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The Hidden Gender Bias Behind "The Best Interest of the Child" Standard in Custody Decisions

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THE HIDDEN GENDER BIAS BEHIND "THE BEST INTEREST OF THE CHILD" STANDARD IN CUSTODY DECISIONS†

INTRODUCTION

A. *The Jennifer Ireland Case: A Manifestation of Gender Bias*

In 1994, a Michigan judge aroused bitter emotion and fear across the nation when he awarded custody of three-year-old Maranda Ireland to her father because her mother used daycare while attending college classes.[1] Jennifer Ireland's plight touched

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1. Elizabeth Kastor, *The Maranda Decision: It was an Ordinary Custody Fight, Until Day Care Tipped the Scales of Justice*, WASH. POST, July 30, 1994, at D1. On November 7, 1995, the Michigan Court of Appeals held that the trial court erred reversibly by including evaluation of each party's arrangements for child care as part of the court's analysis of the statutory factor "e," the permanence of the family unit. Ireland v. Smith, 542 N.W.2d 344 (Mich. Ct. App. 1995), *judgment aff'd as modified by* 547 N.W.2d 686 (Mich. 1996). Michigan law delineates 12 non-exclusive factors the court must consider in custody cases. *Id.* at 348. Factor e is "the permanence, as a family unit, of the existing or proposed custodial home or homes." *Id.* at 349. The court stated that there was no support in the record for the trial court's speculation that a single parent attending college could not raise a child. *Id.* The court reasoned that an evaluation of each party's arrangements for the child's care while her parents work or go to school is not an appropriate consideration under factor e. *Id.* The appellate court held that the trial court committed error by considering the acceptability of the parties' homes and child care arrangements under factor e, which is related to the permanence as a family unit of the parties. *Id.* at 349-50. The court found no record support for the trial court's finding that factor e favored Mr. Smith. *Id.* at 349. The appellate court remanded the case to the trial court to consider up-to-date information regarding factor e, as well as the fact the child has been living with Ms. Ireland during the appeal. *Id.* at 350. The appellate court affirmed the trial court's finding that the parties were equal with regard to the other 11 statutory factors. *Id.* at 351. Furthermore, the appellate court disqualified Judge Cashen because of the appearance of bias and ordered the case to be heard by a different judge on remand. *Id.* at 351-52.

Steven Smith appealed the decision of the appellate court, and on May 21, 1996, the Michigan Supreme Court affirmed the appellate court's decision to remand the case. Ireland v. Smith, 547 N.W.2d 686, 689 (Mich. 1996). The Michigan Supreme Court agreed that the circuit court erred in finding the factor e heavily favored Mr. Smith, but wrote an opinion to clarify the analysis of the appellate court and to modify the terms of the remand. *Id.* at 690. While the Supreme Court agreed with

the hearts of people around the country[2] and revealed the threat of hidden gender bias[3] that may lurk behind the amorphous "best interest of the child" standard in custody decisions.[4] Ireland, the nineteen-year-old unmarried mother of little Maranda, was an honors student when she became pregnant while in high school.[5] She and Maranda's father, twenty-year-old Steven Smith, never married, and Ireland raised Maranda on her own.[6] When Ireland received a scholarship to the University of Michigan, she placed Maranda in a licensed daycare facility while attending class.[7] The custody battle over Maranda began when Ireland sued Smith for the weekly twelve dollar child support payments he had failed to pay;[8] Smith countered by suing for custody of Maranda.[9] On July 25, 1994, Judge Raymond R. Cashen of the Macomb County Circuit Court awarded custody of Maranda to Smith, because it was in the best interest of the child.[10] The judge found that "but for the daycare issue, [Ireland and Smith] were equally good parents"[11] and stressed, "the day care issue was 'pivotal' [to] his decision."[12] He

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the appellate court that factor e applies to permanence of the family unit and not acceptability of the home, the Court stated that the circuit court must weigh all the facts that bear on whether Ms. Ireland or Mr. Smith can best provide permanence as a family unit. *Id.* The Court also stated that child care arrangements are a proper consideration in a custody case, and that daycare may have many benefits and is not a sign of parental neglect; thus, the circuit court must consider what form of child care is in the best interest of the child. *Id.* at 691. The Supreme Court also stated that on remand, the circuit court should consider all 12 statutory factors, not only factor e. *Id.* at 691-92. Finally, the Supreme Court stated that the judge who has been reassigned the case should hear it, but that there is no basis in the record for the disqualification of Judge Cashen. *Id.* at 629 n.13.

2. Kastor, *supra* note 1.

3. Nancy D. Polikoff, *Why are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 236 (1982).

4. David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 479, 568 (1984); Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 357 (1982); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 230 (1975).

5. Kastor, *supra* note 1.

6. *Id.*

7. *Id.*

8. Jane Daugherty, *Ruling in Custody Case Seems to Defy Very Clear Criteria*, DET. FREE PRESS, Aug. 7, 1994, at F4.

9. Kastor, *supra* note 1.

10. *Id.*

11. *Id.*

12. Marianne Means, *Single-Parent Paradox*, TIMES UNION, Aug. 2, 1994, at A6.

held that Smith should have custody of Maranda because he lives with his parents, and Smith's mother, a homemaker, can care for Maranda while Smith attends community college and works.[13] According to Judge Cashen, "There is no way that a single parent [like Ireland] attending an academic program . . . as prestigious as the University of Michigan can do justice to their [sic] studies and the raising of an infant child."[14] The judge stated that if Maranda remained with her mother and attended daycare, she would essentially be raised by strangers; whereas, if Maranda lived with her father, she would be raised by blood relatives and would have more security and stability.[15] Thus, according to Judge Cashen, it is not in the best interest of the child to remain with the mother, who alone has raised her since birth, but who must use daycare in order to make a better future for her.[16] The tragedy of this situation is that the very security and stability that Judge Cashen strove to protect in Maranda's best interest may now be abrogated by the emotional trauma of leaving her mother.[17] The paradox of this situation is that while society tells single mothers like Jennifer Ireland to become productive members of society, to provide for their children, and to avoid the dependency and hopelessness of welfare, society may also punish them for doing just that.[18]

B. Demographics: Socio-Economic Causes of Gender Bias

Due to the increasing divorce rate,[19] as well as to the growing number of unwed single mothers like Jennifer Ireland,[20] "two-thirds of all children [born today] will live with a single parent [sometime] during their childhood."[21] That parent will usually

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13. Kastor, *supra* note 1.
14. *In the Care of Strangers*, WASH. POST, Aug. 4, 1994, at A30.
15. *Id.*
16. Lucia Herndon, *Justice Is Blind, and Ludicrous: Why Take This Little Girl from Her Mother?*, PHILA. INQUIRER, Aug. 3, 1994, at G1.
17. Means, *supra* note 12.
18. *In the Care of Strangers, supra* note 14.
19. Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 452 n.132 (1990); Lenore J. Weitzman, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 473, 473 n.2 (1979) (stating that 44% of all marriages will end in divorce).
20. Dowd, *supra* note 19, at 440 (stating that proportion of nonmarital births rose to 20% in 1983).
21. *Id.* at 452 n.132.

be a single mother, since "women head ninety percent of single-parent families."[22] Additionally, due to employment discrimination, low wages, declining welfare payments, and the failure in enforcing child support, most female-headed families are poor.[23] "One [out] of three households headed by women is below the poverty line," compared to one out of every nine families headed by men or one out of every nineteen families headed by married couples.[24] Not surprisingly, the economic circumstances of many single mothers force them into work schedules or educational demands which result in their having less time with their children.[25] To provide financially for their families, single mothers of young children often must resort to some type of child care. In 1990, more than six million children under five were cared for by a nonparent while their mothers were at work,[26] and approximately sixty-five percent of these children, like Maranda Ireland, attended daycare facilities.[27] Under the best interest of the child standard applied by Judge Cashen,[28] many of these single mothers could lose custody because they are using daycare.[29] This decision could become precedent for "trapping working mothers everywhere in a Catch-22. . . . If they don't work, they can't support their children. If they do work, they could lose them because they work."[30]

C. *Best Interest of the Child: A Standard Susceptible to Gender Bias*

Unfortunately, the Jennifer Ireland case is not just an anomaly or aberration, but represents a "nationwide backlash of [gender]

22. *Id.*
23. *Id.* at 452 n.133.
24. *Id.* at 452.
25. Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1261 n.274. (1981). In fact, "eighty percent of divorced mothers are employed." Linda R. v. Richard E., 561 N.Y.S.2d 29, 33 (1990).
26. Means, *supra* note 12. This figure does not include the number of single mothers, like Jennifer Ireland, who use daycare while attending some type of educational program in order to facilitate future employment. *Id.*
27. *Id.*
28. *Id.* (stating that the daycare factor was "pivotal" to Judge Cashen's decision).
29. *Id.*
30. *Id.*

discrimination in child custody awards" under the guise of the best interest of the child standard.[31]

The best interest of the child is the governing legal standard for custody awards.[32] "All states recognize [that] the welfare or 'best interests' of the child . . . [is the] paramount concern" in any custody decision.[33] Although courts rely on this "ultimate criterion" either by statute or by case law,[34] there is no consensus of what is meant by a child's best interest. As a result, judges often have no legal framework for determining what is in a child's best interests,[35] which gives trial judges broad discretion "to exercise their own views on what is best for children."[36] Exacerbating this problem is the fact that judges usually do not know enough about the family to make a valid assessment of what the child's best interest really is.[37] As a result, custody decisions are often determined by what is "in the heart[s] of the trial judge[s]," which may reflect their biases.[38] Custody decisions show that "mothers are losing custody as a result of . . . inappropriate criteria"[39] caused by gender bias unrelated to the best interest of the child[40] in the areas of economic resources, employment, traditional family values, and morality.[41] Thus, the best interest of the child standard is an indeterminate,[42] vague standard in which judicial subjectivity

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31. Laurie Woods et al., *Sex and Economic Discrimination in Child Custody Awards*, 16 CLEARINGHOUSE REV. 1130 (1983).

32. *Id.*

33. Klaff, *supra* note 4, at 335.

34. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 797 n.3 (2d ed. 1988) (listing states that designate best interest of the child standard by statute); Chambers, *supra* note 4, at 479. When the state statute lists the factors a court should consider in determining the best interest of the child, these factors are often non-exclusive and subjective. For example, the Michigan custody statute lists 11n factors the court should consider plus "any other factor considered by the court to be relevant to a particular child custody dispute." Ireland v. Smith, 547 N.W.2d 686, 688 (Mich. 1996).

35. Chambers, *supra* note 4, at 568.

36. Klaff, *supra* note 4.

37. Phyllis T. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?*, 8 B.Y.U. J. PUB. L. 75, 80 (1993).

38. Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L. Q. 1, 16 (1984).

39. Polikoff, *supra* note 3.

40. *Id.; see also* Richmond v. Tecklenberg, 396 S.E.2d 111 (S.C. Ct. App. 1990); Anderson v. Anderson, 472 N.W.2d 519 (S.D. 1991).

41. Polikoff, *supra* note 3, at 236-37; Woods et al., *supra* note 36.

42. Mnookin, *supra* note 4, at 230.

and gender bias often penalize single mothers and children, resulting in custody decisions that discriminate against mothers.[43]

This Note examines gender bias behind the best interest of the child standard in custody decisions. Part I briefly discusses the constitutional law relating to the parent-child relationship as well as the statutory and common law best interest of the child standard adopted by the states. Part II discusses how inherent judicial subjectivity in the best interest of the child standard may result in gender bias impacting custody determinations. Part III examines the factors that courts consider regarding economic resources, employment, traditional family values, and morality, and how gender bias in these areas may affect custody determinations. Part III also discusses the results of an empirical study and delineates the statistical analysis of 378 child custody cases from 1990 through 1994 in which courts applied the factors of economic resources, employment, traditional family values, and morality, in order to discern how gender bias may influence courts' custody determinations. Part IV analyzes the factors discussed in Part III. Part V suggests ways to eliminate the gender bias from the best interest of the child standard in custody decisions.

I. THE LAW AFFECTING CHILD CUSTODY

The law affecting child custody determinations is grounded in the constitutional doctrines of due process and equal protection as well as in state common law and statutory law adopting the best interest of the child standard.

A. *Constitutional Law: Due Process and Equal Protection Rights*

Child custody determinations raise the following two constitutional issues: (1) the fundamental due process right to raise one's children and (2) the equal protection right that similarly situated people not be treated differently because of gender.[44]

43. Woods et al., *supra* note 31.
44. Atkinson, *supra* note 38, at 13-14.

1. Due Process

The Supreme Court has recognized that the relationship between parent and child is a fundamental right constitutionally protected by the Due Process Clause.[45] This right has been construed as either a liberty interest or as a privacy right emanating from the penumbra of the Bill of Rights.[46] The Court has held that parents have a "fundamental liberty interest . . . in the care, custody, and management of their child[ren],"[47] an essential right to conceive and raise their children,[48] and the right to decide on the upbringing and education of their children.[49] However, this right is not an absolute right, as demonstrated by case law in which parental rights have been terminated[50] or custody has been awarded to a nonparent over the parent's objection.[51] Although the Court's discussion of this parental right has been most widely recognized in cases dealing with *termination* of parental rights,[52] the scope of this parental right regarding custody has not been precisely defined, and the majority of custody cases are decided without ever relying on this constitutional doctrine.[53]

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45. *Id.* at 14; Laurel S. Banks, Schutz v. Schutz, 31 U. LOUISVILLE J. FAM. L. 105 (1992); *see also* Santosky v. Kramer, 455 U.S. 745, 747 (1982).

46. Banks, *supra* note 45; *see also* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65 (1973) (stating in dicta that fundamental privacy right protects home, family, marriage, motherhood, procreation, and child rearing); Roe v. Wade, 410 U.S. 113 (1973) (holding that there is a privacy interest in the right to have an abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding limited by City of Dallas v. Stanglin, 490 U.S. 19 (1989)) (stating that right of privacy is constitutionally protected from government intrusion, including right of married couples to use contraceptives for birth control and family planning).

47. Santosky v. Kramer, 455 U.S. 745, 758-59 (1982) (holding that because of the fundamental interest in family autonomy, state must show clear and convincing evidence in order to sever a parental relationship); *see also* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (holding that termination of parental rights of an unmarried father upon death of the mother violated his due process); Banks, *supra* note 45.

48. Banks, *supra* note 45; *see also* Meyer v. Nebraska, 262 U.S. 390 (1923).

49. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that state cannot require children to attend public school, and parents have the right to direct their children's education).

50. Banks, *supra* note 45.

51. CLARK, *supra* note 34, at 822 (citing Sorentino v. Family & Children's Soc'y of Elizabeth, 378 A.2d 18 (N.J. 1977), *aff'd* (1978)); *see also* Millet v. Andrasko, 640 So. 2d 368 (La. Ct. App. 1994); *In re* Williams, No. 16660, 1994 WL 440439 (Ohio Ct. App. 1994).

52. Banks, *supra* note 45; *see also* Stanley v. Illinois, 405 U.S. 645 (1972).

53. CLARK, *supra* note 34, at 822.

2. *Equal Protection*

Under the Equal Protection Clause, the Constitution requires that similarly situated women and men be treated equally.[54] Gender classifications can only withstand an equal protection challenge if the "classifications . . . serve important governmental objectives and must be substantially related to [achieving] . . . those objectives."[55] Although deciding which parent should receive custody of a child may be an important state interest, giving a preference to one parent over another solely because of gender is not substantially related to this important government interest.[56] As the New York Supreme Court Appellate Division recently held in the custody case of *Linda R. v. Richard E.*, gender "finds no place in our current law."[57] Thus, parents are theoretically considered to have co-equal rights to custody of children as long as they are determined to be fit.[58] However, when both parents are fit, a court has to make a choice. Substantive equality becomes a matter of " 'relative fitness,' " and a court makes the choice that is in the best interest of the child.[59]

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54. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (holding that nursing school policy limiting enrollment to women was unconstitutional); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding women soldiers have same right to claim spouse as dependent as do male soldiers); Reed v. Reed, 404 U.S. 71 (1971) (prohibiting statutory preference due to gender); *cf.* Michael M. v. Superior Ct., 450 U.S. 464, 469 (1981) (upholding a statutory rape law that punished only adult men who had sexual intercourse with a child because "the sexes are not similarly situated in certain circumstances"); Rostker v. Goldberg, 453 U.S. 57 (1981) (holding that women can be excluded from military draft and registration because men and women are not similarly situated for purposes of combat).

55. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, 734 (4th ed. 1991) (discussing Craig v. Boren, 429 U.S. 190 (1976)).

56. Atkinson, *supra* note 38, at 14.

57. 561 N.Y.S.2d 29, 32 (App. Div. 1990).

58. Annamay T. Sheppard, *Unspoken Premises in Custody Litigation*, 7 WOMEN'S RTS. L. REP. 229, 232 (1982). However, Alabama, Florida, Kentucky, Louisiana, Mississippi, Utah, and Virginia still give mothers an automatic preference. Atkinson, *supra* note 43, at 11 n.26.

59. Sheppard, *supra* note 58, at 232 (quoting Sheehan v. Sheehan, 143 A.2d 874, 882 (N.J. Super. Ct. App. Div. 1958)); *see also* Linda R. v. Richard E., 561 N.Y.S.2d 29, 32 (App. Div. 1990).

B. Common Law and Statutory Law: The Best Interest of the Child Standard

Historically, under English common law, children were considered paternal property, and fathers automatically received custody of children upon divorce.[60] By the mid-nineteenth century this rule was replaced by the "tender years presumption,"[61] which established a rebuttable maternal preference.[62] Under this doctrine, the custody of young children was automatically awarded to the mother, unless she was proven to be "unfit" or "morally impure."[63] The tender years presumption was adopted by most American states and became the accepted standard in child custody decisions for a century.[64] However, societal pressure for sexual equality and gender neutrality, the growing fathers' rights movement, and feminist ideology weakened the hold of this doctrine.[65] As a result, in the 1970's and 1980's most states eliminated this non-politically correct tender years presumption[66] so that both parents were considered equal candidates to receive custody.[67]

The tender years doctrine was replaced by the best interest of the child standard, which now dominates custody decisions.[68] This standard focuses on the needs of the child.[69] Psychologists advocate that when parents cannot resolve custody issues, the courts should use the best interest of the child test and focus on the psychological relationship between the parent and child.[70] The psychologists' theory is that children belong with their psychological parent "who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality fulfills the child's psychological needs for a parent, as well as the child's physical needs."[71] Many state statutes now mandate that

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60. Bookspan, *supra* note 37, at 78.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 79.
65. *Id.* (stating that at least two states have held the tender years presumption violated the Equal Protection Clause).
66. Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 20 (1990); Bookspan, *supra* note 37, at 79.
67. CLARK, *supra* note 34, at 787.
68. Mnookin, *supra* note 4, at 236.
69. Bookspan, *supra* note 37.
70. CLARK, *supra* note 34, at 802 (referring to JOSEPH GOLDSTEIN ET AL, BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979)).
71. Jennifer E. Horne, *The Brady Bunch and Other Fictions: How Courts Decide*

courts recognize this psychological relationship in determining the best interest of the child.[72]

However, this standard has been widely criticized as being too vague[73] because there is no consensus as to what constitutes a child's best interest.[74] Even though a majority of states have statutorily accepted the best interest of the child standard, and many other states have achieved this in their courts,[75] very little specificity is given in the law as to what factors should be used in determining what is in the child's best interest.[76] As a result, determining what is in the child's best interest is a subjective process.[77]

Because the best interest of the child is indeterminate,[78] judges are allowed great discretion and can consider almost anything when evaluating a parent.[79] The indeterminacy of this standard is exacerbated because the judge usually does not have enough pertinent information about the family to make a valid

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Child Custody Disputes Involving Remarried Parents, 45 STAN. L. REV. 2073, 2142 n.78 (1993) (quoting GOLDSTEIN ET AL., *supra* note 70).

72. CLARK, *supra* note 34, at 802 n.44 (listing ALASKA STAT. § 25.24.200 (1983); DEL. CODE ANN. tit. 13, § 721 (1981); IND. CODE ANN. § 31-1-11.5-21 (West 1980); KAN. STAT. ANN. § 60-1610 (1983); ME. REV. STAT. ANN. tit. 19, § 752 (West Supp. 1986); MICH. COMP. LAWS ANN. § 25.312(3) (West 1984); OHIO REV. CODE ANN. § 3109.04 (Anderson Supp. 1986); OR. REV. STAT. § 107.137 (1985); VT. STAT. ANN. tit. 15, § 652 (Supp. 1986); VA. CODE 1986 § 20-107.2 (Michie Supp. 1986); WIS. STAT. ANN. § 767.24 (West 1981 & Supp. 1986)).

73. *Id.* at 798.

74. Chambers, *supra* note 4, at 479.

75. Mnookin, *supra* note 4, at 236-37 n.46; *see also* O.C.G.A. § 19-9-3(a) (Supp. 1994); Myers v. Myers, 561 So. 2d 875, 878 (La. Ct. App. 1990); Bah v. Bah, 668 S.W.2d 663, 665 (Tenn. Ct. App. 1984).

76. Mnookin, *supra* note 4, at 236-37. The majority of states have statutes "that provide for the best-interest-of-the-child test in some form," but "[t]hese statutes vary considerably." *Id.* at 236 n.45. Some statutes refer generally to the best interest and welfare of the child; other statutes "specify factors that may be considered in applying the standard, such as [the] sex, age, or preference of the child"; "[o]thers combine best-interests with vestiges of a parental-fault standard." *Id.* Many states have adopted the provisions of the Uniform Marriage and Divorce Act. Atkinson, *supra* note 43, at 4 n.6. Section 402 of the Act directs the court to consider the following: the wishes of the children and parents; the interaction of the children with anyone who affects their best interest; the children's adjustment to their home, school, and community; and the mental and physical health of the individuals involved. *Id.*

77. *See generally* Thomas J. Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM. L.Q. 75 (1989).

78. Mnookin, *supra* note 4, at 230.

79. Horne, *supra* note 71, at 2075; *see also* discussion *infra* Part III.

assessment of what is in the child's best interest.[80] Additionally, the judge does not have enough information to make predictions about the future behavior of the parties concerned and its impact on the best interest of the child.[81] Because judges do not routinely have access to necessary, objective, and reliable information about the child and the parents, they cannot make thoughtful predictions or choices.[82]

These inherent problems are multiplied because appellate judges have only the trial transcript, and thus, have no opportunity to assess the personalities or relationships of the parties involved.[83] One judge said, "So much may turn, consciously or unconsciously, on estimates of character which cannot be made by those who have not seen or heard the parties."[84] Thus, appellate courts are very reluctant to interfere with determinations made by the trial judges absent a finding that trial judges have abused their discretion.[85]

Original custody orders, whether part of divorce decrees or other judgments, subsequently can be modified when the petitioning party proves modification is necessary to promote the child's best interest.[86] Usually a more stringent standard is applied than in the original custody determination, and the parent seeking modification must show that there has been a substantial and material change of circumstances that affects the child's best interest.[87] Some states will also consider modification based on evidence not presented to the court, but that existed at the time of the prior decree.[88] As in the original custody decision, the decision to modify custody is also determined by the trial court's discretion.[89] However, regardless

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80. Bookspan, *supra* note 37.
81. Mnookin, *supra* note 4, at 258.
82. Chambers, *supra* note 4, at 482.
83. *Cf.* Mnookin, *supra* note 4, at 254.
84. *Id.* (quoting *In re* B.(T.A.) (An infant), [1971] 1 Ch.270 (1970)).
85. *Id.* In fact, whereas 20% to 25% of all civil and criminal appeals are successful, the rate of reversal in custody cases is only 18%. Atkinson, *supra* note 38, at 39.
86. CLARK, *supra* note 34, at 840; *see also* Taft v. Taft, 553 So. 2d 1157 (Ala. Civ. App. 1989); Simmons v. Simmons, 576 P.2d 589 (Kan. 1978).
87. Uniform Marriage and Divorce Act § 409, 9A U.L.A. 211 (1979); *In re* Custody of Pearce, 456 A.2d 597, 602 (Pa. Super. Ct. 1983); Gaona v. Gaona, 627 S.W.2d 821 (Tex. Ct. App. 1982).
88. Riley v. Riley, 643 S.W.2d 298 (Mo. Ct. app. 1982); Carpenter v. Carpenter, 645 P.2d 476 (Okla. 1982); Atkinson, *supra* note 43, at 6.
89. CLARK, *supra* note 34, at 837-38.

of whether it is an original custody determination, an appeal, a petition for modification, or an appeal of a modification order, the same best interest of the child standard is determinative.

II. BEST INTEREST OF THE CHILD: A STANDARD SUBJECT TO GENDER BIAS

The pervasiveness of gender bias in the courts has been irrefutably documented by state supreme court task forces showing that gender bias is distorting the justice system, and that women are overwhelmingly the victims.[90] "[G]ender bias against women litigants . . . is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment and equal opportunity."[91] The Massachusetts task force has verified that gender bias harms women in custody disputes.[92] Because the best interest of the child standard is vague,[93] and judges do not have the necessary objective information to make an informed custody determination,[94] judges often decide custody based on their own personal experiences,[95] values,[96] gender biases,[97] and prejudices.[98]

Statistics showing that women get custody of their children ninety percent of the time in divorce settlements are deceptive.[99] In the majority of these cases, women get custody because fathers do not want custody; when fathers want custody, they

90. Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181 (1990). These task forces are comprised of judges and lawyers appointed by state chief justices and testify to the importance of gender issues and the "profound implications for the fair administration of justice." *Id.* at 182. The task forces also found gender bias against fathers by some judges who cannot envision men as primary caretakers of their children. *Id.* at 191.

91. *Id.* at 187 (quoting REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS (1986), *published in* 15 FORDHAM URB. L.J. 3 (1986-87)).

92. *Id.* at 192.

93. CLARK, *supra* note 34, at 798.

94. Bookspan, *supra* note 37, at 80.

95. Atkinson, *supra* note 38, at 3.

96. *See* Mnookin, *supra* note 4, at 269.

97. Chambers, *supra* note 4, at 481; *see also* Dempsey v. Dempsey, 292 N.W.2d 549 (Mich. Ct. App. 1980); *cf.* Porter v. Porter, 274 N.W.2d 235 (N.D. 1979).

98. Charles N. Trudrung-Taylor, *The Changing Family and the Child's Best Interests: Current Standards Discriminate Against Single Working Mothers in California Custody Modification Cases*, 26 SANTA CLARA L. REV. 759, 776 (1986) (quoting *Final Report of the California Assembly Interim Committee on Judiciary*, 23 ASSEMBLY INTERIM COMMITTEE REPORTS NO. 6 161 (1965)).

99. Polikoff, *supra* note 3, at 236.

stand a very good chance of getting it.[100] For example, a Massachusetts task force reported that fathers who ask for custody receive either primary or joint physical custody more than seventy percent of the time.[101]

Furthermore, court decisions show that mothers are losing custody because of "sex[ually] discriminatory judicial reasoning."[102] In custody disputes, mothers often are held to a higher standard of parenting and personal behavior than are fathers.[103] Although the best interest of the child is a gender-neutral standard by which the parent who can best meet the needs of the child is awarded custody, this standard is "being undercut by the development of criteria that discriminate against mothers."[104] Courts have given undue weight to the superior economic resources of fathers while minimizing the value of mothers who have been the primary caretakers of their children when the very commitment to their children may have left them with less education and earning potential.[105] Courts have treated employed mothers and fathers disparately, penalizing women for spending less time with their children and using daycare, but failing to apply the same criteria to fathers.[106] Courts have failed to recognize that working women continue to be the primary caretakers of their children, while giving disproportionate weight to any of the same daily parenting responsibilities fathers assume.[107] Courts have also favored fathers who remarry, inferring that mothers are fungible and easily replaced by stepmothers.[108]

Courts have used a double standard regarding the sexual behavior of mothers and fathers by focusing mainly on the immorality of the mothers' relationships (without considering the absence of deleterious effects on the children), but failing to evaluate the immorality of fathers' nonmarital sexual

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100. *Id.*
101. Schafran, *supra* note 90, at 192.
102. Polikoff, *supra* note 3, at 236; *see also infra* notes 251-74 and accompanying text.
103. *See, e.g.,* Smith v. Smith, 448 So. 2d 381 (Ala. Civ. App. 1984); *see also* Schafran, *supra* note 90, at 192.
104. Woods et al., *supra* note 31, at 1130.
105. *See* discussion *infra* Part IV.A.
106. Woods et al., *supra* note 31, at 1131-32.
107. *Id.*
108. *Id.*

relationships.[109] Additionally, courts often fail to recognize the inherent immorality of fathers who beat, batter, and abuse mothers as well as the adverse effect of this domestic violence on the children.[110]

Thus, courts are using inappropriate factors that do not have a substantial connection to what is really in the best interest of the child, resulting in an increasing number of mothers who are losing custody of their children.[111]

III. FACTORS SHOWING GENDER BIAS BEHIND THE BEST INTEREST OF THE CHILD STANDARD

In determining what is in the best interest of the child, courts often consider economic resources, employment, traditional family values, and morality to be significant; however, judges' evaluations of these factors may reflect gender bias.

A. Economic Resources

Many single mothers are poor and lack education and employment skills, but must work to support their children.[112] Many of these single mothers were full-time homemakers who sacrificed career opportunities in order to raise their children and do not have the education or skills to qualify for well-paying jobs.[113] This problem is exacerbated by the fact that there is a great disparity between the incomes of men and women.[114]

Divorce is financially disastrous for most women.[115] In the majority of cases, statistics show that the economic status of men increases after divorce, but the economic status of women and children drastically declines after divorce.[116] However, even

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109. *Id.*

110. *Id.* at 1133-34; *see also* Prost v. Greene, 652 A.2d 621 (D.C. 1995) (remanding custody case back to trial court for consideration of possible domestic abuse); Holmgren v. Holmgren, No. CX-92-2277, 1993 WL 140892 (Minn. Ct. App. May 4, 1993).

111. Polikoff, *supra* note 3, at 237.

112. Trudrung-Taylor, *supra* note 98, at 769.

113. *Id.*

114. Sheppard, *supra* note 58, at 233.

115. Weitzman, *supra* note 25, at 1252.

116. *Id.* at 1249-50. Divorced men lost 19% in real income while divorced women lost 29%. *Id.* at 250. However, in terms of purchasing power, the experiences of men and women were very different. *Id.* Over a seven-year period, the economic position of divorced men improved by 17%, but over the same period, divorced women experienced a 29% decline in terms of what their income could provide in relation to

when single mothers provide children with healthy and loving environments and the necessities of life, some courts are using economic criteria in awarding custody to fathers who possess greater economic resources than the mothers.[117] Many judges consider wealth-based criteria, including present income, future employment, and material advantages.[118] Mothers risk losing custody to fathers who can provide bigger homes, nicer neighborhoods, or more material commodities.[119] Courts may express this concern about economics by asking who is the most stable parent, who has the better home, or who can maintain the family home.[120]

In *Dempsey v. Dempsey*,[121] the trial court awarded custody of three children to the father because he had a full-time job and could maintain the family home,[122] even though he had spent little time with his family and planned to have a neighbor, a sister-in-law, and three other women provide child care in his absence.[123] In contrast, the mother had been the children's primary caretaker: she had taken them to the doctor, church, and Sunday school; had attended school conferences; and had cooked, sewn, cleaned, and washed for the children.[124] Furthermore, only the mother had the training and skills to administer therapy to the youngest child who had epilepsy.[125] Nevertheless, the trial court awarded custody to the father because he earned $14,000, could maintain the family home, and had greater earning potential; on the other hand, the mother worked part-time, earned $1000 to $3000, and did not know where she would live after the divorce.[126] The trial court suggested that instead

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their needs. *Id.*

117. Trudrung-Taylor, *supra* note 98, at 760; Woods et al., *supra* note 31, at 1131. In a survey of judges, 50.7% said they would not consider economics in custody, but 46.5% said they would award custody to the parent (mother or father) who was more economically stable. Reidy et al., *supra* note 77. The study did not elucidate the degree of difference between the parents' economic resources, but usually both parents are able to provide the necessities of life. *Id.*

118. Woods et al., *supra* note 31, at 1131.

119. Burchard v. Garay, 724 P.2d 486, 495 (Cal. 1986).

120. Woods et al., *supra* note 31, at 1131.

121. 292 N.W.2d 549 (Mich. Ct. App. 1980), *aff'd in part and rev'd in part,* 296 N.W.2d 813 (Mich. 1980).

122. *Id.* at 553.

123. *Id.* at 550.

124. *Id.*

125. *Id.*

126. *Id.*

of paying child support, the mother could fulfill her obligation by being the children's regular baby-sitter after the divorce.[127]

In contrast, the Michigan Court of Appeals held that the economic circumstances of the parents are relevant to a determination of the best interests of the child but not determinative.[128] The appellate court recognized that such a holding would preclude most mothers from obtaining custody, and that the mother's lesser income from part-time employment was attributable to her having been the children's primary caretaker.[129] Even though the appellate court reversed the trial court's decision and awarded custody to the mother, the state supreme court deferred to the trial court and remanded the case for a new determination.[130]

In *Porter v. Porter*,[131] the appellate court upheld a custody award to the father, an Air Force captain, because he had superior financial resources and could be with his children at night.[132] The mother, who had temporary custody of the children pending trial, had been working as a waitress four to five hours a night in order to be home with the children after school.[133] However, the mother was planning to quit her evening job and had already found a part-time job cleaning apartments in the afternoon while the children were at school.[134] She said she would return to the waitress job only if she could not otherwise support her children.[135] Although the court emphasized it was detrimental for the mother to leave the children with a baby-sitter while she worked at night, the court never considered that the father would also have to provide after-school child care while he was at work.[136] The court also stated that the mother's job prospects were not financially secure, whereas the father's employment enabled him to support the children and to provide stability, guidance, and nurturing when he was not working.[137] The mother argued that she was being

127. *Id.* at 550, 554.
128. *Id.* at 554.
129. *Id.*
130. Dempsey v. Dempsey, 296 N.W.2d 813 (Mich. 1980).
131. 274 N.W.2d 235 (N.D. 1979).
132. *Id.* at 237.
133. *Id.* at 239.
134. *Id.* at 238.
135. *Id.* at 239.
136. *See id.*
137. *Id.* at 241.

unfairly penalized because she had decided to stay home and care for the children instead of pursuing a career.[138] The court responded that it would be no less unfair to deprive the father of custody because he had developed his career to support his family, and that both care and support are important.[139]

Economic factors are usually not solely determinative of custody, but may be significant in a court's decision.[140] In *Richmond v. Tecklenberg*,[141] the court considered that the mother's work hours necessitated her being away from home a great deal, but the appellate court's decision to uphold the grant of custody to the father turned on the fact that the father could maintain a home that was "spacious and in a good neighborhood."[142]

Maintenance of the family home was also a consideration in *McCreery v. McCreery*,[143] where the Supreme Court of Virginia affirmed the grant of custody to the father. The court said that, although the relative physical conditions between the homes of the mother and father were not dispositive in determining custody, it is "highly relevant to the determination of the suitability of the child-rearing environment."[144] One of the factors the court considered in making its determination was that the mother lived in a two-bedroom apartment, but the father remained in the home, " 'a spacious, attractive and well-appointed detached residential dwelling with separate bedrooms for the children.' "[145]

Not only do some courts show a preference for wealthier fathers, but some criticize nonworking mothers, especially if they are on welfare. In *Taft v. Taft*,[146] the appellate court affirmed

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138. *Id.* at 241-42.
139. *Id.* at 242.
140. *See* Taft v. Taft, 553 So. 2d 1157, 1159 (Ala. Civ. App. 1989) (stating father can provide ample housing and financial resources); Holmes v. Holmes, No. CA 90-80, 1990 WL 162102 (Ark. Ct. App. 1990) (noting mother and new husband had bought a new house with four bedrooms and three baths in a quiet neighborhood); Weems v. Weems, 548 So. 2d 108, 109 (La. Ct. App. 1989) (stating that each child can have a separate bedroom in new home in country setting); Lunsford v. Lunsford, 545 So. 2d 1279, 1285 (La. Ct. App. 1989) (noting father has superior financial ability to provide for his children).
141. 396 S.E.2d 111 (S.C. Ct. App. 1990).
142. *Id.* at 114.
143. 237 S.E.2d 167 (Va. 1977).
144. *Id.* at 169.
145. *Id.*
146. 553 So. 2d 1157, 1158 (Ala. Civ. App. 1989).

the grant of custody to the father because the mother had relocated eight times; was unemployed; had been dependent on her parents, friends, and lovers for financial support; and had poor parenting skills.[147] In comparison, the father had adequate financial resources to support the child, could provide ample housing, and had remarried a woman who was willing to help with child care.[148]

Similarly, in *Anderson v. Anderson*,[149] the South Dakota Supreme Court upheld transferring custody to a father in a modification action because he had a full-time job, a good house, a mother who lived nearby, and a new wife who also worked full-time.[150] Although the court conceded that the mother was the primary caretaker and that the children were well-cared for and thriving under her care, the court criticized the mother because she wanted to move near her parents, had no marketable skills, had frequently changed jobs since her divorce, and received welfare.[151] The concurring opinion specifically criticized the mother for supplementing her part-time job with welfare payments even though she received more income this way than by working full time.[152] In contrast, the father and stepmother both had steady employment, and the court noted that, "responsible employment is a good quality."[153] The court never considered that the reason the mother did not have the occupational skills to get a better-paying job was because of her commitment to stay home and raise her children. The dissent argued that the custody determination should have been based on the evidence that the mother had provided a stable, loving home where the children had been well-cared for and were thriving, and not on the fact that she did not have the economic resources to buy "new [bicycles] or a Nintendo game" like the father.[154]

147. *Id.* at 1158-59.
148. *Id.* at 1159.
149. 472 N.W.2d 519 (S.D. 1991).
150. *Id.* at 521.
151. *Id.* at 520-21.
152. *Id.* at 521-22.
153. *Id.* at 522.
154. *Id.* at 523.

B. Employment

A mother's employment status is often scrutinized more closely than is a father's.[155] Some courts penalize mothers who have limited financial resources and who have stayed home to care for their children.[156] Other courts penalize women who use daycare to work full-time to support their children because they spend less time with their children.[157] This places mothers in an impossible situation: "if they do not work, courts question their ability to support their children; yet, if they do, courts question their commitment to their children."[158] In contrast, courts rarely address the issue that fathers who receive custody also need child care for their children while they work. However, when the father's mother is available to baby-sit, the courts sometimes consider this to be a significant advantage for the father over a mother who must use daycare.[159]

In *Richmond v. Tecklenberg*,[160] in which the mother, an obstetrician, appealed the family court's decision awarding custody to the father, the appellate court scrutinized the time her newly-established practice would require her to spend at the hospital away from home.[161] The court was also concerned that her two-year-old daughter would have to be cared for by a baby-sitter while the mother was at work.[162] The appellate court affirmed the grant of custody to the father, who had been in the oil business for ten years, but never evaluated the father's work schedule, how much time he spent at work, or what baby-sitting arrangements he had made for the child.[163]

Likewise, the court only criticized the mother's work schedule in *Simmons v. Simmons*,[164] where the mother, who lost custody of her children in a modification hearing, argued that the trial

155. Edward L. Raymond, Jr., Annotation, *Mother's Status as "Working Mother" as Factor in Awarding Child Custody*, 62 A.L.R. 4TH 259, 265 (1986). *But cf.* W. v. W., 422 A.2d 159, 163 (Pa. Super. Ct. 1980) (noting that custody should be with mother going to school because father works irregular hours).
156. *See supra* part III.A.
157. Polikoff, *supra* note 3, at 239.
158. Horne, *supra* note 71, at 2125.
159. *See infra* this section; *see also* McCreery v. McCreery, 237 S.E.2d 167 (Va. 1977) (considering that grandparent who lived nearby often baby-sat).
160. 396 S.E.2d 111 (S.C. Ct. App. 1990).
161. *Id.* at 114.
162. *Id.*
163. *Id.*
164. 576 P.2d 589 (Kan. 1978).

court had used a double standard in awarding custody to the father.[165] The mother, who originally had been awarded custody, had started her own business and had hired five different housekeepers to care for the children while she was working.[166] The turnover in housekeepers was partially attributed to the stress of the custody proceedings.[167] In ordering the change of custody, the court considered that the mother's work took her away from the children, but the father, a millionaire oil company executive, had arranged his work schedule so he could "spend a normal working father's time with the children."[168] Thus, the court inferred that there is no normal working mother because it is not normal for a mother to work.[169] However, the court never specified what the father's work schedule was or how many hours he actually spent with the children as compared with the number of hours the mother spent with them.[170]

The mother was also penalized for her work hours in a modification hearing in *Lunsford v. Lunsford*,[171] in which the trial court awarded custody of the children to the father, an Air Force pilot, who was no longer on call as a pilot and worked at the Pentagon from 8:00 a.m. to 5:00 p.m., Monday through Friday.[172] The mother, who had originally been granted custody, worked from 8:00 a.m. to 4:30 p.m., Monday through Thursday, and until 6:00 p.m. on Friday.[173] Although the mother actually worked one less hour per week than the father, the court considered the father to have regular work hours, which allowed him to spend more time with the children.[174]

Similarly, in *Prentice v. Prentice*,[175] the trial court awarded custody of the children to the father, which the appellate court affirmed.[176] One of the main factors both courts considered was that the father was a farmer, and that the mother worked forty

165. *Id.* at 593.
166. *Id.* at 590.
167. *Id.* at 591. The court did not elaborate on this point.
168. *Id.*
169. Polikoff, *supra* note 3, at 240.
170. *Simmons*, 576 P.2d at 593.
171. 545 So. 2d 1279 (La. Ct. App. 1989).
172. *Id.* at 1280.
173. *Id.* at 1281.
174. *Id.* at 1280.
175. 322 N.W.2d 880 (S.D. 1982).
176. *Id.* at 881-82.

hours a week away from the home, which rendered her unable to spend time with the children who were cared for by baby-sitters.[177] The court mentioned that the paternal grandparents lived nearby and had expressed a willingness to help raise the children, but the court never considered how much time the father spent with the children, how often the grandparents would babysit for the children, or whether the father, like the mother, would have to use other baby-sitters.[178]

Furthermore, in *Guyer v. Guyer*,[179] a precursor to the *Ireland* case, the Iowa Supreme Court upheld custody to the father largely because the mother intended to use daycare.[180] During the marriage, the mother had begun working to help with the father's business, and the father's mother cared for the child while both parents were at work.[181] At the time of the divorce, the mother had taken another job, requiring her to leave the child in daycare four to five days per week.[182] The district court awarded custody of the child to the father because the father's mother could continue to care for the child while the father was at work, which was preferable to the mother's use of daycare.[183] The court also emphasized that the father lived in a modern four-bedroom house and that the mother lived in a trailer park.[184]

Although courts often consider it an advantage when the father's mother can care for the child, mothers who rely on relatives or friends for help are often criticized. In *Lunsford*,[185] the trial court criticized a recently divorced mother of three young children for being too dependent on a female friend who provided moral support right after the divorce and occasionally bought groceries and washed the laundry.[186] Although the father conceded that this friendship was not a romantic relationship,[187] the court proscribed the times and conditions under which the friend could visit the mother.[188] When the

177. *Id.* at 882.
178. *Id.*
179. 238 N.W.2d 794 (Iowa 1976).
180. *Id.* at 796.
181. *Id.* at 795.
182. *Id.* at 796.
183. *Id.*
184. *Id.*
185. 545 So. 2d 1279 (La. Ct. App. 1989).
186. *Id.* at 1281.
187. *Id.*
188. *Id.* at 1280.

father remarried and subsequently petitioned for a modification of custody, the court found that the mother had not adhered to the strictly proscribed limitations on her friendship with her female friend.[189] This continuing friendship between the two women was one of the court's main considerations in awarding custody to the father.[190] After the mother appealed this modification judgment, the appellate court returned custody to the mother, holding that the relationship with her friend did not harm the best interest of the children.[191]

Courts also discriminate against working mothers by denigrating their continuing roles as the primary caretakers. Under the best interest of the child standard, whichever parent has provided the child's primary nurturing and daily care is considered to be the psychological parent[192] or primary caretaker.[193] Most courts consider the primary caretaker to be an important factor in custody decisions because that parent is closer to the child, more experienced at meeting the child's needs, and is committed to caring for the child.[194] Although this is a gender-neutral standard,[195] the primary caretaker is usually the mother. Thus, judges have no problem recognizing the traditional mother, who stays home to raise her children, as the primary caretaker, or giving this factor its due weight in custody decisions.[196] However, even though the majority of working mothers are the primary caretakers of their children,[197] once a woman works or goes to school, judges often fail to recognize that she remains the psychological parent or primary caretaker.[198] The court often mistakenly assumes that the working mother

189. *Id.* at 1282.
190. *Id.*
191. *Id.* at 1283-85.
192. Horne, *supra* note 71.
193. Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981).
194. Atkinson, *supra* note 38, at 17 (citing Commonwealth *ex rel.* Jordan v. Jordan, 448 A.2d 1113 (Pa. Super. Ct. 1982)). Some courts also consider the primary caretaker to be the only factor in awarding custody, and some legal scholars advocate replacing the best interest of the child standard with the primary caretaker presumption. *See infra* Part V.
195. *Garska*, 278 S.E.2d at 363.
196. *Cf.* Sheppard, *supra* note 58, at 232-33.
197. Mason, *supra* note 66; Woods et al., *supra* note 31, at 1130.
198. Sheppard, *supra* note 58, at 232-33; *see also* Polikoff, *supra* note 3, at 241 (citing *In re* Marriage of Shepherd, 588 S.W.2d 174, 176 (Mo. Ct. App. 1979) (quoting Stanfield v. Stanfield, 435 S.W.2d 690, 692 (Mo. Ct. App. 1968)).

"has no more part [than the father] in training, nurturing, and helping in the child's development."[199]

Just as working mothers are measured against this "traditional mother" standard, fathers are measured against a "traditional father" standard.[200] The traditional father is not expected to know or participate in traditional mothering skills such as cooking, cleaning, taking the children to the doctor's office, or chauffeuring children to activities. Thus, any effort the father makes to do these ordinary household tasks is seen as remarkable.[201] This was the case in *In re Marriage of Estelle*,[202] where the court affirmed the grant of custody to a working father who used daycare and emphasized that the father often made the child breakfast and dinner and picked her up from daycare.[203] "It is difficult to imagine a mother's performance of these chores even attracting notice, much less commendable comment."[204] Likewise, in *Dempsey*,[205] the trial court awarded custody to the father, who had rarely been at home before the divorce proceedings, but emphasized that after the mother filed for divorce, the father started making breakfast for the children, making their school lunches, and provided groceries immediately before the divorce trial.[206] Although, the father spent very little time at home, and the mother did all of the cooking, sewing, and laundry for the children; took medical training to care for an epileptic child; took the children to church and Sunday school; and attended all of the school conferences;[207] these facts had little impact on the trial court's decision to award custody to the father.[208] Furthermore, in

199. Raymond, *supra* note 155, at 271 (citing *In re* Marriage of Estelle, 592 S.W.2d 277 (Mo. Ct. App. 1979)).
200. Woods et al., *supra* note 31, at 1133.
201. Horne, *supra* note 71, at 2133; *see also In re* Marriage of D.L.(B.)M., 783 S.W.2d 473 (Mo. Ct. App. 1990) (describing father, whose wife left him with several young children, as having succeeded against incredible odds by keeping his family together, caring for them, and nursing them); Ferguson v. Ferguson, 202 N.W. 2d 760 (N.D. 1972) (praising father who did the cooking, cleaning, laundry, and Sunday breakfast even though the mother worked from four until midnight).
202. 592 S.W.2d 277 (Mo. Ct. App. 1979).
203. *Id.* at 278.
204. Burchard v. Garay, 724 P.2d 486, 496 n.6 (Cal. 1986).
205. 292 N.W.2d 549 (Mich. Ct. App. 1980).
206. *Id.* at 550.
207. *Id.*
208. *Id.*

McCreery,[209] the court never mentioned what the working mother did for the children, but pointed to testimony that the father was a mother figure who had occasionally cooked hot meals for the children, washed the dishes, changed diapers, done the laundry, bathed the children, and transported them to the babysitter.[210]

C. *Traditional Family Values*

One of the main factors often used by trial court judges in determining what is in the best interest of the child is a preference for a "traditional lifestyle."[211] Many judges favor a parent who can provide a child with the most traditional lifestyle.[212] These judges prefer the traditional family structure of a working father and a nonworking mother, which does not exist in the majority of families in the United States.[213]

Because the majority of judges are male[214] and are "characteristically conditioned to favor conventionality," biases regarding the proper role of women in society are bound to influence judges' thinking.[215] When judges must decide what is in a child's best interest, their "internalized norms" of what a good mother should be may reflect outmoded, traditional, gender stereotyping.[216] Thus, custody decisions may reflect the judge's belief that a mother's place is in the home, caring for her children, and that a single, working mother who uses daycare is not providing a good home.[217] Some courts are particularly critical of ambitious working women and intimate that a career-minded woman is dissatisfied with her proper role and is selfishly subordinating her child's needs to her own.[218] In comparison, courts do not criticize men who are ambitious.

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209. 237 S.E.2d 167 (Va. 1977).
210. *Id.* at 170.
211. Trudrung-Taylor, *supra* note 98, at 776.
212. *Id.* at 777.
213. *Id.*
214. Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1705-07 (1991).
215. Sheppard, *supra* note 58, at 233 n.37 (citing 1970 Census report, which of all the federal and local judges in the country, only 5.1% (662 of 12,943) were women, and only 3.7% (38 of 1031) of federal judges were women).
216. *Id.* at 232-33.
217. Trudrung-Taylor, *supra* note 98, at 777; *see also* text accompanying notes 239-50.
218. Burchard v. Garay, 724 P.2d 486, 495 (Cal. 1986) (concurring opinion).

In *Landsberger v. Landsberger*,[219] the mother appealed the trial court's award of custody to the father.[220] The couple had been married for four years, during which time the mother had stayed at home with two children.[221] A month before the mother filed for divorce, she started working outside the home.[222] The court conceded that the mother and father were equally loving and fit parents.[223] Although the court acknowledged that the mother had been the children's primary caretaker, the court emphasized that while the mother had sought a social life outside the home, the father had baby-sat and learned about child care.[224] The court recognized that the father's knowledge about his children was not as extensive as the mother's, but found that he could acquire this knowledge because he had many relatives who lived in the area.[225] The court stated that the mother is a "strong willed" "career mother," who believed "that a life limited to homemaking is not adequate to fulfill her needs," and that the father "now focuses more on the children."[226] On this basis, the trial court awarded custody to the father, and the appellate court affirmed.

In *Gulyas v. Gulyas*,[227] a mother unsuccessfully appealed the trial court's decision to give custody of the child to the father.[228] The mother, a regional manager for a tax firm, worked forty to fifty hours a week during tax season, but only ten to thirty hours a week the rest of the year.[229] She also said she would refuse a transfer to another city and would even quit her job in order to retain custody of her six-year-old daughter.[230] Although the court conceded that both parents loved the child and were equal in most respects, the "wife's career and need for obtaining a better livelihood . . . has diminished her . . . ability to care for the child other than in Day Care homes. . . . [T]he mother . . . is an energetic and ambitious career woman. . . . [T]he father . . . is

219. 364 N.W.2d 918 (N.D. 1985).
220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 919.
224. *Id.*
225. *Id.*
226. *Id.*
227. 254 N.W.2d 818 (Mich. Ct. App. 1977).
228. *Id.* at 818-19.
229. *Id.* at 821-22 (dissenting opinion).
230. *Id.* at 818.

perhaps less ambitious than the mother, but is more of a homebody."[231] The court failed to consider that the child had only spent two months in daycare before first grade, and after starting first grade, had spent only one-and-a-half hours a day after school at a neighbor's home until her mother arrived from work.[232] The court also said that the father could provide a more stable home life because the child had lived with him for the past five months.[233] However, the court failed to consider that the only reason the child had been with her father during that period was because he had *abducted* her from the mother.[234]

The dissent stated that the lower court had abused its discretion by awarding custody to the father because the mother was a successful career woman.[235] The dissent also pointed out that the mother actually worked fewer hours than the father, and if the mother gave up her career in order to retain custody, she would be financially unable to provide the necessities of life for the child.[236] The dissent admonished that "the best interests of the child . . . should not be used as a screen with which to hide outmoded notions of a woman's role being near hearth and home."[237] This was the reasoning of the court in *Guyer*, which criticized the mother because she continued to work against the wishes of the father, was not a good housekeeper, and was "neither satisfied nor content in the role of mother and housekeeper."[238]

The trial court in *McCreery* was similarly critical of the mother and awarded custody to a father, determining that the mother of two young children was working for the government "to relieve her of the stress and anxiety of her household duties and chores in connection with the raising of the children."[239] The Virginia

231. *Id.* at 818-19.
232. Marilyn H. Mitchell, Note, *Family Law—Child Custody—Mother's Career May Determine Custody Award to Father*, 24 WAYNE L. REV. 1159, 1165 n.44 (1978) (citing Record at 13, 44, Gulyas v. Gulyas, No. 75-083-748 (Wayne Co. Cir. Ct. Oct. 20-21, 1975) (custody hearing)).
233. *Gulyas*, 254 N.W.2d at 818-19.
234. Mitchell, *supra* note 232, at 1164 n.38 (citing Record at 3-4, Gulyas v. Gulyas, No. 75-083-748 DC (Wayne Co. Cir. Ct. Oct. 20-21, 1975) (custody hearing)).
235. *Gulyas*, 254 N.W.2d at 821.
236. *Id.* at 822-23.
237. *Id.*
238. *Guyer*, 238 N.W.2d at 796.
239. McCreery v. McCreery, 237 S.E.2d 167, 169-70 (Va. 1977).

Supreme Court affirmed custody to the father and said the trial court had not based its decision on the theory that mothers are not proper custodians unless they are full-time mothers.[240] However, the Supreme Court then concurred with the trial court's comparison between the two working parents: the mother had been preoccupied with the " 'glamour of her work' " and had subordinated the interests of her children to her job; whereas the father, who occasionally did household chores, was "willing to place the welfare of [the] children above all else, to a much greater extent than the mother."[241]

In modification cases, courts often show a preference for a traditional two-parent family and may favor a father who has remarried and can provide a stepmother to care for the child.[242] In *Taft*, the appellate court affirmed a grant of custody to the father, partially because the father had remarried and his new wife "demonstrate[d] a willingness to assist and support him in raising [the] child."[243]

In a modification proceeding in *Anderson*, the court affirmed a grant of custody to the father, apparently giving weight to the fact that the father and his new wife engaged in family activities with the children such as camping and fishing.[244] Part of the evidence presented at trial was the father's family album containing photographs of his home and family life with his new wife.[245] The court held that it was in the children's best interest to live with the father and stepmother because they could provide the most stable environment.[246]

Likewise, in *Lunsford*, the trial court awarded custody to the father in a modification hearing, placing great emphasis on the fact that the father had remarried and that his new wife was willing to reduce the number of hours she worked to care for the children.[247] The court held that the father's ability to provide the children with a husband and wife relationship was a major factor in determining that the best interest of the children was to

240. *Id.* at 171.
241. *Id.* at 170.
242. Polikoff, *supra* note 3, at 241; Trudrung-Taylor, *supra* note 98, at 777.
243. Taft v. Taft, 553 So. 2d 1157, 1159 (Ala. Civ. App. 1989).
244. Anderson v. Anderson, 472 N.W.2d 519, 521 (S.D. 1991).
245. *Id.*
246. *Id.*
247. Lunsford v. Lunsford, 545 So. 2d 1279, 1280-81 (La. Ct. App. 1989).

grant custody to the father.[248] Similarly, in *Simmons*, the appellate court affirmed a change of custody to the father and stressed that the father and his new wife, who was "ready, willing and able to care for the minor children," would "offer the children a more stable home environment."[249]

Conversely, in modification proceedings, when the mother has remarried, no assumption is made about the role the stepfather will play. However, if the mother's remarriage enables her to have the financial means to stay home full-time with the child, the court often weighs this factor in favor of the mother.[250]

D. Morality

A parent's nonmarital, sexual relationship is a factor courts often apply inconsistently to mothers and fathers in custody decisions[251] because judges' have strong personal feelings about the issue.[252] Cases that cite to sexual relations outside of marriage as a factor mainly involve mothers. Today, "many courts . . . find that a mother's [nonmarital], sexual conduct is immoral and justifies removal of the child from her custody."[253] Other courts and the Uniform Marriage and Divorce Act recognize that sexual mores have changed and hold that parents' sexual behavior is only relevant if it adversely affects the parent-child relationship.[254] When the effect on the child is not definitive, judges may "presume, without specific proof, that a nonmarital sexual relationship is harmful to children."[255]

The most infamous case involving the effect of a mother's nonmarital relationship on custody is *Jarrett v. Jarrett*,[256] in which a father brought a modification action for custody of his

248. *Id.* at 1282.
249. Simmons v. Simmons, 576 P.2d 589, 591 (Kan. 1978).
250. Myers v. Myers, 561 So. 2d 875, 878 (La. Ct. App. 1990); Holmes v. Holmes, No. CA90-80, 1990 WL 162102 (Ark. Ct. App. Oct. 24, 1990).
251. Smith v. Smith, 448 So. 2d 381, 381-83 (Ala. Civ. App. 1984); Woods et al., *supra* note 31, at 1133.
252. Atkinson, *supra* note 38, at 29.
253. CLARK, *supra* note 34, at 845.
254. *Id.* at 802-03 (referring to Uniform Marriage and Divorce Act § 402, 9A Unif. L. Ann. 198 (1987)); *see also* Dunlap v. Dunlap, 475 N.E.2d 723 (Ind. App. 1985); Stewart v. Stewart, 430 So. 2d 189 (La. App. 1983); Greenfield v. Greenfield, 264 N.W.2d 675 (Neb. 1978).
255. Atkinson, *supra* note 38, at 30.
256. 400 N.E.2d 421 (Ill. 1979), *cert. denied*, 449 U.S. 927, *reh'g denied*, 449 U.S. 1067 (1980).

three daughters who were living with their mother.[257] The basis of the claim was that the mother was living with a man to whom she was not married.[258] The court held that the mother's actions were damaging to the moral welfare and development of the children, and there did not have to be a tangible manifestation of damage to the children before granting custody to the father.[259] This attitude reflects the approach of other courts that a parent's relationship negatively affects a child, but the court does not delineate exactly how the child has been harmed.[260]

Fathers who have nonmarital, sexual relationships often do not jeopardize their custody rights, but mothers who have the same relationships often do.[261] In *Smith v. Smith*,[262] the appellate court upheld custody to the father. The parents had been married for nine years and had two children when the mother filed for divorce.[263] The trial court found that the mother was the primary caretaker and both parents loved the children.[264] However, the mother went to bars with fellow employees and had "clandestine liaisons" with a male co-worker.[265] Based on the testimony of an observer, the trial court inferred the mother had participated in "acts of immorality"[266] with her co-worker in motels, in cars, and at the zoo. Observers conceded that the father had also engaged in a "close personal relationship . . . with a female employee" during the marriage, but the court excused his behavior because it had not caused the breakup of the marriage.[267] Even though the court noted the mother had not neglected the children and loved them as much as the father did, the court criticized the mother because her "need for . . . personal growth and independence [became] increasingly apparent . . . [and had] begun a course of conduct indicating primary concern

257. *Id.*
258. *Id.*
259. *Id.*
260. Atkinson, *supra* note 38, at 31.
261. *Jarrett*, 400 N.E.2d at 421; Blonsky v. Blonsky, 405 N.E.2d 1112 (Ill. App. 1980); Simmons v. Simmons, 576 P.2d 589 (Kan. 1978); Woods et al., *supra* note 31, at 1133.
262. 448 So.2d 381 (Ala. Civ. App. 1984).
263. *Id.*
264. *Id.* at 382-83.
265. *Id.*
266. *Id.* at 383.
267. *Id.*

with her own pleasure."[268] Based on these factors, the trial court awarded custody to the father.[269] Even though the appellate court stated that a parent's moral misconduct can only result in a loss of custody when it is shown to have harmed the child, the court affirmed custody to the father without specifying how these children had been harmed. Although the mother contended that the trial court denied her custody solely because of her indiscretions, the appellate court held there was no indication that the trial court had denied the mother custody for that reason alone.[270]

Ironically, although courts may use a double standard in considering parents' immoral, sexual behavior, courts often do not even acknowledge the inherent immorality and illegality of a father's domestic violence towards the mother.[271] While some courts may deny mothers custody because of their immoral, sexual relations, even when there is no adverse effect on the children, many courts, surprisingly, refuse to consider the immorality of a father's domestic violence towards the mother and its deleterious effect on the children.[272] The Maryland Special Joint Committee on Gender Bias in the Courts confirmed a " 'specter of double standards' regarding mothers' and fathers' sexual behavior."[273] The Maryland task force found cases in which women lost custody because of sexual relationships that had no effect on their children, and cases in which the father's violence against the mother was ignored.[274]

E. Courts That Address Gender Bias

Although many courts perpetuate gender bias, other courts, recognizing that gender bias in custody decisions is a pervasive, insidious problem, have addressed it specifically. In *Burchard v. Garay*,[275] the California Supreme Court held that the trial court

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268. *Id.*
269. *Id.* at 382.
270. *Id.* at 382-83. See also *infra* results of empirical study regarding parents' nonmarital, sexual relationships.
271. Woods et al., *supra* note 31, at 1133-34.
272. *Id.* at 1134; *see also* Prost v. Greene, 652 A.2d 621 (D.C. 1995); Prost v. Greene, No. DR-2957, 1994 WL 525043 (D.C. Super. Aug. 22, 1994); Holmgren v. Holmgren, No. CX-92-2277-92D, 1993 WL 140892 (Minn. App. May 4, 1993).
273. Schafran, *supra* note 90, at 192.
274. *Id.*
275. 724 P.2d 486 (Cal. 1986).

abused its discretion in awarding custody of a two-year-old child to the father based on the father's superior economic resources, the necessity for the mother to place the child in daycare while she worked, and the fact that the father's new wife could stay at home and care for the child.[276] The Supreme Court held that an economic advantage is not a permissible basis for custody, and in an era when eighty percent of divorced mothers work, the presumption that a working mother is inferior or less committed to the child is invalid, especially when she has been the primary caretaker.[277] Instead, a custody determination should be based on the emotional bond between parent and child.[278]

In a concurring opinion, Chief Justice Bird recognized that the "outmoded notions of a woman's proper role being near hearth and home"[279] are unconstitutional.[280] She recognized that mothers are usually the primary caretakers, whether or not they work, and that there is no scientific evidence showing children are detrimentally affected by their mothers' working.[281] According to Justice Bird, the trial court's rationale would place a mother in a no-win situation.[282] If she did not work, she could not compete financially with the father who could provide a larger home and material benefits; if the mother did work, "she would face the prejudicial view that a working mother is by definition inadequate, dissatisfied with her role, or more concerned with her own needs than with those of her child. This view rests on outmoded notions of a woman's role in our society."[283] Chief Justice Bird explained that stability, continuity, and the emotional bond between the parent and child are the factors that determine what is in the best interest of the child.[284]

In a more recent case, *Linda R. v. Richard E.*,[285] the New York Supreme Court, Appellate Division, addressed many of the same issues as *Burchard* and held that the trial court had not

276. *Id.* at 488.
277. *Id.* at 491-92.
278. *Id.* at 492.
279. *Id.* at 493.
280. *Id.*
281. *Id.* at 494.
282. *Id.* at 494-95.
283. *Id.* at 495.
284. *Id.* at 494.
285. 561 N.Y.S.2d 29 (N.Y. App. Div. 1990).

applied gender-neutral standards in determining custody.[286] The Court held that the wife's alleged sexual relationship with another man was not relevant because the relationship had not affected the children.[287] Furthermore, the trial court had not permitted similar questions about nonmarital sexual activity to be asked of the father.[288] The Court recognized that custody determinations should be made on the basis of gender-neutral factors,[289] and working mothers should not be penalized because they work.[290]

F. Empirical Study of 378 Custody Cases from 1990 Through 1994

This study analyzes 378 nation-wide custody cases between mothers and fathers from 1990 through 1994 to ascertain how judges evaluated different factors for mothers and fathers in determining what is in the best interest of the child. Forty-six factors that may reflect gender bias in the areas of economics, employment, traditional family values, and morality were charted for each case in which they occurred.[291]

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286. *Id.* at 30.
287. *Id.* at 31.
288. *Id.*
289. *Id.* at 32-33.
290. *Id.* at 33; *see also In re* Marriage of Kush, 435 N.E.2d 921 (Ill. Ct. App. 1982) (holding leaving children with babysitter is no reason to deny custody to mother who goes to school and works); Wellman v. Dutch, 604 N.Y.S.2d 381 (N.Y. App. Div. 1993) (reversing trial court's improper award of custody to the father based on his superior financial income, the mother's use of daycare, and the fact that the father's new wife would stay at home and care for the child); Witmayer v. Witmayer, 467 A.2d 371 (Pa. Super. Ct. 1983) (holding the fact that parents work or have a nonmarital relationship that does not adversely affect the child is not a factor that can be used to deprive parents of custody).
291. The Author compiled a citation list of 378 custody cases between parents from a computerized WESTLAW search using the query: "CUSTODY /P "BEST INTEREST OF THE CHILD" & WORK WORKING "DAY CARE" FINANCIAL! ECONOMIC MONEY STUDENT EDUCATION HOUSE MORALITY IMMORALITY /P MOTHER FATHER & DA(AFT 1989 & BEF 1-1-95) % (ADOPTION RELOCATION JURISDICTION! SURROGATE FOSTER "HABEAS CORPUS")." The purpose of this search was to study all the reported parental custody cases, nationwide, for a five-year period in which economics, employment, traditional values, and morality were considered in decisions based on the best interest of the child. The Author's research showed that gender bias in these areas may influence custody decisions. The search covered all state custody decisions from 1990 through 1994. Most of these cases were appeals of original custody determinations or appeals of modification determinations. A standardized chart delineating the 46 factors (see text page 878) was compiled to document each case. The chart also includes a section in which factors outside the scope of this Note were considered by the court. The section

A standardized chart, the cumulative chart shown on pages 878 to 880, was used for each case. The chart is divided into the areas of finances and housing, employment and child care, traditional values, and morality. Each of these areas was further broken down into the forty-six specific, individualized, component factors.

For each of the 378 cases, the factors considered by the court in determining what was in the best interest of the child were documented. If the court considered a particular factor relevant in its reasoning or holding, that factor was charted according to whether it was considered in favor of the mother, against the mother, in favor of the father, against the father, or neutral.[292]

This cumulative chart on pages 878 to 880 shows the results of all 378 cases in which these factors were considered in custody decisions. On the cumulative chart only the columns for and against mothers and fathers are included in order to give an overview of how courts evaluated mothers and fathers. A statistical analysis of this cumulative data from the random sample of 378 cases ascertained which factors may indicate gender bias in the general population, and what proportion of the time courts could be expected to consider these factors for or against parents in future custody cases.[293] The results of this

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labeled, "Main Factors Decision Based On," was more subjective and documented for the author's background information, but does not affect the results of the study. The chart on pages 878-80 shows the cumulative results of the 378 cases in which the factors were considered for or against the mother and father. An identical, individual chart, which also includes the frequency, neutral factors, and the optional factors was compiled for each of the 378 cases. The cite lists for 488 cases obtained from the WESTLAW search, the 378 individual charts, as well as the documentation of the 110 non-relevant cases is compiled in the Appendix (available in Georgia State University College of Law Library).

292. Each factor was quantified according to whether it was the sole determinant of custody or whether it was one of several factors considered. If it was one of several factors, it was further subdivided as either a factor that was mentioned only one time in one sentence, or as a factor that was mentioned more than one time or in more than one sentence. This allowed the importance of each factor to be quantified with a minimum of subjective judgment or analysis.

293. A random sample of 378 child custody cases was drawn from the general population of all child custody cases between parents (see Appendix). Each case was analyzed for forty six factors courts might consider in custody determinations; a cumulative chart showing the results from all 378 cases was compiled and is shown on pages 878-80. This cumulative data was then analyzed to determine which factors are statistically significant and may indicate gender bias in the whole population in future custody cases. The sample proportion for each factor or group of factors courts considered, either for or against the mother or father, was compared to a presumed unbiased proportion of 50% for each parent (see Appendix). When the sample

empirical study and statistical analysis will be discussed in Section IV.

CUMULATIVE EMPIRICAL DATA

Factor	For Mother	Agst. Mother	For Father	Agst. Father	Neut.
Finances and Housing 1. Income	6	8	20	4	
2. Steady Job	14	10	28	4	
3. Potential Income	2		1	1	
4. Material advantages	3	2	5	1	
5. Home: Nicest, biggest, country, own room, bed	7	2	15		
6. Can maintain family income	13		16		
7. Lack of housing		3		3	
8. Father failed to pay support Mother failed		1 1		13	
Employment & Childcare 1. Mother works	15	6			
2. Mother does not work	1	10			

proportion refuted this presumed 50% bias and showed a disparity in the way mothers and fathers were treated, the cumulative data for this factor was statistically analyzed to determine the proportion of times courts would probably consider the factor for/against mothers and fathers in the general population with a 95% confidence interval (see Appendix). For each group of factors analyzed, three variables were utilized in a standard mathematical equation. Where:

π = the population proportion, or the percentage of time judges could be expected to find a factor for or against mothers and fathers in the general population

N = the total number of observable cases for a particular factor

P = the sample proportion in the sample population = *number of times factor is for or against a mother/father* / N

Then: $\pi = P \pm 1.96 \sqrt{\frac{P(1-P)}{N}}$

Thus, π shows the range of the proportion of time in the whole population courts could be expected to consider a particular factor for or against a parent with a 95% confidence interval (see Appendix). When π is greater than or less than 50%, this may indicate gender bias for this factor in the general population. Where the range for π includes the assumed bias of 50%, the number of cases in the sample was not high enough for determinative statistical comparison to conclude if gender bias is indicated in the general population for that factor; however, the data based on the sample population may be indicative of how courts consider the factor for mothers and fathers. This documentation and methodology for the statistical analysis is contained in the Appendix (available in Georgia State University College of Law Library).

Factor	For Mother	Agst. Mother	For Father	Agst. Father	Neut.
Employment & Childcare (cont'd) 3. Father works			13	1	
4. Father does not work				4	
5. Negative attitude to non-working parent: on welfare, dependent		8	1	4	
6. Mother remarries and stays home	3	2			
7. Time: Concern over working parent and time away from children		13	1	15	
8. Concern over student parent and time away from children		1		2	
9. Praise of working parent	4		5		
10. Work/School schedules/hrs negative		5		6	
11. Work/School schedules/hrs positive	9	1	5	1	
12. Primary Caretaker	71	3	17	2	
13. Father's parenting efforts lauded			46		
14. Mother's parenting efforts lauded	36				
15. Mother uses daycare	4	6			
16. Father uses daycare			1	2	
17. Daycare used gen.(neutral)					
18. Stepmother provides care			6	2	
19. Stepfather provides care	4	3			
20. M/P grandparent provides care	11	3	23	3	
21. Other 3rd party care	6	1	2	3	
Traditional Values 1. Parent too career oriented		3		2	
2. Parent's successful career	1	2	2	1	
3. Remarriage=nuclear family/stability	20	11	33	3	
Morality 1. Mother has non-live in extramarital sexual relationship	2	24			

Factor	For Mother	Agst. Mother	For Father	Agst. Father	Neut.
Morality (cont'd) 2. Father has non-live in extramarital sexual relationship				2	
3. Mother has live-in lover	5	13			
4. Father has live-in lover			4	8	
5. Specific adverse effect on child noted: Specify		5		6	
6. Father abuses mother				20	7
7. Father abuses child				10	
8. Mother abuses child	6			1	
9. Parent abuses alcohol	7			10	
10. Parent abuses drugs	11			3	
11. Criminal activity	4			6	
12. Mental Problems	20			3	
13. Mother lesbian	1				
14. Father gay					

Other Factors Court Considered:	Yes	No	Mentioned Once Only
1. Child's Preference			
2. Parent's compliance & willingness to promote contact with other parent			
3. Relationship with siblings			
4. Stability			
5. *Other Factors*:			

IV. ANALYSIS

An analysis of the case law and empirical data attests that gender bias in the areas of finances and housing, employment and childcare, traditional values, and morality may have a determinative impact on custody decisions, which is unfairly disadvantageous to women.

A. *Finances and Housing*

Using finances and housing as a determinative factor in custody decisions often disadvantages women and may not be in the best interest of the child.[294] Many judges consider present income, future earning potential, housing, maintenance of the family home, and other material advantages in making custody determinations.[295] This has a devastating effect on women, who generally do not earn as much as men because of disparity in wages, and because of a focus on raising children instead of advancing career opportunities.[296] Many of these women must suddenly face life as single mothers without marketable job skills and less potential earning power than the fathers.[297] When judges consider the disparity between parents' incomes and earning potentials, a mother's commitment to her children may actually jeopardize her getting custody because she has fewer economic resources.

Even when women do receive custody of children after divorce, ironically, they often assume sole economic responsibility for the children.[298] One of the main reasons for this is that less than half of the women awarded child support ever receive it as designated.[299] A single mother who heads a household can expect to have just over half the funds that are available to two-parent families or families headed by single males.[300] Additionally, most divorced men experience an increase in their financial status after divorce, but divorced women and their children experience a steep decline.[301] This disparity in economic resources results in an inadvertent custody preference for fathers in modification cases.[302]

Not only is using economic criteria unfair to mothers, but it also is not in the best interest of the child. Using financial criteria devalues the importance of the emotional relationship and psychological ties between the child and the primary

294. Polikoff, *supra* note 3, at 239.
295. Woods et al., *supra* note 31, at 1131.
296. *See supra* text accompanying notes 105-07.
297. *Id.*
298. Polikoff, *supra* note 3, at 238.
299. Woods et al., *supra* note 31, at 1132.
300. *Id.*
301. Weitzman, *supra* note 25, at 1250.
302. Trudrung-Taylor, *supra* note 98, at 777.

caretaker, who is usually the mother,[303] and gives disproportionate weight to economic capacity.[304] However, courts should provide for the economic welfare of children. It is assumed that children should not lack the basic necessities of life.[305] However, this type of "privation" is rarely at issue in custody cases, and generally either parent is able to meet the child's basic needs.[306] Additionally, there is no scientific evidence establishing a correlation between wealth, good parenting, and the child's best interest.[307] The parent who can supply a bigger house, fancier clothes, trips to Disneyland, and more Nintendo games is not necessarily the better parent. In fact, the parent who is financially superior likely achieved this success by spending time at work away from the child.[308]

Instead of giving disproportionate weight to economic factors and denigrating the importance of the primary caretaker, the courts, as a means for ensuring that a child has the necessary financial support, should make and enforce more equitable property and support agreements.[309] This solution would be in the best interest of the child.

Another danger that occurs when courts use economic criteria to determine custody is "custody blackmail."[310] Fathers who do not want custody can use the threat of a custody suit to coerce mothers into financial concessions.[311] Mothers may acquiesce to inadequate spousal and child support in exchange for uncontested custody.[312] "A woman faced with a contested custody hearing seldom would turn down a proposed settlement that removes the threat, no matter how low the child support or how disproportionate the property settlement."[313]

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303. Woods et al., *supra* note 31, at 1130.
304. Polikoff, *supra* note 3, at 238.
305. *Id.* at 239.
306. Chambers, *supra* note 4, at 539.
307. Klaff, *supra* note 4, at 350.
308. Polikoff, *supra* note 3, at 239.
309. *See* Dempsey v. Dempsey, 292 N.W.2d 549, 553 (Mich. Ct. App.), *modified*, 296 N.W.2d 813 (Mich. 1980) (stating that the court can adjust any difference in income by requiring more financial support by the noncustodial parent); Polikoff, *supra* note 3, at 238-39 (stating that failure of child support enforcement results in mother's sole financial responsibility for the children and suggesting more appropriate child support awards and enforcement).
310. Mason, *supra* note 66, at 26-27.
311. *Id.*
312. *Id.*
313. Woods et al., *supra* note 31, at 1134 (quoting Polikoff, *Child Custody Disputes:*

Additionally, a mother may be intimidated into not bringing suit against a delinquent father who has failed to make support payments, because the father often retaliates by suing for custody.[314] The mother may not have the financial resources to wage a legal battle, especially since custody litigation is particularly expensive.[315] Thus, the mother may forego legal enforcement of support, which results in a lower standard of living for the child. Using economic resources as a factor in custody determinations may also encourage a father who wants custody to renege on support payments in order to "exacerbate the financial disparity"[316] between the mother and himself, subjecting the mother and child to diminished economic resources.[317]

The empirical study attests that the availability of economic resources is more often in the father's favor. In the sample population of 378 cases, economic factors were considered 168 times (44% of 378 cases). Out of 168 times, economic factors were considered in the mother's favor 45 times (27%), but 85 times (51%) they were considered in the father's favor. Conversely, the lack of financial resources hurt mothers more often than fathers. Out of 168 times, economic resources were considered a negative factor against mothers 25 times (15%), but only against fathers 13 times (8%).

The sample proportion of decisions either in favor of the mother or father was compared to a presumed unbiased proportion of 50% for each parent. This statistical analysis shows that in reality, courts can be expected in future cases to find economic factors in favor of the mother and against the father 28% to 42% of the time, which is less than the assumed bias of 50%.[318] Conversely, courts can be expected to find economic factors in favor of the father and against the mother 58% to 72% percent of the time, which is greater than the assumed bias of 50%.[319] Therefore, these statistics indicate that there is gender

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Exploding the Myth that Mothers Always Win, in FAMILIES, POLITICS AND PUBLIC POLICY: A FEMINIST DIALOGUE ON WOMEN AND THE STATE, (Diamond, ed. (1982)).

314. *Id.*

315. *Id.*

316. Polikoff, *supra* note 3, at 238.

317. *Id.*

318. *See* Appendix (available in Georgia State University College of Law Library).

319. *Id.*

bias against mothers when judges consider economic factors in custody determinations.

However, thirteen cases in the sample also criticized fathers for failure to pay child support. One court held this factor against the mother, and one case criticized a mother for failing to pay child support.

B. Employment

Some courts continue to show concern over the effects of working mothers and daycare on children. However, a growing acceptance of daycare is reflected in federal and state legislative programs as well as in the empirical data. Additionally, public policy can facilitate the integration of work and family, which will be in the best interest of children, parents, and society.

1. Working Mothers

Since most single mothers have to work, most will have to use some type of child care. In 1990, more than six million children under five, whose parents worked, were cared for by someone other than the parent,[320] and nearly sixty-five percent of these children attended daycare facilities.[321] Due to this increasing use of daycare, concern has developed that a mother's absence might have a "negative impact . . . on [a] child's emotional well-being."[322] However, the best interest of the child focuses on the importance of stability in the child's life. Consensus exists among psychologists and psychiatrists that continuity and stability are important to young children, and disruption of this parent-child relationship carries significant risks.[323] Research has shown that the "quality of the relationship between the primary caretaker and the child is far more important to healthy development than the constant availability of the caretaker."[324] It is the quality and intensity of the care, not necessarily the quantity, which forms the bond between the child and the

320. Means, *supra* note 12.
321. *Id.*
322. Trudrung-Taylor, *supra* note 98, at 769.
323. Mnookin, *supra* note 4, at 265.
324. Trudrung-Taylor, *supra* note 98, at 770. This holds true if the father is the primary caretaker, although the mother is the primary caretaker in the majority of cases. *Id.*

primary caretaker.[325] The "continuity of the relationship between the primary caretaker and child"[326] is crucial to the child's best interest.[327] However, continuity and stability are not the same as availability. While children need to be with their primary caretaker for quality time every day, children do not need constant access to this person.[328] As the Chief Justice of the Supreme Court of California stated, "[T]here is no accepted body of expert opinion that maternal employment per se has a detrimental effect on a child."[329] Thus, when the mother is the primary caretaker, the stability and welfare of the child are better served when the mother retains custody and uses a good daycare facility. When a mother has been the primary caretaker, and the child has been well-cared for, the best interest of the child should dictate that the child remains with the mother, even if, for example, the paternal grandmother has offered to help the father care for the child, if he wins custody.[330] Courts should recognize that a mother is not a fungible commodity who can automatically be replaced by another female, even a grandmother.

Further, judges should recognize and acknowledge that mothers who work do not automatically abrogate the role of primary caretaker. Judges should not measure working mothers against a "traditional mother" standard, nor should they measure fathers against the "traditional father" standard.[331] Courts should not give fathers disproportionate credit for doing child care duties that mothers routinely do without fanfare.

2. *Daycare*

In addition to concern over the effect on children of working mothers, concern has been expressed over the long term effects of daycare on children.[332] However, many child experts believe that a good daycare program is a positive experience for children and can be a child's first educational experience.[333] Good

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325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. Burchard v. Garay, 724 P.2d 486, 494 (Cal. 1986) (concurring opinion).
330. *See, e.g.,* Ireland v. Smith, 547 N.W.2d 686 (Mich. 1996).
331. *See supra* text accompanying notes 211-13.
332. *Cf.* Trudrung-Taylor, *supra* note 98, at 770.
333. Herndon, *supra* note 16.

daycare fulfills the basic health, safety, and emotional needs of the child.[334] Studies show that children in daycare learn cooperation skills better and sooner than children who are raised by their mothers.[335] David Liederman, executive director of the Child Welfare League of America stated: "[T]he vast majority of mothers in the work force are using child care. It's a great place for kids to learn, if it's quality child care."[336]

There are many different views on what constitutes excellent child care for children under five. Although some people think children should be at home with their mothers, some people believe it is essential that children be cared for, at least part of the week, by someone other than their parent.[337] Some people believe children are benefitted by playing with other children in "small, warm, and loving family day care homes"; other authorities, however, believe children benefit from exposure to diverse groups of "other races and ethnic groups."[338] Thus, judges should keep "open minds" when it comes to deciding social policy for which there are many credible, diverse views.

3. Legislative Policy

The acceptance of daycare is reflected in government policy. Welfare reform proposals presently debated in Congress include requirements that single mothers who are capable of working must either work or lose welfare benefits.[339] Many of these proposals facilitate the mothers' access to daycare, so they will be able to work.[340] Head Start, one of the most successful government programs, provided "a federally-financed learning day care environment for low-income preschoolers."[341] Many

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334. *See* Trudrung-Taylor, *supra* note 98, at 770. However, poor daycare can certainly have an adverse affect on children. *Id.*

335. Bonnie Erbe, *What Will Day Care Babies Grow Up to Be?*, L.A. DAILY J., Sept. 26, 1989, at 6.

336. Kastor, *supra* note 1.

337. Coons et al., *Deciding What's Best for Children*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 465, 487 (1993).

338. *Id.* at 487-88.

339. Means, *supra* note 12. On August 22, 1996, President Clinton signed the welfare overhaul bill that requires welfare recipients to work within two years and imposes a five-year lifetime limit on benefits. Barbara Vobejda, *Clinton Signs Welfare Bill Amid Division*, WASH. POST, Aug. 23, 1996, at A1.

340. Means, *supra* note 12.

341. *Id.*

states are also developing more stringent standards for daycare facilities to ensure safety and better quality childcare.[342]

4. Public Policy

Public policy should encourage the availability of more flexible work schedules for women, and employers should consider the feasibility of on-site daycare facilities for employees with children. Because work is a part of most parents' lives, public policy should encourage the integration of work and family. Additionally, public policy should consider accommodations between these two areas of life that would not only be in the best interest of the child, but would also be in the best interest of the family, the employer, and society.

Furthermore, public policy should dissuade young, single mothers from becoming dependent on welfare and should encourage them to further their education, obtain marketable skills, and support their children. To achieve these goals, mothers will often need daycare for their children. Instead of penalizing women, like Jennifer Ireland, by jeopardizing their custody, judges should encourage women to build a better life and future for their children.

5. Empirical Data

Courts in the sample population were somewhat more impressed by any parenting responsibilities the fathers assumed. Parenting efforts were lauded 82 times (22% of 378 cases). Mothers' parenting efforts were lauded 36 times (44% of the 82 times); whereas, fathers' parenting efforts were lauded 46 times (56% of the 82 times).

The most striking disparity is that the role of primary caretaker was considered in the mother's favor 71 times, but only in the father's favor 17 times. This supports the fact that mothers are most often the primary caretakers, even when they work. In this sample, judges recognized and rewarded mothers for being the primary caretaker 81% of the 88 times this was a determinative factor (23% of 378 cases). However, being the primary caretaker was considered in favor of the father only 17 times (19% of 88 times).

342. *Id.* For example, some states are helping to train childcare providers as well as forming referral networks to help parents find affordable daycare. *Id.*

The statistical analysis shows that in reality, courts will find the primary caretaker factor in favor of the mother and against the father between 70% to 86% of the time.[343] Although courts can be expected to find the primary caretaker factor in the mother's favor more often in the whole population, this may not be indicative of a gender bias against fathers, but more likely reflects that mothers are most often the primary caretakers.

The empirical study reveals some similarity, but also some disparity in the way courts in the sample treated mothers and fathers who work and use daycare. Some statistics were very close: courts favorably described mothers' working 19 times, and favorably described fathers' working 18 times; mothers were criticized 25 times for either working or for time spent away from home, and fathers were criticized 24 times. However, some statistics still show a discrepancy in the way mothers and fathers are treated. Parents were criticized for not working, staying home, or being dependent on welfare or other people 28 times (7.4% of 378 cases). Out of the 28 cases, mothers were criticized 20 times (71%), but fathers were criticized only 8 times (29%). Conversely, parents were rewarded 18 times (5% of 378 cases) for having enough time with children. Of these 18 times, mothers were praised 13 times (72%) for either staying home and/or for positive work hours allowing them ample time with the children; fathers were praised 5 times (33%) for a good work schedule. In light of recent cases, such as the Jennifer Ireland case, and the decisions of the trial courts in *Burchard*[344] and *Linda R. v. Richard E.*,[345] it is surprising that daycare was not a factor more often. Out of the applicable 378 cases, daycare was a determinative factor only 25 times, less than 7% of the total number of cases. Out of 25 times, courts considered daycare in favor of the mother 10 times, (40%), and against her seven times, (28%). Courts considered daycare in favor of the father only three times (12%), and against the father five times (20%). Because this study includes contemporary cases, these statistics could indicate that daycare is becoming more accepted and generally will not play as determinative a role in custody decisions. However, out of the 12 cases in which it was considered a

343. *See* Appendix (available in Georgia State University College of Law Library).
344. Burchard v. Garr, 724 P.2d 486 (Cal. 1986).
345. 561 N.Y.S.2d 29 (N.Y. App. Div. 1990)

negative factor, it was held against the mother 58% (7 times), but only against the father 42% (5 times).

The number of cases in the random sample was not high enough for conclusive statistical comparison of parents' work status or time away from children to determine whether gender bias exists in the whole population. The statistics indicate that courts may favor fathers when considering parents' work status and favor mothers when considering time away from children, and daycare not provided by grandparents or stepparents.[346]

However, grandparent or stepparent care was a factor 55 times in the sample (15% of 378 cases). While third-party care was considered a plus for mothers 15 times (28%), it was considered a plus for fathers 29 times (53%). It was considered against the mother 6 times and against the father 5 times. The statistical analysis showed that in reality, courts will find grandparent/stepfather care in favor of the mother and against the father 23% to 49% of the time, which is less than the presumed bias of 50%.[347] Conversely, in reality, courts can be expected to find grandparent/stepmother care in favor of the father and against the mother between 51% to 77% of the time, which is greater than the assumed bias of 50%.[348] Therefore, these statistics indicate a gender bias against mothers when judges consider the father's ability to provide a stepmother or grandparents to care for the child, and the mother can only provide some other third-party daycare. Cases like Jennifer Ireland's affirm how judges may still be influenced by gender bias in this area.

C. Traditional Family Values

Judges sometimes allow their personal bias for a particular lifestyle to influence their decisions. Indeed, the Supreme Court of Alaska[349] warned that a trial court may not denigrate a parent's chosen lifestyle absent any deleterious effect on the child, and must avoid "even the suggestion that a custody award stems from a life style conflict between a trial JUDGE and a parent."[350]

346. *See* Appendix (available in Georgia State University College of Law Library).
347. *Id.*
348. *Id.*
349. Craig v. McBride, 639 P.2d 303 (Alaska 1982).
350. *Id.* at 306.

However, many judges have a personal bias for the traditional family lifestyle and favor the parent who can provide the child with the traditional family structure of a working father and a nonworking mother.[351] This attitude is unrealistic and fails to acknowledge that today the majority of mothers with young children work,[352] and that an increasing number of single-parent families are headed by women.[353]

Even more troublesome is the gender stereotyping behind this preference for a traditional family lifestyle. "If you are a woman, your role as . . . mother is viewed as inconsistent with work. Work is always secondary to family."[354] This is particularly evident when the court specifically criticizes a working woman for being too career-oriented and not satisfied with her "proper" role as wife and mother.[355] The real danger of this gender stereotyping is that it perpetuates the subordination of women. The Chief Justice of the Supreme Court of California warned that a court cannot hold to "outmoded notions of a woman's role being near hearth and home" because such "stereotypical thinking cannot be sanctioned."[356] "[To] imply that a woman who leaves her 'proper sphere' to participate fully in modern life cannot be an adequate mother . . . denies full humanity to women . . . [and] cannot be tolerated in our courts."[357]

This bias for the traditional, two-parent family is also seen in modification cases when courts favor a father who has remarried and can provide the traditional, two-parent family structure, particularly when the stepmother can care for the children or provide additional income.[358] This can have a discriminatory effect on women, because twice as many divorced men remarry compared to divorced women;[359] thus, a single mother who is

351. *See supra* text accompanying notes 211-13.

352. *See* JUDITH AREEN, CASES AND MATERIAL FAMILY LAW 120 (3d ed. 1992). One of the most dramatic social changes of the last 20 years has been the advent of mothers into the workplace. *Id.* Between 1970 and 1990, the number of working mothers with children under six rose from 32% to 58%. *Id.* In 1992, over 17 million children had working mothers. *Id.*

353. *See supra* text accompanying notes 21-22.

354. Dowd, *supra* note 19, at 452.

355. *See supra* text accompanying notes 239-41.

356. Burchard v. Garay, 724 P.2d 486, 493 (Cal. 1986) (Bird, C.J., concurring).

357. *Id.* at 496.

358. *See supra* text accompanying notes 242-50.

359. Polikoff, *supra* note 3, at 241 n.51 (citing NATIONAL CENTER FOR HEALTH STATISTICS, that in the 25-44 age range, the remarriage rate of divorced men is

fighting the father for custody is frequently compared to the father's new wife and family. However, "a stepmother cannot take the place of a mother who has been the child's primary caretaker since birth."[360] To allow a stepmother to be so easily substituted for a mother implies that "mothers [and women] are fungible"[361] commodities, easily discarded and replaced. Judges fail to consider that second marriages are often not very stable. Statistics show a high rate of divorce among stepfamilies: over half of all remarriages break up within ten years.[362] This fact, of course, controverts the belief that a father's remarriage gives a child more stability and is in the best interest of the child.

The empirical study shows that in the sample, courts considered the parents' dedication to their careers 11 times (3% of 378 cases). Out of these 11 times, a mother's successful career was considered against her five times (45%); a father's successful career was only counted against him three times (27%). However, a father's success or devotion to his career was a positive factor two times (18%); whereas a mother's devotion to her career was only looked on favorably by one court (9%). Although this factor was considered by courts only about three percent of the time in the sample, when courts considered this to be a determinative factor, mothers were penalized for being career-minded much more than fathers. Because the sample of 11 times is small and the ranges for mother against father and for father against mother included the assumed bias of 50%, statistical analysis did not conclusively indicate gender bias for this factor in the whole population.[363]

However, remarriage was considered a factor in 67 cases (18% of 378 cases) in the sample. Out of 67 cases, courts evaluated a mother's remarriage favorably 20 times (30%), but evaluated a father's remarriage favorably significantly more often, 33 times (49%). Courts disfavored a mother's remarriage 11 times (16%), but only disfavored a father's remarriage 3 times (4%). The statistical analysis shows that, in the whole population, courts will consider remarriage in favor of the mother and against the

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almost double that of divorced women. U.S. DEP'T OF HEALTH & HUMAN SERVICES, PUB. NO. (PHS 80-1120), VITAL STATISTICS REPORTS, FINAL MARRIAGE STATISTICS, 1978, 6 (Sept. 12, 1980)).

360. Trudrung-Taylor, *supra* note 98, at 778.

361. Polikoff, *supra* note 3, at 241.

362. Horne, *supra* note 71, at 2096.

363. *See* Appendix (available in Georgia State University College of Law Library).

father only 23% to 45% of the time, which is less than the presumed bias of 50%.[364] Conversely, courts can be expected to consider remarriage in favor of the father and against the mother between 55% to 77% of the time, which is greater than the assumed bias of 50%.[365] Therefore, these statistics indicate that there is gender bias against mothers when judges consider parents' remarriage.

D. Morality

Gender bias is often prevalent when courts consider the effect of a parent's nonmarital, sexual relationships on custody.[366] Although many courts recognize that sexual mores have changed, and that a parent's sexual behavior is only relevant if it adversely effects children,[367] judges' attitudes towards this issue often reflect their strong personal feelings and experiences.[368] "It is permissible for fathers to have nonmarital sexual relationships without jeopardizing their custody rights, [but when] a woman does so, she may well lose custody."[369] Women may be penalized for their sexual relationships even when the court has not found that the child was adversely affected.[370] Judges should be careful not to make value judgments about a parent's lifestyle, when there is no adverse affect on the child, based on the judge's own personal beliefs and biases.

The empirical study confirms that a mother's sexual relationship is more often weighed against her in custody determinations than a father's sexual relationship. A parent's sexual relationship was a factor 58 times (15% of 378 cases) in the sample. Out of 58 times, the court penalized mothers 37 times (64%); however, courts penalized fathers only 10 times (17%). Courts approved of a mother's boyfriend 7 times (12%) and approved of a father's girlfriend 4 times (7%). The statistical analysis shows that courts can be expected to consider sexual relationships for the mother and against the father only 17% to

364. *Id.*
365. *Id.*
366. *See supra* Part III.D.
367. *Id.; see also* Craig v. McBride, 639 P.2d 303, 306 (Alaska 1982) (holding that trial courts should "scrupulously avoid" consideration of a parent's sexual conduct absent any evidence that it adversely effects the child).
368. *See supra* text accompanying notes 252-53.
369. Woods et al., *supra* note 31, at 1133.
370. *See supra* text accompanying notes 268-70.

41% of the time, which is less than the assumed bias of 50%.[371] In contrast, courts can be expected to consider sexual relationships against mothers and in favor of fathers between 59% to 83% of the time, which is greater than the assumed bias of 50%.[372] Therefore, these statistics indicate a strong probability of a gender bias against mothers when judges consider parents' extramarital and postmarital sexual relationships, based to some extent on judges' notions that mothers who engage in extramarital and postmarital sexual relationships are more immoral than fathers.[373]

Ironically, while some courts evaluate the parents' sexual immorality and its adverse effects on children, courts often do not acknowledge the inherent immorality of fathers beating and abusing mothers and its effect on children.[374] Surprisingly, many courts simply do not consider a father's domestic abuse as evidence that he is an unfit parent.[375] This is even more disturbing, considering the prevalence of domestic violence in society. Domestic violence is the single leading cause of violent injury to women today, and more than four thousand women are killed by their male partners each year.[376] Courts may penalize a woman for having a sexual relationship absent any adverse effect on the child, but may not consider the impact of domestic violence on the best interest of the child, even though it directly affects a child's relationships and well-being.[377] Studies show that children who witness their fathers battering their mothers are emotionally scarred for life.[378] However, courts do consider child abuse as well as other "forms of moral and criminal culpability."[379]

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371. *See* Appendix (available in Georgia State University College of Law Library).
372. *Id.*
373. *Id.*
374. *See supra* note 272 and accompanying text. However, 38 states and the District of Columbia have enacted legislation that requires the court to consider battering in intrafamily custody cases. *See, e.g.*, CAL. FAM. CODE ANN. § 3011 (West 1994); MASS. GEN. LAWS 208, § 31 (West 1992); N.H. REV. STAT. ANN. § 458:17 II(c) (West Supp. 1995); N.J. STAT. ANN. § 9:2-4c (West 1993); WASH. REV. CODE § 26.09.191(2)(c) (West 1996); WIS. STAT. ANN. § 767.24(2)(b), (c) (West 1995).
375. Woods et al., *supra* note 31, at 1134; *see also* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions,* 44 VAND. L. REV. 1041, 1072-78 (1991).
376. Cahn, *supra* note 375, at 1046-47.
377. *Id.* at 1042.
378. Woods et al., *supra* note 31, at 1133 (citing D. MARTIN, BATTERED WIVES 23-25, 1976)).
379. *Id.* at 1134; *see also In re* Marriage of Love, 511 N.W.2d 648 (Iowa Ct. App.

The empirical study showed that the father's abuse towards the mother was a factor in only 27 cases out of the applicable 378 cases (7%) in the sample. In 20 of these cases (5% of 378), the courts disfavored fathers for their domestic violence towards mothers, and in 7 cases it was considered a neutral factor. However, out of the 27 cases, courts did consider domestic abuse against the father 74% of the time, but did not consider it to be relevant 26% of the time. Alcohol and drug abuse was a factor 32 times, disfavoring mothers 18 times and fathers 13 times. Criminal activity was a negative factor for mothers in 4 cases and favored fathers in 6 cases.

V. ALTERNATIVES FOR ELIMINATING GENDER BIAS

Because the best interest of the child standard gives courts few guidelines and has the inherent potential for judicial subjectivity and gender bias, alternative methods for resolving child custody, such as joint custody, the primary caretaker presumption, and mediation have been adopted by some courts and legislatures. However, these alternatives do not always appear to be viable replacements for the best interest of the child standard; thus, the most effective way to eliminate gender bias in custody determinations may be through legal education.[380]

A. Joint Custody

Because determining what is in the best interest of the child is difficult, some states have adopted preferences for joint custody.[381] Joint custody can mean either joint physical custody, joint legal custody, or both.[382] Joint physical custody means that

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1993) (awarding mother custody where father has abused his stepson); John O. v. Jane O., 601 A.2d 149 (Md. App. 1992) (finding that father's sexual perversion may endanger child in the future); Putzbach v. Putzbach, No. 62119 1993 WL 76897 (Ohio Ct. App. 1993) (considering drug and alcohol problems of both parents).

380. Schafran, *supra* note 90, at 208.

381. Bookspan, *supra* note 37, at 83; *e.g.*, CAL. FAM. CODE ANN. § 3080 (West 1994) (rebuttable presumption favoring joint custody when the parties have agreed); IDAHO CODE § 32-717B(4)(1983) (Michie 1996).

382. Atkinson, *supra* note 38, at 36. For example, California's statute distinguishes between joint legal custody when only decisions regarding the child will be jointly made by both parents and joint physical custody when each parent will have the actual care of the child for substantial periods. CAL. FAM. CODE ANN. §§ 3003-3004 (West Supp. 1994). However in Connecticut, Idaho, Colorado, Iowa, and New Mexico, joint custody means sharing both the decisions and care of the child. CONN. GEN. STAT. §§ 46b-56a (West 1995); IDAHO CODE § 32-717B(4) (Michie 1996); *In re*

the child lives with each parent for part of each week.[383] Joint legal custody means that both parents share equally in making decisions that affect the child's schooling, religious training, and medical care.[384] The main advantage of legal and physical joint custody is that both parents are able to participate in raising the child.[385] Thus, a child does not experience a traumatic sense of loss and is able to maintain the psychological bonds and emotional stability with both parents.[386]

However, there are several problems with joint custody. Having a child rotate between homes may actually create instability, and "the child may feel caught in a tug-of-war between his parents."[387] Joint custody also will only be successful when the parents cooperate and are committed to making it work.[388] This may include a myriad of decisions and logistical details that have to be worked out such as the proximity of homes as well as work and school schedules. If parents are hostile towards each other, the conflicts that may have led to the divorce will continue and may cause the child further emotional distress.[389] Cases in which the type of cooperation exists in which to foster joint custody are not prevalent.[390] Thus, joint custody may be a good solution in the ideal situation, but because its success depends on many other factors, it cannot be considered an automatic, feasible substitute for the best interest of the child and sole custody.

B. Primary Caretaker Presumption

The most recent reform in child custody determinations is the primary caretaker presumption.[391] This presumption is a gender-neutral standard, which advocates that the best interest

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Marriage of Lampton, 704 P.2d 847 (Colo. 1985); *In re* Marriage of Burham, 283 N.W.2d 269 (Iowa 1979); Strosnider v. Strosnider, 686 P.2d 981 (N.M. Ct. App. 1984).

383. Atkinson, *supra* note 38, at 36.

384. *Id.*

385. *Id.*

386. CLARK, *supra* note 34, at 816.

387. Atkinson, *supra* note 38, at 37.

388. *Id.*

389. CLARK, *supra* note 34, at 817.

390. *Id.* The empirical study showed that parents were often unwilling to promote the child's contact with the other parent and that there is often a great deal of hostility between the mother and father. *See* Appendix (available in Georgia State University College of Law Library).

391. Bookspan, *supra* note 37, at 83.

of the child is with the parent who has the primary responsibility for the child's day-to-day care: cooking meals, grooming and bathing, arranging medical care, taking the child to school, teaching the child, arranging social activities, and disciplining the child.[392] West Virginia has formally adopted the primary caretaker standard as a legal presumption in custody cases, and the idea is increasingly popular with appellate courts.[393]

This presumption has several advantages. First, it is gender-neutral and treats parents equally, even though mothers most often have been the primary caretakers.[394] Another advantage is that it encourages active parenting by both parents during the marriage.[395] Whichever parent has made the greatest investment of time and effort in caring for and nurturing the child is entitled to the presumption. The primary caretaker presumption also removes the incentive for costly litigation and protects children from becoming pawns in their parents' custody war.[396] Most importantly, the primary caretaker may be able to provide the most continuity and stability for the child, having provided for most of the child's daily physical needs. This is also true because it is more likely that the child has developed the strongest psychological bond with the primary caretaker.[397] Another advantage under this presumption is that economic resources, parental employment, remarriage, and lifestyle choices (factors that are often subject to gender bias) are not relevant to the custody determination.[398] Therefore, the court does not have to make "unreal judgments about the relative fitness of the contending spouses" who are both fit parents.[399]

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392. *Id.* at 4; CLARK, *supra* note 34, at 801. The difference between the primary caretaker presumption and the primary caretaker factor under the best interest of the child standard is that under the presumption, being the primary caretaker is the sole determinant of custody; whereas, under the best interest of the child standard, the primary caretaker is only one of many factors considered.

393. Bookspan, *supra* note 37, at 84. The primary caretaker presumption was first delineated in Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1982). Minnesota followed West Virginia in Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985), but in 1989 the Minnesota legislature enacted a statutory scheme in which the primary caretaker is only one of 12 factors to consider in determining custody. *Id.* at 84 n.56.

394. Mason, *supra* note 66, at 25.

395. Polikoff, *supra* note 3, at 242.

396. Bookspan, *supra* note 37, at 86-87.

397. *Id.* at 87.

398. Polikoff, *supra* note 3, at 243.

399. CLARK, *supra* note 34, at 801.

However, this presumption also presents some of the same problems that plague the best interest of the child standard. Because the primary caretaker is a rebuttable presumption, it may be rebutted by showing that a parent is not fit or that a child's welfare would be better served with the other parent, which is not discernable from determining what is in the best interest of the child.[400] In fact, the West Virginia Supreme Court, which first formulated the primary caretaker concept, did so in its belief that judges do not have the necessary tools to measure intelligently and precisely the relative degrees of fitness between parents.[401] This presumption may also be problematic when judges must evaluate "the increasingly common contemporary family in which both spouses work outside the home and share the care of the children."[402] Additionally, when both parents have actively participated in raising a child, but one parent has had fifty-five percent of the responsibility and the other parent has had forty-five percent of the responsibility, it does not seem reasonable to base custody on a ten percent difference.[403] Furthermore, as a child becomes older, the different needs of the child may not best be met by the parent who has been the primary caretaker.[404] Although the primary caretaker factor should obviously be a very important consideration in custody decisions, the primary caretaker presumption often does not appear to be a better alternative to the best interest of the child standard.[405]

C. Mediation

The difficulty of formulating rules in custody adjudication has invited consideration of alternative private dispute resolution, such as mediation.[406] There are several apparent advantages of such a system. The parents can avoid the financial and emotional costs of custody litigation, and the child can better maintain his

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400. *Id.*
401. Atkinson, *supra* note 38, at 18 n.54 (quoting Garska v. McCoy, 278 S.E.2d 357, 361 (W. Va. 1981)).
402. *See* CLARK, *supra* note 34, at 802.
403. Atkinson, *supra* note 38, at 18.
404. CLARK, *supra* note 34, at 802.
405. Atkinson, *supra* note 38, at 18.
406. Mnookin, *supra* note 4, at 287-88; *see also* Judy C. Cohn, *Custody Disputes: The Case for Independent Lawyer-Mediators*, 10 GA. ST. U. L. REV. 487 (1994) (discussing mediation in the resolution of custody disputes as an alternative to litigation).

relationship with both parents when they have agreed to a negotiated settlement rather than one imposed by the court in an adversarial proceeding.[407] Furthermore, the parents know more about the child than the judge and are better able to match their capabilities and desires to the child's needs.[408]

However, some commentators have criticized mediation for the following reasons: it is more expensive and stressful than traditional adjudication; it facilitates the exploitation of one party; it produces unfair or irrational compromises; and it may subordinate women when mediation is compulsory.[409] The biggest drawback to mediation is that the mediator is supposed to play an impartial role and not represent the interests of one party over another.[410] Therefore, it is implicit in this process that what is in the best interest of the child will not be the primary focus, and that the emphasis will be on achieving an accommodation between the parents.

D. Legal Education

Custody determinations make critical decisions about the lives of mothers, fathers, and children, and often require the legendary wisdom of Solomon. Although the best interest of the child standard invites judicial subjectivity, most judges do have the best interest of the child at heart, and, thus far, no alternative standard offers a better solution. Because the underlying problem of gender bias in custody decisions is really a societal problem, gender bias must be addressed before it ever reaches the courtroom. This can best be achieved through legal education.[411]

There has been an impressive start to this process: thirty state supreme courts have formed task forces to study gender bias in their states' judicial systems, formulate solutions, and implement the changes.[412] As a result of these task force recommendations, court systems are improving.[413] One of the approaches being used to achieve administrative and legislative reforms is judicial

407. Mnookin, *supra* note 4, at 287-88.
408. *Id.*
409. AREEN, *supra* note 352, at 860-62 (citations omitted).
410. *Id.* at 861.
411. Schafran, *supra* note 90, at 208.
412. *Id.* at 186.
413. *Id.* at 194.

and legal education.[414] Minnesota Supreme Court Justice Rosalie Wahl has introduced an education program focusing on family law, domestic abuse, acquaintance rape, and employment discrimination that starts in law school and continues throughout the lawyer's or judge's career.[415] Evidence indicates that the reports of these task forces and the judicial education implemented under task force recommendation, is helping to ameliorate gender bias in the courtroom.[416] This is a slow process and begins with educating attorneys and judges about the problem. The attorneys and judges who comprise these task forces are often amazed when they learn about the pervasiveness and scope of the problem,[417] and some become staunch activists to eradicate gender bias.[418]

It is imperative that knowledge and awareness about gender bias become an integral part of legal education. The Florida Supreme Court Gender Bias Study Commission was the first task force to present its findings at a law school, in recognition of the need for legal education.[419] The importance of starting this education in law schools was addressed by Professor Elizabeth Schneider.[420] She stated: "Law schools can play a central role in changing gender bias. . . . Legal education must be reconstructed to remedy the problems discussed in the task force reports. . . . [L]aw schools will be successful only when . . . graduates are . . . knowledgeable about and sensitive to women's concerns in the law. . . ."[421]

Concurrent with this process, courts should take judicial notice of the potential for discrimination and of the importance of the primary caretaker's role in maintaining continuity and stability, which is important for a child.[422] Judges should be educated about gender bias and given specific guidelines for avoiding it. They should be informed about children's cognitive development and psychology and need for continuity and stability as well as

414. *Id.* at 195.
415. *Id.* at 196.
416. *Id.* at 198-201.
417. *Id.* at 204.
418. *Id.*
419. *Id.* at 207-08.
420. *Id.* at 208 (discussing Elizabeth Schneider, *Task Force Reports on Women in the Courts: The Challenge for Legal Education*, 38 J. LEGAL EDUC. 87 (1988)).
421. *Id.*
422. Trudrung-Taylor, *supra* note 98, at 783.

about the changing structure of the family and modern social realities, so that they do not "inadvertently apply outdated biases for a traditional family."[423]

Once attorneys are educated about the potential for gender bias in custody decisions, they have the duty to inform the court about contemporary family life,[424] the real needs of mothers and children, hidden stereotypes that are irrelevant to the best interest of the child, and the critical factors that are important to the best interest of the child such as the nurturing and stability provided by the primary caretaker.[425]

CONCLUSION

Gender bias is a pervasive problem in our legal system. It is subtle, insidious, and harmful to women, men, children, and society. In custody determinations in which the primary consideration to be ascertained is the best interest of the child, gender bias is particularly devastating to women and children. In evaluating economic resources, employment, traditional family values, and morality, judicial subjectivity may easily influence a judge's determination as to what is in the best interest of the child. Instead of safeguarding the psychological and physical welfare of the child, hidden gender bias can result in a custody decision that is not in the best interest of the child.

Fairness and justice are the cornerstones of the legal system. If the legal system is to be the guardian of these values, then judges must not manifest the same biases and stereotypes that exist in society. Recent cases suggest that judges are becoming more aware of the problem, and many have become vocal advocates in the effort to eradicate it from the judicial system. The advent of state supreme court task forces is a promising weapon against gender bias, and these task forces have already implemented educational programs to inform the legal community as well as to effectuate change. The most effective way to eradicate the problem is through education. Judges, attorneys, and law students must first be educated about gender bias, so that it is not perpetuated by the legal system. Only then

423. *Id.*
424. *Id.*
425. *Id.*

can the power of the justice system be marshalled to eliminate any vestige of gender bias in society.

A court's custody determination is one of the most critical decisions that will ever impact the life of a child. It is crucial to that child's welfare and future that the judge makes the best possible decision—a decision not influenced by gender bias—a decision that truly is in the best interest of the child.

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