North Dakota Law Review

Volume 73 | Number 2 Article 3

1997

Solomon's Wisdom or Solomon's Wisdom Lost: Child Custody in North Dakota - A Presumption That Joint Custody Is in the Best Interests of the Child in Custody Disputes

Brian J. Melton

SOLOMON'S WISDOM OR SOLOMON'S WISDOM LOST: CHILD CUSTODY IN NORTH DAKOTA—A PRESUMPTION THAT JOINT CUSTODY IS IN THE BEST INTERESTS OF THE CHILD IN CUSTODY DISPUTES

I. INTRODUCTION

King Solomon ruled the kingdom of Israel with a knowledge and wisdom which were known throughout his land.[1] One of the most well known examples of Solomon's wisdom was his resolution of a dispute between two women, both of whom claimed to be the mother of a child, and both of whom desired custody.[2] In this infamous story, Solomon was able to determine who the actual mother was and gave her custody of the child.[3] But Solomon's wisdom would be lost in modern day custody disputes. Would Solomon's solution have been as simple if the argument for custody was between the biological mother and father? Would Solomon have had to weigh both parties' interests to decide what was in the best interests of the child? Would he have thought about a solution that would have allowed both parents to have custody? Or would he have just threatened to cut the child in half and wait for one of the parents to acquiesce? These are questions which will forever remain unanswered. However, the North Dakota Supreme Court still uses Solomon's example in explaining several of its decisions for child custody.[4] Although our courts do not use swords to make decisions,

1. *See* 1 Kings 4:29-31.

> God gave Solomon wisdom and very great insight, and a breadth of understanding as measureless as the sand on the seashore. Solomon's wisdom was greater than the wisdom of all the men of the East, and greater than all the wisdom of Egypt . . . [a]nd his fame spread to all the surrounding nations.

Id.

2. *See* 1 Kings 3:24-27. Solomon solved the problem of determining who the mother was in this way:

> Then the king said, "Bring me a sword." So they brought a sword for the king. He then gave an order: "Cut the living child in two and give half to one and half to the other." The woman whose son was alive was filled with compassion for her son and said to the king, "Please, my lord, give her the living baby! Don't kill him!" But the other said, "Neither I nor you shall have him. Cut him in two!" Then the king gave his ruling: "Give the living baby to the first woman. Do not kill him; she is his mother."

Id.

3. *Id.*

4. *See* Kaloupek v. Burfening, 440 N.W.2d 496, 501-02 (N.D. 1989) (Levine, J., dissenting) (discussing Solomon's wisdom and his acuity of knowledge to help in determining child custody); Gravning v. Gravning, 389 N.W.2d 621, 622 (N.D. 1986) (evoking the wisdom of Solomon in deciding whether split custody may be proper).

their words can cut as quickly as any blade. The North Dakota Supreme Court has stated that it does not have the wisdom of Solomon,[5] but in a society of ever increasing divorce and child custody battles the wisdom of kings would be welcome.

This Note will discuss child custody in North Dakota and the factors considered in determining which parent should be awarded custody. Specifically, this Note will discuss joint custody and argue that it is the best solution for the child and parents. Furthermore, this Note will propose that a presumption for joint legal custody and an emphasis on joint physical custody should be found in child custody cases, rebutted only when the statutory factors indicate joint custody is not in the best interests of the child.

Part II of this Note will give a brief history of the development of child custody law. Part III will analyze the development of North Dakota's child custody law, with particular focus on North Dakota's treatment of joint custody and primary caregiver theories. Part IV will analyze recent North Dakota custody cases and discuss how the current trend seems to be to discourage joint custody arrangements and favor awarding custody to the primary caregiver. Finally, Part V will propose changing North Dakota's best interest statute to include a presumption for joint custody arrangements and will demonstrate how this change would better promote the best interests of children and the divorced parents.

II. NORTH DAKOTA'S CHILD CUSTODY DILEMMA

A. DEVELOPMENTAL HISTORY OF CHILD CUSTODY

Before discussing North Dakota's child custody laws, it is helpful to understand the development of child custody law throughout the legal system. This in turn will help in understanding the basis of North Dakota's child custody law. While this Note does not purport to be a complete discourse on child custody theories, it is helpful to be aware of how different theories developed and where the major strengths and weaknesses of each lie.

North Dakota uses the best interest of the child standard to resolve the difficult issue of child custody.[6] It was not until 1979 that the

5. *See* Landsberger v. Landsberger, 364 N.W.2d 918, 920 (N.D. 1985) (stating that a choice between parents is rarely easy, for neither the trial court nor the supreme court has the wisdom of Solomon).

6. N.D. CENT. CODE § 14-09-06.1 (1991); N.D. CENT. CODE § 14-09-06.2 (Supp. 1995); *see* Ternes v. Ternes, 555 N.W.2d 355, 356-57 (N.D. 1996) (finding it not clearly erroneous that the trial

legislature enacted specific criteria for the courts to evaluate what the best interests of the child would be.[7] Since that time, the best interests of the child statute has undergone many revisions and changes.[8] The

court applied the best interests of the child standard by determining that certain factors applied to the custody in this case, while other factors were not applicable); Fahlsing v. Teters, 552 N.W.2d 87, 89 (N.D. 1996) (stating that a trial court is statutorily vested with the duty to award custody to the parent who will promote the best interests of the child under section 14-09-06.1 of the North Dakota Century Code and when awarding custody, the court should consider all relevant factors affecting the best interests of the child as enumerated in section 14-09-06.2 of the North Dakota Century Code); DeForest v. DeForest, 228 N.W.2d 919, 924 (N.D. 1975) (finding that an award of custody must contain a reference to the basis for the trial court's decision, demonstrating the award is based upon the best interests of the child).

7. Award of Custody, ch. 194, sec. 3, 1979 N.D. Laws 423. The original 1979 best interests of the child statute listed ten factors for custody consideration:

1. The love, affection, and other emotional ties existing between the parents and child.
2. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.
3. The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
4. The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
5. The permanence, as a family unit, of the existing or proposed custodial home.
6. The moral fitness of the parents.
7. The mental and physical health of the parents.
8. The home, school, and community record of the child.
9. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
10. Any other factors considered by the court to be relevant to a particular child custody dispute.

Id.; see also Lapp v. Lapp, 293 N.W.2d 121, 126 (N.D. 1980) (stating that the factors in section 14-09-06.2 of the North Dakota Century Code were not a departure from existing case law that has evolved over the past decade for North Dakota, but were merely a codification of factors always relevant to child custody).

8. N.D. CENT. CODE § 14-09-06.2. In 1989 the North Dakota legislature amended section 14-09-06.2 to include domestic violence as a factor to be considered in child custody. *Id.* The 1989 amendment read:

J. The existence of domestic violence. If the court finds that domestic violence has occurred, the court shall provide for a custody arrangement that best protects the child and the parent or other family or household member who is the victim of domestic violence from any further harm. As used in this subdivision, "domestic violence" means domestic violence as defined in section 14-07.1-01.

K. The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, or assault, on other persons.

Domestic Violence in Custody Determinations, ch. 178, sec. 2, 1989 N.D. Laws 547. In 1991, the legislature again amended section 14-09-06.2. The new sections read:

J. Evidence of domestic violence. In awarding custody or granting rights of visitation, the court shall consider evidence of domestic violence. If the court finds credible evidence that domestic violence has occurred, this evidence creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child. This presumption may be

statute is considered a menu or checklist of all relevant factors to be considered, with no factor being more important than another.[9] In addition to several "specific" factors listed in the statute it includes a "catch-all" factor, which the courts have used to consider any other relevant factors which may be important in the custody decision.[10] North Dakota courts have used this factor to introduce both the primary caregiver status and joint custody theories into custody decisions.[11]

As far back as Roman law and in the earliest developments of child

overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as a custodial parent. The court shall cite specific findings of fact to show that the custody or visitation arrangement best protects the child and the parent or other family or household member who is the victim of domestic violence. If necessary to protect the welfare of the child, custody may be awarded to a suitable third person, provided that the person would not allow access to a violent parent except as ordered by the court. If the court awards custody to a third person, the court shall give priority to the child's nearest suitable relative. The fact that the abused parent suffers from the effects of the abuse may not be grounds for denying that parent custody.

L. The making of false allegations not made in good faith, by one parent against the other, of harm to a child as defined in section 50-25.1-02.

Evidence in Custody Decisions, ch. 148, sec. 2, 1991 N.D. Laws 413.

The issue of domestic violence in child custody disputes is beyond the scope of this note. The problems with domestic violence in America are immense and well documented. However, North Dakota case law and the statutory presumption create an antithetical position to ensuring that parental rights are maintained. This Note focuses on the problem of determining custody between two fit parents, and thus does not discuss many of the recent joint custody cases which have focused on the problem of domestic violence in the marriage and the rebuttable presumption against allowing the perpetrator custody of the child. *See* Krank v. Krank, 541 N.W.2d 714, 718 (N.D. 1996) (applying the presumption against custody for the father as a perpetrator of domestic violence); Bruner v. Hager, 534 N.W.2d 825, 828-29 (N.D. 1995) (remanding the case back to the trial court for determinations of whether domestic violence existed when primary custody had been awarded to the father); Heck v. Reed, 529 N.W.2d 155, 159, 166 (N.D. 1995) (finding that the presumption applied against the father gaining custody of his children because of evidence of violent behavior toward his wife, although the trial court found him to be the more interested and potentially better parent); *see also* Kathleen Garner, Comment, *Applying The Rebuttable Presumption Against Awarding Custody To Perpetrators Of Domestic Violence*, 72 N.D. L. REV. 155 (1996) (discussing *Heck v. Reed* and child custody matters where domestic abuse is apparent in the household).

9. *See* Foreng v. Foreng, 509 N.W.2d 38, 40 (1993) (stating that section 14-09-06.2 of the North Dakota Century Code provides the courts with a menu of relevant factors in considering the best interests of the child); *see also Gravning*, 389 N.W.2d at 622 (finding that the guiding standard for the best interests of the child "must 'be determined by the court's consideration and evaluation of *all* factors affecting . . . the child' as enumerated in 14-09-06.2.") (emphasis added). *But see Bruner*, 534 N.W.2d at 828 ("The [statutory] presumption places an emphasis on domestic violence as the paramount factor in a custodial placement when credible evidence of domestic violence appears."); *Heck*, 529 N.W.2d at 162 (stating that the legislative intent of subsection (j) in section 14-09-06.2 puts a heavier burden on a parent who is the perpetrator of domestic violence that may be overcome only by clear and convincing evidence).

10. N.D. CENT. CODE § 14-09-06.2(m) (Supp. 1995).

11. *See Gravning*, 389 N.W.2d at 622 (finding that the primary caretaker has not been given elevated status but "in North Dakota the concept inheres in the statutory factors"); *Lapp*, 293 N.W.2d at 129 (stating that the court properly considered the enumerated factors in section 14-09-06.2 of the North Dakota Century Code in finding that joint or "alternating" custody would be proper).

custody, a preference was given to fathers based on property rights.[12] English law adopted basically the same form and discarded any interest the mother had in the custody of her children.[13] By the turn of the 20th century, however, the courts' acknowledgment of mothers' abilities to nurture children helped to change custody from a property issue to one that looked at the maternal nature of women in rearing the children.[14]

The American legal system developed from this premise, with an eye towards the best interests of the child.[15] The development of the law took into consideration both the father's and mother's interests in the child.[16] Over time, the recognition of the mother as a legitimate caregiver grew into a maternal preference in child custody,[17] known as the tender years doctrine.[18]

B. THE TENDER YEARS DOCTRINE

The tender years doctrine was based on a sentimental approach: that a child's development from the womb through adolescence was best

12. *See* David Miller, *Joint Custody*, 13 FAM. L.Q. 345, 351 (1979) (stating that Roman law allowed a father to sell or even kill his children without punishment); Marcia O'Kelly, *Blessing The Tie That Binds: Preference For The Primary Caretaker As Custodian*, 63 N.D. L. REV. 481, 486 (1987) (discussing the property interests that the head of the household had in his wives, children, and slaves, which were protected like other objects of ownership) (citing Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 180 (1916)); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 464 n.41 (1984) (stating the paternal preference was based on the fact that the father was the one with decision-making authority and was the one obligated to support his family while the mother was entitled only to reverence and respect).

13. *See* Scott & Derdeyn, *supra* note 12, at 464 (explaining that the father, by law, was entitled to custody of his children).

14. *See generally* O'Kelly, *supra* note 12, at 487-88 (discussing the discretion of judges to give maternal custody); Scott & Derdeyn, *supra* note 12, at 465 (discussing reforms which allowed judges discretion to order maternal custody of children under the age of seven).

15. *See* Scott & Derdeyn, *supra* note 12, at 466 n.47 (citing Finlay v. Finlay, 240 N.Y. 429, 433 (1925)). Justice Cardozo was instrumental in developing the best interest of the child standard. *Id.* However, the doctrine did not develop quickly from there because of the presumption of custody with the mother under the tender years doctrine. *See infra* notes 17-21 and accompanying text (discussing the tender years doctrine).

16. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (stating that the history and culture of America reflect a strong tradition of parental concern for their children and their upbringing); *see also* DAVID STEWART, THE LAW OF MARRIAGE AND DIVORCE, AS ESTABLISHED IN ENGLAND AND THE UNITED STATES 384 (1884) (noting that parental rights in custody of a child are foremost because natural affection is believed to guarantee the child's welfare).

17. *See* O'Kelly, *supra* note 12, at 495-500 (discussing the tender years doctrine and its application in North Dakota); Ramsey Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 340-42 (1982) (stating that the tender years presumption gradually became the dominant rule over the first half of the 20th century); Scott & Derdeyn, *supra* note 12, at 464 n.41 (discussing the tender years doctrine's development).

18. *See generally* Klaff, *supra* note 17, at 341 n.43 and accompanying text (noting that by 1900, 30 states had created equal parenting rights). This means that those states had created a maternal preference based on the tender years doctrine.

developed through a mother's nurturing.[19] As long as the mother was found to be fit, she was entitled to custody of her children.[20] Therefore, motherhood was the prevailing factor that determined custody for much of America's early history.[21]

North Dakota's early child custody law accepted the tender years doctrine.[22] North Dakota was one of several States which created a statutory presumption for custody with the mother based on the tender years doctrine.[23] However in 1973, the North Dakota legislature repealed the part of the statute which established a maternal preference.[24]

During this same time, society's ideas concerning roles that women could have outside the home began to evolve and change.[25] In addition, attitudes toward parenting changed.[26] Although attitudes toward the gender of parents changed, the nuclear family has maintained its autonomy,[27] meaning that the family has the fundamental right of self-determination.[28] When the family is able to function and make decisions as an autonomous unit, that right should not be diminished based on the fact that one of those decisions is to dissolve the relationship.[29]

19. *See* O'Kelly, *supra* note 12, at 495 (noting that tender years presumptions were often expressed in excessively sentimental terms).

20. *See* Klaff, *supra* note 17, at 342 (discussing the development of the tender years doctrine into a rigid rule mandating maternal custody unless the mother was found unfit). Klaff states that if a child is deprived of developing a relationship with its mother during infancy that child will be "retarded in its physical, intellectual, and social development and runs a high risk of being permanently afflicted with a non-attachment personality disorder." *Id.* at 345-46.

21. *Id.* at 341 (discussing the tender years doctrine being used as the court's basis for custody awards by the end of the nineteenth century).

22. *See generally* O'Kelly, *supra* note 12, at 495-500 (discussing the tender years doctrine's development in North Dakota).

23. *Id.* at 497 (noting that the statutory presumption for the tenders years preference to the mother lasted from 1877 to 1973).

24. *Id.* at 499-500 (discussing the repealing of tender years preference).

25. *See* Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 235-36 (1975) (stating that the women's movement of the 1970's and the increased amount of mothers entering the workforce helped in displacing the maternal preference in child custody cases to a best interests of the child evaluation); Scott, *infra* note 50, at 620 (stating that gender roles have changed in society as more mothers entered the work force).

26. *See* Scott, *infra* note 50, at 620 (discussing the fact that fathers also began to take on greater involvement in the care of their children).

27. *See Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1323 (1980) (discussing that the constitutional framework provides that a parents' interest in directing their child's upbringing is strong and that there is an importance in maintaining family autonomy).

28. *Id.* at 1323. The article discusses the fact that in every State the court is vested with jurisdiction to enter an order regarding child custody after a divorce. *Id.* This is the case whether the parents have agreed to a certain custody arrangement or if it is contested. *Id.* The article points out that uncontested single custody arrangements are rarely interfered with, while joint custody arrangements are frequently disapproved of by the court's discretionary power. *Id.* at 1324.

29. *Id.* at 1323. The article analogizes the death of a parent with a divorce between parents. *Id.* at 1323-24. In the former situation, the State has no right to step in to decide the best interests of the

C. CONSTITUTIONAL RIGHT OF PARENTING

While the development of child custody policies has shifted between parental preferences, the United States Supreme Court has maintained that both parents have a constitutional right to custody of their children which should not be hindered.[30] The Supreme Court has analyzed the importance of child custody; weighing the vital interest the State has in protecting children and considering their best interests against the right of parents to raise their children as they see fit.[31] In one child custody case where the parents decided on their own who was to have custody of their child, the Court found that the State could still step in and determine if the custody agreement was in the best interests of the child.[32]

Although there are times when the State's interest is paramount to the parent's interest, the Court has laid out guiding principles for when the parent's interests outweigh those of the States.[33] In the case of *Bellotti v. Baird*,[34] the Court provided requisite factors explaining why the State should give deference to parents raising their children.[35] The Court stated:

> The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors. But an additional and more important justification for State deference to parental control over children is that '[the] child is not the mere creature of the

child, although a death of a parent is more likely to be traumatic to the child than divorce. *Id.* But, in the area of divorce, the courts have immediate jurisdiction whether or not there is a need for protection of the children. *Id.* at 1323.

30. *See* Hodgson v. Minnesota, 497 U.S. 417, 484 (1990) (Kennedy, J., concurring in part, dissenting in part) (stating that the Supreme Court has maintained a liberty interest, protected by the Constitution, in allowing parents to develop relationships with their children); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (stating that "cardinal with us [is] that custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder").

31. *Hodgson*, 497 U.S. at 484; *Prince*, 321 U.S. at 166.

32. Ford v. Ford, 371 U.S. 187, 193 (1962) (stating that "the question of custody, so vital to a child's happiness and well-being, frequently cannot by left to the discretion of parents"). *But see* Lehr v. Robertson, 463 U.S. 248, 256 (1983) (stating that "[t]he intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases").

33. Bellotti v. Baird, 443 U.S. 622, 637-39 (1979) (finding that parents have the right and duty to care for and provide the guiding role for their children); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (recognizing that it is the parents' responsibility to prepare their children for his or her obligations to society).

34. 443 U.S. 622 (1979).

35. *Bellotti*, 443 U.S. at 637-39.

> State; those who nurture him [or her] and direct his [or her] destiny have the right, coupled with the high duty, to recognize and prepare him [or her] for additional obligations'. . . . This affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens. Unquestionably, there are many competing theories about the most effective way for parents to fulfill their central role in assisting their children on the way to responsible adulthood . . . [and] we cannot ignore that central to many of these theories, and deeply rooted in our Nation's history and tradition, is the belief that the parental role implies a substantial measure of authority over one's children . . . . Under the Constitution, the State can 'properly conclude that parents . . . who have [the] primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility.'[36]

The Court has gone further in stating that "[a] State pursues a legitimate end under the Constitution when it attempts to foster and preserve the parent-child relationship by giving all parents the opportunity to participate in the care and nurture of their children."[37] The Court has also noted that a parent's rights deserve protection where the parent has "sired and raised" that child.[38] The Constitution undeniably warrants deference to the parents absent a powerful countervailing interest.[39]

The Court in *Stanley v. Illinois*[40] reasoned that the protection of a parent's right to custody of his or her own children is an interest that is worth paramount protection.[41] In *Stanley,* the Court recognized that the father's right to be a parent and to provide care for his children was a constitutional right which should not be taken away without a showing of

36. *Id.* (citations omitted).

37. Hodgson v. Minnesota, 497 U.S. 417, 484 (1990).

38. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

39. *Id.*

40. 405 U.S. 645 (1972).

41. *Stanley*, 405 U.S. at 651. The Court found that the father should receive custody of his children after their mother's death, stating:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

Id.

good cause.[42] Because Mr. Stanley was shown to be a fit parent, it was determined that he should have custody of his children.[43] Although the *Stanley* case was one where the issue was between the rights of the natural father and the rights of non-parents, the ruling is sound as to the rights parents have in regard to their child's custody. The words still ring true today that "the primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[44]

Applying constitutional protections for child custody is somewhat problematic, however, since the Constitution protects against state interference in the rights of a mother and father only as long as the family unit is intact.[45] When divorce occurs, the protections and rights of the parents under the Constitution give way to state-created best interests of the child standards.[46] Greater emphasis needs to be put on the protection of the parent's individual liberty interest, which is in the bringing up of one's own children, whether that be during marriage or after divorce.[47]

D. BEST INTERESTS OF THE CHILD

The outdated preference for the mother over the father, based on the tender years doctrine, was generally abolished by the early 1970's.[48] Most states have enacted a best interests of the child standard, which takes several factors into consideration.[49] The best interests theory was

42. *Id.* The Court emphasized its long history in holding the rights of parenting and family as constitutionally protected. *Id.* The Court pointed out the rights to conceive and to raise one's children have been deemed "essential," the "basic civil rights of man," and "[r]ights far more precious . . . than property rights." *Id.* (citing May v. Anderson, 345 U.S. 528, 533 (1953); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); and Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

43. *Id.* at 657-59.

44. *See* Hodgson v. Minnesota, 497 U.S. 417, 484 (1990) (Kennedy, J., concurring in part, dissenting in part) (citing Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925)).

45. Ellen Canacakos, *Joint Custody as a Fundamental Right, reprinted in* JOINT CUSTODY AND SHARED PARENTING 223, 225 (Jay Folberg ed. 1984) (1981).

46. *See id.* (stating that the State's paramount concern is the welfare of the child which in turn makes the parent's rights of custody and control subject to the court's perceptions of the advancement of the best interests of the child). Canacakos points out that the vital inquiry is whether a constitutional protection of parental custody is dependent on the nuclear family remaining intact or if it is independent within each parent. *Id.* She concludes that the constitutional protection does not come from the family unit *per se*, but rests in the rights of individuals. *Id.* at 226.

47. *See id.* at 228 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that the Fourteenth Amendment protects the liberty interest in the *individual* to "marry, establish a home and bring up children")) (emphasis added).

48. *See* O'Kelly, *supra* note 12, at 497 (noting that the tender years doctrine was abolished in North Dakota in 1973).

49. *See* N.D. CENT. CODE § 14-09-06.2 (Supp. 1995) (listing factors to be used in determining the

greeted by many as a welcome change to the tender years doctrine.[50] However, others saw it as giving the courts broader discretion to determine custody by allowing the courts to look at every facet of the parents' performance.[51] Because of this, many custody determinations evolve into a battle of who has best served the child.[52] One author called this practice "a destructive contest in which each parent competes to expose the flaws of the other."[53] What occurs is an adversarial contest where the court may be forced to speculate as to how much care each parent has provided, which parent has the better job, or which parent can cook and clean better.[54] Other courts, although applying the best interest of the child factors, may still be persuaded by older, traditional stereotypes and give custody to the mother when the weight of the evidence is not so obviously in her favor.[55]

Because of the problems of determining the best interests of the child through a list of statutory factors, some scholars and judges have suggested alternatives to evaluating the best interests of the child.[56]

best interests of the child); *see also* Mnookin, *supra* note 25, at 235-36 (discussing the fact that most States have enacted statutes which provide for the best interests of the child standard). Mnookin is well known as discussing the problems inherent in applying the factors under the best interest analysis to child custody. *Id.* at 231-32; *see also* Scott & Dedreyn, *supra* note 12, at 466 (discussing application of the best interest standard).

50. *See* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 620 (1992) (stating that due to an evolution in gender and parenting roles, the tender years doctrine seemed less viable because it reinforced stereotypical gender roles). Scott points out that fathers favored the gender-neutral best interests of the child over the maternal preference given mothers by the tender years doctrine. *Id.* at 623. Initially, feminists supported the innovation of best interests because they saw it as a break from reinforcing stereotyped gender norms. *Id.* at 620.

51. *See* Mnookin, *supra* note 25, at 230, 253-54 (discussing the trial court's broad discretion in custody determinations).

52. *See id.* at 257. The application of the best interests standard may incur substantial application costs because of the need for considerable information about the family structure and the difficulty in predicting how children will be affected in the future based on which parent they will live with. *See id.* at 257-61 (discussing the considerable information needed to make a child custody decision); Scott, *supra* note 50, at 622 (noting that courts use a wide-open evaluation of factors which may be speculative and value-laden depending on the court doing the evaluating); Scott & Derdeyn, *supra* note 12, at 466-67 (stating that the individualized nature of the best interests standard gives judges great discretion in determining what weight should be given non-specific criteria).

53. Scott, *supra* note 50, at 622.

54. *See generally* Mnookin, *supra* note 25, at 257-61 (stating that the judge will determine the weight to be given different criteria and that the value a judge places on fitness or affection will greatly affect the outcome of a case); Scott, *supra* note 50, at 622 (noting that courts apply the factors inconsistently or possibly imprecisely due to the fact that no guidance is given on how to weigh past performance).

55. *See* Miller, *supra*, note 12, at 353-54 (noting that even with legislation that calls for the rights of parents to be equal in custody determinations, 90% of contested custody determinations result in awards to the mother, additionally, in 90% of divorce cases that never reach the court, mothers will assume custody); Scott, *supra* note 50, at 622 (noting that the best interests standard may be applied unevenly based on a judge's stereotypical assumptions).

56. *See* Lapp v. Lapp, 293 N.W.2d 121, 130 (N.D. 1980) (stating that the court is aware of clamoring by parents to clarify child custody laws); Mnookin, *supra* note 25, at 246 (stating that

Justice Levine,[57] during her tenure on the North Dakota Supreme Court stated she would like to see solutions which would offer more consistency in dealing with the difficult problems facing the court in child custody.[58]

E. PRIMARY CAREGIVER

One suggested alternative has been that of establishing custody through analysis of who has acted as the primary caregiver.[59] The primary caregiver doctrine gives the parent who has provided the majority of the child's daily care, and thus established the emotional and physical bonds which are important to the child's development, a preference toward custody based on the desirability of maintaining and developing these bonds.[60] Many groups embraced the primary caregiver standard as a fairer way to establish child custody.[61]

Most States that consider the primary caregiver theory in child

impatience has arisen in the judicial, legislative, and scholarly sectors because of a need for more uniform standards in child custody cases).

57. Justice Beryl Levine served on the North Dakota Supreme Court as the first female Justice to ever do so. In her years of service on the court, Justice Levine penned many of the decisions in the family law and domestic relations area. In addition, she was a great advocate for using the idea of a primary caregiver in determining child custody.

58. *See* Dinius v. Dinius, 448 N.W.2d 210, 218 (N.D. 1989) (Levine, J., dissenting) (arguing for a primary caregiver presumption, stating "[i]f trial courts are to have any guidance and this court is to conduct any meaningful, principled review" the court should identify and analyze specific factors which would help in that endeavor).

59. *See* Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981). *Garska* is one of the first reported cases to have used the primary caregiver as a factor for awarding custody. *Id.* In *Garska*, West Virginia's highest court held that the best interests of a child would be with his or her primary caregiver when that child is too young to express a preference. *Id.* The court in *Garska* set out criteria by which the court could evaluate which parent was the primary caregiver:

> [T]he trial court shall determine which parent has taken primary responsibility for, *inter alia*, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. baby-sitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.

Id.; *see also* Pikula v. Pikula, 374 N.W.2d 705, 713-14 (Minn. 1985) (recognizing the importance of a primary caretaker in young children's lives). The Minnesota Supreme Court in *Pikula* followed the example set down in *Garska* and awarded custody to the primary caregiver. *Id.*

60. *See* O'Kelly, *supra* note 12, at 484 (stating that the position of primary caregiver is the most important consideration for custody based on the intimate interaction between the child and his or her primary parent because of a unique psychological bond between the two).

61. *See* Scott, *supra* note 50, at 627-28 (stating that certain groups, including some feminists, view child custody as continually downplaying the importance of the mother and believe that mothers face a greater risk of losing custody under the best interests of the child standard).

custody cases will use it as only one factor in the custody decision.[62] However, there may be growing support for the adoption of a primary caregiver presumption.[63] Critics of the primary caregiver doctrine state that it is merely an attempt to return to the tender years doctrine and a presumption that the best interests for child custody are with the mother.[64] Other commentators have noted that as the traditional roles of parenting become more blurred, the primary caregiver status becomes difficult to determine, which reduces its value as an easily administered theory.[65]

F. JOINT CUSTODY

The other child custody theory which has evolved in the courts is that of joint custody, which is a continually expanding sector in the field of child custody law.[66] Joint custody originally developed out of a concern that fathers were not being treated equally in child custody cases.[67] Joint custody, in many States, is looked at as the favored custody arrangement because it is fair to both parents and is in the best interest of the child.[68] There may be numerous reasons why joint custody may better help children to cope with divorce: it may more closely resemble the intact family; it may continue to foster parent-child relationships between both parents; and it may ensure that the child is spending "quality" time with each parent and not time with a "visiting" parent.[69] Currently, forty-one States and the District of Columbia

62. *See* IRA MARK ELLMAN ET AL., FAMILY LAW 513 (2d ed. 1991) (stating the proposition that many more states may be using the primary caretaker as a factor in the consideration of its child custody decisions).

63. *See id.* at 513 (citing *Pikula*, 374 N.W.2d at 705); *In re* Maxwell, 456 N.E.2d 1218, 1220-21 (Ohio Ct. App. 1982); Van Dyke v. Van Dyke, 618 P.2d 465, 466-67 (Or. Ct. App. 1980) (finding that identification of the primary caretaker is relevant in custody decisions).

64. *See* Scott, *supra* note 50, at 628-29 (discussing the return to the tender years doctrine with the primary caregiver status); *see also* Klaff, *supra* note 17, at 344-49 (discussing the presumption for the tender years doctrine in terms of who is the primary caregiving parent).

65. *See* Scott, *supra* note 50, at 629 (stating the primary caregiver could become obsolete or increasingly unhelpful in custody disputes where there is greater sharing of child care between parents).

66. *See* Miller, *supra* note 12, at 359-60 (stating that there is no precise definition for joint custody but that it is both parents sharing responsibility and authority with respect to the children).

67. *See* Scott, *supra* note 50, at 624 (discussing the introduction of joint custody theory in the early 1980's by divorced fathers).

68. *See infra* note 196 (listing several state statutes which have made joint custody the paramount concern for that state); Miller, *supra* note 12, at 362 (noting that "joint custody provides the child with love, attention, training, and influence of both parents"); Scott & Derdeyn, *supra* note 12, at 455 (pointing out that a substantial body of literature has appeared in favor of joint custody and that there has been an accelerating momentum toward joint custody).

69. *See* Miller, *supra* note 12, at 363 (noting that a "visiting" or "visited" parent does not have the opportunity to be a true object of love, support, or trust. Additionally, children with joint custodial

have statutes which address joint child custody.[70] Only eight states, including North Dakota, have no statutory authority for joint custody.[71]

1. Joint Custody Versus The "Visiting" Parent

Among the most common criticisms of sole custody is the fact that the other non-custodial parent is given "visitation rights."[72] In addition, sole custody is seen as inflexible and unable to change as both the parent and child change.[73] Further, there may be the unambiguous signal that one parent is right while the other is wrong, or that one parent is the true

parents are able to spend more time with a parent, especially quality time, than children who have a non-custodial visiting parent).

70. ALA. CODE § 30-3-150 (Supp. 1996); ALASKA STAT. §§ 25.20.060, 25.20.090, 25.20.130 (Michie 1996); ARIZ. REV. STAT. ANN. § 25-403 (1996); CAL. FAM. CODE §§ 3080 to 3089 (West 1994); COLO. REV. STAT. §§ 14-10-123.5 to -124 (1988 & Supp. 1996); CONN. GEN. STAT. ANN. §§ 46b to 56a (West 1995); DEL. CODE ANN. tit. 13, §§ 727 to 728 (1993); D.C. CODE ANN. § 16-911 (1981); FLA. STAT. ANN. § 61.13(2)(b) (West Supp. 1997); GA. CODE ANN. § 19-9-6 (Harrison 1994); HAW. REV. STAT. §§ 571-46 to -46.1 (1993); IDAHO CODE § 32-717B (1996); 750 ILL. COMP. STAT. ANN. §§ 5/602.1, 5/610 (West Supp. 1997); IND. CODE ANN. § 31-1-11.5-21 (Michie Supp. 1996); IOWA CODE ANN. §§ 598.1, 598.21, 598.41 (West 1996); KAN. STAT. ANN. § 60-1610(a)(4)(A) (1994); LA. REV. STAT. ANN. §§ 9:335 to :337 (Supp. 1997); ME. REV. STAT. ANN. tit. 19, § 752 (West Supp. 1996); MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1997); MICH. COMP. LAWS ANN. § 722.26a (West 1993); MINN. STAT. ANN. §§ 518.003, 518.17 (West Supp. 1997); MISS. CODE ANN. § 93-5-24 (1994); MO. ANN. STAT. § 452.375 (West 1997); MONT. CODE ANN. §§ 40-4-222 to -224 (1995); NEB. REV. STAT. § 42-364 (1993); NEV. REV. STAT. ANN. §§ 125.480, 125.490 (Michie 1993 & Supp. 1995); N.H. REV. STAT. ANN. § 458:17 (Supp. 1996); N.J. STAT. ANN. § 9:2-4 (West 1993); N.M. STAT. ANN. § 40-4-9.1 (Michie 1994); N.C. GEN. STAT. § 50-13.2 (1995); OHIO REV. CODE ANN. §§ 3109.04, 3109.041 (Anderson 1996); OKLA. STAT. ANN. tit. 43, § 109 (West 1990); OR. REV. STAT. § 107.169 (1995); 23 PA. CONS. STAT. ANN. §§ 5302, 5304, 5306 (West 1991); S.D. CODIFIED LAWS § 25-5-7.1 (Michie 1992); TENN. CODE ANN. § 36-6-101 (1996); TEX. FAM. CODE ANN. §§ 153.005, 153.007, 153.131 (West 1996); UTAH CODE ANN. § 30-3-10.2 (1995); VT. STAT. ANN. tit. 15, §§ 650, 660, 670 (1989 & Supp. 1996); VA. CODE ANN. § 20-124.1 (Michie 1995); and WIS. STAT. ANN. § 767.24 (West 1993 & Supp. 1996).

Not every State defines custody in terms of both "joint legal custody" and "joint physical custody." *See* MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1992) (referring to the joint custody of children as a shared custody plan); MICH. COMP. LAWS ANN. § 722.26a (West 1993) (defining joint custody in a singular term without breaking down the joint legal and joint physical custody); TEX. FAM. CODE ANN. § 153.005 (West 1996) (referring to parents as sole or joint conservators). All of the statutes speak in terms of some type of shared custody or custody to ensure that both parents maintain custody and that the child has an opportunity to interact with both parents.

Of the 41 states that have a joint custody statute, 14 of those states and the District of Columbia have a presumption for joint custody. Several of the presumptions only operate if both parents agree on joint custody. The states which have a joint custody presumption are: California, Florida, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, Oklahoma, and Texas.

71. The states which have no statutory authority for joint custody are: Arkansas, Maryland, New York, North Dakota, Rhode Island, South Carolina, Washington, West Virginia, and Wyoming. Among the states listed, North Dakota and Rhode Island mention joint custody within the discussion of domestic abuse. N.D. CENT. CODE § 14-09-06.2(j) (Supp. 1995); R.I. GEN. LAWS § 15-5-16(a)(1) (1996).

72. *See* Miller, *supra* note 12, at 355, 363 (discussing visitation rights given to the non-custodial parent and that the visiting parent has little chance to develop the role of nurturer who can provide love, trust, and identification to the child).

73. *Id.* at 355.

parent while the other is only someone who brings gifts or comes only to play with the child for a few hours.[74] There is also a great deal of evidence to show that a child's development is not only furthered by the involvement of the mother but that a great deal of influence comes from a father who is present in his child's life.[75] Furthermore, the problems arising in the sole custody arrangement are not limited to the non-custodial parent but also affect the parent who maintains daily control of the child.[76]

2. *Constructive Arguments For and Against Joint Custody*

Studies on joint custody arrangements have shown that joint custody is a viable, working option in the child custody field.[77] But not

74. *Id.* at 355-56. Although Miller's comments in regard to visitation are gender stereotypical, with the mother regarded as the custodial parent and the father as the visiting parent, the foundation of his argument and problems that arise in the sole custody arrangement are applicable to any custodial/non-custodial arrangement. *Id.* Miller points out several problems with a sole custody arrangement where the father is denied frequent access to his child. *Id.* The child is denied access to his or her father's view of the world and the opportunity to develop a deep personal relationship with him. *Id.* In turn, the father may lose his self-esteem based on his loss of authority and begin to decrease or terminate his visits. *Id.* Many times, even the most loving and caring fathers may become despondent and lose interest. *Id.*

75. *See id.* at 358-59 (stating that "[r]esearch has shown that the father's greatest impact on his children occurs primarily in those areas involving psychosexual, personality, social and intellectual development. In essence, current research has suggested that there is more to the parent-child relationship than that involving the mother and the child").

76. *Id.* at 356. Miller notes that sole custody will have an impact on the mother/custodial parent. *Id.* The custodial mother may become resentful towards both the children and her former spouse based on the fact that the custody arrangement consumes more of her time and activities than it would have during marriage. *Id.* at 356-57. The custodial mother must now do the work normally done by two parents which may make it more "difficult for the mother to establish a career, to earn a living for her family, to sever her financial dependence on her ex-spouse, and to cultivate a social life." *Id.* at 356.

77. Frederic W. Ilfeld, Jr. et al., *Does Joint Custody Work? A First Look at Outcome Data of Relitigation* (1982), *reprinted in* JOINT CUSTODY AND SHARED PARENTING 136, 139-41 (Jay Folberg ed., 1984). Dr. Frederic Ilfeld, Dr. Holly Ilfeld, and John Alexander, J.D., collected data from the courts of the West District of Los Angeles County for more than a two year period (1978-1980) and compared the outcome of relitigation between 276 sole custody arrangements and 138 joint custody arrangements. *Id.* at 137. The authors recognized that relitigation is only one factor that indicates whether a custody arrangement worked but believed that it was an objective measurement reflecting parental conflict. *Id.* The study concluded that out of the 414 child custody cases that came through the court, the proportion of relitigation for joint custody cases was one-half that of sole custody cases. *Id.* at 139-40. The authors made two assumptions in their research study: (1) they assumed that problems with children's adjustment after divorce came more from the amount of conflict and problems of post-divorce than from the actual divorce itself; and (2) they assumed that relitigation of custody issues represented a moderate to severe level of conflict between parents and the custody arrangement, which in turn adversely affects the children of divorce. *Id.* at 140. The authors' final conclusions were that, considering the best interests of the child as foremost in importance, "all professionals should recognize a strong, positive indication for joint custody." *Id.* Furthermore, the study stated that the burden of proof that joint custody would not work in the child's best interest should fall on the parent who is requesting sole custody. *Id.*

everyone has embraced joint custody as a welcomed alternative.[78] One of the reasons for this opposition may be the confusion that sometimes exists about what joint custody is and how courts should apply the doctrine.[79] Courts have made matters worse by confusing terms and issues in different custody cases.[80] For the purposes of this article, the distinctions to be made will be between joint legal custody and joint physical custody. Joint legal custody refers to the equal rights of each parent to be responsible for decisions involving the health and welfare of their child.[81] Joint physical custody refers to the time a parent spends with their child in their day-to-day upbringing.[82]

Proponents of the joint custody theory assert many reasons why it is

78. *See* Scott, *supra* note 50, at 626-27 (explaining that some feminists may not agree with joint custody based on a belief that fathers get windfall results under joint custody).

79. *See* Danece Day Koenigs & Kimberly A. Harris, *Child Custody Arrangements: Say What You Mean, Mean What You Say*, 31 LAND & WATER L. REV. 591, 597-605 (1996) (explaining the confusion based on courts applying joint, alternating, and split custody in erroneous and ambiguous terms and describing how each custody situation must be analyzed and broken down between legal and physical custody). Koenigs and Harris broke down the individual aspects of each type of custody arrangement which a court determines for child custody at divorce. *Id.* at 599-605. The following definitions can be useful when keeping in mind custody arrangements of the court:

> *Sole Custody*: In a sole custody arrangement one parent is given complete legal and physical custody of the child.
> *Divided or Alternating Custody*: A divided custody arrangement is one in which both parents are given sole physical custody and legal custody of the child for set durations during the year, subject to visitation by the non-custodial parent.
> *Split Custody*: Split custody describes an arrangement where there are two or more children who are literally split or divided between the parents. In such an arrangement, each parent receives sole physical and legal custody of one or more of the children and visitation rights to the other children.
> *Joint Custody*: The distinguishing feature of joint custody is that both parents retain legal responsibility and authority for the care and control of the child, much as in an intact family. Neither parent's rights are superior; both have an equal voice in education, upbringing, and the general welfare of the child. The term joint custody has two components, joint legal custody and joint physical custody.

Id.

80. *See* Lapp v. Lapp, 293 N.W.2d 121, 125 n.1 (N.D. 1980) (stating that the terms "split custody," "alternating custody," and "joint custody" would be used interchangeably throughout the opinion); *see also* Taylor v. Taylor, 508 A.2d 964, 966 (Md. 1986) (commenting that the confusion on what constitutes a joint custody arrangement may be due to the inability of the courts to agree on what is meant by joint custody). In *Taylor*, the court stated that inherent in the meaning of "custody" are the concepts of "legal" and "physical" custody. *Id.* at 967. Legal custody carries with it the right and obligation to make decisions in areas ranging from education and religion to discipline and medical care. *Id.* Physical custody carries with it the right and obligation to provide a home and daily care to the child. *Id.* The court pointed out that joint physical custody does not necessarily mean a fifty-fifty split of custody but may involve the best possible division of time with each parent. *Id.* This may mean that one parent gets custody during the school year and the other during summers or some other arrangement. *Id.*

81. *See* Koenigs & Harris, *supra* note 79, at 604 (defining joint legal custody as the equal rights of each parent to make major decisions affecting their child).

82. *See id.* (defining joint physical custody as the day-to-day participation that each parent has with the child).

the best solution for all parties involved.[83] One such reason is that both joint legal custody and joint physical custody more closely resemble the custody and control each parent had during marriage.[84] Joint legal and physical custody may also foster cooperation between parents and further a societal goal of parental sharing of responsibilities.[85] In addition, the flexible nature of joint custody is seen as an advantage to custody arrangements.[86] Finally, the healthy development of both parent-child relationships ensures that the best interests of the child are being cared for.[87]

Opponents of joint custody note that there is always the distinct possibility that joint custody will not help parental cooperation but may instead exacerbate any existing conflicts.[88] The North Dakota Supreme Court has been quick to point out that it cannot control the relationship between the parents beyond the walls of the court and that the parents will determine whether or not the relationship is amicable.[89]

Opponents of joint custody are also quick to point out that in most

83. *See* Scott, *supra* note 50, at 624. Scott discusses several reasons or theories that have been asserted in the past as positive rationale for joint custody. *Id.* First, she states that as gender roles have evolved and changed with society, fathers have become more involved with caring for their children. *Id.* Second, sole custody arrangements relegate the non-custodial parent to the role of "visitor" and take away parental authority. *Id.* Conversely, joint custody more accurately replicates or reflects modern family roles. *Id.*

84. *See* Koenigs & Harris, *supra* note 79, at 604 (citing Jay Folberg & Marva Graham, *Joint Custody Of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523, 525 (1979) (stating that during marriage parents do not assign authority or responsibility for the children)).

85. *See, e.g.*, Scott, *supra* note 50, at 625 (stating that proponents of joint custody promote egalitarian gender roles and promote the best interests of children by having fathers and mothers involved in the child's custody).

86. *See* Miller, *supra* note 12, at 361-62. Miller points out that the flexibility of joint custody is one of the key elements that makes the arrangement work. *Id.* He states that, "[t]here may be times when a child needs the constant attention and affection of his [or her] mother, others when his [or her] father's masculine image is of primary importance. Furthermore not only the child but the parents and their relationships may change." *Id.* at 361. Finally, it is the parents who determine the living schedules of the parents and children, not the courts. *Id.* at 361-62. *See also* Persia Woolley, *Shared Parenting Arrangements* (1978), *reprinted in* JOINT CUSTODY AND SHARED PARENTING, 16, 16-24 (Jay Folberg ed., 1984). Woolley defined "shared custody" as any type of custody which allows a child to grow up knowing and interacting with each parent on a frequent or even daily basis. *Id.* at 17. The shared custody could come in many forms, such as a fifty-fifty split or the children living with each parent for several years or more. *Id.* The overall result was the important factor to Woolley, that the flexibility allowed the children the "opportunity for a more realistic, normal relationship with each parent." *Id.* Additionally, shared custody allowed the parents to feel that they had a chance to pass on their own beliefs and standards on to the child. *Id.*

87. *See* Miller, *supra* note 12, at 362 (stating "several recent studies have concluded that the best conditions for continued development [of children], require the deep involvement of both parents").

88. *See* Taylor v. Taylor, 508 A.2d 964, 971 (Md. 1986) (discussing joint custody arrangements as inappropriate when parents lack any spirit of cooperation). The court stated in *Taylor* that joint custody may present an opportunity for the child to manipulate the parents. *Id.* at 970.

89. *See* Lapp v. Lapp, 293 N.W.2d 121, 131 (1980) (stating that courts cannot help develop a healthy parent-child relationship nor can they regulate the day-to-day happenings between the parent and child).

families the daily care of the children is not equally proportionate.[90] Therefore, joint custody gives "windfall" rights to a parent who has not invested as much time with the child as the other parent and then forces a dissatisfied parent to make certain concessions, usually financial, to obtain an acceptable custody arrangement.[91] Finally, a criticism of joint custody is that it may create confusion and instability for children of divorce at a time when they need a sense of certainty in their lives.[92]

The important part to remember about the joint custody theory is that it does not evaluate parental roles based on the quantitative weight of which parent has cooked for the children more or which parent has brought in more income to the family and children. Instead, the theory focuses on the qualitative importance in a child's development of having both parents providing care.[93]

The common theme that runs through child custody theories, from primary caregiver to joint custody, and through much of the common law is a general interest in finding uniformity in child custody cases.[94] Instead of basing child custody decisions on ambiguous, unweighted factors or misconceived notions, most courts and scholars seem to agree that the best way to decide custody is by a certain criteria which would let parents, children, and the courts know how custody disputes will be solved.[95]

90. *See* Scott, *supra* note 50, at 627 (stating mothers often spend more time childrearing than do fathers).

91. *Id.*

92. *Taylor*, 508 A.2d at 970.

93. *Compare supra* note 59 and accompanying text (discussing factors which go into the reasoning for primary caregiver) *with supra* notes 66-69 and 82-86 and accompanying text (discussing the reasoning behind joint custody).

94. *See Lapp*, 293 N.W.2d at 130. The court in *Lapp* pointed out that there is "no general agreement among courts, lawyers, psychologists, behavioral scientists, social workers, or other professionals in the family law field" in regards to the desirability of joint custody. *Id.* That same disagreement is evident 16 years later with no harmony between family law experts and the courts as to which child custody theory acts in the best interests of the child. *See also supra* notes 58-64 and accompanying text (discussing the need for primary caregiver); *supra* notes 65-86 and accompanying text (discussing reasons for joint custody).

95. *See, e.g., Lapp*, 293 N.W.2d at 130. The court in *Lapp* stated:

> Over the past few years, we have become aware of a mounting clamor for changes in the laws pertaining to child custody. The discussion about the complexities of custody and visitation in our changing society has spurred the publication of a number of books, articles, and treatises throughout the country.

Id.; see also supra notes 48-55 and accompanying text (discussing best interest of the child); *supra* notes 58-95 and accompanying text (discussing the primary caregiver and joint custody).

III. NORTH DAKOTA'S CHILD CUSTODY DEVELOPMENT

A. THE PARENTING ROLE IN NORTH DAKOTA

The North Dakota Supreme Court has held that the marriage relationship is one of equality.[96] Justice Levine has commented that "this court shares the enlightened view of the marriage relationship—that marriage is a partnership enterprise, a joint venture, to which each party contributes his and her efforts and skills, as agreed upon, either or both within or without the home."[97] The North Dakota legislature has also codified the idea of equality in the marriage, particularly in the area of child care.[98] The statute states that, "The husband and father and wife and mother have equal rights with regard to the care, custody, education, and control of the children of the marriage."[99] The statute for awarding custody also indicates no preference for one parent over the other.[100] However, once a divorce has taken place, statistics seem to indicate that the rights of parents, in maintaining custody of their children, are often violated.[101] Opponents of joint custody solutions are quick to point out that many sole child custody awards were done by stipulation.[102] However, when focusing on

96. *See* Erickson v. Erickson, 384 N.W.2d 659, 663 (1986) (Levine, J., concurring) (commenting that marriage is a partnership and joint venture).

97. *Id.* In *Erickson*, the court discussed the division of marital property. *Id.* at 660-61. The court stated that although one party may not have contributed the same amount of effort in being the primary income earner, that party still deserves an equitable distribution of the property. *Id.* The question arises, if the argument as stated with that logic is true, would the converse also be true: that the parent who has provided the primary income to the marriage has assisted the other parent in being the primary caretaker? Since it is an equal partnership, even if one parent has done more in the area of child rearing, is the other parent entitled to an equal allowance of the right to be a parent under the law?

98. N.D. CENT. CODE § 14-09-06 (1991).

99. *Id.*

100. N.D. CENT. CODE § 14-09-06.1 (1992).

101. *A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts*, 72 N.D. L. REV. 1113, 1177-78 (1996). The Domestic Law Committee reviewed 155 random, unappealed divorce judgments from six judicial districts. *Id.* at 1177 n.140. The draft committee readily admits that the sample size was small and may not provide a sound basis for conclusions for domestic law analysis but the empirical data may at least pose some insight as to distribution of custody cases. *Id.* Of the 155 divorces, mothers received primary physical custody 73.7% of the time. *Id.* at 1178. In 99 of the 155 cases, minor children were involved. *Id.* In the 99 cases, fathers received primary physical custody in only 10 or 9.9% of the cases. *Id.* Mothers received primary physical custody in 73 cases or 75.1%. Joint or split physical custody was awarded in 16 cases or 15%. *Id.* Of the 99 cases joint legal custody was awarded in 58 cases or 58.6%. *Id.* Legal custody to the mother was granted in 36 cases or 36.4 % and to fathers in 5 cases or 5%. *Id.*

102. *Id.* at 1179. In 52% of the cases in which the mother received sole custody of minor children, that decision was carried out by parental stipulation. *Id.* At the same time a problem exists where many parents are not able to rightfully obtain some type of custody of their children, parents should not be able to use divorce to get out of the duties and responsibilities of parenting. Just as the

constitutional protections in North Dakota for custody and control of one's children it does not seem that the courts have protected the individual liberty interests which the United States Supreme Court spoke of in *Stanley v. Illinois*.[103]

B. NORTH DAKOTA'S USE OF JOINT CUSTODY

The North Dakota Supreme Court's use of joint custody has been intermittent and apparently invoked on a case by case basis. In 1975, the North Dakota Supreme Court reviewed the issue of joint custody in *DeForest v. DeForest*.[104] *DeForest* involved a joint custody arrangement where the trial court awarded the mother physical custody for the remaining four months of that year and then to the father for six months of the next year and then back to the mother for six months.[105] The mother commenced an action on appeal for sole custody of her child.[106] The North Dakota Supreme Court found that a best interests of the child standard had not been applied in the lower court and remanded the case for further findings.[107] Although the court in *DeForest* reversed and

legislature has properly found that parents cannot stipulate to child support payments below a certain level, so too should they find that parents cannot stipulate to no longer functioning in the capacity of a parent to their child.

103. The Supreme Court in *Stanley* stated that "[w]e observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents." Stanley v. Illinois, 405 U.S. 645, 652-53 (1972); *see also supra* notes 30-44 and accompanying text (explaining the individual rights protected by the Constitution which give parents custody and control over their own children).

104. 228 N.W.2d 919 (N.D. 1975). In *DeForest*, Margaret DeForest appealed from a judgment of the district court of Burleigh County, which provided alternating or split custody of their child Peggy between herself and her former husband Patrick DeForest. DeForest v. DeForest, 228 N.W.2d 919, 921-22 (N.D. 1975). Patrick and Margaret were living in Bismarck where both were employed as teachers until the time of separation. *Id.* at 921. At the time of the divorce Margaret and the children were living in Grand Forks. *Id.* The court provided no findings as to whether one parent was responsible for a greater share of the child care duties. *Id.* The court did cite to the record in finding that the divorce was based on irreconcilable differences, and also concerning Margaret's responsibilities as a mother to Peggy and Margaret's employment outside the home. *Id.* Both parents were extremely bitter toward each other and allowed those problems to spill over into the custody situation. *Id.* at 922.

105. *Id.* The district court made the findings of fact, specifically authorizing joint custody. *Id.* The lower court, although stating that the arrangement was for joint custody, authorized an alternating custody arrangement. *Id.* The court found that Margaret would be awarded custody of Peggy from the day of the trial until January 12, 1975. *Id.* Peggy would then live with Patrick from January 12, 1975, until Memorial Day, 1975. *Id.* Both Patrick and Margaret would get seven weeks of custody during the summer, along with visitation during non-custody times, and allowances for alternating custody during holidays. *Id.*

106. *Id.* Patrick DeForest argued that the split custody decision was not clearly erroneous and should be maintained. *Id.* In the alternative, he requested that sole custody go to him if the court determined that split custody was not in the best interests of Peggy. *Id.*

107. *Id.* at 924-25. The North Dakota Supreme Court determined that the trial court had made no indication, in either the findings on custody or the oral opinion, that a split custody arrangement would act in the best interests of Peggy. *Id.* at 924. During oral argument before the supreme court the attorneys for both sides indicated that an inference or presumption of best interests of the child could

remanded the case back to the trial court for further findings, the court stated that if there is substantial evidence to support a party's position for "alternating custody" that party may be able to show that it is in the best interests to have the child spending time with both parents.[108] The court also stated that between two parents all things should be considered equal.[109] The court went on to state that a finding that joint custody is in the best interests of the child would not be found to be clearly erroneous when supported by proper facts.[110]

The North Dakota Supreme Court did not issue another joint custody decision for five years until *Lapp v. Lapp*,[111] in which the court looked at a joint custody arrangement rotating custody between the husband and wife every six months.[112] The court not only determined the fitness of each parent, but seemed intent on reviewing the husband-wife relationship and characteristics of each person to determine the best custody arrangement.[113] Differentiating from the *DeForest* case, the court in *Lapp* found that the district court's memorandum opinion outlined sufficient factors to allow for joint custody.[114] The court in *Lapp* upheld the custody arrangement, finding that both parents were fit,

be made from the lower court's opinion. *Id.*

The supreme court was not satisfied that the lower court had taken the best interests of child into consideration, although some findings from the district court records indicated the judge was concerned with the best interests of the child. *Id.* at 924-25. The trial court had stated that its position was the predominate concern for the welfare of the child and not the welfare of either of the parents. *Id.* at 924.

108. *Id.* at 925.

109. *Id.*

110. *Id.* at 924. The court stated that in the findings of fact it was looking to determine whether the trial court had analyzed the best interests of the child in determining custody. *Id.* The appellate court stated that it wanted to be able to obtain a correct understanding of the factual issues determined by the trial court as a basis for the conclusions of law. *Id.*

111. 293 N.W.2d 121 (N.D. 1980).

112. Lapp v. Lapp, 293 N.W.2d 121, 124 (N.D. 1980). Lynette and Dale Lapp were divorced in Burleigh County on November 5, 1979. *Id.* Their eight year marriage produced one daughter, Trina Lapp. *Id.* Although the court called the custody arrangement a split custody or alternate custody arrangement, the make-up of the custody order is one that would be joint custody. *Id.* Lynette would have custody for a period of six months each year, beginning with the first of August and ending the first day of February, with custody then switching to Dale. *Id.* The order also provided for visitation and custody on holidays. *Id.* Lynette brought an appeal and requested an order for stay of judgment for joint custody. *Id.*

113. *Id.* at 126-28. The court was very specific in its discussion of both Lynette and Dale's age, physical and mental health, education, and employment. *Id.* The court reviewed the important role that both sets of grandparents played in Trina's life. *Id.* at 126. The court also reviewed the expert testimony which had been presented in the district court. *Id.* Lynette brought two experts in the field of family counseling. *Id.* The experts determined that Trina was a well-adjusted and happy child and stated that Lynette was a very capable and competent mother. *Id.* The experts had never met or spoken with Dale or formed an opinion of him as a parent. *Id.* at 127. Dale brought in a family friend to testify as to his fitness as a parent. *Id.* She stated that both parents loved Trina but that she thought Dale would "provide a more stable, disciplined, organized home." *Id.*

114. *Id.* at 128.

capable, and deserving of custody of their child.[115] The court further stated that when the evidence supports joint custody, it will be in the best interests of the child to follow that standard.[116] The factors used by the court in *Lapp* could be used as criteria in other joint custody cases.

The supreme court in *Lapp* also outlined how joint physical custody arrangements may be worked out without having an equal division of time.[117] The court also discussed the reality of little or no agreement as to the effects of joint custody by the courts, psychologists, or social workers.[118] However, the court pointed out that no one wins in divorce and the object of custody is to make the adjustment for the children as least stressful as possible.[119] What the court emphasized was the importance of the parents cooperating, dealing with post-divorce life, and trying to make the custody arrangements work.[120]

115. *Id.* at 129. The district court found both Lynette and Dale to be fit, willing, and able parents. *Id.* at 124. The findings of the court stated that Trina's custody would be divided equally between the parents. *Id.*

116. *Id.* at 128. The court extracted particularly important district court findings that:

> 1) Both parties expressed a strong desire to retain custody of the minor child, and both suggested that the child should be afforded liberal visitation with the noncustodial parent and with the respective grandparents . . . .
> 2) Both parties demonstrated that they are capable of raising the child in a stable and satisfactory environment, and of providing for her physical and emotional needs.
> 3) The expert witnesses who testified at trial . . . [were not qualified] to form an opinion as to which parent was the preferred custodial parent because neither witness had sufficient professional involvement with the [father].
> 4) The expert witness who had been ordered by the district court to conduct a custody investigation testified that both [parents] were "suitable custodial parents."
> 5) The work hours and routine of both parents are such that child care will be suitable at both homes.
> 6) The logistics are such that there will be no substantial disruption of the child's routine, schooling, etc. Both parents are of close geographical proximity, i.e., both reside and work in [the same town].
> 7) Both maternal and paternal grandparents reside in [the same town] . . . .
> 8) The [mother] has been inflexible and uncooperative in allowing Dale and his parents to see Trina during the interim period.

Id. at 128-29.

117. *Id.* at 129. Joint custody theories support the idea that there does not need to be an equal fifty-fifty split of physical custody, in fact, the court in *Lapp* suggested options other than a six month split of custody. *Id.; see also* Taylor v. Taylor, 508 A.2d 964, 967 (1986) (discussing the flexibility of joint custody arrangements and the fact that they do not have to be even fifty-fifty splits of custody). In *Lapp*, the court discussed the possibilities of a division of custody where one parent had the child during the school year and the other during the summer months. *Lapp*, 293 N.W.2d at 129. Another possibility was giving the child a home for one full year with one parent and the next year with the other. *Id.* However, the court found that the trial court did not err in its discretion of awarding joint custody based on every six months. *Id.*

118. *Id.* at 130.

119. *Id.* at 130-31. The district court in *Lapp* stated that "[t]he reality is that in some cases joint custody is the least detrimental of the alternatives available." *Id.* at 129.

120. *Id.* at 130. The court emphasized that, with an adversarial approach to divorce, where the child becomes the focus of conflict, negative attitudes will continue to promulgate and the ultimate loser will be the innocent child in the middle. *Id.*

The court, in 1989, held true to the *Lapp* precedent in upholding a joint custody award to the parents of a child in *Kaloupek v. Burfening*.[121] In *Kaloupek* the court looked at a joint custody arrangement which gave each parent legal and physical custody.[122] The court discussed the importance of both parent's contribution to their child's upbringing.[123] The court also pointed out the equal rights of parents in North Dakota to the custody and control of their children.[124] Analyzing the child's care under the factors of section 14-09-06.2 of the North Dakota Century Code, the court showed it was obvious that both parents loved and cared for their child and were capable as parents.[125] The North Dakota Supreme Court further stated that in order to give the child the benefit of both parent's contribution, it would be in his best interest to have shared legal and physical custody.[126] Finally, the court pointed out that the success of any custody arrangement is determined by the parents.[127] It is impossible for courts to administer and supervise a custody arrangement on the day-to-day level.[128]

C. THE PRIMARY CAREGIVER IN NORTH DAKOTA CASE LAW

North Dakota first considered the primary caregiver theory in *Gravning v. Gravning*.[129] *Gravning* involved a split custody decision which gave one child to the father and the other child to the mother.[130]

121. 440 N.W.2d 496 (N.D. 1989).

122. Kaloupek v. Burfening, 440 N.W.2d 496, 497 (N.D. 1989). Chris Kaloupek and Michael Burfening had lived together but were never married. *Id.* They had one child together, Robert, who was two years old at the time of the custody proceedings. *Id.*

123. *Id.* at 498.

124. *Id.* at 497 (citing Gravning v. Gravning, 389 N.W.2d 621 (N.D. 1986)).

125. *Id.* at 498-99. The court did not apply factors from *Lapp*. *Id.* Rather, it analyzed the joint custody award through the statutory factors. *Id.* The court found that both Chris and Michael loved Robert and wished to have custody of him. *Id.* at 498. Both Chris and Michael had the disposition and capacity to give Robert the necessary affection and guidance he needed, along with providing for the necessities of life. *Id.* The court in *Kaloupek* determined that there was sufficient evidence by the district court to conclude that joint custody was proper and necessary. *Id.*

126. *Id.* Chris argued for sole custody based on the fact that she had been Robert's primary caregiver. *Id.* at 497. Chris argued that statutory factors four and five of section 14-09-06.1 were given inadequate consideration because, as the primary caregiver, she had maintained a stable and satisfactory environment and the permanence of the family unit weighed in her favor. *Id.* at 498-99.

The supreme court agreed with the trial court's finding that both parents had played a role in Robert's upbringing and the importance of maintaining continuity was not with the primary caregiver but with both parents. *Id.* at 499. The maintaining of continuity would best be served by allowing each parent to "open his [or] her home to Robert, alternately sharing in the responsibility of providing the day to day care, love, and nurture that physical custody entails." *Id.*

127. *Id.*

128. *Id.*

129. 389 N.W.2d 621 (N.D. 1986).

130. Gravning v. Gravning, 389 N.W.2d 621, 622 (N.D. 1986). Greg and Nancy Gravning were divorced in 1985. *Id.* The trial court gave Gabriel to Greg and Amanda to Nancy with "joint

Although the trial court found that each parent was equally fit to have custody, it decided that split custody would fulfill the individual needs of the children.[131] One of the major concerns of the court was the fact that Mrs. Gravning was not cooperative in promoting visitation between the children and Mr. Gravning while she had custody of the children.[132] Justice Levine dissented, stating that she thought the children should be placed with their mother, who was the primary caregiver.[133] Justice Levine argued that where two equally fit parents seek custody, North Dakota should adopt the rule that the primary caregiver receives custody.[134] She believed that splitting custody raised more questions than it answered and she asserted that preserving the intimate bond between the primary caregiver and the child would better maintain the best interests of the child.[135]

The *Gravning* case is a good example of where joint custody would have worked in the best interests of the children.[136] By applying the *Lapp* factors,[137] the trial court could have found a custody arrangement which would have kept the two children together. Both parties expressed a strong desire to have custody of both children.[138] Instead of splitting

visitation" taking place two days a month. *Id.* Nancy appealed contending that she should have custody of both children because she had been the children's primary caregiver. *Id.*

131. *Id.* at 623-24. At trial the adversarial procedure pitted Nancy and Greg against each other, with the majority of their efforts going to show how each would be a better parent than the other. *Id.* at 623. The district court found that "each of Nancy Gravning and Greg Gravning are competent and capable parents and that each shall have equal standing in the eyes of the law." *Id.* The court then agreed to split the children between the two parents. *Compare Gravning*, 389 N.W.2d at 624, *with Kaloupek*, 440 N.W.2d at 497 (finding that both parents are fit, loving parents, who both play an important role in the child's life and therefore the proper custody order is for joint custody), *and* Thorlaksen v. Thorlaksen, 453 N.W.2d 770, 774 (N.D. 1990) (finding that both parents were fit and loving and that the court fairly weighed the evidence between two fit parents and properly determined sole custody as being in the best interests of the child).

132. *Gravning*, 389 N.W.2d at 623.

133. *Id.* at 625 (Levine, J., dissenting).

134. *Id.* at 624 (citing Pikula v. Pikula, 374 N.W.2d 705, 713 (Minn. 1985); Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981)).

135. *Id.* at 625. Justice Levine stated that the awarding of custody is one of the most difficult decisions a judge can face but when they order splitting of custody between two parents, judges should be required to explain in a particularized fashion their findings and conclusions. *Id.* at 624.

136. *Id.* Although Greg and Nancy were unable to get along with each other and did not show that they could maintain an amicable relationship, that should be only one factor in the consideration of joint custody. *See* Lapp v. Lapp, 293 N.W.2d 121, 128-29 (N.D. 1980) (stating factors which the court used to determine whether joint custody was a feasible alternative, including: whether both parents desired custody; whether both parents had demonstrated that each was capable of raising the child; whether the parents' work hours and routine were suitable to joint custody; and whether the logistics were such that no real disruption in the child's routine, school, or other activities would occur).

137. *See supra* note 113 and accompanying text (referring to factors which would help in deciding if joint custody is feasible in a particular child custody case).

138. *Gravning*, 389 N.W.2d at 622. The court's findings as to both Greg and Nancy were very limited, but the court determined that the factors in North Dakota Century Code section 14-09-06.1 had been satisfied. *Id.* at 622-23. The fact that each parent received custody of one child also suggests

custody between the parents and denying the other the right of parenting that child, it would have seemed a better solution for the court to allow both parents to have control and influence in their children's lives.[139] The fact that both parents did not live that great of a distance away from each other would have allowed for some type of joint legal and physical custody arrangement.[140]

Three years after the *Gravning* decision, the supreme court affirmed the trial court's joint physical custody award to both parents in *Kaloupek v. Burfening*.[141] Justice Levine filed a dissent and asked the court to give custody to the mother as the primary caregiver.[142] Justice Levine adamantly argued that the court had made a mistake in trying to preserve the father's relationship with his child along with the mother's.[143] Justice Levine stated that an explicit preference for one parent over the other would protect the child's psychological relationships.[144]

Justice Levine made no mention of the psychological bonding that a child may have with both parents or the fact that a parent would be able to provide nurturing without being the person who has done the cooking or cleaning.[145] Instead, she focused completely on the premise that the only parent who could provide the child with a stable upbringing would be the primary caregiver.[146] This apparently would shift the focus of child rearing into a quantitative evaluation to see who has changed more diapers, bathed the child more, or gotten up to give more bottles to the baby.[147] Instead the focus should be on whether the father or

that each parent was deemed capable of providing a stable and satisfactory environment for each child. *Id.*

139. *Compare Gravning*, 389 N.W.2d at 623-24, *with* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (stating that the interest of a parent in the companionship, care, custody, and management of his or her children is a vital liberty interest to be protected).

140. *Gravning*, 389 N.W.2d at 623.

141. *See supra* notes 121-28 (discussing the *Kaloupek* case). The majority for the court found that a joint legal and physical custody arrangement would serve the best interests of the child by giving access to both parents to provide care and support to their child. *Id.* at 498.

142. Kaloupek v. Burfening, 440 N.W.2d 496, 499 (N.D. 1989) (Levine, J., dissenting). Justice Levine opened her dissent with "Poor Robert!" to express her dismay at having the child in this case under a joint custody arrangement. *Id.* Justice Levine called the situation a "custodial schizophrenia" and classified the joint custody as a four year probationary period. *Id.* Justice Levine went on to chastise the court for not "biting the bullet" and awarding custody to one parent. *Id.*

143. *Id.* at 499-500.

144. *Id.* at 501. Justice Levine stated that a message had been sent out by the court that alarmed her as to the future of child custody in North Dakota. *Id.* She continued by stating that other circumspect jurisdictions had held joint custody was correct only where there was parental agreement, but failed to mention the number of jurisdictions which use joint custody as a guideline for custody. *See id.* at 500-01.

145. *See supra* notes 86-87 and accompanying text (discussing the importance of nurturing and bonds between a child and both parents).

146. *Kaloupek*, 440 N.W.2d at 502.

147. *See supra* note 59 (discussing Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981) and the

mother is fit to parent a child.[148] The analysis should look at whether one parent is incapable of providing discipline, love, or other nurturing qualities, not whether one parent has not done as much caretaking for the child in the past.[149]

Justice Levine argued in *Kaloupek* that joint custody should be used sparingly and only in exceptional circumstances.[150] Justice Levine also described joint custody as the "antithesis of Solomonic."[151] She stated that even Solomon had not given the parents of the child a choice of joint custody, but instead forced them to make a decision based on the health and welfare of the child.[152] Justice Levine stated that Solomon's acute wisdom did not let the parent's off the hook by resorting to joint custody[153] However, what the majority in *Kaloupek* seemingly tried to do was find a solution which acted in the best interests of the child and still maintained the continuity of parenting from both parents.[154]

Again in 1989, Justice Levine dissented in *Dinius v. Dinius,*[155] where a father had received sole custody of the four children from the marriage.[156] Although both parents were found to be fit by the trial

factors which go into evaluating which parent has serviced the child by cooking, cleaning, and bathing the child, and in turn who would be the primary caregiver).

148. N.D. CENT. CODE § 14-09-06.2 (Supp. 1995); *see also infra* app. (suggesting that a parent could only be denied joint custody if the factors in deciding the best interests of the child are rebutted against that parent).

149. *Id.* § 14-09-06.2; *see also* Miller, *supra* note 12, at 357 (noting that the awarding of one parent as superior and giving them custody is disruptive and that custody should be a plan for the future and not a reward for the past).

150. *Kaloupek*, 440 N.W.2d at 501.

151. *Id.* at 501-02. Justice Levine mistakenly invokes Solomon's wisdom as a basis for not allowing joint custody. *Id.* Justice Levine misunderstands the story of Solomon as being between two biological parents or that King Solomon in some way allowed the parents to make a choice for the health and welfare of the child. *See supra* note 2 and accompanying text (discussing the wisdom of Solomon in discovering the identity of the biological mother). Instead, the reality of the situation was that the biological mother was trying to prevent her child from being cut in half because another vindictive mother wanted it done. *Id.*

152. *Kaloupek*, 440 N.W.2d at 502. Again, Justice Levine mistakenly favored piecemealing the Solomon parable into a fashionable resolution that joint custody was not a proper child custody arrangement. *But see* Garska v. McCoy, 278 S.E.2d 357, 362 (W. Va. 1981) (suggesting the potential for a phenomenon known as the "Solomon syndrome" where the parent who may be in the position of the primary caregiver would be willing to sacrifice everything else in order to avoid the prospect of losing the child in an unpredictable court trial). The *Garska* court compared the harlot in the Solomon story, who was willing to give up her child to save him from being cut in half, to a sacrificing parent of today who may lose support or alimony payments in a custody battle to ensure that their parent-child relationship is maintained. *Id.*

153. *Kaloupek*, 440 N.W.2d at 502.

154. *Id.* at 499 (recognizing the importance of cooperation and the child's development with both parents through joint custody).

155. 448 N.W.2d 210, 217 (N.D. 1989).

156. Dinius v. Dinius, 448 N.W.2d 210, 210 (N.D. 1989). John and Carmen Dinius were married in 1975 and divorced in 1987. *Id.* at 210-11. Their marriage produced four children. Although both Carmen and John had been working prior to the marriage, after they had children Carmen became a stay-at-home mom and John was the income earner. *Id.* After a drawn out divorce, the court decided

court and the supreme court, Justice Levine dissented in favor of the primary caregiver.[157] In *Dinius*, the court, for the first time, was asked to evaluate the primary caregiver in relation to specific sections in the North Dakota Century Code section 14-09-06.2 to determine if granting custody to the primary caregiver would be in the best interests of the child.[158] Justice Levine stated that even if custody to the primary caregiver did not have presumptive force it was still a major factor in considering who deserved custody.[159] Justice Levine argued that stability needed to be maintained and that stability came from the child being with his or her primary caregiver.[160] She argued that a stable and satisfactory environment meant more than a continuing job held by the father.[161] Finally, Justice Levine interpreted "custodial home" to mean not just the house itself, but the emotional attachment between family members.[162]

Joint custody would have alleviated many of the questions that Justice Levine had as far as who was most deserving of custody.[163] In *Dinius*, both parents had proven to be fit and ready to accept the responsibilities of parenting.[164] Both had worked in the daily main-

that custody of all four children would go to John. *Id.* at 211. Carmen appealed claiming that it was erroneous for the court to give custody to John. *Id.*

157. *Id.* at 217 (Levine, J., dissenting). Although Justice Levine argued that Carmen was the primary caregiver, there was some question as to who actually had fulfilled that job. *Id.* at 218. The trial court noted the fact that Mr. Dinius was involved with the "grocery shopping, bathing, occasional school conferences, discipline, and in entertaining the children." *Id.* at 213. In addition, John was responsible for caring for the children when they were sick as well as being the parent responsible for discipline. *Id.*

158. *Id.* at 212. Carmen claimed that the trial courts findings were erroneous because it had not properly weighed the best interests of the child factors under section 14-09-06.2. *Id.* Carmen stated that the trial court needed to focus greater attention on factor four, the length of time in a stable environment; and factor five, the permanence of the family unit and custodial home under section 14-09-06.2. *Id.* at 211-12.

159. *Id.*

160. *Id.* at 218.

161. *Id.* A joint custody proponent might argue that Justice Levine is correct in stating that a continuing job does not ensure custody, but what should factor into custody is whether the father and the mother have the capacity to provide love and nurturance to their children. The court found that "both parents love their children, and the children love them, [b]oth parents are willing and capable of acting as the custodial parent." *Id.* at 213.

162. *Id.* at 218 (stating that the permanence of the family unit meant home is where the heart is and that should give the primary caregiver a stronger presumption because of the emotional bonds).

163. *See supra* notes 66-86 and accompanying text (discussing joint custody). Once again, *Dinius* is a good example of how the adversarial system does not benefit custody arrangements. *Dinius*, 448 N.W.2d at 213. The court specifically found that much of the parents' efforts at trial were leveling criticisms at each other and trying to prove that the other lacked the capacity for parenting. *Id.* The court found that none of their animosity or negative statements helped in deciding custody. *Id.*

164. *Id.* There had been some question as to John's mental health and well-being. *Id.* at 214. John had suffered from a bout of depression and suicidal tendencies. *Id.* John sought help from a hospital and received medication which helped to relieve the problem. *Id.* The court determined that John had overcome any problems he had and from the standpoint of a stable environment, that John

tenance of the children as far as bathing, cooking, disciplining, and general care of the children.[165] In addition, both were capable of providing the love and nurturing necessary to raise children.[166] If joint custody had been granted in this case, Mrs. Dinius would not have been denied the right to care for her children.

In *Foreng v. Foreng*,[167] the court was again faced with the difficult question of child custody between two fit parents.[168] Justice Levine, writing for the majority, found that the trial court was not clearly erroneous by focusing on the primary caregiver status to establish who should have custody.[169] The court stated that section 14-09-06.2 of the North Dakota Century Code was the checklist used by the courts to determine the best interests of the child and that part of that determination was to figure out who was the primary caregiver.[170] The court reasoned that the substantial impact the primary caregiver has on the child makes it a proper focus for child custody determinations.[171] At no time, however, did the court mention any possible constitutional protection for the right of parenting one's own children.[172]

IV. NORTH DAKOTA'S LOSS OF DUAL PARENTING AFTER *FORENG*

The theories behind joint custody and the primary caregiver are distinct and powerful ideas each heading in different directions. With the primary caregiver theory, the idea is that one parent is the "main" parent and deserves sole custody to preserve his or her relationship with

had the better of the situations. *Id.* The court affirmed the order and sole custody of all four children remained with John. *Id.* at 217.

165. *Id.* at 213.

166. *Id.*

167. 509 N.W.2d 38 (N.D. 1993).

168. Foreng v. Foreng, 509 N.W.2d 38, 39-40 (N.D. 1993). In a rather short but important opinion, the court decided the issue of custody of the two children of David and Rita Foreng. *Id.* David and Rita were married in December of 1985 and were divorced six years later, in December of 1991. *Id.* at 39. The lower court awarded custody of the children to Rita. *Id.* David appealed stating that the trial court erred by considering which spouse was the primary caregiver. *Id.* at 40.

169. *Id.* Justice Levine wrote that the trial court could not decide custody on the primary caregiver factor alone, but that the court should determine who the primary caregiver was and could use that as a *focus* for custody. *Id.* (emphasis added).

170. *Id.* (stating that the trial court was not improper in determining the primary caregiver or using it as the main focus in determining custody under best interests of the child test); *see also supra* notes 7-8 (providing the text of section 14-09-06.2).

171. *Id.* (citing Heggen v. Heggen, 452 N.W.2d 96, 98 (N.D. 1990) and Roen v. Roen, 438 N.W.2d 170, 174 (N.D. 1989), which determined that established patterns of care and nurture are relevant factors, which along with continuity of the child's relationship with the closest parent, make it lawful to focus on the primary caregiver)).

172. *See supra* notes 30-44 and accompanying text (acknowledging an individual's constitutional right to parent his or her own children).

the children. Joint custody recognizes that both parents have created psychological bonds with their children that should be maintained. This last section will analyze two cases where joint legal and physical custody had been awarded to the parents. In both cases the trial court changed custody, based on the fact that the joint physical custody arrangement had not been working, and awarded one parent sole custody of the children. The supreme court affirmed the lower court's decision in both cases. What seems important to the analysis is the material weight given to the primary caregiver status in determining whether to overturn a joint custody arrangement.

In *Dalin v. Dalin,*[173] the court had before it a joint physical custody arrangement that had unquestionably broken down.[174] The trial court found that sole custody was proper because joint custody had not worked between the parents.[175] The court resolved the issue by giving the child to Mrs. Dalin.[176] Mr. Dalin appealed, claiming that the best interests of the child would be that the girl live with her father.[177] Justice Levine, writing for the majority, found that the court could not make a determination as to who was the primary caregiver based on the "constant shifting of the child" back and forth since the divorce.[178] The trial court determined that the best interests of the child would be served by

173. 512 N.W.2d 685 (N.D. 1994).

174. Dalin v. Dalin, 512 N.W.2d 685, 687 (N.D. 1994). Roland and Patricia Dalin were married in 1989 and divorced in 1992. *Id.* at 686. They had one child from the marriage. *Id.* Upon divorce, Roland and Patricia agreed to joint custody of their child on a rotating basis, with Patricia having the child in September, November, January, March, and half of July. *Id.* at 687. Roland was to have her the other months. *Id.* at 686. Both Roland and Patricia determined that the custody arrangement had not been working as planned. *Id.* at 687. They stipulated that a "significant change of circumstances necessitating a change of custody" had occurred. *Id., see also supra* note 86 and accompanying text (defining joint custody and describing the benefits of this custody arrangement as being flexible and allowing the parties to change when the arrangement calls for such action, without having to involve the court system every time).

175. *Compare Id., with* Stanley v. Illinois, 405 U.S. 645 (1972); *see also supra* notes 38-44 (finding the rights of both parents as a protected liberty interest in the continued access to his or her own child).

176. *Dalin*, 512 N.W.2d at 689. Roland moved for sole physical custody of the child but the court awarded custody to Patricia. *Id.* at 687. Some confusion may come from the opinion in that the court did not define what type of custody it gave to Patricia. Although Roland had moved for sole custody, most likely the court meant to give Patricia physical custody and not eliminate joint legal custody between the two. In addition, the court actually provided a modified joint physical custody arrangement, by way of giving Patricia custody during the school year and giving Roland custody during the summer months. *Id.; see also* Taylor v. Taylor, 508 A.2d 964, 967 (1986) (noting that a physical custody split does not have to be a fifty-fifty in the amount of time spent with the child).

177. *Dalin*, 512 N.W.2d at 687. The court noted, similar to *Lapp* and *Kaloupek*, that "both parents care deeply for the child and are fit parents for custody." *Id.* at 688. The court still found that joint custody would not be in the best interests of the child and awarded custody to Patricia. *Id.*

178. *Id.* By Mr. Dalin's account and testimony entered at the trial court, he had the children approximately 70% of the time compared to Mrs. Dalin's 30%. *Id.* Mrs. Dalin testified that it was more like a 60%-40% split in favor of Mr. Dalin. *Id.*

sole custody with Mrs. Dalin.[179] In stating that it could not determine which parent had been the primary caregiver, the court pointed out that there may be more than just a mathematical computation of days spent with a parent to figure out the primary caregiver.[180]

Justice Levine's opinion seems to inexplicably weaken the importance of determining the primary caregiver as a primary factor.[181] One explanation may be that in joint custody arrangements there is no room for the primary caregiver status.[182] It may also be that neither parent has a presumptive right to custody and joint custody is the best determinant for the interests of the child.[183] Possibly, the goals of joint custody are beginning to be fulfilled, as gender roles are changing and both parents are taking a more active role in child care.[184]

The problems with the *Dalin* decision are only exacerbated by the inconsistency of the court in the case of *Schneider v. Livingston.*[185] In *Schneider,* the court again looked at a failed joint custody arrangement.[186] Although both parents had essentially agreed that the current custody arrangement was not working, neither wanted to give up their parental rights to the children.[187] The trial court this time determined

179. *Id.* at 687. The court also agreed with the trial court that another major concern was whether Mr. Dalin would help to maintain the future relationship between the child and Mrs. Dalin. *Id.* at 688. This was based on the fact that Mr. Dalin had shown unyielding disapproval of Mrs. Dalin's parenting skills. *Id.*

180. *Id.*

181. *But cf.* Dinius v. Dinius, 448 N.W.2d 210, 217 (N.D. 1989) (dissenting in favor of the primary caregiver); Kaloupek v. Burfening, 440 N.W.2d 496, 499 (N.D. 1989) (dissenting in favor of the primary caregiver); Gravning v. Gravning, 389 N.W.2d 621, 624 (N.D. 1986) (dissenting in favor of the primary caregiver).

182. *Dalin,* 512 N.W.2d at 688 (stating that when there is substantially shared custody it may be difficult to determine that one parent enjoyed the advantage of being the primary caregiver). *See also supra* note 65 and accompanying text (pointing out that a primary caregiver may be hard to determine where there has been significant shared or joint custody).

183. *See supra* notes 30-47 and accompanying text (discussing the constitutional right of parenting).

184. *See, e.g.,* Scott, *supra* note 50, at 625 (stating that the goal of joint custody is to promote egalitarian gender roles and the best interests of children).

185. 543 N.W.2d 228 (N.D. 1996). Bruce Livingston and Angela Schneider had three children from their previous marriage. Schneider v. Livingston, 543 N.W.2d 228, 230 (N.D. 1996). After their divorce both agreed to joint legal custody as well as joint physical custody. *Id.* The arrangement they settled on was that each would get physical custody of the children three and a half days of the week. *Id.* Both parties moved for sole custody of the children and the court awarded custody to Angela. *Id.*

186. *Id.* at 228. Similar to *Dalin,* both parties in *Schneider* had stipulated that the custody arrangement had not been working and that each parent desired sole custody of the children. *Id. But see* note 86 and accompanying text (stating that one of the major benefits of joint custody is the flexibility of the custody arrangement and the ability to determine the most suitable arrangement for the parents and child).

187. *Schneider,* 543 N.W.2d at 230. Bruce stated that this particular arrangement had not been working based on the continual shuffling of the children back and forth. *Id.* Angela agreed that the "custody arrangement was not *completely satisfactory.*" *Id.* (emphasis added). It would not have been beyond the courts power to maintain the agreed upon joint legal custody and also to have

that Mrs. Schneider was more the primary caregiver than Mr. Livingston in the joint custody arrangement.[188] Neither the trial court nor the supreme court made any real mention of Mr. Livingston's ability to be a parent or his fitness to have custody.[189] Both courts, instead, focused on the fact that Mr. Livingston could not remember some of his children's teachers names.[190] There was also evidence that Mr. Livingston had not washed as many clothes as Mrs. Schneider had for the children.[191] For these reasons, the court took away Mr. Livingston's right to continue to act as a parent to his child.[192]

V. APPLYING THE PRESUMPTION FOR JOINT CUSTODY

As stated earlier, most scholars and courts would agree that stability and consistency are what child custody determinations need desperately.[193] By applying a presumption for joint legal custody of children, the constitutional rights of both parents are protected, the best interests of the child are served by still having both parents responsible for their child's upbringing, and the child may receive better care by ensuring that both parents are involved with important decisions for the child.[194]

The trickier questions are the problems arising from joint physical custody. Obviously, most of the court battles arise from the question of

maintained a joint physical custody arrangement modified to be a more workable arrangement for both parents.

188. *Id.* at 230. The court put great importance on the determination of who was the primary caregiver. *Id.* at 230-31. The trial court had determined that the best interest of the child factors weighed in favor of Angela as the primary caregiver. *Id.* at 230. The court was very specific in its findings that the first factor of section 14-09-06.2, "the capacity and disposition of the parents to give the child love, affection, and guidance," fell in favor of the primary caregiver, Angela. *Id.*

189. *Id.* at 230-33. In an ironic move, the court discussed that although it was a joint custody arrangement, the caretaking tasks had not been distributed equally. *Id.* at 231-31. Angela washed more of the children's clothes and made out lists for Bruce detailing the children's upcoming schedule. *Id.* at 231. Because Angela had done more of the quantitative work, she was deemed the primary caregiver, and was given custody. *Id. But see* Dalin v. Dalin, 512 N.W.2d 685, 688 (N.D. 1994) (commenting that no mathematical computation of amount of care, custody, or control creates the primary caregiver).

190. *Schneider*, 543 N.W.2d at 231. In a final irony, when Bruce tried to prove that he had contributed equally to the care and nurturing of his children, the court commented that Bruce mistakenly believed that quantitative terms of care equate to greater quality and stability in care. *Id.* at 231-32. The court stated that the joint custody arrangement impeded both Bruce's and Angela's ability to provide a stable home for the children. *Id.* The court found Mr. Livingston to be a fit parent. *Id.* at 231. It also heard testimony from the guardian ad litem recommending Mr. Livingston as the better parent. *Id.* It then found that sole custody for Mrs. Schneider was the best solution; one parent would now have the ability to provide a home for the children and the other would not. *See id.*

191. *Id.*

192. *See id.* (giving custody to the mother).

193. *See supra* notes 94-95 and accompanying text (discussing the need for consistency in child custody cases).

194. See Miller, *supra* note 12, at 355-56, 361-62 (discussing the importance of joint child custody solutions in ensuring the healthy development of the parent-child relationship).

where the child will live or the issues that involve access, transportation, or discipline between the two homes. Some believe that it would take a social revolution to make joint custody work.[195] Other experts point out that it is difficult to see how well joint custody arrangements work because the only statistics and case law come from disputes where the custody arrangement has broken down. Although a revolution is not required in North Dakota to make joint custody work, what is needed is resolve on the part of the courts and the legislature to ensure that parental rights are maintained and protected.

A statutory requirement that joint legal custody is presumed to be in the best interest of the child would give courts a definitive starting point for custody cases.[196] From there courts could explore the possibility of

195. *See* MEL ROMAN & WILLIAM HADDAD, THE DISPOSABLE PARENT: THE CASE FOR JOINT CUSTODY 149 (1978) (discussing that a change of societal attitudes toward parental roles is needed to make joint custody work, but that such a change would take call for a revolution in the way people think).

196. *See supra* note 70 and accompanying text (describing states which already have statutory authority for joint custody arrangements). Each state, in describing what it wants in joint custody, has used different language and criteria to describe those arrangements. *Id.* As a way of illustration, several joint custody statutes are listed below from varying states:

> CALIFORNIA FAMILY CODE § 3080. Presumption of Joint Custody:
>
> There is a presumption, affecting the burden of proof, that joint custody is in the best interest of a minor child. . . where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child.
>
> CAL. FAM. CODE § 3080 (West 1994).
>
> COLORADO REVISED STATUTES § 14-10-123.5. Joint Custody:
>
> (1) For purposes of this article, "joint custody" means an order awarding legal custody of the minor child to both parties and providing that all major decisions regarding the health, education, and general welfare of the child shall be made jointly. The order may designate one party as a residential custodian for the purpose of determining the legal residence of the child. The order may also provide that one party shall have a longer period of physical custody of the child than the other party, but such provision shall have no legal effect on the rights or responsibilities of the parties with regard to joint custody. The order shall state that, under emergency circumstances, it is sufficient for either party to sign legal releases or to take any other necessary measures.
>
> (2) Joint custody shall not eliminate the duty of child support ordered pursuant to section 14-10-115, nor shall joint custody alone constitute grounds for modification of a support order. . .
>
> (3) In order to implement joint custody, both parties may submit a plan or plans for the court's approval. . . [or] the court, on its own motion, shall formulate a plan which shall address and resolve, where applicable, the parties' arrangements for the following:
>
> (a) The location of both parties, the periods of time during which each party will have physical custody of the child, and the legal residence of the child;
>
> (b) The child's education;
>
> (c) The child's religious training, if any;
>
> (d) The child's health care;
>
> (e) Finances to provide for the child's needs;
>
> (f) Holidays and vacations; and
>
> (g) Any other factors affecting the physical or emotional health and well-being of the child.
>
> (4) The court may order mediation to assist the parties in formulating or modifying a

joint physical custody and determine whether a particular case is capable of maintaining that arrangement. This would let the parents know why

plan or in implementing a plan specified in subsection (3) of the section and may allocate the cost of said mediation between the parties.

(5) The final plan specified in subsection (3) of this section shall be jointly agreed to by the parties. . .

COLO. REV. STAT. § 14-10-123.5 (1988).

IDAHO CODE ANNOTATED § 32-717B. Joint Custody:

(1) "Joint Custody" means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents. The court may award either joint physical custody or joint legal custody or both as between the parents or parties as the court determines is for the best interests of the minor child or children. If the court declines to enter an order awarding joint custody, the court shall state in its decision the reasons for denial of an award of joint custody.

(2) "Joint physical custody" means an order awarding each of the parents significant periods of time in which a child resides with or is under the care and supervision of each of the parents or parties.

Joint physical custody shall be shared by the parents in such a way to assure the child a frequent and continuing contact with both parents but does not necessarily mean the child's time with each parent should be exactly the same in length nor does it necessarily mean the child should be alternating back and forth over certain periods of time between each parent.

The actual amount of time with each parent shall be determined by the court.

(3) "Joint legal custody" means a judicial determination that the parents or parties are required to share the decision-making rights, responsibilities and authority relating to the health, education, and general welfare of a child or children.

(4) Except as provided in subsection (5), of this section, absent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interests of a minor child or children.

(5) There shall be a presumption that joint custody is not in the best interests of a minor child if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence. . .

IDAHO CODE § 32-717B (1996).

MICHIGAN COMPILED LAWS ANNOTATED § 722.26a. Joint Custody:

(1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall state on the record the reasons for granting or denying a request. In other cases joint custody may be considered by the court. The court shall determine whether joint custody is in the best interest of the child by considering the following factors:

(a) the factors enumerated in section 3

(b) Whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child.

(2) If the parents agree on joint custody, the court shall award joint custody unless the court determines on the record, based upon clear and convincing evidence, that joint custody is not in the best interests of the child.

(3) If the court awards joint custody, the court may include in its award a statement regarding when the child shall reside with each parent, or may provide that physical custody be shared by the parents in a manner to assure the child continuing contact with both parents.

(4) During the time a child resides with a parent, that parent shall decide all routine matters concerning the child.

MICH. COMP. LAWS ANN. § 722.26(a) (West 1993); *see also infra* app. (describing a proposed statutory supplement for North Dakota describing joint custody arrangements).

physical custody was or was not given to them. It would also encourage the parents to come to an agreement on what physical custody arrangement may work best. The proposed factors which may be able to best decide whether joint custody will work in a particular situation are:[197] (1) whether there exists an amicable relationship between the parties and whether they are able to communicate and generally agree with each other concerning joint decisions affecting the welfare of the child; (2) whether both parties are employed and whether the child would benefit by the assumption of joint responsibility for the care and maintenance of the child; (3) whether the child is of such age or emotional development that the child would benefit from experiencing the advantages of joint physical custody; (4) whether the health or other conditions of one party are such that custody of the child by that party alone may be undesirable; and (5) whether the parties live in sufficiently close proximity to each other that the child's life would not be disrupted to any significant degree by joint custody.[198]

If the court finds that a fifty-fifty split of custody time is not feasible, then the court can find a better solution such as school year-summer division or a rotating year-to-year custody basis. The best solution may be one where the courts are more aware of joint custody as a solution and fashion a remedy that best fits the particular case before it.

VI. CONCLUSION

As the face of the family changes in our society we must be aware and ready to change our attitudes with it. As more children are subjected to the pains of divorce and living with a dual parent structure, we must be ready to accommodate that dynamic of our culture. The best solution for both the children and the parents is to find a joint custody arrangement that works best for them. A presumption that it is in the best interests of the child for joint legal custody in all cases is at least a good starting point. In addition, finding suitable joint physical custody arrangements would also be in child's the best interest where it is possible to work out an amicable solution between the parents. No fit parent should lose his or her right to have custody of their child due to divorce. Instead, courts should help in solidifying the relationships be-

197. *See infra* app. (listing the factors which courts may use in deciding a joint physical custody arrangement).

198. *See* ROMAN & HADDAD, *supra* note 195, at 175-76 (describing factors which may best help decide whether joint custody will work in a particular situation).

tween both parents and children. In a time when more parents are learning the importance of nurturing and providing guidance to their children, we must assure that the law lends itself to those people. It is the responsibility of the legal system to look out for the best interests of the child and that begins with providing any child mutual access to both parents in a joint custody arrangement. North Dakota does not need King Solomon to determine what the best interests of the child are when two fit parents are requesting custody of their child. The wisdom to work toward the best solution for child custody after divorce is within each of us.

Brian J. Melton

APPENDIX

PROPOSED STATUTORY SUPPLEMENT

This is a statutory proposal based upon the research and writing of this article.

§ 14-09-___. JOINT CUSTODY:

(1) "Joint Custody" means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents. The court may award either joint physical custody or joint legal custody or both as between the parents or parties as the court determines is for the best interests of the minor child or children. If the court declines to enter an order awarding joint custody, the court shall state in its decision the reasons for denial of an award of joint custody.

I. PRESUMPTION FOR JOINT LEGAL CUSTODY

(2) "Joint legal custody" means a judicial determination that the parents or parties are required to share the decision-making rights, responsibilities, and authority relating to the health, education, and general welfare of a child or the children. Except as provided in subsection (4) of this section, absent a preponderance of the evidence to the contrary, there shall be a presumption that joint legal custody acts in the best interests of a minor child or children. In determining the desirability of joint legal custody, the best interests and welfare of the child as described in N.D. CENT. CODE §§ 14-09-06, 14-09-06.2 of this code shall be the primary consideration. Only by rebutting the factors of N.D. CENT. CODE § 14-09-06.2 will joint legal custody not be awarded to both parents.

II. DESIRABILITY OF JOINT PHYSICAL CUSTODY

(3) "Joint physical custody" means an order awarding each of the parents significant periods of time in which a child resides with or is under the care and supervision of each of the parents or parties.

"Joint physical custody" shall be encouraged. In determining the

desirability of joint physical custody, the best interests and welfare of the child as described in N.D. CENT. CODE §§ 14-09-06, 14-09-06.2 of this code shall be the primary consideration.

Joint physical custody shall be shared by the parents in such a way as to assure the child frequent and continuing contact with both parents but does not necessarily mean the child's time with each parent should be exactly the same in length nor does it necessarily mean the child should alternate back and forth over certain periods of time between each parent.

The actual amount of time with each parent shall be determined by the court. Joint physical custody may be appropriate under one or more of the following circumstances:

(a) Where there exists an amicable relationship between the parties and they are able to communicate and generally agree with each other concerning joint decisions affecting the welfare of the child.

(b) Where both parties are employed and the child would benefit by the assumption by both parties of joint responsibility for care and maintenance of the child.

(c) Where the child is of such age or emotional development that the child would benefit from experiencing the advantages of joint physical custody.

(d) The health or other conditions of one party are such that custody of the child by that party alone may be undesirable.

(e) Where the parties live in sufficiently close proximity to each other that the child's life is not disrupted to any significant degree by joint custody.

(f) Any other circumstances that the court may deem appropriate.

(4)There shall be a presumption that joint custody is not in the best interests of a minor child if one of the parents is found by the court to be a habitual perpetrator of domestic violence.