

The Best Interest Standard: A Review of How Broad Judicial Discretion and Influences of Social and Political Suggestion Have Led to An Abandonment of the Rule's Primary Purpose In Child Custody Decisions

LaKeisha J. Johnson, JD
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Abstract:

The vital questions in child custody disputes all concern that which is in the best interest of the child. Historically, interpretations of the “best interest” standard have been founded upon presumptions steeped in the notion of natural rights and duties based largely upon a mix of scientific and subjective conclusions regarding gender-based parenting roles and the need to sustain them. My research demonstrates that, as courts attempt to avoid the decisions of the past and submit to the societal will of the present, the modern application of the “best interest of the child” standard has led unexpectedly to an abandonment of the principle’s primary purpose, which is to provide for the child’s best interest, and should, therefore, be changed with the adoption of specific suggestions that consider both the natural and social interests of the child and, ultimately, places the child’s interest above those of parents and politics.

I. Introduction

During the decision making process of a child custody proceeding, judges are faced with an enormous responsibility - not only to the child, but also to society as a whole. As studies have confirmed, the period immediately after a divorce is a trying time for parents. For children, that period can be devastating and the effects long term, leading to depression and even crime. Those effects are mediated only by the cooperation and involvement of both parents during, and especially after, the separation process.¹ The level of cooperation and involvement parents are willing to submit to, however, is measurable in remarkably large part by not only the personal issues brought to the table by both parties, but also by the ability of the judge to maintain a clear focus while controlling the proceedings, even in the face of heated debates, in such a way that he might plan and implement a fair and reasonable solution.

This undoubtedly difficult task is made even less bearable by outside pressures and the existence of few consistent or cohesive guidelines or jurisprudence from which the court might draw wisdom. Often the strategy of Solomon is called upon, but to

no avail. Parents are passionate about their offspring and are bound to do whatever they feel is necessary to acquire custody. If they do not fight for custody, in some courts, they could very well lose it - a parent's greatest fear. However, as Professor John Elster notes, "the more forcefully a parent presses a custody claim, the more he proves himself unfit for custody."² Thus, parents are left as unsure as the judge as to how to proceed.

In the section two of this paper, I will examine the best interest standard as it has been applied from the Roman era to modern times, focusing special attention on the reasoning behind various interpretations of the rule. In sections three and four, I will examine the application of the rule today, as well as the factors which tend to influence the conclusions. And finally, I will conclude by presenting a number of suggestions which the courts should consider; allowing judges not only the freedom of discretion within a more concrete framework, but also the right of discretion within a framework centered around commonsense.

II. The Evolution of the Best Interest Standard

A. Paternal Preference

From the earliest written European laws, western society has recognized a father's absolute right to the children born of his marriage. In Rome, this right was referred to as the *patria potestas* or "paternal power".³ Initially, it was believed that a father had supreme authority over all things concerning his children, well into their adulthood.⁴ The rule, however, was not without purpose. By limiting the young adult child's ability to make financial decisions, for example, the rule succeeded in limiting the risk of his losing the family fortune (assuming the father's decisions were more responsible than the son's would have been). Over time, this led to a centralization and strengthening of the family's resource.⁵ Such leadership, it was presumed, was in the best interest of not only the child, but of the entire family.

In English common law also, it was believed that the father had an automatic right to the custody of all of the minor children of his marriage.⁶ The rule was supported by two theories which I will refer to as *sole provider* and *natural tenderness*.

The first, *sole provider*, is an economically based theory. It refers to the belief that the father, by virtue of his responsibilities regarding the "care, maintenance, education and religious training" of his children, was assumed to have a "corresponding entitlement to the benefits of his children, i. e., their services and association."⁷ The theory, like the doctrine of *patria potestas*, was rooted in mother and child's financial dependency on the father. This is not surprising, considering the fact that, upon marriage, women were relieved of all of their property rights -

including rights in that which they acquired by inheritance and personal earnings. Even they themselves became, in effect, “the property of their husbands”.⁸ Therefore, since the father was not merely the primary provider, but the sole provider of their offspring (having acquired his wife’s holdings as his own), it was thought that his superior financial status placed him in the best position for governing his children’s interests and relationships.

The second theory, *natural tenderness*, refers to the belief that the father, as the “author of their being”, would express the greatest love for the children of his marriage, more so than even their mother, and would therefore care for them “most wisely”, and would “feel for them a tenderness which [would] secure their happiness...”.⁹ From these beliefs, it was logically reasoned that the best interest of the child was to remain in the custody and control of the one who would, because of his superior love (in addition to his superior financial position), be the most willing and the most able to provide for the child’s future - his father. Thus, the husband was automatically the preferred parent in divorce proceedings.

It was only during and after the 1830s that married women began to be viewed as more than mere *femme coverts* (women under the *cover* or legal protections of a man), but as able individuals and capable parents in the eyes of societal and legal opinion.

This change in English law was due in large part to the growing female writers and activists of early 19th century Europe. In particular, Lady Caroline Norton who, after her own divorce, was refused access to her children by her abusive former husband, even after one of them had taken ill.¹⁰ In response, Lady Norton researched and lobbied what was to become the Infant Custody Act of 1839 into law. Until that time, divorced women under the English common law had virtually no claims to their own children.¹¹ Instead, the mother, as merely the wife of her children’s father, was entitled “only to reverence and respect”, but no power over her children’s lives.¹² Even afterward, divorced women were only allowed to petition for the custody of their youngest children (up to age seven) with the possibility of visitation with the older ones¹³ - a privilege easily denied by the husband. Still, the Act represented one of the first official exercises of what was to eventually become known as the *tender years* doctrine.

In the United States, the rule of paternal preference was followed by many courts well into the 19th century. The courts here, however, were faced with a dilemma. Women had begun to acquire and maintain property rights of their own by this time, so judges were no longer able to justify paternal preference based upon a need for the father’s control or management of the children’s long term financial affairs. Also, as women were becoming less dependent on men, due to their

growing interest in and willingness to seek educational and employment opportunities, judges became less able to justify paternal preference based upon the father's superior economic position as *sole provider*. Thus, the courts, without a basis upon which to support a father's automatic entitlement to the children by virtue of necessity, his control of the family fortune, or any other advantage he might otherwise have had with respect to their rearing, chose instead to rely, though reluctantly in some cases, on the mere superiority of the father as parent by virtue of his status as a man¹⁴ - a view that reflected perfectly the patriarchal mood of American society at that time - as the foundation upon which to grant custody to him.

In the Illinois decision of *Umlauf v. Umlauf*, for example, a case in which both parents were deemed "fit and proper persons,"¹⁵ equally capable of physically and financially caring for the interests of the children of their marriage, the court applied the paternal preference rule, removing the child from the custody of his mother with whom he had spent his past six years, whilst, at the same time, fully rejecting one of the rule's historical primary *raison d'être* - the father's supposed natural tenderness.

Initially, the court in *Umlauf* stated that, without question, "no other person can feel for a boy as his mother does, or show to him the love and affection which he receives from his mother".¹⁶ This marked a complete reversal of earlier common law understanding which insisted that the father had a *natural tenderness* toward his children superior to that of the mother, and would form a cornerstone of later rulings favoring maternal custody. Nevertheless, the court went on to maintain the rule, stating that "the right of the father is superior to that of every other person, and can only be made to yield when it is manifestly inconsistent with the health and welfare of the child."¹⁷

Likewise, in *Bryan v. Bryan*, the court acknowledged all manner of faults on the part of the husband including habitual drinking, a history of verbal abuse in front of the children (with language the court described as "rude, harsh, and indecorous"), and even an instance of physical battery in which he slapped his wife "in fun". On his wife's part, the court acknowledged "paroxysms of causeless rage" and faulted her attempt to remove herself and her children from what she considered an unhealthy environment. Yet, other than the ruling in his favor, the most surprising aspect of the opinion was the court's ambivalence in awarding custody to the father due to the children's youth (the youngest was just two years old and the oldest only four). The court's admitted hesitation evidenced a changing attitude in American society toward recognizing maternal importance. Ironically, the court reconciled its conflict by concluding that its decision was justified because the father would be aided by *his* mother in caring for the children and

because both children had “passed the age when the mother's care, though valuable and desirable, is indispensable”.¹⁸

Thus, even in cases where the qualities of the father were less than admirable and even while hinting at the disturbing quality of their own decisions, some courts were still quite comfortable granting custody to the father under the paternal preference rule without any historical or scientific justification whatsoever. The paternal preference rule and its application by virtue of necessity devolved, as the best interest of the child went ignored, into little more than patriarchal conservatism.

B. Maternal Preference and the Tender Years Doctrine

After centuries of supporting the father's presumption of right to the unitary care and control of his offspring, a number of European nations and American states began to shift their views, recognizing, as if for the first time, the sheer insensitivity and “cruelty” of denying the nature of the mother-child relationship, particularly where very young children were concerned.¹⁹

In France, this change began with the repeal of Art. 261 of the Code Civil which had previously granted the husband “superior rights” to the children of the marriage, at least provisionally, after the divorce. Two years later, a similar article was amended in Louisiana; only, rather than doing away with any preference altogether, the state amended the statute so that provisional custody would be given to the mother, “unless the judge decided that there were strong reasons to deprive her of it, either in whole or in part....”²⁰

One of the earliest cases to highlight this transition in American common law, from paternal preference in nearly all cases to maternal preference during at least the child's *tender years*, was the 1830 Maryland decision of *Helms v. Franciscus*. The *Helms* decision affirmed the father's status as “the rightful and legal guardian of all his infant children...,”²¹ but it also made several arguments in favor of maternal preference with respect to the custody of small children. Those arguments were based primarily upon the idea of the mother as being the “natural nurturer” of her young child.

The *natural nurturer* theory was very similar to the theory of *natural tenderness* in that both were grounded in what was presumably the obvious - that the “natural” parent has some inherent ability to desire and insure the success and survival of her/his offspring. The two theories, however, were also quite distinct. The latter was associated with a father's perceived natural tendency to govern and provide for the fruit of his loins (regardless of its age). The former was associated with the

mother's perceived natural tendency to comfort and protect the babe suckled at her breast.

The problem with the natural tenderness doctrine was its lack of distinctiveness. Though the father may have a natural tendency to govern his child or provide for its material needs, an independent mother is just as capable of doing the same... at least until the child is of an age at which it can be properly governed by its father. In addition, the bringing up of an infant includes, if nature's rule be not broken, breastfeeding. It would not have been completely illogical for the court to assign this duty under the authority of the mother, with little allowance otherwise. Thus, financial independence in addition to the mother's unique ability to provide nutritional sustenance to the child, which the court assumed contributed to her stronger attachment to the child and vice versa, led the court to believe that the interest of a small child was best served by the custody of his mother.²²

Moreover, there seemed to be an element of guilt on the part of court when deciding to remove a small child from its mother. In *Helms*, the court noted that, "...even a court of common law will not go so far as to hold nature in contempt, and snatch helpless, puling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father."²³ . The sense of shame, however, was altogether new. For, the court was mistaken. Under English common law, courts did indeed allow for the snatching of "helpless" infants from their mothers' bosom - literally, even in cases where the divorce was the result of cruelty on the part of the husband.²⁴

Another interesting aspect of *Helms* is that, not only did the court choose not to entertain the idea of a father's superiority of natural affection or *natural tenderness* towards his child during its infancy, the court readily denied it, by distinguishing the father as "coarse" and as, apparently, the least suited for raising a small child. According to the court, "...the mother is the softest and safest nurse of infancy". "With her", the court concluded, "it will be left in opposition to this general right of the father."²⁵

Unlike the later cases of *Bryan* and to a greater extent *Umlaut*, the court in *Helms* went beyond simply acknowledging a *natural nurturer* aspect of motherhood and, in deciding what was in the best interest of the child, the court placed what it perceived to be the need of the babe for its mother by virtue of its infancy and her perceived natural abilities to provide for its affection, nutrition, and protection above the centuries of legal history which had guaranteed the father a near-absolute entitlement to all his offspring by virtue of, if nothing else, his corresponding obligation of support. By doing so, the court put aside all notions of paternal preference and opened the door to the recognition of maternal rights as

well as the right of the child to maternal love and his need for maternal association. As the doctrine developed, the general rule became that, “in a divorce proceeding other things being equal, if a child be of tender years its custody should be given to the mother.”²⁶

In another case, *Commonwealth ex. Rel. Keller v. Keller*, both parents were equally suitable for custody. Yet, the Pennsylvania Supreme Court maintained the presumption that “...the needs of a child of tender years are best served by the mother who, in the common experience of mankind, is better fitted to have the charge of it”.²⁷ Over the next 40 years, courts continually reinforced the tender years doctrine by making statements such as the one made in the case of *Hershey v. Hershey* that “...in the absence of some compelling reason to the contrary preference is to be given the mother in awarding custody of a child of tender years”.²⁸ That which was considered “compelling”, however, often amounted to nothing short of abuse of the child or moral unfitness - as the court in *Jordan v. Jordan* put it, “open concubinage with a paramour for a substantial period of time.”²⁹

In *Jordan*, the Louisiana first circuit appellate court reversed a lower court ruling and awarded custody to a wife who had been involved in a long term affair, had spent time hospitalized for psychiatric care, and had been jobless until two months prior to the proceedings. She was awarded custody, despite the fact that the children had been living with their father for over two years prior to the proceeding.³⁰ Thus, even bouts of insanity or the threat of disrupting the stability of the child’s established home life were not necessarily enough to deny a mother custody.

So it was, when applied, that the tender years rule resulted in mothers receiving custody in cases they otherwise wouldn’t have and, at least in a few cases, probably shouldn’t have. That is not to say, however, that maternal preferences were considered with near as much absoluteness as paternal preferences had been in the past. *Tender years* only applied to young children, as teenagers were generally given the right to choose their own guardian. And, as seen in *Bryan* and *Umlaut*, fathers were still granted custody when the children were not considered by the court to be of *tender years*.

Either way, a combination of the practice of awarding custody in accordance with perceived unique maternal attributes, even those limited in effect to the smallest of children, and of the more outrageous court decisions in which women were winning when they shouldn’t have, led to a political barrage of assault on maternal preference across the nation, particularly during the 1970s and early 1980s when campaigns in opposition to maternal preference began to grow and expand. As a result, the courts and the legislatures were left with little choice but to jump on the

bandwagon as well.

In the New York case of *State ex rel. Watts v. Watts*, for example, the court claimed that the tender rules doctrine constituted “judicial error” and called it a “a blanket judicial finding of fact.” The general consensus was that what had started out as a long awaited legal affirmation of maternal rights had turned into a female-centered version of *patria potestas*, heavily biased against the father. The major legal argument against the preference was that it deprived the father of “his right to equal protection under the law”.³¹ For this reason, according to the court, there was a “trend in legislation, legal commentary, and judicial decisions” away from the presumption. The court noted the adoption of anti-presumption statutes across the nation and the decline of the official application of the rule in American courts, and made clear that that goal of the legislators and judges was to make it such that “no party [would] be presumed to be able to serve the best interests of the child better than any other party because of sex.”

In keeping with the trend, by 1981, at least twenty states had declared that any consideration of maternal preference was unconstitutional, while the practice in several others had become steadily limited.³² The demise of the tender years doctrine was championed in part by men upset with being (at least in their eyes) summarily denied custody, as well as those longing for the patriarchal days of old, and in part by feminists desiring an opportunity to free themselves from the burden of any presumption of primary responsibility in raising their own children.

A major non-constitutional argument made by opponents in the legal community was based largely on the growing independence and improved economic status of women during that time. Professor Title summed the position up quite well when he stated that, “when a woman ‘s place was in the home, the maternal preference rule may have had some marginal value as a consideration in awarding custody, today it is an invalid consideration.”³³ Ironically, it was the utter lack of independence of women in the past which kept them and their children apart. It was their acquired independence which enabled the courts to grant them custody of at least their youngest children. And, now, it was that same independence which could cost them custody under a non-preferential system.

Nevertheless, the opposing lines of thinking led legislatures and courts to adopt “gender neutral” rules and guidelines in order to pigeonhole judicial discretion. However, the rules were loosely organized, based on past traditions and theories. And, their utter lack of sufficient guidance has allowed judges ample discretion to carry on as they had in the past, adapting whichever preference they hold to the factors laid out before them. Courts are now as free as ever to award custody however they see fit, and do. Not explicitly, but implicitly under the guise of the

“best interest” standard. Only, now, the opinions are at times without reason or rationale, but are the result of personal prejudice or outside political pressures.

III. Problems with the Best Interest Standard

In custody disputes, the job of the courts has been to decide that which is in the best interest of the child. In making its decision, the courts have always taken several core factors into consideration. Initially, those factors included the perceived natural attributes of the parents. As discussed earlier, this led to fathers receiving custody in cases in which they had the economic upper hand. It later led to mothers receiving custody in cases in which the court believed they had a biological upper hand and in cases in which the children were too young for courts to overcome the guilt of snatching them away.

As the 1980s approached, an attempt was made to do away with both the paternal and maternal preference doctrines of the past via the design and adoption by courts and legislatures across the country of modern gender-neutral rules and guidelines. At present, the general rule is that the court is not allowed to presume a preference for either parent, despite any superior *natural* or biological traits.

One benefit of the best interest standard is its flexibility, as it allows the court to easily adapt its decisions to individual circumstances. Its major fault, however, is that the opportunity for implicit presumptions is still there, even if the notions of paternal preference based upon an explicit presumption of natural superiority are not.

Because the evolution of the best interest standard has been nothing more than a merging of both maternal and paternal preferences, its design is highly subjective and highly vulnerable to manipulation. This is especially true when there is no requirement that all of the factors be equally or reasonably considered. Bias judges are allowed to support preferential rulings whenever they so desire by ignoring those factors which conflict with personal points of view and making much ado over those that do not. The best interest standard as it exists today is weak and transparent; it may as well not even exist.

A. Lack of Guidance

Louisiana, Art. 134 of the Civil Code is very similar to those in other states in that it advises the court to consider “all relevant factors” including those provided in a list to be weighed by the court in its own discretion. Included among those in Louisiana are considerations previously incorporated under historical preferences, factors such as the “emotional ties” between parent and child, and the “capacity

and disposition” of each for love, affection, spiritual guidance, education, etc...,³⁴ both of which relate to the historical notions of *natural nurturer* and *natural tenderness*. The court, however, is not provided with any information as to the weight that should be given to each factor. Instead, the judge is left to infer from past attempts on the part of the parents or glean what they can from present evaluation to determine that the parents have established a bond with the child and then decide which is the strongest. Also, the court is placed in the position of predicting whether the parents are capable and likely to make such attempts in the future if given custody. This is not only subjective, but vulnerable to exacerbation by both parties. A judge preferential to either parent could use both rules to his advantage.

Another factor the court is given the option of considering is the “capacity and disposition” of the parent to provide the child with various material needs such as food, clothing, and medical care. This factor is closely related to the economic aspect of the paternal preference rule which justified awarding custody to the father because of his role as *sole provider*. Because the father provided for all of the child’s “care, maintenance, education and religious training”, he was assumed to have a “corresponding entitlement to the benefits of his children, i. e., their services and association“ as a result.³⁵ Though they may no longer be the sole providers, fathers are still the primary providers for their children’s material needs due to their higher incomes.³⁶ Thus, men are at a clear advantage when this father-friendly factor is considered. Without further guidance as to how this factor is to be measured, the mothers may not stand a chance in the courts of a judges biased in favor fathers who and who are allowed to consider or give substantially more weight to this factor than other more mother-friendly factors.

Similarly, the consideration of responsibilities for the “care and rearing of the child previously exercised” is closely related to the tender years doctrine of the maternal preference rule. Since women are usually the ones responsible for feeding, bathing, and grooming young children, arranging play-dates, baby-sitters, etc., they are at a greater advantage where this factor is concerned. Thus, a father who has not been emotionally and intimately involved in the personal goings on of his child is unlikely to fair well in a court of a judge biased in favor of mothers who is allowed to give a excessive amount of consideration to this particular factor.

Not only does the Louisiana article, and those like it, not offer guidance as to how much weight should be given to each factor provided, rarely do the comments to those articles; this leaves open doors to presumption and preference. What’s worse, in Louisiana, the court is given the discretion to act however it sees fit, with the ability to consider or reject any or all of the factors, unlike the “source provision, which required the court to reach its decision only ‘after consideration

of evidence introduced with respect to all”³⁷. Thus, there is not the balancing of the various factors that one might expect and no possibility of mutual cancellation of mother-friendly and father-friendly factors. Rather, judges are allowed to pick and choose which factors they consider most valuable. This naturally leads to inconsistency in results and a perpetuation of unfairness against both fathers and mothers. The result is a system in which the courts are allowed to move away from what is truly in the best interest of the child by using legal factors to swing their opinions in the direction of whichever preference they most favor.

B. Personal Preference

Initially, it was believed that removing the maternal and paternal preference options from judicial discretion would lessen if not end completely the perceived unfairness in the system and bias against both parents, particularly fathers. The result, however, was just the opposite. Judges have as much discretion as ever and the effects of the modern best interest standard have led to unpredictability in child custody cases across the nation. One of the primary reasons behind the inconsistency of decisions is that judges are still applying their own preferences, with noticeable differences in analysis and application of the rule by older and younger judges.

This phenomenon was evidenced in Professor Stamp’s study on the “Age Differences Among Judges Regarding Maternal Preference in Child Custody Decisions” which surveyed judges from four states (Alabama, Louisiana, Mississippi, and Tennessee) on the issue.³⁸ The study asked questions designed to “measure their beliefs with regard to maternal preference”. Those surveyed included young judges between the ages of 40 and 49 and older judges between the ages of 60 and 69. The statements to which the judges were asked to respond closely resembled the inherently preferential theories traditionally held by judges in child custody disputes. The judges’ responses reflected their inclinations with respect to specific historic theories of child custody.

One item, which dealt directly with the *tender years* doctrine, stated that: “mothers are the preferred custodian when children are under the age of 6.” In response, 36% of the youngest judges and 71% of the oldest judges agreed with the statement. In contrast, 0% of youngest judges and only 1% of the oldest ones agreed with the statement that “fathers are the preferred custodian when children are under the age of 6.” This seemed to suggest a significant maternal preference on the part of older judges.

Another item, which dealt with the *natural nurturer* theory, stated that “mothers, by nature, make better parents than fathers”. The study showed that only 5% of the

youngest judges and 46% of oldest judges agreed with the statement. Again, the older judges seem to reveal a maternal preference. Interestingly, however, though most of the youngest judges were unwilling to answer in agreement to the suggestion that mothers are, by nature, better parents, none of them were willing to agree to the statement that: “fathers, by nature, make better parents than mothers”. In fact, 68% of the youngest judges and 84% of the oldest disagreed with the *natural tenderness* related statement.

Professor Stamps suggests that the findings of the survey are consistent with reviews of appellate cases and opinions of mental and legal experts which “indicate that maternal reference still plays a definite role in many custody determinations”, and reveal a strong bias in favor of maternal preference among older judges. The author also offers an explanation for the generation gap in legal opinion. According to him, the oldest judges were the product of a time when “divorce was rare and family roles were fixed”. Young judges, on the other hand, grew up in the age in which divorce was more common and gender roles were blurring. This explanation, however, does not hold.

In 1940, the divorce rate per 1,000 was 2.0. However, it got as high as 4.3 in 1946 and did not reach that level again until 1973.³⁹ “Of the couples who married in 1950, it was 25 years before even 25 percent were divorced.”⁴⁰ In other words, both the older judges and the younger judges were born and raised in environments in which divorce, though certainly not as common as it is today, was also not experienced to significantly greater degrees between them. Even if it were true, however, it would not be wise to assume that the judges who grew up during the 1950s and 1960s were not influenced by their parents’ upbringing during the 1930s and 1940s – the period of the traditional home’s proverbial peace. It is even less wise to assume that the roles of women in the family during those eras changed to any significant degree. In the 1950s, for example, the average wife worked until her child was born, but didn’t return until her child had entered school.⁴¹ Therefore, though it is true that women were not staying home as much as before, the desires, expectations, and responsibilities with respect to rearing their children remained the same.

What is more likely an explanation for the differences between the opinions of older and younger judges is the fact that the young judges were influenced heavily during their early adulthood (in the mid to late 1970s and early 1980s) by the changing climate of that time. It is no coincidence that this period in their lives coincided with the rise of feminist mantra, father’s rights rhetoric, and the repeal of maternal preference rules across the country. Either way, attempts by judges - young or old - to adjust or interpret the factors in such a way that they align either with personal preference or outside opinion do nothing more than inhibit justice.

One example of this is Michigan case of *Ireland v. Edwards*.

In *Ireland*, a young mother filed an action for child support against her child's father only to have him petition for custody and win. The decision was unbelievable, considering the fact that, until the initial action, the child had never lived with anyone other than its mother and the father hadn't bothered to seek visitation until a year after the child's birth. Even more unimaginable was the fact that she lost custody simply because her provision for the child's care while she attended classes - a day-care center, was rejected by the trial judge due to his preference for the father's proposed provision - a "blood relative" (his mother).⁴²

Interestingly, the trial judge in the case found both parties perfectly equal or neutral in regards to every factor of the Michigan child custody statute, except the one he misinterpreted in favor of the father - "the permanence, as a family unit, of the existing or proposed custodial home or homes". According to the appellate court, which reversed the ruling, the statute had to do with the permanence of the "family unit" (i.e. the likelihood that the family would stay intact). It was completely unrelated to "an evaluation about whether one custodial home would be more acceptable than the other".⁴³

Furthermore, the father lived at his parents' home without a clue as to "his own future education, housing, or employment". It was illogical to award custody to a man so completely unfocused as to his own future, someone who had taken no interest in the child for her first year, and someone who had never taken any long term care of the child, over the mother with whom she had spent her entire life, just because his mother would be available to baby-sit. The result of the trial court's decision was not based upon a fair evaluation of the factors or the child's best interest, but upon the speculation and personal preference of the trial judge. Such is exactly the sort of decision making our system of justice should seek to avoid.

C. Societal and Political Pressures

Studies on judicial thought and the results of judicial applications of the best interest rule supposedly reveal the tendency of American judges to interject their own personal prejudices into their decision making process. However, such studies often do not discuss the pressures judges receive from the outside which influence not only judicial opinion, but society as a whole.

With respect to child custody, there are two main sources of outside influence with which judges must contend. The first of the two is the feminist regime. The second is the father's rights regime. The primary argument of both is that there is no

scientific support for any parental preferences - particularly maternal. Both groups have essentially bullied the courts into discounting or completely ignoring biological evidence in favor of a presumption of *sexual equality*. They argue that the sex of either party should never be taken into account when determining a child's best interest. This presumption, however, though legally permissive, is scientifically flawed.

Sexual equality does not exist. Biology has shown and evolutionary psychologists agree, men and women are distinct. Women, for example, have a great deal more invested in the survival of their offspring than men.⁴⁴ They are less aggressive,⁴⁵ more emotionally adept, and have better senses of touch, hearing, and sight.⁴⁶ To suggest that these traits should not be considered by a court in awarding custody of a young child is to reject human reality in favor of legal fantasy. Either way, any court's reliance on natural attributes should not be considered "arbitrary". For, such traits evolved, at least in part, for the very purpose of enabling women to do that which has been the circumstance, responsibility, desire, and expectation of them in nearly all cultures and species throughout time - to care for their young.

This reminder, however, frightens both feminists and father's rights advocates. Professor Chambers framed their argument well in his article "Rethinking the Substantive Rules for Child Custody Disputes in Divorce":

Even if a preference for women would produce slightly better dispositions for children across the generality of cases today and even if it turned out that some parenting propensities were genetically transmitted and hence unalterable, gender-based rules might transmit a harmful message to both men and women about appropriate spheres of responsibility. The harm from such a message might well be thought to outweigh the value to children to be obtained from the general rule.⁴⁷

I disagree, however, with the suggestion that what is best for the child should be outweighed by that which is best for parental and societal ego. Children suffer the most as a result of divorce proceedings. If for no other reason than that, parents who choose to divorce should be willing to put aside all notions of personal privilege or political correctness in favor of placing the child's needs paramount to their own. That would include, if it is truly to the child's advantage, a consideration of natural paternal or, in this case maternal, attributes. As one commentator put it, if the mother is "biologically or culturally or through a combination of the two better qualified for the care of children", then "the law should create a rebuttable presumption in favor of the mother."⁴⁸ Ultimately, it is the duty of the court in a child custody case to do only that which is in the child's

best interest, not to sooth the political and societal wounds of self-centered, emotionally-charged neo-activists.

IV. Suggestions

1. Swift adjudication. To allow a child custody case to extend for an unspecified period of time inevitably “aggravates the friction between the parents and adds to the tensions the child is already experiencing“. Measures should be in place to ensure that the question of permanent custody is not drawn out, but is instead handed down promptly “so that they may salvage what they can of their lives and plan the future with some degree of certainty,” regardless of the judge’s determination.⁴⁹ Thus, the best interest of the child’s emotional welfare, as well as physical, becomes of considerable importance in the process and the decision.

2. Environmental and emotional stability. Courts are often asked to infer from past acts on the part of the parents, or glean what they can from present circumstances to determine whether a parent is able to provide for his/her child. However, courts should not be placed in the position of predicting or speculating as to whether one parent or another is capable of or likely to do what they have never done before. Though the parent unused to caring for the child might actually be physically able to fumble into it relatively decently, the long term effects may not be worth the trouble. Since, after divorce, “the quality of child rearing competence” received by the child is of the utmost importance,⁵⁰ significant consideration should be given to the parent who has had the most experience in actually rearing the child, not the one who might just be able to pull it off . Significant weight should also be given, if applicable, to factors relating to the “stable, adequate environment” in which the child currently lives.

One of the primary problems with joint custody arrangements is that they can never truly exist. It is practically impossible to split either the child or his time equally between both parents. Attempts via constant migrations back and forth are disruptive and, especially in the case of very small children, potentially damaging.⁵¹ Therefore, the courts should consider it in the child’s best interest to decide upon a primary custodial parent with generous visitation rights (if warranted) to the other. Since stability is a priority in a child’s early years after divorce, the court should make every effort to limit disruption to his environment and the life he is used to leading.

3. Maintenance of the care-giver relationship. In response Professor Stamps’ survey statement that: “a mother who has performed most of the child’s nurturing and maintenance activities would be favored in custody decisions”, 97% of the youngest judges and 96% of the oldest judges agreed. Similarly, 95% of the

youngest judges and 81% of the oldest judges agreed with the statement that: “a father who has performed most of the child’s nurturing and maintenance activities would be favored in child custody decisions”.⁵²

These statistics suggest a positive point of view on the part of many judges, young and old, that it is not maternal or paternal preference that should be the deciding factor in child custody decisions, but the question of which parent has been the most directly involved, the most hands on, the “*primary caregiver*” of the child throughout its life. Still, the primary caregiver theory is viewed by some as nothing more than a smoke screen for maternal preference. That argument is valid, since women have been in the past and remain the primary caregivers of their children. In fact, during the late 1980s and well into the 1990s, after the anti-maternal preference revolution, many women put their priorities with respect to work and family in the traditional order. They reverted back, as near as possible, to the ways of the past and chose to reclaim their historical and monumental roles in their children’s lives.⁵³ A “substantial body of research shows that a significant amount of division of labor within the family still exists. Fathers work long hours outside the home, earn more, and do substantially less housework and child care.”⁵⁴

Nevertheless, the issue is not and never should have been whether or not mothers are advantaged by the primary caregiver concept by virtue of their decision to act more personally in their children’s lives. Mothers should not be punished or disadvantaged for raising their children, but that is effectively what would happen with the elimination or minimization of such activity as a judicial consideration. Rather, the issue should be whether or not it is in the best interest of the child to be raised by the parent, mother or father, who has been the most involved in his upbringing. Sources noted above with respect to stability as well as noted psychoanalyst J. Bowlby suggest that it is.

Bowlby expressed the belief that “the child who is separated from a primary caretaker early in life is more likely than other children to develop into an adult less capable than others of forming and maintaining emotional ties and to be subject to sudden depressions and to periods of acute anxiety.”⁵⁵ Thus, since the primary caregiver relationship can create stronger or necessary “emotional ties” via attachment between the parent providing personal services (as oppose to the parent providing more material ones) and the child which can aid in the child’s psychological development, then it is in the child’s best interest for that factor to be given significant weight in consideration.

4. Consideration of every and all matters which may effect the child’s interests, including whatever historical, social, and biological associations exist with respect to his parents. The suggestion that no parent should be deemed better or less fit for

custody by virtue of his sex alone makes sense, but to suggest that biological traits should be ignored completely is ridiculous for two reasons.

First of all, the courts in Louisiana are allowed to consider the “mental and physical health” of the parties in deciding custody. Generally, this factor is considered only in so far as the parent’s condition may harm the child’s interest. But, since there is no measure in the guideline related to the extent to which this factor may be used, it would be fair to argue that, since individuals with certain mental or physical inadequacies are kept from receiving custody, then it should also be the case that individuals with certain extra mental or physical abilities should be given greater consideration in custody matters. This is particularly true when they may suggest a better ability to connect with the child or a greater “capacity and disposition” to express the emotional stimulation and support the child needs.

Secondly, it would not violate the due process rights of fathers to consider such factors, despite arguments to the contrary. In *Ex Parte Divine*, the court accused the tender years doctrine of being an “unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex”.⁵⁶ Two Supreme Court cases are often cited in support of this argument, *Reed v. Reed* and *Frontiero v. Richardson*. The factual circumstances, however, are not entirely comparable.

In *Reed and Frontiero*, the court dealt with laws designed to discriminate for the sake of administrative efficiency. According to the court in *Reed*, “mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings ... is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment”.⁵⁷ The purpose of considering biological advantages of the sexes, however, would not be for the purpose of efficiency with respect to the child custody hearing. Rather, it would relate to the essential element of the hearing itself - the effect, if any, it had on the child’s interest.

In more recent cases, the Supreme Court has even allowed for gender discrimination under certain circumstances. For example, in the case of *Miller v. Albright*, the court upheld a law which established upon birth the U.S. citizenship of illegitimate foreign-born children whose mothers were U.S. citizens but did not do the same if their fathers were U.S. citizens. The court’s rationale related to a fundamental difference between men and women – mother’s know immediately of their child’s existence “due to the normal interval of nine months between conception and birth”, while an unmarried father may never know the child exists. Thus, the court concluded, the parents were not “similarly situated” because of this biologically based distinction. Similarly, in the realm of child custody, laws

relating to the biological distinctions between mothers and fathers that suggest that they are indeed differently situated such that either has a trait preferable for the child's upbringing should not be summarily dismissed or cast out as arbitrary.⁵⁸

Again, three years later, the law was challenged because it provided different rules for attaining citizenship by children born out of wedlock outside of the United States, depending on whether the mother or father had American citizenship. Again, it was upheld. In, *Tuan Anh Nguyen v. INS*, Justice Anthony M. Kennedy, stated that the law "is consistent with the constitutional guarantee of equal protection." "For a gender-based classification to withstand equal protection scrutiny it must be established 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives'".⁵⁹

In child custody law, science has shown that gender based distinctions between men and women, if embraced, may prove to be in the child's best interest. If this is the case, then classifications based upon those distinctions would serve an important governmental objective by improving the lives of its children. Furthermore, any statute allowing for the recognition of the biological attributes of men and women would not command "dissimilar treatment for men and women who are similarly situated," (as was the case in *Frontiero*).⁶⁰ If science continues to show that men and women are inherently distinct with respect to their child rearing attributes, the government's interest in having custody disputes resolved in the manner most likely to have a positive effect on the child's best interest would justify biological consideration, despite its "discriminatory" nature.

V. Conclusion

Without question, it is the duty of every judge in a child custody decision to do, to the fullest extent possible, what is in the best interest of the child. The court must consider every child as an individual and take into consideration everything that would aid in determining what is best for the child's emotional and physical well being. To do that requires the court to foster communication and cooperation between the parents, but it also requires the court to put aside any fears of political pressure and lay to rest any burden he may feel to correct centuries of perceived wrongs. Only when the child is the focus of decision-making in child custody cases will decisions made truly reflect the child's best interests.

¹ Pruett MK, et. al. (2003) Family and legal indicators of child adjustment to divorce among families with young children, J Fam Psychol. 2003 Jun;17(2):169-80.

² Elster, John (1987) Solomonic Judgments: Against the Best Interest of the Child, 54 U. Chi. L. Rev. 1. “Solomon’s method - the use of behavior in custody proceedings to decide custody - can result in a Catch - 22. “

³ This privilege was held by the *paterfamilias*, the “father of the family”. He was not necessarily the father of the household (i.e. the husband or father of the children), but often the eldest or highest ranking male in the entire family - the children’s paternal grandfather. For a brief discussion of the extent of paternal power in early European history, see Stein, Peter. (1999) Roman Law In European History. Cambridge, Cambridge University Press.

⁴ “The power of the *paterfamilias* over his descendants in his power lasted until either his or their death.” Stein, Peter. (1999) Roman Law In European History. Cambridge, Cambridge University Press. p.7.

⁵ Id. pp.5-7

⁶ *Ex Parte Devine*, 398 So. 2d 686, 688 (1981). See also: *State ex rel. Herrick v. Richardson*, 40 N.H. 272 (N.H. , 1860) in which the court held fast to the father’s “paramount right to the custody of his infant child” even against the child’s own mother.

⁷ Id.

⁸ Shanley, Mary L. (1989) Feminism, Marriage, and the Law in Victorian England, 1850-1895. Princeton, Princeton University Press. p.8.

⁹ This was the case, absent a showing of unsuitability. *Ex Parte Devine*, 398 So. 2d 686, 688 (1981).

¹⁰ Norton, Caroline Sheridan (1854) English Laws for Women in the Nineteenth Century. University of Pennsylvania (2002-2003) *Digital Library Project [Internet]* Available from: <<http://digital.library.upenn.edu/women/norton/elfw/elfw.html>> [Accessed 21 October, 2003].

¹¹ Spartacus Educational (2001) *School Net System [Internet]* Easynet Ltd, Brighton. Available from: <<http://www.spartacus.schoolnet.co.uk/Wcustody39.htm>> [Accessed 05 October, 2003]

¹² *Ex Parte Devine*, 398 So. 2d 686, 688 (1981) quoting 1 W. Blackstone, Commentaries on the Law of England 453 (Tucker ed. 1803).

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- ¹³ The mother would only receive custody provided she was of “good character”. Spartacus Educational (2001) *School Net System [Internet]* Easynet Ltd, Brighton. Available from: <<http://www.spartacus.schoolnet.co.uk/Wcustody39.htm>> [Accessed 05 October, 2003].
- ¹⁴ Elster, John (1987) *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. Chi. L. Rev. 1.
- ¹⁵ *Umlauf v. Umlauf*, 128 Ill. 378; 21 N.E. 600 (Ill., 1889) in which the lower court’s decision to grant custody of a child who had been in his mother’s custody for the last six of his ten years was reversed in favor of the father.
- ¹⁶ *Umlauf v. Umlauf*, 128 Ill. 378; 21 N.E. 600 (Ill., 1889).
- ¹⁷ Id.
- ¹⁸ *Bryan v. Bryan*, 34 Ala. 516, 518 (Ala. , 1859). See also *Commonwealth v. Briggs*, 33 Mass. 203, in which a mother was relieved of “exclusive custody and control” of her two and four year old in favor of their father who had a history of drinking to inebriation, verbal abusiveness, and physical battery.
- ¹⁹ *Ex Parte Devine*, 398 So. 2d 686, 689 (1981) quoting W. Forsyth, *A Treatise on the Law Relating to the Custody of Infants in Cases of Difference Between Parents or Guardians* 66 (1850).
- ²⁰ Title, Peter. (1976) *The Father’s Right to Child Custody in Interparental Disputes*, 49 Tul. L. Rev. 189.
- ²¹ *Ex Parte Devine*, 398 So. 2d 686, 689 (1981) quoting *Helms v. Franciscus*, 2 Bl. Ch. (Md.) 544 (1830).
- ²² See *Hershey v Hershey*, 85 SD 85, 177 NW2d 267 (1970) in which the court reversed an order changing the custody of a 22-month-old boy from his mother to his father.
- ²³ *Ex Parte Devine*, 398 So. 2d 686, 689 (1981) quoting *Helms v. Franciscus*, 2 Bl. Ch. (Md.) 544 (1830).
- ²⁴ See *R. v. De Manneville*, 5 East. 221, 102 E.R. 1054 (1804), in which the mother was denied custody of a child not yet weaned despite the cause of the divorce being the undisputed cruelty of the father. Université de Montréal (2002-2003) *LexUM System [Internet]* Cour Suprême du Canada. Available from: <<http://www.canlii.org/ca/jug/csc/1993/1993csc117.html>> [Accessed 05 October, 2003].
- ²⁵ Id.

²⁶ *Lewis v. Sisney*, 205 Okla. 599, 239 P.2d 787, 1952 OK 5, (Okla., 1952). See also: *Commonwealth ex rel. Keller v. Keller*, 90 Pa.Super. 357, 1927 WL 4590, (Pa.Super. 1927) in which the court stated that “...if there is any preference to be given to the parties aside from the fact that the mother is the natural guardian for an infant, it should be given to her.”

²⁷ *Commonwealth ex rel. Keller v. Keller*, 90 Pa.Super. 357, 1927 WL 4590, (Pa.Super. 1927)

²⁸ *Hershey v. Hershey*, 85 S.D. 85, 90 (S.D. , 1970). See also *Moore v. Moore*, 212 Va. 153, 155 (Va. , 1971) in which the court states that, “the mother is universally recognized as the natural guardian and custodian of her children of tender years...”.

²⁹ *Jordan v. Jordan*, 294 So. 2d 261, (La. App. 1st Cir. 1974).

³⁰ *Jordan v. Jordan*, 294 So. 2d 261, (La. App. 1st Cir. 1974). See *Lyckburg v. Lyckburg*, 140 So. 2d 487 (La. App. 1st Cir. 1962) in which the wife was given custody despite being twice hospitalized in a mental institution. And also, *Fontenot v. Fontenot*, 327 So. 2d 678 (La. App. 1st Cir. 1976) in which the court affirmed a decision awarding custody to the wife despite her adultery, because she intended to correct the error of her ways by marrying her “paramour“.

³¹ *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285, 77 Misc.2d 178, (N.Y.Fam.Ct., 1973)

³² *Ex Parte Devine*, 398 So. 2d 686, 691 (1981)

³³ Title, Peter S. (1976) The Father’s Right To Child Custody In Inter-parental Disputes, 49 Tul. L. Rev. 189.

³⁴ La. C.C. Art. 134. (2004).

³⁵ *Ex Parte Devine*, 398 So. 2d 686, 688 (1981).

³⁶ “Median weekly earnings for women who were fulltime wage and salary workers were \$530 in 2002, or 78 percent of the \$680 median for their male counterparts.” Highlights of Women’s Earnings in 2002. U.S. Dept. of Labor, Bureau of Labor Statistics, Washington, DC. September 2003. Report 972. Available from: <<http://www.bls.gov/cps/cpswom2002.pdf>> [Accessed 20 October, 2003]

³⁷ La. C.C. Art. 134. (2004). See Id. cmt. b.

³⁸ Stamps, Leighton E. (2002) Age Differences Among Judges Regarding Maternal Preference In Child Custody Decisions, 28 Court Review 18.

³⁹ United States Department of Health and Human Services, Centers for Disease Control and Prevention 2003, Divorces and annulments and rates: United States, 1940–90, Monthly Vital Statistics Report, Vol. 43, No. 9(S) Table 1 (1995) Available from: < <http://www.cdc.gov/nchs/fastats/pdf/43-9s-t1.pdf>> [Accessed 05 October, 2003].

⁴⁰ Paul, Pamela. (2003) The Starter Marriage and the Future of Matrimony, Random House. p.23.

⁴¹ Id. p. 24.

⁴² *Ireland v. Smith* , 214 Mich. App. 235, 542 N.W.2d 344, 349 (Mich. App., 1995).

⁴³ *Ireland v. Smith* , 214 Mich. App. 235, 542 N.W.2d 344, 349 (Mich. App., 1995).

⁴⁴ “In mammals, fertilization and gestation occur within the female, and after birth, mothers provide the primary nutritional support for their offspring until they are weaned. In contrast, the male’s investment in the next generation may be as little as the sperm he contributes.” Bjorklund David, et. al. (2002) Child Development and Evolutionary Psychology, Child Development. 2002 Nov/Dec; 71(6): 678-1708.

⁴⁵ "This study affords us neurobiological evidence that women may have a better brain capacity than men for actually 'censoring' their aggressive and anger responses." Gur Ruben C., et. al. (2002) Possible Basis Found for the Cliché Depicting Men as More 'Hot-Headed' than Women. University of Pennsylvania. (2002-2003) *University of Pennsylvania Health System [Internet]* Press Releases. Available from: <http://www.uphs.upenn.edu/news/News_Releases/sept02/Aggression.html> [Accessed 20 October, 2003].

⁴⁶ Rossie, Alice. (1984) Gender and Parenthood, 49 A.M. Soc. Rev. 1.

⁴⁷ Chambers, David L. (1984) Rethinking the Substantive Rules For Child Custody Disputes In Divorce, 83 Mich. L. Rev. 477.

⁴⁸ Title, Peter. (1976) The Father’s Right to Child Custody in Inter-parental Disputes, 49 Tul. L. Rev. 189. quoting : Oster, Custody Proceeding: A Study of Vague and Indefinite Standards, 5 J. Fam. L. 21, 29-32 (1965).

⁴⁹ *Eisel v. Eisel*, 261 Minn. 1 (Minn. , 1961).

⁵⁰ “In particular, the most important factors that shape long-term adjustment are (1) the amount of parental

conflict children are exposed to and (2) the quality of parenting or childrearing competence they receive.“ Teyber, Edward. (2001) Helping Children Cope With Divorce, Jossey-Bass. p. 20.

⁵¹ “Children rely on day-to-day routines and predictability for a sense of stability and security in their lives. when parents divorce, [they] experience feelings of uncertainty and instability that are worsened if there also is a lot of change in their day-to-day routines” .Long, Nicholas. et.al. (2002) Making Divorce Easier on Your Child: 50 Effective Ways to Help Children Adjust, McGraw-Hill/Contemporary Books. p. 110.

⁵² Stamps, Leighton E. (2002) Age Differences Among Judges Regarding Maternal Preference In Child Custody Decisions, 28 Court Review 18.

⁵³ “In the 1980s, the so-called resurgent mommy track was extensively covered by the media. In the 1990s, the stay-at-home mom decision gained a new respect, and importantly, it did so in the mainstream. ...Surveys show that young women, many daughters of women who worked full-time, take more of an interest in raising children full-time than did their counterparts of the previous two decades. In a 1995 poll, more women were likely to want to stay at home and care for their families than to work outside the home (31 percent versus 27 percent in 1989).” Those numbers reached as high as 50 percent among the wealthiest Americans. Paul, Pamela. (2003) The Starter Marriage and the Future of Matrimony, Random House. p.71.

⁵⁴ MacCoby, Eleanor and Mnookin, Robert. (1992) Dividing the Child: Social & Legal Dilemmas of Custody, Harvard Press. p. 22

⁵⁵ Chambers, David L. (1984) Rethinking the Substantive Rules For Child Custody Disputes In Divorce, 83 Mich. L. Rev. 477.

⁵⁶ Id. Interestingly, this was said immediately after the court affirmed the traditional notion of paternal preference - that men are the natural custodians of their children.

⁵⁷ *Reed v. Reed*, 404 U.S. 71 (U.S. , 1971).

⁵⁸ *Miller v. Albright*, 523 U.S. 420 (U.S., 1998).

⁵⁹ *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (U.S. , 2001)

⁶⁰ *Frontiero v. Richardson*, 411 U.S. 677 (U.S. , 1973).