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# The Primary Caretaker Presumption: Have We Been Presuming Too Much?

PAUL L. SMITH\*

The court officer barks, "all rise," and while exiting the courtroom, I see out the corner of my eye the mother of the two children collapse into the arms of her own mother. The father's family has rushed to his side. It would not surprise me if they pick him up on their shoulders and carry him out of the courtroom for a victory celebration. As the door to my chambers closes, I also collapse into my chair. My stomach aches and a feeling of frustration floods over me. The decision I have made will affect two children's lives forever. They will have graduations, weddings, and holidays to share with their parents, but separately. Instead of working together, these two parents have decided to do everything they can to hurt each other and somehow try to even the score. Can we not do something better? I think we can.<sup>1</sup>

## INTRODUCTION

Divorce is an issue which almost every American, in one way or another, has to deal with. As adults, we can try to explain the rational reasons for divorce and we can cope with the consequences. Children who are affected by divorce, however, may not understand the personal, practical, or legal reasons for divorce, and they may be confused and upset by the repercussions.

Divorce is increasing at an alarming rate. Nearly fifty percent of all marriages in the United States now end in divorce. An estimated forty percent of all children born to married mothers will be affected by the divorce of their parents. In addition, there has been a dramatic rise in the number of nontraditional families in recent decades. . . .

[I]t is not surprising that approximately one million children are affected by custody determinations each year.<sup>2</sup>

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\*J.D., December 1999, Indiana University School of Law—Bloomington. I would like to thank my parents, Earl and Darla Smith, for their emotional and financial support, which has always allowed me to achieve anything I have set my mind to. Also, I would like to thank my fiancée, Bryn Wittmayer, for her constant love and support which helped guide me through a busy second year of law school which included the writing of this Note. Finally, I would like to thank Professor Susan Williams for her guidance in helping me select the subject matter for this Note and her helpful comments on earlier versions of this Note.

1. Judge Don R. Ash, *Bridge over Troubled Water: Changing the Custody Law in Tennessee*, 27 U. MEM. L. REV. 769, 772 (1997). Judge Ash is a family court judge in Tennessee whose primary concern is how to protect children who are the true victims of all custody disputes. In this passage he describes the helplessness he feels as a judge because there often is not a good standard or guideline to assist those in authority in making important decisions like deciding which parent should receive custody in a divorce.

2. Debra L. Swank, *Day Care and Parental Employment: What Weight Should They Be Given in Child Custody Disputes?*, 41 VILL. L. REV. 909, 928 (1996) (footnote omitted); see also Ash, *supra* note 1, at 773 (providing additional statistical information about divorce in the United States); Susan Beth Jacobs, *The Hidden Gender Bias Behind "the Best Interest of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845, 847-48 (1997) (same).

When making custody determinations, it is these one million children to whom the family courts of America should be tailoring their decisions.

Several different approaches for making custody determinations have been tried and continue to be tried. Many states seek to protect the "best interest of the child." Other jurisdictions presume that divorcing parents will have joint custody. Others make presumptions about who should be awarded custody based on the child's age or sex. Finally, some states follow, to an extent, a standard which was introduced to the legal community in 1981 and which has since increased in popularity: the primary caretaker presumption.

The primary caretaker presumption, although only in effect as the sole factor for child custody determinations in one state, West Virginia, has received a significant following in the academic journals in recent years.<sup>3</sup> However, the primary caretaker presumption has been criticized from all sides of the child custody debate in the past ten years.<sup>4</sup> Father's rights groups have claimed that it is actually a maternal preference disguised as a gender neutral rule.<sup>5</sup> Mother's rights advocates argue that the vague

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3. See, e.g., Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767, 818-19 (1997); Christopher L. Blakesley, *Louisiana Family Law*, 52 LA. L. REV. 607, 640-41 (1992); Phyllis T. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?*, 8 BYU J. PUB. L. 75, 83-85 (1993); Francis J. Catania, Jr., *Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes*, 71 NEB. L. REV. 1228, 1254-55 (1992); Harriet Newman Cohen, *Finding Fairness in Financial Settlements*, FAM. ADVOC. Summer 1994, at 57, 59; Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 770-73 (1988); Jennifer E. Horne, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN. L. REV. 2073, 2087 (1993); Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 49-56 (1995-96); Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 345 (1993); Anna Maria Maxwell, *Court Extends Primary Caretaker Doctrine to Cases in Which Neither Parent Takes Clear Responsibility for the Parental Duties*, 48 S.C. L. REV. 113, 115-16 (1996); Kathryn L. Mercer, *The Ethics of Judicial Decision-making Regarding Custody of Minor Children: Looking at the "Best Interests of the Child" and the "Primary Caretaker" Standards as Utility Rules*, 33 IDAHO L. REV. 389, 403-14 (1997); Marcia O'Kelly, *Blessing the Tie That Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, 533-34 (1987); J. Thomas Oldham, *The American Law Institute's Principles of the Law of Family Dissolution: Its Impact on Family Law*, 7 TEX. J. WOMEN & L. 161, 163-64 (1998); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 14 WOMEN'S RTS. L. REP. 175, 177-78 (1992).

4. See, e.g., Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 850-51 (1998); Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1549 (1994); Jacobs, *supra* note 2, at 897.

5. See, e.g., Bookspan, *supra* note 3, at 85; Judith Band Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 RUTGERS L. REV. 1141, 1153 (1991); Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 916 (1998).

“unfitness”<sup>6</sup> exception to the presumption leaves too much discretion to a disproportionately male state judiciary<sup>7</sup> and sets a double standard for men and women.<sup>8</sup> Finally, feminists argue that the presumption entrenches gender roles in society as related to the upbringing of children.<sup>9</sup>

In Part I of this Note, I will examine the importance of the primary caretaker presumption as it is used in child custody determinations today and why the debate on the subject has not been as extensive as it should be. In Part II, I will examine what the primary caretaker presumption is and how it is applied in its most common forms. Part III explores the various criticisms of the presumption from many different perspectives. Also in Part III, I will examine some of the under-reported criticisms of the presumption and explain why I think the presumption needs more study and more debate before it is further implemented in the family courts of this country. Finally, in Part IV, I scrutinize the impact that the primary caretaker presumption has on children and the way children are treated in the legal system. The primary caretaker presumption fails where far too many custody rules have failed in the past—it does not treat children as human beings and fails to recognize the role that children must play in the custody determination process.

#### I. THE IMPORTANCE OF EXAMINING THE PRIMARY CARETAKER PRESUMPTION

Although there has been a great deal of scholarship with references to the primary caretaker presumption within the past eighteen years, it is important to reexamine it today in a slightly different context.<sup>10</sup> The problem with most of the recent references to this subject in the academic literature is twofold. First, it has focused on some peripheral effects of the primary caretaker presumption as implemented in West Virginia and Minnesota. This discussion has not dealt with whether the factors identified in the presumption actually help the courts identify who the primary caretaker of a child is or whether the factors help identify who the better custodial parent will be.<sup>11</sup> Second, most of the literature seems to suggest that the primary caretaker presumption is rather insignificant because it is only currently used in its “pure”<sup>12</sup> form in one state, West Virginia. What this does not recognize is that the

6. Krista Carpenter, *Why Are Mothers Still Losing: An Analysis of Gender Bias in Child Custody Determinations*, 1996 DET. C.L. MICH. ST. U. L. REV. 33, 53.

7. *See id.*

8. *See, e.g.*, Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291, 292-93 (1992).

9. *See, e.g.*, Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 256 (1998).

10. For a detailed listing of the academic discussion of the primary caretaker presumption, see discussion *supra* text accompanying notes 2-9

11. Some writers have advanced the notion that the primary caretaker presumption was never intended to grant custody to the “best” parent, but instead is more like a reward for the parent who sacrificed the most for their children during the course of the marriage. *See infra* Part III.B.

12. Sack, *supra* note 8, at 320. Sack uses the term “pure” to describe the standard when the primary caretaker presumption is used as the sole rule for determining custody. She would

primary caretaker presumption continues to be one factor that many states use when making a best interest of the child custody determination, and those states often cite West Virginia for the primary caretaker standard that they use.

The question that should always be asked first when evaluating any rule that uses proxy factors is do those proxies represent what they are supposed to represent? In the case of the primary caretaker presumption, there are approximately ten factors that courts are to use in evaluating who the primary caretaker of a child was during the marriage.<sup>13</sup> When evaluating this presumption, the first thing we ought to do is determine if the enumerated factors are, in fact, a good substitute for determining which parent was the primary caretaker. The academic discussion up to this point has not addressed this issue, choosing instead to assume that these factors are good proxies, and jumping straight to a defense or a critique of the presumption. This is putting the cart before the horse and evaluating the presumption before we truly know what the presumption represents.

Furthermore, the primary caretaker presumption has only been given cursory coverage in legal academia as an insignificant doctrine in the big picture of child custody determinations.<sup>14</sup> This may be because only one state uses the presumption as its sole test in making custody determinations.<sup>15</sup> Or it could be because commentators believe that the presumption is in decline in the wake of the Minnesota legislature's decision to abandon the presumption in favor of returning to a modified best interest determination.<sup>16</sup> It is possible that because "the great majority of custody cases are settled by negotiation at some stage,"<sup>17</sup> many scholars do not feel that it is important to evaluate a rule which will only be used in the rare circumstance that the custody determination gets to the point of adjudication. Finally, it could be because the Uniform Marriage and Divorce Act continues to read that "[t]he court shall

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classify the use of the presumption in West Virginia as "pure," although she would seek to modify the broad "unfitness" exception that has always been part of West Virginia's primary caretaker presumption. *See id.* at 303, 321.

13. *See infra* text accompanying note 35.

14. Only two prominent law journal pieces since 1990 have taken an extensive look at the primary caretaker presumption, and even those do not address the initial question posed by this Part; that is, whether or not we even understand what the primary caretaker presumption is. *See* Mercer, *supra* note 3, at 403-14; Sack, *supra* note 8, at 292, 300-28. Mercer goes on to note that "the literature is void of an analysis on how the standard is used by judges and whether it is indeed 'workable.'" Mercer, *supra* note 3, at 414.

15. West Virginia adopted the presumption in *Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981), and continues to use the presumption to this day. Minnesota courts experimented with the presumption beginning in 1985. *See* *Pikula v. Pikula*, 374 N.W.2d 705, 713-14 (Minn. 1985). The decision of *Pikula* was legislatively overturned in 1989 because lawmakers felt that the primary caretaker presumption was too rigid and did not give judges enough discretion to decide individual cases. *See* MINN. STAT. ANN. § 518.17(13) (West Supp. 1999) (stating that "[t]he primary caretaker factor may not be used as a presumption in determining the best interests of the child").

16. *See* Gary Crippen, *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*, 75 MINN. L. REV. 427, 438-39 (1990).

17. Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of Law: On Dividing the Child*, 92 MICH. L. REV. 1808, 1817 (1994).

determine custody in accordance with the best interest of the child” and does not lend any credence to any form of a primary caretaker presumption.<sup>18</sup>

Whatever the reason for the legal community’s neglect of the primary caretaker presumption, it is unfortunate because the presumption still plays a vital role in custody determinations across the country. The primary caretaker presumption is a vital part of a relatively new form of making custody determinations called “approximation.” In a system of approximation, a judge tries to approximate the amount of time and effort each parent expended raising the children during the marriage and award the parents the respective amount of custody or decisionmaking power in the postdivorce childrearing.<sup>19</sup>

Therefore, in most cases the law’s goal should be to approximate, to the extent possible, the predivorce role of each parent in the child’s life. Because this role is most likely to reflect the real preferences of each parent, and also to predict actual caretaking arrangements, an “approximation” rule serves the law’s traditional objectives of promoting continuity and stability for the child more effectively than do existing rules. Moreover, again because it is more likely to reflect parents’ actual preferences than other custody frameworks, an approximation rule can reduce the heavy costs of bargaining over custody by reducing the incentive to exchange entitlements.<sup>20</sup>

Although the approximation standard has not been widely adopted, it is an interesting new approach and may have a role to play in joint custody states in determining which parent gets a larger amount of physical custody. Additionally, courts and legislatures across the country, a majority of which use a best interest standard, continue to incorporate the primary caretaker presumption as one of the factors in determining what would be in the best interest of the child.<sup>21</sup> “[T]he primary caretaker presumption . . . concept ‘inheres’ in the best interest factors.”<sup>22</sup> “Courts in

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18. UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 197-98 (1979).

19. See Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 617 (1992).

20. *Id.*

21. See, e.g., Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1, 14 (1984) (finding the preference for placing a child with the primary caretaker to be “[o]ne of the most important factors in child custody determination”); Blakesley, *supra* note 3, at 640 (arguing that the primary caretaker presumption realizes the “psychological parent” vision of some best interest standards); Bookspan, *supra* note 3, at 84; Federle, *supra* note 4, at 1548; Mary Kate Kearney, *The New Paradigm in Custody Law: Looking at Parents with a Loving Eye*, 28 ARIZ. ST. L.J. 543, 557 n.89 (1996) (noting that commentators and numerous state courts endorse primary caretaker standard); Mercer, *supra* note 3, at 401; Teitelbaum, *supra* note 17, at 1836 (arguing that “California judicial decisions . . . plainly indicate . . . a very strong preference[] for parents who acted as primary caretakers before the separation, finding such placements to be generally consistent with the child’s best interests”).

22. William A. Neuman & Tracy Vigness Kolb, *A Woman’s Touch*, 72 N.D. L. REV. 953, 962 (1996) (quoting *Gravning v. Gravning*, 389 N.W.2d 621, 622 (N.D. 1986)). Judge Levine, in her dissent from the *Gravning* majority opinion, extols the virtues of the primary caretaker presumption. “First, it will generally be in the child’s best interest to be in the primary caretaker’s custody . . . [because t]he intimate interaction of the primary caretaker with the

at least sixteen states have identified and showed some favor for the parent who had been the primary caregiver before the couple separated. Furthermore, courts from at least seven of these states have identified primary caretaking as a significant factor in assessing the child's best interests."<sup>23</sup> Some commentators have even argued that there is a trend in the laws of many states towards saying that it is always in the child's best interest to be with his or her primary caretaker.

At the present time, a majority of states have adopted the theory that the best interest of the child is served by awarding custody to the parent who is the "primary caretaker." The primary caretaker has been defined as "the person who, before the divorce, managed, monitored the day-to-day activities of the child, and met the child's basic needs including: feeding, clothing, bathing, and protecting the child's health."<sup>24</sup>

It is this line-blurring between different standards for custody determinations that makes it incredibly important for the legal community not to discount any particular standard because it has not been implemented in its fullest form in a majority of jurisdictions.

Finally, even the American Law Institute has proposed adopting a version of the primary caretaker presumption.<sup>25</sup> The primary caretaker presumption is a custody standard which has achieved prominence in family court jurisprudence and ought to be thoroughly evaluated by the legal community; this is what I intend to do in this Note.

## II. EXPLANATION OF THE PRIMARY CARETAKER PRESUMPTION

The primary caretaker presumption was first defined and implemented as a standard in custody decisions by West Virginia Supreme Court of Appeals Justice Neely<sup>26</sup> in *Garska v. McCoy*.<sup>27</sup>

child creates a vital bonding between parent and child." *Gravning*, 389 N.W.2d at 625 (Levine, J., dissenting). "Second, continuity of care with the primary caretaker is the most objective, and perhaps only predictor of a child's welfare about which there is agreement and which can be competently evaluated by judges." *Id.* "Third, the primary caretaker rule will benefit the negotiation process between divorcing parents." *Id.* "Finally, on its face, at least, the primary caretaker rule is gender neutral; it may benefit either parent." *Id.*

Throughout her judicial career, until her retirement in 1996, Justice Levine continued to be a strong proponent of the primary caretaker presumption in North Dakota, even though it was never adopted in its fullest form in that state.

23. Crippen, *supra* note 16, at 434 (footnote omitted). The sixteen states are California, Delaware, Florida, Iowa, Massachusetts, Minnesota, Missouri, Montana, New York, North Dakota, Ohio, Oregon, Pennsylvania, Utah, Vermont, and West Virginia. *See id.* at 434 n.26, 435 n.27, 436 nn.28-30, 438 nn.34 & 41-42.

24. Swank, *supra* note 2, at 925 (footnote omitted) (quoting Sanford N. Katz, "That They May Thrive" *Goal of Child Custody: Reflections on the Apparent Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker Presumption*, 8 J. CONTEMP. HEALTH L. & POL'Y 123, 133 (1992)).

25. *See* Oldham, *supra* note 3, at 163.

26. Chief Justice Neely was only an Associate Justice at the time the *Garska* decision was authored.

27. 278 S.E.2d 357 (W. Va. 1981).

Under the primary caretaker doctrine, children are divided into three age groups: 1) those of tender years, i.e., under age six; 2) those between the ages of six and fourteen; and 3) those fourteen years of age and older. For children under the age of six, an absolute presumption exists in favor of the primary caretaker as custodian, provided that she or he is a fit parent. For children six years old to under fourteen, the trial court may hear the child's preference on the record out of the presence of the parents. . . . Finally, for children fourteen years and older, the child is permitted to name his or her custodian if both parents are fit.<sup>28</sup>

Set out like that, the primary caretaker presumption seems fairly straightforward and should be simple for judges to apply.

The simplicity and predictability of the presumption was one of the many reasons that Chief Justice Neely was an advocate of, and eventually adopted, the standard in West Virginia. "The Supreme Court of West Virginia adopted the primary caretaker standard: 1) to increase the predictability of and standardize custody decisions; 2) to give parents less incentive to litigate than to settle their custody cases; and 3) to eliminate the use of children as bargaining chips in the process."<sup>29</sup> A panoply of other legal experts have identified many other advantages to the presumption. Some argue that it is more objective, does not rely on the use of expert testimony, establishes a bright line rule,<sup>30</sup> protects the party who is at a financial disadvantage, reduces judicial discretion,<sup>31</sup> and is gender-neutral.<sup>32</sup> Of course, many others argue that some of these advantages are in fact disadvantages.<sup>33</sup>

The real trick of applying the presumption comes in deciding who the primary caretaker is. "In order to determine the identity of the primary caretaker, the trial court must ascertain which parent took primary responsibility for the recurring needs of the child."<sup>34</sup> The court looks at the following exhaustive list of factors to determine which parent was, in fact, the primary caretaker:

(1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e., transporting to friends' houses or, for example, to girl or boy scout meetings;

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28. Lisa A. Kelly, *Children and Divorce: Custody Determinations Under West Virginia Law*, W. VA. LAW. May 1995, at 22.

29. Mercer, *supra* note 3, at 408 (citing *Garska*, 278 S.E.2d at 361-62). *But cf.* Blakesley, *supra* note 3, at 641 (explaining that litigation actually increased in Minnesota over custody issues during its four year experiment with the presumption).

30. *But cf.* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 318 ("Consistency for its own sake, however, is not a virtue.").

31. *See* LaFrance, *supra* note 3, at 50; Law & Hennessey, *supra* note 3, at 355; *cf.* O'Kelly, *supra* note 3, at 511-33. O'Kelly argues that the six benefits of adopting the primary caretaker presumption are that it promotes continuing of the psychological relationship with the primary parent, it provides an objective basis for forecasting future parenting, it deters litigants from using custody as a weapon, it encourages private settlement, it is very easy for judges to apply, and it permits effective appellate review of the trial court's decision.

32. *See* Jacobs, *supra* note 2, at 895; Polikoff, *supra* note 3, at 175.

33. *See infra* Part IV.

34. Kelly, *supra* note 28, at 22.



(6) arranging alternative care, [that is] babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.<sup>35</sup>

In theory, the court will determine which parent did more of the things which are enumerated on the above list, and that parent will be deemed the primary caretaker.

There are two other small, but important, aspects to the primary caretaker presumption as adopted in West Virginia. First, where the court determines that neither parent meets the standards for being a primary caretaker, neither will enjoy the presumption.<sup>36</sup> “[T]his presumption should only be applied when one parent has ‘clearly’ taken responsibility for the child.”<sup>37</sup> The rationale for this exception should be evident. If the court is not convinced that either parent was a primary caretaker, it would be inappropriate to afford either parent the benefit of the presumption. This is not to say that one or both of the parents were not good parents; it merely recognizes that in modern America it is likely that both parents will work outside the home, and neither could claim to be a primary caretaker under the enumerated factors. It also captures the notion that sometimes both parents are extremely involved and it is, therefore, impossible to label either one of them as the “primary caretaker.” “If the court finds that the parties evenly shared the parenting duties, then neither party is entitled to the presumption that flows from primary caretaker and the court must make further inquiry into the ‘relative degrees of parental competence.’”<sup>38</sup> “When neither parent has so clearly assumed the parental role, the court is to rely on other factors, including the competence of each parent, the resources of each parent, the opinions of third parties, and the age, health, and sex of the child.”<sup>39</sup>

The final aspect of the primary caretaker presumption, and one that has taken significant criticism from mothers advocacy groups and feminists, is the “unfitness” exception. This exception simply states that even if one parent is determined to be the primary caretaker, the court will not award custody to that parent if he or she is deemed to be unfit.<sup>40</sup> This exception grants significant discretion to the trial judge to determine whether or not the primary caretaker is unfit, and it is this discretion which has drawn objections.<sup>41</sup>

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35. *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981).

36. *See Patricia Ann S. v. James Daniel S.*, 435 S.E.2d 6, 9 (W. Va. 1993); *Lewis v. Lewis*, 433 S.E.2d 536, 539 (W. Va. 1993); *Channell v. Channell*, 432 S.E.2d 203, 205 (W. Va. 1993); *Garska*, 278 S.E.2d at 363 (W. Va. 1981).

37. Maxwell, *supra* note 3, at 113.

38. Kelly, *supra* note 28, at 22 (quoting *Garska*, 278 S.E.2d at 363).

39. Maxwell, *supra* note 3, at 115.

40. *See Francis J. Catania, Jr., Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes*, 71 NEB. L. REV. 1228, 1262 (1992).

41. *See infra* Part III.A.

## III. CRITICISMS OF THE PRIMARY CARETAKER PRESUMPTION

A. Common Criticisms<sup>42</sup>

Although there are many criticisms of the primary caretaker presumption, to discuss them all would be beyond the scope of this Note. There are however, several common themes which arise in critiques of the presumption and I will look at some of these critiques in turn. Critics from all across the spectrum have argued that the presumption favors women, or that it favors men. They have argued that it entrenches gender stereotypes. They have argued that it is difficult for judges to apply, and finally that judges still have too much discretion in making custody decisions under a primary caretaker regime.

## 1. The Primary Caretaker Presumption Is Sexist

The most obvious criticism of the presumption is that it favors women. "The primary caretaker standard, adopted explicitly in West Virginia and Minnesota, and implicitly in a number of other jurisdictions, may be a thinly veiled return to the maternal preference standard."<sup>43</sup> Some commentators have been even more critical of the sexism inherent in the presumption. "The Minnesota primary caretaker presumption was, quite simply, the tender years doctrine shed of its sexist skin, but not its sexist operation; mothers are still overwhelmingly considered to be primary caretakers, especially for young children."<sup>44</sup> Under the maternal preference standard, an outgrowth of the tender years presumption, women were assumed to be better caretakers, and thus were given custody of the children absent extenuating circumstances. The primary caretaker preference even includes a tender years presumption within the body of its rule. Furthermore, there can be little doubt about the sexist nature of the primary caretaker presumption when "Chief Justice Neely, a strong and forceful advocate of the primary caretaker rule, writes that such a rule spells 'mother.'"<sup>45</sup>

Additionally, the presumption has also been sexist in its application, and the sexism can cut against the women as well. An example of this involves the use of "bad morals" as a reason for judges to deem one parent or the other unfit. This is often referred to as "sexual misconduct." "For the purpose of determining parental fitness,

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42. I want to be clear that I take no positions on any of these common criticisms of the presumption. I think the arguments on both sides of these objections have merit and have flaws. The more important criticisms, in my mind, are those identified *infra* Part III.B. I include this section only to show where most of the debate on the primary caretaker presumption presently lies, and that there are gaps in this debate.

43. Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1075-76 (1996); see also Ash, *supra* note 1, at 793; Cohen, *supra* note 3, at 59; Katz, *supra* note 24, at 133; Law & Hennessey, *supra* note 3, at 354; Oldham, *supra* note 3, at 164.

44. Jennison, *supra* note 5, at 1153.

45. Katz, *supra* note 24, at 133. As discussed *supra* Part III, Chief Justice Neely is also the one who wrote the opinion in *Garska* which implemented the first use of the primary caretaker presumption in the nation.

it seems that judicially defined 'sexual misconduct' is treated as wholly irrelevant when perpetrated by a man, but entirely relevant (and often sufficient proof of unfitness) when committed by a woman.<sup>46</sup>

Despite these criticisms, many defenders of the presumption point out that this is a strictly gender-neutral standard and if fathers want custody of their children after divorce, they should take a more active role in their caretaking during the marriage.

Regardless, the primary concern must be for the child's interest. The child's interests are best served through placement with their [sic] primary caretaker; gender is not the issue. Therefore, if the father has been the primary caretaker, he will be awarded custody. Rather than acting as a disadvantage to fathers, such a standard should have the effect of encouraging fathers to be more active and involved parents.<sup>47</sup>

Women have always had to sacrifice career goals in order to raise their children, and the primary caretaker presumption recognizes this, and rewards women for this sacrifice.<sup>48</sup>

## 2. The Primary Caretaker Presumption Entrenches Gender Stereotypes

As was discussed in the previous subsection, mothers are much more likely than fathers to be deemed the primary caretakers of their children during marriage. As a result, the factors listed in the primary caretaker presumption's list will not be deemed to represent who the most committed parent is; they will instead become a proxy for motherhood. "It should also be said, however, that the primary caretaker presumption operates to confirm maternal custody because mothers and fathers continue to allocate childrearing responsibilities in 'traditional' ways during marriage and themselves value continuity of child care."<sup>49</sup> Because society expects mothers to be the primary caretaker of the children, it will hold women to a higher, idealized standard of motherhood.

Since men are traditionally expected to be full-time workers, fathers do not face this disadvantage. In fact, a man with a full-time job who provides any assistance in childrearing, however limited, looks like a dedicated father, while a woman with a full-time job who still does primary, but not all, caretaking, looks like -"half" a mother, dissatisfied with the childrearing role.<sup>50</sup>

46. Sack, *supra* note 8, at 303.

47. Carpenter, *supra* note 6, at 61; *see also* Polikoff, *supra* note 3, at 178.

48. *See* Bookspan, *supra* note 3, at 84; Federle, *supra* note 4, at 1548; Fineman, *supra* note 3, at 773 ("[E]ven though both parents work, mothers' career sacrifices for their children would often qualify them as the primary caretakers."); Teitelbaum, *supra* note 17, at 1832-33 ("Mothers and fathers generally agreed that mothers had been more involved than fathers in childrearing prior to separation . . .").

49. Teitelbaum, *supra* note 17, at 1837.

50. Polikoff, *supra* note 3, at 179-80; *see also* Horne, *supra* note 3, at 2125-29; Jacobs, *supra* note 2; Maxwell, *supra* note 3, at 119.

“The danger in such a presumption is that some courts don’t recognize that the mother is the primary caretaker even when she has a career outside the home; a nanny notwithstanding, [m]other does a second shift at home.”<sup>51</sup> What this, in effect, means is that fathers will be given significantly more credit by the courts for the work they do in raising children during marriage than mothers will. This bias will filter through the system to the lawyers and litigants who decide most custody cases before the matter ever gets before a judge.

In response to a suggestion that the primary caretaker presumption replace the BIOC [Best Interest of the Child] analysis, one commentator observed that “any new presumptions will affect not only the decisions of judges who apply them but also the planning and negotiating of the parents who know they will be applied.” During a divorce, child custody and support are negotiated along with property division and maintenance; this bargaining takes place “in the shadow of the law.” It is not unheard of for one parent to successfully make financial demands on the other by threatening to litigate custody.<sup>52</sup>

Granted, the fact that gender stereotypes exist in society and in the judicial system is not the fault of the primary caretaker presumption. However, in order to claim that the presumption offers a better solution, many critics argue that it should deal with these inequities rather than perpetuate the stereotypes.

### 3. The Primary Caretaker Presumption Is Difficult for Judges To Apply

There are several ways that courts struggle when attempting to apply the presumption, and there is some evidence that the presumption is not as easy and mechanical in application as some would suggest. “When courts apply presumptions, the hard cases are the ones where the counterproof is sufficient, but not conclusive.”<sup>53</sup>

One example of a difficult decision for a judge occurs when the parents’ roles have changed during the child’s lifetime. It is quite common for mothers to stay at home with their children for the first five years, but once the kids reach school age, the mother also goes back to work. When you combine that with the possibility that the father has lost his job and spends more time with the children than he did earlier in their lives, judges are presented with a difficult situation.

Another problem occurs because “[i]n jurisdictions where a primary caretaker presumption exists, courts may have difficulty in determining which parent is the primary caretaker when both parents are employed full-time.”<sup>54</sup> Although the West Virginia rule proclaims that if it is not clear which parent is the primary caretaker, then neither will enjoy the presumption, courts still will have a tendency to try to determine which parent is the primary caretaker, especially when that is just one

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51. Cohen, *supra* note 3, at 59; *see also* Becker, *supra* note 9, at 256-57 (noting that even judges expect more from mothers than fathers).

52. Ball & Pea, *supra* note 30, at 323 (quoting David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 480 (1984) (footnote omitted)).

53. *Id.* at 325; *see also* Law & Hennessey, *supra* note 3, at 358.

54. Swank, *supra* note 2, at 945-46.

factor among many. Additionally, what good is such a presumption if the judge cannot use it because neither parent meets the criterion? Custody determinations under this regime would be no easier for judges than custody determinations under any other system.

A third problem that judges face is the situation where one parent has acted as primary caretaker for one child but not another. Courts have long expressed a reluctance to separate siblings in custody proceedings and, I think, would continue to do so even in primary caretaker jurisdictions. This means the court would have to decide which child got to stay with her primary caretaker, and which one did not.

The final big problem that judges face in applying the presumption is how far back to look to determine who is the primary caretaker.<sup>55</sup> Some courts look at the situation right before the divorce. Some look at the caretaking arrangements prior to the breakdown of the marriage (which could be many years before the actual divorce).<sup>56</sup> Others still examine the caretaking arrangements throughout the entirety of the child's life.<sup>57</sup> However the court does it, the mechanistic approach of the primary caretaker presumption will have to be abandoned in favor of judicial discretion.<sup>58</sup>

#### 4. The Primary Caretaker Presumption Grants Judges Too Much Discretion

As mentioned in Part III of this Note, there is a major qualification to the primary caretaker presumption—the unfitness exception. In order to implement this exception, judges must make discretionary, and often subjective, judgements about whether the primary caretaker is a fit parent.<sup>59</sup> “[T]he vagueness of the unfitness exception reintroduces unfettered judicial discretion into the primary caretaker standard.”<sup>60</sup> This discretion is criticized in Part III.A.3, but it is an especially weighty problem in this area, because standards for parental unfitness are traditionally quite vague.

In reality, the primary caretaker standard falls short of the ideal, as the seemingly narrow exception for “unfit” primary caretakers effectively swallows the rule in many cases. This exception has been read expansively by courts at both the trial and appellate levels. Simple determinations of which parent is the primary caretaker have become vicious battles over each spouse's unfitness.<sup>61</sup>

When discretion allows an exception to “swallow the rule,” then the rule is doomed to failure.

55. See Mercer, *supra* note 3, at 408.

56. See *id.* at 407-08.

57. See *id.*

58. See *infra* Part III.A.4.

59. I do not mean to suggest in this Part, or in any part of this Note, that judges do not exercise their discretion wisely and prudently; I am sure that most do. However, it is an inescapable fact of human nature that everyone, even judges, approaches situations with biases and preconceived ideas. The fact that most judges in this country are male no doubt means that some of their biases are going to adversely affect women.

60. Sack, *supra* note 8, at 293; see also Jacobs, *supra* note 2, at 897.

61. Sack, *supra* note 8, at 303.

This argument cuts against the nonprimary caretaker (often the father) as well.

The fact that the secondary caretaker allowed the primary caretaker to dominate appears to place the secondary parent in a "Catch 22" situation. If the primary parent is unfit, and the secondary parent was aware of that fact, then the secondary parent was obviously not acting in his child's best interests in allowing the unfit primary parent to care for the child. In most cases, evidence that the "non-primary" parent allowed the child to be cared for mostly by the "primary caretaker" seems to militate against a finding of unfitness.<sup>62</sup>

When the nonprimary caretaker argues that the court should find the primary caretaker unfit, and thus rebuts the presumption, a diligent judge would inquire why the primary caretaker was allowed so much control over the children's upbringing. The fact that the nonprimary caretaker allowed this supposed "unfit" person to be the primary caretaker, may indicate that he (or she) is also unfit. This would also put the court in a terrible bind, because now both parents may be claiming to be the primary caretaker *and* they may both be claiming that the other is unfit. This type of situation would force the court to abandon the presumption in favor of some other test or the judge's own discretion.

An example of this discretion being harmful to women is that "while most of the reported cases decided on the primary caretaker issue find the mother to be the primary caretaker, when a finding of shared parenting duties is made, typically, the father has won custody."<sup>63</sup> This fact places an even greater burden on women to prove that they alone are the primary caretaker. Despite claims to the contrary by primary caretaker presumption supporters, this might actually increase litigation. It will no longer be enough for a parent to prove that she actively participated in the childrearing responsibilities; the parent must also show that the other spouse was delinquent in assuming his responsibilities.

*B. The Presumption Does Not Necessarily Place  
the Child with the Better Parent*

Now that the other commentators on the subject have had their opportunity to debate the merits of the primary caretaker presumption, I feel that it is important to recognize two fatal flaws of the presumption that have not received much attention in the legal press. First, there is no scientific, psychological, or sociological support for the ten factors used by the presumption to determine who is the primary caretaker. Although I admit that each of the factors presented by Chief Justice Neely is important, I do not believe that it is necessarily an exhaustive or an accurate list.

The list of factors emphasizes<sup>64</sup> the day-to-day activities of a parent, but it does not look at the intangible contributions made by many parents—both mothers and fathers. "[T]he most serious problem with the primary caretaker standard is that it ignores the quality of the relationship between the child and caretaker in favor of 'counting hours

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62. Jennison, *supra* note 5, at 1153-54 n.72.

63. Kelly, *supra* note 28, at 22.

64. And in my view, it over-emphasizes these factors.

and rewarding many repetitive behaviors.”<sup>65</sup> This clinical examination of a parent-child relationship does nothing to salvage any glimmer of hope for a child caught in the middle of a devastating dispute between her parents.

Many parents make conscious decisions about who will assume which role in raising the children. These decisions are made at the outset of the marriage when the concept of divorce is the farthest thing from the couples' minds. Are we saying that we should punish one spouse because he was unlucky in which roles the two parents together chose to undertake?

These factors do not recognize the financial and emotional contributions made by many parents that cannot be quantified or categorized as coldly as the presumption requires. The fact that one parent is supporting the family financially might allow the other to be a better primary caretaker. A father might spend more time teaching his daughter how to play softball, or a mother might spend time teaching her son how to cook. Where do these activities go in the primary caretaker factors? Nowhere.

There are many bonding experiences between a parent and a child that are simply not accounted for in the factors. “[T]he factors delineating how to determine who the primary caretaker is may not really be suitable in determining what is best for the child. Does ‘bonding’ really equate with the volume of time spent with the child? What is bonding, anyway?”<sup>66</sup> “The primary caretaker test assumes that these bonds exist between the primary caretaking parent and the child; they are evidenced by the caretaker’s sacrifice and devotion to the child. The test also assumes that the child reciprocates this devotion.”<sup>67</sup> My basic argument is that if we are going to use a list of factors as a proxy for which parent has the closest bond with a child, we should at least be sure that those factors actually represent that bond. Until there is more conclusive proof that such a representation is real, courts should not continue to apply blindly the primary caretaker factors as determinative factors in child custody cases.

My second major problem with the primary caretaker presumption is that it does not even purport to place the child with the better parent. A parent could be an extremely poor parent, but still not be unfit, and that parent could be given custody over a better parent, simply because he or she met more of Chief Justice Neely’s criteria. “[T]he primary caretaker presumption, unlike the best interests test, does not promise to place each child with the *best* parent. To this extent, it seems less child-centered and perhaps will place some children with the ‘worse’ parent.”<sup>68</sup> Any custody doctrine which could force a judge knowingly to place a child with the

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65. Barry, *supra* note 3, at 819 (quoting Joan B. Kelly, *The Determination of Child Custody*, in 4 THE FUTURE OF CHILDREN 121, 130 (1994)).

66. Blakesley, *supra* note 3, at 641 (footnotes omitted).

67. LaFrance, *supra* note 3, at 52 (quoting Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 771 (1988)).

68. Horne, *supra* note 3, at 2141 (emphasis in original). Despite this, Horne goes on to state that “the available evidence suggests that the best interests test is no better. Except in a few extreme circumstances, we generally *cannot* discover who is the ‘best’ parent.” *Id.* at 2141-42 (emphasis in original).

“worse” parent is in serious need of repair. “A primary caretaker presumption assumes that families have a primary caretaker and, furthermore, that having a primary caretaker is the best post-divorce arrangement.”<sup>69</sup>

#### IV. PUTTING CHILDREN FIRST

The primary caretaker presumption, like most standards used in child custody decisionmaking, does not recognize that children have rights and should not be treated as though they were property. The primary caretaker presumption makes the highest bidder in the custody auction, the parent who, supposedly, spent the most time with the children during the marriage. This approach only recognizes the parents’ rights and not the rights of the children. As quoted in the introduction to this Note, Judge Ash of the Tennessee Circuit Court argued that there had to be a better way to make custody decisions than the way we do it now.<sup>70</sup> Judge Ash goes on to say that the place to start in formulating a better system is to recognize that children have rights, too.

When making custody determinations, one should remember that children have certain rights. These rights include: (1) the right to be with their natural parents and siblings; (2) the right to good physical care with adequate food, clothing, and shelter; (3) the right to education; (4) the right to emotional security; (5) the right to diagnosis and treatment of medical and emotional conditions; (6) the right to be protected from harm, injury, and neglect; (7) the right to controlled use of any estate or property of the child for preservation and conservation of such property in the child’s best interests; and (8) the right to all guarantees and protections of the federal and state constitutions.<sup>71</sup>

The primary caretaker presumption fails, in that it does not recognize that children caught in the middle of a custody battle have rights that the courts should be protecting.<sup>72</sup>

The approach offered by the primary caretaker presumption makes no steps toward helping the child through the process. A child caught in her parents’ divorce does not care that some judge is applying some legal standard in determining with whom she will live. That child wants to be treated with respect and understanding and she wants her voice to be heard.

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69. Bartlett, *supra* note 4, at 852.

70. See *supra* text accompanying note 1.

71. Ash, *supra* note 1, at 795.

72. See Federle, *supra* note 4, at 1549.

The primary caretaker presumption is merely another form of a parental preference rule and is subject to the same criticisms already made, namely, that it tautologically equates the placement with the child’s best interests. The presumption also fails to minimize indeterminacy as more couples share parenting responsibilities and may actually disadvantage children by directing courts to order placements that are not responsive to their special educational or health needs. Without some basis in a coherent account of children’s rights, it is inevitable that children’s interests will be subordinated to those of their parents.

*Id.* (footnotes omitted).



Law reformers are constantly seeking magical solutions or formulas for determining who should be awarded custody in divorce cases. While mathematical formulas might work in determining child support payments, there are no such mechanical tests for child placement. The focus in child custody today should not be placed on searching for such tests, but rather on humanizing the process by which custody disputes are resolved. This requires the judge to approach each case with an open mind, apply the appropriate standards, and support the decision with specific reasons.<sup>73</sup>

By forcing judges into using a mechanized approach, the primary caretaker presumption does not allow judges to adjust for the needs of the children involved. I am not taking a position on whether judicial discretion is something to be embraced or feared. What I am saying is that when the legal system becomes too mechanistic and too formalistic, it loses its humanness. In many aspects of the legal system, humanity is not necessary; in the family courts of America, however, humanity is essential—for the children's sake.

#### CONCLUSION

The primary caretaker presumption for custody determination has not been properly evaluated by the judiciary or the academic legal community and therefore it should not be used when making custody decisions. On its face, it appears to be a simple, gender-neutral, objective alternative to some of the other complicated standards used by judges in making custody decisions. However, there is no evidence that the primary caretaker factors actually measure parenting skills, and there is no guarantee that a child will end up with the best parent if the court uses this presumption. Finally, and most importantly, the primary caretaker presumption fails to recognize that children have rights and concerns and need to be treated like human beings in the family courts. For these reasons, I would abandon the use of the primary caretaker presumption in all of its many forms.

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73. See Katz, *supra* note 24, at 135.