THE INAPPLICABILITY OF RIGHTS ANALYSIS IN POST-DIVORCE CHILD CUSTODY DECISION MAKING

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It is well understood that in custody battles passions become inflamed and children often become victims of their parents' irrational, selfish behaviour. Within the court system, various concepts have been developed in an attempt to combat this and to achieve custody arrangements that are in the best interests of the children. Munro explores these concepts and reveals that all too often the best interests of the children are sacrificed for the rights of the parents. Indeed, the Charter of Rights and Freedoms *has added strength to parental rights arguments within custody battles. Munro challenges those who believe that rights analysis should be used to create equality between parents seeking the custody of their children. She explores the various myths about the differences between men and women as caregivers and concludes that, on a general level, men are biologically capable of being the caregiving parent but refuse to actively take on the role. Ultimately, Munro suggests that the appropriate test to use to determine who should have custody is the* Primary Caregiver Test. *This test is based on the presumption that the parent who was the primary caregiver during the marriage will be the better caregiver after the marriage and, thus, should be awarded custody of the children. The* Primary Caregiver Test, *Munro argues, is not only more effective, less time consuming and less costly than other tests, but also acts to preserve the concept of the best interests of the children which must be the pinnacle consideration in all custody disputes.*

On sait que les enfants sont souvent victimes du comportement irraisonné et égoïste des parents qui s'en disputent la garde et dont les passions s'enflamment. Au sein du système des tribunaux, divers concepts ont été élaborés pour tenter de combattre cette situation et de parvenir à des ententes respectueuses de l'intérêt véritable des enfants. Munro explore ces concepts et relève que, trop souvent, les droits des enfants sont sacrifiés au profit de ceux des parents. En fait, la Charte des droits a fortifié les droits parentaux dans ce type de situations. Munro interpelle ceux qui croient que l'analyse des droits devrait servir à créer l'égalité des parents qui cherchent à obtenir la garde de leurs enfants. Elle examine les divers mythes qui existent sur les capacités différentes de «maternage» des hommes et des femmes, et conclut que les hommes sont en général biologiquement capables d'assumer activement ce rôle mais le refusent. Munro suggère d'utiliser le Primary Caregiver Test *avant de prendre une décision. Ce test présuppose que le conjoint qui avait la responsabilité parentale principale des enfants durant le mariage sera le parent plus compétent et devrait par conséquent avoir la garde des enfants. Selon Munro, ce test n'est pas seulement plus efficace, plus rapide et moins coûteux que les autres, mais il préserve aussi la notion de l'intérêt véritable de l'enfant, laquelle doit rester le souci premier dans tout différend de ce type.*

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I. INTRODUCTION

Society has long had to deal with custody disputes with respect to minor children.[1] Throughout history, when faced with a decision as to where a particular child was to be reared, judges or other decision-makers have taken widely varying factors into account.[2] This paper will examine the current "best interests" test for custody decisions[3] and arguments for the change of that test. Much of the discourse with respect to the need for change to the best interests test centres around the concept of parental rights; this discourse occurs largely within liberal feminist and father's rights groups. I will explore the reasons why parental rights are inappropriate as the basis for analysis of custody decisions and then propose a preferred method of settling custody disputes.

II. HISTORY OF CUSTODY

It is only very recently in history that the question of to whom custody would be granted was even remotely debatable. Until mid-nineteenth century, fathers were granted

1. See I. Kings 3:16-28, in which King Solomon earned respect for his wisdom in determining the custody of a healthy baby.
2. For a tracing of the history of child custody laws, see M. Grossberg, *Governing the Hearth* (University of North Carolina Press: Chapel Hill, 1985).
3. I am restricting this discussion to custody decisions post-divorce, and the majority of the discussion to contested custody. These cases are increasing in number with an increase in the number of divorcing couples. This has predictable results with respect to child-related litigation, such as increases in custody/access disputes, as well as increases in support issues, especially with second and third marriages.

custody as a matter of right.[4] This right, however, must be understood in the context of the times: husbands and fathers were considered to have not only a familial relationship with wives and children, but also a relationship of ownership.[5] It was only through statutory change following lobbying by early suffragettes that mothers were even able to apply for custody of children of the marriage. This change was highly controversial, since it also afforded women a slightly higher degree of power in the marriage. Julia Brophy states:

> The problem which the early promoters faced was not so much a total rejection of the notion that mothers should have some rights commensurate with her responsibility towards young children, but that provision would also give women some power within marriage....[6]

The debate was argued largely within notions of equality, and the prevailing view was that equality must be tempered by reference to women's different nature, that is, that women are instinctively good mothers. Once fathers no longer had an automatic right to custody, the court's focus became the child's best interest. For approximately half a century, the question of custody was largely unexamined.[7]

Though the demise of a father-right to custody necessitated new rules, the situation was not changed massively.[8] The tender years doctrine meant that older, employable, male children stayed in the custody of the father. Thus, the statutory right to apply later became a preference in favour of mother-custody for a child of "tender years," that is, for a child under the age of seven. The tender years doctrine was based on belief about the inherent limitations of males to be parents that seem ludicrous in today's world. Bruno Bettelheim describes the unnaturalness of fathers raising children even with the cooperation of mothers:

> Male physiology and that part of his psychology based on it are not geared to infant care...infant care and child-rearing, unlike choice of work, are not activities in which who should do what can be decided

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4. L.J. Weitzman and R.B. Dixon, "Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce" (1979) 12 U.C.D.L. Rev. 471, who at 478 cite *King* v. *DeManneville*, 102 Eng. Rep. 1054 (K.B., 1804), wherein Lord Ellenborough awarded custody of a nursing infant to its French father; this award was made notwithstanding that the man's cruelty had "driven the mother and children from his home."

   See also M.L. Fineman & A. Opie, "The Uses of Social Science Data in Legal Policy Making: Custody Determinations and Divorce" (1987) Wis. L. Rev. 107 at 111; J.C. MacDonald, "Historical Perspective of Custody and Access Disputes: A Lawyer's View" in R.S. Parry, et al., eds., *Custody Disputes: Evaluation and Intervention* (Toronto: Lexington Books 1986) 9.

5. Grossberg, *supra*, note 2.

6. J. Brophy, "Parental Rights and Children's Welfare: Some Problems of Feminists' Strategy in the 1920s" (1982) 10 Int. J. of Soc. of Law 149 at 154.

7. J. Elster, "Solomonic Judgments: Against the Best Interest of the Child" (1987) 54 U. Chi. L. Rev. 1 at 3. "The major exception to the political unimportance of child custody disputes is that to some extent they have been an issue in the women's liberation movement. Yet feminist writers have, by and large, held ambivalent views on the question."

   I would suggest that the issue is less "ambivalent views" and more disagreement; this will become apparent, *infra*.

8. Fineman & Opie, *supra*, note 4, trace the changes due to feminist agitation.

> independently of physiology...The relationship between father and child never was and cannot now be built principally around child-caring experiences. It is built around a man's function in society: moral, economic, political.[9]

In the past two decades, this presumption has been severely criticized, and is now in disuse.

It is important to note that in its inception the tender years doctrine meant that the child remained with the mother only until she reached the age of seven. *Talfourd's Act 1839* was amended in 1873 to allow the mother custody of the child to the age of sixteen years; then again in 1886 to allow custody to the mother to the age of twenty-one.[10] Children, then, were moved as they reached the relevant age to the custody of the father. This was, in practice, more frequently done with males than females, because males were employable and viewed as more in need of the influence of fathers.

With the exception of the father-right to custody, it should be noted that all of the tests for placement of children are argued from within the "best interests" test; that is, all are posited as merely presumptions which assist the judge in making her[11] determination in each individual case. The Court of Appeal of Alberta considered the tender years doctrine, and the majority rejected its use in *Roebuck*. Kerans, J.A. quoted with approval from the trial judgment:

> There is no longer, in my view, any historic or traditional right that favours either mother or father. This issue must be decided on the merits of this case...[it] is acknowledged for the mother that the learned trial judge was not bound to give the mother custody of a child of tender years just because the child was of tender years...I understand him simply to reject the "rights" approach to the determination of a custody case in lieu of the "best interests" approach.[12]

He thus argues against use of the doctrine of tender years, even as a factor, because, "[if] the extreme youth of the child must be the deciding factor, then that factor gives the mother an undeniable right."[13] Interestingly, this analysis with respect to rights is done notwithstanding that the tender years doctrine was never rights-based; the doctrine is a presumption that the mother is *better for the child* when the child is of tender years. Certainly, it is arguable that this doctrine is no longer of any assistance for deciding custody; few would argue otherwise. There are reasonable grounds for rejecting the test

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9. B. Bettelheim, "Fathers Shouldn't Try to Be Mothers" *Parents' Magazine*, October 1956, as cited in Weitzman et al., *supra*, note 4 at 481 note 41.

10. 2 & 3 Vict. c. 9. See MacDonald, *supra*, note 5. See also M. Grossberg, "Who Gets the Child? Custody, Guardianship, and the Rise of a Judicial Patriarchy in Nineteenth Century America" (1983) 9 Feminist Studies 235; L.E. Teitelbaum, "The Legal History of the Family" (1987) 85 Michigan Law Rev. 1052; and I. Thery, "The Interest of the Child, and the Regulation of the Post-Divorce Family (France)" (1986) 14 Int. J. of Soc. of Law 341.

11. Because I find it difficult to either read or write the uneven text which occurs with the use of inclusive pronouns, (i.e. his/her, he/she, etc.) the use of the words "she" or "her" will be taken to include either a male or a female.

12. *Roebuck* v. *Roebuck* (1983), 45 A.R. 180, 34 R.F.L. (2d) 277, at 195 in A.R.

13. *Ibid.*

– that it gives "rights" to mothers over fathers is not one of them. In fact, the test was begun as a response to the lack of justice inherent in the earlier rights-based father-custody.

Custody of children of divorce[14] is arguably a matter of provincial power;[15] however, post-divorce custody is regulated by the federal Parliament, as a necessarily incidental and corollary matter to the *Divorce Act*.[16] As of 1985, Canadian courts must look at the "best interests" of the child and are not entitled to make gender-specific decisions.[17] The court is instructed to "not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child."[18] This would, of course, disallow the use of the tender years doctrine. A number of different forms of custody awards can be made by the Court:[19] split custody;[20] joint custody;[21]

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14. When I use the word "custody," I am referring to both legal custody and physical custody. This distinction is an important one, although academic literature does not always make it. When necessary, I will draw the distinctions; when unnecessary to make distinctions, I will simply use the term "custody."

See the report by the Law Reform Commission of Canada, *Studies on Divorce* (1975) Information Canada, Ottawa, for detailed definitions of legal and physical custody.

See also H. Garfield, "Due Process Rights of Absent Parents in Interstate Custody Conflicts: A Commentary on In re Marriage of Hudson" (1983) 16 Indiana Law Rev. 445 at 449-50, where she characterizes custody determination as a "temporary allocation" of parental rights and duties, subject always to reconsideration.

15. This would come under the head of power of "property and civil rights," *The Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 92(13). It is under this head of power, for example, that *The Child Welfare Act*, S.A. 1984 c. C-8.1 as am. is enacted.

16. R.S.C. 1986 (2nd Supp.), c. 4.

17. *Ibid.* s. 16(8).

18. *Ibid.* s. 16(9). This is to reverse the situation described by A. Mayrand, "The Influence of Spousal Conduct on the Custody of Children" in R.S. Abella and C. L'Heureux-Dube, eds, *Family Law: Dimensions of Justice* (Butterworths, 1983) at 159. "At one time there existed two categories of separated or divorced spouses: the innocent and the guilty. The innocent spouse was given custody of the children as a first prize for good behaviour, whereas the guilty one was deprived of custody as a punishment."

19. It should be noted that the vast majority of custody awards are merely judicial approval of decisions agreed upon by both parties to the divorce. It is only a small percentage of custody decisions which are litigated; however, it is to these decisions that this paper is directed. I make no comments with respect to agreed-upon decisions unless these are explicitly made. My comments in this paper refer to legislative and judicial presumptions or responses to litigated cases, and the arguments are presented with respect to these.

I would add, however, that negotiated agreements between parents are strongly influenced by the content and predictability of litigation. See R. Cooter, S. Marks, & R. Mnookin, "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behaviour" (1982) 11 J. of Legal Studies 225.

20. In *Re L.*, [1962] 3 All E.R. 1 (C.A) at 4, the mother had committed adultery, thus Lord Denning awarded legal custody to the father, but physical custody to the mother.

21. *Jones* v. *Jaworski* (1989) 93 A.R. 378. See also *Sichmann* v. *Sichmann* (1988) 88 A.R. 270; *Lehmann* v. *Lehmann* (1989), 95 A.R. 383; *Demchuk* v. *Demchuk* (1986) 73 A.R. 161.

sole custody to one parent with visitation to the other parent;[22] and custody awarded to a third party.[23]

III. THE BEST INTERESTS TEST

Notwithstanding the only recent inclusion in our divorce legislation, the "best interests of the child" or "welfare of the child" test has been preferred by the Courts for some time in making custody determinations.[24] As currently formulated, this test requires a Court to examine, in the absence of any presumptions and on a case-by-case basis, all of the circumstances of a child's particular situation, and to make a determination as to what situation, home, or parent will constitute the best placement for that child. While there are recognized factors to be considered in making such a determination,[25] there is clearly not agreement by decision-makers or by academics, as to the preferred ranking or priorizing of such factors. Factors weighed include the child's preference, the preference of either parent, plans made by each parent, status quo, and any other fact or factor a judge may deem relevant to a particular case.

It is under this "basket-clause" that the morality questions sneak into consideration. The *Divorce Act's* requirement that parental conduct should not be considered unless related to the ability to parent has been very liberally interpreted. However, the lack of consideration of parental morality has been argued to still follow the old "double

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22. This is a common custody award. Such an order may be a "reasonable access" order, or it may be very specific about the times and dates which children will see the non-custodial parent. L. Weitzman, *The Divorce Revolution* (New York: The Free Press, 1985), [hereinafter cited as *Divorce Revolution*] states that 90% of sole custody awards include the common "reasonable access" clause; only 5% either spell the specifics out in detail, or refer directly to an agreed-upon separation agreement.

23. While this form of award is possible, a discussion of the factors in such a decision is outside the scope of this paper. This is generally an award to a third party such as a grandparent or foster parent; a third party must apply for leave to apply, and the condition is that the application must only not be frivolous or vexatious. See, for example, *R.M. and E.M.* v. *G.B., J.B. and Director of Child Welfare (Intervener)* (1987), 6 R.F.L. (3d) 44 (Nfld. S.C.-T.D.), where the court ruled that foster parents could apply for custody in a divorce proceeding of the natural parents only with leave from the court.

24. See *MacDonald* v. *MacDonald*, [1976] 2 S.C.R. 259; *Talsky* v. *Talsky*, [1976] 2 S.C.R. 292 where the Supreme Court ruled in favour of "best interests" test. For Alberta authority, see *Roebuck*, *supra*, note 12; *K. (M.M.)* v. *K. (U.)* (1990), 28 R.F.L. (3d) 189 (Alta. C.A.), rev'g. (1990), 105 A.R. 102 (Q.B.), leave to appeal denied (1991), 31 R.F.L. (3d) 366 (S.C.C.); *Stewart* v. *Stewart* (1991), 30 R.F.L. (3d) 67 (Alta. C.A.).

25. D.L. Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984) 83 Michigan Law Review 477, tried to identify "elemental qualities" to be considered in child placement in divorce. He listed these elemental needs: need to sustain secure relationship with parent figure; to feel valued by parent figure; to enjoy childhood day by day; to develop a range of capacities to function as an adult; most particularly, to be able to love; to have a sense of self-worth; and to have a sense of control over life. For the child of divorce, he added: opportunity for regular contact with both parents in conflict-free setting.

standard": women who are sexually active still appear to be judged more harshly than are men in similar circumstances.[26]

Criticism of the best interests standard comes from two spheres. Firstly, from judges themselves: comments within reported case decisions about a custody dispute frequently include a reference to the difficulty of making such a determination. See, for example, the comments by Miller, A.C.J.Q.B., in *Jones*:

> ... I reiterate what has often been said by my colleagues and myself, namely, that contested custody cases are surely amongst the most difficult types of judgments we are called upon to deliver. Typically we deal with important issues that can dramatically impact upon the lives of the children and the parents and are forced to do so with relatively little exposure to the people involved. In the case of young children, judges have found that they are ill-equipped to interview the children themselves or, if they did, to interpret accurately what they are really saying.[27]

Secondly, from various academic authors, these criticisms arise for a number of reasons, but the underlying theme of all is the fact that there is no method for giving priority to any of the relevant factors. Elster argues that this is due to the lack of possibility for rational weighting of factors, because the issues are so important to the parties directly involved, and because custody decisions are seldom clear-cut.[28] Mnookin states:

> Deciding what is best for the child poses a question no less ultimate than the purposes and values of life itself...[W]here is the judge to look for the set of values that should inform the choice of what is best?

He further states that our lack of public consensus about childrearing, and our difficulty of defining best interests renders it impossible to determine best interest "save except minimum of absence of abuse."[29] The indeterminacy of the test arguably leaves the final decision to the individual judge's whim or personal values. Crean argues:

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26. For empirical data to support this statement, see K. Arnup, "Mothers Just Like Others: Lesbians, Divorce, and Child Custody in Canada" (1989) 3 Canadian Journal of Women and Law 18; N. Lauerman, "Nonmarital Sexual Conduct and Child Custody" (1977) 46 U. Cin. L. Rev. 647 at 649-53; L.K. Girdner, "Child Custody Determination: Ideological Dimensions of a Social Problem", in E. Seidman & J. Rappaport, eds, *Redefining Social Problems* (1986) 165 at 175-76; and B. Child, "The Nonmarital Sexual Conduct of Custodial Mothers: A Study of California's Precarious Parental Rights" (1982) 12 Golden Gate University Law Rev. 505 at 530-531.

Case decisions which demonstrate a questioning of morality underpinning custody determinations include *Roebuck*, *supra*, note 12 at 184, where it was held that the amorous adventures of mother, and her sensitivity to cruelty, were to "blame for marriage breakdown." See also, *Mullen* v. *Mullen* (1979), 24 A.R. 154 where Kirby, J. ordered sole custody to the father because the mother had committed adultery. See also, *MacDonald*, *supra*, note 24 at 261-262, where Spence, J. discussed the conduct of each party, and held that "greater fault must be laid at the feet of [the wife]" even though also holding that the husband was "insensitive, critical, [and] demanding, but he was unaware of it." Here, the wife's adultery, which made it impossible for continuation of the marriage, was considered unfit parenting.

27. *Supra*, note 21 at 381-2.

28. *Supra*, note 7.

29. R. Mnookin, "Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy" (1975) 39 Law & Contem. Probs. 226 at 260.

> ...by making the "best interests" of the child the test in court, women were inevitably put in the position of trying to demonstrate greater parenting skills than their husbands when in most instances they have fewer economic and social resources to call on. To them it must feel like being tested for the job of motherhood after the fact, and flunking it. Furthermore, evaluating something so ephemeral as a child's "best interests" is inescapably a matter of subjective opinion and personal prejudice, no matter how factual and detailed the statutory guidelines. It is here that women run headlong into the bias of the white, male, middle-class judiciary.[30]

At minimum, without some priorization of factors, there is decreased predicability of the outcome which increases the likelihood of litigation.

There is agreement, then, that the question of who will be the custodian of a particular child requires a more clearly formulated process. There is certainly not agreement, however, about what is determinative of the proper process, nor what factors should be given priority in the actual decision.[31] A recent, and in my opinion disturbing, trend is to frame the custody discussion in the liberal democratic discourse of rights. While I would certainly concede that there are important human and social conditions for which rights analysis is the correct focus, I would nonetheless argue that what is in the best interests of a child is not one of them. This is because children are simply too vulnerable to be risked. Ideology of anything: fatherhood, motherhood, or equality is not sufficient, in my view, to displace clear-headed thinking about how society can best deal with children of divorce. These children plainly have too much at stake, and are too young or too lacking in maturity to formulate or articulate a preference, for us as intelligent adults to not seriously consider the impact of our policies on them. Rights analysis, in practice, is not demonstrably working to the benefit of children; there is strong evidence it may work to the clear disbenefit of both children and women.

IV. RIGHTS ANALYSIS

Canadians have become more "rights-conscious," especially in these post-*Charter* years.[32] It should come as no surprise, then, that the use of rights analysis might be applied to such judicial decision-making as placement of children post-divorce. Certainly, the common law has long recognized parental rights. However, it should be noted that such parental rights have heretofore only been "exercisable" as against state or third party intrusion; it is only recently that the attempt has been made to extend this concept to include post-divorce custody. Post-divorce custody rights have been argued to include the right:

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30. See S. Crean, *In the Name of the Fathers: The Story Behind Child Custody* (Toronto: Anamita Publishers, 1988) at 28.

31. Child, *supra*, note 26 at 512 cites a survey of lawyers with respect to the "best interests" standard: "The American Bar Association once polled its members involved in custody litigation and was forced to conclude that "there is total disagreement and variety as to what aspects of family life make up 'best interests and welfare'."

32. *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11.

to physical possession (custodial parent);
to access (non-custodial parent);
to determine education, religion;
to domestic services;
to discipline child;
to consent to marry;
to consent to medical treatment;
to administer child's property;
to succeed to child's property on child's death;
to appoint guardian;
to agree to adoption;
to object to state assumption of parental rights;
to consent to change in child's surname; and
to represent child in legal proceedings.[33]

The basic tenet of those arguing custody in terms of rights is that neither parent should have priority over the other parent. The biological nexus between the parent and the child is the same for the mother or father; this biological nexus is sufficient to overturn the existing sole custody/non-custodial visitation preference in custody litigation.[34] Given that equality between parents is impossible, should sole custody be the placement awarded by the court? Rights proponents prefer joint custody awards as a method by which equality between parents can be mandated by court awards.[35] These arguments are posed by two major groups: liberal feminists and father's rights groups. However, the presentation of each argument contains sufficient differences to warrant separate examination.

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33. S. Maidment, *Child Custody & Divorce* (Croom Helm: London, 1984) at 23. See also A. Levy, *Custody and Access* (Oyez Longman Publishing, 1983).

I find the use of the phrase "right to physical possession" offensive: it is difficult to discern a difference between the right to physical possession of a child, and a car or even a favourite book, when confronted with this use of language.

Additionally, it is arguable that some of these enumerated rights are not rights at all, but that some are responsibilities and some are neither (i.e. domestic services).

34. The arguments presented to King Solomon, *supra*, note 1 are based on this notion. Each woman presented a narrative to the King which indicated her "biological nexus" to the child in question.

This is also the notion upon which the earlier-stated "father-right" was based: the father "owned" his descendants because of the biological nexus, a connection which was deemed proven by virtue of the fact that the child was born to him of his wife. Thus, any legitimate child of the marriage was considered to be biologically the husband's child, a deeming provision in common law which continues to this day.

35. There are a number of different forms of legislation which mandate either imposed joint custody or judicial consideration of joint custody. See K.A. Bartlett and C.B. Stack, "Joint Custody, Feminism and the Dependency Dilemma" (1986) 2 Berkeley Women's Law Journal 9 at 24 for a discussion of various forms of joint custody statutes.

The *Divorce Act*, *supra*, note 16, allows for an order of joint custody, but gives no guidelines with respect to conditions under which such an order ought to be made. For the American position, see the *State Divorce Statutes Chart and Summary Sheet Introduction* (24 March 1986) Fam. L. Rep. (BNA) 5-6.

A. LIBERAL FEMINISTS

The genesis of the questioning of a maternal preference in child custody was the women's movement; however, such questioning did not arise in the context of post-divorce custody. The questioning was of the inapplicability of roles being determined by sex alone, i.e. that it was "women's work" to do family care and "men's work" to be breadwinner. With the advent of women continuing careers outside the home following childbirth and during childrearing years, feminists called for more egalitarianism within the home.[36] The original challenge to the heretofore rigid sex roles was based on the notion that biology is not determinative of capability for parenting or any other societal task; that individual skills are the only factors which should be considered determinative, i.e. that males are as capable of "mothering" as females.

It is very important to note that the position of liberal feminists is grounded in a strong allegiance to the ideology of equality and, therefore, of gender neutrality. Fineman states, with respect to this position:

> Mainstream feminists attack gender-specific legal tests as inherently discriminatory. In the family law context, gender neutrality remains popular goal of liberal feminist reform.[37]

This results in an "individualizing" of gender differences; that is, liberal feminists would hold that any differences between the work done by women and that done by men, either in the workplace or in the home, are only able to be eradicated by easier and formally accessible opportunities for both, as well as more egalitarian socialization of children of both sexes. Liberal feminists argue that barriers to access must be removed from existing structures but do not argue for a fundamental change to those structures.[38]

Liberal feminists argue that a maternal preference for child placement post-divorce mitigates against equality for women in two ways: (1) it reinforces the traditional stereotype of the woman as the innate family caregiver; and (2) it decreases the opportunity for women to compete in careers, insofar as it leaves women doing the inside-

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36. See M.L. Fineman, "Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking" (1988) 101 Harvard Law Rev. 727, [hereinafter cited as Dominant Discourse] at 768.

37. M.L. Fineman, "Implementing Equality: Ideology, Contradiction and Social Change: A Study of Rhetoric and Result in the Regulation of the Consequences of Divorce" (1983) Wis. L. Rev 789 [hereinafter cited as Implementing Equality] at 821-22.

38. N. Erickson, "The Feminist Dilemma Over Unwed Parents' Custody Rights: The Mother's Rights Must Take Priority" (1984) 2 Law & Inequality 447, calls for acknowledgment that formal sexual equality often operates to detriment of women, i.e. culminating in a preference to the parent with most money versus the parent with closer tie with child; a view of the calm, authoritarian father as a better potential custodian versus the mother who appears emotionally shattered by divorce; reluctance to award alimony; a view that custodial responsibilities are detrimental to ex-housewife's ability to support; denial to employed mother for not being providing at-home care, especially if the father has new wife in wings to become the children's new mother.

She states, at 449: "Mainstream feminists would describe these scenarios simply as abuses of an otherwise fair system, a system they define as formal sexual equality in the law of child custody upon divorce."

the-home work as well as the breadwinning.[39] Thus, argue liberal feminists, equality between the father and the mother in custody determination generally, and joint custody preferences, in particular,[40] will advance the cause of equality for women in all spheres of society. Most liberal feminists recognize that the sharing of household and family tasks is not equal in reality;[41] however, liberal feminists would argue that provisions such as joint custody will change this reality and encourage men to take a more active part in childcare.[42] This argument is based on the belief that a change in law will necessarily involve social change; thus, any opportunity to give a societal message about how men and women should participate in raising of children cannot be overlooked.

> A feminist might attempt to justify a best interest, case-by-case approach on the grounds that an approach that helps women win custody battles is better than another approach that does not...women's interests cannot be collapsed into one formula. In the short term, a near guarantee of custody of one's children may be thought to be a victory for women, but in supporting an ideology that mothers more than fathers should devote themselves to the care and custody of their children, this approach itself draws on traditional stereotypes that are easily perpetuated by sole custody decision. These stereotypes confirm that women usually will (read, should) take primary responsibility for the caretaking of children.[43]

Bartlett and Stack seem uncertain as to whether to acknowledge that child care practices remain largely unchanged, but in the end make what is, in effect, a grudging concession on this point. However, but say that they remain in favour of joint custody legislation. They view the process as this: give fathers joint custody, and they will then take on more responsibility for child care.[44]

Thus, liberal feminists would argue that a presumption of joint custody is essential to any restructuring of gender roles within parenthood. The theory is that to eliminate traditional patterns of childrearing responsibilities by law will lead irrevocably to a later change in the practice of childrearing by individual couples.[45] The argument by liberal

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39. It should be noted that liberal feminists, as well as father's rights groups, when noting the astonishing rate of default in child support payments to sole-support mothers, further argue that joint custody would encourage fathers to make such payments, because there would be an ongoing participation in the child's life which would lead the father to maintain payments. There is simply no research to back this up: in fact, there is research indicating the opposite. See *supra*, note 22, whose statistics indicated lowered support awards accompanying an order for joint custody, whether or not that included joint legal custody or joint physical custody.

40. Liberal feminists also make this statement from within the understanding that the existing "best interests" test is frequently perceived as biased. See Bartlett et al., *supra*, note 35 at 25.

41. Though not all, see, for example J. Miller, "Joint Custody" (1979) 13 Fam. L. Q. 345 at 364-365 perceives this fairness as both practically and theoretically based, and bases her joint custody argument on fathers' existing cooperation in childcare. She cites no empirical evidence for this claim.

42. Bartlett et al., *supra*, note 35 at 28-32. See also A. Schepard, "Taking Children Seriously: Promoting Cooperative Custody After Divorce" (1985) 64 Texas Law Rev. 687, who bases his arguments on the ideal of equality.

43. Bartlett et al., *supra*, note 35 at 31-32.

44. Were this to work, I would see it at the very least as an arguable point. However, it does not. See notes 91-99 and accompanying text.

45. R. Joyal-Poupart, "Joint Custody" in *Family Law in Canada: New Directions* (Canadian Advisory Council on the Status of Women: 1985) 107.

feminists, then, is one which implicitly calls for joint physical custody as well as joint legal custody.

B. FATHER'S RIGHTS GROUPS

Father's rights groups became popular in the late 1970's as a result of dissatisfaction with court decisions affecting men following divorce.[46] Such groups are customarily organized around seeking equality for men in post-divorce issues such as custody and access, child support, and spousal maintenance. The members are very active and are very effective. They take credit for the *Children's Law Reform Amendment Act*[47] which allows extraordinary enforcement remedies for impeded access. Crean makes the analogy to the fifteen years of lobbying associated with the enactment of maintenance enforcement legislation, which was ultimately passed when it was argued, rightly, that maintenance enforcement would save the provincial treasury money. This is notwithstanding statistics gathered by the Manitoba Attorney-General's office that while there was an 85% default rate on child support payments, there was only a 15% problem rate with access denial, the vast majority of which were resolved over a short time.[48] It is interesting to note that while these groups claim to be acting for fathers in general, there is no mention of policy change which would encourage sharing of parenting in intact families.[49]

It is claimed by organizations such as Fathers for Justice that if equality between men and women is the goal sought by feminists, then feminists and all women must therefore agree to joint custody, decreased child support, and total self-sufficiency post-divorce. Anything less than this, it is argued, is by definition unequal treatment for men.[50] While it is true that these three issues form the organizing structure of father's rights groups, the custody issue is given most publicity. It is arguable that this is due in large part to the fact that the public generally supports equality of parents with respect to interaction with their children, but that the public is aware of the unequal position of women with respect to economics, and would thus not be supportive of a punitive stance regarding economic support. Thus, to take a strong stance with respect to decreased child support or a complete lack of spousal maintenance for example, for a woman who had been a full-time homemaker for forty years pre-divorce would not be a good political strategy. However, it seems equally apparent that the latter two goals are closer to completion: it is now rare

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46. While the membership of father's rights groups is only estimated at 80 nationwide (A. Rauhala, March 1988, The Globe and Mail, as cited in Crean, *supra*, note 30), there are a number of them: Canadian Council for Co-parenting; F.A.C.T.S., which stands for Fathers and Children, Their Society; Canadian Council for Family Rights; Fathers for Justice; In Search of Justice; REAL Men; and Association Hommes Separes ou Divorces de Montreal.

47. S.O. 1989, c. 22.

48. *Supra*, note 30 at 117.

49. For a comparison between legislators' attempts to encourage egalitarianism in intact families versus separated families, see Girdner, *supra*, note 26 at 152.

50. This use of the jargon of equality for ensuring greater than equality for men is now an established jurisprudential result of the Charter. See statistics in C. Jefferson, "The Charter Four Years Later: The Promise of Equality" *LEAF Letter*, Number 7, Summer 1989, a newsletter of the Women's Legal Education and Action Fund, who says at 1: "The vast majority of section 15 cases have *not* been initiated by those interested in promoting equality for women or other disadvantaged groups...Some cases have challenged legislation designed to protect women."

for a woman to be awarded spousal support, and there have been relative decreases in the amounts of child support payable, and paid without governmental coercion.

Fathers' rights groups can only be viewed as a backlash to the movement toward equality made by the women's movement. Fineman and Opie state:

> These men's groups were organizations that arose during the seventies, expressing ideas that many labelled as a backlash to some of the successes of the feminist movement. Many of these groups initially organized around the issue of child support. The problem of non-paying fathers had begun to be publicized, and the groups attempted to counter the image of the "deadbeat dad" with their own political interpretation of the situation. Custody soon became an issue for the fathers groups, as they justified widespread non-payment of child support with the images of beleaguered fathers who were only reaction to a court system which always gave mothers custody and treated them as nothing more than "walking wallets." Father's rights groups used the rhetoric of the feminist movement, and argued joint custody as the child's right to have equal access to both parents, but most importantly, as the father's rights to have equal control of decisions affecting child after divorce.[51]

These organizations assert that the very language used with respect to custody is demeaning to men. Such terms as "custodial parent" and "visiting parent," they argue, are hierarchical and humiliating. Drawing on positive social scientific research done with families living in voluntary joint custody situations, father's rights groups extrapolate from these and insist that the only fair method of dealing with unresolved custody of children post-divorce is to legislate mandatory joint custody. It is argued that not only is there a familial right to equality underlying this issue, but that there is a constitutionally guaranteed "right to parent," which extends so far as a father's constitutionally guaranteed right to joint custody of children which are biologically his. Robinson, states:

> ...when marital breakdown occurs, both parents are entitled to constitutional protection of their right to continue to direct the upbringing of their children through the exercise of custody. Adequate protection of this parental right requires that parents be awarded joint custody of their children upon divorce unless a compelling state interest directs otherwise...[this is] based on (1) decision to procreate as part of right to privacy and (2) right to retain parental rights over children: "...once procreation has occurred and a biological parent-child relationship has been created, parents retain a constitutionally protected, fundamental liberty interest in maintaining full and meaningful relationships with their children.[52]

Much of the writing in the fathers' rights genre begins with personal statements from men who have been unable to see their children, or who have found seeing them as "visitors" too painful to continue. It is highly emotional; these personal statements are

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51. *Supra*, note 4 at 116.

52. See H. Robinson, "Joint Custody: Constitutional Imperatives" (1985) 54 U. Cin. L. Rev. 27 at 41. See also Joyal-Poupart, *supra*, note 45; and "Developments in the Law – The Constitution and the Family" (1980) 93 Harv. L. Rev. 1156 at 1313-15, for a discussion of parental rights cases.

frequently virulent in their attacks on former wives and are unabashedly anti-feminist.[53] The constitutional "answer" to this pain is then presented as obligatory joint custody.

These narratives are generally framed as impeded visitation (i.e. impeded by the mother of the child). It is then argued that joint custody would change this by making the former wife unable to stop the father from seeing his child. It is important to note that in cases where there is *impeded* access, there is a court order in place. Very few court orders deny access completely to any parent; even a father who is known to have sexually abused the child will generally be awarded at least supervised access.[54] Thus, it would appear that a court order specifying joint custody will be of no more force than an access order. It seems, then, that the perceived solution does not address the underlying problem.

In addition, statistics indicate that the real problem is less impeded access, and more lack of maintaining contact. It would appear obvious that there is greater cause for concern about fathers who fail to see their children, than with fathers who are impeded from seeing their children.[55] Chambers argues that while such a finding may suggest fathers care little about contact with children, the visitation declines over time; thus it may be the visiting relationship, not weakness in preexisting relationship, that leads to the infrequency of contact.[56] While it may be the case that the role of the visiting parent is difficult, this fact alone does not explain the extreme discrepancy between mothers, who are much more likely to visit regularly, and fathers, who have an abysmal visiting record. Thus, it would appear that this is an important question for which we have, at present, no answer: is the declining visitation due to a lesser bond with the child? This does not seem to be a particularly startling possibility: see the statistics on fatherhood involvement in intact families.[57] This question must be answered more satisfactorily before basing any policies on the narratives of non-visitation which suggest impeded visitation is the norm. Statistics simply do not bear this contention out.

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53. See, for example, the comments of R. Virgin, of In Search for Justice, in Crean, *supra*, note 30 at 106, who believes that "when a husband and wife separate, he is obliged to continue to support her financially while no one expects her to keep up her side of the bargain by continuing to plan and cook his meals and do household chores."

The fact that this is simply not a correct statement of present Canadian law does not dissuade him; nor, it would appear, does the fact that this marriage-as-contract-for-services model is not one which is the prevailing view of Canadians.

54. See for an example of such, *P.* v. *P.*, [1985] A.U.D. 1455, which allowed the father supervised access.

55. Certainly, statistics would indicate cause for concern. See Furstenberg, et al., "The Life Course of Children of Divorce: Marital Disruption and Parental Contact" 48 Am. Soc. Rev. 656 at 665, Table 7: Most children of divorce see their father at least once per month in the first two years post-separation. However, by five years post-separation, 64% of children have not seen their father in over a year. By contrast, they report at 663 that from a sample including both noncustodial mothers and fathers: 69% of mothers, but only 33% of fathers had visited with minor children at least once per month during the preceding year. In fact, 52% of fathers, but only 14% of mothers, had not seen child in over a year.

56. *Supra*, note 25 at 548 n. 272.

57. *Infra*, notes 90-100 and accompanying text.

C. EFFECT OF ARGUMENTS

Even a superficial analysis of rights arguments regarding custody determination will reveal that children do not figure in it to any great extent. The interests of children are only referred to indirectly within this discourse; that is, children's right to contact with both parents is purported to be a corollary to the parents' right to equality. The right of the child is not stated as anything but a concept. There is no presentation of cogent argument as to why such equal rights are actually in the best interests of the child, nor why children benefit from the equal contact which is deemed to be probable under joint custody, nor how equal contact with each parent will be maintained. The benefit to children is assumed; in fact, many of the articles are written without any references at all to actual children.[58]

These arguments are not made without success. The *Divorce Act* allows for a judicial joint custody ruling, but gives no guidelines with respect to conditions under which such a ruling should be made. Additionally, the "friendly parent" clause in the *Divorce Act* encourages negotiation of joint custody; a "non-friendly" parent risks losing custody entirely.[59] Legislation mandating a presumption of joint custody was introduced but not ultimately passed in the amendments to the *Divorce Act*.[60] In Ontario, however, the *Children's Law Reform Amendment Act* is a statutory recognition of parents' rights; this legislation mandates that the mother and father are equally entitled to custody of the child.[61]

Presently, about thirty American states expressly authorize joint custody through legislation. California has a presumption of joint custody which mandates a judge to impose joint custody even when parents disagree and one parent requests it. This is coupled with a friendly parent provision, which means that if sole custody is to be awarded, it is to be awarded to whichever parent promises to allow the other parent most liberal access to the child.[62]

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58. For example, try to discern this author's view about what is best for children. This is the policy statement underlying the California mandatory joint custody statute, written by the person who spearheaded its passage through the legislative process. J.A. Cook, "California's Joint Custody Statute" in J. Folberg, ed., *Joint Custody and Shared Parenting* (Association of Family and Conciliation Courts, 1984) 168 at 169: "By making sole custody less likely to be decreed by the courts, [the statute] is intended to deter divorcing parents who might otherwise be prone to pursue sole parent custody for purposes of vindictiveness, leverage, or extortion. Since the advent of California's "no fault" divorce a decade ago, there has been widespread supposition that the battleground has subtly shifted from personal accusations to custody and visitations fights, thus confounding rather than resolving the divorce process."

59. *Supra*, note 16, s. 16(10). L. Lamb, "Involuntary Joint Custody" (1987) Jan./Feb. Herizons 20 at 22, calls this clause "the silencer."

60. However, such orders are clearly contemplated by the legislation, *ibid.* note 16, s. 16(4). S.B. Boyd, "Women, Men and Relationships with Children: Is Equality Possible?" in K. Busby et al., *Equality Issues in Family Law: Considerations for Test Case Litigation* (Winnipeg: Legal Research Institute of the University of Manitoba, 1989) 69, asserts that the non-inclusion of a presumption of joint custody was thanks to the efforts of the National Association of Women and the Law.

61. *Supra*, note 47, s. 20(1).

62. E. Canacakos, "Joint Custody as a Fundamental Right" in Folberg, ed., *supra*, note 58 at 223.

One could conclude that because Canadian legislation requires that custody decisions be made only on the basis of the best interests of the child, such analysis would be rejected by the judiciary. However, such analysis is not infrequently imported into the "best interests" test. L'Heureux-Dube, J., before her appointment to the Supreme Court of Canada, stated:

> In the field of child custody, the recognition of equal rights of both parents, coupled with the increasing number of women in the work force and the assertion of fathers' rights, may complicate further the delicate task of the judge in awarding custody.[63]

While not yet stated as a deciding factor, parents' rights are frequently alluded to in divorce and change of custody judgments. In the case of *Tremblay* v. *Tremblay*, Trussler, J. stated:

> I start with the premise that a parent has the right to see his or her children and is only to be deprived of that right if he or she has abused or neglected the children. Likewise, and more important, a child has a right to the love, care and guidance of a parent. To be denied that right by the other parent without sufficient justification, such as abuse or neglect, is, in itself, a form of child abuse.[64]

Canadian judges have frequently made joint custody rulings in the absence of the parents' agreement. In *Faunt* v. *Faunt*, the court dismissed an appeal from an order of joint custody at trial, notwithstanding that the trial judge was aware that the father was not in agreement with it. The Court held that it was necessary to balance the father's disagreement with joint custody against their sense of the childrens' best interests and the need to have both parents participate in the children's upbringing.[65] It has been argued in Canadian courts that the Charter guarantees parents a right to joint custody, or that, in the alternative of awarding sole custody to a mother, the Charter protected a father from the necessity of paying child support. In *Keyes* v. *Gordon*, the father's argument was that the Charter overruled the best interests of the child, and if sole custody was granted to the mother, then it was, therefore, against his constitutional equality rights to be ordered to pay child support for the children "banished" from him notwithstanding his willingness to care for them.[66] While this reasoning may seem deplorable, it is not without

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63. C. L'Heureux-Dube, "Family Law in Transition: An Overview" in Abella et al., eds. *supra*, note 18, 302 at 307.

64. (1987), 82 A.R. 24 at 26.

65. (1988), 12 R.F.L. (3d) 331 (Alta.C.A.). This issue was first discussed in *Kruger* v. *Kruger* (1979), 25 O.R. (2d) 673, 104 D.L.R. (3d) 481, 11 R.F.L. (2d) 52 (C.A.), where Wilson, J.A. as she then was, stated at 68, albeit in dissent: "It is perhaps timely for courts in Canada to shed their "healthy cynicism" [towards joint custody] and reflect in their orders a greater appreciation of the hurt inflicted upon a child by the severance of its relationship with one of its parents." See also *Parsons* v. *Parsons* (1985), 48 R.F.L. (2d) 83 (Nfld. S.C.); *Abbott* v. *Taylor* (1986), 2 R.F.L. (3d) 163 (Man. C.A.); *Nurmi* v. *Nurmi* (1988) 16 R.F.L. (3d) 201 (Ont. U.F.C.); and *Kamimura* v. *Squibb (Carruthers)* (1988), 13 R.F.L. (3d) 31 (B.C.S.C.).

66. (1985), 45 R.F.L. (2d) 177 at 184. For an account of the underlying control issue in this particular case, see J. Gordon, "Multiple Meanings of Equality: A Case Study in Custody Litigation" (1989) 3 Canadian Journal of Women and the Law 256, where the mother describes three years of litigation, in which the case was in court on sixteen different occasions, and heard by four different levels of court. During this time, the agreed-upon $25 per month child support award was reduced to $1 per

precedent. The Manitoba Court of Queen's Bench declined to order maintenance for children to a sole support mother as long as she "insist[ed] on keeping custody of them," after the children's father made an argument based on parental rights.[67]

This concept has also been the subject of much academic writing. Supporters of joint custody invariably write from within the context of rights discourse.[68] Canacakos defines a fundamental right as:

> ... a right so basic or essential that the state must have a compelling interest to override it and must, even in those cases, use the least restrictive means possible to secure the compelling interest ... fundamental rights belong to individuals, not groups or abstract entities ... An individual may acquire a certain right (e.g. a right of parenthood) by virtue of a certain relationship (e.g. biological parenthood)...Courts sometimes speak loosely of simply the "rights of the family" when it is clear that their real concern is to protect certain valued relationships and the individual's right to those relationships.[69]

Much of the criticism of existing decisions of what constitutes the best interests of the child uses rights analysis as the basis of criticism.[70] There is considerable case law and academic writing on this subject: indeed, one should not be surprised at this. Each assertion is based on the same principle – a biological connection to a child gives one rights in or over that child's life. In fact, the argument is presently being expanded: it is becoming increasingly common for grandparents to be asserting rights to grandchildren in the post-divorce period.[71]

It is interesting to note that this literature is split with respect to the type of relationship the non-parent ought to have with the child in order to obtain rights in the child: biological relationship, a state-sanctioned family tie, any significant adult to the child, or a psychological bond. Expanding parental rights arguments to adults with non-biological ties to the child is argued in light of the lack of logic in presuming biology alone is

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month, and alleged violations of access which were brought before the court at least once per month were, without exception, not upheld.

67. *Wilton* v. *Wilton* (1982), 30 R.F.L. (2d) 170 at 175.

68. See, for examples of this: J. Folberg et al., "Joint Custody of Children Following Divorce" (1979) 12 U.C.D.L. Rev. 523; *supra*, note 45; Ramey, Stender, and Smaller, "Joint Custody: Are Two Homes Better Than One?" (1979) 8 Women's L. F. 559; Trombetta, "Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes" (1980) 19 J. Fam. L. 213.

69. *Supra*, note 62.

70. For an argument for a less rigid standard within the best interests test, see Child, *supra*, note 26 at 508; and Garfield, *supra*, note 14 at 445.

71. See R.S. Victor, "Grandparents: The Right to Visit" (1986) 65 The Michigan Bar Journal 986; R. Kotkin, "Grandparents Versus the State: A Constitutional Right To Custody" (1985) 13 Hofstra Law Review 375; S.F. Ladd, "Tennessee Statutory Visitation Rights of Grandparents and the Best Interests of the Child" (1985) 15 Memphis State University Law Rev. 635; E.D. Ingulli, "Grandparent Visitation Rights: Social Policies and Legal Rights" (1985) 87 West Virginia Law Rev. 295; and S.L. Ramsey Barineau, "Grandparental Rights to Visitation and Custody: A Trend in the Right Direction" (1985) 15 Cumberland Law Rev. 161.

The Nova Scotia Family Court rejected this type of argument in *Salter* v. *Borden* (1991), 31 R.F.L. (3d) 48.

sufficient to establish a relationship with a child. While such authors allude to the delicate balance between parental rights and the children's best interests, they do not reject the form of discourse; they only warn as to the danger of such discourse.[72] It is my view that this simply is not sufficient. This is because of the reality that, if there is *balancing* parental or grandparental rights against the best interest of a child, then the process and outcome becomes contrary to the child's best interests. One must critically examine whether such discourse is grounded in a way that would prove it to be in the best interests of children: that is, should it be provable that protection of parents' rights and mandatory joint custody are also in the best interests of children, only then is it helpful to engage in such discourse. If it is not so provable, then such discourse is simply irrelevant and unacceptable.[73] It would appear that there are two preconditions for a principled choice for a mandatory joint custody statute: (1) that joint custody, especially imposed joint custody, is proven to be better for children; and (2) that joint custody, based as it is on equal rights between parents, actually creates or ensures equality between them. It is, then, necessary to examine these two questions. It is my view that these questions are contingent; that is, one need not answer the second question unless one has first a positive answer to the first. However, I will proceed to respond to both of these questions in turn, out of an abundance of caution.

V. SOCIAL SCIENCE RESEARCH ON PARENTING

There are two major areas of research used to support an assertion of parental rights and, thus, court-imposed joint custody. The research is utilized to answer the first question posed earlier; that is, whether joint custody is of benefit to children. The most abundant is research on the effect on children of father-absence, and more recently, the role of father in intact families; the less abundant is that of the effect on children of joint custody.

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72. Not only is this form of discourse the most common for proponents of joint custody, it is also the prevailing discourse for those arguing for judicial enforcement of a non-custodial parent's access orders. See L.A. Goldman, "Tortious Interference with Visitation Rights: A New and Important Remedy for Non-custodial Parents" (1986) 20 The John Marshall Law Rev. 307, where he argues, on constitutional grounds, for new remedies for impeding visitation.

The counter-argument is presented by D.W. Phelps, "Child Support v. Rights to Visitation: Equity, Economics and the Rights of the Child" (1986) 16 Stetson Law Rev. 139.

In *Smith* v. *Frame*, [1987] 2 S.C.R. 99, the Supreme Court of Canada held that there is no tort action for interference with visitation.

73. I do not think it is sufficient to refer to the current problem of child-snatching as rationale for joint custody, as is implied by S. Abrahms, *Children in the Crossfire: The Tragedy of Parental Kidnapping* (Atheneum: New York, 1983). In this book of personal narratives of children who were kidnapped by their own parents, she states that childsnatching is now of "epidemic of disturbing proportions" [p. xii], and suggests joint custody as a method of preventing such events.

While these are truly horrific stories, there is absolutely no evidence that a different form of legal custody will change that. In fact, charges have been laid under the abduction sections of the Canadian Criminal Code s. 282 under an existing joint legal custody order (*R.* v. *Olsen*, unreported, September 25, 1989, Alta. Prov. Crt., Judicial District of Red Deer).

A. FATHERHOOD RESEARCH

The earliest significant research on fatherhood was carried out during and after World War II, when interest was acute about the impact of father-absence on children of soldier fathers.[74] This research found that the absence of a father created problems, especially for boys, in "inappropriate gender role development."[75] Research done subsequently on single mother-led families had similar findings, including inappropriate gender role development for both boys and girls, as well as an increased likelihood of the child becoming delinquent.[76] Biller reports such studies as finding father absent boys as being "less aggressive, less independent, less masculine, scoring higher on verbal rather than mathematical tests, and less able to form heterosexual relationships." Similarly, girls were found to "develop [less] fully in the feminine direction, are more aggressive, more likely to reject feminine interests, and have more difficulty with heterosexual relationships." He also reports children in father absent homes having decreased cognitive development (especially boys), more anti-social behaviour, and more likely to be delinquent and to have psychological problems.[77] While much of the writing of the time lamented the lack of appropriate sex role behaviour, few would claim this to be a disadvantage in present day society.[78]

In addition, serious research flaws render this research largely useless. The research has been widely criticized for not having controlled for economic factors: father-absent homes are, by definition, more likely to fall below poverty-level economically. Thus, any comparison between father-absent, poor families and father-present, middle class families which fails to deal with the potential impact of economics simply cannot be extrapolated or generalized in any serious fashion. This criticism is especially true for the comments with respect to juvenile delinquency.

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74. J. Drakich, "In Search of the Better Parent: The Social Construction of the Ideology of Fatherhood" (1989) 3 Canadian Journal of Women and the Law 69.

75. H. Biller, "Father Absence, Divorce, and Personality Development" in Michael E. Lamb, ed., *The Role of the Father in Child Development* (New York: John Wiley & Sons, 1981).

76. B. Sutton-Smith, B.G. Rosenberg, & F. Landry, "Father-absent Effects in Families of Different Siblings Compositions" (1968) 39 Child Development 1213.

77. *Supra*, note 75. See also C.F. Cortes & E. Fleming, "The Effects of Father Absence on the Adjustment of Culturally Disadvantaged Boys" (1968) 2 Journal of Special Education 413, who report father-absent boys score lower on mathematical tests.

78. Few would claim this to be a disadvantage, however, some would. See comments by the Association Hommes Separes ou Divorces de Montreal, submission to the Sub-Committee on Equality Rights (1985) at 10. "[C]hildren need to break the very primitive, simple, easy relationship they have had with their mother since birth and move into a relationship in which they must fight to earn the esteem of their father, who is recognized as more socially competent." I would suggest that contemporary literature about parenting would suggest a considerably less violent parent-child relationship.

Interestingly, in the same submission, this group state at 26 that "Some observers feel that women's liberation is one of the primary causes of juvenile delinquency."

The other area of research on fatherhood has largely occurred within the past two decades, and has dealt with the role of the father within intact families.[79] These research findings are generally that fathers have the ability to nurture their children, demonstrate competence in responding to and handling their babies, and are "sensitive, nurturing, supportive, capable, and competent."[80] There is also considerable recent research which shows that fathers are more likely than mothers to "reward children for appropriate gender behaviour and punish children for inappropriate gender behaviour," and, especially for girls, to "actively discourage the intellectual and physical competence" whereas for boys to encourage the development of these very traits.[81] Research also shows that fathers indirectly influence mothers to be better mothers, especially of infants.[82] From this research, one would be led to presume that males are competent and caring parents, even if sexist, and that children are at grave disadvantage if deprived of their father's care and attention.

However, one must practice restraint in using such research to support a state policy of imposing joint custody post-divorce. Certainly, none of it proves that fathers *are* better parents than mothers; it merely proposes that fathers *can be* competent parents. There is a considerable body of academic literature suggesting the above-reported social scientific research is flawed methodologically and, at best, must be confined to the specific findings.

> Research focusing on fathers has not adequately controlled for or investigated the influence of the mother on the father-child relationship, the nature of the mother-father relationship or the father-child relationship, child effects, fathers' actual participation in childcare, heterogeneity of fathering roles, fathers' education and occupation, social class, situational constraints, and much more. Lack of control or focus on the above factors provides a distorted view of fathering...Moreover, the assumption of physical presence in intact families may misrepresent what may be going on in many families. Fathers may rarely be at home in many middle-class families professional families, while their poor or unemployed counterparts may spend considerably more time in the home.[83]

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79. There are simply too many studies to cite or report on in this paper. However, for examples of the basic studies and findings, see B. Schlesinger, *Families: A Canadian Perspective* (Toronto: McGraw Hill Ryerson Limited, 1972); numerous articles in M.E. Lamb & A. Sagi, eds., *Fatherhood and Family Policy* (Hillsdale: Lawrence Erlbaum Associates, Publishers, 1983); R.D. Parke & S.E. O'Leary, "Father-Mother-Infant Interaction in the Newborn Period: Some Findings, Some Observations and Some Unresolved Issues" in K.F. Riegeel and J.A. Meacham, eds., *The Developing Individual in a Changing World* (The Hague: Mouton, 1976); and J. Bowlby, *Attachment and Loss, II: Separation* (New York: Basic Books, 1973).

80. *Supra*, note 74, where she also says at 74: "Fathers have paternal aptitude, and they can be as responsive and sensitive as mothers in the development of relationships and attachments with infants."

81. *Ibid.* While some might view this as father-positive, I do not. We are now sufficiently aware of the negative impact of role-bound behaviour on both boys and girls to view this particular aspect of father-influence as non-positive. These views are strongly held with respect to discouraging physical and intellectual development of any child, but they are especially strong when the discouraging is of girls, while at the same time encouraging boys.

82. See R. Parke, *Fathers* (Cambridge, Massachusetts: Harvard University Press, 1981); M. Weinraub, "The Father's Role in the Infant's Social Network", in Lamb & Sagi, eds, *supra*, note 79; and M. Kotelchuck, "The Infant's Relationship to the Father: Experimental Evidence" in *ibid.*

83. *Supra*, note 74 at 76-78.

Also, there is some criticism that research on intact families may not be generalizable to divorcing or divorced families.[84] This is due to the radically different nature of the relationship between the parents in an intact, as opposed to divorcing, family. Presumably, the parental couple in an intact family will share beliefs with respect to child rearing: i.e., education, religion, geographical location of home, day to day care. However, the intimacy and shared understandings in an intact family which allows for jointly exercising decision-making responsibility certainly cannot be presumed to exist in a divorcing family.

Other research has shown that females typically demonstrate more nurturing, caring behaviour than do males, who tend to be somewhat more rule oriented in their interpersonal relationships. Carol Gilligan cites empirical evidence that women have different modes of thought and morality, and that that difference is a "voice of care."[85] This is not an issue without controversy within the feminist community. There are those who argue that this caring, relationship-aware, female is no more "female" than any other personality trait, that the voice of care is a voice of oppression, the "voice of a victim speaking without consciousness."[86] Others argue that no matter from whence came this voice of care, our world needs such care, and we must celebrate the trait in women.[87] However, these findings would appear to have a potentially huge impact on this question of custody; if it is empirically proven that women, in fact, are more caring in their interactions with children (and others), then it is in childrens' best interests to ensure that mothers are custodial parents whenever possible. Susan Boyd discusses two studies which demonstrate differences in the ways mothers and fathers interact with their children:

> While fathers are participating more in parenting, including attending the delivery, changing diapers, and playing with children, both Arlie Hochschild and Meg Luxton found different patterns of interaction with children for mothers and fathers. One of Hochschild's findings about dual earner parents is that women tend to use a "primary parent's voice" in all of their interactions with their children, conveying "a sense of welcoming attachment to [their] children." Fathers tend, on the other hand, to resist real interaction with their children which will distract them from their other activities (for example, watching television or reading a magazine). Men also engaged in what Hochschild calls the "fatherhood of toughening", an interaction involving play which inspires fear in a child, and then resolving it by joking. Luxton found in her study that women were still responsible for overall childcare and organization, and that men tended to "babysit" their children in a detached and temporary way that women never assumed. [cites omitted][88]

It must be noted that while Boyd refers to greater participation by fathers, she also discusses the significant lack of equality between mothers and fathers in both perception

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84. Fineman, Dominant Discourse, *supra*, note 36 at 766.

85. C. Gilligan, *In A Different Voice* (Cambridge: Harvard University Press, 1982); "Reply (to MacKinnon)" (1986) 11 Signs 324.

86. C. MacKinnon, "Feminist Discourse, Moral Values, and the Law — A Conversation" (1985) 34 Buffalo Law Rev. 11.

87. C. Menkel-Meadow, "Feminist Discourse, Moral Values, and the Law — A Conversation" (1985) 34 Buffalo Law Rev. 11.

88. S.B. Boyd, "Potentialities and Perils of the Primary Caregiver Presumption" (1991) 7 C.F.L.Q. 1 at 22-23.

and reality.[89] It is important to note that these studies are generalized by sex, but not indicative of any biological difference between men and women in capacity to parent. None of this would suggest that all men are bad parents, or that all women are good parents: such a statement is absolutely unsupportable. They do suggest, however, that because of our socially constructed genders and different male and female life experiences, our interpersonal relationships – including parent-child relationships – are different.

Most importantly, there is considerable research which shows that notwithstanding that fathers may be competent to care for children, they simply are not doing the bulk, or in some instances any, of the childcare in the family. Mothers, notwithstanding the women's movement into the paid labour force, continue to do the bulk of household and childcare labour. The evidence of this is unanimous and overwhelming. Martin Meissner, in a study of couples in Vancouver, found men's participation in domestic labour less than one-fourth that of women's participation, and that more than one-third of the men did not even make a token contribution to domestic tasks. He reported that husbands were indifferent to the double burden on their employed wives and that only a small percentage of fathers of under-ten-year-old children took part in childcare.[90] William Michelson, in a Toronto study, found that wives devoted approximately three times as much time to work, including housework and childcare, as their husbands.[91]

This differential in amount of time spent on domestic tasks is even greater during the years when there are young children in the family. Cynthia Rexroat and Constance Shehan studied families at various stages of the family-life cycle and found, without exception, that wives spend more time working than do husbands. These authors examined hours spent in both productive labour and domestic labour, and report that

> ... [our] results also tend to cast doubt on the predominant conceptualization and measurement of role sharing....the productive labour may be more equitably shared by the spouses but that domestic labour clearly is not. When both spouses are employed, wives tend to spend about as many hours at work as their husbands, but husbands do not begin to spend nearly as many hours in housework as their wives.[92]

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89. S.B. Boyd, "Child Custody, Ideologies and Employment" (1989) 2 Canadian Journal of Women and the Law 111; S.B. Boyd, "Child Custody and Working Mothers" in S. Martin & K. Mahoney, eds, *Equality and Judicial Neutrality* (Toronto: Carswell, 1986) 168; S.B. Boyd, "From Gender-Specificity to Gender-Neutrality? Ideologies in Canadian Child Custody Law" in C. Smart and S. Sevenhuijsen, eds, *Child Custody and the Politics of Gender* (London: Routledge, 1989) at 126; and S.B. Boyd, *supra*, note 66.

90. M. Meissner et al., "No Exit for Wives: Sexual Division of Labour and the Cumulation of Household Demands" (1975) 12 Canadian Review of Sociology and Anthropology 424.

91. W. Michelson, *From Sun to Sun: Daily Obligations and Community Structures in the Lives of Employed Women and Their Families* (Totowa: Rowman and Allanheld, 1985) at 65.

92. C. Rexroat & C. Shehan, "The Family Life Cycle and Spouses' Time in Housework" (1987) 49 Journal of Marriage and the Family 737 at 747.

Berardo et al. report similar findings that "across couple types, wives spent considerably more time in housework than husbands, performing 79% of all the housework that was done..."[93] Similarly, a Report By the National Council of Welfare states:

> Many studies have confirmed that the employment status of wives makes very little difference to the amount of domestic work husbands do. On average, men whose wives have full-time jobs do less than 15 minutes of additional housework and child care per day. Contrary to expectations, men in modern two-career couples are no more likely than other husbands to do their share of household work.[94]

Margrit Eichler cites a number of studies which reach the same conclusion: women do vastly more of household labour, including child care, than men. Eichler discusses the gap between the "normative agreement" that the "majority of tasks should be performed by the husband and wife equally," and the reality; the discrepancy between the two is "very pronounced."[95] Harvey Krahn and Graham Lowe echo these findings and refer to the "double burden" of working wives, due to husbands' non-participation in housework and childcare.[96] Drakich compares international data, reports an "impressive uniformity of data," and concludes that the "popular belief of the participant father is statistically an illusion."[97] This is true irrespective of whether the mother is employed outside the home or is a stay-at-home mother.

Arlie Hochschild makes these alarming statistics more concrete. In her studies of the amount of time spent on both paid work and domestic labour (housework and child care), she found that:

> Adding together the time it takes to do a paid job and to do housework and childcare, ... women worked roughly fifteen hours longer each week than men. Over a year they worked an *extra month of twenty-four days a year*. Over a dozen years, it was an extra year of twenty-four hour days. Most women without children spend much more time than men on housework; with children, they devote more time to both housework and childcare. Just as there is a wage gap between men and women in the workplace, there is a "leisure gap" between them at home. Most women work one shift at the office or factory and a "second shift" at home.[98]

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93. D.H. Berardo, C.L. Shehan, & G.R. Leslie, "A Residue of Tradition: Jobs, Careers, and Spouses' Time in Housework" (1987) 49 Journal of Marriage and the Family 381 at 388.

94. National Council of Welfare, *Women and Poverty Revisited* (Ottawa: Minister of Supply and Services Canada, 1990) at 51.

95. M. Eichler, *Families in Canada Today*, 2nd ed., (Gage Educational Publishing Company, 1988) at 99.

For similar findings, see also P. Armstrong, "Economic Conditions and Family Structures" in M. Baker, eds, *Families: Changing Trends in Canada*, 2nd ed., (Toronto: McGraw-Hill Ryerson Ltd., 1990) 67 at 72-74.

96. H. Krahn & G. Lowe, *Work, Industry and Canadian Society* (Nelson Canada: Scarborough, Ontario, 1988).

97. *Supra*, note 74 at 85. The universality of these statistics is noted also by Armstrong, *supra*, note 95; as well as Eichler, *supra*, note 95.

98. A. Hochschild, with A. Machung, *The Second Shift: Working Parents and the Revolution at Home* (New York: Penguin Group, 1989) at 3-4.

These statistics are compellingly real: women are disproportionately working at household tasks and child care, with no appreciable difference whether or not they are also employed outside the home. Meissner et al. conclude that:

> married women do the necessary and most time consuming work in the family, and that, considering their husbands' small and selective contribution, they can anticipate doing it for the rest of their lives.[99]

At minimum, then, it can be said that males are not biologically dispossessed of the possibility of being competent parents, but that by and large, males are not taking on this role within families to any appreciable extent. If the reader reacts to this statement by thinking that things are really better than they were before and that fathers are really taking on a greater share of the familial duties than they used to, this reaction is due to a socially constructed "ideology of fatherhood." This ideology supports the notion of caring, involved fathers — which in reality for most families is still dad "helping out" in his spare time, "babysitting" his own children, but not taking responsibility for one-half of the work or childcare associated with families.[100]

Thus, it would be a fair statement that while fathers are capable of caring parenting, generally fathers are less involved parents than mothers and may have difficulty in adjusting to the role of caregiving parent. Depending upon the age of the child, state-imposed father-custody could have a serious impact upon the child. Mandating joint custody, or sole custody fathering means that the child could be placed in a custodial position with a father with whom she has had relatively little meaningful interaction or contact. This becomes important because courts seem willing to view any fathering at all as extraordinary and "ordinary" mothering as meaningless. An example of this is *Davidovich* v. *Davidovich*, a custody determination of two children aged 5 and 2. Custody was awarded to a father who was, by all accounts, uninvolved until he virtually kidnapped the children. MacKenzie, J. states:

> ...the mother of the infant children provided them with constant care,...[but] I am satisfied that the respondent also provided fatherly care to the infants, although possibly not to the same extent in terms of time as was done by the petitioner...[there is no] significant difference in the bonding between either parent and the children.[101]

I am not arguing that fathers should never be custodial fathers, nor am I arguing that fathers should be "shut out" of their child's life. I am simply stating that, barring exceptional circumstances, statistics show that the issue is not between two "equal parents." In fact, one parent in the majority of families is still providing the vast majority

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99. *Supra*, note 90.

100. The role of ideology would also explain the otherwise inexplicable findings of K. Wooden, *Weeping in the Playtime of Others* (New York: McGraw-Hill, 1976), who found that fathers who claimed in a survey study to spend 15-20 minutes per day playing with their one-year old infant, in reality during research spent an average of only 37.7 seconds per day.

101. (1988), 89 A.R. 27, at 27-29. Interestingly, MacKenzie, J. also refers to the fact that immediately before and at the time of the separation, the housekeeping care by the mother left a great deal to be desired. This lack of cleanliness was referred to no less than three times in this short judgment; the fact that the father forcibly removed the children from their home was mentioned once.

of caregiving and is having the most meaningful contact with the child, and that parent is the mother.

B. POST-DIVORCE AND JOINT CUSTODY RESEARCH

The other area of research used to support mandatory joint custody as a logical extension of parental rights is that of research on post-divorce sole custody and joint custodial families. Unfortunately, this type of research is extremely limited; however, the findings may be instructive. The leading study, widely reported and cited, was done by Wallerstein and Kelly. They found evidence that the very process of separation and divorce can alter the quality of the relationship of child to either parent — in ways not predictable at time of separation. The stress and anxiety, caused by the "absence of a person central to their lives" and their "substantially altered living situation" continued for all participants, they report, until restabilization at four years post-separation. Problems for all family members peaked at one year post-separation.

Many mothers reported a temporary loss of the very traits they prized as associated with good caregiving, such as sympathy, compassion, and control of temper. They also reported being more likely to discipline negatively. Mothers reported as well that extreme financial distress exacerbated all else. Non-custodial fathers fared no better; they reported feeling rootless and found the visitation relationship with their children painful. They reported some difficulty even maintaining a satisfying relationship with their child.[102]

The authors found that in the period immediately post-divorce, all participants in the divorce suffer from "abnormal" stress and anxiety. With respect to the specific stress of divorce on children, they state:

> ... the loss of a parent by divorce is potentially as serious as is the death of a parent. The loss of the sense of security, the fear of being vulnerable to unknown forces, the loss of a loved source of caring and of the object for role identification, results in the reaction of depression and denial, agressivity and acting out behaviour, ranging from mild to severe neuroses and may develop in to persistent character disorders.[103]

This stress was lessened for children who had continued interaction with both parents.

These authors also conclude that parents' stress exacerbates conflict with respect to custody. In fact, they suggest that any conflict over custody is rooted in personal

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102. J. Wallerstein & J. Kelly, *Surviving the Break-Up: How Children and Parents Cope with Divorce* (Basic Books: New York, 1980) [hereinafter cited as *Surviving*]. The studies by Wallerstein and Kelly are widely reported. Alternate cites include: "Children and Divorce: A Review" (1979) 24 Soc. Work 468 at 472 [hereinafter cited as Children and Divorce]; "The Effects of Parental Divorce: Experiences of the Pre-school Child" (1975) 14:4 Journal of the American Academy of Child-Psychiatry 600ff; "The Effects of Parental Divorce: Experiences of the Child in Early Latency" (1976) 46:1 American Journal of Orthopsychiatry 20ff; "The Effects of Parental Divorce: Experiences of the Child in Later Latency" (1976) 46:20 American Journal of Orthopsychiatry 256ff.

103. *Ibid.* at 115.

pathology. Wallerstein and Kelly view litigation of "divorce issues" such as custody as indicative of "unresolved feelings about the termination of the marriage." They state:

> Psychologically, an *individual's* rage against an ex-spouse, often expressed in litigation in which the child is the pawn, can apparently remain undiminished by the passage of time or by distance. The fight for a child may serve profound psychological needs in a *parent*, including the warding off of severe depression and other forms of pathological disorganization.[104]

However, Kelly, who recognizes systemic problems with abuse of the mandatory mediation and shared custody, continues to characterize such opposition as pathological, and specifically female. She emphasizes the problem of the:

> ...*emotionally disturbed women* who, due to their own pathology, vigorously fight a father's desire to be involved in the children's lives.[105]

The earlier non-gendered "parent" who is pathological is now stately gendered, an "emotionally disturbed woman" the mother.

A superficial reading of this research would suggest two circumstances which would benefit children: state-imposed parental cooperation, such as that imposed by joint custody and continued access to both parents, such as that achieved through joint custody. It must be noted, however, that the method of sampling in this study makes its findings suspect: Wallerstein & Kelly report that 30% of mothers in the sample were severely depressed immediately post-divorce. However, these findings were without doubt skewed because of the selection of participants; the method of selecting the sample was to choose from names of participants in a counselling clinic. This almost certainly resulted in a disproportionate number of troubled families.

Other research has been done, not on merely post-divorce families, but on joint custodial families. The most positive findings come from a study by Ababarnel who found that children in voluntary joint custody situations maintain attachments to both parents. She states:

> There is no doubt that joint custody yields two psychological parents, and that the children do not suffer the profound sense of loss characteristic of so many children of divorce. The children maintained strong attachments to both parents. Perhaps the security of an ongoing relationship with two psychological parents helps to provide the means to cope successfully with the uprooting effects of switching households.[106]

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104. Wallerstein et al., Children and Divorce, *supra*, note 102 at 472 [emphasis added].

105. J. Kelly, "Further Observations on Joint Custody" (1983) 16 U. C. D. L. Rev. 762 at 769 [emphasis added].

For an opposing view, see N. Lemon, "Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5" (1981) 11 Golden Gate U. L. Rev. 485 at 527-31, who suggests the stereotype of the "manipulative" or "vindictive" mother opposing joint custody is overstated.

106. A. Ababarnel, "Shared Parenting after Separation and Divorce, A Study of Joint Custody" (1979) 49 American Journal of Orthopsychiatry 328 at 328.

Notwithstanding that this statement is generally held to be strongly supportive of joint custody, Ababarnel argues that joint custody is neither inherently positive or negative, but that it only works under certain, as yet unascertained, conditions. It should also be noted that these conclusions are based on *four* case study cases, in all of which the joint custody was voluntarily chosen by the parents. In fact, none of the four families studied by Ababarnel were operating under a joint custody order; all orders were the common sole custody/visitation orders.[107]

There is, in addition, some research which suggests that while joint physical custody remains workable for some time, the majority of couples who embark upon it discontinue it after approximately two years. The strongest predictor of discontinuance is the remarriage of one of the spouses, and subsequent family reorganization which frequently will include a geographic move.[108] Another predictor of problems is the ability of one parent to void, reasonably or unreasonably, any decision made by the other parent.

> One of the most frequent sources of failure of joint custody agreements is the power that each party holds to void the agreement at any time, for any reason, or for no reason.[109]

Indeed, while the joint custody families studied began their arrangements with shared legal and physical custody, within one year, many of these families reverted to circumstances where physical care was primarily provided by only one parent.[110]

Clingempeel and Reppucci have studied the factors which indicate successful joint custodial relationships, and found them to be tentatively identifiable, but not clearly supported by existing research. They grouped the factors likely to affect success of joint custody into three categories:

> (1) centring around divorced family: quality of preexisting dyad relationships (mother/child, father/child, mother/father), mechanics of joint custody plan, similarity or dissimilarity of two home environments, characteristics of child (age, temperament), social-demographic characteristics of family,
>
> (2) centring around family's social system: jobs, schools, informal social networks, and
>
> (3) family life cycle: recoupling or remarrying of parents.[111]

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107. J. Schulmann & V. Pitt, "Second Thoughts on Joint Child Custody: Analysis of Legislation and its Implications for Women and Children" (1982) 12 Golden Gate U. L. Rev. 539 at 554-56; alt. cite in Folberg, ed., *supra*, note 58 at 209.

108. See W.G. Clingempeel & N.D. Reppucci, "Joint Custody After Divorce: Major Issues and Goals for Research" (1982) 91 Psychological Bull. 102; alt. cite in Folberg, *supra*, note 58 at 87.

109. C.N. Carroll, "Ducking the Real Issues of Joint Custody Cases" in Folberg, *supra*, note 62, 56 at 58. It is important to note that she was discussing voluntary joint custody arrangements.

110. S. Steinman, "Joint Custody: What We Know, What We have Yet To Learn, and the Judicial and Legislative Implications" in Folberg, ed., *supra*, note 58, at 117 found that the most likely reasons for this change in circumstances were: a geographical move; remarriage and a new baby; the child reaching adolescence.

111. Clingempeel et al., *supra*, note 108 at 110.

These authors state concern about the potential impact on children of joint custody and remarked that most studies in this area interviewed parents, not children. They conclude that it is impossible to make "any generalizations about the effects of joint custody or its advantages or disadvantages vis-a-vis sole custody arrangements. The available studies are egregiously inadequate..."[112]

Without exception, researchers of joint custody acknowledge that it requires parental cooperation, and only succeeds under "certain conditions."[113] Payne describes the indications for the success of joint custody which include the parents' ability to co-operate, and further states that litigation is unlikely to lead to such cooperation.[114] Others argue that in the absence of cooperation, joint custody can be "calamitous," and state that even *voluntary* joint custody only works under certain conditions; that is, when the parents are tolerant and resilient, and the children are not allowed to play one parent off against the other.[115] Steinman, who is unabashedly pro-joint custody, states:

> It may be that a cooperative, smooth running co-parenting relationship is a necessary but not sufficient condition for children to do well. In other words, we need to consider not only which parents, but also which children make good candidates for joint custody...We have no data on the outcome of joint custody for families in which parents come to joint custody...involuntarily or as a result of pressure from the legal system.[116]

Thus, the minimum conclusion to be drawn from existing research with respect to joint custody is that it may be workable for the parents when it is voluntarily chosen and that there is no evidence at all that it is positive for children.

There is a further break in logic in the argument for the use of parental rights and mandatory joint custody: all of this research has been done on voluntarily chosen, joint physical custodial arrangements. The vast majority of joint custody awards ordered under the mandatory laws in California are split custody awards; that is, joint legal custody but sole physical custody to one parent, usually the mother. It is arguable that the legislators contemplated this very type of arrangement. James Cook, the author of the statute and a long time advocate of joint legal custody, has this to say about joint physical custody:

> However, the paragraph purposely does not elaborate with constraining prerequisites such as scrupulously equal contact or conditions of residence. Instead, the parents are encouraged to *work out personally* the details of sharing physical custody *as best befits their circumstances...* [117]

Such personal circumstances would appear to favour mothers continuing to do the bulk of the work of childrearing, but having the benefits of independence removed from that

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112. *Ibid.* at 110.
113. *Ibid.* See also Ababarnel, *supra*, note 106.
114. J.D. Payne, "Co-Parenting Revisited" in Folberg, ed, *supra*, note 58 at 249.
115. Benedek & Benedek, "Joint Custody: Solution or Illusion?" (1979) 136 Am. J. Psychiatry 1540 at 1543.
116. Steinman, *supra*, note 110 at 117.
117. J.A. Cook, *supra*, note 58, at 178 [emphasis added].

role. In fact, these situations do not "look" any different than the traditional sole custody/visitation award: the children continue to spend the majority of time with their mothers who provide the physical care for them, and "visit" the "joint legal custodian" as opposed to the "non-custodial parent." Chambers refers to this reality:

> The line between joint physical custody and a single-custody arrangement with generous visitation cannot be drawn by reference solely to the amount of time spent in the two homes: some children in single custody spend more time "visiting" with the noncustodial parent than some other children in joint custody spend "living" with one of their parents.[118]

Empirical study results show very little difference in the day-to-day situation between joint custody and sole custody: joint custody situations "resemble sole maternal custody and paternal visitation."[119] In a study of court records with respect to custody arrangements, the authors found joint legal custody ordered in 22% of cases but joint physical custody in only 2%. Most importantly:

> ... the same proportion of mothers (70%) ended up with physical custody in the joint legal custody cases as in the sole legal custody cases.[120]

Thus, the perceived advantages to the child of having continued involvement with both parents is not borne out by the actual arrangements: fathers still are non-involved, but with joint legal custody they have a legal veto to any major lifetime decisions the caregiver mother may make. This difference between joint legal custody and split physical custody is one which proponents of mandatory joint custody do not account for. For example, Schepard perceives the difference between "physical" and "legal" custody as a conceptual division which only exists in theory, and asserts that the parent who receives primary physical custody usually controls all major decisions with respect to the child's upbringing. However, he then cites the child's primary residence, as well as decisions about the form of medical treatment for the child, as incidents of legal custody.[121]

Chambers puzzles "why so many parents with physical custody of a child are agreeing, apparently without major concessions from the other parent, to share legal custody of the child."[122] He considers that this decision may be made in order to increase the likelihood of the non-caregiving parent maintaining child support payments, or even of

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118. *Supra*, note 25 at 550 footnote 277.

119. W. Phear et al., "An Empirical Study of Custody Agreements: Joint versus Sole Legal Custody" in Folberg, ed., *supra*, note 58 at 142.

120. *Ibid.* at 147.

121. A. Schepard, *supra*, note 42. This is not an uncommon custody order. See *Kastning* v. *Charles* (1987), 9 R.F.L. (3d) 169 (Alta. Q.B.), where Sulatycky, J. ordered joint custody of a child of unmarried parents, but then ordered that the child would reside with the mother, the mother will have day-to-day care of the child, and the father will have reasonable access. See also *Rezansoff* v. *Razansoff* (1991), 32 R.F.L. (3d) 443 at 444, where joint custody, primary care to the mother was ordered, notwithstanding that "[the husband] has some propensity to be violent, ...has a history of moving residences frequently, an unstable work history, and his life-style is hardly a good example for young children."

122. *Supra*, note 25 at 550 footnote 276.

visiting the child. It would appear that the more likely reason is that in a jurisdiction with joint custody legislation, the notion of negotiating is simply that – a notion. The reality is that these agreements are often made under the implied threat of a worse situation. Caregiving parents choosing from the lesser of two evils, or "bargaining in the shadow of the law,"[123] is clearly not a positive legal or family outcome. The reality of the results is described by Girdner:

> What joint legal custody can reflect is the replication of roles found within many intact families. The father remains relatively uninvolved in the daily aspects of childrearing, "delegating" these to the mother. He retains, however, control over decisionmaking. As in many marriages, he "allows" the mother to make day-to-day decisions. His control is largely passive until the mother makes a decision with which he disagrees. He reserves veto power. He decides whether or not her decision will stand. Her decisionmaking authority is dependent on his concurrence. Many women leave marriages because they do not want to continue relationships with men who are domineering, controlling, and/or abusive.[124]

VI. INAPPLICABILITY OF RIGHTS ANALYSIS

It is clear, then, that the existing research does not provide a positive answer to the question, "Is joint custody better for children?" Indeed, it would appear that there are sufficient conditions in which the answer to this question would be an unequivocal "no!"[125] Notwithstanding this, I will proceed to answer the question of whether or not joint custody actually creates equality between the biological parents of the child, which is the "entry point" for the rights argument.

A. FORMAL vs. SUBSTANTIVE EQUALITY

Any consideration of the impact of rights analysis in general, and joint custody in particular, on the actual equality between parents must first deal with the meaning of equality. This aspect of the issue is certainly not limited to the question of custody determination;[126] the question of whether our goal in attempting to achieve equality is "formal equality" or "real or substantial equality" figures in every debate about the subject. Formal equality presupposes equally independent, freely operating individuals

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123. Mnookin & Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce" (1979) 88 Yale L. J. 950.

124. *Supra*, note 26 at 138.

125. The concerns raised by Girdner, *supra*, note 26, and the questions about control without responsibility become particularly problematic for those families in which there has been abusive behaviour, which, for physical abuse, statistics place at between 1 in 3 families and 1 in 10 families. Either statistic used, the numbers of families for whom this is the case are huge.

See, for a discussion of the exacerbating of existing problems in the case of physical battering of the wife, or sexual abuse of the child, see C. Germane, M. Johnson & N. Lemon, "Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence" (1985) 1 Berkeley Women's Law Journal 175 discuss the specific concerns such legislation bring for women who are battered women. Domestic violence occurs in epidemic proportions, and the authors conclude that it is therefore crucial to reexamine assumptions underlying mandatory mediation and joint custody awards.

126. A. Sheppard, "Unspoken Premises in Custody Litigation" (1982) 7 Women's Rights Law Reporter 229.

who will compete for resources on equal grounds – with the only state intervention to be a guarantee of equal treatment before the law. Formal equality perceives equality to mean "sameness"; thus, treating "equals" in the same fashion will result in equality. Real or substantial equality, on the other hand, recognizes that there are substantial differences between individuals and that any presupposed sameness exacerbates inequality, rather than promotes equality. From the perspective of substantive equality, merely being treated "the same" is not sufficient to reach the stated result of equality; real differences in individual persons compels differences in treatment in order to result in equality. What form of equality one seeks to achieve is instrumental in forming the method by which one would achieve such equality. Thus an understanding of this difference is crucial to an understanding of any discussion of the meaning of "rights."

Many feminists recognize and argue that formal equality actually makes women less equal, rather than more equal. MacKinnon states this premise with respect to divorce and custody:

> The sameness standard has mostly gotten men the benefit of those few things women have historically had – for all the good they did. Under gender neutrality, the law of custody and divorce has shifted once again, giving men what is termed an equal chance at custody of children and at alimony. Men often look like better parents under gender-neutral rules like level of income and presence of nuclear family, because men make more money and (as it is termed) initiate the building of family units. They also have greater credibility and authority in court. Under gender neutrality, men are in effect granted a preference as parents because society advantages them before they get to court. But law is prohibited from taking that preference into account because that would mean taking gender into account, which would be sex discrimination...The equality principle in this form mobilizes the idea that the way to get things for women is to get them for men. Men have gotten them. Women have lost their children and financial security and still have not gained equal pay or equal work, far less equal pay for equal work...[127]

Formal equality arguments do not recognize that women are the childbearers, and for the most part still in today's world, the childrearers. Thus, any move toward fair treatment must account for these differences in life experience of women and men. Formal equality arguments obliterate the important and significant work traditionally and generally done by women in the private sphere. Equality is measured only by standards determined by the public sphere; that is, male standards.

This distinction is particularly important when one is discussing equality between parents. Liberal feminists and fathers' rights groups are arguing for formal equality between fathers and mothers with respect to child custody determination.[128] The

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127. C.A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 221-222.

128. This is understandable given that both begin their arguments with the fact of the biological nexus between the parent and the child. Obviously, this is one area where parents are irrevocably equal: both contribute 23 chromosomes to the formation of the embryo. Were we as a society to take this argument seriously, we would without exception hold that adoptive parents must accede to the wishes of birth parents, no matter at what point in the child's life those birth parents would seek to assert their parenthood. We would, without exception, allow no state intrusion on biological parents' rights; that is, we would not allow child welfare apprehension orders. We would, without exception, hold

question remains, "Does this formal equality actually result in equality?" If so, then the determination based on parental rights *may* be supportable.[129] If not, then one must question the use of this argument as applicable to custody determination at all. It is this question that any examination must answer positively. There are two areas of enquiry within this question: firstly, whether or not custody decisions are now unjustly favouring women; and secondly, how joint custody might change that situation.

B. PRESENT CUSTODY AWARDS

The stated impetus for lobbying for a presumption of parental rights recognition and joint custody is that mothers were, because of the tender years doctrine, gaining custody of children post-divorce in unjust proportions. Certainly, it is clear that women are more likely to be custodial parents than are men.[130] However, these statistics, without more, are not indicative of a judicial mother-preference. The vast majority of custody orders are based on a pre-existing agreement between the parties to the divorce. In this situation, the judge makes no determination as to which home is better for the children, she merely ascertains that the agreement is minimally acceptable and fashions the divorce decree upon it.[131] Thus, the important question with respect to unfair or unequal ordering of custody only arises for divorce cases where a judicial determination is required with respect to child custody.

The belief that mothers are easily obtaining custody of the children is unsubstantiated by statistics. Where statistics are kept, the reality is that men are more than likely to win in *contested* custody cases.[132] This may be due to a number of factors. One is that

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that a man can force a woman to carry a fetus to term should he want her to maintain the pregnancy; we would similarly hold that a man could force a woman to have an abortion, should he want her to do that. Such is the nature of an argument based on biology.

129. With recognition of the earlier disclaimer, about the lack of proof with respect to the benefit to children of joint custody.

130. See Crean, *supra*, note 30, who at 37-38 cites the following statistics: "...in the seventies 85.6% of custody awards went to mothers and 14.4% to fathers....In 1980, these figures show a shift to 16% of custody awards to fathers and 78.2% to mothers...[In 1987] in a comparative study commissioned by the federal Department of Justice and undertaken by University of New Brunswick sociologist James Richardson...[he found] the following breakdown of custody awards: 76.6% sole custody to mothers, 9.5% to fathers, 8.8% joint custody, and 4.4% split custody (where siblings are divided between parents)."

She reports at 38-39 that the Department of Justice study, which drew on file data in four Canadian cities, three of which (Montreal, Saskatoon, and St. John's) had mediation available, found that the data "does indicate joint custody awards are more prevalent than they were" and that "mediation had a strong effect on joint custody awards" in non-contested custody cases.

131. In fact, in most divorce decrees, the Separation Agreement is incorporated by reference into the actual court order, so that the court orders exactly what the parties have agreed to. This judicial "rubber stamp" arises from the belief that the family is private, and that any state intrusion must be minimal so as to protect that privacy.

132. Crean, *supra*, note 30, discusses contested cases at 38: "...where custody was in dispute, fathers were much more likely to end up with sole custody..."

The statistics of who wins custody in contested cases are startling. Weitzman et al., supra., note 4, report at 503 that "one notable change...is in the success rate" of fathers who ask for custody...among those fathers who requested physical custody, 35% were awarded it in 1968, 37% in 1972, and 63% in 1977. Similarly, the success rate of fathers who requested legal custody rose

fathers are discouraged from attempting to gain custody of their children unless they have compelling evidence of the unfitness of the mother of their children. Another may be that the mother of the children is behaving in an "un-motherly" fashion, by either being employed (i.e. non-traditional), or not able to support the children (i.e. not employed). A compelling third possibility is that the contribution of the mother to child care is simply not understood by most judges, and that any participation by fathers is overestimated.[133] Whatever explanation one chooses, the fact remains that judicial determinations are simply not inequitably weighted in favour of mothers, notwithstanding the use or non-use of the tender years doctrine.

It is not only statistics which indicate why determinations go a certain way; the reasoning of the judges is frequently instructive about differing perceptions of mothering and fathering. For example, in *Roebuck*, the father was the successful litigant by virtue of the fact that he was farming and, thus, available to be with the child during the day. It was most helpful that his mother (i.e. the child's grandmother) was living in the same farm yard. Thus, the grandmother was available to help with domestic tasks of "housekeeping and babysitting chores." The mother, by contrast, was employed which necessitated placing the child in daycare. While this may seem a commonplace lifestyle in today's world, it was clearly the deciding factor. The father would be able to provide stay-at-home care; whereas, the mother would be only providing daycare.[134]

A scenario such as that in *Roebuck* is not remarkable: men marry much more quickly than do women post-divorce, which makes it more likely that a father will be able to provide home care (i.e. his new wife as a stay-at-home mother); whereas, the mother will be able to only provide daycare. In fact, *Roebuck* exemplifies the prevalence, to the point at which it is considered natural to be and without need for questioning that a female, here the paternal grandparent, will provide childcare.

Contrast this with *Davidovich*, where MacKenzie, J., in awarding custody to the father, stated:

> I see serious problems if the custody of the children is transferred to the mother...I note that her common law husband is already involving himself very directly in the custodial relationship. It is only natural that

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from 33% in 1968, to 35% in 1972 to 63% in 1977. Thus, by 1977, a surprisingly large proportion – close to two-thirds – of the fathers who requested custody were awarded it. Age is not a factor, but sex is; fathers are more likely to get custody of sons than daughters.

It must be remembered that these statistics are only for a small proportion of families; the authors make this reminder at 521: "Today, the vast majority of divorced fathers are not really interested in obtaining custody of their children after divorce, while the vast majority of divorced women are. And until these preferences and the social patterns on which these preferences are based change, mothers will continue to have custody of most children after divorce."

133. It is interesting to note that Bowker, J. in *Grills* v. *Grills* (1982), 30 R.F.L. (2d) 397 recognized "the magnitude of the responsibility for day-to-day care of a young child," and listed those duties. She awarded custody to the mother, and noted that although either mother or father would have to perform the same duties, given that the mother was employed, "she has had more experience in this field, since this has been part of her way of life."

134. *Supra*, note 12.

> he takes the mother's side, but if things are to work out in such a way as to truly encourage and preserve the relationship between the children and their father, Mr. Brown would have to make a tremendous effort not to insert himself into that relationship. I am not satisfied he will be able to do that at this time.[135]

The mother in this case had suggested that it would be easier for the father to drive to Edmonton, where he had family, than for her to drive to Fort McMurray, where she knew no one, in order to visit with the children. On the face of it, this would seem not only reasonable with respect to family support, but also a cost-effective suggestion; however, the judge viewed it as recalcitrant regarding cooperative visitation, and so ruled. These comments would appear, as well, to be based on the view that children are unable to bond or positively respond to more than one male and that preservation of the father's role is of supreme importance. I note that there was not equal concern for any diminution of the mother's place in the children's lives; nor was there recognition that her stable partner was acting responsibly vis-a-vis the children, and trying to play an active and trustworthy role in the children's lives.

One must, in addition, examine joint custody awards. This examination is somewhat limited by virtue of the fact that there is no statutory authority to impose joint custody in Canada. Thus, the scrutiny will be largely of voluntary joint custody situations in Canada and imposed joint custody conditions in jurisdictions which so allow. Simply stated, either voluntary or imposed joint custody are still the minority of total awards. However, in California, where the court can impose such an award, a parent who "requests" joint custody has a greater than equal chance of having it so awarded.[136] While these statistics would suggest that fathers and mothers stand an equal chance of winning custody litigation, the difference between joint legal custody and joint physical custody marks the solid distinction between perceived equality and lack of substantive equality. Whereas joint legal custody is awarded in approximately 20% of cases in California, joint physical custody is awarded in only 2% of these.[137] This has huge ramifications with respect to independence in parenting for the person, usually the mother, who is the physical custodian of the children.

For a post-divorce family who is subject to a joint legal custody, but physical custody to the mother, the results for women are overwhelmingly unfair. This preference for joint legal custody is frequently assumed by judges regardless of any history of genuinely shared parenting.[138] The father, by virtue of the fact of having been awarded "joint custody" is considered to be contributing more parental support and, therefore, is required to provide less in the way of financial support for the child. Even Bartlett and Stack, ardent supporters of joint custody, recognize the inequities inherent in this:

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135. *Supra*, note 101 at 30.

136. See Weitzman et al., *supra*, note 4. Many would argue that no one should be surprised by this; see M. Minow, "Consider the Consequences" (1986) 84 Michigan Law Rev. 900.

137. See *supra*, note 119. See also *supra*, note 30, for further statistics.

138. See *Davidovich*, *supra*, note 101, where MacKenzie, J. specifically said, albeit in obiter: "[i]deally joint custody is the best solution in these cases."

> As a result of their increased custodial rights, fathers have attained greater economic leverage in the bargaining process surrounding custody decisions. Thus women wishing to retain satisfactory custody arrangements with their children have found themselves more vulnerable at divorce, often needing to negotiate away economic for custodial rights.[139]

The mother, who is the sole physical custodian, provides the care, nurturing, household tasks, doctor's appointments, and all else required to carry out childrearing satisfactorily – but at the same time is expected, because of the goal of post-divorce partners' self-sufficiency, to also maintain full-time employment.[140] In addition, and in my view most importantly, the father retains what is virtually veto power over any and all decisions the "custodial" mother may make with respect to the children's residence, schooling, religion, and health care. The effects are predictable:

> Any increase in fathers' rights serves to undermine the decisionmaking authority of mothers who are primary caretakers of children. Orders for joint legal custody may interfere with a mother's attempt to make necessary and timely decisions for the child's welfare. Yet, in order to juggle the responsibility of childcare, housework, and lack of monetary support, a single parent probably needs more autonomy and flexibility than does a woman who has more resources.[141]

Clearly, this result is inequitable.

Thus, the question is whether no-fault divorce laws and parental rights analysis do anything to change that situation for children. The answer to that question is clearly yes; however, the change thus far has been a negative, not positive, change. The irony, devastatingly real for women caught by it, is that this virtually re-creates all of the factors which may have caused the demise of the marriage. It recreates all of the factors which most wives and mothers realize remain unequal in intact marriages (i.e., childcare and housework), but leaves none of the possible advantages of marriage (i.e., partnership decisions, affection, companionship). Joint legal custody with only one parent having physical custody is the worst example I can conceive of patriarchy writ large, run amok. Or, perhaps, merely the best example.

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139. *Supra*, note 35 at 13. It is not only in circumstances where joint custody is awarded that such is the case, although it is here that this phenomenon is best recorded. It may also occur where a mother resists joint custody, as in *supra*, note 67.

See also E.D. Pask, "The Effect on Maintenance of Custody Sharing" (1989) 3 Canadian Journal of Women and the Law 155.

140. Note that this full-time job is likely to pay 60% of the wage payable to a man in a comparable job. Weitzman, *Divorce Revolution*, *supra*., note 22, shows statistics that immediately post-divorce, men experience a 42% increase in disposable income; whereas women and children experience a 73% decrease in the same time period. These statistics affect more than half of American children under the age of 18. Bartlett et al., *supra*, note 35, cite this problem with joint custody, causing a significant decline in standard of living of children. The economic devastation of divorce on women and children is not a new phenomenon. See also, *supra*, note 45; *supra*, note 25; and *supra*, note 136.

141. A.M. Delorey, "Joint Legal Custody: A Reversion to Patriarchal Power" (1989) 3 Canadian Journal of Women and the Law 33 at 41.

C. RIGHTS ANALYSIS, CUSTODY, AND EQUALITY

There are a number of reasons why rights analysis is inappropriate as a process for determining child custody. As just discussed, one compelling reason is that the concept of parental rights and formal equality between parents does not result in actual equality between the parents. By definition, any "rights" arguments must purport to create equality; otherwise one must question whether it is really rights about which the proposer speaks.[142] By any standards, the notion of rights as proposed by liberal feminists or fathers' rights groups simply is not one which creates equality.

Secondly, though those who would argue parental rights recognize that it is always a delicate balance between these rights and the best interests of the child, I do not believe a balance should even be contemplated. This type of analysis has not established its resulting in better situations for children.[143] In fact, social scientific research, even as limited as it presently is, would imply the polar opposite. A contest between the competing principles of equal parental rights and the best interest of the child is one which actually damages the very relationship it is purporting to enhance or protect. This should, in my view, oblige us to re-think the need for balancing: the best interests of a child must not be "balanced" but, instead, must "trump" any other consideration. Some would suggest another rights-argument: that parental rights analysis is best balanced by employment of the paradigm of children's rights. It would seem to me that there is an alternative to increasing children's rights as a balancer to the very real injustices wrought by the employment of parental rights analysis.[144] One of the alternatives is to re-think our view, individually and collectively, of children. This alternative is to examine with diligence the rationale and result of the underlying analysis. There are other, less destructive and more logical forms of analysis which can be just as meaningfully employed. We are not bound by the view of parents' rights; we are not bound to make children pawns in a political chess game. We can envision alternatives which are

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142. The vast majority of rights-based articles were written completely from the perspective of parent's rights. Children's rights, when they were mentioned, were assumed to be the same as formal parental equality; that is, children were assumed to be best served by joint custody, and there was no further discussion of their "rights".

For a contrast, see G. Paquin, "Protecting the Interests of Children in Divorce Mediation" (1988) 26 Journal of Family Law 279; he argues for the use of children's rights as a counter to parental rights.

143. See M. Minow, "Rights for the Next Generation: A Feminist Approach to Children's Rights" (1986) 9 Harvard Women's Law Journal 1, who suggests that despite our rhetoric, there is widespread and societal neglect of children, broken only by occasional outpourings of rage over particular problems confronting children. She cites American statistics on the treatment of children: 12 countries do better than the U.S. in infant mortality; 20% of children in country live with poverty-level family incomes; nearly 40% of people in poverty in the country are children; 1 million children are reported to public authorities as victims of serious abuse by adults; Massachusetts spends the same daily fee for a child in foster care as a kennel charges per day to house a dog; only 35% of mothers raising children alone receive any child support from fathers; and nearly 1 million children under age 5 are without adult supervision during the day.

144. E. Goodman, "A Child's Right to Access: A Problematic Postulate" (1983) 7 Univ. of Tasmania Law Rev. 308, discusses the difference between "rights" and "privileges," which is instructive in this analysis.

workable for children; however, we must take the lives of children seriously in order to do so. Such is the nature of responsibility toward children.

VII. A BETTER TEST THAN BEST INTERESTS?

There is general agreement that the best interests test, as it is presently applied in law, is difficult and unworkable. The fluidity of the test works to disfavour predictability of litigation, and exacerbates the adversarial nature of an already extremely conflict-ridden process.[145] The results of weighing factors which make each respective parent a "good" parent or "bad" parent[146] are results which do little to foster continued good relations between irrevocable partners in parenthood. The evidence is overwhelming that all concerned in this litigation-promoting process are harmed: certainly the children; but also the parents, grandparents, social workers, lawyers, and judges. It may be helpful to isolate the components of the test which lead to these results in order to formulate recommendations for another test.

A. NUMBER OF FACTORS

Because there are a number of factors which, in a very complex fashion, comprise the best interests of a child, any determination of best interests must involve a weighing of unweighted factors. This, from the perspective of the litigants, leaves the judge in a position of being allowed to maintain her own personal biases in an unfair way. From the perspective of the judge, this gives extremely little guidance as to what might be the best of two situations.

B. NO PRESUMPTIONS

A best interests test with no operative presumptions leaves potential litigants with little predictability as to outcome. Lack of predictability increases the potential gain in litigation, and intensifies the conflict by encouraging each litigant to "drag the other parent through the mud." Knowledge that the slightest thing might "tip the balance" is a sufficient reason for evidence overkill with respect to the unfitness of the other parent.

C. PROLONGED LITIGATION

Even very young children are affected by the tension caused by custody litigation. Prolonged litigation causes a prolongation of this tension. In addition, should a change

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145. Mediation is been suggested as the panacea to the adversarial nature of the divorce and custody process. It would appear that this is not, in fact so. Clearly, mediation can work for some; however, for others, it is simply not workable. The underlying problem is able to be analogized to the topic of this paper: perceived versus real equality between the partners is the demarcation point between workable mediation and non-workable mediation.

146. This, coupled with the fact that some factors have been held to be out of the realm of the decision. The most obviously unfair, and I would add dangerous, is that a father's physical violence within the family is not considered relevant to his parenting. See Girdner, *supra*, note 26 who discusses special problems for battered women in either mediation or litigation.

in physical custody occur following judicial determination, the lengthier the time before the child is moved to a different home, the more difficult it is for the child to adjust to that move.

D. FUTURE STANDARDS

The best interests test must be judged by future standards; that is, the question to be answered is which parent *will make* the better parent, or which parent *will provide the better circumstances* for the child? Such a standard is not easy to adjudge, since it necessarily involves a certain amount of guesswork about the future on the part of the expert witnesses and the judge. Perceptions formed by either the judge or the expert witnesses are formed about all family members at a point in time which research has indicated is least likely to result in an accurate assessment, the immediate post-separation period.

VIII. PROPOSED NEW TESTS

Four tests or presumptions have been suggested to ensure a more predictable, more fair, and better determination for the placement of the child. The first two are not serious contenders; they are the coin-flip method, and the maternal preference, or tender years doctrine to be re-employed. The third is that the judge should ascertain which is the "psychological parent," and award sole custody to that person. The last is that the judge should hear evidence as to which parent has been the "primary caregiver," and award custody to this parent. Each of these latter two presumptions answers the stated concerns related to the best interests test. An examination will now be undertaken to ascertain the more workable of these presumptions.

A. COIN-FLIP METHOD

It is surprising the number of authors who only slightly tongue-in-cheek suggest that the determination be made by a coin-flip.[147] This would appear to have been presented in order to demonstrate the futility of attempting to achieve equality between parents in making custody determinations. Authors suggest that if we are serious about ensuring parental equality, we could do it more efficiently by merely drawing straws, or flipping a coin. Goldstein et al. state:

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147. J. Goldstein, A Freud & A. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1973) have this to say about the value of making such a suggestion at 154 footnote 12: "A judicially supervised drawing of lots between two equally acceptable psychological parents might be the most rational and least offensive process for resolving the hard choice."

For other authors who mention this suggestion somewhat seriously, see Mnookin, *supra*, note 29 at 263-4, who argues for less discretionary custody award standards, and discusses the coin-flip approach. To be fair, he also includes an indication of why this would be viewed as inappropriate.

Elster discusses and rejects random decisionmaking. See *supra*, note 7 at 44.

See also Fineman, Dominant Discourse, *supra*, note 36, who states at 773: "If we merely want to further the goal of symbolic "equality" between parents, custody could be decided by the flip of a coin. If we aspire beyond rhetoric, however, we need a more sensitive and realistic rule."

> It will be said this is a "give-it-up" philosophy. Of course it is. A give-it-up attitude is constructive when it appears that the task is impossible of accomplishment with the resources that are available.[148]

This "give-it-up philosophy" is indisputably being utilized in order to make apparent the impossibility of achieving parental equality in custody determinations. The coin-flip argument is not taken seriously by anyone as anything other than a symbol of the difficulty of this endeavour.

B. RETURN TO TENDER YEARS DOCTRINE

This recommendation is based on the assertion that the mother-child relationship is more psychologically important than the father-child relationship. While proponents are careful to assert that this theory is not biology-based, it is a hard assertion to maintain when the dividing line between psychologically important parents and less psychologically important parents is, itself, biological.[149] It is not seriously considered by most academic authors and is without empirical backing. This is not a test I would recommend to be thoughtfully pursued.

C. PSYCHOLOGICAL PARENT PRESUMPTION

This presumption is recommended by Goldstein, Freud, and Solnit. Basically, they say that a child is more emotionally attached to one parent, whom they call the "psychological parent."[150] These authors argue that, post-divorce, it is in the best interests of the child to live with and be fully parented by the parent to whom she is most attached. This theory was first developed with respect to child welfare apprehension and adoption cases, where the custody issue was between the biological parent(s) and a third party. However, this theory has been elaborated to include custody questions between two biological parents. The concept remains the same: pure biology is not an adequate reason for custody of a child; something more is required to place the biological parent in the child's best interest. This "something more" is that the parent have a psychological tie to the child, and that this psychological connection between the parent and child is the important aspect of the relationship, not the biological connection. These authors argue for a "continuity guideline," which is that custody decisions must be made with the child's time frame in mind, and that once decisions are made, they should be irrevocable. Goldstein states these as the factors which should be considered in a custody determination:

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148. Goldstein et al., *supra*, note 147 quoting B. Currie, *Selected Essays on the Conflicts of Laws* (Durham: Duke University Press, 1963) at 120-121. They state at 154: "One is almost tempted to suggest that it would be better to flip a coin, since that procedure would produce the same result more economically."

149. R. Klaff, "The Tender Years Doctrine: A Defense" (1982) 70 Calif. L. Rev. 335. See also R. Uviller, "Father's Rights and Feminism: The Maternal Presumption Revisited" (1978) 1 Harv. Women's L. J. 107 at 108-109.

However, see *Doe* v. *Doe* (1990), 28 R.F.L. (3d) 356 (Ont. D.C.) for a decision using this line of reasoning.

150. *Supra*, note 147. In an note clearly before its time, "Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties" (1963) 73 Yale Law Journal 151, similar recommendations are made.

(1) The child's need for continuity of care by autonomous parents requires that the court acknowledge parents generally are entitled to raise children as they think best, free of state interference. Their preference is for minimum state intervention, and they call for restraint in justifications for coercive intrusion on the family relationships.

(2) Only the child's well-being, not the parents', nor the family's, nor the child care agency's (for state adoption issues) should be determinative. Once the justification for state intervention is established, and the protective shell of the family is already broken, the goal of state is to create or re-create the family for the child as soon as possible. The decision should reflect the child's sense of time, should take into account the law's incapacity to supervise interpersonal relationships, and the limits of knowledge to make long-range predictions.[151]

Goldstein et al. argue that once the custody determination has been made, the custodial parent should have full responsibility for the child and the independence required to make any and all decisions related to the child. In a most controversial fashion, they say this should include the decision about whether or not the non-custodial parent should be allowed to visit the child. This is a very serious recommendation, which has been frequently dismissed out-of-hand. To understand its seriousness, it is crucial to understand the authors' rationale, and also to understand that they are not stating that one parent is all a child can be psychologically bonded to. They are saying that in a conflict situation, the ability of one parent (i.e. the custodial parent) to stop the conflict is more important — to the child — than the ability of the other parent (i.e. the non-custodial parent) to see the child. Goldstein clarifies this position:

...courts and commentators, blinded by the spectre of spiteful custodial parents denying visits or opposing joint custody at the child's expense, have rejected our position with the misleading assertion that visitation or access is a right of the child, not of the parents. In fact, by subjecting an award of custody to an order imposing visits, the court does not protect the child's "basic right" to see his noncustodial parent. It merely shifts the power to deprive the child of his "right" from the custodial parent to the noncustodial parent. Visitation orders make the noncustodial parent — rather than the parent who is responsible for the child's day-to-day care — the final authority for deciding if and when to visit. Even if the court orders visits because it believes they will serve the child's best interest, the non-custodial parent remains free not to visit, to "reverse" the court without risk of being in contempt. The court is powerless, as it should be, to order noncustodial parents to visit their "waiting" children. But the court has the corrosive power to have a child forcibly removed from a custodial parent who refuses to allow visits, or to imprison that parent for contempt. When it exercises such power, the court disrupts, not insures, continuity of parent-child relationships. It establishes for the child -- and indeed for other children of the family who are themselves subject to visitation orders -- that the custodial parent cannot be trusted and is powerless to protect them. Courts obscure the real issues when they say what they cannot mean; that access or visitation or indeed joint or divided custody is a basic right of the child rather than a basic right of the parent.[152]

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151. J. Goldstein, "In Whose Best Interest?" in Abella et al., eds, *supra*, note 18 at 121; alt. cite in Folberg, ed., *supra*, note 58 at 47.

152. *Ibid.* at 126-128. For an example of a court doing this very thing, see Trussler, J. in *Tremblay*, *supra*, note 64.

Because of the child's need for continuity and stability, Goldstein et al. also argue that the possibility of appeals or subsequent applications to vary custody should be foreclosed by legislation, or the courts.[153]

The psychological parent test requires that a judge determine which parent is the psychological parent, based on an examination of the emotional tie between a parent and child. Some critics of this theory state that the psychological parent may not be the best parent for the child. Radin argues that psychological parents may also be unfit parents, and that therefore additional guidelines are necessary.[154] It would appear, however, that this is exactly why the psychological parent test is presented as a *presumption* which could be rebutted with sufficient evidence of unfitness. The strongest criticism of this test is that it requires judges to go into an area of fact-finding for which they are completely unprepared.[155] The result is strong judicial reliance on the reports by expert witness called by each litigant; perhaps undue reliance.[156] Research indicates that the time immediately post-divorce is the time least likely to engender correct analysis as to parental strengths; yet, this is the very time in which the majority of psychiatrist, psychologist, or social worker home studies are carried out in preparation for litigation.[157] Reliance on expensive expert witnesses, in addition, puts unwarranted emphasis on "pocketbook litigation." Because of the fact that the presumption of psychological parent obliges the

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153. Goldstein et al., *supra*, note 147 at 106: "This absence of finality coupled with the concomitant increase in opportunities for appeal are in conflict with the child's need for continuity. As in adoption, a custody decree should be final, that is, not subject to modification."

154. Radin, "The Psychological Parent Concept in Contested Custody Cases" (1983) 11 J. Psychiatry & L. 503 at 512-13. This article discusses the test within a different context – biological parents vs. a third party in a custody battle.

155. S. Levine, "The Role of the Mental Health Expert Witness in Family Law Disputes" in Abella et al., *supra*, note 18 at 129. Fineman et al., *supra*, note 4 argue that the removal of the "rules of thumb" engendered a crisis of custody decisionmaking. However, they state, the way to resolve this crisis is not to place even greater reliance on psychological experts and social scientific data.

156. See, for an analysis for judicial reliance on this theory, P.C. Davis, "'There is a Book Out ...': An Analysis of Judicial Absorption of Legislative Facts" (1987) 100 Harvard Law Rev. 1539 at 1547-92. This article is written by a former judge with respect to the "effects of judicial liberty in the determination of legislative facts." She examines the use of the psychological parent theory, and does an analysis of its impact in child placement cases. Judge Davis calls for "careful use" of the psychological parent theory. She warns against "laissez-faire" application of any theory, but especially this one because of the powerful role of expert evidence in the case determination.

157. This examination by experts is fraught with potential difficulties, most of which are advanced by the experts themselves. Most family therapists or mental health professionals agree that a short interview is insufficient time to ascertain something as basic as which placement would be better for a child. The Report by The Committee on the Family, Group for the Advancement of Psychiatry, Pub. No. 106, Divorce, Child Custody and the Family (1980) stated that even in cases where there is little difference between the parents, it is necessary to carry out assessments by interviewing family members and observing each parent with each child. This is extremely time consuming.

R. Gardner, *Family Evaluation in Child Custody Litigation Apps. V-VI* (1982) estimated the charge for an average examination at $2,000 (1982 dollars, U.S.). He states the elements of a good examination took approximately 20 hours of interview time – not counting time to prepare written report, or to present testimony in court.

A.M. Jackson, N.S. Warner, R. Hornbein et al., "Beyond the Best Interests of the Child Revisited: An Approach to Custody Evaluations" (1980) 3 J. of Divorce 207, also estimated 20 hours as necessary for sufficient contact with family members; this did not include case conferences among professionals.

court to rely so heavily on the evidence of expert witnesses, I think it is not the best method by which the "best interests" test can be interpreted.

D. PRIMARY CAREGIVER PRESUMPTION

This presumption is, simply stated, that the parent who has been primarily responsible for childcare pre-divorce should be the parent who becomes the custodial parent post-divorce. The rationale for the test is as follows: if one seriously believes that stability of care is in the best interests of the child, then stability must include remaining in the care of that primary caregiver. There are a number of advantages to the primary caregiver presumption. Olsen argues that the use of the "primary attachment figure" test negates sexual stereotyping, and encourages male responsibility for children; it is, additionally, more determinate than the current test.[158] Erickson states:

> The purpose of the primary caretaker parent presumption is not to reward a parent for caring for a child. The purpose of the presumption is to serve the best interests of the child by awarding custody to the parent who has had the most interaction with the child on a day-to-day basis. That parent is the person to whom the child is likely to be more psychologically connected ... Even though rewarding a "dutiful" parent is not the goal of the primary caretaker presumption, it has that effect and may, in fact, be encouragement to take on more childcare responsibilities.[159]

When this test was explicitly used in *Pikula* v. *Pikula*, the Court held that "[c]ontinuity of care with the primary caretaker...is perhaps the single predicator of a child's well-being about which there is agreement, and which can be completely evaluated by judges.[160]

Statistics would suggest that in the majority of families there is still one parent who provides the bulk of the actual care for the child; it is this parent to whom the child would arguably have the strongest emotional tie. The advantage of this test is that it is with relative ease that a judge can hear and determine the necessary facts. Potential litigants need not call extensive and expensive witnesses; they merely need demonstrate to the court who has been the provider of the primary care for that child. Which party is the primary caretaker would be established by:

> ...lay testimony by the parties themselves, and by that of teachers, relatives, and neighbours. Which parent does the lion's share of the chores can be demonstrated satisfactorily in less than an hour of the court's time in most cases.[161]

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158. F. Olsen, "The Politics of Family Law" (1984) 2 Law & Inequality 1 at 19.

159. *Supra*, note 38 at 450 footnote 15. Similarly, N. Polikoff, "Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations" (1982) 7 Women's Rts. L. Rep. 235, argues for a primary caretaker rule, regardless of gender, but with a recognition that this is usually female "because she has earned it by providing years of primary child care."

160. 374 N.W. 2nd 705 at 712. S.A. Ahl, "A Step Backward: The Minnesota Supreme Court Adopts a "Primary Caretaker" Presumption in Child Custody" (1986) 70 Minnesota Law Review 1344.

161. R. Neely, "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed" (1984) 3 Yale L. & Pol'y Rev. 168 at 181.

In addition to the relative speed and ease of evidence presentation, this test has the advantage of high predictability; it would be a rare family in which there would be a truly 50-50 split in childcare duties.

The court in *Garska* v. *McCoy*, which awarded custody to the primary caretaker, stated the tasks associated with primary care:

> (1) preparing and planning of meals;
>
> (2) bathing, grooming and dressing;
>
> (3) purchasing, cleaning, and care of clothes;
>
> (4) medical care, including nursing and trips to physicians;
>
> (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses;
>
> (6) arranging alternative care, i.e. babysitting, day-care, etc.;
>
> (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning;
>
> (8) disciplining, i.e. teaching general manners and toilet training;
>
> (9) educating, i.e. religious, cultural, social, etc.; and
>
> (10) teaching elementary skills, i.e. reading, writing, and arithmetic.[162]

The primary caregiver test has the added advantage that it answers some of the concerns addressed by the psychological parent test, but without the court's heavy reliance on expert evidence. Absent unusual circumstances, the primary parent and the psychological parent will be one and the same, especially for a pre-school child. Fineman asserts that it is:

> ... essential that only the past performance of the parents be considered. Helping professionals should not speculate about which parent would be able to produce the best future environment for the child. The only relevant inquiry should be which parent has *already adapted* his or her life and interests to accommodate the demands of the child...not speculation as to quality or extent of emotional bonding... [the] primary caretaker test assumes that these bonds exist between the primary caretaking parent and the child; they are evidence by the caretaker's sacrifice and devotion to the child. The test also assumes that the child reciprocates this devotion. This test also involves past fact-finding, an inquiry traditionally performed by courts. The primary caregiver rule is one that judges can comfortably apply, and that lawyers can easily understand and use. It gives predictable results in most cases, which engenders less

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162. 278 S.E.2d 357, (W. Va. 1981) at 363.

> litigation. The mere fact that both parents work does not, in the vast majority of cases, mean that both are primary caretakers (or that neither is).[163]

The ease of determining which parent has, in fact, been the primary caregiver, allows for a decision to be made "on the child's timeline."[164] A decision within the parameters of the primary caregiver presumption would be made very quickly. The test is highly determinative and thus less likely to encourage litigation. Evidence, when custody is litigated, would be swiftly admitted, insofar as it is not expert evidence for which there must be interviews, report-writing, or long discoveries. The child's continuing to be primarily cared for by the parent who has been the primary caregiver allows for "continuity of care."[165] The use of this test, which is almost purely hard evidence, has the advantage of decreasing animosity between parents which is often created by the adversarial system.

Determinations made on the basis of the primary caregiver presumption are unlike the present method of determining "best interests," which, because of its fluid equality, encourages parents to litigate with animosity and vengeance. Under present circumstances, it is all too easy to forget the child, to have the child the focus of an argument to which the child has no real connection except as a pawn. Goldstein et al. say about this process:

> Adults have deeply engrained irrational reservations about the primacy of children's needs. These reservations -- ambivalent feelings -- cannot be guarded against except by *clear and compelling priorities* once there is conflict about the child's placement...Once the child is the focus of conflict between adults or their institutions, there are an infinite number of disguised ways in which these irrational negative attitudes will find expression.[166]

The determinative nature of the primary caregiver test would be beneficial in two ways: (1) to reduce the time and cost of litigation, because of the above-stated reasons; and (2) to reduce the need for litigation, because the test is more predictable.

Some criticisms of the primary caregiver presumption are easily refuted. Elster, for example, rejects the presumption because it is "useless for the increasing number of divorces in which both parents work full time."[167] Given the statistical evidence of mothers' differential contribution to household tasks and childcare, irrespective of employment, this argument is not convincing. Olsen argues that decision-makers are dependent on experts, and that the test reinforces the view that one person is primarily responsible for child care.[168] Olsen's comments with respect to the need for experts are

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163. *Supra*, note 36 at 771 [emphasis mine].
164. Goldstein et al., *supra*, note 147.
165. *Ibid.*
166. *Ibid.* at 106. See also, J.D. Payne, "Co-Parenting Revisited" in Folberg, ed., *supra*, note 58 at 249; N.D. Polikoff, "Gender and Child-Custody Determinations: Exploding the Myths" in I. Diamond, ed., *Families, Politics and Public Policy* (New York: Longman, 1982) 195.
167. *Supra*, note 7 at 44.
168. *Supra*, note 158.

counter-intuitive. Caregiving is generally observable: who is washing, shopping, cooking, cleaning, spending time with the children. Respecting her concern that the primary caregiver presumption reinforces the view that one person is responsible for childcare, I would argue that the test recognizes present reality, as opposed to contributes to a perception. One certainly hopes for a day in which childcare is shared equally by both parents. However, that is not today's empirical reality, and public policy decisions must be based on factual information.

Importantly, the primary caregiver presumption is the test which takes the parents' earlier decision about preferred child-rearing — albeit an implied decision — most seriously. If decisions intentionally made by parents during marriage, while decisions were cooperatively made, are to have any meaning at all with respect to preferred method of child rearing, the primary caregiver pre-divorce should continue to be the primary caregiver post-divorce. The choice of one parent to carry out the dailiness of parenting is a choice taken much earlier than a couple's separation. The primary caregiver presumption would, in effect, take judicial notice of a choice already made, and allow childrearing to continue within the ambit of that choice.[169] This is, in fact, the most compelling argument for the use of the presumption. To maintain parents' earlier choices with respect to preferred child-rearing would seem not only a laudable goal, but also to make manifest good sense. It would appear obvious that in the vast majority of families, the parents' conduct during the marriage indicates a preference for mother-care. Thus, it is reasonable to suggest that these same parents would continue to prefer to have the same children reared primarily by the mother.

While not explicitly adopting the primary caregiver presumption, the Court of Appeal of Alberta recently decided that the fact of the mother's primary care of the children was of considerable import in deciding custody.[170] Stratton, J.A. states:

> The trial judge held the petitioner has good parenting skills and I agree. Further they are proven parenting skills while Dr. K.'s care giving skills are untested on a continuous day-to-day basis. Mrs. K. has always been the children's primary care giver. She has been the one who has wiped their noses, bathed them, maintained their health, driven them to school, tutored K., taken them to church and arranged their daycare. Dr. K. has had a role in these matters, but it has been much more limited in nature. Mrs. K. has not only proven that she can cope with the daily pressures of child rearing, but she has exhibited an active and extended concern for the children's condition means, and needs. Indeed, in all primary aspects it was Mrs. K. who was charged with child rearing before the marriage broke down and I see no reason why that role should be changed now that the marriage has been dissolved.[171]

The Court recognizes that the primary care provided, here by the mother, is a strong factor within the best interest test, and also impliedly recognizes that primary care is more

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169. Chambers, *supra*, note 25 implies this point in a minimal fashion at 486: "Judges, *in rare cases*, may find that they can draw upon some shared views of the child's needs revealed by the parents' conduct during the marriage..." [emphasis mine].

170. K. (M.M.) v. K. (U.), *supra*, note 24.

171. *Ibid.* at 204.

often provided by the mother.[172] The import of this case is in the Court's recognition that custody decision making can no longer "ignore the parenting roles each [parent] has undertaken in the past."[173] The roles chosen within the intact marriage have significance with respect to the care of the children, and have significance after the dissolution of the marriage.

Criticism of this presumption comes from the proponents of the rights concept in custody determination, and it is this: a presumption for the primary caregiver is heavily weighted in favour of mother-custody and, therefore, is not equal as between the two parents of the child. There are two reasons why this is a misguided argument. Firstly, this test is not formulated to ensure equality between parents;[174] this test is to ascertain the best interests of the child. The goal of any test for custody determination is to ascertain in a predictable, fair and unclouded manner the best possible placement for a child of divorce. The primary caregiver test does just that; formal equality between parents surely must take a back seat to such advantages for the child. The second objection to the primary caregiver test is that it is simply the "tender years doctrine" in disguise. In fact, this argument is also without merit. The tender years doctrine is biologically based: under this principle, a child who had rarely seen her mother could conceivably be placed with the mother simply because of the sex of that parent and the stereotypical view that the child is better off with a mother. The primary caregiver presumption is based on completely different analysis. This test is based on the principle that the child is better off in circumstances in which she is stable, comfortable, and emotionally connected. Stability of care — especially for a small child — is essential for positive cognitive and emotional development. It is true that the end result will, at present, be the same for the vast majority of families, whether a court applies a tender years presumption or the primary caregiver presumption. This is, however, not a function of the inequality of the test; this is a function of the lack of equal sharing in parenting which is epidemic in our society.

> As with most gender-neutral rules, its impact may not be gender neutral, but this result only reflects the fact that women are the primary nurturers of children in our society...If fathers are "left out", they can change their behaviour and begin making sacrifices in their careers and devoting their time during the marriage to the primary care and nurturing of children. Men can exercise the same "free" choice that women traditionally have in these matters, adjusting their outside activities to care for their children...The system should reward demonstrated care and concern for children...The primary caretaker test is an attempt to ensure a good future for children in our culture. It encourages nurturing and concern for

172. *Ibid.* at 203-204.

173. E.D. Pask & M. L. (Marnie) McCall, "K. (M.M.) v. K. (U.) and the Primary Care-Giver" (1991) 33 R.F.L. (3d) 418.

174. M.L. Fineman, "Custody Determination at Divorce: The Limits of Social Science Research and the Fallacy of the Liberal Ideology of Equality" (1989) 3 Canadian Journal of Women and the Law 88 at 109-110: "Solutions to women's inequality will not be found within the confines of legal rules, but within the cultural and social climate in which legal rules are developed and used. The care of children produced dependency, not for children, but for the primary caretaker. The needs that this dependence generates must be met, either by society as a whole or by individuals with legally significant connections to children...The reforms based in this social science research ignore true inequalities, and thus actually exacerbate women's inequality."

children in a concrete way. The positive message that the rule sends to parents about what is valued by the legal system and by society at large is clean and unambiguous.[175]

Even were we to be seeking equality between men and women, surely we are not so superficial that we are prepared to say to women that in the midst of pervasive and pernicious lack of equality in general society, the one area in which we will force formal equality is that of post-divorce custody of their children! To so state is to argue in the realm of ludicrousness and absurdity.

IX. CONCLUSION

Because our feelings of self-worth and immortality are often connected in complex ways to our children, there is no easy answer to the question of child custody. No solution to the question of determining post-divorce custody is easy or perfect. However, the fact that the answers are not easy must not propel us to a solution which is not fully informed and carefully considered. It is essential to always consider this question with the spectre of a child in the background. We cannot squander the fates of children on formal equality. We cannot allow the concept of rights to pervade this area of judicial determination. To do so is folly at its worst.

Certainly, to legislate for mandatory joint custody with a test for unfitness to rebut that presumption appears on the surface to be the fairest method by which to determine the placement of a child after marriage dissolution. However, on closer analysis, it becomes obvious that this presumed fairness does not, in fact, create fairness, but instead creates unfairness between parents and causes hardship for children.

However, the primary objection I have to the use of rights analysis with respect to custody of children is that such analysis is reductionist. It reduces children to just another possession which must be divided after the dissolution of a marriage. Even a cursory examination of either the liberal feminist discourse or the discussion by fathers' rights groups will reveal a primary political agenda which has little to do with the need for caring for and nurturing of children. The notion of playing politics with children's lives is obscene. Divorcing couples have equal rights to the cottage or to the matrimonial home or even to the business, but the concept of rights, as applied to "possession" of children is an anathema, in my view. Rights imply ownership. To change the factors used in determining custody of children to balancing competing parental rights, is to revert to the mid-nineteenth century notions of fathers as owners of their children. Or, to be contemporary, fathers and mothers as owners of their children. It is, however, no less objectionable. It is especially important to be cognizant of the underlying basis for rights analysis if one bears in mind the frequency with which the custody award does not include joint physical custody.

It is difficult to argue, and I do not so argue, that parents, post-divorce, should not continue in their parenting roles vis-a-vis the child. However, to argue thusly, and then

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175. *Supra*, note 36 at 773-774.

extrapolate that a court should be compelled to account for that shared parenting as the right to an order for joint legal custody, is specious. To encourage the sharing of parenting rights and responsibilities, one should not give the father the rights and the mother the responsibilities.

A better view of the role of the parent than that employed by rights analysts could be fashioned around concepts of stewardship: the parent as a person who has the responsibility for rearing a child, as opposed to a parent as a person who has rights to, or owns, the child. It is because of this view that I recommend the use of the primary caregiver test for post-divorce child placement. Thus, a parent who has, in the past, shown a willingness to provide the day-to-day care for the child should continue to do so and should have legal custody so as to be able to do so effectively. Parents who have earlier made the choice with respect to whom will provide the primary care for their child should be taken seriously regarding that choice. Children should receive care from the person from whom they are used to receiving care. This is not to say that a non-custodial parent would be rendered obsolete; this would, however, mean that the custodial parent would have the legal means of carrying out her responsibilities in an effective fashion. This concept maintains a child-orientation and reinforces the responsibility of parenthood. This concept turns the question from what can we get from our children to what can we give to our children. Surely we owe our children no less than that.