d 779 (1979); *Boggs v. Boggs*, 65 Ill. App. 3d 965, 383 N.E.2d 9 (1978).

42. 271 N.W.2d 837 (Minn. 1978).

43. 608 S.W.2d 64 (Ky. Ct. App. 1980), *cert. denied*, 451 U.S. 911 (1981). For a further discussion of *S. v. S.*, see notes 30-32 and accompanying text *supra*.

44. The facts of some decisions affirming modifications could be interpreted as meeting this balancing test, although scant reference to it appears. See, e.g., *In re Custody of McIntyre*, 97 Ill. App. 3d 777, 423 N.E.2d 281 (1981) (evidence of the father's remarriage, employment and stability and the mother's instability and her involvement in adulterous relationship supports the conclusion that harm from modification of custody would be less than benefits); *Gunter v. Gunter*, 93 Ill. App. 3d 1043, 418 N.E.2d 149 (1981) (mother in bigamous marriage with unstable man who drank too much, treated own daughter with indifference, exhibited violent tendencies toward daughter of former spouse, used profane language and twice committed bigamy in five previous marriages); *Applegate v. Applegate*, 80 Ill. App. 3d 81, 399 N.E.2d 330 (1980) (children spent more time with babysitter than mother; man with whom mother lived abused children and favored own children); *Russell v. Russell*, 80 Ill. App. 3d 41, 399 N.E.3d 212 (1979) (father seeking modification had larger home,

by the present environment, but also on the harm caused by the disruption of a change of custody, modification might not have been granted in a case like *Jarrett*⁴⁵ where a speculative moral decline would be balanced against the obvious disruption of a present change of custodial parent.

A number of decisions have also shown interpretive flexibility when addressing the issues of both the identity of the current custodian and the existence of a prior decree, the modification of which must meet section 409 standards. *Doyle v. Doyle*⁴⁶ pointed out the difficulty faced by courts when the child is in the actual custody of the non-custodial parent. The *Doyle* court analyzed various interpretations of the statutory phrase "the child's present environment" which is found in section 409. Under section 409, the court must find that the child's health is endangered by his "present environment" in order to modify a custody decree. The *Doyle* court stated that to interpret "present environment" to mean the temporary custody of the legal non-custodian would be "totally illogical."⁴⁷ Such an interpretation would place the petitioner in the absurd position of arguing as a basis for modification that his environment is endangering. The court reasoned that to interpret the phrase to mean the legal custodian's environment before the child left it may not reflect present reality.⁴⁸ Finally, the court noted that to interpret "the child's present environment" to mean the environment which the legal custodian could provide if the child were in his or her custody would be speculative. The *Doyle* court declined to rule on the correct interpretation of the phrase since under any of the possible interpretations, the trial court's decision was not contrary to the manifest weight of the evidence.⁴⁹

his new wife would be at home, and he was more stable than mother); *In re Marriage of Farris*, 69 Ill. App. 3d 1042, 388 N.E.2d 232 (1979) (improved school work when with father); *De Franco v. De Franco*, 67 Ill. App. 3d 760, 384 N.E.2d 997 (1978) (remarried father lived in good home); *Doyle v. Doyle*, 62 Ill. App. 3d 786, 379 N.E.2d 387 (1978) (since children had been with non-custodian, no harm would result from ending theoretical custodian's custody); *Ross v. Ross*, 64 Ohio St. 2d 203, 414 N.E.2d 426 (1980) (child's speech problem improved when visiting non-custodian); *Timmons v. Timmons*, 94 Wash. 2d 594, 617 P.2d 1032 (1980) (mother's stability and living situation compared unfavorably with that of father); *McDaniel v. McDaniel*, 14 Wash. App. 194, 539 P.2d 699 (1975) (exposure to marijuana smoking and irregular diet, school attendance and dental care rendered child's environment detrimental).

45. For a discussion of *Jarrett*, see text accompanying notes 22-24 *supra*.

46. 62 Ill. App. 3d 786, 379 N.E.2d 387 (1978).

47. *Id.* at 789, 379 N.E.2d at 390.

48. *Id.*, 379 N.E.2d at 389-90.

49. *Id.*, 379 N.E.2d at 390.

Instead of choosing among the various possible interpretations of "the child's present environment" suggested by the *Doyle* court, some decisions have dispensed with the presumption in favor of the current custodian when identifying the child's present environment proves difficult. In *Blonsky v. Blonsky*,⁵⁰ the original decree split custody between the father and the mother on a six-month basis. The court concluded that neither parent could benefit from the presumption favoring continuity. It therefore held the standards of subsections b(1)-(3) of UMDA section 409 inapplicable, and required only a finding of change of circumstances (and, presumably, the best interest of the child).⁵¹ However, if the purpose of the relevant provision is to promote the finality of the original custody decision, requiring the moving party to overcome the presumption of continuity of the arrangement would seem to further that policy.

Even more clearly contrary to the UMDA's purpose is the position taken by the court in *In re Marriage of Lawson*.⁵² The *Lawson* court concluded that because the child's present environment was with the legal non-custodian, the modification statute and its presumption of continuity was inapplicable.⁵³ The court directed the trial court on remand to determine the propriety of the change considering only the child's best interest. The UMDA's policies arguably would be better served by leaving the child with the physical custodian unless that custodian's environment was demonstrated to be harmful to the child.⁵⁴

When deciding whether there is a prior decree, the modification of which must meet section 409(b) standards, courts have also shown a tendency to conclude that there is no prior decree and rule *de novo*. This situation has arisen in cases in which a child has been in the custody of one parent for a period of time under a temporary decree, a decree procured by fraud, or no decree at all. If these situations are dealt with as if no prior decree had in fact been entered, the standard to be applied would be the child's best interest, and no presumption

50. 84 Ill. App. 3d 810, 405 N.E.2d 1112 (1980).

51. *Id.* at 816-17, 405 N.E.2d at 1117.

52. 44 Colo. App. 105, 608 P.2d 378 (1980).

53. *Id.* at 108, 608 P.2d at 380.

54. However, this common sense approach, which is admittedly speculative, has not been followed by all courts. *See, e.g., Groves v. Groves*, 173 Mont. 291, 567 P.2d 459 (1977). In *Groves*, the non-custodial mother was awarded temporary custody, having kept the child after a visit. The father had legal custody. On the mother's petition to modify the original decree, the *Groves* court looked to the legal custodian's environment as the relevant one. Although the mother had shown improvement in her circumstances, no evidence was introduced to discredit the father's past or present home. As a result, her motion was denied. *Id.* at 299, 567 P.2d at 463.

for the current custodian would operate, thus undermining the UMDA's policy favoring stability. In *In re Marriage of Kennedy*,⁵⁵ the court clearly held that the grant of a permanent decree was not a modification merely because the permanent placement differed from the temporary placement.⁵⁶ In *In re Marriage of Rinow*,⁵⁷ the child was left in the custody of the father for two years and was then transferred by a final order to the mother. The court concluded that the latter order was an original one and not a modification.⁵⁸

Where a prior decree has been nullified because of the fraud of one of the parties, courts are faced with a somewhat different issue. In *In re Custody of Mayes*,⁵⁹ the original decree gave the mother custody. This order was supplanted by a second order granting custody to the father. The second order, however, was procured by the father's fraud. The court did not want the father to benefit from his fraud; nor did it want to relocate the children automatically by reinstating the first decree. The court resolved the dilemma by considering the situation *de novo*.⁶⁰ It is obvious that in this type of situation the court's concern is not with providing stability, but with refusing to reward the wrongdoer by creating a presumption in his favor.⁶¹ Yet, the practical result is increased ease of modification.

Where a court did expressly align itself with the UMDA's policy of finality and did apply the presumption in favor of the temporary custodian by viewing the temporary order as a prior decree, the modification of which must meet the section 409(b) standards, it was reversed. In *In re Marriage of Little*,⁶² the trial court reasoned that since the children had been with the father for approximately one year, they would be placed in a state of limbo if no presumption for the father's continuing custody were applied.⁶³ The Washington

55. 94 Ill. App. 3d 537, 418 N.E.2d 947 (1981).

56. *Id.* at 544, 418 N.E.2d at 953.

57. 624 P.2d 365 (Colo. Ct. App. 1981).

58. *Id.* at 366. The court found, however, that the present environment did endanger the child, so it theoretically could have concluded that the modification standards had been met. *See id.* For cases distinguishing between permanent and temporary custody decrees, see *William H.Y. v. Myrna L.Y.*, 450 A.2d 406 (Del. 1982); *Spence v. Spence*, 2 Ohio App. 3d 280, 441 N.E.2d 822 (1981). *Cf. In re Marriage of Kondos*, 109 Ill. App. 3d 615, 440 N.E.2d 1046 (1982).

59. 86 Ill. App. 3d 644, 409 N.E.2d 12 (1980).

60. *Id.* at 647-48, 409 N.E.2d at 15-16.

61. *See, e.g.,* *Sexton v. Sexton*, 60 Ohio App. 2d 339, 397 N.E.2d 425 (1978) (reversing award of custody to father where he compelled mother to sign separation agreement); *In re Marriage of Mahalingam*, 21 Wash. App. 228, 584 P.2d 971 (1978) (father had defrauded mother into signing separation agreement).

62. *In re Marriage of Little*, 26 Wash. App. 814, 614 P.2d 240 (1980), *rev'd sub nom.* *Little v. Little*, 96 Wash. 2d 183, 634 P.2d 498 (1981).

63. *Id.* at 819, 614 P.2d at 243.

Supreme Court, however, was more concerned with preserving the flexibility of temporary placement and therefore reversed the lower court.⁶⁴

The above cases illustrate that the presumption in favor of the current custodian and the policy of finality which that presumption was meant to further have been avoided by some courts in interpreting the UMDA provisions on modification. More significantly, the Illinois legislature, only five years after enacting the UMDA, amended the modification provisions to eliminate the presumption in favor of the current custodian.⁶⁵

It is the position of this article that this judicial and legislative reluctance is appropriate. While the importance of stability in a

64. See 96 Wash. 2d at 198, 634 P.2d at 507. Another provision of the UMDA, § 403, does permit temporary awards based on the child's best interest. See UNIF. MARRIAGE AND DIVORCE ACT § 403, 9A U.L.A. 92, 201 (1979). While that section does not address the issue of what standard is applied when custody is finalized, it is arguable that the drafters intended a *de novo* hearing to insure the flexibility of the temporary placement. The overall concern with stability may have been secondary to the desire to preserve temporary orders as truly temporary. See *id.*

65. See ILL. REV. STAT. ch. 40, § 610 (Supp. 1984). The Illinois repeal is not total, however. If modification is sought within two years after the original decree is entered, the petitioning party must show, by affidavit, endangerment to the child (although the parties may stipulate to a modification). If modification is sought after the two-year period, the petitioning party must show, by clear and convincing evidence, that the request for modification is based on changed circumstances and is in the child's best interests. See *id.* Although there is thus some continued emphasis on stability in this compromise statute, the legislature viewed the change as a return to the best interest standard. According to State Representative Greiman, "[i]t returns to the traditional language of child custody cases in determining that the best interests of the child shall be the real and only consideration of a court in determining custody." TRANSCRIPTION OF DEBATE 28, ILL. HOUSE OF REPRESENTATIVES, 82D GEN. ASSEMBLY (Apr. 22, 1981) (statement of Rep. Greiman). Representative Currie expressed concern over relitigations of the custody issue as a result of the repeal. *Id.* at 31-32 (statement of Rep. Currie). Representative Greiman responded:

[W]e have used the phrase in Illinois courts, "the best interest of the child" for 150 years or so. In 1977 the Legislature adopted a new Act and imposed in Section 610 a rather impossible standard. Now, as a parent, one ought not to necessarily have to wait until the child is off the wall, until it's mental, physical, moral or emotional health is being destroyed. There are points before that where . . . a parent would want to intervene and have a right to intervene and should have a right if he or she is a concerned parent. I don't believe that there would be any increase in litigation . . . I don't believe there would be any more cases. But I think that the courts would be able to handle them in an intelligent way and not wait until there's a crisis in a child . . . in the raising of a child.

Id. at 32-33 (statement of Rep. Greiman). The Senate added the requirement of clear and convincing evidence. TRANSCRIPT OF THE PROCEEDINGS 57-58, ILL. SENATE, 82D GEN. ASSEMBLY (June 16, 1981). Senator Bloom saw the bill as a reversion "from the Clear and . . . Present Danger Standard to the Best Interest of the Child Standard. This amendment essentially adds back into it clear and convincing evidence that it is in the best interest of the child for custody to change." *Id.* (statement of Sen. Bloom).

child's life cannot be denied, that factor has been consistently taken into account when courts have determined a child's best interest. The psychological literature which serves as the foundation of the UMDA's policy of custodial stability does not compel the conclusion that it is necessarily in a child's best interest to remain with the original custodian unless endangered. In the absence of more compelling evidence that changes of custody are inherently harmful, the standard of the best interest of the child is the more appropriate standard since it allows a complete analysis of the child's needs.

III. THE PSYCHOLOGICAL AND SOCIOLOGICAL LITERATURE

The theoretical underpinning of the UMDA's position on modification appears to be that since a child of divorced or separated parents has experienced one disruption in his or her life, the child should not be subjected to a second change by being legally transferred from one parent to the other. This second change⁶⁶ is presumed to be so harmful that it is to be avoided unless the child is endangered.

It is very important to note initially that there has been no research directed specifically to the effect on children of custody modifications. On what, then, does the UMDA base its recommendations? The cited psychological support consists of two basic types of studies: maternal deprivation studies⁶⁷ and studies on the effects of divorce.⁶⁸

There are a number of reasons why the maternal deprivation studies are not particularly helpful in deciding whether modification is an evil to be avoided at almost any cost. Many of the deprivation

66. The UMDA does not limit modification only when there have been multiple changes of custody. It also applies to the first such modification. For the text of § 409, see note 7 *supra*.

67. See UNIF. MARRIAGE AND DIVORCE ACT § 409 commissioner's note (1979) (citing Watson, *supra* note 1). Watson in turn cites Richmond & Lipton, *Studies on Mental Health of Children with Specific Implications for Pediatricians*, in PREVENTION OF MENTAL DISORDERS IN CHILDREN 95 (G. Caplan ed. 1961). The Richmond and Lipton article analyzes the practical implications of maternal deprivation studies. Another obvious source was Robert Levy's analysis of the proposed Uniform Act prepared for the Special Committee on Divorce of the National Conference of Commissioners on Uniform State Law. See R.J. LEVY, *supra* note 35. See also Ellsworth & Levy, *Legislative Reform of Child Custody Adjudication*, 4 LAW & SOC'Y REV. 167 (1969) (republication with modification of Appendix I of R.J. LEVY, *supra* note 35). That article in turn relies heavily on parental deprivation studies. See *id.* (citing J. BOWLBY, *MATERNAL CARE AND MENTAL HEALTH* 44 (1952); K.M. SIMONSEN, *EXAMINATION OF CHILDREN FROM CHILDREN'S HOMES AND DAY-NURSERIES* (1947); S. VAN SENDEN THEIS, *HOW FOSTER CHILDREN TURN OUT* (1924); Yarrow, *Separation from Parents During Early Childhood*, in 1 REVIEW OF CHILD DEVELOPMENT RESEARCH 89 (1964)).

68. See, e.g., Gay & Tonge, *The Late Effects of Loss of Parents in Childhood*, 113 BRIT. J. PSYCHIATRY 753 (1967); McDermott, *Parental Divorce in Early Childhood*, 124 AM. J. PSYCHIATRY 1424 (1968).

studies confound separation of child and mother⁶⁹ with subsequent deprivation of the maternal caretaking. Because these studies often involve the child's removal to institutional care,⁷⁰ the ill effects attributed to separation may actually be the result of negative aspects of institutional care, such as poor stimulation or poor substitute mothering. Numerous studies⁷¹ have pointed out the ameliorating impact that good substitute care may have on the negative effects of separation. Richmond and Lipton note the importance of considering not only what the child is leaving but also what the child is moving toward.⁷² Yarrow,⁷³ Ainsworth⁷⁴ and Rutter⁷⁵ all note the possibilities of confusing the effects of separation with environmental deprivation and point out the benefits of interaction with individual mother figures. It is a fair assumption that the transfer of a child from one parent to another results in neither the environmental deprivation nor the lack of individual caretaking so pervasive in the institutions which have been the scene of many studies. In the majority of cases, there will be at least adequate individual substitute caretaking in the new home.

That the change involved in a modification of custody is from one parent to another makes the maternal deprivation studies irrelevant in the related sense that the change is not only to a decent environment, but to a familiar one. A move to an institution is a move to an unknown environment. Rutter, in summarizing the literature in the area, concluded that the maternal deprivation studies wholly confound the effects of a new environment and separation, noting evi-

69. John Bowlby has highlighted the problem of maternal deprivation. He concluded that a child needs to experience "a warm, intimate, and continuous relationship with his mother (or permanent mother-substitute) in which both find satisfaction and enjoyment." J. BOWLBY, *supra* note 67, at 11. The failure to have this relationship "may entirely cripple the capacity to make relationships." *Id.* at 12.

70. *See, e.g.*, A. FREUD & D. BURLINGHAM, 3 THE WRITINGS OF ANNA FREUD: INFANTS WITHOUT FAMILIES—REPORTS ON THE HAMPSTEAD NURSERIES 1939-1945 (1973); H. LEWIS, DEPRIVED CHILDREN (1954); Bowlby, *Some Pathological Processes Set In Train by Early Mother-Child Separation*, 99 J. MENTAL SCI. (1953); Spitz & Wolf, *Anaclitic Depression*, 2 PSYCHOANALYTIC STUDY CHILD 313 (1946). *See generally* M.D.S. AINSWORTH, DEPRIVATION OF MATERNAL CARE: A REASSESSMENT OF ITS EFFECTS 292 (1962); Katkin, Bullington & Levin, *Above and Beyond the Best Interests of the Child: An Inquiry into the Relationship Between Social Science and Social Action*, 8 LAW & SOC'Y REV. 669, 675 (1974) (analyzing social policy with regard to child custody); Yarrow, *Maternal Deprivation: Toward an Empirical and Conceptual Re-Evaluation*, 58 PSYCHOLOGICAL BULL. 459 (1961) (discussing institutionalization).

71. These studies constitute the major support for the UMDA provision. For a discussion of some of these studies, see Ellsworth & Levy, *supra* note 67, at 197-98.

72. *See* Richmond & Lipton, *supra* note 67, at 106.

73. *See* Yarrow, *supra* note 70, at 460, 475-76.

74. *See* M.D.S. AINSWORTH, *supra* note 70, at 295, 297, 304-05.

75. *See* RUTTER, MATERNAL DEPRIVATION REASSESSED 43-44, 69-70 (1972).

dence which indicated that separation stress may be reduced by the presence of familiar people and a familiar environment.⁷⁶

It appears that the child is able to form bonds with more than one person.⁷⁷ Ainsworth considered continuity to be important, but concluded that an exclusive mother-child pair relationship is not essential to avoiding deprivation because of the importance of the father.⁷⁸ Wootton cited one study for its observation of the importance "of the variety of sources (including the father) from whom children may draw the love and support necessary for their happiness."⁷⁹ Schaffer and Emerson found that only one-half of the eighteen-month olds studied had bonds exclusively with the mother.⁸⁰ In fact, one-third of the children were attached principally to their fathers. Although there was typically one particular strong attachment, most children showed a number of attachments of varying strengths. While there may be a hierarchy of attachments, studies have shown that the attachments may be similar in quality and serve similar emotional functions.⁸¹

It has been hypothesized that it is the disruption of the child's bonds rather than the separation itself which traumatizes the child.⁸² However, a change of custody from one parent to another need not disrupt all the child's bonds, since it is possible to maintain a bond with a person from whom one is separated.⁸³ Moreover, if the child has maintained a bond with the original non-custodial parent, as is typical in cases in which the non-custodial parent attempts a modification, a return to that parent is obviously not a disruption, but a reaffirmation, of that bond. So again, the maternal deprivation studies generally concern situations very much different from those in-

76. *Id.* at 35-39, 44-45, 125. See also M. RUTTER, MATERNAL DEPRIVATION 1972-1978: NEW FINDINGS, NEW CONCEPTS, NEW APPROACHES 50 (1979); Rutter, *Parent-Child Separation: Psychological Effects on the Children*, 12 J. CHILD PSYCHOLOGY AND PSYCHIATRY 233, 237-38 (1971).

77. John Bowlby, however, argued that a child attaches himself or herself primarily to one figure and that this attachment differs in kind from attachments to other figures. See J. BOWLBY, I ATTACHMENT AND LOSS (1969). If this were so, the change of custody from one parent to another would involve traumatic deprivation.

78. See M.D.S. AINSWORTH, *supra* note 70, at 292.

79. B. WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY 144 (1959) (citing H. LEWIS, *supra* note 70, at 75).

80. H. SCHAFER & P. EMERSON, THE DEVELOPMENT OF SOCIAL ATTACHMENTS IN INFANCY 32 (1964). See also H.B. BILLER, PATERNAL DEPRIVATION: FAMILY, SCHOOL, SEXUALITY AND SOCIETY 15-16, 25-29 (1974).

81. See, e.g., M. RUTTER, *supra* note 76, at 286-87.

82. See M. RUTTER, *supra* note 75, at 124.

83. *Id.* at 23, 81-82. See also B. WOOTTON, *supra* note 79, at 146 (noting that even Bowlby recognized that hospitalized children cheered up when able to see their mothers).

volved in modification proceedings, and as such, are of limited predictive value.

These studies do point out, however, that even when conditions are more traumatic than in the modification situation, there is tremendous variation in response, with some children emerging unscathed from the deprivation experiences. All reviews of the literature in the area comment on this phenomenon but express little understanding of the reasons behind it.⁸⁴ Variations in response were typically seen as the result of genetic temperamental differences which needed further study.⁸⁵ Rutter, in his most recent review of the research, predicts that this phenomenon is likely to constitute a major growth area in deprivation research.⁸⁶ Multiplicity of stresses, improved circumstances, the child's genetic and temperamental makeup, factors in the family, and the quality of schooling may all be relevant in determining how a child will respond to any particular trauma. Since there are so many variables influencing a child's response, it is suggested that the judicial and legislative approach denying modification in the absence of endangerment is too constrictive. Consideration of the child's best interest, taking these variables into account, is more appropriate.

If the maternal deprivation studies are of little support for the UMDA's non-modification stance, are the studies of the effects of divorce any more helpful? Again, there are no studies analyzing the effects of a change of custody. In fact, until very recently, there have been few studies on the effects of divorce.⁸⁷ In looking to divorce studies, the advocates of custodial stability must argue that a child has suffered so much from the disruption of the family that he must not be subjected to a second change. It is not at all clear that this conclusion follows, however, since it is not certain that the second disruption is of the same quality as the first. Assuming that the divorce of a child's parents is a painful and disruptive experience,⁸⁸

84. See, e.g., M.D.S. AINSWORTH, *supra* note 70, at 292-93, 342; M. RUTTER, *supra* note 75, at 51-52, 127; M. RUTTER, *supra* note 76, at 295-97; B. WOOTTON, *supra* note 79, at 138; McDermott, *supra* note 68, at 1424-25; Rutter, *supra* note 76, at 254; Yarrow, *supra* note 67, at 126-27; Yarrow, *supra* note 70, at 465, 474, 484-85.

85. See M.D.S. AINSWORTH, *supra* note 70, at 292-93, 342.

86. M. RUTTER, *supra* note 76, at 295-98.

87. Ellsworth & Levy, *supra* note 67, at 179.

88. See, e.g., Hetherington, Cox & Cox, *The Aftermath of Divorce*, in MOTHER/CHILD, FATHER/CHILD RELATIONSHIPS 149 (1978); Hetherington, *Divorce: A Child's Perspective*, 34 AM. PSYCHOL. 851, 851 (1979); Kelly & Wallerstein, *The Effects of Parental Divorce: Experiences of the Child in Early Latency*, 46 AM. J. ORTHOPSYCHIATRY 20 (1976); Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the Child in Later Latency*, 46 AM. J. ORTHOPSYCHIATRY 256 (1976) [hereinafter cited as Wallerstein & Kelly, *Later Latency*]; Wallerstein & Kelly, *The Effects of Parental Di-*

what is it that causes the pain? It has been suggested (at least for 9 or 10 year olds) that difficulties in adjustment may stem from a sense of "ruptured identity" because of the disintegration of the family structure.⁸⁹ The child's self-identity is closely tied to the external family structure, and he or she is developmentally dependent on the physical presence of both parents. It is submitted that once the family structure is destroyed, it does not follow that any further change is to be avoided. A review of the literature on the subject is informative.

Assuming that the pain of the divorce is repeated when a modification occurs, does the literature indicate that the second experience is so much worse that it is to be avoided at almost any cost? Assertions have been made in the maternal deprivation literature that discontinuity in custody is harmful in itself. However, Ainsworth, who subscribes to that notion, noted the need for additional research in the area.⁹⁰ Bowlby's study of delinquents is often cited as evidence of the ill effects of repeated separations, but that study suffers from many of the factors affecting the maternal deprivation studies noted above.⁹¹ Some have argued that multiple foster home placements are traumatic.⁹² However, these changes involve change to the unknown and are therefore not useful models. As Rutter notes: "It is generally supposed that children who have experienced separation once become sensitized so that later similar experiences are likely to be especially traumatic for them, . . . but there is remarkably little evidence on this point."⁹³ He also calls for more research.

There is evidence that certain conditions may ameliorate the trauma of subsequent changes in custody. The possibility of ameliorative factors would suggest an individual approach to modification requests. Factors emerging as important in a child's post-divorce adjustment include the continuation of contact with the non-custodian and the quality of that relationship.⁹⁴ If the party seeking modifica-

orce: *Experiences of the Preschool Child*, 14 J. AM. ACAD. CHILD PSYCHIATRY 601 (1975) [hereinafter cited as Wallerstein & Kelly, *Preschool Child*]; Wallerstein & Kelly, *The Effects of Parental Divorce: The Adolescent Experience*, in 3 THE CHILD IN HIS FAMILY: CHILDREN AT PSYCHIATRIC RISK 479 (1974) [hereinafter cited as Wallerstein & Kelly, *Adolescent Experience*].

89. Wallerstein & Kelly, *Later Latency*, *supra* note 88, at 263-64.

90. M.D.S. AINSWORTH, *supra* note 70, at 335.

91. See J. BOWLBY, FORTY-FOUR JUVENILE THIEVES: THEIR CHARACTERS AND HOME LIFE (1946).

92. See Yarrow, *supra* note 67, at 126, 130.

93. M. RUTTER, *supra* note 75, at 33. See also Longfellow, *Divorce in Context: Its Impact on Children*, in DIVORCE AND SEPARATION: CONTEXT, CAUSES AND CONSEQUENCES 292, 306 (1979).

94. See, e.g., J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 207-08, 215-18, 235, 307 (1980);

tion is willing to have the other parent's relationship with the child continue, some of the negative aspects of the change may be counterbalanced.

Children tend to adjust to divorce more easily when they are not involved in their parents' conflict and where familial discord has decreased.⁹⁵ The possibility of responsible parenting should thus be considered by the judge in assessing the effect of granting the modification.⁹⁶ The work done in this area shows a broad range of response to trauma on the part of the children.⁹⁷

There is no persuasive evidence demonstrating that children suffering the trauma of divorce (or modification) suffer long-term ill effects.⁹⁸ Wallerstein and Kelly reported that five years after the

Kelly, *The Visiting Relationship After Divorce: Research, Findings and Clinical Implications*, in CHILDREN OF SEPARATION AND DIVORCE: MANAGEMENT AND TREATMENT 338, 339-40 (1981); Hess & Camara, *Post-Divorce Family Relationships as Mediating Factors in the Consequences of Divorce for Children*, 35(4) J. SOC. ISSUES 79, 90-92, 94 (1979); McDermott, *supra* note 68, at 1426; Wallerstein & Kelly, *Children and Divorce: A Review*, 24 SOCIAL WORK 468, 471 (1979).

95. See J. WALLERSTEIN & J. KELLY, *supra* note 94, at 224, 316-17; Hetherington, *supra* note 88, at 854-55; Hetherington, Cox & Cox, *supra* note 88; Longfellow, *supra* note 93, at 292-94; Wallerstein & Kelly, *Adolescent Experience*, *supra* note 88, at 497; Raschke & Raschke, *Family Conflict and Children's Self-Concepts: A Comparison of Intact and Single-Parent Families*, 41 J. MARRIAGE & FAM. 367, 372 (1979); Rosen, *Some Crucial Issues Concerning Children of Divorce*, 3(1) J. DIVORCE 19, 24-25 (1979).

96. One may argue that following a less strict standard for modification will prompt a greater number of modification petitions, along with the discord those petitions inevitably create regardless of their merits. If a petition is without merit, the child will at least not have to experience the stress of a change of custody since the petition would obviously not be granted. In any case, it is not at all clear that the strict standard discourages parents from filing suit. Illinois, which adhered to the strict standard for approximately five years, experienced a significant relitigation rate. And it can be argued that the strict standard may prompt a greater number of original custody battles by non-custodians who view such suits as their only opportunity for custody. The discord may be experienced, then, even under the strict standard, and at a time when the child is living with both parents and may not be shielded from the controversy.

97. See, e.g., Hetherington, *supra* note 88, at 852; Kelly & Wallerstein, *supra* note 88, at 23-31; McDermott, *supra* note 68, at 1426-29; Wallerstein & Kelly, *Later Latency*, *supra* note 88, at 257-68; Wallerstein & Kelly, *Adolescent Experience*, *supra* note 88, at 485-503.

98. Authors reviewing the research on the effects of divorce conclude that there are no consistent findings regarding the short or long term impacts of divorce on children. They suggest that an investigation into more isolated variables such as marital conflict and the custodian's adjustment may be profitable. See Lamb, *The Effects of Divorce on Children's Personality Development*, 1(2) J. DIVORCE 163, 171 (1977); Longfellow, *supra* note 93, at 287, 305-06; Magrab, *For the Sake of the Children: A Review of the Psychological Effects of Divorce*, 1(3) J. DIVORCE 233, 236 (1978); Raschke & Raschke, *supra* note 95, at 367-69. Moreover, there is a paucity of long-term studies. See Pfeffer, *Developmental Issues Among Children of Separation and Divorce*, in CHILDREN OF SEPARATION AND DIVORCE: MANAGEMENT AND TREATMENT 20, 31 (1981); Magrab, *supra*, at 236.

beginning of their research, sixty-three percent of the children studied either were doing very well or had resumed developmental progress while still experiencing some sadness.⁹⁹ Thirty-seven percent of the children were suffering moderate to severe depression which manifested itself in a variety of behavioral problems including delinquency, anger, poor learning, and sexual promiscuity.¹⁰⁰ Gay and Tonge, on the other hand, did not find a relationship between parental loss by separation and depression, but did find a relationship between marital disharmony in women and occupational maladjustment in men, and loss by divorce.¹⁰¹ Most recently, Kulka and Weingarten examined the relationship between experiencing divorce before age sixteen and adult adjustment.¹⁰² Using data from two national cross-section surveys conducted approximately twenty years apart, they concluded that "these early experiences have at most a modest effect on adult adjustment."¹⁰³ Clearly, one cannot say with authority that experiencing a divorce has long-term effects on a child's adjustment. It would be even more difficult to conclude that the long-term effects of experiencing a change of custody are so severe that modification ought not occur.

Ordering priorities so that the stability of the custodial situation outweighs all factors except for the endangerment of the child ignores the great importance of those other factors. For example, it has been tentatively suggested that the success of any custody arrangement may depend upon the child's amenability toward it.¹⁰⁴ How should this factor be balanced with that of custodial stability in a situation in which the child decides he would like to live with the non-custodian? This possible clash of policies may dictate a more flexible approach than that provided under the UMDA.

Lastly, precluding modification unless the child is endangered discounts possible benefits resulting from a change. Richmond and

99. Wallerstein & Kelly, *supra* note 94, at 470-71. See also J. WALLERSTEIN & J. KELLY, *supra* note 94, at 209-13.

100. *Id.*

101. See Gay & Tonge, *supra* note 68, at 758.

102. Kulka & Weingarten, *The Long-Term Effects of Parental Divorce in Childhood on Adult Adjustment*, 35(4) J. SOC. ISSUES 50 (1979).

103. *Id.* at 73. See also Crossman, Shea & Adams, *Effects of Parental Divorce During Early Childhood on Ego Development and Identity Formation of College Students*, 3(3) J. DIVORCE 263, 268 (1980) (divorce background not predictive of lower scores on measures of ego development, locus of control and identity achievement of college students).

104. Ellsworth and Levy cite a study by Malone in which he found a statistically significant difference in the success rate of placements to which the children had agreed and that of placements other children had rejected. Ellsworth & Levy, *supra* note 67, at 200-01 (citing Malone, in CHILDREN AWAY FROM HOME (1942)).

Lipton point out that mastering the separation experiences is part of the child's normal development and may enhance his adaptability. Separation may thus have some positive results.¹⁰⁵ Weiss criticizes the focus on the pathogenic potential of a divorce, arguing instead that "for many children, both younger and older, the new demands on them for autonomy and responsibility may lead to growth."¹⁰⁶

This article does not suggest that custody modifications are a blessing and should be easily granted. Its point is that the psychological literature cited does not support the policy reflected in the UMDA provision on modification. Stability and continuity are certainly important in development, and modifications of custody awards should not be granted lightly. However, the literature on which the UMDA is based does not lead to the conclusion that there should be no modification unless the child is endangered. Such a stagnant approach is inappropriate in the common situation in which a child's welfare and "best interests" change over time.

IV. STABILITY AS A FACTOR

The more appropriate approach, followed by most jurisdictions, requires the petitioner to show both a change of circumstances sufficiently material to justify reopening the custody issue and that modification is in the best interest of the child.¹⁰⁷ The issue of stability is appropriately considered as a factor within this framework along with other values.

A required showing of a material change of circumstances before a court will entertain a modification petition creates a limitation on the availability of modifications. Courts, noting the importance of stability in custody arrangements, have imposed just such a requirement.¹⁰⁸ In *Rice v. Rice*,¹⁰⁹ the petitioner alleged that the changed condition justifying modification was a slight reduction in the frequency of visitation. The appellate court reversed the initial grant of

105. Richmond & Lipton, *supra* note 67, at 110.

106. Weiss, *Growing Up a Little Faster: The Experience of Growing Up in a Single-Parent Household*, 35(4) J. SOC. ISSUES 97, 110 (1979).

107. *See, e.g.*, *Rice v. Rice*, 415 A.2d 1378 (D.C. 1980); *Wiggins v. Wiggins*, 411 So. 2d 263 (Fla. Dist. Ct. App.), *petition denied*, 418 So. 2d 1281 (Fla. 1982); *Languirand v. Languirand*, 350 So. 2d 973 (La. Ct. App.), *cert. denied*, 352 So. 2d 236 (La. 1977); *Stevens v. Stevens*, 448 A.2d 1366 (Me. 1982); *Jordan v. Jordan*, 50 Md. App. 437, 439 A.2d 26 (1982); *Hogge v. Hogge*, 649 P.2d 51 (Utah 1982).

108. *See, e.g.*, *Gratrix v. Gratrix*, 652 P.2d 76 (Alaska 1982); *Perreault v. Cook*, 114 N.H. 440, 322 A.2d 610 (1974); *Tucker v. Tucker*, 288 N.C. 81, 216 S.E.2d 1 (1975); *Mackey v. Mackey*, 9 Or. App. 113, 496 P.2d 21 (1972); *Smith v. Clements*, 424 S.W.2d 326, (Tex. Civ. App. 1968); *Hogge v. Hogge*, 649 P.2d 51 (Utah 1982).

109. 415 A.2d 1378 (D.C. 1980).

the modification petition on the ground that the change of circumstances was insubstantial. The court stated that the rule requiring such a change existed precisely to prevent trauma from modifications that occurred too frequently and were pointless.¹¹⁰ In *Stevens v. Stevens*,¹¹¹ the Maine court reversed a grant of modification petition, noting that the case was an illustration of why a change of circumstances is required. The court stated that “[r]epeated hearings on such motions put further strain on the relationship between the divorced parents and have an unsettling effect on the children that is itself not in their best interests.”¹¹² Similarly, in *Jordan v. Jordan*,¹¹³ the Maryland appellate court upheld a denial of a modification petition, stating that the reason for the requirement that a change of circumstances be shown is that the advantages of continuity usually far outweigh the advantages of change.¹¹⁴

Stability is obviously considered when determining what is in a child’s best interest once a change of circumstances is found.¹¹⁵ In *Hogge v. Hogge*,¹¹⁶ the Utah Supreme Court directed that, in deciding a petition for modification, the trial court must “consider the changes in circumstance along with all other evidence relevant to the welfare or best interests of the child, including the advantage of stability in custody arrangements that will always weigh against changes in the party awarded custody.”¹¹⁷ In *Jordan*, the court stated that stability,

110. *Id.* at 1383.

111. 448 A.2d 1366 (Me. 1982).

112. *Id.* at 1370.

113. 50 Md. App. 437, 439 A.2d 26 (1982).

114. *Id.* at 443, 439 A.2d at 29.

115. *See, e.g.*, *Messer v. Messer*, 259 Cal. App. 2d 507, 66 Cal. Rptr. 417 (1968) (court considered “unwholesome tension” in mother’s home and daughter’s “anxious pleas” to stay with father and grandmother); *Cheek v. Ricker*, 431 So. 2d 1139 (Miss. 1983) (court emphasized need for “stabilizing influence” of knowing where home is following divorce); *In re Marriage of Roedel*, 550 S.W.2d 208 (Mo. Ct. App. 1977) (order requiring child to fly twelve times a year unattended to visit mother would be disruptive, upsetting and destabilizing); *Scripter v. Scripter*, 190 Neb. 317, 208 N.W.2d 85 (1973) (not in child’s best interest to “change custody and bandy the child back and forth between parents”); *Adams v. Adams*, 86 Nev. 62, 464 P.2d 458 (1970) (mother’s physical and emotional problems, including drug use, warranted denial of custody); *Pact v. Pact*, 70 Misc. 2d 100, 332 N.Y.S.2d 940 (N.Y. Fam. Ct. 1972) (awareness of stability in home essential during child’s formative years); *Silseth v. Levang*, 214 N.W. 2d 361 (N.D. 1974) (court averse to changing custody when child had been living happily in one place for period of time); *Pirrong v. Pirrong*, 552 P.2d 383 (Okla. 1976) (domineering, paranoid, aggressive and obsessive father improper custodian); *Melzer v. Witsberger*, 299 Pa. Super. 153, 445 A.2d 499, (1982) (child needs a stable, comforting shelter of some objective judgment); *Ohland v. Ohland*, 141 Vt. 34, 442 A.2d 1306 (1982) (child deserves all the stability a court can make available).

116. 649 P.2d 51 (Utah 1982).

117. *Id.* at 54.

not change, is in the child's best interest.¹¹⁸ The court in *Languirand v. Languirand*¹¹⁹ placed great value on the stability of the child's environment and on factors such as the age and sex of the child as well as the physical and emotional health of all the parties involved.¹²⁰

It is obvious that courts are concerned with stability and have given it great, but not necessarily determinative, weight within the framework of change of circumstances and the child's best interest standards. The court in *William H. Y. v. Myrna L. Y.*¹²¹ made an explicit plea to the legislature to repeal the UMDA provisions for being too restrictive, although it reversed the trial court because the case should have been treated as an initial custody award. The *Myrna L. Y.* court expressed its interest in preventing numerous custody changes, but was afraid that the goal "may be frustrated by ignoring full consideration of the best interests criteria and general welfare of the child, including his rational wishes as to custody."¹²²

The anomalous result of a strict reading of the UMDA would be a denial of the very policy of stability the UMDA seeks to further. The UMDA's expressed preference for the custodian supports stability only by precluding a transfer to the non-custodian. By that unilateral approach, the UMDA ignores any instability in the custodian's situation which does not actually endanger the child. Stability in both situations is important and should be relevant in the determination of custody. Some cases under the UMDA which have creatively interpreted its language can be read to support the policy of stability. For example, the court in *In re Marriage of Nodot*¹²³ formally granted the modification on grounds of endangerment, but in actuality looked to the custodian's contemplated moves and the attendant disruptions for the child.¹²⁴

When not restrained by the UMDA modification provision, courts may more clearly weigh the respective disruptions and instability of both parents. In *Wood v. Wood*,¹²⁵ modification was granted

118. See *Jordan*, 50 Md. App. at 443, 439 A.2d at 29. For a further discussion of *Jordan*, see text accompanying notes 113-14 *supra*.

119. 350 So. 2d 973 (La. Ct. App.), *cert. denied*, 352 So. 2d 236 (La. 1977).

120. *Id.* at 976.

121. 450 A.2d 406 (Del. 1982).

122. *Id.* at 410.

123. 81 Ill. App. 3d 883, 401 N.E.2d 1189 (1980).

124. *Id.* at 890-91, 401 N.E.2d at 1194. See also *Russell v. Russell*, 80 Ill. App. 3d 41, 399 N.E.2d 212 (1979) (custodian frequently changed residence); *In re Marriage of Farris*, 69 Ill. App. 3d 1042, 388 N.E.2d 232 (1979) (custodian failed to provide stable home); *In re Marriage of Frasier*, 33 Wash. App. 445, 655 P.2d 718 (1982) (custodian frequently moved and took child on prison visits).

125. 333 So. 2d 826 (Ala. Civ. App. 1976).

because of the custodian's instability and disruption in the child's life resulting from both the custodian's removal of the child from school for a six-week trip and the custodian's attempted suicide.¹²⁶ In *Galeener v. Black*,¹²⁷ the disruption to the child resulting from the custodian's proposed move to another state was a reason justifying the change of custody to the father.¹²⁸ These cases clearly illustrate that if stability is viewed as important, then stability in all aspects should be considered.

V. CONCLUSION

In summary, it appears that judicial distaste for the UMDA provision on modification is well-founded. The psychological and sociological literature does not support the position that stability should override all other concerns. Some jurisdictions have correctly considered the element of stability within the more traditional modification analysis. Those jurisdictions which have enacted the UMDA provision should return to the change of circumstances and best interest analysis where a more complete consideration of all relevant factors, including a more complete and general analysis of stability, is possible. If the concern of the UMDA's drafters is with an uneducated judiciary, more emphasis should be put on cooperation between the legal and mental health professions. The answer, however, is not to lock the judiciary into a fixed response to a complex problem.

126. *Id.* at 828-29.

127. 606 S.W.2d 245 (Mo. Ct. App. 1980).

128. *Id.* at 248. *See also* Poret v. Martin, 434 N.E.2d 885 (Ind. 1982) (custodian proposed to move from state); Perreault v. Cook, 114 N.H. 440, 322 A.2d 610 (1974) (non-custodian could provide greater stability).