

2017

Distributing Children As Property: The Best Interest Of The Children Or The Best Interest Of The Parents?

Darya Hakimpour

Follow this and additional works at: <https://lawcommons.luc.edu/clrj>



Part of the [Family Law Commons](#), and the [Juvenile Law Commons](#)

Recommended Citation

Darya Hakimpour, *Distributing Children As Property: The Best Interest Of The Children Or The Best Interest Of The Parents?*, 37 CHILD. LEGAL RTS. J. 128 (2020).

Available at: <https://lawcommons.luc.edu/clrj/vol37/iss1/4>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Children's Legal Rights Journal by an authorized editor of LAW eCommons. For more information, please contact law-library@luc.edu.

Distributing Children As Property: The Best Interest Of The Children Or The Best Interest Of The Parents?

*By: Darya Hakimpour**

I. INTRODUCTION

Recognizing that half of marriages in the United States result in divorce¹ and that almost half of children born in the United States are born out-of-wedlock,² it comes as no surprise that child custody remains a highly debated and controversial issue within the legal field. Studies show that two out of every five children in the United States will directly feel the repercussions, familial breakdown, and dramatic lifestyle changes that stem from divorce.³ By swinging the pendulum from one extreme arrangement to the other, guidelines and presumptions regarding child custody have repeatedly gone from one failing idea to the next.⁴ This cyclical disaster leaves almost half of our nation's children as innocent victims who suffer the devastating consequences of a recurring legal failure.⁵

In many states, including California, the standard currently used to determine child custody is “the best interest of the child.”⁶ There are numerous considerations that the court may take into account when it decides what arrangements should be made for the child. These factors include: the welfare of the child, the amount of contact the child has had with each parent, and

* J.D. 2016, Whittier Law School; B.A. 2012, University of California Irvine. I would like to thank Professors Erez Aloni and Deborah Forman for their support, encouragement and helpful feedback.

¹ See Stephan J. Bahr, *Social Science Research on Family Dissolution: What It Shows and How It Might Be of Interest to Family Law Reformers*, 4 J. L. & Fam. Stud. 5, 5 (2002).

² Michelle Castillo, *Almost Half of First Babies in the U.S. Born to Unwed Mothers*, C.B.S. NEWS, (Mar. 15, 2013), <http://www.cbsnews.com/news/almost-half-of-first-babies-in-us-born-to-unwed-mothers/>.

³ Bahr, *supra* note 1, at 5.

⁴ See generally Linda D. Elrod, *Historical Perspective*, in CHILD CUSTODY PRACTICE AND PROCEDURE § 1:5 – 1:7 (Westlaw 2015) (a presumption of custody for the father, then the “tender years” doctrine presuming custody for the mother, and finally the “best interest” test advocating for joint custody).

⁵ See Bahr, *supra* note 1, at 5.

⁶ CAL. FAM. CODE § 3011 (West, Westlaw through 2016 Legis. Sess.).

the parents' continuous use of controlled substances.⁷ Regardless of these various considerations, there remains an incredibly strong *de facto*⁸ presumption that joint custody⁹ is in the best interest of a child.¹⁰

Though joint physical custody may be in the best interest of many children in theory, it does not serve the long-term best interests of children in practice. Rather, it takes an idealistic and unrealistic approach to this pertinent matter. Joint physical custody essentially treats children as property that should be similarly distributed between separated parents. The presumption or *de facto* preference of joint physical custody consequently puts the interests of the parents before the interests of the children. Therefore, it profoundly contradicts the standard allegedly used by the courts to determine custody. To truly serve the best interests of a child, the court should change its inclination to place children in these arrangements and adopt a rebuttable presumption that sole physical custody is in the best interest of the child. The parent that the court believes will better serve the best interests of the child should be given physical custody and the other parent should be given regular, consistent contact through visitation.

This article will explore the unresolved and continuously challenging issue of child custody. It will only directly address physical custody, but it should be noted that many of the arguments and analysis also apply to legal custody.¹¹ Section II will investigate how courts have

⁷ *Id.*

⁸ A Latin expression that means “being such in effect though not formally recognized.” *De Facto*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/de%20facto> (last visited October 20, 2016).

⁹ See DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & DAVID D. MEYER, CONTEMPORARY FAMILY LAW 743-45, 754-755 (3d ed. 2012). There are two types of custody – physical and legal. Physical custody is the actual physical care, responsibility and housing of a child. Legal custody is the decision-making power regarding a child, including decisions about health, education, religious practices, etc. *Id.* Joint custody results when both parents have shared and significant legal and/or physical custody of the child, whereas sole custody means one parent has a majority of legal and/or physical custody of the child. See CAL. FAM. CODE § 3003-07 (West, Westlaw through 2016 Legis. Sess.).

¹⁰ 33 CAL. JUR. 3D FAM. LAW § 974 (2014).

¹¹ Henceforth, “custody” shall refer to physical custody unless otherwise noted.

historically determined child custody and how decisions have transformed through time. Section III will examine the modern approaches used in determining custody. Section IV will discuss the standard exercised by courts today: the best interest of the child. Section V will discuss the action taken in Australia with regards to child custody, specifically by implementing the Family Law Act, and discuss the results of the studies conducted on Australian families following the Act's passage. Section VI will contemplate the "gender-neutral" approach, the problems with joint custody, the factors used by the court in determining sole custody, significant arguments in favor of and against sole custody, and the issue of father's rights in regard to child custody. Finally, in Section VII, I will present a brief conclusion explaining the direction that should be taken in the legal field in order to more adequately accomplish the goal of safeguarding children, minimizing their potential damage, and genuinely ensuring their best interests in the future.

II. HISTORICAL PERSPECTIVE

Before the 19th century, fathers automatically obtained custody of their children.¹² This principle stemmed from Roman Law, which was later adopted by English Law, and subsequently also embraced by American Law.¹³ Because men were generally the only financial providers for the family during the time, the father was the only parent considered capable of maintaining control and custody of the children.¹⁴ At that time, the father was considered to be in total control of his property and household, so he was presumed the appropriate custodial parent.¹⁵ Furthermore, the father was seen as more capable of financially providing and taking care of the

¹² See LINDA D. ELROD, *CHILD CUSTODY PRACTICE AND PROCEDURE*, § 1:5 (Westlaw 2015).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

children; this argument was partially attributed to women's lack of property rights and resources during this time.¹⁶

By the early 1900s, the law drastically shifted from favoring the father to favoring the opposite parent.¹⁷ The Tender Years Doctrine, which strongly favored mothers, quickly became the favored approach in determining issues of child custody.¹⁸ This doctrine marked the commencement of a strong bias in favor of mothers that persists in cases of child custody to this day.¹⁹ The principle first originated and gained traction under the theory that the mother should raise children under three years old, then subsequently custody should shift back again to the father.²⁰ The philosophy was that mothers obtained the innate gift of showering small children of "tender years" in the affection, nurture, and love they profoundly required.²¹ Shortly thereafter, the courts maintained that if the child's innately nurturing mother were the superior parent for a certain age range, her parenting would be superior to the father's regardless of the child's age.²² Subsequently, the courts and the general public strongly presumed that, following a separation, mothers should attain and maintain custody regardless of even the most obvious moral flaws and character deficiencies.²³ In one instance, the court explained:

¹⁶ See SHANNON D. SEXTON, *A Custody System Free of Gender Preferences and Consistent With the Best Interests of the Child: Suggestions for a More Suitable Custody System*, 88 KY. L. J. 761, 766 (2000).

¹⁷ See ELROD, *supra* note 12, at § 1:6.

¹⁸ See generally Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423 (1976).

¹⁹ Robert Hughes, Jr., *Are Custody Decisions Biased in Favor of Mothers?*, THE HUFFINGTON POST, (Nov. 29, 2011), http://www.huffingtonpost.com/robert-hughes/are-custody-decisions-bia_b_870709.html; see SEXTON, *supra* note 16, at 781-92.

²⁰ See ELROD, *supra* note 12, at § 1:5.

²¹ See *Freeland v. Freeland*, 159 P. 698, 699 (Wash. 1916).

²² See generally ELROD, *supra* note 12; See SEXTON, *supra* note 16, at 700 ("unless the mother was proven unfit," which is an extremely difficult standard, "the mother was awarded custody").

²³ See also *Random v. Random*, 170 N.W. 313, 314 (1918); *Hines v. Hines*, 185 N.W. 91, 92 (1921); *Duncan v. Duncan*, 80 So. 697, 703 (Miss. 1919); *McKay v. McKay*, 149 P. 1032, 1032 (Or. 1915); *Jenkins v. Jenkins*, 181 N.W. 826, 827 (Wis. 1921); *Phillips v. Phillips*, 149 P.2d 967, 971 (Or. 1944); *Shrout v. Shrout*, 356 P.2d 935, 936 (Or. 1960); *Bruce v. Bruce*, 285 P. 30, 37 (Okla. 1930); *Ellis v. Johnson*, 260 S.W. 1010, 1012 (Mo. Ct. App. 1924).

Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than a father's. For these reasons courts are loathe to deprive the mother of the custody of her children²⁴

This excerpt from the court clearly illustrates that in cases of child custody under the prevailing influence of the Tender Years Doctrine, the legal system blatantly and unapologetically discriminated based on gender.²⁵ While following this philosophy, the courts erroneously presumed that even the foulest, most substandard mother - simply because of her gender - could provide a child overwhelmingly more than even the best father could.²⁶

By the 1950s, the courts in over forty states had accepted and adopted the Tender Years Doctrine.²⁷ Regardless of its growing approval and recognition among the courts, criticism toward the doctrine grew by the 1970s.²⁸ Some states rightfully changed their view; they reasoned that the Tender Years Doctrine further perpetuated gender-stereotypes.²⁹ Eventually, the doctrine was held unconstitutional under the Equal Protection Clause granted by the 14th Amendment.³⁰

III. MODERN APPROACH

Presently, there are two popular attitudes in determining child custody: the preference for the primary caretaker and the preference for joint custody.³¹

²⁴ *Id.*

²⁵ *Id.* SEXTON, *supra* note 16, at 769-770; See ROBERT J. BREGMAN, *Custody Awards: Standards Used When the Mother Has Been Guilty of Adultery or Alcoholism*, 2 FAM. L. Q. 384, 410 (1968).

²⁶ *Id.*

²⁷ See ELROD, *supra* note 12, at §1:6.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See *Pusey v. Pusey*, 728 P.2d 117, 119-24 (Utah 1986).

³¹ *Id.* at 682; see ABRAMS, *supra* note 9, at 675.

In jurisdictions with the preference or presumption of awarding custody to the primary caretaker, the rationale is that children should remain in the care and control of the parent who was responsible for most of the children's day-to-day tasks.³² The preference toward the primary caretaker would give a parent sole custody and the other parent visitation.³³ Though this perspective may seem gender-neutral on the surface, it still continues the gender-biased view that mothers are the dominant and more responsible parent.³⁴ Thus, it seems to simply be a camouflaged version of the transparently discriminatory Tender Years Doctrine used in the past.³⁵

Jurisdictions that have a preference or presumption for joint custody argue that a child who has the same or almost equal contact³⁶ with each parent leads a healthier life.³⁷ In theory, this may be true. However, in actuality, there are many concerns with this approach. California,³⁸ like many other states, uses a "Best Interest" test to determine custody; when deciding what is in the child's best interest, there remains a very strong preference for joint custody.³⁹

Under the "Best Interest" test in California, the judge is the ultimate authority and has broad discretion to determine what custody arrangement would be best for the child given a number of factors and circumstances.⁴⁰ These factors include considerations of the health, safety and welfare of the child, any history of abuse by one parent, the nature and amount of contact

³² See *Pikula v. Pikula*, 274 N.W.2d 705, 711-12 (Minn. 1985).

³³ See ELROD, *supra* note 12, at § 1:9.

³⁴ *Id.*

³⁵ ABRAMS, *supra* note 9, at 686.

³⁶ Many states, such as California, do not require an exactly equal 50/50 split to be considered joint custody. See CAL. FAM. CODE § 3004 (West, Westlaw through 2016 Legis. Sess.). The requirement may be that each parent has significant periods of physical custody of the child. *Id.*

³⁷ See ELROD, *supra* note 12, at § 1:7.

³⁸ CAL. FAM. CODE § 3080 (West, Westlaw through 2016 Legis. Sess.).

³⁹ See CAL. FAM. CODE § 3080 (West, Westlaw through 2016 Legis. Sess.); see CAL. FAM. CODE § 3020 (b) (West, Westlaw through 2016 Legis. Sess.); see CAL. FAM. CODE § 3040 (West, Westlaw through 2016 Legis. Sess.).

⁴⁰ See ELROD, *supra* note 12, at § 1:7.

with both parents, and the habitual or continual illegal use of controlled substances.⁴¹ Though many states, including California, statutorily forbid any presumption for sole or joint custody,⁴² the courts cling tightly to the *de facto*⁴³ presumption that joint custody is in the best interest of the minor child.⁴⁴

IV. BEST INTEREST OF THE CHILD STANDARD

The best interest of the child standard is intended “to maximize the child’s opportunity to develop into a stable, well-adjusted adult.”⁴⁵ It requires the contemplation of all relevant factors⁴⁶ and considers custody by looking at the totality of the circumstances.⁴⁷ Therefore, one factor alone does not determine custody.⁴⁸

The child’s health, safety, and welfare are the most important considerations.⁴⁹ The standard encompasses very expansive and elusive considerations. The quality and nature of the home, incorporation of the child into the home, type of guidance provided by the custodial parent, and the ability of each parent to cater to the child’s emotional and intellectual needs are all weighed.⁵⁰ The court also considers any history of familial abuse by a parent and the quality and quantity of contact the minor child has had with each of the parents.⁵¹ Furthermore, the court

⁴¹ CAL. FAM. CODE § 3011 (West, Westlaw through 2016 Legis. Sess.).

⁴² *Id.* § 3040.

⁴³ MERRIAM-WEBSTER, *supra* note 8.

⁴⁴ *See* 33 Cal. Jur. 3d Fam. L. § 974; CAL. FAM. CODE § 3020(b) (West 2013).

⁴⁵ Keith R. v. Superior Court, 96 Cal. Rptr. 3d 298, 301 (Ct. App. 2009).

⁴⁶ *See* ELROD, *supra* note 12, at § 17:6.

⁴⁷ *See id.* at § 1:7.

⁴⁸ *See id.* at § 17:6.

⁴⁹ CAL. FAM. CODE § 3020(a) (West, Westlaw through 2016 Legis. Sess.).

⁵⁰ *See* ELROD, *supra* note 12, at § 17:6; *Family Law Act*, 1975, Sect. (Cth) s 65DAA(3), (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s65daa.html.

⁵¹ CAL. FAM. CODE § 3011 (West, Westlaw through 2016 Legis. Sess.); *See also* CAL. FAM. CODE § 6203 (West, Westlaw through 2016 Legis. Sess.).

may contemplate the ability of each parent to meet the child's needs based on the child's age, gender, and physical, moral, intellectual, and psychological needs.⁵²

V. CHILD CUSTODY IN AUSTRALIA

To better assess the potential consequences of joint custody arrangements generally and a potential joint custody presumption, an exploration of the outcomes that arise out of such a presumption are helpful to determine whether joint or sole custody better serves the best interest of the child. In Australia, joint custody became the presumption adopted into legislation.⁵³ After joint custody was implemented on a large scale, studies were conducted to discover whether the new presumption had achieved its intended goals.⁵⁴

A. Family Law Act (1975)

Australia's Family Law Act of 1975 explained that both parents are responsible for the care and welfare of their children until the children turn eighteen years old.⁵⁵ In 2006, Australia reformed their approach to family law; it actively endorsed the presumption that arrangements that involve *equal* shared responsibilities and cooperation between the parents is in the best interest of the child in most cases.⁵⁶

Prior to the 2006 reform, joint custody occurred in less than 10% of the divorcing families in Australia.⁵⁷ Therefore, the custodial arrangement and presumption that the legislature

⁵² See ELROD, *supra* note 12, at § 1:7.

⁵³ *Family Law Act*, 1975, (Cth) s 61DA, (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s61da.html.

⁵⁴ Jennifer McIntosh, *Legislating for Shared Parenting: Exploring Some Underlying Assumptions*, 47 FAM. CT. REV. 389, 389 (2009).

⁵⁵ *Family Law Act*, 1975 (Cth) s 61DA, (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s61da.html.

⁵⁶ *Family Law Act* 1975 Sect. (Cth) s 65DAA(3) (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s65daa.html.

⁵⁷ *Id.*

had adopted was relatively rare prior to the reform.⁵⁸ The new legislation significantly changed the family dynamic after separation or divorce.⁵⁹ Some even alleged it was the “most sweeping innovation to family law since the passage of no-fault divorce.”⁶⁰

Though this reform changed most family dynamics, the change only benefited a small group: separated or divorced parents who were able to get along and communicate well with their former spouses.⁶¹ Unsurprisingly, the legislation created a presumption for equal parenting that only further damaged the families that already had higher levels of conflict. By essentially forcing these parents to continue very involved relationships, the toxicity of their relationships furthered until the parents ultimately lacked responsiveness to one another.⁶²

B. Studies on Sustaining Australia's Joint Custody Orders

After Australia implemented the presumption in favor of equal parenting time, a four-year study of elementary-school-aged children in high conflict families with joint parenting was conducted.⁶³ The study consisted of over 130 families, who switched from sole custody arrangements to joint custody arrangements⁶⁴ during mandatory mediation.⁶⁵ The presumption implemented in Australia favoring equal parenting likely influenced the general settlement of

⁵⁸ McIntosh, *supra* note 54, at 391.

⁵⁹ See Matthew Fynes-Clinton, *Children Suffer When Law Splits Parenting Equally*, COURIER MAIL (November 9, 2008), <http://www.couriermail.com.au/news/national/custody-is-not-fair/story-e6fre000-111117985645>.

⁶⁰ *Id.*

⁶¹ *Id.*; See also Claire M. Kamp Dush, Letitia E. Kotila & Sarah J. Schoppe-Sullivan, *Predictors of Supportive Coparenting After Relationship Dissolution Among At-Risk Parents*, J. FAM. PSYCHOL. 356, 356-65 (2011), (Some consistent predictors of successful co-parenting between the studies.).

⁶² *Id.*

⁶³ Margaret Kelaher, Caroline Long, Jennifer McIntosh, Bruce Smyth, & Yvonne Wells, *Post-Separation Parenting Arrangements: Patterns and Developmental Outcomes: Studies of Two Risk Groups*, FAM. MATTERS, 86, 40-48, (2011), <https://aifs.gov.au/publications/family-matters/issue-86/post-separation-parenting-arrangements> [*Hereinafter*, Post-Separation].

⁶⁴ *Id.* (for the case of this study, parents were in a joint custody, or “shared parenting,” arrangement as long as both parents maintained at least 35% of the overnights.)

⁶⁵ *Id.* at 41.

joint custody,⁶⁶ since the parents had reason to believe that the court would likely follow the presumption even if the parents went to trial.

At the end of the four-year study, most of the parents in joint custody⁶⁷ arrangements voluntarily returned to the arrangements that existed for those families prior to the mediation.⁶⁸ Typically, this meant that the mother regained sole custody of the child.⁶⁹ In fact, at the end of the four years, only about a quarter of the families in the study remained in a joint custody arrangement.⁷⁰ Therefore, high conflict parents who settled on equal arrangements during mediation failed to maintain the arrangement less than four years later.⁷¹ It follows, then, that sole custody arrangements were much more stable in situations where joint custody was somehow imposed on the parents.⁷²

1. Shared Characteristics of Groups

In this study, the very limited number of families who were able to maintain a joint custody arrangement had common characteristics.⁷³ The children were very young males, whose parents lived close to each other.⁷⁴ The fathers had high academic accomplishments; the mothers had both higher education *and* high incomes.⁷⁵ Finally, the mother was settled in a romantic relationship.⁷⁶ Compared to the other families in the study, these families were also the least

⁶⁶ *Family Law Act*, 1975 (Cth) s 65DAA(3) (Austl.), available at http://www.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s65daa.html.

⁶⁷ Post-Separation, *supra* note 63, at 41 (study specified that as long as both parents maintained at least 35% of the overnights, they were in a joint custody – or “shared parenting” – arrangement).

⁶⁸ *Id.* at 42.

⁶⁹ *Id.*

⁷⁰ *Id.* at 42 (study specified that as long as both parents maintained at least 35% of the overnights, they were in a joint custody (or “shared parenting”) arrangement.)

⁷¹ *Id.*

⁷² Post-Separation, *supra* note 63, at 40-42.

⁷³ *Id.* at 42.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*; See also Dush, Kotila & Schoppe-Sullivan, *supra* note 61 (some consistent predictors of successful co-parenting between the studies.).

spiteful and most respectful toward one another.⁷⁷ In these very limited circumstances, parents were able to maintain a joint custody agreement throughout the four years of the study.⁷⁸

Families who were unable to maintain a joint custody arrangement also shared qualities similar to one another. In these families, the father generally had lower educational accomplishments, the children were at least eleven years old when joint custody was implemented, the children reported lower emotional bonds with their father when the arrangement began, and the mothers had a high level of animosity toward the child's father.⁷⁹ Because these characteristics are broader, more families would likely fall into this category; thus, it is probable that most families would not be able to sustain a joint custody arrangement for many years.⁸⁰

In some of the families, the father became an absent figure altogether; in all of these cases, the father reported very high and consistent levels of conflict throughout the course of the study with the other parent.⁸¹ This finding supported the vast literature that correlates sustained levels of high conflict to the eventual loss of contact between one parent and the child.⁸²

2. The Child's Perspective

Though parents in the study generally reported they were content with the joint custody arrangement by the end of the four-year period, the children in joint custody arrangements were the unhappiest of all the children in different living arrangements.⁸³ The child's displeasure and frustration with joint custody remained present even when the parents did not adopt a rigid

⁷⁷ Post-Separation, *supra* note 63, at 42.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See id.* at 42.

⁸¹ *Id.*

⁸² Dush, Kotila & Schoppe-Sullivan, *supra* note 61.

⁸³ *Id.*

parenting schedule.⁸⁴ The children in joint custody arrangements were also more likely than the children in other living arrangements to desire a modification to their custodial time-share.⁸⁵ Although joint custody became easier for the parents involved, the arrangement proved more difficult for the children involved⁸⁶

Additionally, the children in joint custody arrangements were the most likely to feel caught in the middle of their parents, their parents' wishes, and their parents' conflicts.⁸⁷ Conversely, children in sole custody arrangements reported the largest decrease in feeling involved in a loyalty conflict or parental conflict from the start of the study.⁸⁸ For those children, the sole custody arrangement had more adequately sheltered them from feeling caught in between the parental struggle. Lastly, the children who maintained joint custody arrangements throughout the four-year study had more trouble focusing and finishing tasks than the children in sole-custody arrangements.⁸⁹ Rather than focusing on whether the parents' animosity toward sharing equal time with the child subsides, more emphasis should be placed on considering joint custody through the lens of a child.

VI. ANALYSIS OF THE AUTHOR

A. The Attempted "Gender Neutral Approach"

Because women are more likely to take on most of the child rearing prior to a separation or divorce,⁹⁰ the primary caretaker is a gender-neutral consideration on its face but not in

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Post-Separation, *supra* note 63, at [pincite].

⁸⁷ Dush, Kotila, & Schoppe-Sullivan, *supra* note 61, at [pincite].

⁸⁸ *Id.*

⁸⁹ *Id.*; The study noted that the children who already had these difficulties were omitted from this calculation. *Id.*

⁹⁰ ABRAMS, *supra* note 9, at 686.

application.⁹¹ It effectively turns a blind eye to the reality that countless changes often occur as an aftermath of separation and divorce – including finances, living arrangements, friends, and day cares or schools for the children.⁹² Among these changes could be the pattern of care by the parent who was not considered the primary caretaker prior to the divorce.

Further, divorce and separation may also initiate a change in caretaking roles. This approach fails to consider many circumstances where such an analysis would be unjust to the parents and children.⁹³ For unwed fathers, for instance, the opportunity to take on such duties may have never been an option while their child is in the care and control of the mother of their children.⁹⁴ This presumption blatantly ignores scenarios where mothers, who may use their children as pawns to reflect their rage for a failed relationship or withhold their children to protect their current relationship, thwart fathers from establishing a relationship with their children.⁹⁵ It ignores the fact that aside from a child support obligation, unmarried fathers essentially lack any legal relationship with their child until they begin paternity proceedings to secure visitation through the court.⁹⁶ Furthermore, the primary caretaker approach fails parents who have been deployed to serve our country; under this approach, these parents' planned short-term sacrifice to secure a better life for their children and country has the potential to become a

⁹¹ See Weitzman & Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 471, 521 (1979).

⁹² See generally Marion Gindes, Ph.D., *The Psychological Effects of Relocation for Children of Divorce*, 15 J. AM. ACAD. MATRIM. LAW. 119, 124-26 (1998).

⁹³ Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L. Q. 381, 400 (2008).

⁹⁴ See *Lehr v. Robertson*, 463 U.S. 248, 268-70 (1983).

⁹⁵ See *id.*; See *Caban v. Mohammed*, 441 U.S. 380, 382 (1979).

⁹⁶ See *Michael H. v. Gerald D.*, 491 U.S. 110, 142 (1989); *Matter of Appeal in Pima County Juvenile Severance Action No. S-114487*, 875 P.2d 1121, 1129 (1994). Kevin Noble Maillard, *Fatherhood Is One Area Where Men Are Unequal*, N.Y. TIMES (June 13, 2014), <http://www.nytimes.com/roomfordebate/2014/06/13/fathers-rights-and-womens-equality/fatherhood-is-one-area-where-men-are-unequal>; See *Stanley v. Illinois*, 405 U.S. 645 (1972); see generally *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

life-long loss of a parent-child relationship.⁹⁷ Because of the high cost associated with custody proceedings,⁹⁸ the difficulty maneuvering through the legal system, and the public notion that courts are biased toward mothers,⁹⁹ the primary caretaker approach disregards that many fathers consider court a last resort.

Also, the impression that whichever parent has been the primary parent in the past is the parent who is more capable of being primarily responsible for the child in the future is a flawed and counterproductive approach to determining custody. When expecting the arrival of a new child, many couples plan how their lives must change and discuss how to arrange their lives to best serve their household needs and the needs of the new child. Throughout different chapters of the child's life, these decisions are often revisited and adjusted to better fit the changing needs of the household and family. Though situations that prompt a change in family or household dynamics commonly occurs in intact families, the primary caretaker approach does not consider the possibility of adapting prompted by separation.¹⁰⁰ Instead, it attempts to keep parenting schedules as similar as possible¹⁰¹ – even if another alternative would better serve the growing needs of the child in this stage of adjustment or even if the primary caretaker's parenting would be different under the new circumstances.¹⁰²

⁹⁷ See ELROD & DALE, *supra* note 87, at 391.

⁹⁸ Anne-Marie Dorning, *How to Beat the High Cost of Divorce*, ABC NEWS (July 2, 2007), <http://abcnews.go.com/Business/LifeStages/story?id=3323282> (in major cities, a high-conflict custody battle could cost at least \$75,000-\$100,000).

⁹⁹ Nina Shapiro, *Ripped Apart*, SEATTLE WEEKLY NEWS (Jan. 17, 2012), <http://archive.seattleweekly.com/2012-01-18/news/ripped-apart/>; see *Custodial Mothers and Fathers and Their Child Support: 2007*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/childsupport/chldsu07.pdf> (Courts are more likely to award custodial mothers more child support than custodial fathers).

¹⁰⁰ See ELROD & DALE, *supra* note 93, at 388.

¹⁰¹ ABRAMS, *supra* note 9, at 682-683.

¹⁰² ANDREA CHARLOW, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL. REV. 266, 275 (1987).

Furthermore, the reason for separation and divorce may stem from differences in parenting style and beliefs.¹⁰³ The primary caretaker presumption or factor fails to recognize that the family's pre-established arrangement may not serve the needs of the child as well as a newly proposed arrangement. Though children need stability and consistency,¹⁰⁴ the approach wrongly presumes that continuing the past routine is the most favorable option available to the child in question.¹⁰⁵ Those who advocate for the primary caretaker approach contend that the most reliable indicator of a good future for the child is maintaining the same caretaking patterns.¹⁰⁶ However, the preceding habits and caretaking arrangement should merely be a starting point for analysis and consideration during a child custody evaluation and examination, not a presumption of what is best for children in the future.

B. The Problems with Joint Custody

Joint custody is the fairest arrangement for parents.¹⁰⁷ If parents share joint custody, each parent has responsibilities and aspects of control over their children.¹⁰⁸ Children maintain frequent stays with each parent, and grow close bonds with each as well.¹⁰⁹ In theory, joint custody could be the best option for most separated and divorced families.¹¹⁰ In reality, it equates

¹⁰³ See Adriana Barton, *Disagreements over childrearing are growing cause of divorce*, THE GLOBE AND MAIL (Sept. 13, 2010), <http://www.theglobeandmail.com/life/disagreements-over-childrearing-are-growing-cause-of-divorce/article1380006/> (parents argue about their children's care in many ways, including child-rearing philosophies, limits, boundaries, appropriate discipline, technology usage.).

¹⁰⁴ Philippa M. Eve, Mitchell K. Byrne & Cinzia R. Gagliardi, *What is Good Parenting? The Perspectives of Different Professionals*, 52 FAM. CT. REV. 114, 120 (2014).

¹⁰⁵ Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 490 (1990).

¹⁰⁶ *Id.*

¹⁰⁷ See generally Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L. Q. 201, 205 (1998) (to parents, joint custody may seem fair).

¹⁰⁸ CAL. FAM. CODE § 3004 (West, Westlaw through 2016 Legis. Sess.).

¹⁰⁹ Hardcastle, *supra* note 107, at 204, 209.

¹¹⁰ Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L. J. 455, 460 (1984).

to a life of unrest, unease and instability for children¹¹¹ – especially children with high-conflict¹¹² parents. This shaky lifestyle filled with frequent moves exhausts and negatively impacts the children involved.¹¹³ Essentially, the child is involved in a world of constant instability and a seemingly endless tug-of-war in between both parents and households – both of whom the child feels closely bonded.¹¹⁴

The law mistakenly presumes that all parents are mature enough to be outwardly civil with one another for the sake of their children following the breakdown of their relationship.¹¹⁵ Though many divorces or separations do end amicably and many parents can remain respectful to one another following a separation for their children, it is naïve to assume that the child custody cases standing before a judge fall into such a courteous and relatively respectful category.¹¹⁶

The emotional and financial cost of litigation is too great a burden for parents who can find it within themselves to compromise and work together to create an arrangement that is workable for all parties or one that would be best for the child involved. Parents who resort to litigation prove by default that they cannot agree and work together; because of the intensity of child custody cases, resorting to litigation also shows that the parents are likely high-conflict¹¹⁷ Candidly, the parents' inability to co-parent¹¹⁸ or compromise is evident if the parties litigate. In

¹¹¹ See Hardcastle, *supra* note 107, at 201-02.

¹¹² See ELROD & DALE, *supra* note 93, at 384, 387 (high-conflict is the term used to describe parents who cannot effectively communicate; any interaction is counter-productive, increasing the hostility and negativity surrounding the co-parenting relationship.).

¹¹³ See Hardcastle, *supra* note 107, at 201-02.

¹¹⁴ *Id.*

¹¹⁵ Scott & Derdeyn, *supra* note 110, at 457.

¹¹⁶ See Hardcastle, *supra* note 107, at 219.

¹¹⁷ See *id.* at 214.

¹¹⁸ See ELROD & DALE, *supra* note 93, at 397 (co-parenting explains the action of parenting together, even though the parents' romantic relationship has terminated and communicating effectively for the well-being of the child.).

fact, it is likely what led them into court in the first place.¹¹⁹ Therefore, the hope that parents who end up litigating in court can eventually learn to co-parent – or merely expecting that the parents will learn to co-parent for the sake of their children – is unquestionably far-fetched and unrealistic.¹²⁰

Studies have verified that high-conflict parents who attempt shared parenting cannot sustain the arrangement for long.¹²¹ One study found that almost 70% of judges polled agreed that the joint custody arrangements they witnessed panned out worse than the sole custody plans they oversaw.¹²² Shared parenting keeps the lives of the separated parents closely intertwined and results in everlasting, routine conflict.¹²³ The children involved regularly witness the ever-growing animosity between parents, which severely harms the children's growth and well-being.¹²⁴ These perpetual battles between the parents hinder the child involved and cause the child long-term emotional, psychological, and developmental problems.¹²⁵ Though joint custody may seem to be the most just option when the rights of the parents are at the forefront, it is a pitiful and unfortunate arrangement for children, especially if their parents litigate custody matters.¹²⁶

Additionally, joint custody produces extensive instability in the life of the children.¹²⁷ The children in shared parenting arrangements lack the safe, stable environment that they need to

¹¹⁹ High Conflict Custody Cases: Reforming the System for Children, 39 FAM. CT. REV. 146, 146 (2001)

¹²⁰ *See id.* at 215.

¹²¹ Robert Hughes, Jr., *What Happens To Shared Parenting Arrangements Among High-Conflict Couples Over Time?*, HUFFINGTON POST (May 6, 2012), http://www.huffingtonpost.com/robert-hughes/what-happens-to-shared-pa_b_1292461.html.

¹²² *See* Hardcastle, *supra* note 107, at 201.

¹²³ *Id.* at 215.

¹²⁴ *Id.* at 215-16.

¹²⁵ *Id.*

¹²⁶ *See* Scott & Derdeyn, *supra* note 110, at 493.

¹²⁷ *See* Hardcastle, *supra* note 107, at 201-02.

fully flourish and develop.¹²⁸ They are constantly moving from one home to another,¹²⁹ adapting from one set of rules to another, and adjusting from one routine back to another.¹³⁰ Though they need to feel safe and secure, the children in these cases lack the consistent structure that is necessary to feel that they truly belong in either environment.¹³¹ They essentially feel like they have two lives, as they wander from one place to another.¹³² Moreover, the instability and inconsistent values impact the child's distinctions between right and wrong, good and bad, and appropriate and inappropriate. This lack of stability and increased potential for conflict between the parents is detrimental to the development and growth of a child.¹³³ Joint custody promotes fairness among the parents at the expense of the children involved, who must grow up in a world where the only foreseeable surroundings are inconsistency, chaos, and utter confusion.¹³⁴

Joint custody creates an arrangement that cannot endure inevitable yet unavoidable, unpredictable life changes. Certainly, children in joint custody arrangements will most likely be placed in the difficult situation of moving from two homes into ultimately one primary house.¹³⁵ Parents' lives change with time. They move for jobs or new relationships. They often times remarry or cohabitate with a new partner.¹³⁶ These life changes may be a major reason why shared custody arrangements typically do not last.¹³⁷ Because these life alterations often clash with joint custody arrangements, many children are eventually forced to give up a home and

¹²⁸ See Scott & Derdeyn, *supra* note 110, at 494-95.

¹²⁹ See Hardcastle, *supra* note 107, at 201; See JANA B. SINGER & WILLIAM L. REYNOLDS, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 509 (1988).

¹³⁰ See Scott & Derdeyn, *supra* note 110, at 485-86.

¹³¹ See SINGER & REYNOLDS, *supra* note 123, at 510.

¹³² Scott & Derdeyn, *supra* note 110, at 486.

¹³³ ELROD & DALE, *supra* note 93, at 388.

¹³⁴ See Scott & Derdeyn, *supra* note 110, at 493.

¹³⁵ *Id.* at 486.

¹³⁶ Most people remarry after divorce. See Rose M. Kreider, *Remarriage in the United States*, U.S. CENSUS BUREAU (August 10, 2006), <https://www.census.gov/hhes/socdemo/marriage/data/sipp/us-remarriage-poster.pdf>.

¹³⁷ See Scott & Derdeyn, *supra* note 110, at 493

parent for another later on in life.¹³⁸ Sadly, these prospective modifications to the parenting plan would present yet another drastic life change for the children in joint custody arrangements to overcome and ultimately result in another transition period of instability for the children to encounter and cope with in the future.

Joint custody arrangements are ideal on the surface, but joint custody vigorously clashes with the long-term best interests of the children in practice. It is arguably the best or most fair custody arrangement for the parents involved, but it is unequivocally detrimental to the children.¹³⁹

C. Factors Used by the Court in Determining Sole Custody

Though the court strongly favors joint custody, it still awards sole custody in some circumstances.¹⁴⁰ For instance, a parent's proven incapacity to make a joint custody plan work or the parents' proven inability to cooperate with each other may be a reason for the court to award sole custody.¹⁴¹ The court can award sole custody without having to expressly show the child's harm because it believes it to be in the best interests of the child.¹⁴² Some states prohibit joint custody in cases of domestic violence, child abuse, or spousal abuse.¹⁴³ Using the primary caretaker approach, the court may determine that sole custody is the appropriate arrangement for the child if only one parent had taken on most of the daily responsibilities for the child.¹⁴⁴ Ultimately, an arrangement of sole custody must serve what the court believes is the best interest of the child in order to be granted.

D. Reasons to Promote Sole Custody Arrangements

¹³⁸ *See id.*

¹³⁹ *See id.* at 494.

¹⁴⁰ *See id.* at 455.

¹⁴¹ *See generally* Sutton v. Sutton, 223 S.W.3d 786 (Mo. Ct. App. 2007).

¹⁴² *See id.*

¹⁴³ DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN 165, 172 (2d ed. 2014).

¹⁴⁴ *See* Crippen, *supra* note 104, at 428.

Though sole custody¹⁴⁵ may seem unjust to the parent who is only granted visitation,¹⁴⁶ it better serves the long-term best interests of the children than any other alternative arrangement available.¹⁴⁷

Sole custody provides the children with one stable and secure environment that the child can truly associate with being “home.” Social workers and professionals agree that this type of consistency and security is what a child needs to ensure their complete and undisturbed development.¹⁴⁸ This stability guarantees a more trusted environment, home, surroundings, and relationships.¹⁴⁹ This lifestyle would create the impression of permanency, which is a fundamental requirement for children in order to reach their utmost potential.¹⁵⁰

Sole custody more impressively limits the contact and interaction between the parents, and thus safeguards the child from the consistent, bitter disputes of his or her parents.¹⁵¹ Because the parents’ lives are far less intertwined than in joint custody arrangements, this parenting arrangement drastically reduces the children’s exposure to hostility, unhealthy relationships, and damaging interactions between his or her parents.¹⁵² Consequently, the child can grow up without the constant reminder of the parental aggression and incessant turmoil that surrounds his or her life. This reduction of contact positively impacts the quality of life for the child, who would otherwise be placed in the middle of strife and cyclical parental conflict on a regular basis.

¹⁴⁵ Maritza Karmely & Kelly A. Leighton, *The Brass Ring of Custody: Toward a Better Solution for Families in Massachusetts*, 93 MASS. LAW. REV. 373, 374 (2011) (sole custody occurs when one parent has primary and significant decision-making power and/or physical responsibility of the children.).

¹⁴⁶ Visitation is the time a parent, who does not have custody, will spend with the children.

¹⁴⁷ See generally Scott & Derdeyn, *supra* note 110, at 455.

¹⁴⁸ Mirka Girard, Nancy Houle & Me. Viviane Topalian, *The Importance of Stability for Children*, YOUTH PROTECTION ACT INFO (October 2008), https://www.aqesss.qc.ca/docs/public_html/document/Documents_deposes/InfoYPA_vo1no5_versionFinale.pdf (last visited: February 7, 2017).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See Hardcastle, *supra* note 107, at 215.

¹⁵² *Id.* at 215-16.

Clear boundaries and more structure are other benefits that result from a sole custody arrangement for the children.¹⁵³ Where joint custody can create endless confusion for children about distinguishing appropriate behavior and habits due to different parenting styles and beliefs,¹⁵⁴ sole custody ensures that a child can predict what behaviors or routines are expected of them. They can also foresee which actions and habits are not appropriate. Rather than blurring lines or implementing conflicting standards in each household, sole custody allows one clear message to be sent to children about boundaries and suitable behavior. This certainty and socialization during the early years are crucial; they set the stage for a child to understand and respect limitations. Regard for clear limitations and restrictions – or lack thereof – are patterns that follow children into their adult lives.¹⁵⁵ While joint custody allows for many contradictory and opposing messages, sole custody ensures one well-defined and reinforced message of what behavior is appropriate in the household and what behavior will be deemed inexcusable.

In the event that a parent chooses to remarry or relocate further away, the child in a sole custody arrangement knows and is more secure about making a decision in regard to a potential environmental transition. On the other hand, a child in a joint custody determination would be torn between both parents, to whom he or she has developed close ties. Once the decision is made, the child is then forced to take on the emotionally draining and harmful task of detaching from a significantly involved parent. Sole custody takes a proactive approach and safeguards a child from the potential hurt that results from this all-too-common situation.¹⁵⁶

¹⁵³ See Hardcastle, *supra* note 107, at 201-02 (implying that sole custody arrangements would not present the problems judges expressed existed in joint custody arrangements); See generally Karen Spangenberg Postal, *Think Better*, PSYCHOLOGY TODAY (November 11, 2011), <http://www.psychologytoday.com/blog/think-better/201111/how-structure-improves-your-childs-brain>.

¹⁵⁴ See generally Nancy Ver Steegh & Hon. Dianna Gould-Saltman, *Joint Legal Custody Presumptions: A Troubling Legal Shortcut*, 52 FAM. CT. REV. 263 (2014).

¹⁵⁵ See generally Postal, *supra* note 153.

¹⁵⁶ *Id.*

Sole custody ensures more stability for the child than any other arrangement. Though a sole custody determination could potentially be unfair to one of the parents, it is the best option available for the children involved. It provides the children more stability and a trusted environment that is considered “home.” It reduces the exposure of parental conflict to children, creates clear and accepted boundaries, and minimizes the potential harm a child could face in the future.

E. Criticisms About Sole Custody

The most substantial concern and criticism that exists about sole custody arrangements is that the results may not adequately serve the best interest of the child, because there still remains an inherent gender bias within the system and society. The 2011 U.S. Census reports a shockingly disparate statistic: of the 14.4 million parents who had custody of their children, 82% were mothers.¹⁵⁷ One study proudly asserts that there is a rise of single fathers, citing that a record has been broken: single fathers account for 8% of U.S. households.¹⁵⁸ This number, the study finds, has increased from less than 1% in a little over fifty years.¹⁵⁹ This study also confirmed the aforementioned finding that single fathers headed less than one-quarter of single parent households in the U.S., whereas single mothers headed over three-quarters of single parent households.¹⁶⁰

These statistics do not necessarily confirm that over 80% of mothers with custody were awarded custody by a judge. However, the fact that single fathers only account for less than one-quarter of the single U.S. households fuels the publicly held perception that courts likely prefer

¹⁵⁷ Carmen Solomon-Fears, *Child Support: An Overview of Census Bureau Data on Receipt*, CONGRESSIONAL RESEARCH SERVICE (December 16, 2013), <https://www.fas.org/sgp/crs/misc/RS22499.pdf>.

¹⁵⁸ Gretchen Livingston, *The Rise of Single Fathers*, PEW RESEARCH CTR. (July 2, 2013), <http://www.pewsocialtrends.org/2013/07/02/the-rise-of-single-fathers/>.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

to award mothers custody.¹⁶¹ Though many would like to argue that such a bias no longer occurs within the courts, studies estimate that mothers still obtain custody in as many as 88% of cases; meanwhile, fathers are granted custody as little as 8% of the time.¹⁶² Studies revealing such a gross disparity based on gender undoubtedly further spread the commonly held belief that this gender-bias exists within the family courts.¹⁶³ To fathers, the grossly disparate statistic sends the message that fighting for custody of their children is too great a risk to take; the emotional and financial expenses associated with an almost guaranteed failure would be too great to bear for most.¹⁶⁴ Consequently, the notion that mothers will almost certainly prevail no matter the circumstances ultimately controls the outcome of custody at various stages – whether it is before proceedings begin by alleged “agreement” or settlement agreements.¹⁶⁵ Most fathers – through uncertainty, recommendation of friends or family, advice of counsel, or research – often have little choice but to surrender custody to the mothers;¹⁶⁶ only 4% of divorced fathers ultimately take the risk and seek custody with the help of the family courts.¹⁶⁷

Though sole custody does not directly address the gender bias and inherent preference for the mother that still exists,¹⁶⁸ it would be the best arrangement for the children once the societal and legal bias dissipates. For the construct of the mother being the superior parent to breakdown

¹⁶¹ *Id.*; See Erin N. Birt & Elizabeth J. Chacko, *The Changing Role of the Tender Years Doctrine: Gender Bias, Parenthood and Illinois Law*, 26 DCBA Brief 26, 28 (2013); See Scott & Derdeyn, *supra* note 110, at 476; Hughes, *supra* note 19.

¹⁶² See *Birth & Chacko*, *supra* note 161, at 28. See Soloman-Fears, *supra* note 157, at [pincite]; Hughes, *supra* note 19, at [pincite]; Angelina Chapin, *Dads' Rights: The Rise of Firms for Fathers Going Through Divorce*, THE GUARDIAN (Oct. 15, 2016), <https://www.theguardian.com/lifeandstyle/2016/oct/15/fathers-rights-divorce-lawyers>.

¹⁶³ Hughes, *supra* note 19, at [pincite]; see Scott & Derdeyn, *supra* note 110, at 462.

¹⁶⁴ See Scott & Derdeyn, *supra* note 110, at 469-70, 477-80; see Weitzman & Dixon, *supra* note 91, at 271-273

¹⁶⁵ *Id.*

¹⁶⁶ See *id.*; See Cathy Meyer, *Dispelling The Myth of Gender Bias in the Family Court System*, HUFFINGTON POST (July 10, 2012), http://www.huffingtonpost.com/cathy-meyer/dispelling-the-myth-of-ge_b_1617115.html; See Chapin, *supra* note 161, at [pincite].

¹⁶⁷ Meyer, *supra* note 166.

¹⁶⁸ See Scott & Derdeyn, *supra* note 110, at 476; See ELROD, *supra* note 12, at § 1:9; see Hardcastle, *supra* note 107, at 202.

within society, the courts must take the first step. Just as the courts have ingrained in society with the Tender Years Doctrine that fathers are inferior parents,¹⁶⁹ the courts must take the initiative to prove the presumption it spread¹⁷⁰ – and arguably continues to perpetuate¹⁷¹ – throughout the nation is unfounded. If the courts take the lead and more actively disprove the public notion of this gender-bias rather than prolong it,¹⁷² the children at the mercy of the legal system will have their best interests served more genuinely. Such a change would reignite the passion of fathers to fight for their children on a more level playing field, without the fear of investing time, energy, and money into a system that favors their adversary.¹⁷³ This ability of fathers to be on a level playing field with mothers would ensure that the court's custody evaluation would most adequately serve the best interest of the children involved.

Another argument critics of sole custody reiterate may be that the arrangement is grossly unfair to the parent who is not awarded the majority of custody.¹⁷⁴ However, the fairness between the parents should not precede the best interest of the child under any circumstance.¹⁷⁵ The court should determine what arrangement would truly be in the child's best interest. A child is not an asset to be apportioned similarly between parties as property – nor should the court treat the child as such.¹⁷⁶

¹⁶⁹ See ELROD, *supra* note 12, at § 1:9

¹⁷⁰ Hughes, *supra* note 19; see SEXTON, *supra* note 16, at 781-92; see *Freeland*, 159 P. at 699.

¹⁷¹ ABRAMS, *supra* note 9, at 686; Weitzman & Dixon, *supra* note 91, at 271-273; see *Hardcastle*, *supra* note 107, at 202.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Jo-Ellen Paradise, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L.Rev. 517, 568 (1998); *Hardcastle*, *supra* note 107, at 205.

¹⁷⁵ See *Hardcastle*, *supra* note 107, at 216.

¹⁷⁶ *Id.*

Similarly, critics claim that the child needs strong bonds with both parents, and sole custody would not allow that.¹⁷⁷ It is true that the child needs strong bonds with both of his or her parents, so long as each parent is fit and capable. Critics who stress this argument fail to address that a sole custody arrangement still promotes ample visitation by the other parent.¹⁷⁸ During this abundant and meaningful bonding time, the child and parent can foster a close attachment without having to sacrifice the security or stability of the child.¹⁷⁹ Sole custody, therefore, would support the close relationship a child should have with each of his or her parents without compromising his or her best interest.¹⁸⁰

F. Misconceptions about Fathers

There is a noticeable discrepancy between how mothers and fathers are perceived and treated within the legal system and society. Despite the existence of this publicly accepted gender-bias and impression, it is injurious to children to presume that all mothers encompass the archetype, selfless, and nurturing societal image and to classify all divorced, separated, or unmarried fathers as unfit, selfish deadbeats.¹⁸¹

Although even deficient mothers are automatically presumed fit¹⁸² to take most of the responsibility of child rearing, fathers – habitually labeled “deadbeats” for their lack of presence or ability to provide adequate financial support¹⁸³ – have to consistently fight to prove their

¹⁷⁷ See SINGER & REYNOLDS, *supra* note 123, at 500.

¹⁷⁸ A proposed sole custody arrangement would provide the non-custodial parent with one day of visitation in the middle of the week from after school to 7:00 p.m. and every other weekend from Friday after school to Sunday evening (extended to Monday evening, if there is a school holiday on Monday). During the holidays, the children alternate parents between vacations each year.

¹⁷⁹ See SINGER & REYNOLDS, *supra* note 123, at 505; see Hardcastle, *supra* note 107, at 210.

¹⁸⁰ *Id.*

¹⁸¹ See Maillard, *supra* note 96.

¹⁸² Factors to be weighed in determining a parent fit or unfit include neglect, abuse, a parent's ability to provide the child with basic needs, a parent's physical and emotional health, and a parent's ability to properly guide a child through life. See generally *Adoption of Zoltan*, 881 N.E.2d 155 (Mass. App. Ct. 2008).

¹⁸³ Elizabeth S. Scott and Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2435 (1995); Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 263 (2000); Joseph E. Cordell, *The Myth of the*

aptitude to be a parent deserving of meaningful time with their children.¹⁸⁴ While mothers are often provided government funding to assist them in financially providing for their children¹⁸⁵ and often perceived as victims, few resources exist to help fathers obtain time with their children.¹⁸⁶ Instead, fathers often face social stigma; this stigma and shaming only compounds the hardships fathers endure for being unable to financially provide for their children – a truly unfair circumstance when they do not have the resources to secure any physical time with their children.¹⁸⁷ Some of the harsh penalties these fathers face include getting licenses revoked, wages garnished, and even facing criminal or civil charges for falling behind on payments.¹⁸⁸

Research has consistently verified that fathers – especially those who are unmarried – continue to face an uphill battle when trying to gain a consistent and valuable relationship with their children through the legal system.¹⁸⁹ Unlike mothers or married fathers, unmarried fathers, who usually also have lower-incomes and education rates, cannot seek custody of their children without first filing a paternity action.¹⁹⁰ Therefore, unmarried fathers – who studies show are substantially less economically able to incur *any* legal costs – must secure more funds and take additional steps maneuvering around a complicated legal system than their female or once married counterparts for just a chance to secure a protected and substantial role in the lives of their children.¹⁹¹ For courts to properly and fully be able to analyze the best interest of the

“Deadbeat Dad” Label, HUFFINGTON POST (Feb. 7, 2014), http://www.huffingtonpost.com/joseph-e-cordell/the-myth-of-the-deadbeat-_b_4745118.html.

¹⁸⁴ See also Huntington, *supra* note 9.

¹⁸⁵ See Soloman-Fears, *supra* note 157.

¹⁸⁶ Cordell, *supra*, note 149.

¹⁸⁷ *Id.*

¹⁸⁸ See generally CAL. FAM. CODE § 17 (West, Westlaw through 2016 Legis. Sess.).

¹⁸⁹ Huntington, *supra* note 95; see generally Michael H. v. Gerald D. 491 U.S. 110 (1989); see generally Lerman, *supra* note 95.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

children, such hurdles fathers face and distorted perceptions toward fathers – particularly unwed fathers – must be significantly altered.

G. A Closer Look at Australia

The study conducted on Australia's joint custody presumption, discussed above, suggests that joint custody only provides a true solution for a select group of parents and children. Understanding and considering the outcomes of this Australian study¹⁹² is imperative to analyzing the effects of forced equal parenting. In Australia, the parents' "decision" to proceed with a joint custody arrangement was not a voluntary one, because it was expressly mandated in their laws. In the U.S., parents are coerced into electing a joint custody arrangement; however, it is more disguised and nuanced, because the forceful nature hides behind the best interest of the child standard. The blanket statement that joint custody is better for children has been ingrained in our beliefs – whether it be by Father's Rights advocates, Social Science, or any other means. The vast number of circumstances where children would fare better in a sole custody arrangement rarely qualifies the overbroad allegation, which is usually stated as fact. However, critically reviewing the consequences of expressly or impliedly forcing a consistent and heavily involved relationship between parents can provide clarity: imposing joint custody on families who are not ready for the arrangement or families who do not genuinely want it – whether it be a parent or child who is unwilling – will lead to unfortunate results.

Because joint custody arrangements are quickly becoming the preferred allocation of custody in our society¹⁹³ and because general Social Science studies generally advocate for

¹⁹² Hughes, Jr., *supra* note 121.

¹⁹³ See ABRAMS, *supra* note 9, at 744-45; Ashby Jones, *Big Shift Pushed in Custody Disputes*, WALL STREET J. (April 16, 2015), <http://www.wsj.com/articles/big-shift-pushed-in-custody-disputes-1429204977>.

shared custody except for in more extreme cases,¹⁹⁴ analyzing the effects that the presumption has had on Australia illustrates the various intricacies that may impact the success or failure of a joint custody arrangement. Further, learning which parental characteristics generally give rise to a joint custody's success or failure could assist in better assessing in which circumstances joint custody is more likely to withstand time. Australia's presumption also demonstrates that joint custody is not always the best for the parties involved and that a one-size-fits-all approach will not work for families.

Moreover, even if joint custody may endure throughout the years, it still may not be the approach to adopt in a particular family. Considering the potential detriments to the child, the child's desires after time has passed, and the instability becomes more apparent to maturing children, the Australian study emphasizes the more discreet yet notable adverse effects of joint custody.¹⁹⁵ Turning a blind eye or denying the effects of joint custody does not fulfill the ultimate goal of rearing better adjusted, more successful, and happier children.¹⁹⁶ The results of this Australian study reveal that children who are exposed to joint custody, at least when there is relatively high parental conflict, are not ultimately happy with their arrangement.¹⁹⁷ Though the parents are content with the joint custody arrangement, the child hopes for a change¹⁹⁸ – whether it is because the change will relieve him or her from the tug-of-war between the feuding parties, provide him one stable environment to call home, or another reason.¹⁹⁹

¹⁹⁴ J. Daw, *Joint Custody Might Be Best Option for Children of Divorce, Study Finds*, AMER. PSYCH. ASSC., (June 2002), <http://www.apa.org/monitor/jun02/custody.aspx>; Children Likely to Be Better Adjusted in Joint Vs Sole Custody Arrangements in Most Cases, According to Review of Research, (2002), <http://www.apa.org/news/press/releases/2002/03/custody.aspx> (last visited Feb 7, 2017).

¹⁹⁵ See Post-Separation, *supra* note 63, at 41-42.

¹⁹⁶ See *id.* at 42.

¹⁹⁷ *Id.*

¹⁹⁸ See *id.*

¹⁹⁹ *Id.* at 42-43.

Finally, the belief that joint custody would force parents to eventually co-parent and effectively communicate has proved to be idealistic in most cases. Some families maintained high conflict for years after the imposition of joint custody, until the non-custodial parent had no contact with the child whatsoever.²⁰⁰ Thus, joint custody did not facilitate more effective communication between the parties.²⁰¹ In fact, almost three-fourths of parents in joint custody arrangements expressed “almost never” engaging in co-parenting.²⁰² The most successful joint custody arrangements are voluntarily agreed upon by parents, who are committed to making the arrangement work;²⁰³ it is likely that this cooperation and dedication is what has influenced the Social Science findings that children in that situation fare better.²⁰⁴ However, the Courts and many legislators are now imposing joint custody on parents who are unwilling to make joint custody work.²⁰⁵

H. Social Science Research

Advocates of joint custody have consistently used data gathered from Social Science to support claims that children in joint custody arrangements fare better than children situated in sole custody arrangements. Such claims are stated as fact and advocate for a one-size-fits-all approach; however, these studies oversimplify the solution to the complex, fact-sensitive dilemma of determining the appropriate custodial arrangement for each child. To reach a valid and sound conclusion, however, these findings should not be heavily relied upon until the studies are clearer and specific factors of the studies are more specifically dissected.

²⁰⁰ *Id.* at 42.

²⁰¹ *See id.*

²⁰² Matthew Fynes-Clinton, *Children Suffer When Law Splits Parenting Equally*, COURIER MAIL (November 9, 2008), <http://www.couriermail.com.au/news/national/custody-is-not-fair/story-e6freooo-1111117985645>.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

This section will assert that the Social Science Research that is relied upon to support joint custody is unclear and that, even if the research were reliable, the alleged correlation between children in joint custody faring better than children in sole custody arrangements does not necessarily signify that children fare better *because* they are in joint custody arrangements.

1. Social Science Research is Unclear

Typically, the Social Science research relied upon in the field of custody is imprecise. Though critical assumptions and claims are publically drawn from these studies, the studies remain ambiguous and seem, at times, misleading.

a. Lack of Clearly Defined Terms

Social Science studies comparing joint custody and sole custody fail to clearly define what constitutes joint and/or sole custody.²⁰⁶ Because these definitions change from jurisdiction to jurisdiction in law, it is possible that a 70/30 arrangement could be seen as joint custody in some cases, while the same arrangement could be seen as sole custody in others. It remains uncertain whether the Social Science studies mirror the lack of uniformity in the legal definitions regarding custodial arrangements or whether the studies have their own criteria set forth to determine which custodial arrangement falls into a particular category.²⁰⁷

²⁰⁶ Some studies also refer to “shared” parenting; it is unclear whether “shared parenting” is used in place of “joint custody” for the purposes of these studies or whether they are entirely different. See Dr. Linda Nielson, *Parenting Time & Shared Residential Custody: Ten Common Myths*, THE NEB. LAWYER (Jan./Feb. 2013), <http://www.acfc.org/acfc/assets/documents/Articles/Nebraska%20Lawyer%20Magazine.pdf>; Michelle Griffin, *Shared Custody A Mistake for the Under-2s, Say Guidelines*, THE SYDNEY MORNING HERALD (Dec. 15, 2011), <http://www.smh.com.au/lifestyle/life/shared-custody-a-mistake-for-the-under2s-say-guidelines-20111214-1ouy6.html>; Mandy Oaklander, *This Divorce Arrangement Stresses Kids Out Most*, TIME (April 27, 2015), <http://time.com/3836627/divorced-parents-joint-custody/>.

²⁰⁷ See Edward Kruk, Ph.D., *Research Consensus Statement on Co-Parenting After Divorce*, PSYCHOL. TODAY (July 28, 2014), <https://www.psychologytoday.com/blog/co-parenting-after-divorce/201407/research-consensus-statement-co-parenting-after-divorce>.

Similarly, the children with any access to both parents regardless of time-sharing could potentially be determined as a joint custody arrangement in some of these studies.²⁰⁸ It is also possible that the children used to study the sole-custody arrangements could have no relationship with their non-custodial, biological parent whatsoever. Thus, it is uncertain as to whether children who were in “sole custody” situations had *any* visitation with the non-custodial parent. Having a parent who is altogether absent would skew the findings. It is also uncertain how much exposure, if any, the child had with the non-custodial parent. For instance, if the children in sole custody arrangements for the purpose of the study only had access to one parent nearly 100% of the time, the child could have a very different experience than one who had a 70/30 arrangement. Thus, the assertion that joint custody is best compared to sole custody may not necessarily be true. Instead, it may be true that access to both parents – emotionally, financially, physically – not necessarily equal custody or almost equal custody is best for children.²⁰⁹

Without clearly distinguishing which custodial arrangements are used in the study and defining the labels used for the custodial arrangements, it is difficult to accurately deduce whether the study appropriately applies to a particular family's dynamic – or, more broadly, whether children in joint custody arrangements *truly* fare better than those in sole custody arrangements. Thus, before making sweeping statements claiming that children in one custodial arrangement fare better than those in others, a deeper analysis must be conducted into the particular custodial arrangements that are being considered and compared.

b. Arrangements in Agreements Differing from Arrangements in Practice

²⁰⁸ *See id.*

²⁰⁹ *See* Post-Separation, *supra* note 63, at 42.

For purposes of the Social Science research conducted, it is unclear how the arrangements are classified.²¹⁰ Often times, parents may agree on or stipulate to a particular arrangement but practice a different custodial arrangement.²¹¹ For instance, a non-custodial parent may fight for more custodial time, since more time typically equates to a lower amount owed in child support.²¹² Unfortunately, once the modifications are made, the non-custodial parent often times may not exercise the visitation as often as agreed upon. Sometimes, it is unclear whether the Social Science studies used the stipulated arrangement or the arrangement as it was practiced to determine which custodial arrangement was most beneficial for the child. It is also unclear whether the motivation is to have the child be in a joint custody arrangement, because it is better for the child's well-being or better for the non-custodial parent's finances.²¹³

2. Correlation Does Not Equate to Causation

Even if the Social Science studies are further analyzed to make more specific findings based on particular custodial arrangements, the percentage of custodial time may not be the underlying reason for the correlation.²¹⁴ It is important to note that a correlation between joint custody arrangements and better-adjusted children does not necessarily mean that joint custody arrangements *caused* the child to be better-adjusted. When reviewing the data from the Social Science research in this area, the reviewer should carefully distinguish correlation between

²¹⁰ See Clinton, *supra* note 203.

²¹¹ *Id.*

²¹² See SINGER & REYNOLDS, *supra* note 123, at 514.

²¹³ *Id.*

²¹⁴ See ELROD & DALE, *supra* note 93, at 388.

causation; confusing a correlation for causation could potentially lead to detrimental results for children whose custodial arrangements are determined solely based on these studies.²¹⁵

a. Economic Hardship

When more carefully assessing children in joint custody arrangements and children in sole custody arrangements, it is noticeable that the majority of children in sole custody arrangements share strikingly similar household characteristics.²¹⁶ Any of these individual attributes or all of these attributes combined could be the underlying cause of the disparity between the children in sole custody arrangements and the children in joint custody arrangements.²¹⁷

For instance, single parent households are primarily comprised of single mothers; they made up over 77% of single-parent households in 2013.²¹⁸ While most single parents had graduated high school and 34% of single parents had some college education in 2013, only about 18% had at least a Bachelor's degree.²¹⁹ Single parents have more difficulty finding steady, full-time employment to meet their household needs.²²⁰ This statistic is consistent with general findings that lower academic achievement correlates with more difficulty sustaining regular employment or overall wealth through a person's lifetime.²²¹ For single mother families, the

²¹⁵ See Post-Separation, *supra* note 63, at 42.

²¹⁶ See *Family Households, by Type, Age of Own Children, Age of Family Members, and Age, Race and Hispanic Origin of Householder: F1*, U.S. CENSUS BUREAU (2013), <http://www.census.gov/hhes/families/data/cps2013F.html>.

²¹⁷ *Id.*; see Post-Separation, *supra* note 63, at 42.

²¹⁸ *Id.*

²¹⁹ *Family Households, By Type, Age of Own Children, and Educational Attainment of Householder: F2*, U.S. CENSUS BUREAU (2013), <http://www.census.gov/hhes/families/data/cps2013F.html>.

²²⁰ See Jason DeParle, *Two Classes, Divided by "I Do,"* N.Y. TIMES (July 14, 2012), <http://www.nytimes.com/2012/07/15/us/two-classes-in-america-divided-by-i-do.html>.

²²¹ *Earnings and Unemployment Rates by Educational Attainment, 2015*, U.S. BUREAU OF LABOR STATISTICS (March 15, 2016), http://www.bls.gov/emp/ep_chart_001.htm.

median household income was about \$2,100 per month or about \$25,500 per year in 2012.²²² For the same year, the median salary for single father families – a relatively small portion of single-parent households – was about \$3,050 per month or about \$36,500 per year.²²³ Furthermore, over 40% of children in single parent households are considered poor and receive public assistance in the form of Food Stamps.²²⁴ These statistics related to fiscal difficulty in single-family homes are especially worrisome because child poverty is linked to poor academic achievement, higher likelihood of dropping out of school, lack of emotional and physical health, and adult unemployment.²²⁵ Most of these negative effects are also linked to the chronic stress that accompanies children suffering from poverty.²²⁶

Given all the similarities most single-parent households have and the known correlations between poverty and negative outcomes for children suffering from poverty,²²⁷ there is a high probability that children in joint custody arrangements fare better than those in sole custody arrangements primarily due to other underlying factors – particularly those associated with economic hardship, lower parental educational attainment, chronic stress, and instability.²²⁸

b. Lack of Paternal Influence in Single-Mother Households

²²² *Presence of Children Under 18 Years Old All Families by Median and Mean Income: 1974 to 2012*; F-10, U.S. CENSUS BUREAU (2016), <http://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-families.html>.

²²³ *Id.*

²²⁴ Table C8., *Poverty Status, Food Stamp Receipt, and Public Assistance for Children Under 18 Years by Selected Characteristics*: 2013, U.S. CENSUS BUREAU (2016), <http://www.census.gov/hhes/families/data/cps2013C.html>.

²²⁵ See Harry J. Holzer et al., *The Economic Costs of Poverty in the United States: Subsequent Effects of Children Growing Up Poor*, CTR. AMER. PROGRESS (2007), https://cdn.americanprogress.org/wp-content/uploads/issues/2007/01/pdf/poverty_report.pdf; *Effects of Poverty, Hunger and Homelessness on Children and Youth*, AMER. PSYCHOL. ASS'N., <http://www.apa.org/pi/families/poverty.aspx>.

²²⁶ Valerie Stauss, *Public Education's Biggest Problem Gets Worse*, WASH. POST (Sept. 14, 2011), https://www.washingtonpost.com/blogs/answer-sheet/post/public-educations-biggest-problem-gets-worse/2011/09/13/gIQAWGz2RK_blog.html.

²²⁷ *Id.*

²²⁸ *Id.*

Because mothers head most single-parent households,²²⁹ an argument may also be made that the lack of a father in the household or a father figure in the child's life could be the underlying problem distinguishing the children in sole custody and the children in joint custody arrangements.²³⁰ The father's rights movement heavily advocates this position in their efforts to have fathers more involved in child-rearing activities.

Many studies have also attempted to substantiate the allegation that the lack of paternal influence in single-mother households causes the disparity, asserting that children without a father are more likely to be incarcerated, drop out of school, and face poverty.²³¹ Like the studies discussing custodial arrangements, studies pointing to the lack of male influence as the reason for these dilemmas also remain unclear. More specifically, some of the problems with this Social Science data stems from the inability to truly determine whether fatherlessness is the actual cause of the children's difficulties or that fatherlessness merely correlates to children with the described negative characteristics.²³² It is particularly important to consider the lack of specificity as to the children's exposure to their fathers or any paternal influence, the quality of the parent-child relationship that exists with the custodial and non-custodial parent, the child's stability, and whether the non-custodial parent contributes to the child's expenses.²³³

²²⁹ U.S. CENSUS BUREAU, *supra* note 208.

²³⁰ See generally Cory Maret Dickerson, *The Lived Experience of Fatherlessness in Male Adolescents: The Student Perspective* (July 2014), <http://digitalcommons.liberty.edu/cgi/viewcontent.cgi?article=1960&context=doctoral>.

²³¹ See Luke Rosiak, *Fathers Disappear from Households Across America*, WASH. TIMES (December 25, 2012), <http://www.washingtontimes.com/news/2012/dec/25/fathers-disappear-from-households-across-america/?page=all>; WILLIAM D. MOSHER & JO JONES, *Fathers' Involvement with Their Children: United States, 2006-2010*, U.S. DEP'T OF HEALTH AND HUM. SERVS., CDC, (December 20, 2013), <http://www.cdc.gov/nchs/data/nhsr/nhsr071.pdf>.

²³² See Dickerson, *supra* note 223; see Hardcastle, *supra* note 107, at 207-11.

²³³ Hardcastle, *supra* note 107, at 207-11.

Furthermore, it has been confirmed that children of same-sex couples fare just as well as children raised by opposite-sex parents.²³⁴ Because they strictly rely on gender, the argument that a father's influence is necessary and the argument that a mother's household is the cause of the child's difficulties are both equally flawed perspectives.²³⁵ The finding that children of same-sex couples fare similarly to children of opposite-sex couples discredits any argument that directly and solely uses gender as a reason for the disparity between sole custody and joint custody arrangements. Accordingly, it is most likely that other underlying similarities – some of which may remain unvisited by Social Science data – are the true reasons for a possible discrepancy in how children fare based on their custodial arrangements.

c. Voluntariness of Joint Custody Arrangement

Studies that allege that children in joint custody arrangements fare better than those in sole custody arrangements do not explain whether the arrangements were voluntarily decided by the parents or whether a judge directed them through a court order. Revealing the circumstances in which the joint custody arrangement was determined would also shed light on how applicable the Social Science data would be to a court seeking to impose joint custody on unwilling parents.

Literature has consistently explained that joint custody can be a great arrangement for children and parents alike, if the arrangement was voluntarily decided on and both parents were committed to making a joint custody arrangement work.²³⁶ On the other hand, when parents do not reach joint custody arrangements voluntarily and are not committed to keeping a joint

²³⁴ Shelby Sebens, *Children With Same-Sex Parents Are No Worse Off Than Those Raised by Straight Parents, Study Finds*, HUFF. POST (June 23, 2015), http://www.huffingtonpost.com/2015/06/24/children-same-sex-parenting-study-_n_7648320.html.

²³⁵ *Id.*

²³⁶ *Custody and Parenting Time: Summary of Current Information and Research*, PARENTAL INVOLVEMENT WORKGROUP: OR. STATE LAW ADV. COM. (March 2011), <http://courts.oregon.gov/OJD/docs/OSCA/cpsd/courtimprovement/familylaw/CustodyPTR.pdf>.

custody arrangement, the outcome is vastly different.²³⁷ In those situations, conflict between the parents increase, children experience difficulty maintaining loyalty to clashing parents, and instability becomes more prevalent.²³⁸ Thus, forcing joint custody on parents would likely lead to negative outcomes for children in those arrangements. Courts must be extremely careful when imposing such arrangements on families who do not voluntarily reach this agreement on their own.

Given this information, it is likely that most of the parents in the Social Science studies comparing children in joint custody and sole custody arrangements arrived at those custodial arrangements on their own. Usually, parents who determine joint custody arrangements on their own have a more amicable relationship. Because joint custody requires constant communication and regular contact between the parents, parents who voluntarily elect to have joint custody arrangements are more likely and willing to co-parent. They are also more likely to communicate effectively, respect one another, and have low levels of conflict or animosity.²³⁹ This also implies that both parents are also more likely to trust the other parent's child-rearing and parenting decisions.²⁴⁰ Simply, in joint custody situations, the quality of the parental relationship is critical to its success.²⁴¹ This peace, mutual respect and commitment to a positive co-parenting relationship create an environment where the child is able to fully thrive. If the studies assessed children whose parents voluntarily elected joint custody arrangements, then the underlying reason for children in the joint custody arrangements faring better could be the amicable

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

relationship and low levels of conflict between the child's parents rather than the joint custody arrangement itself.²⁴²

Therefore, even in the best scenario, a correlation between joint custody arrangements and better-adjusted children does not mean that the joint custody arrangement was the *cause* of the more secure child; only a correlation between the two is reliable. In this example, the harmonious co-parenting relationship could be the *cause* of the better-adapted and adjusting child. By the same token, just because there is a correlation between sole custody arrangements and children being more inclined to somehow suffer does not necessarily mean that the sole custody arrangement was the *cause* of less stability in the child. It could merely mean that the parental relationship in the sole custody arrangement is more acrimonious, which creates a more hostile and unsafe environment for the child.

VII. CONCLUSION

With almost half of children in the United States facing the real and challenging consequences of divorce, it is apparent that issues of child custody profoundly impact the future of our citizens and societal well-being. Historically, we have constantly and disappointingly missed the mark. Now, we have finally chosen the correct standard – the best interest of the child. However, the theory that joint custody serves the best interest of the child is flawed and proves that the courts have not properly implemented the standard. Instead, the courts have essentially used the standard as a tool to apportion ownership rights of children to their parents.

Admittedly, joint custody could be a workable arrangement between healthy, civil parents depending on the circumstances. On the other hand, joint custody arrangements generally

²⁴² *Id.*; See Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 502 (1988); See Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL. REV. 266, 267 (1987).

fail in high-conflict cases, which include parents who must resort to extensive litigation to determine child custody arrangements. When the parents are considered high-conflict, joint custody puts the child's safety, well-being and best interest in the background and the fairness between the parents at the forefront of the determination. In those countless cases, it is evident that parental rights carry drastically more weight than what is actually in the child's best interest – at least in the eyes of the court. Parental rights should simply never override a child's long-term best interest and ability to grow into a well-adapted, contributing, and stable adult.

The push for joint custody and equal parenting originated from the Father's Rights Movement. Joint custody opened the door to begin disproving public notions of maternal superiority. However, joint custody is not in the best interest of the child when parents tend to be more acrimonious. Unlike most other pieces of work trying to eliminate father's rights by encouraging sole custody arrangements, this piece encourages fathers who want to be heavily involved in the lives of their children to seek sole instead of joint custody.

The problematic disregard for the best interest of the child is compounded by the gender-biased presumptions influencing the court in making its custody decisions. Whether the bias is forthright or disguised, a preference for mothers in child custody determinations is unjust and detrimental to the child. Not comprehensively considering all available factors beyond blanket presumptions of one gender's capability to rear children versus another places the child in a dangerous position, where his or her needs may not be most closely met.

In order to more accurately meet the needs of the child and effectively serve his or her best interest, joint custody arrangements should only be awarded in the rarest and most extreme cases. Sole custody should most commonly be awarded to one parent and ample visitation should be awarded to the other parent. This way, the child can establish and continue meaningful bonds

with each parent without having to unduly sacrifice his or her own well-being and stability. The child can maintain a primary residence and environment to consider “home.” With this arrangement, a consistent and predictable routine is a realistic possibility. The child does not have to keep a mental list of which behaviors are encouraged and which actions are discouraged at each house while constantly switching back and forth between the two. The child can refrain from living two lives and focus on developing himself or herself without worrying about making sense of conflicting messages.

Though joint custody caters to the best interest of the parents, it is extremely contradictory to the best interest of the children. The law must advance to better serve the children in these devastating situations and realistically consider the standard that should be used when making decisions regarding custody determination. Children can no longer be treated as community property to be owned and almost equally divided. The pervasive gender-bias that plagues the courts when determining child custody issues must be pushed out of existence. By implementing these changes, children will be more thoroughly safeguarded from future harm, and their best interest has a higher likelihood of being properly considered and met. Most importantly, the cyclical failure of the child custody determinations will finally be resolved and be free of gender-biases that have historically hindered the realization of the ultimate goal – maximizing the prospect of the child to develop into a stable, well-adjusted adult.