

PRIORITIZING PAST CARE TAKING IN CHILD-CUSTODY DECISIONMAKING

KATHARINE T. BARTLETT*

I

INTRODUCTION: THE BEST-INTERESTS DILEMMA AND THE ALI'S PROPOSED SOLUTION

There is much to be said for the best-interests standard for resolving child-custody conflicts.¹ It conveys that the child's interests are the most important consideration in these conflicts—more important than, say, the interests of their parents or other interested adults, and more important than other competing social goals, such as fairness and equality. It also gives maximum flexibility for considering the individual needs and circumstances of the child.

The problem is that even if everyone can agree that a child's interests should be paramount, they do not agree about what best serves those interests. In the absence of more specific criteria to decide custody cases, judges are left to rely on their own intuitions about what is best for children, or the intuitions of those upon whom they choose to rely.

Almost forty years ago, in the article celebrated in this issue of *Law and Contemporary Problems*, Robert Mnookin analyzed the difficulties with the best-interests standard in terms of the mismatch between what the traditional adjudication model provides and what the best-interests standard requires. He explained that courts are designed to adjudicate facts about *past* acts,² whereas the best-interests standard requires courts to evaluate persons and relationships, predict *future* behaviors and the impact of those behaviors upon others, and hypothesize the value to the child of each possible outcome.³ These determinations, on the one hand, often reflect systematic class and gender biases about parenting, education, religion, and morality. On the other hand,

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* A. Kenneth Pye Professor of Law, Duke University School of Law. I am grateful to Alyssa Kahn, Andrew Foglia, and Brittany Edwards-Franklin for invaluable research assistance on this article, and to the participants in the Child-Custody Decisionmaking symposium that occurred at Duke on April 26, 2013, for discussions that helped refine it. I thank especially Elizabeth Scott—for conceptualizing the approximation standard to begin with, for conversations over the years about this standard, and for the idea of the symposium that motivated me to finally write this article.

1. For a history of child-custody standards, including the evolution from a paternal presumption to the best-interests standard, see MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* (1994).

2. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *LAW & CONTEMP. PROBS.* 226, 249–54 (Summer 1975).

3. *Id.* at 255–61.

they can also be highly idiosyncratic. Importantly, differences of opinion are not resolvable by scientific evidence; even experts can disagree about which available option is “best” for a child, making judicial reliance on child-custody evaluations another version of the problem, not a solution to it.⁴

Many legislatures have enhanced their custody statutes with specific decisionmaking criteria. These criteria encompass every factor potentially relevant to a child’s welfare, from each parent’s comparative parenting skills, moral fitness, and willingness to cooperate with the other parent, to the age and sex of the child, the quality of the relationship each child has with each parent, and the child’s adjustment to his home, school, and community.⁵ However, although these specific factors appear to give greater guidance to courts, most of the criteria are themselves open-ended and subjective. In addition, few of the statutes prioritize the different factors, which means that a factor given little weight by one court may be dispositive for another.

To achieve greater determinacy, advocates have urged the adoption of preferences or presumptions, such as a presumption in favor of the primary caretaker,⁶ or in favor of joint custody to both parents.⁷ Neither a primary-caretaker presumption nor a joint-custody presumption has caught on in a significant way, however, in part because of the understandable reluctance by legislatures and courts to impose a particular postdivorce custodial arrangement on all families. The primary-caretaker presumption was adopted for a time in two states, but it was eventually abandoned in both.⁸ A number of jurisdictions have adopted statutory language that appears to favor joint custody,⁹ yet despite

4. See Robert E. Emery et al., *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. PUB. INT. 1 (2005); Steven K. Erickson et al., *A Critical Examination of the Suitability and Limitations of Psychological Tests in Family Court*, 45 FAM. CT. REV. 157, 170 (2007); Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS. no. 1, 2014 at 69, 91–100; Timothy M. Tippins & Jeffrey P. Wittman, *Empirical and Ethical Problems with Custody Recommendations*, 43 FAM. CT. REV. 193, 214–17 (2005).

5. See, e.g., ME. REV. STAT. tit. 19, § 1653(3) (2012 & Supp. 2013) (listing nineteen factors).

6. See, e.g., David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 559–61 (1984); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 770–74 (1988); Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 47 (2008).

7. See, e.g., Ellen Canacakos, *Joint Custody as a Fundamental Right*, in JOINT CUSTODY AND SHARED PARENTING 223, 223–34 (Jay Folberg ed., 1984).

8. See *Pikula v. Pikula*, 374 N.W.2d 705, 712 (Minn. 1985) (adopting primary-caretaker presumption), *superseded by statute*, MINN. STAT. § 518.17(1)(a)(3) (2006) (best-interests standard); *Garska v. McCoy*, 278 S.E.2d 357, 363 (W. Va. 1981) (adopting primary-caretaker presumption), *superseded by statute*, W. VA. CODE § 48-9-206(a) (2009) (approximation standard).

9. See, e.g., ALA. CODE § 30-3-152(a) (2011) (“The Court shall in every case consider joint custody . . .”); N.J. STAT. ANN. § 9:2-4 (West 2013) (“The Legislature finds and declares that it is in the public policy of this State to assure minor children of frequent and continuing contact with both parents after the parents have separated . . . and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.”); VA. CODE ANN. § 20-124.2(B) (2013) (“The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents so share in the responsibilities of rearing their

robust advocacy efforts, the commitment to joint custody has been more rhetorical than substantive. Only five jurisdictions now have a joint-custody preference or presumption that operates regardless of whether the parents have agreed to it, and in nearly all of these jurisdictions the preference or presumption is overcome if the court finds that joint custody is not in the best interests of the child.¹⁰ Florida's statute contains the strongest preference, requiring the court to make a finding of detriment if it does not order joint custody,¹¹ but in Florida, the joint-custody preference appears to mean little. There is no presumption for "any specific time-sharing schedule," and Florida law provides that "the court shall order sole parental responsibility for a minor child to one parent, with or without time-sharing with the other parent if it is in the best interests of the minor child."¹² The ambivalence toward joint custody conforms to public opinion, which tends to favor joint fifty-fifty physical custody in principle, but to abandon that principle when one parent has exercised substantially more caretaking responsibility for the child than the other.¹³ At least two states have eliminated their joint-custody preference in recent years,¹⁴ and the number of states explicitly disfavoring joint custody has

children.")

10. See D.C. CODE § 16-914(a)(2)(3) (2001) (presumption that joint custody is in the best interest of the child is rebuttable on best-interests grounds); IDAHO CODE ANN. § 32-717B(4) (2006) ("[T]here shall be a presumption that joint custody is in the best interests of a minor child," "absent a preponderance of the evidence to the contrary"); LA. CIV. CODE ANN. art. 132 (2013) (absent an agreement, or in cases when the agreement is not in the best interests of the child, court shall award custody to parents jointly); N.M. STAT. ANN. § 40-4-9.1 (2006) (establishing a presumption that joint custody is in the best interests of a child, subject to consideration of best-interests factors). There are ten states that have a presumption in favor of joint custody only when the parents agree to it. See ALA. CODE § 30-3-152(a) (2011); CAL. FAM. CODE § 3080 (West 2004); CONN. GEN. STAT. § 46b-56a (2009); ME. REV. STAT. tit. 19-A, § 1653(2)(A) (2012 & Supp. 2013); MISS. CODE ANN. § 93-5-24(4) (2013); NEV. REV. STAT. § 125.490(1) (2010); N.J. STAT. ANN. § 9:2-4(d) (West 2013); OR. REV. STAT. § 107.169(3)-(4) (2013); TENN. CODE ANN. § 36-6-101(a)(2)(A)(i) (2010); see also MINN. STAT. § 518.17(2) (2014) (stating a preference in favor of joint custody, but if one of the parents objects to it, allowing joint custody only if the court makes findings explaining why joint custody is in the child's best interests). Two states require the court to make findings explaining a decision not to order joint custody if a parent requests it. See MICH. COMP. LAWS § 722.26a(1) (2011); NEV. REV. STAT. § 125.480(3)(a) (2010). This list does not include states that have a presumption or preference in favor of legal custody. See, e.g., IOWA CODE § 598.41(2) (2001 & Supp. 2013); TEX. FAM. CODE ANN. §§ 153.131(b), 153.252 (West 2008); WIS. STAT. § 767.41(2)(a)-(am) (2009 & Supp. 2013).

11. FLA. STAT. § 61.13(2)(c)(2) (Supp. 2013).

12. FLA. STAT. § 61.13(2)(c)(1). In 2008 and 2009, "visitation" was changed to "time-sharing." *Id.* Recent legislation to establish a presumption of fifty-fifty joint physical custody in Florida (among other things) was vetoed by the governor. See *Florida Gov. Scott Vetoes Bill that Would End Permanent Alimony in State*, FOX NEWS (May 2, 2013), <http://www.foxnews.com/politics/2013/05/02/florida-gov-scott-vetoes-bill-that-would-end-permanent-alimony-in-state/>.

13. See Sanford L. Braver et al., *Lay Judgments About Child Custody After Divorce*, 17 PSYCHOL. PUB. POL'Y & L. 212 (2011). For a description of some of the various ways that courts have watered down stated policies in favor of joint custody, see PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 Reporter's Notes to Cmt. a (2002).

14. *Czapranski v. Czapranski*, 63 P.3d 499, 507 (Mont. 2003) (stating that Montana's previous presumption in favor of joint custody was repealed); *Thronson v. Thronson*, 810 P.2d 428, 432 (Utah. Ct. App. 1991) (describing elimination of Utah's rebuttable presumption favoring joint legal custody by the 1990 Utah legislature).

grown from two¹⁵ to six.¹⁶

In 2000, in a comprehensive effort to promote determinacy, fairness, and good outcomes across a wide range of family dissolution matters, including child custody, the American Law Institute (ALI) adopted the *Principles of the Law of Family Dissolution (Principles)*.¹⁷ The *Principles* adopted an approach to custody similar to the “approximation standard,” proposed in 1992 by Elizabeth Scott.¹⁸ Under this approach, if parents cannot agree on an allocation of custodial responsibility, the court should allocate that responsibility in a way that “approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents’ separation.”¹⁹ At the heart of this approach is reliance on the circumstances of the family itself, not a commitment to one particular postdissolution arrangement. Under the ALI *Principles*, if one parent has been the primary caretaker, that role, and the role of the secondary caretaker, presumptively should continue, roughly in proportion to each parent’s past caretaking responsibility. Likewise, if both parents participated equally in the child’s day-to-day caretaking, the continuation of this shared responsibility is assumed to be in the child’s best interests.

Past caretaking has both adjudicative and substantive virtues as a determinant of a child’s best interests. In terms of adjudication, it requires the determination of past facts, which courts are accustomed to doing, rather than speculations about the future, which they are not. Because a past-caretaking factor is more determinate than factors relating to the quality of parenting styles or abilities, it reduces the opportunity for judges to rely on their own biases about childrearing, whether those biases be idiosyncratic or conventional. And it reduces the incentives for parents to engage experts to criticize and undermine one another with respect to their parenting efforts and their relationships with their children. Some critics argue that the past caretaking simply gives parents another thing to argue about and thus increases rather than

15. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 Reporter’s Notes to Cmt. a (2002) (citing statutes of Oregon, OR. REV. STAT. § 107.169(3) (1999), and Vermont, VT. STAT. ANN. tit. 15, § 665(a) (2002)).

16. See ARK. CODE ANN. § 9-13-101(a)(1)(A)(i) (2009); NEB. REV. STAT. § 42-364(3) (2011); OR. REV. STAT. § 107.169(1)(3) (2013); S.C. CODE ANN. § 20-3-160 (1985); VT. STAT. ANN. tit. 15, § 665(a) (2010 & Supp. 2013); VA. CODE ANN. § 20-124.2(B) (Supp. 2013).

17. In addition to the allocation of caretaking and decisionmaking responsibilities for children, the PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) address spousal support, property division, child support, agreements, and nonmarital relationships. In full disclosure, the author of this article was a Reporter for Chapter Two, which addresses child custody. Because these areas of law are primarily statutory rather than common law, the proposals are called “Principles,” rather than a “Restatement.” The *Principles* were adopted by the ALI Membership in 2000, and published in a single, final volume in 2002. *Id.*

18. See Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CALIF. L. REV. 615, 617–18, 630–56 (1992).

19. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08(1) (2002).

reduces strategic behavior by parents.²⁰ The evidence of this claim, however, comes from self-reports by parents in cases in which custody evaluations have become necessary—that is, cases in which parents are unable to settle custody matters on their own.²¹ For such parents, the question typically is not whether they will fight with each other, but what they will fight about. Given the choice, it seems preferable for parents to disagree over questions of fact that courts can resolve, rather than over often impossible judgments about who is the better parent or what makes for a more successful childhood.²²

Substantively, past caretaking is a reasonable proxy for the less determinate factors that are generally thought to be related to a child's best interests. Past caretaking will tend to correspond with the child's emotional bonds to the parents, parental abilities, and the child's need for stability and continuity. Past caretaking also takes into account the individual circumstances of the child. When a court approximates past caretaking patterns, a child who has had a primary caretaker will maintain that primary caretaker after the parents' separation, whereas a child who has enjoyed equal caretaking from each parent can expect that arrangement to continue to the extent practicable. An additional advantage is that past caretaking arrangements reflect the lived expectations of the parents themselves. To be sure, the parents' separation changes the circumstances on which these expectations were based. Nonetheless, the *Principles* assume that, as between the parents and the child, the parents are in the best position to take the actions necessary to support their expectations, and to manage those expectations when they are frustrated. Exceptions from the past-caretaking standard are available (1) to ensure that each parent has some reasonable time with the child, even if he or she has not had significant involvement in the child's daily care,²³ (2) to implement parental agreements, which the *Principles* strongly favor,²⁴ and (3) to take account of other relevant factors when they clearly outweigh the significance of past caretaking, such as domestic violence.²⁵

20. See Mary Jean Dolan & Daniel J. Hynan, *Fighting Over Bedtime Stories: An Empirical Study of the Risks of Valuing Quantity Over Quality in Child Custody Decisions*, 38 LAW & PSYCHOL. REV. (forthcoming Aug. 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253061; see also Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1244 (2011) (arguing that an emphasis on past caretaking causes parents to engage in "over-parenting").

21. See Dolan & Hynan, *supra* note 20 (describing methodology involving questionnaire surveys by ninety-four parents).

22. Katharine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project*, 36 FAM. L.Q. 11, 24–25 (2002); Scott, *supra* note 18, at 639–43.

23. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08(1)(a) (2002).

24. *Id.* §§ 2.06, 2.08(e).

25. *Id.* § 2.11. A court may also depart from the approximation standard to take account of a child's (especially an older child's) "firm and reasonable preferences," "keep siblings together," "protect the child" from harm caused when past caretaking clearly does not align with the child's emotional attachments of the parents' abilities, avoid "extremely impractical" arrangements, accommodate the relocation of a parent, and otherwise "avoid substantial and almost certain harm to

In a number of important respects, the *Principles* captured trends that had already begun when the *Principles* were drafted, and have continued since then. For example, a central focus of the *Principles* is the emphasis on parents themselves resolving their conflicts over children. The *Principles* require parenting plans, services to assist parents in developing those plans, protection of domestic-violence victims in the bargaining process, and judicial deference to parental agreements.²⁶ Many states had already moved in this direction and more states have continued to do so.²⁷ The ALI *Principles* also built on the existing momentum in favor of enhancing protection for victims of domestic violence²⁸ and prohibiting consideration of race, ethnicity, sex, religion, sexual orientation, extramarital sexual conduct, and financial circumstances in custody

the child.” *Id.* § 2.08(1)(b)–(d), (f)–(h).

26. *Id.* §§ 2.05–2.07.

27. At the time the *Principles* were adopted by the ALI, nine states mandated the submission of parenting plans regardless of the form of custody sought, and three additional statutes required a parenting plan if the parties sought joint custody. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.05 Reporter’s Notes to Cmt. b (2002). Six more states left the ordering of parenting plans to the court’s discretion. *Id.* Today, at least fifteen additional states have passed parenting-plan bills—twelve of these requiring the submission of parenting plans, and three additional states make them discretionary with the court. *See, e.g.*, CAL. FAM. CODE § 3040(a)(1) (West 2004) (discretionary); MISS. CODE ANN. § 93-5-24(1) (2013) (discretionary); MO. REV. STAT. § 452.310(8) (Supp. 2013) (mandatory); WASH. REV. CODE § 26.09.181(1)(a) (2005) (mandatory). For a review of parenting-education programs, see Jill R. Bowers et al., *A Review of Online Divorce Education Programs*, 49 FAM. CT. REV. 776 (2011) and Susan L. Pollet & Melissa Lombreglia, *A Nationwide Survey of Mandatory Parent Education*, 46 FAM. CT. REV. 375 app. A (2008) (summarizing provisions in forty-six states for parenting education, as of September 10, 2007). Mandatory parenting education has been upheld in the courts against challenges that it violates a parent’s substantive due process rights. *See, e.g.*, *Dutkiewicz v. Dutkiewicz*, 957 A.2d 821, 835 (Conn. 2008); *Nelson v. Nelson*, 954 P.2d 1219, 1226 (Okla. 1998). With respect to protections from domestic violence in the negotiation of parental agreements, see Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions*, 46 FAM. CT. REV. 476, 492 (2008) (“[C]ourt-based mediation programs have become increasingly responsive to the legitimate challenges and questions raised by women’s advocates, and incorporated a variety of new screening and service procedures to protect victims of partner violence, including separate sessions, different arrival and departure times, metal detectors, referrals to appropriate treatment agencies, presence of support persons, and monitoring of no-contact orders.”) and Susan Landrum, *The Ongoing Debate About Mediation in the Context of Domestic Violence: A Call for Empirical Studies of Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425, 434 (2011) (“[M]ost mediation programs have developed screening protocols to ensure that cases are appropriate for mediation.”). As for the trend in favor of deference to parental agreements, see Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615, 634–35 (2004) (describing a move among states toward presuming that arrangements agreed-upon by both parents are in the child’s best interests).

28. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.03 Reporter’s Notes to Cmt. h, 2.11 Reporter’s Notes (2002); Leslie Joan Harris, *Failure to Protect From Exposure to Domestic Violence in Private Custody Contests*, 44 FAM. L.Q. 169, 170 (2010) (“Today, statutes in all fifty states and the District of Columbia require courts to consider domestic violence committed by one parent against the other in resolving a custody or visitation dispute between parents. A significant number of states also have statutes or case law that require courts to consider the occurrence of violence in a child’s household or proposed household in resolving such disputes, regardless of who commits the violence or at whom it is directed.”).

decisionmaking.²⁹ In addition, the ALI *Principles* joined the emerging trend to substitute the traditional win–lose categories of custody (win) and visitation (lose) with terminology that reflects the assumption that both parents have a meaningful caretaking role.³⁰ At the time the *Principles* were adopted by the ALI, a handful of states had already replaced the traditional custody and visitation language with less all-or-nothing terminology, such as custodial responsibility, decisionmaking responsibility, parenting time, and residential provisions.³¹ Since then, a number of other states have moved in this direction.³²

Although the ALI *Principles* followed a developing consensus among the states, the provisions for allocating custody were highly controversial and the subject of intense debate, both before and after their adoption by the ALI.³³

29. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12 Reporter’s Notes (2002). With respect to gender, states increasingly disallow consideration of the gender of a parent in a custody case. See, e.g., OR. REV. STAT. § 107.137(5) (2013) (“No preference in custody shall be given to the mother over the father for the sole reason that she is the mother, nor shall any preference be given to the father over the mother for the sole reason that he is the father.”); 23 PA. CONS. STAT. § 5328(b) (Supp. 2013) (“[N]o party shall receive preference based upon gender . . .”). Sexual orientation and extramarital sexual conduct typically are not addressed in custody statutes. An exception is the District of Columbia. See D.C. CODE § 16-914(a)(1)(A) (2001) (stating that sexual orientation shall “not be a conclusive consideration”). A majority of courts faced with the issue, however, prohibit consideration of such matters unless specific harm to the child is demonstrated. See, e.g., *Mongerson v. Mongerson*, 678 S.E.2d 891 (Ga. 2009) (holding that it was an abuse of discretion to order a homosexual father to refrain from exposing the children to his homosexual partners and friends); *M.A.T. v. G.S.T.*, 989 A.2d 11, 17–18 (Pa. Super. Ct. 2010) (en banc) (holding that courts may not rely on “unsupported preconceptions and prejudices” in concluding that “the traditional heterosexual household is superior to that of the household of a parent involved in a same sex relationship”); *Parker v. Parker*, 986 S.W.2d 557 (Tenn. 1999) (holding that it was error for the trial court to rely on “marital transgressions” of the mother relating to an extramarital relationship); see also Todd Brower, *It’s Not Just Shopping, Urban Lofts, and the Lesbian Gay-by Boom*, 17 AM U. J. GENDER SOC. POL’Y & L. 1, 17 (2009) (arguing that courts will increasingly interpret custody and visitation standards without considering the sexual orientation of the parents). But see Nancy D. Polikoff, *Custody Rights of Lesbian and Gay Parents Redux: The Irrelevance of Constitutional Principles*, 60 UCLA REV. DISC. 226 (2013) (demonstrating that, under harm test, courts continue to penalize gay and lesbian parents in custody cases).

30. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(2)–(4) Reporter’s Notes to Cmt. g (2002); *id.* § 2.03(2)–(4) (defining custodial responsibility and decisionmaking responsibility).

31. See *id.* at Cmts. e–f & Reporter’s Notes to Cmts. e–f (explaining shift in terminology); see also COLO. REV. STAT. § 14-10-124 (2012) (“allocation of parental responsibilities,” “determination of parenting time,” and “allocation of decisionmaking responsibility”); DEL. CODE ANN. tit. 13 § 722 (2013) (“legal custody” and “residential arrangements”); OHIO REV. CODE ANN. § 3109.04 (LexisNexis 2013) (“allocation of parental rights and responsibilities” and “shared parenting”); TENN. CODE ANN. § 36-6-108 (2010) (“parent spending the greater amount of time with the child” and “parent with whom the child resides the majority of the time”).

32. See, e.g., ARIZ. REV. STAT. ANN. § 25-403 (Supp. 2012) (effective Jan. 1, 2013) (substituting “legal decision-making” and “parenting time” for custody language); KAN. STAT. ANN. § 23-3203 (Supp. 2012) (“custody, residency and parenting time”); MINN. STAT. § 518.175 (2006 & Supp. 2013) (“parenting time”); NEB. REV. STAT. § 43-2923 (2011) (“parenting arrangements”); N.H. REV. STAT. ANN. § 461-A:6 (2012) (“parental rights and responsibilities”); N.D. CENT. CODE § 14-091-06.2 (2009) (“parental rights and responsibilities”); W. VA. CODE § 48-9-205 (2009 & Supp. 2013) (“custodial responsibility” and “decision-making responsibility”).

33. In addition to the reporters who had the drafting responsibilities, judges, academics, and

Some saw the ALI *Principles* as a child-centered breakthrough that takes the individual circumstances of the family into account without the uncertainty and biases of existing custody standards.³⁴ Other reactions dismissed the *Principles* as unfair to fathers, uninformed about the needs of children especially as those needs change over time, unappreciative of the important role that both parents play in a child's upbringing, unrealistic in seeking to preserve a division in roles that the parties' separation often makes impossible, and irrelevant to contemporary policy debates.³⁵

practitioners from the ALI participated in a multilayered consultative process. Participants included a Members Consultative Group of over 100 individuals, a ten-member Judges Consultative Group, a twenty-seven-member set of advisers, the Council (or governing body) of the ALI, and, ultimately, the full ALI membership. These individuals came from a broad spectrum of backgrounds and held a variety of beliefs about the values and assumptions that should inform the law's resolution of disputes over children. Debates, which occurred at the various committee meetings and at four different ALI annual meetings reflected a wide range of views, and were described by the ALI Director, Lance Liebman, as "vigorous," "lengthy," and "spirited." Lance Liebman, *Director's Foreword to PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* (2002). The final product, including commentary, occupies almost 1200 pages.

34. See, e.g., Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 434 (2008) (arguing that the "no 'one size fits all'" approximation approach of the ALI *Principles* is superior to shared-custody promotion in promoting the best outcomes for children); Kathy T. Graham, *How the ALI Child Custody Principles Help Eliminate Gender and Sexual Orientation Bias from Child Custody Determinations*, 8 DUKE J. GENDER L. & POL'Y 301, 329–31 (2002) (applauding gender neutrality of the ALI standards); Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling out the Gender Wars*, 36 FAM. L.Q. 27, 40 (2002) (praising ALI standards for offering "both mothers and fathers a way to retreat from this particular battlefield [of custody law] with their honor intact"); David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 47, 66 (Robin Fretwell Wilson ed. 2006) (*Principles* have given children raised in nontraditional families "the most that likely can be given them in a society that remains deeply respectful of traditional parental roles and prerogatives"); see also Robert F. Kelly & Shawn L. Ward, *Allocating Custodial Responsibility at Divorce: Social Science Research and the American Law Institute's Approximation Rule*, 40 FAM. CT. REV. 350, 355–59 (2002) (advocating an attachment theory consistent with ALI's approximation standard, but stating that more research would be needed to test assumption that there is a strong relationship between direct caretaking functions and secure parent-child attachments); Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. ILL. U. L. REV. 347, 353 (2005) (arguing that although the ALI *Principles* could have been more detailed on some issues, the approximation approach "avoids some of the major problems associated with the traditional best interest standard"); Molly Sanders, *Should Child Custody Awards Be Based on Past Caretaking?: The Effect of the Approximation Standard Ten Years After its Adoption*, 30 CHILD. LEGAL RTS. J., Fall 2010, at 17, 25–26 (arguing that the approximation standard is the best alternative for resolving child custody, but that more study is required in order to give courts more guidance in applying it).

35. See, e.g., Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 576, 596 (2008) (stating that ALI *Principles* are more of an "obligatory footnote" than an actual influence on courts and legislatures); Lyn R. Greenberg et al., *The Problem with Presumptions—A Review and Commentary*, in RELOCATION ISSUES IN CHILD CUSTODY CASES 139, 148 (Philip M. Stahl & Leslie M. Drozd, eds. 2006) (explaining that post-separation need for both parents to work and other factors mean that "pre-separation parenting is not necessarily predictive of post-separation parenting"); Patrick Parkinson, *The Past Caretaking Standard in Comparative Perspective*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 446, 455 (2006) (criticizing past-caretaking

The sharpest critique of the *Principles* focused on their reception by courts and legislatures. Michael Clisham and Robin Fretwell Wilson claimed, based on their review of forty-eight cases citing to Chapter Two in the years following the ALI's adoption of the *Principles*, that the impact of the *Principles* was "slight," "mixed," and "anemic," and that the recommendations of the *Principles* "are rejected more often than accepted by a ratio of 1.5 to 1."³⁶ This conclusion is puzzling, and not supported by the researchers' data. First, as the researchers acknowledge, the cases included in their 1.5-to-1 ratio (which encompasses cases from all chapters of the *Principles*, not just Chapter Two) comprise less than half of the cases studied.³⁷ The majority of cases were, by the researchers' own account, "neutral."³⁸ Second, among the custody cases identified as "negative" toward the *Principles* were some that, although they did not adopt the *Principles* per se, applied reasoning that closely mirrored it. For example, courts in one of the two custody cases that the researchers coded as negative because the courts stated that custody standards were for the legislature, not the courts, to determine,³⁹ proceeded to apply standards that were, in fact, very similar to the ALI *Principles*, using the same rationale.⁴⁰ Most of the cases coded as "neutral" rather than "positive" cited the ALI *Principles* to describe the majority rule, support a concurring opinion, further support a decision that would have been reached without the ALI *Principles*, address an issue not reached by the court for procedural reasons, or provide evidence of a social phenomenon.⁴¹ Notably, of the forty-eight custody cases in their study, the

standard for, among other things, being "prejudicial to the primary earning parent in role-divided marriages," and for not doing enough to promote shared parenting); Shelley A. Riggs, *Is the Approximation Rule in the Child's Best Interests?: A Critique from the Perspective of Attachment Theory*, 43 FAM. CT. REV. 481, 486–89 (2005) (critiquing the assumptions of the approximation rule from the standpoint of attachment theory and arguing that the ALI does not provide enough protection for children whose attachments do not track parental-caretaking patterns); Richard A. Warshak, *Parenting By the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 U. BALT. L. REV. 83, 85 (2011) ("The approximation rule is difficult to apply, creates a new focus for disputing parents, renders a poor estimate of parents' contributions to their child's best interest, and overlooks parents' intangible, yet significant, contributions to their child's well-being.").

36. Clisham & Wilson, *supra* note 35, at 576, 577. The forty-eight cases were decided between 1998 and 2008. *Id.*

37. *Id.* at 597 (only forty-three cases were identified as either negative or positive).

38. *Id.*

39. Clisham & Wilson, *supra* note 35, at 597 (code 7).

40. See *In re Marriage of Hansen*, 733 N.W.2d 683, 697 (Iowa 2007) (declining to adopt ALI's approximation standard explicitly because "[a]ny wholesale adoption of the approximation rule would require legislative action," but agreeing that "the successful caregiving by one spouse in the past is a strong predictor that future care of the children will be of the same quality," and that by "focusing on historic patterns of caregiving, the approximation rule provides a relatively objective factor" that "rejects a 'one-size-fits-all' approach and recognizes the diversity of family life"). In the other custody case coded as acknowledging the prerogative of legislatures in this area, the court also states that the applicable test was "very similar" to the factors used by the Wisconsin Supreme Court in *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995), from which the ALI *Principles* were drawn. See *In re R.A. & J.M.*, 891 A.2d 564, 580 (N.H. 2006).

41. Clisham & Wilson, *supra* note 35, at 596–697 (codes 3, 5, 10, 11 & 12). The "neutral" group

researchers identify only one case that represented a “flat out” rejection of the *Principles*.⁴²

Both judicially and legislatively, past caretaking is an increasingly important factor in custody cases. Despite this fact, the majority of jurisdictions do not prioritize past caretaking and, as a result, custody decisions continue to be inconsistent and unpredictable. In this article, I demonstrate this continued indeterminacy not by coding and counting cases—a method that tends to reinforce the order it presupposes—but by qualitatively analyzing of various outlier cases in three areas: (1) initial custody cases, (2) cases to modify custody as a result of the relocation of a parent, and (3) custody petitions by third parties who have functioned as the child’s parent. Through this analysis, I show that courts often rely heavily on past caretaking in initial custody determinations and relocation decisions, but that insofar as the law does not require a priority on this factor, courts sometimes reach results that are unpredictable and difficult to explain by any consistent, child-centered principles. I show further that in third-party custody and visitation cases, courts and legislatures have developed tests for functional parenthood that are highly specific to past caretaking, and as a result yield relatively determinate results. I urge further prioritization of past caretaking across the spectrum of custody cases to assure more consistent and more child-centered outcomes.

II

INITIAL CUSTODY DECISIONS

Applying a variety of child-custody statutes, courts in custody disputes have long tended to favor the parent who has been the child’s primary caretaker. At the same time, custody cases decided under the best-interests standard sometimes turn, idiosyncratically, on factors that matter greatly in some cases, and not at all in others. In this part I provide detailed examples of this inconsistency in jurisdictions that use various statutory approaches. I then contrast the law in a handful of states—West Virginia, Massachusetts, Michigan, Oregon, and South Carolina—that, by statute or case law, have prioritized past caretaking. These jurisdictions have generated few appellate decisions, and these decisions are relatively consistent and predictable.

A. Best-Interests Jurisdictions Without Priority on Past Caretaking

A number of jurisdictions decide custody cases under a best-interests standard without any specific criteria except as relates to domestic violence.⁴³ In

also included citations in dissenting opinions, *id.* (code seven), although the cases in this category did not necessarily reach results inconsistent with the ALI *Principles*. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000) (finding it unconstitutional to award visitation to a grandparent over the object of a parent based on a best-interests standard).

42. Clisham & Wilson, *supra* note 35, 613 app. 6 at 617. The case is *Janice M. v. Margaret K.*, 948 A.2d 73, 74 (Md. 2008). See further discussion of de facto parenthood *infra* Part IV.

43. See, e.g., MD. CODE ANN., FAM. LAW § 5-203 (LexisNexis 2012); MISS. CODE ANN. § 93-5-24

these jurisdictions, courts tend to award primary custody to the parent who has been the child's primary caretaker, but from time to time a court will give more weight to one or another consideration, thereby reaching an unexpected, contrary result.

New York is a case in point. The New York custody statute requires courts to enter custody orders as, "in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child."⁴⁴ Courts in the state have generally given strong weight to the parents' respective past caretaking roles, despite the presence of other considerations.⁴⁵ In any particular case, however, a court may decide to give more weight to another consideration. In one case, for example, the court decided that the primary caretaker had moved too frequently and had a "chaotic personal life."⁴⁶ In New York, a positive factor in one case might be construed negatively in another. For example, one court viewed a father's decision to live with his parents for financial reasons as a positive indication of the greater resources the father could offer the child, in comparison to the mother, who lived in a trailer where the child did not have her own bedroom.⁴⁷ Another New York court, in contrast, viewed the fact that the mother moved in with her parents for financial reasons as an indication of irresponsibility on her part.⁴⁸

South Dakota custody law similarly requires only that courts "be guided by consideration of what appears to be for the best interests of the child in respect to the child's temporal and moral welfare."⁴⁹ Under this statute, South Dakota courts, like New York courts, typically conclude that the child's interests are best served by continued custodial care by the primary caretaker⁵⁰ but judges are not required to give this factor any particular weight, and in some cases that are hard to distinguish from others, they may subordinate past caretaking to

(2013); N.Y. DOM. REL. LAW § 240 (McKinney 2010 & Supp. 2013); N.C. GEN. STAT. § 50-13.2 (2013); OKLA. STAT. tit. 43, § 109(A) (2001); R.I. GEN. LAWS § 15-5-16 (2013); S.D. CODIFIED LAWS § 25-4-45 (2004).

44. N.Y. DOM. REL. LAW § 240 (McKinney 2010 & Supp. 2013).

45. See, e.g., *Sitts v. Sitts*, 902 N.Y.S.2d 274 (App. Div. 2010) (overturning custody award to the father because the mother was the children's primary caregiver); *In re Marrero v. Centeno*, 896 N.Y.S.2d 157 (App. Div. 2010) (reversing custody order to the father because the mother was the child's primary care provider since the child's birth); *In re Larkin v. White*, 884 N.Y.S.2d 90 (App. Div. 2009) (reversing custody award to the father, based on the fact that the six-year-old child had lived with the mother his entire life).

46. *In re Siler v. Wright*, 882 N.Y.S.2d 574, 575-76 (App. Div. 2009).

47. *Dudniak v. Olmstead*, 761 N.Y.S.2d 714, 716 (App. Div. 2003).

48. *Storch v. Storch*, 725 N.Y.S.2d 399, 402 (App. Div. 2001). Of the five judges on the reviewing court who unanimously affirmed the trial court order in *Storch*, two of them joined in affirming the trial court in *Dudniak v. Olmstead*. Compare *id.* (majority opinion of Crew III, J., Lahtinen, J., Mercure, J., Mugglin, J. & Rose, J.), with *Dudniak*, 761 N.Y.S.2d 714 (majority opinion of Carpinello, J., Crew III, J., Kane, J., Mugglin, J. & Spain, J.).

49. S.D. CODIFIED LAWS § 25-4-45 (2004).

50. See, e.g., *Haanen v. Haanen*, 769 N.W.2d 836 (S.D. 2009); *Arneson v. Arneson*, 670 N.W.2d 904 (S.D. 2003); *Price v. Price*, 611 N.W.2d 425, 433-34 (S.D. 2000).

other factors. In *Kreps v. Kreps*,⁵¹ for example, the parties did not contest that the mother was the primary caretaker of the couple's three children at the time of the litigation,⁵² and the custody evaluator recommended custody in the mother.⁵³ The trial court awarded custody to the father, however, based on the fact that the father's work schedule was more flexible and because of a few relatively minor transgressions on the mother's part. These transgressions included taking the children to medical appointments without telling the father until after the visits, failing to share all information about the children's daycare arrangements during the litigation, and missing three scheduled visitations over a twelve-week period due to her "unwillingness or inability to travel."⁵⁴ The trial court believed that these actions demonstrated a "pattern" of unilateral action on the mother's part, a "profound lack of ability or willingness to maturely encourage and provide frequent and meaningful contact between the children and [the father,]" and less commitment to preparing the children "for responsible adulthood" than the father had demonstrated when he provided "exemplary modeling of what it means to be a good parent, loving spouse, and responsible citizen."⁵⁵ Under the highly deferential abuse-of-discretion standard applied in custody matters, the appellate court deferred to the trial court's evaluation of the evidence and left standing a decision that the dissenting justice described as premised on nothing more than "one-sided inferences and contrived inadequacies."⁵⁶ "Repeatedly, . . . we see language in the findings describing the mother as having 'demonstrated a pattern,' 'a profound lack of ability or willingness,' a 'pronounced inability or unwillingness,' all raising 'serious concerns,' manifesting 'deficiencies'"—[findings] not supported by the record.⁵⁷ Despite the mother being faulted for not granting the father additional or extra time with the child, the dissenting justice observed, "nowhere in the findings is there a single statement that the mother violated a court order on visitation."⁵⁸ In giving free rein to the trial court to interpret the actions of the primary caretaker parent through its own views about good parenting, *Kreps* is not an isolated example. One recent case turned on the fact that the mother "heavily favored therapy over playtime and time with the family."⁵⁹

51. 778 N.W.2d 835 (S.D. 2010).

52. *Id.* at 842, 844–45.

53. *Id.* at 841, 844.

54. *Id.* at 840–41.

55. *Id.* at 842.

56. *Id.* at 849 (Konenkamp, J., dissenting).

57. *Id.*

58. *Id.* at 847 (majority opinion).

59. See *Schieffler v. Schieffler*, 826 N.W.2d 627, 635 (S.D. 2013); see also *Walker v. Walker*, 720 N.W.2d 67, 73–74 (S.D. 2006) (awarding the father physical custody rather than the mother mostly because, although the mother stayed home most of the time with the children, "the children often joined their father for farm work and while he was trucking" and "also enjoyed spending time with their paternal grandparents").

In contrast to the open-ended custody statutes found in some states, many jurisdictions provide specific criteria to help guide the determination of the child's best interests. Perhaps surprisingly, however, the pattern of cases is similar. For example, North Dakota law provides twelve separate factors, which in 2006 included "[t]he length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity."⁶⁰ This law was interpreted by the state's highest court to mean that although "a primary caretaker enjoys no paramount or presumptive status under the best interests of the child factors, . . . primary caretakers 'deserve recognition' in custody determinations" from which a court might conclude that stronger emotional ties exist.⁶¹ Nonetheless, in *Klein v. Larson*,⁶² the North Dakota Supreme Court overturned a custody order to the mother, who had raised her ten-year-old child alone for the large majority of the child's life, on the ground that the mother had moved six to ten times and kept changing jobs.⁶³ Although the trial court had found that the mother's moves were not detrimental to the child, the appellate court determined that a showing of harm was not required, and that in "engrafting" a harm requirement, as well as in counting the days in which the child had been in custody of each parent, the trial court had applied "an erroneous view of the law" and was therefore not entitled to deference.⁶⁴ In another North Dakota case, the state supreme court affirmed a modification of custody from the mother, who had been the child's only primary caregiver, to the father, who had not regularly exercised visitation, because the court believed that the father's lifestyle was more stable, in comparison to the mother's "chronic unemployment."⁶⁵ The court particularly disapproved of the mother moving back in with her parents for financial reasons after she became pregnant by her unemployed spouse.⁶⁶

60. N.D. CENT. CODE § 14-09-06.2(1)(d) (2006) (amended in 2009 to read, "The sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community," *id.* § 14-09-06.2(1)(d) (2013)).

61. *Heinle v. Heinle*, 777 N.W.2d 590, 596–97 (N.D. 2010); *see also* *Doll v. Doll*, 794 N.W.2d 425, 430–33 (N.D. 2011); *Lindberg v. Lindberg*, 770 N.W.2d 252, 256–61 (N.D. 2009).

62. 724 N.W.2d 565 (N.D. 2006).

63. *Id.* at 567, 569.

64. *Id.* at 569–70. In addition, the appellate court rejected the trial court's conclusion that the mother had the edge on moral fitness because the father was guilty of statutory rape of the mother. This rejection was based on a quibble with the trial court about the parties' ages when they had sex, as well as the appellate court's conclusion that moral fitness was determined not only by crimes of moral turpitude, in which the father might have engaged, but also by the kind of conduct in which the mother had engaged, including "regularly associat[ing] with people using methamphetamine" and a number of traffic violations. *Id.* at 571.

65. *Woods v. Ryan*, 696 N.W.2d 508, 510, 513 (N.D. 2005).

66. *Id.* The court also noted the mother's arrest for driving with a suspended license and for possession of drug paraphernalia, and the mother's one-month secret marriage. A strong dissent criticized the trial court's reliance on factors that were not shown to have a harmful effect on the child. *Id.* at 514–21 (Maring, J., dissenting).

In Ohio, too, courts exercise their “broad discretion” to decide custody according to a long list of best-interests factors,⁶⁷ which often results in custody awards to the primary caretaker.⁶⁸ As in other states, however, Ohio courts sometimes decide that a factor deemed unimportant in one case will in another case override the primary-caretaker factor. For example, one court decided in favor of the father who had been less involved in the children’s upbringing because he “owns his own home, has been attentive to the needs of the two children, and[,] because he is retired, is available to care for the children.”⁶⁹ A 2012 Ohio appellate court affirmed a custody award to the father instead of the primary-caretaking mother because, despite a substantiated act of domestic violence by the father for which he served ten days in jail, custody with the father would allow the child to develop relationships with his grandparents, father, and stepmother, as compared to the mother, who lived only with her fiancé.⁷⁰ That same year, an appellate court in Ohio affirmed a custody modification to the father because the primary-caretaking mother had a history of moving from one relationship to another, and the man with whom she lived “lacked character.”⁷¹ In still another 2012 case, custody was changed by the court because the thirteen-year-old child’s relationship with his mother and stepfather had become “strained.”⁷²

Quite a few state statutes now include past caretaking as a factor in their best-interests statutes. It might be expected that this more objective factor would make custody decisions more predictable and the outcomes of cases decided under these statutes do, in fact, usually favor a parent who has been raising the child on a day-to-day basis. Iowa law requiring consideration of “whether both parents have actively cared for the child before and since the separation,”⁷³ for example, was interpreted in *Hansen v. Hansen*⁷⁴ to focus on “historic patterns of caregiving,” because these patterns provide “a relatively objective” basis for decisionmaking,⁷⁵ and reflect other, more intangible and hard-to-measure factors in the child’s well-being.⁷⁶ Joint physical care, the court

67. See OHIO REV. CODE ANN. § 3109.04(F)(1) (LexisNexis 2013).

68. See, e.g., *Edwards v. Edwards*, No. 25309, 2013 WL 209179 (Ohio Ct. App. Jan. 18, 2013); *Heilman v. Heilman*, No. 6-12-08, 2012 WL 5397596 (Ohio Ct. App. Nov. 5, 2012). The case often cited on the importance of the primary-caretaker factor in Ohio is *In re Maxwell*, 456 N.E.2d 1218 (Ohio Ct. App. 1982).

69. *Williams-Booker v. Booker*, Nos. 21752 & 21767, 2007 WL 2685057 (Ohio Ct. App. Sept. 14, 2007).

70. *Seymour v. Hampton*, No. 11CA821, 2012 Ohio App. LEXIS 4422, at *15 (Ohio Ct. App. Oct. 16, 2012).

71. *Cure v. Cure*, No. 2011 CA 73, 2012 Ohio App. LEXIS 2597, at *15 (Ohio Ct. App. June 29, 2012) (affirming change of custody from mother to father).

72. *Hull v. Hull*, No. 2011CA00155, 2012 Ohio App. LEXIS 834, at *9–10 (Ohio Ct. App. Feb. 27, 2012) (modifying custody).

73. IOWA CODE § 598.41(3)(d) (2013).

74. *Hansen v. Hansen*, 733 N.W.2d 683, 697 (Iowa 2007).

75. *Id.*

76. *Id.*

reasoned, is most likely to be in the best interest of the child when “both parents have historically contributed to physical care in roughly the same proportion.”⁷⁷ “Conversely, where one spouse has been the primary caregiver, the likelihood that joint physical care might be disruptive on the emotional development of the children increases.”⁷⁸ Reliance on past caretaking also, the court further noted, respects the autonomy of families.⁷⁹

Nevertheless, although a number of subsequent appellate cases in Iowa also have relied on past caretaking patterns,⁸⁰ other decisions have given less weight to them in favor of other, more erratic factors. An example is *In re Marriage of Eldred*, in which the father was given primary custodial responsibility for his children, solely because the mother had abruptly left the children with the father for a month while she went to another state with a person she had recently met on the Internet.⁸¹ The court found that the mother’s month-long absence was more significant than the fact that she had been the children’s primary caretaker, and that the father had himself been involved in pornography on the Internet, struggled with his finances, and kept the house in “disarray.”⁸²

Pennsylvania law requiring giving “weighted consideration” to various factors including past caretaking⁸³ has also failed to yield predictable results. Some decisions in Pennsylvania have interpreted the statute to give priority to the parents’ past caretaking,⁸⁴ but other courts have read the statute to require special weight only to those factors relating to the “safety of the child,” and to give courts free rein “to determine which factors are most salient and critical in each particular case.”⁸⁵ Likewise, Nebraska case law designates primary caretaking as an important factor,⁸⁶ but some courts have awarded custody to

77. *Id.* at 697–98.

78. *Id.* at 698.

79. *Id.* at 697 (“The principle of approximation rejects a ‘one-size-fits-all’ approach and recognizes the diversity of family life.”).

80. *See, e.g., In re Marriage of Powers*, No. 66 / 07-0006, 2008 Iowa LEXIS 71, at *5 (Iowa May 16, 2008) (per curiam); *In re Marriage of Ryland*, No. 1-760 / 11-0125, 2011 Iowa App. LEXIS 1410, at *3 (Iowa Ct. App. Nov. 23, 2011); *In re Cooley*, No. 1-208 / 10-1078, 2011 Iowa App. LEXIS 808, at *3 (Iowa Ct. App. Aug. 10, 2011); *In re Marriage of Russell*, No. 1-102 / 10-1361, 2011 Iowa App. LEXIS 219, at *7–8 (Iowa Ct. App. Mar. 21, 2011).

81. *In re Marriage of Eldred*, No. 0-746 / 10-0362, 2010 Iowa App. LEXIS 1568, at *8–10 (Iowa Ct. App. Dec. 22, 2010).

82. *Id.*; *see also Hicks v. Foulks*, No. 10-1497, 2011 WL 3925452, at *2 (Iowa Ct. App. Sept. 8, 2011) (denying primary custody to primary caretaker because of her inability to “set aside her differences” with the father and the father’s ability to provide support to the child).

83. *See* 23 PA. CONS. STAT. § 5328(a)(3) (Supp. 2013).

84. *See, e.g., Wheeler v. Mazur*, 793 A.2d 929, 935 (Pa. Super. Ct. 2002).

85. *See, e.g., M.J.M. v. M.L.G.*, 63 A.3d 331, 339 (Pa. Super. Ct. 2013); *see also J.R.M. v. J.E.A.*, 33 A.3d 647, 652 (Pa. Super. Ct. 2011) (reversing custody order to unmarried mother because it appeared to be based exclusively on the fact that child has been in the custody of the mother since birth and is breastfeeding, and did not consider other factors, such as the presence of extended family and which party could be more likely to encourage contact with the other).

86. *See, e.g., Molczyk v. Molczyk*, 825 N.W.2d 435, 446 (Neb. 2013); *Kamal v. Imroz*, 759 N.W.2d 914, 918 (Neb. 2009); *Pohlmann v. Pohlmann*, 824 N.W.2d 63, 69, 71 (Neb. Ct. App. 2012).

the less involved parent because, for example, the primary caregiving parent stayed out late with friends⁸⁷ or because the court believed that the primary caregiver did not want to care for the child and acted like the child was a nuisance.⁸⁸ In Tennessee, courts must consider the primary-caretaker factor and typically award custody to the primary caregiver.⁸⁹ One Tennessee court, however, rejected an award of custody to the primary caregiver on the grounds that she might have been having a lesbian affair with the children's babysitter,⁹⁰ and the mother in another case lost custody because she had had an extramarital relationship with her employer.⁹¹ In Mississippi, one factor courts must consider is which parent provided continuity of care before the separation.⁹² Despite this important factor, a primary parent lost custody in one case because she committed adultery, had an out-of-state boyfriend, and left it up to the father to attend to her son's need for school tutoring.⁹³ Similarly, although primary caregivers usually win custody disputes in Florida,⁹⁴ a primary-caretaker mother lost custody in one case because the judge was more impressed with the other parent's "deep love" for his sons and the fact that he went on "numerous hunting and fishing trips" with them.⁹⁵ In another case, the judge disapproved of the mother because she was "more oriented to career achievement than parenting."⁹⁶

One final example is instructive. In 1987, Washington state adopted the Parenting Act of 1987, which required courts to give the greatest weight in custody cases to "whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child."⁹⁷ The leading state supreme court decision under the Parenting Act of 1987 was *In re Marriage of Kovacs*.⁹⁸ In affirming an award of custody to the father rather than to the mother, who was a stay-at-home caregiver, the court in *Kovacs* weakened the force of the statute, first recharacterizing the greatest-weight factor as relating to the "child's relationship with each parent" rather than to the past

87. *Williams v. Williams*, No. A-07-1103, 2008 WL 5064933 (Neb. Ct. App. Dec. 2, 2008).

88. *Jones v. Jones*, No. A-12-157, 2012 WL 3600069 (Neb. Ct. App. Aug. 21, 2012).

89. *See, e.g., Burden v. Burden*, 250 S.W.3d 899 (Tenn. Ct. App. 2007); *Hodson v. Griffin*, 210 S.W.3d 568 (Tenn. Ct. App. 2006).

90. *Mobley v. Mobley*, No. E2012-00390-COA-R3-CV, 2013 WL 1804189 (Tenn. Ct. App. April 30, 2013).

91. *Parker v. Parker*, 986 S.W.2d 557 (Tenn. 1999).

92. *See Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983) (en banc).

93. *See Flowers v. Flowers*, 90 So. 3d 672 (Miss. Ct. App. 2012); *see also Brumfield v. Brumfield*, 49 So. 3d 138 (Miss. Ct. App. 2010) (en banc) (refusing custody to the primary-caretaker mother, despite incident of domestic violence by father, because she suffered from depression following the suicide of her father and left more of the caretaking up to the father).

94. *See, e.g., Sacks v. Sacks*, 991 So. 2d 922, 923-24 (Fla. Dist. Ct. App. 2008).

95. *Adair v. Adair*, 720 So. 2d 316, 316 (Fla. Dist. Ct. App. 1998).

96. *Kopec v. Severance*, 658 So. 2d 1060, 1060 (Fla. Dist. Ct. App. 1995).

97. WASH. REV. CODE. § 26.09.187(3)(a)(i) (2001).

98. 854 P.2d 629 (Wash. 1993) (en banc).

performance of parenting functions, as set forth in the statute.⁹⁹ The court went on to say that, although the language of the statute could be construed to be a presumption in favor of the primary caregiver, the court did not believe that the legislature intended to create such a presumption, and therefore it would decline to interpret it as such.¹⁰⁰ Most subsequent appellate decisions in Washington follow the usual pattern of favoring custody by the primary caregiver,¹⁰¹ but a number of decisions uphold custody awards to the nonprimary caregiver on close facts that do not suggest that continued custody by the primary caregiver would be detrimental to the child or that the nonprimary caregiver is clearly a superior parent.¹⁰² In one case, the court of appeals acknowledged that the trial court could have decided the case either way and the appellate court would have upheld it.¹⁰³ In 2007, the Washington legislature amended the law to require that the greatest weight be put on “[t]he relative strength, nature, and stability of the child’s relationship with each parent,” without reference to the past performance of parenting functions.¹⁰⁴ Given that the courts had not previously implemented the statutory language giving “greatest weight” to the performance of past parenting functions, the change appears to have little significance. Washington courts, like courts in other states, continue to tend to place greatest emphasis on past caretaking,¹⁰⁵ but not reliably so.¹⁰⁶

Taken as a whole, the statutes and cases recognize that past caretaking is highly relevant to a child’s best interests. At the same time, this law allows

99. *Id.* at 632.

100. *Id.* at 635.

101. *See, e.g., In re Marriage of Littlefield*, 940 P.2d 1362, 1372 (Wash. 1997) (en banc); *In re Marriage of Carmichael*, No. 22597-6-III, 2005 Wash. App. LEXIS 251, at *5–6 (Wash. Ct. App. Feb. 10, 2005); *In re Marriage of Evans*, No. 50544-1-I, 2003 Wash. App. LEXIS 2095, at *10–12 (Wash. Ct. App. Sept. 22, 2003) (per curiam); *In re Parentage of J.K.N.*, No. 46722-1-I, 2001 Wash. App. LEXIS 2408 (Wash. Ct. App. July 30, 2001); *In re Parentage of B.B.*, No. 18165-1-III, 2000 Wash. App. LEXIS 812, at *8, *12 (Wash. Ct. App. May 30, 2000).

102. *See, e.g., In re Marriage of Sullivan*, No. 25117-5-II, 2001 Wash. App. LEXIS 3396 (Wash. Ct. App. Aug. 17, 2001) (upholding custody award to non-primary-caretaker father because, although both parents had used marijuana and the father had been convicted for manufacturing it, the father said he would stop and the mother did not); *In re Marriage of Mazzi*, No. 41998-6-I, 1998 Wash. App. LEXIS 2483 (Wash. Ct. App. Oct. 19, 1998) (upholding award to father because although mother was the primary caretaker, she was too enmeshed with her family and had personality traits making her less likely to facilitate a good relationship between the child and his father).

103. *In re Marriage of Carmichael*, No. 22597-6-III, 2005 Wash. App. LEXIS 251, at *3–5 (Wash. Ct. App. Feb. 10, 2005).

104. WASH. REV. CODE § 26.09.187(3)(a) (2005 & Supp. 2013).

105. *See, e.g., In re Parentage of Harker*, No. 39899-1-II, 2010 Wash. App. LEXIS 2466, at *28 (Wash. Ct. App. Nov. 4, 2010) (reversing trial court’s award of custody to non-primary-caregiver father because the court believed he had “the ability to perform parenting functions” and could better make sure that the child is aware of his cultural heritage as Native American).

106. *See, e.g., In re Marriage of Harrison*, No. 30011-1-III, 2012 Wash. App. LEXIS 2720, at *16 (Wash. Ct. App. Nov. 20, 2012) (upholding award of custody to mother rather than father, who had been the primary parent, on the grounds that there was some evidence that the mother’s relationship with the child was stronger).

judges broad discretion to decide that something else is more important in a particular case. In the next subpart I examine the law in jurisdictions that have established a more reliable priority on past caretaking.

B. Jurisdictions Giving Priority to Past Caretaking

Only one jurisdiction in the United States—West Virginia¹⁰⁷—has enacted the ALI *Principles* in full, including the past-caretaking standard. Since West Virginia adopted the ALI *Principles* in 2000, only three custody disputes between parents applying the approximation standard have reached the state supreme court. Each of these cases applied the concrete criteria of the statute in a relatively straightforward, predictable manner, including the statute's exceptions. One case, for example, applied the “manifest harm” exception to the approximation rule, after finding that the mother lived with a boyfriend who had a criminal record for deviant sexual behaviors.¹⁰⁸ The only reported cases in which the primary caretaker did not prevail concerned physical or sexual abuse by, or the unfitness of, that parent.¹⁰⁹

Although no other state has gone as far as West Virginia in prioritizing past caretaking as a statutory factor, courts in a handful of other states have interpreted their custody statutes consistently to include this priority. In South Carolina, for example, the state supreme court in 2004 stated “an assumption that custody will be awarded to the primary caretaker.”¹¹⁰ Since then, there have been only a few reported cases reviewing custody decisions between parents, and none of these have upset this assumption.

In 1999, Oregon amended its law to require courts to give a “preference” to the “primary caregiver of the child.”¹¹¹ Although the statute also provides that the “best interests and welfare of the child” shall not be determined by “isolating” any single factor,¹¹² the preference has been applied by courts with some consistency to favor the primary caregiver.¹¹³ Since the effective date of

107. W. VA. CODE § 48-9-206(a) (2009).

108. *B.M.J. v. J.D.J.*, 575 S.E.2d 272, 277 (W. Va. 2002) (per curiam). The harm standard is in section 2.08(1)(h). See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08(1)(h) (2002) (providing an exception to the past-caretaking rule “to avoid substantial and almost certain harm to the child”). In addition, the court is obligated to fashion orders that protect the child from abuse. See *id.* § 2.11. The other cases concerned relocation and sibling visitation. See *Storrie v. Simmons*, 693 S.E.2d 70 (W. Va. 2010) (per curiam) (reversing the denial of a relocation petition by a parent who had been exercising a substantial majority of caretaking responsibility, and affirming such a denial when the parent seeking to relocate had not been exercising a substantial majority of caretaking responsibility); *Lindsie D.L. v. Richard W.S.*, 591 S.E.2d 308 (W. Va. 2003) (sibling visitation).

109. See *Sanders*, *supra* note 34, at 33 n.240 (citing *John P.W. ex rel. Adam W. v. Dawn D.O.*, 591 S.E.2d 260 (W. Va. 2003); *Hager v. Hager*, 591 S.E.2d 177 (W. Va. 2003); *In re Frances J.A.S.*, 584 S.E.2d 492 (W. Va. 2003)).

110. *Patel v. Patel* 599 S.E.2d 114, 120 (S.C. 2004).

111. 1999 Or. Laws 1883 (codified at OR. REV. STAT. § 107.137(1)(e) (2011)).

112. OR. REV. STAT. § 107.137(2) (2011).

113. See, e.g., *Nice v. Townley*, 274 P.3d 227, 229 (Or. Ct. App. 2012) (reversing modification of custody from father to mother on grounds that Oregon law has preference for primary caregiver and

the Oregon statute, there have been no reported state supreme court cases that have relied on subjective factors or speculative predictions in the allocation of parenting time, and the cases decided at the intermediate-appeals level display extraordinary restraint with respect to the statute's stated priority. The few cases awarding custody to the parent who was not the primary caregiver involve circumstances that would likely have been sufficient to rebut the ALI priority on continuing past caretaking patterns. Two cases, for example, involved particularly egregious, ongoing conduct by the primary caregiver to stir up trouble or to deny or interfere with access to the children by the other parent.¹¹⁴ In the absence of such extenuating circumstances, when there is a clear primary caregiver parent who is fit, Oregon courts have predictably awarded primary custody to that parent.¹¹⁵

Massachusetts provides another example of a more determinate approach. Since 1993, the Massachusetts statute has provided that “[i]n awarding custody to one of the parents, the court shall, to the extent possible, preserve the relationship between the child and the primary caretaker parent.”¹¹⁶ The court shall also “consider where and with whom the child has resided within the six months immediately preceding the proceedings . . . and whether one or both of the parents has established a personal and parental relationship with the child or has exercised parental responsibility”¹¹⁷ In interpreting this statute the Massachusetts Supreme Court in the *Custody of Kali* concluded, consistent with the ALI *Principles*, that a judge ordinarily should “allocate custody in proportion to the amount of time each parent previously spent providing care.”¹¹⁸ Although in the *Kali* decision itself the supreme court affirmed the trial court's determination that neither parent was the primary caregiver, every subsequent reported appellate case concerning the allocation of custody between parents either resulted in affirmation of a custody award to the

that the father had not shown that the mother had ceased to be the primary caregiver); *see also* Sjomeling v. Lasser, 285 P.3d 1116, 1126 (Or. Ct. App. 2012) (affirming an order allowing mother to relocate to Utah to accept a new job and be near extended family).

114. *See In re Marriage of Kirkpatrick*, 273 P.3d 361, 362–63 (Or. Ct. App. 2012); *In re D.T.J. S-B*, 238 P.3d 30, 40 (Or. Ct. App. 2010). The *Principles* provide an exception to the approximation standard in response to a parent's persistent interference with the other parent's access to the child. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.11(1)(d) (2002). Another, closer case concerned the less involved parent's ability to handle the special health and education needs of the child, who had lived with that parent since the parties' separation—needs the primary caretaker had not been able to meet. *See In re Marriage of Morales*, 159 P.3d 1183, 1190 (Or. Ct. App. 2007); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08(1)(d) (2002) (allowing for departure from approximation standard to take account of a gross disparity in the parents' respective abilities to meet the child's needs).

115. *See, e.g., In re Marriage of Bradburry*, 238 P.3d 431, 437–38 (Or. Ct. App. 2010); *In re Travis*, 237 P.3d 868, 870–71 (Or. Ct. App. 2010); *In re Marriage of Ringler*, 188 P.3d 461, 466–67 (Or. Ct. App. 2008); *McBrayer v. Randolph*, 83 P.3d 936, 941 (Or. Ct. App. 2004).

116. MASS. GEN. LAWS ch. 209C, § 10(a) (2011 & Supp. 2013).

117. *Id.*

118. *Custody of Kali*, 792 N.E.2d 635, 641 (Mass. 2003).

primary caregiver¹¹⁹ or remand of the case for reconsideration in light of *Kali*,¹²⁰ or involved circumstances that likely would have triggered an exception or limitation under the *ALI Principles*.¹²¹

Michigan requires that clear and convincing evidence be shown by a parent seeking to change “the established custodial environment of a child.”¹²² This custodial factor functions much like the past-caretaking factor under the ALI approach. Under the Michigan statute, a custodial environment is established if “over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort.”¹²³ Courts have applied this approach consistently to impose a higher burden on a parent in a custody case who is seeking an award that changes the child’s existing custodial arrangement. This higher standard applies not only in cases involving the modification of existing orders, but also to custody cases in which no order has yet been issued.¹²⁴

These examples demonstrate that it is possible to have a more objective standard that, with carefully drawn exceptions,¹²⁵ more consistently relies on the factor courts usually rely on in custody cases—past caretaking. Of course, to achieve consistency, it is important to have a stable understanding of past caretaking. In the next subpart I consider this definitional issue.

C. Defining Past Caretaking

Although past caretaking is more determinate than other, more subjective factors like parenting abilities and the quality of the parent–child relationship, it is important to note that a court’s determination of past caretaking patterns can itself, without concrete criteria, undermine the potential consistency of the past-caretaking approach. At the time the *ALI Principles* were drafted, there were numerous examples of decisions that applied a double standard to parents in

119. See, e.g., *Hunter v. Rose*, 975 N.E.2d 857, 860, 865 (Mass. 2012); *R.F. v. I.A.*, No. 10-P-911, 2011 WL 3341117, at *3 (Mass. App. Ct. Aug. 4, 2011); *K.S. v. S.P.*, No. 08-P-169, 2009 WL 723104, at *1, *3 (Mass. App. Ct. Mar. 20, 2009).

120. See, e.g., *Ballou v. Garcia*, No. 10-P-1800, 2012 WL 592833, at *5 (Mass. App. Ct. Feb. 24, 2012).

121. See *Custody of Zia*, 736 N.E.2d 449 (Mass. App. Ct. 2000) (affirming custody award to father who had actively participated in the child’s care, instead of the primary-caretaker mother, in the face of multiple incidents of the mother’s interference with the father’s shared legal custody and parenting failures that included rarely doing anything with the child except watching television and picking up the child from the home of the grandparents in a vehicle without a car seat, driven by a relative who was drinking an alcoholic beverage). The *ALI Principles* require the court to take account of persistent interference with the other parent’s access to the child, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.11(1)(d), (2) (2002), and provide for an exception to the past-caretaking standard to prevent harm due to a gross disparity in the parents’ ability or availability to meet the child’s needs, *id.* § 2.08(1)(d).

122. MICH. COMP. LAWS § 722.27(1)(c) (2011).

123. *Id.* Other factors include the “age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship.” *Id.*

124. See, e.g., *Kessler v. Kessler*, 811 N.W.2d 39 (Mich. Ct. App. 2011) (per curiam).

125. See *supra* text accompanying notes 23–25.

determining who was the child's primary caregiver. For example, when a mother fulfilled the traditional homemaker role, she was ordinarily assumed to be the primary caretaker, but when she worked outside the home, or had an extramarital affair, she might be viewed as having ignored her children.¹²⁶ Conversely, a father who exceeded expectations and performed more tasks than fathers ordinarily performed was often given extra credit as a caretaker.¹²⁷ The ALI *Principles* alleviate potential bias based on gender and other factors by defining caretaking according to specific, historical criteria. Caretaking means having provided the day-to-day care of the child, including discrete, measurable tasks such as feeding, attending to bedtime and personal-hygiene routines, caring for the child when sick or injured, arranging for medical care, education, day care, and recreation, assigning and supervising chores, and meeting the child's developmental needs for motor and language development, toilet training, self-confidence, and discipline.¹²⁸

A number of courts in recent years have given significance to the same factors as those set forth in the ALI *Principles*.¹²⁹ As an indication that stereotypes die hard, however, some courts have continued to evaluate parenting roles against traditional expectations and thus to give fathers credit for performing functions that are taken for granted when it comes to mothers.

126. See, e.g., *Marriage of Estelle*, 592 S.W.2d 277, 278 (Mo. Ct. App. 1979) (affirming a custody award to working father as opposed to working mother, emphasizing that the father often prepared the child's breakfast and dinner and picked her up from the day-care center); *Landsberger v. Landsberger*, 364 N.W.2d 918, 919–20 (N.D. 1985) (in affirming custody award to father, court was impressed by the fact that, although the mother was the children's primary caretaker and knew more about the child, the father had babysat while the mother was a "strong-willed" "career mother" who believed that a "life limited to homemaking is not adequate to fulfill her needs").

127. See, e.g., *Hoover v. Hoover*, 764 A.2d 1192, 1194 (Vt. 2000) (father deemed to have a "slightly more active engagement in the children's lives" even though he spent only about nine waking hours per week with the children, as compared with twenty hours by the mother); *Patricia Ann S. v. James Daniel S.*, 435 S.E.2d 6, 16 (W. Va. 1993) (Workman, C.J., dissenting) (per curiam) (pointing out that the court had been "bowled over by the fact that the father helped in the evenings and the weekends," and had thereby elevated the father to the same caretaker status as the mother, even though the father had limited contact with the child but the mother had given up her career to be a full-time, stay-at-home mother); see also PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.12 Reporter's Notes to Cmt. c (2002) (citing other cases). For an analysis of gender bias under the best-interests standard, see Susan Beth Jacobs, Comment, *The Hidden Gender Bias Beyond "the Best Interest of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845 (1997).

128. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(5) (2002).

129. See, e.g., *In re Marriage of Arnold*, No. 9-057 / 08-1103, 2009 Iowa App. LEXIS 213, at *3 (Iowa Ct. App. 2009) (factoring in that mother did cooking, cleaning, and caring for the children, including calling them from work to get them up and ready to go to school, even though father was at home with them in the mornings); *Sitts v. Sitts*, 902 N.Y.S.2d 274, 275 (App. Div. 2010) (identifying preparation of the family's meals, bathing the children, making the necessary arrangements for day care, administering the children's medications, reading to the children and putting them to bed as the relevant factors in determining who was the children's primary caretaker); *Nice v. Townley*, 274 P.3d 227, 230 (Or. Ct. App. 2012) (holding that the primary caregiver is the party who has provided more care for the child and who "has nurtured the child and has taken care of the child's basic needs, for example by feeding the child, nursing the child when he or she is sick, scheduling daycare and doctor's appointments, and spending time disciplining, counseling, and interacting with the child").

For example, a South Dakota case declined to give weight to the mother's indisputable primary-caretaking role because the children "often joined their father for farm work and while he was trucking" and "also enjoyed spending time with their paternal grandparents."¹³⁰ Likewise, a Tennessee court declined to favor either parent as the primary caregiver because even though the mother had been the primary caregiver, the father provided "a great deal of hands on care" for the child early in life and was more financially stable than the mother.¹³¹

Sometimes the judgments about who has cared for the child appear to be infected by disapproval of one parent's conduct. In one Vermont case, for example, the father admitted that the mother was "the larger caretaker," and yet the trial court concluded that the parental roles were "substantial—possibly equal" on the basis of the father's role in the child's life had been increasing. Evidence of this increasing care was limited to the fact that the "mother had left the minor with [the] father for four or five days . . . when she went to New Mexico to meet the man with whom she had become acquainted on the Internet, and for another full week . . . when she went to Maine to meet the same man."¹³² Similarly, a court in Nebraska considered the father the current primary caretaker, even though he worked ten to twelve hours per day, six to seven days a week, because the mother, who had been the primary caretaker, had begun going out with friends and staying out into the late-evening or early-morning hours.¹³³

These cases show that even if legislatures give more weight to past caretaking in custody cases, the desired predictability will not be achieved unless the criteria determining past caretaking roles are also applied objectively and without gender bias.¹³⁴

130. Walker v. Walker, 720 N.W.2d 67, 73–74 (S.D. 2006).

131. Strickland v. Strickland, No. M2012-00603-COA-R3-CV, 2012 WL 6697296, at *12 (Tenn. Ct. App. Dec. 21, 2012).

132. Porcaro v. Drop, 816 A.2d 1280, 1284 (Vt. 2002); *see also* Gianvito v. Gianvito, 975 A.2d 1164, 1170 (Pa. Super. Ct. 2009) (affirming modification of custody in favor of the father after the mother proposed to relocate within the state because, although the child lived primarily with the mother, the trial court had a sufficient basis for deciding that the father was the primary caretaker based on "the quality of time spent by [the father] with [the child] and his impressive shouldering of parental responsibility," and his "willingness to prioritize [the child's] needs at all points").

133. Williams v. Williams, No. A-07-1103, 2008 WL 5064933, at *2 (Neb. Ct. App. Dec. 2, 2008).

134. In both West Virginia and Minnesota, the difficulties with the implementation of the primary-caretaker presumption included gender bias and the proliferation of exceptions in determining who was the primary caretaker. *See* Gary Crippen, *Stumbling Beyond the Best Interests of the Child: Re-examining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment With the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 460–79 (1990); Paul L. Smith, *The Primary Caretaker Presumption: Have We Been Presuming Too Much?*, 75 IND. L.J. 731, 740–41 (2000). The experience of Washington with its statute requiring that courts give greatest weight to past caretaking also illustrates how courts can apply determinate statutes indeterminately. *See supra* text accompanying notes 99–106.

III RELOCATION

An especially difficult subset of custody cases involves the challenging situation in which the parent who has had the majority of parenting time with the child seeks to relocate. In recent decades, the law has swung back and forth between different approaches, even within the same state,¹³⁵ reflecting the high degree of dissatisfaction and ambivalence associated with each approach.

Some states address relocation under their general modification provisions which, traditionally, place the burden on the party seeking to alter a custody order to show “changed circumstances” necessitating a modification in order to serve the child’s best interests.¹³⁶ A few jurisdictions that rely on their general modification standards to resolve relocation cases have inverted the proof burdens in relocation cases, treating the decision of where to live as a prerogative of the custodial parent and placing the burden of showing that the custodial parent’s relocation is contrary to the child’s interests on the parent resisting the relocation. Alaska courts, for example, interpret Alaska’s general modification statute to place the burden of proving that a proposed relocation is not in the best interests of the child on the noncustodial parent, as long as the custodial parent has a legitimate reason to relocate.¹³⁷ In Kentucky, similarly, courts have interpreted the state’s general modification statutes to place the burden on the noncustodial parent to show that the custodial parent’s relocation will endanger the child and that the advantages of changing the custodial parent outweigh the harms.¹³⁸

In recognition of the particular challenges posed in the relocation context, the large majority of states today address relocation in specific statutes on the subject, rather than under their general modification statutes.¹³⁹ In these statutes, too, the trend is toward a recognition that when a parent seeks to relocate, it is the relationship between the child and the parent who has provided the majority of the child’s care that warrants priority. Only Alabama applies an explicit presumption against the relocation of a parent with the child.¹⁴⁰ A minority of other states place the burden of justifying the move on

135. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17 Reporter’s Notes to Cmt. d (2002) (describing swings back and forth in the law in a number of states, including California, Florida, and New Jersey).

136. See, e.g., TEX. FAM. CODE ANN. § 156.101 (West 2008 & Supp. 2012); *McLaughlin v. McLaughlin*, 647 N.W.2d 577 (Neb. 2002).

137. See, e.g., *Moeller-Prokosch v. Prokosch*, 99 P.3d 531, 533 (Alaska 2004) (in relocation context).

138. See, e.g., *Fenwick v. Fenwick*, 114 S.W.3d 767, 786 (Ky. 2003); see also CAL. FAM. CODE § 7501 (West 2004) (setting forth custodial parent’s “right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child,” and affirming the decision of the court in *In re Marriage of Burgess*, 913 P.2d 473, 478 (Cal. 1996), which stated a “presumptive right of a custodial parent to change the residence of the minor children, so long as the removal would not be prejudicial to their rights or welfare”).

139. See, e.g., IND. CODE § 31-17-2.2-1 (2007); IOWA CODE § 598.21D (2013); KAN. STAT. ANN. § 23-3222 (Supp. 2012); 23 PA. CONS. STAT. § 5337(h) (Supp. 2013).

140. ALA. CODE § 30-3-169.4 (2011) (stating a “rebuttable presumption that a change of principal

the parent seeking to move, either by statute or by court decision.¹⁴¹ A few additional jurisdictions specify that neither party has a heavier burden than the other.¹⁴² The majority of jurisdictions, however, use some legal mechanism that enables a parent who has been exercising a clear majority of custodial care to relocate with the child, so long as the relocation is in good faith and for a reasonable purpose. In some cases, this burden takes the form of a “rebuttable presumption” that the intended relocation of a custodial parent with the child will be permitted.”¹⁴³ In West Virginia, which tracks the ALI *Principles*, this

residence of a child is not in the best interest of the child;” specifying that if the party seeking a change of principal residence meets the initial burden of proof on this issue, the burden of proof shifts to the nonrelocating party); *cf.* *Rice v. Rice*, 517 S.E.2d 220, 222, 226 (S.C. Ct. App. 1999) (stating that in South Carolina “there is a presumption in child custody cases *against* removing children from the state,” but then finding that “any presumption” that existed was rebutted by the fact that the mother was the primary caretaker of the children and had moved in good faith to pursue better prospects in Maine, not to attempt to destroy the father’s relationship with the children).

141. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-408(F) (Supp. 2012) (if relocating out of state or 100 miles away within the state, the parent seeking to relocate has the “burden of proving what is in the child’s best interests”); CONN. GEN. STAT. § 46b-56d (2009) (burden on relocating party to show that the relocation is for a legitimate purpose, is reasonable in light of such purpose, and in the best interests of the child); 750 ILL. COMP. STAT. 5 / 609(a) (2009 & Supp. 2013) (parent seeking relocation has burden of proving that relocation is in child’s best interests); LA. REV. STAT. ANN. § 9:355.10 (Supp. 2013) (“[P]erson proposing relocation has the burden of proof that the proposed relocation is made in good faith and in the best interests of the child.”); MINN. STAT. § 518.175(3)(c) (2006 & Supp. 2013) (“burden of proof is upon the parent requesting to move the residence of the child to another state,” unless the person requesting the “move has been a victim of domestic abuse by the other parent”); MO. REV. STAT. § 452.377(9) (2003) (“The party seeking to relocate shall have the burden of proving that the proposed relocation is made in good faith and is in the best interest of the child.”); *see also* *Elton v. Elton*, No. A-12-180, 2012 Neb. App. LEXIS 203, at *20 (Neb. Ct. App. Oct. 23, 2012) (same); *Schmidt v. Bakke*, 691 N.W.2d 239, 243 (N.D. 2005) (burden of proof in North Dakota is on the party seeking to move).

Some courts have been clear that a burden of proof is not a presumption. *See* *Bartosz v. Jones*, 197 P.3d 310, 317–19 (Idaho 2008) (affirming rule that moving party has the burden of proof, but noting that this does not amount to a presumption against relocation); *B.K.M. v. J.A.M.*, 50 A.3d 168, 175 (Pa. Super Ct. July 31, 2012) (burden-of-proof statute does not create a presumption against relocation); *see also* *In re Marriage of Thielges*, 623 N.W.2d 232, 237 (Iowa Ct. App. 2000) (interpreting Iowa statute, IOWA CODE § 598.21D (2012), to contemplate changes in visitation schedule, not changes in custody).

142. *See, e.g.*, COLO. REV. STAT. § 14-10-129(2)(c) (2012) (when the party with whom the child resides a majority of the time is intending to relocate with the child, the more rigorous standard regarding modification does not apply), *applied in* *In re Marriage of Ciesluk*, 113 P.3d 135 (Colo. 2005) (en banc) (interpreting the statute to hold that both parents equally shared the burden of demonstrating what was in the child’s best interests); FLA. STAT. § 61.13(2)(c)(1) (Supp. 2013) (“There is no presumption for or against the father or mother of the child or for or against any specific time-sharing schedule when creating or modifying the parenting plan of the child.”); *see also* *Tammaro v. O’Brien*, 921 N.E.2d 127, 132 (Mass. App. Ct. 2010) (holding that if custodial parent has “good, sincere reasons” for a relocation, the court must then weigh all relevant factors to determine if the relocation is in the child’s best interests); *Dupre v. Dupre*, 857 A.2d 242, 260 (R.I. 2004) (emphasizing that both parents come to a relocation dispute “on an equal footing”).

143. *See, e.g.*, WASH. REV. CODE § 26.09.520 (2005); WIS. STAT. § 767.481(3)(a)(2)(a) (2009) (“There is a rebuttable presumption that . . . continuing the child’s physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child,” which can be overcome if it is shown that the move is “unreasonable and not in the best interest of the child”); IND. CODE § 31-17-2.2-5 (2007) (once relocating parent shows that the proposed relocation is in good faith and for a legitimate reason, the burden shifts to the nonrelocating parent to show that the

presumption is particularly strong.¹⁴⁴ Ohio requires the court to retain the residential parent from the prior decree, unless the parents agree otherwise, the child has already been integrated into the family of the person seeking to become the residential parent, or the harm of changing the environment is outweighed by the advantages.¹⁴⁵ In Michigan, a parent who is the established custodian may relocate without the burden of showing that the move is in the child's best interests, as long as there is the capacity to improve the quality of life of the child, the relocation is not inspired by a desire to deny parenting time to the other parent, and arrangements can be made to preserve and foster the relationship between the child and the other parent.¹⁴⁶ In California, the custodial parent has the "right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child."¹⁴⁷

Many relocation cases concern two involved parents. The priority on past caretaking cannot always be achieved in these cases. Under the *ALI Principles*, the strong presumption in favor of a requested relocation by the residential parent applies only when that parent has been exercising the "clear majority" of caretaking responsibility.¹⁴⁸ When that threshold is not met, the *Principles* revert to the best-interests standard,¹⁴⁹ reflecting the unavailability of alternative objective criteria that could satisfactorily resolve relocation cases when the

proposed relocation is not in the best interests of the child); N.H. REV. STAT. ANN. § 461-A:12 (2012) (same); TENN. CODE ANN. § 36-6-108(d) (2012) ("The parent spending the greater amount of time with the child shall be permitted to be relocated with the child unless the court finds" that the relocation "does not have a reasonable purpose" or "would pose a threat of specific and serious harm to the child that outweighs the threat of harm to the child of a change of custody," or that the parent's motive for relocating is "vindictive in that it is intended to defeat or deter visitation rights of the non-custodial parent"); see also *Hollandsworth v. Knyzeski*, 109 S.W.3d 653, 657 (Ark. 2003) ("We announce a presumption in favor of relocation for custodial parents with primary custody. The noncustodial parent should have the burden to rebut the relocation presumption.").

144. W. VA. CODE § 48-9-403(d)(1) (2012) (allowing a custodial parent who has been exercising a significant majority of custodial responsibility to relocate if that parent shows that the relocation is in good faith, for a legitimate purpose, and to a location that is reasonable in light of that purpose); *Storrie v. Simmons*, 693 S.E.2d 70, 73 (W. Va. 2010) (per curiam) (reversing a custody order in favor of the father and allowing the relocation of the mother who had exercised "the significant majority of custodial responsibility" over her children, and in companion case, affirming denial of relocation petition because relocating parent had not been exercising a substantial majority of custodial responsibility).

145. OHIO REV. CODE ANN. § 3109.4(E)(1)(a) (LexisNexis 2013).

146. MICH. COMP. LAWS § 722.31(4) (2011); *Gagnon v. Glowacki*, 815 N.W.2d 141, 145–46 (Mich. Ct. App. 2012).

147. CAL. FAM. CODE § 7501(a) (West 2004). This statute was intended to reaffirm *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996), which put the burden of proof on the party opposing the relocation. See CAL. FAM. CODE § 7501(b) (West 2004); *Brown v. Yana*, 127 P.3d 28 (Cal. 2006).

148. What constitutes a "clear majority" is to be set by a rule of statewide application, but the *Principles* suggest that sixty percent would be a reasonable guideline. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17 Cmt. d (2002) (suggesting that a percentage between sixty and seventy percent would be a reasonable rule of statewide application).

149. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17(4)(c) (2002).

parents are well matched in terms of caretaking and the practicalities of the situation do not allow for the equal division of custodial time.

The statistics on the success of relocation petitions reflect the close reality of relocation cases. According to one study, custodial parents seeking to relocate are granted permission in forty-one percent of cases, and denied permission in forty-three percent of cases.¹⁵⁰ In those states requiring consideration of a number of factors in determining whether a relocation is in a child's best interests, past caretaking tends to be a very significant factor. When the parent seeking to relocate is the clear primary caretaker, appellate courts typically affirm orders permitting that caretaker to relocate with the child,¹⁵¹ or reverse court orders denying that permission.¹⁵² When a court denies a petition to relocate, it is generally either because the parents have shared physical custody more or less equally¹⁵³ or because the parent's justification for the move is

150. See Theresa Glennon, *Still Partners? Examining the Consequences of Post-dissolution Parenting*, 41 FAM. L.Q. 105, 123–25 (2007). The other sixteen percent were remanded for further proceedings. *Id.*

151. See, e.g., *Veselsky v. Veselsky*, 113 P.3d 629, 634–36 (Alaska 2005) (applying balancing test, the court affirmed permission for primary-caretaker mother to move from Alaska to Minnesota to pursue her education); *In re Marriage of Guthrie*, 915 N.E.2d 43, 46–48 (Ill. App. Ct. 2009) (over a strong dissent, affirming petition for mother, who was the primary caregiver, to relocate with the child to her home state of Arizona for job and family reasons); *Kienzle v. Selensky*, 740 N.W.2d 393, 396–98 (N.D. 2007) (affirming grant of father's motion to move with the children from North Dakota to North Carolina, when father was the primary caretaker and had shown that the move would improve his quality of life, including his job prospects, and the quality of life of the children); *Valkoun v. Frizzle*, 973 A.2d 566, 569–73 (R.I. 2009) (affirming grant of mother's motion to relocate with children from Rhode Island to North Carolina to live with her parents and enter a program to become a nurse's aide on grounds that the children had been with her for virtually their entire lives and she had been more involved in their day-to-day life).

152. See, e.g., *In re Marriage of Bhati & Singh*, 920 N.E.2d 1147, 1159 (Ill. App. Ct. 2009) (reversing denial of mother's petition to move from Illinois to North Carolina when the move would enhance the general quality of life for the custodial parent and the child, the mother's motives were to remarry and to be able to care for the child as a stay-at-home parent, and a reasonable visitation schedule for the father could be established); *Quainoo v. Morelon-Quainoo*, 87 So. 3d 364, 370 (La. Ct. App. 2012) (finding it an abuse of discretion to deny relocation petition of custodial mother, who had accepted a promotion in another state); *In re Hamilton-Waller & Waller*, 123 P.3d 310, 323 (Or. Ct. App. 2005) (reversing and remanding trial court's change of custody from mother to father after mother proposed to move from Oregon to Holland, stating that although no single relevant factor in determining the child's best interests is dispositive, the fact that the mother was the children's primary caretaker and dealt with the children's needs and difficulties on a day-to-day basis was a more significant factor than the trial court had afforded it); *Durning v. Balent/Kurdilla*, 19 A.3d 1125, 1131 (Pa. Super. Ct. 2011) (reversing denial of mother's relocation petition, despite her serious illness, because of mother's historical role as caregiver and the potential dangers of disrupting established patterns); *Dupre v. Dupre*, 857 A.2d 242, 257 (R.I. 2004) (reversing custody modification in favor of father in the face of mother's proposed relocation to Tahiti, the court stating that "[i]f one parent, in fact, exercises a significant majority of the parental duties and responsibilities, the child's best interests undoubtedly will be closely intertwined with the well-being of that parent").

153. See, e.g., *Mason v. Coleman*, 850 N.E.2d 513, 518–19 (Mass. 2006) (citing PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.17(1), (4)(c) (2002)) (affirming denial of mother's request to relocate with the children where both parents had shared physical custody and thus court had to rely on other factors, such as the quality of the schools in the different locations). In the same jurisdiction, when the child lives primarily with one parent, that parent will be allowed to move with the child if the reasons are legitimate and the other parent does not prove

inadequate or is a pretext for interfering with the other parent's relationship with the child.¹⁵⁴

Because the best-interests standard allows judges to give whatever weight they believe is warranted to the factors they consider, however, courts limited by only that standard sometimes deny relocation petitions by a parent who has been the clear primary parent. The judge might simply have the outlier view that being uprooted from the state is worse for a child than a loss of continuity in the child's relationship to the parent who has performed most of the day-to-day caretaking.¹⁵⁵ Or the judge might believe that remaining near extended family members is especially important to the child—again, even if this means the child will no longer be raised by the parent who has been raising him,¹⁵⁶ and

that the move would be detrimental to the child. *See, e.g.,* *Abbott v. Virusso*, 862 N.E.2d 52, 55 (Mass. App. Ct. 2007), *aff'd*, 881 N.E.2d 133 (Mass. 2008) (reversing trial court's denial of the mother's request to relocate from Massachusetts to Arizona, on the grounds that the trial court's finding of detriment to the child failed to adequately take into account the quality of life of the custodial parent) (citing *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.17(1), (4)(c) (2002)). Likewise, case law in Vermont imposes a heavy burden on a parent resisting a relocation with the child by the custodial parent. *See Lane v. Schenck*, 614 A.2d 786, 790 (Vt. 1992) (holding that the noncustodial parent has the burden of proving that the child's best interests would be so undermined by the relocation that a change in custody is necessary). However, Vermont uses the open-ended best-interests standard when the parents share joint custody or when one parent's caretaking role "approximated" that of the custodial parent. *See Rogers v. Parrish*, 923 A.2d 607, 611 (Vt. 2007) (past role of parent resisting relocation approximated that of custodial parent); *Hoover v. Hoover*, 764 A.2d 1192 (Vt. 2000) (joint custody). Likewise in New Jersey, if a parent has custody, that parent may relocate as long as the move is in good faith and not "inimical" to the child's interests. *See Baures v. Lewis*, 770 A.2d 214, 226 (N.J. 2001). If, on the other hand, the parents share custody, the burden of proving the child's best interests is on the parent seeking to move. *See O'Connor v. O'Connor*, 793 A.2d 810, 821–22 (N.J. Super. Ct. App. Div. 2002); *cf. Allbright v. Allbright*, 215 P.3d 472, 474–76 (Idaho 2009) (affirming change of custody from mother to father based on mother's intended move out of state, when mother had physical custody only slightly more than half of the time); *Heinen v. Heinen*, 753 N.W.2d 891, 893–95 (S.D. 2008) (*per curiam*) (affirming change of custody to father when mother sought to relocate, when mother had been the primary caretaker, but only slightly more so than the father).

154. *See, e.g.,* *Eniero v. Brekke*, 192 P.3d 147, 149–54 (Alaska 2008) (affirming trial court's decision that custody would be changed from the mother to the father if the mother moved from Alaska to Oregon, because although she would have better job opportunities there, part of her motivation was to limit the father's ability to be involved in his daughter's life); *McLain v. McLain*, 974 So. 2d 726, 729–31 (La. Ct. App. 2007) (affirming order requiring primary-caretaker mother to return her two children from Tuscaloosa to New Orleans, from which she had fled in the aftermath of Hurricane Katrina, when the only reason to be in Alabama was a boyfriend and she had relocated without appropriate communication with the father); *Graner v. Graner*, 738 N.W.2d 9, 15–16 (N.D. 2007) (affirming denial of mother's request to change children's residence from North Dakota to Arizona on the grounds that although she was the primary caretaker of the two children at issue, mother did not have a job offer there, was no longer engaged to be married to someone from there, and could not prove any other advantages to the move); *Hanson v. Hanson*, 223 P.3d 456, 459 (Utah Ct. App. 2009) (affirming change of custody to father if mother refused to move back to Utah from Louisiana, even though she was the children's primary caretaker, after trial court determined that the mother had used distance to frustrate the father's access to the children).

155. *See, e.g.,* *Maeda v. Maeda*, 794 P.2d 268, 269–70 (Haw. Ct. App. 1990). *But see* *Inoue v. Inoue*, 185 P.3d 834, 840, 853 (Haw. Ct. App. 2008) (stating that the trial court was incorrect to apply a clear presumption in favor of the parent who was not planning to leave Hawaii, although upholding custody to father on other grounds).

156. *See, e.g.,* *Van Asten v. Costa*, 874 So. 2d 1244, 1245 (Fla. Dist. Ct. App. 2004) (denying a

even if the relocation would offer the benefits of proximity to the extended family of the *more involved* parent.¹⁵⁷ In some cases, the circumstances so clearly favor continued custody with the custodial parent that it is evident that the court's real objective is to dissuade the parent from moving altogether.¹⁵⁸ If this goal is explicit enough, it is one of the rare grounds for reversal.¹⁵⁹

The past-caretaking factor draws attention to what makes many relocation cases so challenging—the importance of the continuity of both parents' involvement with the child when that involvement has been extensive, and the difficulty of preserving that continuity when one party decides to relocate. In this context, a priority on past caretaking does not readily resolve relocation disputes. When one parent has been the clear primary caretaker, however, the elevation of past caretaking as a factor will reduce inappropriate reliance on a judge's personal beliefs, in favor of a criterion that, by broad consensus, correlates strongly with a child's best interests.

IV

DE FACTO PARENTHOOD

Another troublesome issue in custody law concerns recognition of rights and responsibilities of a third party who has functioned as a child's parent. The traditional rule, still often articulated in many statutes and cases, is that a third party may not obtain visitation or custody rights unless the child's parents are unfit, unable to care for the child, or have otherwise relinquished custody.¹⁶⁰ Unfitness is a standard that typically comes with relatively concrete criteria developed in the context of parental-rights terminations¹⁶¹ and generally yields

petition to relocate even though mother offered a compelling reason to relocate, because “substitute visitation would be inadequate to foster the same sort of continuing relationship between the former husband and the children that he enjoyed,” and “the children would lose contact with their paternal relatives”); *Baxendale v. Raich*, 878 N.E.2d 1252, 1258 (Ind. 2008) (in split decision, affirming the denial of a primary-caretaker mother's request to relocate from Indiana to Minnesota for job reasons because, among other reasons, her eleven-year-old son had family members in Indiana).

157. See, e.g., *Elton v. Elton*, No. A-12-180, 2012 Neb. App. LEXIS 203, at *18–20 (Neb. Ct. App. Oct. 23, 2012).

158. See, e.g., *Bartosz v. Jones*, 197 P.3d 310 (Idaho 2008) (affirming change of custody to father if mother followed through with her plans to move to Hawaii, although mother was the primary caregiver).

159. See, e.g., *Allbright v. Allbright*, 215 P.3d 472 (Idaho 2009) (reversing trial court's order prohibiting mother from moving to Michigan); *F.T. v. L.J.*, 123 Cal. Rptr. 3d 120, 136–37 (Ct. App. 2011) (“To the extent the trial court denied Father's move-away motion with the goal of maintaining the status quo and/or coercing Father to abandon his plan to move to Washington, it erred.”); see also *Spahmer v. Gullette*, 113 P.3d 158, 162 (Colo. 2005) (en banc) (holding that the court must make custody decisions as if the intended relocation were to occur and not order the parent wishing to relocate to live in a particular locale).

160. See, e.g., MO. ANN. STAT. § 452.375(5)(5)(a) (2003 & Supp. 2013) (court may not award custody or visitation to a third party unless the court finds that “each parent is unfit, unsuitable, or unable to be a custodian or the welfare of the child requires”).

161. See, e.g., KAN. STAT. ANN. § 38-2269(b) (Supp. 2012) (parental rights-termination statute requiring consideration of (1) illnesses “of such duration or nature as to render the parent unable to care for the ongoing physical, mental and emotional needs of the child,” (2) “conduct toward a child of

predictable outcomes. Applied to situations in which a child has been raised by a third party in a long-term residential relationship, however, it can result in ending the most significant relationship in a child's life, sometimes in favor of a parent who has not been at all involved. To deal with these difficult situations, many jurisdictions developed exceptions to the traditional rule to allow third-party custody or visitation upon a showing that denial thereof would be detrimental or harmful to the child,¹⁶² or that other "extraordinary circumstances" exist.¹⁶³

Same sex-couple parenting arrangements, which became increasingly common beginning in the 1990s, were especially vulnerable to the law's traditional resistance to recognition of third-party parents. In addition to the parental-unfitness rule, same-sex couples faced the law's resistance to recognizing more than one mother and one father at a time.¹⁶⁴ Through the end of the 1990s, most states that had considered coparent petitions for custody or visitation arising from these relationships had rejected them.¹⁶⁵

The first significant exception was a 1985 decision by the Wisconsin Supreme Court, *In re Custody of H.S.H.-K.*,¹⁶⁶ which defined certain narrow circumstances in which a court could award visitation rights to a third-party, de facto parent, over the objection of the legal parent. These circumstances include

a physically, emotionally or sexually cruel or abusive nature," and (3) "the use of intoxicating liquors or narcotic or dangerous drugs of such duration or nature as to render the parent unable to care for the ongoing physical, mental or emotional needs of the child . . .").

162. See, e.g., CAL. FAM. CODE § 3041(a) (West 2004) (court must find that granting custody to a parent would be "detrimental" to the child before awarding custody to a person other than a parent); LA. CIV. CODE ANN. art. 133 (2013) (court may award custody to person other than parent if custody to either parent "would result in substantial harm to the child"); ME. REV. STAT. tit. 19-A, 1653(2)(C) (2012 & Supp. 2013) (court may award parental rights and responsibilities to a third person if it finds that "awarding parental rights and responsibilities to either or both parents will place the child in jeopardy").

163. See, e.g., *Watkins v. Nelson*, 748 A.2d 558, 563–64 (N.J. 2000) (stating presumption in favor of parent over third party, absent a finding of parental "unfitness, abandonment, gross misconduct, or 'exceptional circumstances'"); *Patzer v. Glaser*, 396 N.W.2d 740, 743 (N.D. 1986) (holding that establishment of a psychological relationship by grandparents was not sufficient to establish "exceptional circumstances" or "serious detriment to the welfare of the child," which is required in order to retain custody against the child's biological mother); *Cooper v. Merkel*, 470 N.W.2d 253, 255–56 (S.D. 1991) (per curiam) (holding that nonparent visitation was available only with a clear showing of gross parental misconduct, unfitness, or other extraordinary circumstances affecting the welfare of the child); *Bailes v. Sours*, 340 S.E.2d 824, 827 (Va. 1986) (requiring "special facts and circumstances"). The classic "extraordinary circumstances" case is *Bennett v. Jeffreys*, 356 N.E.2d 277 (N.Y. 1976).

164. For an analysis of parenthood as an exclusive status, see Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 879–83 (1984).

165. See, e.g., *In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999); *McGuffin v. Overton*, 542 N.W.2d 288 (Mich. Ct. App. 1995) (per curiam) (former same-sex partner of deceased biological mother lacks standing to obtain custody); *Bodwell v. Brooks*, 686 A.2d 1179 (N.H. 1996); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (per curiam) (de facto parents from same-sex relationship have no statutory rights to custody); *White v. Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999) (denying third-party visitation after dissolution of long-term, same-sex relationship, absent statutory authority); *Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997) (denying third-party visitation to same-sex partner).

166. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995).

the consent of the legal parent to, and the fostering of, the coparent's parent-like relationship with the child, in the same household, and the assumption by the coparent of "significant responsibility" for the child's care, education, development and support, "without expectation of financial compensation," "for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature."¹⁶⁷ Importantly, *H.S.H.-K.* considered only a grant of visitation to the coparent, not custody. Even so limited, it remained an outlier for some time.

Meanwhile, in contrast to the strict, parental-unfitness approach taken generally toward third parties seeking visitation or custody, a number of states began to carve out certain statutory categories of relatives, particularly grandparents, to whom courts might award visitation or custody rights without a showing of parental unfitness, harm to the child, or other extraordinary circumstances—even when the statutorily favored relatives were not de facto parents.¹⁶⁸ In 2000, the U.S. Supreme Court in *Troxel v. Granville*¹⁶⁹ cut short this trend, disapproving an award of grandparent visitation objected to by a fit parent when that award was based solely on the court's belief that contact with the grandparent would be in the child's best interests. Although the decision produced no majority opinion, a plurality of the Court held that it violated the U.S. Constitution for courts to substitute their own judgments for those of the parent, whose decisions with respect to his or her child should be given "special weight."¹⁷⁰ Importantly, the Court's plurality did not preclude the rights of third parties who had served in a de facto capacity with respect to the child; in fact, some members of the Court specifically identified the right of the child to preserve an "established familial or family-like bond[]" as a potential limitation on parental rights.¹⁷¹ Following *Troxel*, courts in a number of states invalidated their grandparent and other third party—visitation statutes or construed them as including a presumption in favor of a fit parent.¹⁷²

167. *Id.* at 435–36.

168. See statutes cited in PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.18 Reporter's Notes to Cmt. c (2002).

169. 530 U.S. 57 (2000).

170. *Id.* at 68–69.

171. See *id.* at 85, 88 (Stevens, J., dissenting) (listing a "once-custodial caregiver" as example where it would be constitutionally permissible to award visitation, and identifying "a child's liberty interests in preserving established familial or family-like bonds"); see also *id.* at 98, 101 (Kennedy, J., dissenting) (distinguishing parental rights against a "complete stranger" from rights vis-à-vis a parent or de facto parent).

172. See, e.g., *E.H.G. v. E.R.G.*, 73 So.3d 614 (Ala. Civ. App. 2010) (per curiam) (holding the statute unconstitutional, as applied by the trial court, for failure to make the requisite finding of harm), *aff'd*, 73 So. 3d 634 (Ala. 2011); *In re B.J.*, 242 P.3d 1128, 1132 (Colo. 2010) (en banc) (reading *Troxel* and Colorado state precedents to constitutionally prohibit visitation rights to foster parents without rebutting the presumption that the father's decision to deny visitation is in the child's best interest); *Fennelly v. Norton*, 931 A.2d 269, 274–75 (Conn. App. Ct. 2007) (construing a statute allowing right of visitation to person with a parent-like relationship with the child to require, after *Troxel*, a showing by clear and convincing evidence that denial of visitation to third party "will cause real and significant harm to the child" (citing *Roth v. Weston*, 789 A.2d 431 (Conn. 2002)); *Richardson v. Richardson*, 766

The treatment of third-party, de facto parents in the ALI *Principles* combines the approach taken by the Wisconsin Supreme Court in *H.S.H.-K.*, allowing third-party claims to functional parents in certain limited circumstances, with the kind of limits on third-party visitation contemplated in *Troxel*. The ALI's convergence on a unified concept of functional parenthood is consistent with its general reliance on past caretaking patterns. Under the *Principles*, courts may allocate parenting time to a de facto parent, defined by very specific and rigorous criteria.¹⁷³ The *Principles* define a de facto parent as someone who has lived with the child for at least two years and performed at least as great a share of caretaking functions as that of any parent with whom the child also lived, with the agreement of a legal parent to form a parent-child relationship.¹⁷⁴ Grandparents and other relatives receive no special priority, unless the child has no legal parent, de facto parent, or parent by estoppel who

So. 2d 1036 (Fla. 2000) (per curiam) (holding that the grandparent-visitiation best-interests standard is unconstitutional); *Clark v. Wade*, 544 S.E.2d 99, 100, 107 (Ga. 2001) (construing best-interests statute to permit custody to grandparents, with whom children had been living, if clear and convincing evidence showed that parental custody would cause physical or emotional harm to the child); *Doe v. Doe*, 172 P.3d 1067, 1079 (Haw. 2007) (construing the best-interests grandparent-visitiation statute to require a showing that the denial of visitation would result in "significant harm to the child"); *Rideout v. Riendeau*, 761 A.2d 291, 298-99, 301 (Me. 2000) (construing grandparent-visitiation statute to allow visitation if there was a "sufficient existing relationship" between grandparent and child and "urgent reasons" existed for the allowing continued access to the child); *Koshko v. Haining*, 921 A.2d 171, 191-96 (Md. 2007) (holding that a grandparent-visitiation order against the wishes of the parents is improper in the absence of clear and convincing evidence of compelling circumstances, such as significant harm to the child); *Brandenburg v. LaBarre*, 996 A.2d 939, 179-80 (Md. Ct. Spec. App. 2010) (construing statute to require showing of exceptional circumstances in grandparent-visitiation case after *Troxel*); *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002) (construing grandparent-visitiation statute narrowly to further compelling state interest in protecting child, who had experienced family disruption, from harm); *In re R.A. & J.M.*, 891 A.2d 564, 580 (N.H. 2005); *Camburn v. Smith*, 586 S.E.2d 565, 568 (S.C. 2003) (grandparent-visitiation order against the wishes of the parents is improper in the absence of clear and convincing evidence of compelling circumstances, such as significant harm to the child); *Feist v. Lemieux-Feist*, 793 N.W.2d 57, 59-62 (S.D. 2010) (avoiding finding grandparent-visitiation statute unconstitutional by construing it to require showing of extraordinary circumstances); *Stadter v. Siperko*, 661 S.E.2d 494, 498 (Va. Ct. App. 2008) (construing best-interests visitation statute to require presumption in favor of fit parent after *Troxel*); *In re Custody of E.A.T.W.*, 227 P.3d 1284, 1286 (Wash. 2010) (en banc) (construing third party-custody statute to require not only that child is not in the physical custody of one parent or that neither parent is a suitable custodian, but also, after *Troxel*, that parent is unfit or that parental custody "would result in actual detriment to the child's growth and development"); *In re Custody of Shields*, 136 P.3d 117, 126 (Wash. 2006) (en banc) ("[C]ourt can interfere only with a fit parent's parenting decision to maintain custody of his or her child if the nonparent demonstrates that placement of the child with the fit parent will result in actual detriment to the child's growth and development.").

173. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c) (2002). The ALI *Principles* also recognize a category of parents called parents by estoppel. A parent by estoppel is someone who lived with the child for at least two years, or since the child's birth, during that time holding out and accepting the full and permanent responsibilities as a parent, either as the result of mistakenly thinking he was the child's parent or as part of a prior coparenting agreement. *Id.* § 2.03(1)(b). Qualifying as a parent by estoppel entitles an individual to the same status as a legal parent, insofar as that individual has been treated as and assumed to be a parent, even by the legal parent. *See id.* §§ 2.04(1)(b), 2.18(1).

174. *Id.* § 2.03(1)(c).

has been caring for the child and is willing to continue to do so.¹⁷⁵ Importantly, being a de facto parent does not necessarily mean an award of parental rights or responsibilities. A fit parent will still have priority in terms of the majority of custodial responsibility unless that parent has not been performing a “reasonable share of parenting functions”¹⁷⁶ or unless “the available alternatives would cause harm to the child.”¹⁷⁷ A de facto parent, however, might outrank another third party, even a relative of the child, if a fit legal parent is unavailable, and might be allocated some parenting time (traditionally referred to as visitation) even if the legal parent is able to assume the majority of the child’s parenting responsibilities.¹⁷⁸

Robin Fretwell Wilson criticizes the ALI *Principles* with respect to de facto parents as offering a “thinned-out conception of parenthood.”¹⁷⁹ Wilson states that of the twenty-five de facto parent cases decided between 1999 and 2010, only one case adopted the ALI *Principles* of de facto parenthood, and even then, only because the parties had stipulated to de facto parenthood.¹⁸⁰ The remainder of the cases she studied, she states, “have rejected the ALI’s approach twice as often as they have accepted it.”¹⁸¹ Yet, by her own account, the “overwhelming use of the Principles by courts is as a ‘pile-on’ to support an outcome the court would have reached anyway under its own precedent or state law”¹⁸²—hardly an indication of a rejection of the ALI *Principles*. Wilson cites cases that deny a party standing as de facto parent as evidence of the rejection of the ALI’s approach to de facto-parent status,¹⁸³ and yet some of these cases explicitly apply the ALI’s criteria;¹⁸⁴ the failure of a party to meet those criteria

175. *See id.* § 2.18(2)(a).

176. *Id.* § 2.18(1)(a)(i). Parenting functions, defined in section 2.03(6), include not only caretaking functions but also providing economic and other forms of support for the household.

177. *Id.* § 2.18(1)(a)(ii).

178. *Id.* § 2.18(1).

179. Robin Fretwell Wilson, *Trusting Mothers: A Critique of the American Law Institute’s Treatment of De Facto Parents*, 38 HOFSTRA L. REV. 1103, 1111 (2010). Wilson draws support for this proposition from a case involving an abusive live-in boyfriend who sought custody of the child when the child’s mother died, implying that the ALI *Principles* would have allowed such custody to be granted. In fact, the *Principles* incorporate measures to protect children and their parents from domestic violence and abuse—measures that are as strong as those in any existing state law. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.11(2)–(3) (2002) (requiring limits to protect the child from harm and placing burden on individual who has abused a child or inflicted domestic violence to prove that an allocation of custodial or decisionmaking responsibility will not endanger the child); *see also* B.M.G. v. J.D. J., 575 S.E.2d 272 (W. Va. 2002) (per curiam) (applying law of West Virginia—which adopted ALI *Principles* of custody and domestic violence—and affirming change of custody to father because mother could not protect child from abuse by mother’s boyfriend).

180. Wilson, *supra* note 179, at 1144–45 (discussing *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004)).

181. Wilson, *supra* note 179, at 1111.

182. *Id.* at 1140.

183. *Id.* at 1147–50.

184. *See, e.g.*, A.H. v. M.P., 857 N.E.2d 1061 (Mass. 2006) (applying standards set forth in the ALI *Principles* and determining that coparent did not assume sufficient share of caretaking functions); *Smith v. Jones*, 868 N.E.2d 629 (Mass. App. Ct. 2007) (holding that the mother had not ceded sufficient

is hardly evidence that the criteria themselves were rejected. Cases that Wilson cites determining that the third party was entitled to visitation or other access to the child on other grounds,¹⁸⁵ similarly, concern others points of law and do not, themselves, suggest a rejection of the *ALI Principles*.

In only three cases Wilson studied did courts reject the concept of de facto parenthood, and these all involved the claims of lesbian co-parents.¹⁸⁶ One of them was later overruled by subsequent statute.¹⁸⁷ With respect to Wilson's claim that the ALI approach represents a "thinned-out conception of parenthood,"¹⁸⁸ it perhaps bears noting that most of the scholarly criticism of the *ALI Principles* has been that the *Principles* are too strict in the criteria they propose and in the limitations they place on the allocation of parenting rights to de facto parents, not too liberal.¹⁸⁹

Since the ALI began publishing Tentative Drafts of the *Principles*, the law in an increasing number of states has evolved in the direction that the *Principles* recommend. Various state courts, including courts in Massachusetts,¹⁹⁰ New Jersey,¹⁹¹ Washington,¹⁹² Maine,¹⁹³ Rhode Island,¹⁹⁴ and Washington,¹⁹⁵ have

responsibilities to the coparent nor was their sufficient evidence of the parties' intent that they share parenting responsibilities); *see also In re Parentage of M.F.*, 170 P.3d 601 (Wash. Ct. App. 2007) (holding that the stepfather did not meet the criteria of a de facto parent).

185. *See, e.g., Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006) (determining that the partner of the parent was a legal parent under Vermont law, and citing *ALI Principles* with approval).

186. *See Smith v. Gordon*, 968 A.2d 1 (Del. 2009) (en banc); *Janice M. v. Margaret K.*, 948 A.2d 73 (Md. 2008); *White v. White*, 293 S.W.3d 1 (Mo. Ct. App. 2009).

187. *See DEL. CODE ANN. tit. 13, § 8-201* (2009) (establishing de facto-parent status).

188. *See Wilson, supra* note 179, at 1111.

189. *See, e.g., Laura Nicole Althouse, Three's Company? How American Law Can Recognize a Third Party Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN'S L.J. 171, 188–91 (2008) (criticizing *ALI Principles* for excluding most social parents in same-sex families); Susan Frelich Appleton, *Parents By the Numbers*, 37 HOFSTRA L. REV. 11, 30–31 (2008) (arguing that the *ALI Principles* do better by parents by estoppel, who are defined by factors that do not entail caretaking and are more likely to be men, than they do by de facto parents, who are defined by caretaking functions and are more likely to be women); Emily Buss, "Parental" Rights, 88 VA. L. REV. 635, 646 (2002) (defining as the "problem" with the *ALI Principles* not that they recognize third-party functional parents, but that in not giving these individuals sufficient authority, they encourage the fragmentation of parental authority); Nancy E. Dowd, *Parentage at Birth: Birthfathers and Social Fatherhood*, 14 WM. & MARY BILL RTS. J. 909, 917 (2006) (stating that the *ALI Principles* do not address social fatherhood at birth); Mary Ann Mason & Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 FAM. L.Q. 227, 249, 252 (2002) (arguing that the ALI's "strict rules regarding the involvement and consent of the non-custodial parent... are a serious barrier, especially for stepfamilies" and "move[] only slightly away from the traditional legal paradigm"); Barbara Bennett Woodhouse, *Horton Looks at the ALI Principles*, 4 UTAH J.L. & FAM. STUD. 151 (2002) (arguing for a more flexible approach to de facto parenthood). For an argument that the *ALI Principles* are both too liberal and too strict, see Gregory A. Loken, *The New "Extended Family"—"De Facto" Parenthood and Standing Under Chapter 2*, 2001 BYU L. REV. 1045, 1063–64 (criticizing the *Principles*, on the one hand, for expanding potential number of claimants and, on the other hand, for sweeping away grandparent standing).

190. *See E.N.O. v. L.M.M.*, 711 N.E.2d 886, 891, 897 (Mass. 1999) (citing PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(b) (Tent. Draft No. 3 Part I 1998)) (involving same-sex partner); *see also A.H. v. M.P.*, 857 N.E.2d 1061 (Mass. 2006) (applying criteria for de facto parent but determining they were not met).

191. *See V.C. v. M.J.B.*, 748 A.2d 539, 551 (N.J. 2000).

recognized de facto parenthood under certain circumstances,¹⁹⁶ as had a few state statutes even earlier.¹⁹⁷ Since 2000, courts in Alaska,¹⁹⁸ New Jersey,¹⁹⁹ North Dakota,²⁰⁰ and South Carolina²⁰¹ have recognized the similar concept of psychological parent. Pennsylvania and Arkansas have adopted the concept of in loco parentis in coparent situations.²⁰² In New Mexico, the Uniform Parentage Act has been interpreted to permit a court to find that a coparent who has acted in loco parentis and in a custodial and parental capacity is a “natural parent,” entitled to all of the attending rights and responsibilities.²⁰³ In North Carolina, courts have developed the doctrine that custodial rights to a third party might appropriately follow if a parent engaged in “conduct inconsistent with her paramount parental status,” which includes bringing a coparent into the family unit and voluntarily allowing the coparent to act as a parent without creating an expectation that the relationship would be terminated.²⁰⁴

Contemporary definitions of de facto parent typically depend, as do the ALI *Principles*, on, a prior, residential, caretaking relationship with the child, developed with the consent or acquiescence of the parent. For example, Washington defines a de facto parent as one who has developed a parent–child relationship with the consent of the parent, lived with the child in the same household, assumed the obligations of parenthood without expectation of

192. See *In re Parentage of L.B.*, 122 P.3d 161, 683 (Wash. 2005) (en banc).

193. See *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1149 (Me. 2004).

194. See *Rubano v. DiCenzo*, 759 A.2d 959, 967–68 (R.I. 2000).

195. See *In re Parentage of A.F.J.*, 260 P.3d 889, 891 (Wash. Ct. App. 2011).

196. See also *In re Parentage of A.B.*, 818 N.E.2d 126, 131 (Ind. Ct. App. 2004), *vacated and remanded on grounds not precluding recognition of de facto parenthood under the right circumstances*, 837 N.E.2d 965 (2005).

197. See, e.g., COLO. REV. STAT. § 14-10-123(1)(c) (2013) (effective 1989) (permitting “a person other than a parent who has had the physical care of a child for a period of one hundred eighty-two days or more” to file a petition seeking an allocation of parental responsibilities); DEL. CODE ANN. tit. 13, § 733 (2009) (effective 1995) (permitting a stepparent with whom the child has most immediately lived to obtain custody if it is in the child’s best interests, even if there is a surviving natural parent).

198. See *Kinnard v. Kinnard*, 43 P.3d 150, 151 (Alaska 2002) (affirming shared-custody award to father and stepmother, who was the child’s psychological parent); *Buness v. Gillen*, 781 P.2d 985, 987–99 (Alaska 1989) (standing to seek custody is available to child’s “psychological parent” in the stepparent context).

199. See *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000).

200. See *Edwards v. Edwards*, 777 N.W.2d 606, 608–09 (N.D. 2010); *McAllister v. McAllister*, 779 N.W.2d 652, 658–59 (N.D. 2010).

201. See *Marquez v. Caudill*, 656 S.E.2d 737, 743 (S.C. 2008) (stepparent).

202. See 23 PA. CONS. STAT. § 5324(2) (Supp. 2013) (effective 2011); *Bethany v. Jones*, 378 S.W.3d 731 (Ark. 2011); *T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001).

203. See *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012). This is the position urged by Nancy Polikoff in this issue of *Law and Contemporary Problems*. Nancy Polikoff, *From Third Parties to Parents: The Case of Lesbian Couples and Their Children*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 196, 216.

204. See, e.g., *Boseman v. Jarrell*, 704 S.E.2d 494, 550–51 (N.C. 2010); *Price v. Howard*, 484 S.E.2d 528, 531 (N.C. 1997); *Davis v. Swan*, 697 S.E.2d 473 (N.C. Ct. App. 2010). For application of a similar approach in Ohio, see *In re Mullen*, 953 N.E.2d 302 (Ohio 2011) (denying coparent status because mother did not agree to share custody with her partner).

financial compensation, and “has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship, parental in nature.”²⁰⁵ In Delaware, *de facto*–parent status is established if an individual has had “the support and consent of the child’s parent or parents who fostered the formation and establishment of a parent-like relationship,” has “exercised parenting responsibility for the child,” and has “acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.”²⁰⁶ Montana permits a “parenting plan proceeding” to be commenced by a person who has a “child–parent relationship,” defined as a relationship

in which a person provides or provided for the physical needs of a child by supplying food, shelter, and clothing and provides or provided the child with necessary care, education and discipline and which relationship continues or existed on a day-to-day basis through interaction, companionship, interplay, and mutuality that fulfill the child’s psychological needs for a parent as well as the child’s physical needs.²⁰⁷

Similarly, in South Carolina, the third party must have lived with the child and developed a parent-like relationship with the child with the consent of a parent, for “a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature,” and “assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development,” including support, “without expectation of financial compensation.”²⁰⁸

Notably, some states allow standing for third parties on more expansive grounds but then limit the substantive right of these individuals, typically to those who had residential, caretaking responsibility for the child over a significant period. In Indiana, for example, a child-custody proceeding can be commenced by “a person other than a parent,”²⁰⁹ but to obtain any custodial rights as a *de facto* custodian, the child must have resided with the individual for at least six months if the child is less than three years of age at the time the proceeding is initiated, or one year if the child is older.²¹⁰ In Alaska, a third party has standing to seek custody if he or she has “significant connection” with the child, but to get custody rights superior to those of biological parents, that individual must be a “psychological parent” and show clear and convincing evidence that custody to the biological parents would be detrimental to the child.²¹¹ Similarly, in Oregon, any person who has “established emotional ties

205. *In re Parentage of L.B.*, 122 P.3d 161, 176–77 (Wash. 2005) (en banc); *see also In re Parentage of J.A.B.*, 191 P.3d 71, 75–76 (Wash. Ct. App. 2008) (former live-in boyfriend was a *de facto* parent under *Parentage of L.B.* standards).

206. DEL. CODE ANN. tit. 13, § 8-201(c) (2009), *applied in* *Smith v. Guest*, 16 A.3d 920 (Del. 2011) (en banc).

207. MONT. CODE ANN. § 40-4-211(6) (2011), *applied in* *Kulstad v. Maniaci*, 220 P.3d 595 (Mont. 2009).

208. *See Marquez v. Caudill*, 656 S.E.2d 737 (S.C. 2008).

209. IND. CODE § 31-17-2-3(2) (2007).

210. *Id.* § 31-9-2-35.5.

211. *Evans v. McTaggart*, 88 P.3d 1078, 1081–84 (Alaska 2004).

creating a child-parent relationship or an ongoing personal relationship with a child may” file an action,²¹² but to obtain custody or visitation, the person must show that he or she had been the child’s primary caretaker, or that circumstances detrimental to the child exist without such an order, or other specified circumstances.²¹³ California’s standing rules are also broad, but before awarding custody to a third party, the court must find by clear and convincing evidence that parental custody would be detrimental to the child. Detriment, in turn, is specifically defined to include the

harm of removal from a stable placement . . . with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time.²¹⁴

More often, standing itself is limited to persons who have a residential, caregiving relationship with the child.²¹⁵ Some states single out particular categories of individuals, like grandparents, stepparents, or siblings, as individuals who can seek specified visitation or custody rights,²¹⁶ but since

212. OR. REV. STAT. § 109.119(1) (2011).

213. *Id.* § 109.119(4)(a), *applied in In re O’Donnell-Lamont*, 91 P.3d 721, 732 (Or. 2004) (affirming custody award to grandparents after death of mother, because parental presumption was rebutted by, among other things, evidence that the grandparents were the children’s primary caregivers in the months after the mother’s death and had had day-to-day contact much of the time before that).

214. CAL. FAM. CODE § 3041(c) (West 2004), *interpreted in H.S. v. N.S.*, 93 Cal. Rptr. 3d 470 (Ct. App. 2009); *see also* LA. CIV. CODE ANN. art. 133 (2013) (providing that a “court shall award custody to another person with whom the child has been living in a wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment,” if custody “to either parent would result in substantial harm to the child”).

215. *See, e.g.*, COLO. REV. STAT. § 14-10-123(1)(b)–(c) (2012) (proceedings may be brought by a person other than a parent when that person has had the physical care of child for at least 182 days, or when child does not live with either parent), *applied in In re E.L.M.C.*, 100 P.3d 546, 549 (Colo. App. 2004) (holding that a psychological parent who has physical care of a child for six months or more has standing to seek the allocation of parental responsibilities); D.C. CODE § 16-831.02(a)(1)(B) (2001) (providing that a third party may file for custody if he or she has lived with the child “for at least 4 of the 6 months immediately preceding the filing of the complaint or motion for custody, or, if the child is under the age of 6 months, for at least half of the child’s life; and . . . [p]rimarily assumed the duties and obligations for which a parent is legally responsible, including providing the child with food, clothing, shelter, education, financial support, and other case to meet the child’s needs”); S.D. CODIFIED LAWS § 25-5-29 (2004) (person who has served as the child’s “primary caretaker [and who] has closely bonded as a parental figure, or has otherwise formed a significant and substantial relationship” may petition for custody or visitation); TEX. FAM. CODE ANN. § 102.003(a)(9) (West 2008 & Supp. 2013) (effective 2011) (“a person, other than a foster parent, who has had actual care, control, and possession of the child for at least six months ending not more than 90 days preceding the dating of the filing of the petition” has standing); *see also* WYO. STAT. ANN. § 20-7-102(a) (2013) (a person who has been the primary caregiver for the child for not less than six months within the previous eighteen may bring a visitation action).

216. *See, e.g.*, GA. CODE ANN. § 19-7-1(b.1) (2010 & Supp. 2013) (a “grandparent, great-grandparent, aunt, uncle, great aunt, great uncle [or] sibling” may rebut parental presumption and obtain custody by a showing that an award of custody is in the best interests of the child); N.H. REV. STAT. ANN. § 461-A:6(V) (2012) (the court shall order reasonable visitation to a stepparent or grandparent if it is in best interest of the child); *see also* OHIO REV. CODE ANN. § 3109.04(D)(2) (LexisNexis 2013) (the court “may commit the child to a relative” if it is in the best interest of the child for neither parent to be designated the residential parent and legal custodian).

Troxel, these special standing statutes, too, often require that the relative has lived with the child,²¹⁷ sometimes for a particular length of time,²¹⁸ or can show that the child's parents are unfit or unavailable.²¹⁹

Limits designed to preclude de facto–parent access when fit parents are still in the picture continue to exist in some jurisdictions,²²⁰ but are diminishing. At one time, for example, Kentucky did not allow a third party–custody or visitation petition if the child was in the physical custody of one of the parents, or if the child already had two fit parents.²²¹ A change to the law in 2004 was interpreted by the state supreme court to allow standing to a coparent who had physical custody of the child along with the legal parent.²²² Kentucky now, along with a few other jurisdictions, permits de facto parents to obtain custodial rights on the same terms as legal parents.²²³

217. See, e.g., IDAHO CODE ANN. § 32-717(3) (2006 & Supp. 2013) (allowing standing for a grandparent with whom “the child is actually residing . . . in a stable relationship”).

218. See, e.g., ARK. CODE ANN. § 9-13-101(a)(2)(B) (2009) (grandparents who have been the child's primary caregiver for one continuous year, or six months if the child is under one year old, shall be entitled to notice and an opportunity to be heard in any child-custody case); N.Y. DOM. REL. LAW § 72 (McKinney 2010) (grandparent may apply for custody or visitation in case of “extraordinary circumstance” such as an “extended disruption of custody,” which is defined to include a “prolonged separation” from the parent of twenty-four continuous months in which the child “resided in the household” of a grandparent or grandparents).

219. See, e.g., 750 ILL. COMP. STAT. 5 / 601(b)(3)–(4) (2009 & Supp. 2013) (a stepparent who was married to the parent for at least five years can bring a custody action if the child is at least twelve years old, the custodial parent is deceased or disabled and cannot perform the duties of a parent, and the stepparent provided for the care, control, and welfare to the child prior to the initiation of the proceedings; grandparents, in certain specified circumstances, may also file a petition); MICH. COMP. LAWS § 722.26c(1)(b) (2011) (a third person who is “related to the child within the fifth degree” may bring a custody action if the custodial parent dies or is missing).

220. See, e.g., 750 ILL. COMP. STAT. 5 / 601(b)(2)–(4) (2009 & Supp. 2013) (a person other than a parent may commence a child-custody proceeding only when the child is not in the physical custody of one of his parents, unless the person is a stepparent or grandparent and satisfies specific provisions applicable to those individuals); *Scott v. Superior Court*, 89 Cal. Rptr. 3d 843, 846–49 (Ct. App. 2009) (holding that a domestic partner has no rights when child already has two parents); *Bancroft v. Jameson*, 19 A.3d 730, 731, 736 (Del. Fam. Ct. 2010) (holding that statute recognizing de facto parenthood is unconstitutional when in conflict with the rights of two fit parents); *In re Parentage of M.F.*, 228 P.3d 1270 (Wash. 2010) (en banc) (declining to apply de facto parent doctrine to stepparent when child has two fit parents).

221. See *B.F. v. T.D.*, 194 S.W.3d 310 (Ky. 2006) (holding that the domestic partner did not have standing to seek custody because the child was in the physical custody of the legal parent).

222. See *Mullins v. Picklesimer*, 317 S.W.3d 569 (Ky. 2010) (explaining that, since 2004, the law no longer precludes standing by a coparent to seek custody simply because the legal parent has physical custody).

223. See KY. REV. STAT. ANN. § 403.270(1)(b) (West 2013) (“Once a court determines that a person meets the definition of de facto custodian, the court shall give the person the same standing in custody matters that is given to [the parent].”). The other jurisdictions include Indiana, IND. CODE §§ 31-9-2-35.5, -17-2-8.5 (2007) (if individual by clear and convincing evidence meets criteria of de facto custodian, then custody is determined in accordance with the best interests of the child). The other jurisdictions include Arizona, *Downs v. Scheffler*, 80 P.3d 775 (Ariz. Ct. App. 2003) (once nonparent meets in loco parentis standard, best-interests factors are used to make the custody determination), Colorado, *In re E.L.M.C.*, 100 P.3d 546, 551 (Colo. App. 2004) (best-interests standard applies between mother and psychological parent, who was mother's lesbian partner), Maine, *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004) (rights of de facto parent are determined under best-interests standard), and

Today, only three jurisdictions appear to remain committed to doctrines denying custodial responsibilities altogether to third parties who have engaged in day-to-day, residential caretaking in a parenting capacity, and the decisions expressing this commitment are lesbian-coparent cases, reflecting a special resistance to this particular family arrangement.²²⁴ Cases in two additional jurisdictions limit recognition of de facto parenthood to situations in which the de facto parent was married to, or in a valid domestic union with, the parent.²²⁵ Otherwise, all jurisdictions who have directly confronted the matter recognize de facto parenthood in certain limited circumstances—circumstances that invariably relate to past caretaking.

The emerging law with respect to de facto parenthood demonstrates the promising potential of highly detailed criteria focused on past caretaking history. These criteria have developed more recently, more rapidly, and in a context in which the potential conflict with parental prerogatives has required legislatures and courts to be more mindful of the necessity for concrete and objective criteria.²²⁶ For that objectivity, the law has come to rely on the one factor deemed important enough to children to override, in certain circumstances, the rights of their legal parents. The task remains of integrating the priority on past caretaking more fully into other aspects of custody law.

V

CONCLUSION

There remains a widespread belief that trial judges are well situated to determine a child's best interests on a case-by-case basis.²²⁷ Indeed, some view it as a strength that judges under a best-interests standard can rely on their instincts. One court defends the standard stating that “[o]ften trial judges who see the witnesses in a custody dispute come away with a gut feeling that one parent is a better fit than the other, though it may be difficult to explain the

Washington, *In re Parentage of L.B.*, 122 P.3d 161, 174–77 (Wash. 2005) (recognizing common-law doctrine of de facto parent, which creates status equal to that of biological parent). *See also* HAW. REV. STAT. § 571-46(a)(2) (2007 & Supp. 2013) (giving de facto parent preference in custody disputes). The ALI *Principles*, as noted earlier, favor a child's legal parents over the de facto parents in certain respects. *See supra* text accompanying notes 173–178.

224. *See* Janice M. v. Margaret K., 948 A.2d 73 (Md. 2008); *White v. White*, 293 S.W.3d 1 (Mo. Ct. App. 2009); *Jones v. Barlow*, 154 P.3d 808 (Utah 2007) (overruling previous case and declining to adopt de facto-parent or psychological-parent doctrine to allow former domestic partner to seek visitation with child born during the parties' relationship).

225. *See* Harmon v. Davis, 800 N.W.2d 63 (Mich. 2011) (lesbian coparent has no custodial rights because only an individual married to the parent can be an equitable parent); *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010) (court may not grant visitation to same-sex partner who was a de facto parent, unless de facto status was based on valid marriage or civil union).

226. On the relationship between evolving constitutional doctrine and these criteria, see Emily Buss, *An Off-Label Use of Parental Rights? The Unanticipated Doctrinal Antidote for Professor Mnookin's Diagnosis*, 77 LAW & CONTEMP. PROBS., no. 1, 2014 at 1.

227. *See* Dolan & Hynan, *supra* note 20; Warshak, *supra* note 35, at 99–100.

underlying reasons.”²²⁸

In no other area do we turn such consequential decisions over to a group of individuals to decide based on their “gut.” That we do so in the area of child custody is particularly striking given the high level of emotional investment adults, including judges, can have in their own views about what makes a good parent and a healthy childhood. Nearly everyone has opinions on these subjects, often strongly held. In this article I have argued that the subjectivity of the best-interests standard invites judges to apply their own personal views about what is best for children—as Robert Mnookin argued almost forty years ago—and that the past-caretaking priority recommended by the ALI supplies a reasonably determinate and child-centered corrective to this subjectivity.

This priority is appropriate whether the parents have been jointly sharing caretaking responsibility or that responsibility has instead been unevenly divided. When other factors clearly outweigh the significance of those functions, various safety valves are available.²²⁹ The relocation context will continue to pose especially difficult challenges to child-custody decisionmaking because relocation often makes continuation of the approximate allocation of custodial responsibility impractical; when neither parent has been exercising a clear majority of caretaking functions, there might be no reasonably objective basis for deciding between them. Outside this context, however, past caretaking can help to satisfactorily resolve many custody disputes in ways that are predictable, consistent, good for children, and congruent with society’s commitment to family diversity.

It is true that the application of a past-caretaking priority in any particular case might violate a particular decisionmaker’s (or observer’s) instincts about what is in a child’s best interests. There is no reason to assume, however, that the results reached through an intuition-based approach are consistently more sound. To the contrary, the inconsistency of such an approach suggests that some cases are sound and others are not. Past caretaking history is the factor with the strongest societal consensus about the best interests of children, and the factor that will also produce the greatest consistency. There is no good reason not to give it the priority it warrants.

228. *McKee v. Dicus*, 785 N.W.2d 733, 738 (Iowa Ct. App. 2010).

229. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08(1), (4) (2002).