2000

A Custody System Free of Gender Preferences and Consistent with the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System

Shannon Dean Sexton

University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Family Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol88/iss3/7

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledges@lsv.uky.edu.
A Custody System Free of Gender Preferences and Consistent with the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System

BY SHANNON DEAN SEXTON*

“We need normative social arrangements that reinforce Americans who make a commitment to children and home.”¹

INTRODUCTION

A father, whose only fault was that he worked long hours, sought custody of his seven-year-old child.² Despite incredible statistics against the likelihood of his success,³ the father elected to fight for custody. The mother was a troubled soul. The evidence at trial indicated she had a history of lying, and even asked her child to lie for her during the divorce proceeding to substantiate her story. When the child refused, she yelled and cursed at the child and was even heard referring to him as “a brat” and “a monster.”⁴ The mother demonstrated a

---

³ See infra notes 156-251 and accompanying text. See also Ross A. Thompson, The Role of the Father After Divorce, in THE FUTURE OF CHILDREN 210, 217 (Richard E. Behrmen et al. eds., 1994).
⁴ See Lenczycki, 543 N.Y.S.2d at 728-29 (Baletta, J., concurring in part and dissenting in part). Baletta stated that the wife’s lies “involved the child in such a manner as to cause serious questions with respect to the wife’s fitness to provide
lack of fiscal responsibility, including incurring substantial tax liabilities.\(^5\) The mother once told the father that she was pregnant, despite having undergone an abortion a few months prior to fabricating her story. The mother also had a history of suicidal threats—once bringing her threats dangerously close to fruition when she slashed her wrists.\(^6\) Despite the overwhelming evidence that indicated the mother was unstable and in no shape to serve in a parental role, the court awarded the mother sole custody of the child. The appellate court affirmed.\(^7\) Although this is but one example, the fact that such a judicial miscarriage could occur suggests the need for legal reform in the area of child custody determination.

This Note argues that while there has been a steady evolution in child custody law, much more is required to erase the prevalence of bias and prejudice within the current custody system. Too often, gender stereotypes play a role in custody determinations.\(^8\) This Note analyzes bias in modern child custody law and suggests alternatives to present legal rules. Kentucky child custody law provides only that a joint custody determination is permissible;\(^9\) such a discretionary standard has produced—and continues to produce—inequitable and unfortunate custody outcomes. This sad result is also true for other states with similar standards.\(^10\) In order to finally achieve an equitable result and to serve the best interests of the child, states should adopt a statutory joint custody presumption.\(^11\)
While this statutory adoption would be one step in the right direction, there are additional solutions to remedy the custody system. Several states, including Kentucky, have rigid custodial standards that apply when a parent attempts to change a prior custody arrangement or decree. Case law indicates that these standards make it incredibly difficult to change custody orders when one parent (usually the mother) has custody of the child, even if there is evidence that the child is not in the best possible environment. States need to enact a more protective and equitable standard, such as the "changed circumstances" standard in New York, which would ensure the best environment for a child by taking into account problems previously ignored by strict custodial standards.

Part I of this Note traces the development of child custody law over the past several centuries and discusses modern child custody law and standards. Part II examines the "best interests of the child" standard, which is dominant among all custody standards, and discusses what type of custody determination would prove to be in the best interests of the child. Part III discusses the gender bias still prevalent within current presumption in favor of joint custody).

---

14 See Jo-Ellen Paradise, Note, The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?, 72 St. John's L. Rev 517, 518 (1998) (stating that although fathers have large roles in children's lives, in 9 out of 10 divorced families the mother is the sole custodian of the children).
15 See generally Jacobs v. Edelstein, 959 S.W.2d 781, 782 (Ky. Ct. App. 1998) (holding that the trial court was not required to modify custody even when the threshold requirement for modification was met); Harkema v. Harkema, 474 N.W.2d 10, 13 (Minn. Ct. App. 1991) (citing Minn. Stat. § 518.18(d) (2000)) (providing that a modification of a prior custody order should only be granted when the "child's present environment endangers the child's physical or emotional health or impairs the child's emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child").
17 See infra notes 22-86 and accompanying text.
18 See infra notes 87-155 and accompanying text.
custody law despite the advent of gender-neutral statutes and explores the reasons for a "changed circumstances" standard. Part IV provides an analysis of the joint custody presumption and discusses how this standard would provide a more equitable result in child custody determinations, thereby serving the best interests of the child.

This Note explores only two potential solutions to the problems of present child custody standards. It addresses custody determinations regarding fit non-custodial parents specifically and contends that the joint custody presumption and the "changed circumstances" standard provide a practical and efficient solution to the problems inherent in modern child custody law.

I. THE HISTORY OF CHILD CUSTODY LAW

The historical development of child custody law provides practitioners with a framework for understanding how bias has permeated this field of law, and moreover, how this bias has adversely affected everyone involved in child custody disputes. Prior to this century, it was actually the mothers who suffered as a result of unsubstantiated gender-related presumptions. This bias was reversed during the twentieth century as an equally unfair and unfortunate presumption disfavoring fathers arose in custody determinations. Whether it was the mother or father who was favored by these presumptions, the detriment to the child remained the same. The interests of the child remained overshadowed by illogical gender generalizations.

A. The Origins of Child Custody Law

The American experience has been that the mother has traditionally possessed a more advantageous position in the field of child custody law.

---

19 See infra notes 156-251 and accompanying text.
20 See infra notes 252-279 and accompanying text.
21 See Mark D. Matthews, Note, Curing the "Every-Other-Weekend-Syndrome": Why Visitation Should be Considered Separate and Apart from Custody, 5 WM. & MARY J. WOMEN & L. 411, 444 (1999). The author contends that "[t]he current visitation system does not work as well as it should [because i]t generally places little or no emphasis on protecting the relationship between children of divorce and their noncustodial parents." Therefore, proposing a visitation system that "encompasses an analysis of the complete family situation" is needed in order to "promote[, preserve[ , and protect[ the noncustodial parent's relationship with his or her child. Id.
22 See infra notes 24-86 and accompanying text.
23 See infra notes 24-86 and accompanying text.
This has not always been the case, however. Under Roman law and the English common law system, fathers maintained the more advantageous position in the child custody system. A strong presumptive right was created in favor of the father and it was a difficult presumption for the mother or other potential guardians to overcome. One author explained the sociological perspective of the American Colonial period:

Our forebears of two and three centuries ago maintained some characteristic attitudes toward gender considerably at variance with our own. Man, they believed, must "overrule" woman, in domestic affairs no less than in other spheres of activity. For men had received from their maker a generally superior endowment of reason. Both sexes were liable to be misled by the "passions" and the "affections," but women were more liable since their rational powers were so weak.

A father did not lose custody of the child in the common law system even if he was having illicit or extramarital affairs. The presumptive right was not impossible to overcome, however.

The Court of Chancery played a role in early child custody law under the Crown's authority. The Crown gave the Court of Chancery the duty "to protect those of the Crown's subjects who were unable to protect themselves." Pursuant to this broad equitable grant of authority, the court

---


In Roman law, patræ potestas referred to paternal authority and power. This doctrine gave the father power of life and death over his children. In a later period of history it limited his control to property. This doctrine also gave the father absolute right over custody, a power that extended even beyond death. If he appointed a guardian before his death, the guardian rather than the mother had custody of the children upon his death. Moreover, if the mother remarried after his death, she might lose custody of the children to a third party. Roman law enjoined the children to show reverence and respect to their mother, but beyond that she had no rights.

Id.

26 See Black & Cantor, supra note 24, at 4.
27 Id. at 16.
28 See id. at 4.
29 The presumption in favor of sole paternal custody of a child could be rebutted only by showing the father had "cruelly abused" his parental power. See id.
30 See id. at 5.
31 Id.
had power to deny a father's common law presumptive right to custody. For instance, custody was removed as a result of a father’s drinking and as a result of a father’s atheistic beliefs, for fear that the father would teach his children such habits. The Court of Chancery also allowed children of a mature age to choose the parent with which they wished to live, a practice still alive in American custody law. Thus, both the English common law and courts of equity favored the father, although the courts of equity proved more likely to take away a father’s custody in the face of legitimate reasons.

B. The Evolution of Child Custody Law in America

England’s paternal presumption continued throughout its colonization of the Americas. The American colonies adopted the common law’s presumption in favor of the father because it was believed that a father would provide a more economically stable household, thereby granting the child a greater degree of opportunities. Another contributing factor to this presumption was the woman’s lack of rights within the old common law system. Women had very few property rights and could not enter into a contract or institute a cause of action. This lack of basic legal rights, especially in regard to gaining custody of a child, was best evidenced in the case of a father’s death. Upon the death of the father, it was not uncommon for the child to be placed under the care of a male guardian rather than with the mother. Although America’s paternal presumptive right gradually began to fade, an equally unfair era in child custody law arose.

Once the presumption in favor of the father began to erode, a half-hearted attempt to obtain custodial equality emerged in a few states—not from the English common law—but from the French Napoleonic Code.

---

32 See id.
33 See id. at 5-6.
34 See id. at 6.
35 See id.
36 See id.
37 See MARGARET C. JASPER, THE LAW OF CHILD CUSTODY 1 (1997) (stating that “the father had an absolute right to custody unless he was proven unfit”).
38 See id.
39 See BLACK & CANTOR, supra note 24, at 16.
40 See JASPER, supra note 37, at 1, LITTLE, supra note 25, at 4 (explaining that an appointed guardian also had superior rights to the mother in Roman law).
41 See BLACK & CANTOR, supra note 24, at 7. As an unusual example of this attempt at custodial equality, the authors cite to an 1827 Louisiana statute that read:
These statutes created a dual presumption. If a child were below the age of three years, the mother would obtain custody. If the child were three years of age or above, the father would obtain custody. In other states during the early nineteenth century, the initial paternal presumption began to disappear and the “tender years doctrine” emerged. Under the tender years doctrine, a mother was presumed to be a more capable nurturer of a very young child; therefore, custody should be granted to the mother during a child’s early developmental years. The father, however, still retained some ability to regain custody of his child. Once a child reached a mature age, or if the father could prove the mother had been an adulterer, the father could regain custody because the mother was deemed unfit to shape the child into a responsible and capable adult.

Remnants of the paternalistic presumption continued in several states well into the mid-nineteenth century. These states, however, became more likely to take away a father’s custody if he were revealed to be an unfit parent. The well-being of the child became an important factor that limited the paternal presumption, and if a father were proven unfit a mother could obtain custody of the child. Fathers still retained the ability to regain custody in many cases once the child had surpassed the “tender years doctrine.”

Whether the children ought to be in the care of the father or mother, in order that they may be nourished and reared up. The mother ought to nourish and rear her children who are under three years of age, and the father, those who are above that age. But if the mother be so poor that she cannot take care of them, then the father is bound to furnish her, with whatever is necessary for that purpose. And if the spouses happen to separate for any just cause, the party through whose fault the separation took place, will be bound to furnish, out of his own estate, if he be rich, whatever is necessary to rear the children, whether they be above or below three years of age: and the other who is not in fault, ought to take them under his or her care, and maintain them. But if the other should have them under care for the reasons above mentioned, and she get married again, then she ought not to retain them: nor will the father be obliged to furnish her, with anything for their support; but ought on the contrary, to take them under his care, and rear and nourish them, if he have wherewith to do it.

Id.

42 See id.
43 See id.
44 See id. at 7-9; see also LITTLE, supra note 25, at 7-8.
45 See BLACK & CANTOR, supra note 24, at 8-9.
46 See id.
48 See BLACK & CANTOR, supra note 24, at 10-11.
49 See id. at 10.
age,” and it was not an easy task for a mother to prove a father unfit.\textsuperscript{50} A Louisiana court, for instance, allowed a father to maintain custody of his children despite the fact he had murdered his wife’s lover several days after discovering the affair.\textsuperscript{51}

By the latter part of the nineteenth century, a maternal presumption had largely replaced both the paternal presumption and the tender years doctrine.\textsuperscript{52} Several factors contributed to this development: the industrial revolution, the women’s rights movement, and changes in the field of psychology.\textsuperscript{53} The result was a total reversal in child custody standards, which ushered in a period of unequal treatment of fathers. This period continues today.\textsuperscript{54}

Beginning in the late nineteenth century, the common law of custody was phased out as state statutes provided guidance to custodial courts. Some state statutes were relatively simple and provided only that the courts should grant custody pursuant to the best interests of the child.\textsuperscript{55} It was also at this time that other state statutes began to provide at-fault provisions.\textsuperscript{56} The courts would use the at-fault provisions to discern which parent was most fit to raise the child.\textsuperscript{57} Other statutes continued the tender years doctrine, granting custody to mothers if the child were below a certain age.\textsuperscript{58} Unfortunately, while different standards were pursued, the maternal presumption remained.\textsuperscript{59}

C. Child Custody Law in the Past Century

From the beginning to the middle of the twentieth century, America witnessed the solidification of the maternal presumption.\textsuperscript{60} The tender years

\begin{itemize}
  \item \textsuperscript{50} See id.
  \item \textsuperscript{51} See id.
  \item \textsuperscript{52} See JASPER, supra note 37, at 1.
  \item \textsuperscript{53} See Jennison, supra note 16, at 1144.
  \item \textsuperscript{54} See Thompson, supra note 3, at 217 (stating that due to the influence of the tender years doctrine, fathers continue to face a strong challenge for custody in today’s courts).
  \item \textsuperscript{55} See BLACK & CANTOR, supra note 24, at 11.
  \item \textsuperscript{56} See id.
  \item \textsuperscript{57} See id.
  \item \textsuperscript{58} See JASPER, supra note 37, at 1 (noting that the tender years doctrine in these states operated to establish a judicial preference for awarding custody of children under the age of seven to the mother unless the mother was shown unfit).
  \item \textsuperscript{59} See id. at 1-2.
  \item \textsuperscript{60} See BLACK & CANTOR, supra note 24, at 13-14.
\end{itemize}

[B]y 1950, forty of our [United States] jurisdictions had formally announced the [tender years] doctrine to be legally presumptive. Indeed the
doctrine only favored the mother until her child reached a judicially-predetermined age. For instance, a mother would be preferred for children under three years of age, but a father would be preferred for children three years of age or older. This presumption gradually evolved into a standard that favored the mother regardless of the age of the child. All children, therefore, were presumed to be in better hands with their mother. The stereotypes and cultural assumptions of the day created a new bias in child custody law. It was no longer considered paramount for the father to provide guidance and development of the child so as to create a responsible adult, because this would presumably harm the child by removing him or her from the natural and more important love of the mother. This new era in custody law is summarized in a 1950 legal treatise:

And if, during the first half of the twentieth century the courts continued to pay lip service to the doctrine that the welfare of the child was the paramount and controlling factor in awarding custody, the preference for the mother was nevertheless evaluated into something approaching an independent principle by the numerous courts which held that a mother's love is so important to a child that the child should be given to the mother in preference to the father, even though the latter may have been without fault and may have been awarded the divorce.

The maternal presumption continued until the mid-1970s and several standards were created to supplement the tender years doctrine. These

principle was so accepted and dominant that in its 1959 edition Corpus Juris Secundum could summarize the status of the doctrine thus: "Unless a mother is shown to be unfit to assume such responsibilities, or unable to provide a suitable home, the courts are loath to deny her the custody of a very young child; and the rule generally applied, which has been recognized by statute in some jurisdictions, is that all things being equal, preference is to be given to the mother in awarding custody of a child of tender years. Likewise, it is generally held that the mother is entitled to preference in the award of custody of a female child, or of a child who is not of good health."

Id.

61 See id. at 13-15.
62 See id. at 14.
63 See JASPER, supra note 37, at 1.
64 See BLACK & CANTOR, supra note 24, at 14.
65 Id. at 14-15.
66 See id. at 15 (explaining that by 1976 "thirty-one states had by case law enunciated support of the maternal preference by decisions reached, in all but one instance, after 1960").
standards maintained a maternal presumption: unless the mother was proven unfit, or the father could prove he deserved custody by “compelling evidence,” the mother was awarded custody.\(^6\) Consistent with the tradition of the tender years doctrine, the standards produced the same result—the mother invariably gained custody of the child.\(^6\)

While the influence of the maternal presumption is still felt, a shift back toward a gender-neutral\(^6\) middle has begun. In the late nineteenth and early twentieth centuries, the women’s rights movement contributed greatly to mothers overcoming the paternal presumption.\(^7\) Paradoxically, the women’s movement of the 1960s and 1970s, which heralded women as equal and led to many important and beneficial results, has resulted in a shift away from the maternal presumption.\(^7\) Because a greater number of women entered the workplace during the women’s rights movement and an increasing number of men assumed a greater role in the development of their children, the prior custodial favoritism enjoyed by the mother had lost some of its public policy support.\(^7\)

While women fought for equality under the law, this movement in turn inspired a father’s rights movement, which began in earnest in the 1970s.\(^7\) The father’s rights movement has attempted to challenge the traditional twentieth century stereotype that the mother was a better parent and nurturer.\(^7\) This movement has also taken the form of political action and mutual support as men across the country have formed groups to cope with the loss of contact with their children. Organizations such as the Atlanta-based Fathers Are Parents Too have formed to provide advice to fathers whose ex-spouses have moved out of state.\(^7\) Other organizations, such as the California-based Joint Custody Association, have formed political interest groups that seek to influence state and federal legislators in the hope of creating more equitable custody standards and laws.\(^7\) Men in these

\(^{67}\) See id.

\(^{68}\) See id.


\(^{70}\) See id. at 4.

\(^{71}\) See id. at 4-5

\(^{72}\) See id.


\(^{74}\) See id.

\(^{75}\) See 48 Hours: Part VI—For Better; For Worse; Father’s Rights (CBS News, May 22, 1991) [hereinafter 48 Hours].

\(^{76}\) See Morning Edition, supra note 73.
organizations feel the maternal presumption, which was so pervasive only twenty years ago, still unduly influences courts and judges today. They have expressed concerns of being victims of the system and of the current custody standards. As one father has stated, "I think visitation is for hospitals and prisons and not for parents and kids, OK? We can talk about visitation all we want. I'm not a visitor to my kids. I'm a—I'm a father to my kids."

D. Modern Child Custody Law and Standards

The most common custody arrangement today is sole custody. Under the sole custody system, children are required to live with one parent while the non-custodial parent has traditionally received visitation rights. These visitations are typically scheduled on alternate weekends and often include a two-week summer period of visitation. Two less common alternatives are the alternating custody system and the split-custody system. The final type of custody system has been termed joint custody. "Joint legal custody means that both parents retain equal legal rights and responsibilities with regard to the children at all times, regardless of with which parent the child is living."

The predominant standard of modern custody law has become known as the "best interests of the child" standard. While criticized for its vagueness and ambiguity, the standard is designed to consider all surrounding circumstances to determine the best possible placement for the child. Courts and legislatures have enumerated several factors to be considered when the custody of a child is determined, including: (1) the wishes of the child and guardians; (2) the relationship of the child and each guardian; (3) the child's "adjustment" to his/her home, education, and community

---

77 See id.
78 48 Hours, supra note 75.
79 See Jennison, supra note 16, at 1146.
80 See id.
81 See id. at 1146-47 (explaining that the alternating custody system creates dual custody terms, allowing both parents to serve as the custodial parent for certain periods within the year, whereas the split custody system allows the parents to divide up siblings with each parent serving as the custodial parent to their chosen child).
82 See id. at 1147
83 Id.
84 See Matthews, supra note 21, at 426.
85 See id.
environment; (4) evidence of domestic violence; (5) the mental and physical health of all involved; and (6) consideration as to who has been the primary care-giver.  

II. WHAT ARE THE BEST INTERESTS OF THE CHILD?

The courts of the mid-nineteenth century began to articulate a child custody standard that is familiar to family law practitioners: the “best interests of the child” standard. While this standard appears to possess facially gender-neutral qualities that will result in equitable custody determinations, gender stereotypes continue to limit its effectiveness. This same inequality existed when the paternal presumption reigned in prior centuries, and also as the modern maternal presumption of the twentieth century gained credence.

The meaning of the “best interests of the child” standard has been the subject of intense scholarly debate. Some critics have argued that the best interests of the child may be served by the absence of the non-custodial parent. Others argue, however, that further study has revealed that children are benefited by increased exposure to both parents, especially in post-divorce adaptive years. Research has also shown that continued contact between children and parents has numerous benefits for everyone, leading some to assert that the legal system has a duty to develop an equitable standard that will ensure increased contact with both parents.

A. The Developmental Component

The long-term developmental needs of humans are in large part due to the relative instability of a child’s emotions—an instability that needs to be counterbalanced with continued parental support. The parents’ emotional
connection with the child shapes the child’s demands and expectations as to future emotional relationships. The parental connection also helps shape a child’s decision making structure as the child learns objective criteria from the parents’ norms and attitudes. The only way that this connection can be effectively established is through daily contact.

1. Infancy

Prolonged separation of parent from child produces several adverse side effects in the child, depending upon the age of the child. From birth to eighteen months, a change in the parental status can result in sleeping and eating difficulties, increased crying, fear of strangers, and a digression in development skills. Psychologists suggest that infants should maintain a constant home, but that continued contact with both parents after a dissolution of marriage is very important. In toddlers, the absence of an established parent can result in separation distress, increased anxiety, and damage to the child’s ability to form close emotional relationships. Children under the age of five may suffer in their verbal development, regress in their toilet training, and experience a degradation in their overall cleanliness.

2. Elementary School Years

Children from five to twelve years of age (known as the elementary school years) who suffer separation from a parent may develop resentment and an unwillingness to follow established rules. Studies have also

---

95 See id.
96 See id.
97 See id.
100 See GOLDSTEIN ET AL., THE BEST INTERESTS, supra note 94, at 19.
101 See id. at 20.
102 See Robert D. Felner & Lisa Terre, Child Custody Dispositions and Children’s Adaptation Following Divorce, in PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE 106, 111-12 (Lois A.
revealed an increased level of aggression and antisocial behavior within this age group.\textsuperscript{103} Psychologist Linda Frank explains that the elementary school-aged child’s idea of parental structure also suffers because the “loss of one parent implies the loss of the other as well.”\textsuperscript{104} Finally, younger children face a greater risk of educational failure.\textsuperscript{105} Increased contact with a non-custodial parent has been shown to reduce the risk of poor academic performance and to advance a child’s overall academic competency.\textsuperscript{106} One study explained:

Elementary school children who maintained their academic performance following separation of their parents were compared with the levels of those who declined. No single measure could accurately predict children’s academic adjustment. Those who maintained performance level spent significantly more time with both parents. In summary, 30 percent of the children in the present study experienced a marked decrease in their academic performance following parental separation, and this was still evident three years later. Access to both parents seemed to be the most predictive factor, in that it was associated with better academic adjustment.\textsuperscript{107}

3. Adolescence

Adolescents, persons ranging from thirteen to eighteen years of age, may suffer a sense of abandonment and continued resentment creating an emotional distance between both child and parent upon parental separation.\textsuperscript{108} Studies have revealed heightened sexual behavior among adolescents who have been separated from a parent by divorce.\textsuperscript{109} Once these children reach adulthood they are less likely to connect emotionally with their own children, thereby creating a damaging cyclical effect on future generations.\textsuperscript{110}

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item ACKERMAN & KANE, \textit{supra} note 99, at 224.
\item See \textit{id.} at 230.
\item See \textit{id.} at 230-31.
\item \textit{Id.}
\item See JOSEPH GOLDSTEIN ET AL., \textit{B EYOND THE B EST INTERESTS OF THE CHILD} 34 (1979) [hereinafter \textit{GOLDSTEIN ET AL., BEYOND THE B EST INTERESTS}].
\item See Felner & Terre, \textit{supra} note 102, at 112.
\item See \textit{GOLDSTEIN ET AL., BEYOND THE B EST INTERESTS, supra} note 108, at 34. \textit{But cf.} Felner & Terre, \textit{supra} note 102, at 117 (arguing that while frequent contact
\end{enumerate}
\end{footnotesize}
One of the greatest dangers to a child of divorce is the possible development of a condition known as the "parental alienation syndrome." This concept, developed by psychiatrist Richard Gardner, speaks to a child's potential hatred of the non-custodial parent, a hatred that may even extend to the child's aunts, uncles, grandparents, and other extended family members of the non-custodial parent. Gardner explains that the most significant cause of this syndrome is the custodial parent's manipulation and "brainwashing" of the child. Techniques used by the custodial parent to prejudice the child against the non-custodial parent include: isolation of the non-custodial parent from the activities of the child; allegations of late and insufficient payments of child support; derogatory remarks about the non-custodial parent; prevention of phone contact between the child and the non-custodial parent; and exaggeration of the non-custodial parent's flaws. Gardner suggests that the remedies for this syndrome are family therapy or the placement of the child into the home of the non-custodial parent.

B. The Systematic Conflict Component

The "best interests of the child" standard was adopted to serve just that: the best interests of the child. Today, many scholars agree that a child benefits the greatest from continued contact with the non-custodial parent and that the greater the degree of this contact the more positive the child's

with the noncustodial parent may be correlated with positive child adaptation, there are certain circumstances where continued contact could prove detrimental to the child, and that there is a "serious question" whether the positive impact is due to the continued noncustodial contact or to the resulting increased family interaction. See infra notes 116-146 and accompanying text (addressing in depth the argument between the above conflicting sources).

111 See ACKERMAN & KANE, supra note 99, at 238-40.
112 See id.
113 See id. at 238-39 (noting that it is the mother/custodial parent who typically performs the "brainwashing").
114 See id.
115 See id. at 239-40. Gardner's stature in the psychiatric community is not what it once was, however, and support for his theory has waned. See id.
116 See Felner & Terre, supra note 102, at 117; Lynda Fox Fields et al., Children Denied Two Parents: An Analysis of Access and Denial, in CHILD CUSTODY: LEGAL DECISIONS AND FAMILY OUTCOMES 49, 50 (Craig A. Everett ed., 1997) (arguing that a major factor negatively affecting children of divorce is the lack of contact with the non-custodial parent).
post-divorce adaptation. Joint custody, therefore, should be the preferred custody standard. There is scholarly debate, however, as to one fundamental concept relevant to this established principle. Critics argue that continued contact with the non-custodial parent may not prove beneficial, maintaining that "there are certain conditions under which more frequent contact with the non-custodial parent may actually be detrimental to a child." This detriment, they contend, exists when there is a relationship of conflict between the custodial and non-custodial parent.

1. The Current Custody System as a Source of Conflict

Scholars who support joint custody, in response to critics of continued contact with the non-custodial parent, have pointed out that the current custody system may in fact be the primary source of parental conflict: "In the vast majority of [current custody] cases, the non-custodial parent is the father and the court typically awards all legal rights regarding children to the mother who subsequently retains sole custody." This inequitable custody system engenders conflict between the non-custodial father and custodial mother. The first instance of conflict created by the current custody system is the "power differential" created by visitation. Courts have allowed a custodial parent (usually the mother) to leave the home state of the non-custodial parent, thereby rendering visitation almost impossible. Custodial parents also have largely unfettered power to cancel visitation appointments with little notice and generally possess the ability to control when and under what conditions the non-custodial parent

---

117 See Felner & Terre, supra note 102, at 117 (acknowledging the many studies supporting this proposition but qualifying them). See supra note 110 and accompanying text.
118 See generally Jennison, supra note 16, at 1152 (citing several states which follow a presumption of joint custody as in the best interests of the child).
119 See id.
120 Felner & Terre, supra note 102, at 117
121 See id.
122 See Fields et al., supra note 116, at 50-51 (explaining that in the struggle for visitation rights the courts generally support the custodial parent, who in the majority of cases is the mother). The inability of fathers to visit their children increases the frustration level of the fathers, becoming a major source of parental conflict. See id.
123 Id. at 50.
124 See id.
125 See Morning Edition, supra note 73.
will be allowed to visit his or her child. Third, even if the non-custodial parent seeks a judicial remedy, the court has traditionally decided in favor of the custodial parent whenever disputes arise regarding visitation or custody. Finally, it is commonplace for the court to require the non-custodial parent to pay child support. While the child support requirement by itself may not appear to create conflict, other preexisting, latent conflict is amplified and crystallized by the transfer of support money.

Although the non-custodial parent pays child support, there are no corresponding legal provisions to ensure that non-custodial parents can have time to establish an adequate emotional relationship with their children. Even in a state declaring it a misdemeanor to deny a non-custodial parent access to a child, non-custodial parents have had difficulty visiting their children. The custodial parent is not held accountable as to how he or she budgets child support payments, which are ostensibly provided solely for the benefit of the child. The current custody system has, therefore, created the very conflict that critics contend should limit a non-custodial parent's contact with his or her child.

2. The Kentucky Supreme Court's Approach to Systematic Conflict

Critics who oppose joint custody argue that a volatile relationship between former spouses will further damage the psyche of a child already undergoing the stress of a parental breakup. However, scholars have countered this contention by determining the source of post-divorce conflict. The source of that conflict is the current custody system. Where the non-custodial parent is practically powerless to make important decisions regarding his or her child's life—or in the worse case scenario, is even unable to see his or her child—there will be animosity. If, however, the ex-spouses were made to work together as a parental unit after divorce, the overall level of conflict could be reduced. The Kentucky Supreme Court, for example, in Squires v. Squires, 854 S.W.2d 765, 771 (Ky. 1993) (Leibson, J., dissenting) (citing authorities which argue that joint custody should not be granted in situations of parental conflict).

See Kathleen Parker, Divorced Fathers' Frustration, Anger are About to Boil Over, HERALD-LEADER (Lexington, Ky.), Oct. 11, 1999, at A9.
Supreme Court adopted this proposition in explaining that “joint custody may have the effect of encouraging parents to cooperate and stay on their best behavior.” The court also stated that “[i]t would be shortsighted to conclude that because parties are antagonistic at the time of their divorce, such antagonism will continue indefinitely.” Thus, the argument that joint custody is improper where there is evidence of parental conflict is overly simplistic and should be dismissed when the parental conflict is actually nothing more than a by-product of an unfair, adversarial custody system. Scholars and lawmakers cannot and should not deny a child the documented benefit of continued contact with the non-custodial parent.

C. The Fiscal Component

While the sociological and psychological impacts of divorce on children and their parents are potentially severe, there also exists a serious economic component to this analysis. The mother receives primary custody in the great majority of decisions in the current custody system. This is important because it has traditionally been the father who has earned the majority of the family’s income. While married, the family shares this income, but upon divorce the mother usually suffers a relative decline in income while the father experiences a relative increase in income. It seems rather obvious then that the father should pay child support to the mother who predominately serves as the custodial parent. While this proposition remains generally true, there exists a considerable and

---

134 Squires, 854 S.W.2d at 769. The court explained: Joint custody can be modified if a party is acting in bad faith or is uncooperative. The trial court at any time can review joint custody and if a party is being unreasonable, modify the custody to sole custody in favor of the reasonable parent. Surely, with the stakes so high, there would be more cooperation which leads to the child’s best interest, fewer court appearances and judicial economy.

Id. (quoting Chalupa v Chalupa, 830 S.W.2d 391, 393 (Ky. Ct. App. 1992)).

135 Id.

136 See Fields et al., supra note 116, at 50.


139 See Fields et al., supra note 116, at 50.
legitimate concern in this country about the widespread failure of non-custodial parents (usually fathers) to pay child support. Some scholars attribute this failure to the non-custodial parent’s lack of visitation rights. Studies suggest that lack of financial resources is not the main factor causing failure to pay child support; rather, fathers do not pay because they have little or no contact with their child. If a non-custodial parent cannot maintain a relationship with his or her child, the frustration creates a subsequent emotional distance between the parent and the child. Psychologically, it becomes more comfortable for a non-custodial parent to distance himself or herself from the child than face the frustration of being unable to have adequate contact with his or her child. The non-custodial parent may therefore subconsciously sever contact with their child as a coping mechanism.

This distance can lead to a non-custodial parent’s failure to pay child support.

---

140 See Stephen J. Bahr et al., Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?, 28 Fam. L.Q. 247, 258 (1994) (explaining a United States census report which concluded that “a higher percentage of fathers paid child support when there was joint legal custody; 90% of fathers with joint legal custody paid child support, compared to 79% of fathers with visitation privileges, and only 45% of fathers who had neither joint custody nor visitation privileges”).

141 See Thompson, supra note 3, at 222.

142 See id.

143 See id.

144 See Matthews, supra note 21, at 439. Matthews argues that the failures of the current visitation system cause frustration for the noncustodial parent, which leads to the noncustodial parent’s inability to form a valuable relationship with his or her child, which in turn leads to nonpayment of child support. Matthews describes the failure of the current visitation system as follows:

The current visitation standards have failed for several reasons. First, they fail to protect the children’s rights of access to their noncustodial parents and the parents’ rights of access to their children. Second, they fail to satisfy the children of divorce’s needs to maintain a strong relationship with their noncustodial parents. Third, they fail to provide clear guidance for decision-makers. Finally, they fail to clarify what visitation the decision-makers will order and enforce.

Id. These failures reveal how the non-custodial parent is forced apart from their child by the very system that requires them to pay child support. The system expects a non-custodial parent to financially support his or her child, yet it works against a non-custodial parent who wishes to support his or her child through more intimate and significant means. See id.
This fiscal concern can be alleviated in part by allowing greater contact between the non-custodial parent and his or her child. There will be greater likelihood that a parent will fulfill child support obligations if that parent feels he or she has a strong and meaningful relationship with the child.\textsuperscript{145} Thus, it is possible to alleviate a custodial parent’s serious economic concerns while creating a more fulfilling and lasting relationship between a child and non-custodial parent. Both of these outcomes benefit the child.\textsuperscript{146}

D. The Parental Stability Component

The non-custodial parent also suffers a great amount under the current custody system.\textsuperscript{147} While the popular perception is that fathers do not suffer in the role of the non-custodial parent because they usually do not wish to gain custody, this generally could not be farther from the truth.\textsuperscript{148}

The father’s sense of loss after a divorce can be immense. The father typically loses possession of the house in which he has spent a considerable portion of his life. He loses the family unit upon which he once depended, and he is all too often relegated to the role of visiting father with infrequent visitation rights to his children.\textsuperscript{149} These visitation rights, the most common form of custody arrangement,\textsuperscript{150} simply do not provide the father with adequate parental time with his child. As a result, the visiting father’s parental role becomes unclear.\textsuperscript{151} A father’s visiting relationship becomes “ambiguous and therefore stressful” as a result of losing consistent contact with his child.\textsuperscript{152} Just as the child becomes accustomed to the absence of the father, the father must become accustomed to an intermittent relationship with his child.\textsuperscript{153} This fragile situation creates two conflicting psychological strains on the father. While the father has a need to continue a meaningful relationship with his child, the sudden change in the father-child relation-

\textsuperscript{145} See Bahr, supra note 140, at 258.
\textsuperscript{146} Cf. ACKERMAN & KANE, supra note 99, at 230-31 (acknowledging fewer academic problems among children who spend more time with both parents).
\textsuperscript{147} See Thompson, supra note 3, at 222-23.
\textsuperscript{148} See Jennison, supra note 16, at 1175-76.
\textsuperscript{149} See id.
\textsuperscript{150} See id. at 1146.
\textsuperscript{151} See Thompson, supra note 3, at 222.
\textsuperscript{153} See Jennison, supra note 16, at 1175-76.
ship and resulting uneasiness also triggers an emotional self-defense mechanism within the father—a response aimed at avoiding an uncomfortable and painful situation. Not only must the father suffer this powerful psychological and emotional strain, but he must also endure a change in lifestyle that can often lead to a dramatic sense of loss and depression.

III. BIAS AND INEQUALITY IN CURRENT CUSTODY LAW

History has provided a solid foundation for the modern father's concern. While in the early nineteenth century the tender years doctrine marked the beginning of the movement away from the common law paternal presumption, it took over 100 years for mothers to overcome this inequitable standard Substantial time and effort were required to overcome this long history of inequality. It is now the fathers, however, who struggle against an inequitable maternal presumption. Therefore, it

154 See id.
155 See id.
156 The stark historical reversal between the paternal presumption and maternal presumption is evidenced by two custody decisions separated by 74 years.

An 1842 custody decision in the state of New Jersey held that

We are informed by the first elementary books we read that the authority of the father is superior to that of the mother. It is the doctrine of all civilized nations. It is according to the revealed law, the law of nature, and it prevails even with the wandering savage, who has received none of the lights of civilization.

In 1916, in the state of Washington, equally strong language appears to uphold an award of custody to a mother:

Mother love is a dominant trait in even the weakest women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than the father's. For these reasons courts are loathe to deprive the mother of the custody of her children, and will not do so unless it be shown clearly that she is so far an unfit and improper person to be intrusted with custody as to endanger the welfare of the children.

FRIEDMAN, supra note 47, at 18. Friedman explains that this "fundamental change"—the paternal presumption being replaced by the maternal presumption—also took place within other Western nations such as Belgium, France, England, Germany, the Netherlands, Sweden, and Switzerland, although the speed of the transition varied between nations. See id.

157 See Folberg, supra note 69, at 4 (providing a brief synopsis of the social changes that occurred prior to the shift from a parental presumption).
158 See FRIEDMAN, supra note 47, at 18.
is a rather simplistic contention that, because over the past thirty years most custody statutes have been made gender-neutral on their face, the bias of the past century's maternal presumption has been eradicated. The fact remains that a maternal bias still prevails within many states, and this bias harms both the non-custodial parent and the child.\(^{159}\)

A. The Gender-Neutral Standard?

The current "best interests of the child" standard has been heralded as a gender-neutral standard.\(^{160}\) This standard is said to rest on the policy that "parents should be preferred as custodians not on the basis of gender but rather because of their relationships with children."\(^{161}\) This gender-neutral standard remains contaminated, however, by the maternal gender preferences of the past century.\(^{162}\) Statistics indicate that the maternal presumption has not been eliminated from the "best interests of the child" standard. One article explains:

---

\(^{159}\) See infra notes 160-203 and accompanying text.

\(^{160}\) See Thompson, supra note 3, at 213.

\(^{161}\) Id.

\(^{162}\) See Paradise, supra note 14, at 518-19 (emphasis added) (footnotes omitted).

The number of divorced men who fight for child custody is significant. Yet, there remain glaring discrepancies between the number of divorced mothers and fathers awarded custody. Over the past twenty-five years, the women's movement has been successful in eliminating many staunch sex-role stereotypes and in widening the sphere of behavior deemed appropriate for both women and men. Unfortunately, such progress has lagged in the realm of parenting, especially with regard to child-rearing after divorce. Fathers normally play significant roles in children's lives, yet, in nine out of ten divorced families, the mother retains sole custody of the children. The belief that children belong with their mothers is firmly ingrained within this country's social and legal tenets. Such mores need to change, however, to shield children from the heightened sense of grief and despair they experience when their parents divorce and they "lose" their fathers. 

Id. See also MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE, AND WHAT WE CAN DO ABOUT IT 32 (1999) (noting that "[m]any judges still believe that small children belong with their mothers"). This is an important quote because Mary Ann Mason, an advocate of such standards as the primary caretaker standard (which largely benefits women in that most women remain the primary caretaker within our society) concedes that the past prejudices of the tender years doctrine and other maternal presumptions remain prevalent within the current custody system.
Although the advent of joint and shared custody alternatives has broadened the range of options that divorcing couples can consider when negotiating the physical custody of offspring, mothers still overwhelmingly predominate in physical custody awards. By some estimates, 85% to 90% of children of formerly married parents reside with their mothers while only about 10% live with their fathers. While joint physical custody arrangements alter these figures somewhat, children in joint custody are still much more likely to end up with their mothers than their fathers.\textsuperscript{163}

Other studies of state law also indicate that the maternal presumption remains alive in the current and allegedly “gender-neutral” law\textsuperscript{164}

The case law of several states indicates that a gender preference still prevails under current custody standards.\textsuperscript{165} A study by Judith Bond Jennison divides certain states into three categories based upon their custody determinations. “Group I” states do not have a joint custody presumption, but occasionally will award joint custody if they find it in the best interests of the child.\textsuperscript{166} “Group II” states “are the least progressive”\textsuperscript{167} and go so far as to suggest that joint custody should be avoided.\textsuperscript{168} Finally, “Group III” states are the “most progressive,”\textsuperscript{169} advocating a joint custody presumption and favoring joint custody determinations.\textsuperscript{170} The Group I and Group II states evidence this country’s continued bias in custody determinations, despite their use of allegedly gender-neutral standards.\textsuperscript{171}

\textsuperscript{163} Thompson, \textit{supra} note 3, at 215.

\textsuperscript{164} See generally Parker, \textit{supra} note 133, at A9 (explaining that due to this maternal presumption, “[c]oncern and sadness are reasonable responses to that understanding, and to the fact that 82 percent of children from divorced families have little more than a visitation relationship with their fathers. According to the 1989 Census, 37.9 percent of divorced fathers have no access to their children.”). \textit{Id.}, Mayes & Molitor-Siegl, \textit{supra} note 98, at 189 (explaining that according to a 1992 United States Bureau of the Census report, “[a]mong all divorces, 86% of mothers retain physical custody of their children and the proportion is surely higher when children under 2 years of age are involved”). This indicates the aftereffects of the tender years doctrine remain prevalent within the current custody system.

\textsuperscript{165} See Jennison, \textit{supra} note 16, at 1150-69.

\textsuperscript{166} See id. at 1153.

\textsuperscript{167} Id. at 1151.

\textsuperscript{168} See id.

\textsuperscript{169} Id. at 1152.

\textsuperscript{170} See id. at 1151-52.

\textsuperscript{171} See id. at 1151-69.
Despite the fact that gender distinctions in family-related statutes were struck down in 1979 for violating the Equal Protection Clause of the Fourteenth Amendment,\textsuperscript{172} bias still prevails within many states. The worst example of bias in modern custody law arises in Group II states such as Wyoming, where courts still consider gender in custody determinations.\textsuperscript{173} Group I states are the most common, however. These states have gender-neutral statutes, consistent with the Supreme Court’s mandate, but case law from within these states continues to show the modern influences of the maternal presumption.\textsuperscript{174}

Minnesota and New York are both Group I states. These states provide a good example of how a gender-neutral state may still possess remnants

\textsuperscript{172} See Orr v. Orr, 440 U.S. 268, 279-83 (1979). The Court decided that legitimate state goals (to provide for dependent women after divorce) were not substantially related to the alimony statutes, which granted only women the ability to sue for alimony. The Court explained that the Alabama alimony statute gave an advantage to a financially secure wife who would not have to support a dependent husband because the statute excluded men from seeking alimony against their wives by negative implication: “[A] gender-based classification which, as compared to a gender neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny.” Id. at 282-83. See generally Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980) (holding that basing survivor’s benefits for workers’ compensation on separate criteria for husbands and wives violated the Equal Protection Clause); Caban v Mohammed, 441 U.S. 380 (1979) (holding it unconstitutional to allow unwed mothers, but not unwed fathers, to block adoption simply by withholding consent); Califano v Goldfarb, 430 U.S. 199 (1977) (holding it unconstitutional for female’s workers’ social security taxes to provide less protection for their spouses); Weinberger v Wiesenfeld, 420 U.S. 636 (1975) (holding it unconstitutional for females to receive less protection for their spouses from social security than males receive for their spouses). These cases illustrate the Supreme Court’s intolerance of laws benefitting women based on stereotypes about women and their roles in the family and economy. But see Michael M. v Superior Court, 450 U.S. 464 (1981) (upholding a “statutory rape law” against a challenge that it violated the Constitution because only men were criminally liable under the statute); Parham v Hughes, 441 U.S. 347 (1979) (upholding a Georgia statute that permits a father to sue for the wrongful death of a child provided that he has legitimated the child if there is no living mother). These cases are examples of where the Court, in extreme instances, has upheld laws benefitting women but seemingly based upon gender stereotypes.

\textsuperscript{173} See, e.g., WYO. STAT. ANN. § 20-2-113(a) (Lexis 1999) (“[N]o award of custody shall be made solely on the basis of gender of the parent.”) (emphasis added); see also Jennison, supra note 16, at 1151-52, 1164-69.

\textsuperscript{174} See Jennison, supra note 16, at 1153-64.
of the former maternal presumption. Minnesota had what was known as a “primary caretaker” standard until 1989 when it was overruled by the Minnesota legislature. This standard basically created a presumption in favor of the predominant caretaker of the child prior to divorce (almost always the mother). The other parent, usually the father, had to overcome this burden by showing that he could provide a better environment for the child.

The case of *In re Maxfield v. Maxfield* highlights the changes in custody determinations after repeal of the “primary caretaker” standard in 1989. In that case, the trial court initially granted custody of the four children to the father. The court of appeals reversed the trial court’s decision as to three of the children, however, because the trial court had failed to apply the “primary caretaker” standard. The Minnesota Supreme Court affirmed the appellate court’s decision, not because of the trial court’s failure to apply the “primary caretaker” standard, but because the court decided (despite the trial court’s contrary finding of fact) that it was

---

175 See *id.* at 1153 (stating that Minnesota and New York are “concrete examples” of the maternal presumption bias in courts).
176 See *id.* (citing MINN. STAT. ANN. § 518.17 (West 2000)).
177 See Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV 615, 617, 629 (1992) (explaining that the primary caretaker standard “assures” that the parent who primarily cares for the child during marriage will be the custodian in divorce). Critics of the joint custody presumption, such as Elizabeth Scott, argue there is “no sounder basis” to make a custody determination than the past parental relationships with a child. See *id.* This, they argue, most closely approximates the “real” preference of each parent and ensures continuity for the child. The role of the government, therefore, should be to “approximate” the parental roles before divorce to determine the custody arrangement. See *id.* at 617

However, many scholars and the Kentucky Supreme Court disagree with these critics and support joint custody. They argue that the duty of the court is not to approximate prior relationships, but to create a system of continuity for a child by ensuring that both parents play a substantial role in the child’s life. See *Squires v Squires*, 854 S.W.2d 765, 768 (Ky. 1993) (“[T]he child would continue to be reared by both parents and have the benefit of shared decision-making with neither parent being designated the primary custodian and the other relegated to a secondary status.”).

178 See *Jennison*, *supra* note 16, at 1153.
180 See *Jennison*, *supra* note 16, at 1153.
181 See *In re Maxfield*, 439 N.W.2d at 417
in the best interests of the children to live with their mother.\textsuperscript{182} The dissent pointed out that this decision was “a serious departure from well-settled rules governing the scope of appellate review. Moreover it circumvents the clear intent of the legislature expressed by repeated legislative attempts, including very recent amendments to eliminate inflexible and stereotypical presumptions in child custody cases.”\textsuperscript{183} The dissent’s remarks and the facts of this case provide a stark example of how, though overturned, a potentially biased standard (the “primary caretaker” standard) continues to influence custody determinations.

An even more infamous example of maternal bias arose in New York in the case of \textit{Lenczycki v. Lenczycki}.\textsuperscript{184} There, the trial court held that the mother should be awarded sole custody of her seven-year-old child because of the amount of conflict between the parents and because her job was more flexible. The appellate division affirmed.\textsuperscript{185} The mother was awarded sole custody of the child in spite of some very disturbing evidence.\textsuperscript{186} The mother had a history of economic problems, tax violations, and psychological imbalance.\textsuperscript{187} She was described as a pathological liar.\textsuperscript{188} Her dishonesty even presented itself to the court: the mother had attempted to have her child lie so as to substantiate her story, and when the child refused she yelled at the child and cursed at him.\textsuperscript{189} The mother also continued to tell her husband she was pregnant though she had obtained an abortion months earlier. Finally, the mother had attempted to commit suicide.\textsuperscript{190} The only documented criticism of the father was that he held a demanding position in a law firm.\textsuperscript{191} The explanation for such a shocking decision is the continued effect of the maternal presumption. The \textit{Lenczycki} decision serves to put the continuing implications of the prior maternal presumption under the microscope of decency and fairness. The father in this case was obviously the parent best suited to provide primary care to the child, and awarding custody to the troubled mother in no way served the best interests of the child. Yet, because courts programmed by the maternal preference

\textsuperscript{182} See \textit{In re Maxfield}, 452 N.W.2d at 223.
\textsuperscript{183} \textit{Id.} at 224 (Yetka, J., dissenting).
\textsuperscript{185} \textit{See id.} at 726.
\textsuperscript{186} \textit{See id.} at 728 (Balletta, J., concurring in part and dissenting in part).
\textsuperscript{187} \textit{See id.} at 728-29 (Balletta, J., concurring in part and dissenting in part).
\textsuperscript{188} \textit{See id.} at 728 (Balletta, J., concurring in part and dissenting in part).
\textsuperscript{189} \textit{See id.} (calling him a “f***ing little monster” and a “f***ing little brat”).
\textsuperscript{190} \textit{See id.} at 729.
\textsuperscript{191} \textit{See id.} at 726.
applied the allegedly gender-neutral statute, the best interests of the child were not served.

Unfortunately, Lenczycka is not the only case from New York which evidences the continuing influence of the maternal presumption in the modern custody system. In Klat v. Klat, the father appealed an order of the trial court granting custody of an eight-year-old to the mother. Despite the fact that the child wanted to live with his father, the court determined that the child should remain in the custody of his mother. The court's only criticisms of the father were his long working hours and participation in athletic activities on the weekends. The court never afforded the father a chance to re prioritize so as to accommodate the needs of his child. Rather, the court maintained the status quo and granted custody to the mother.

Another example of bias in the custody system is Crowe v. Crowe. The trial court in this case granted custody to the father. Shortly thereafter, however, the appellate court reversed the custody decision despite a threat by the mother that she might abscond to Germany, her homeland, with the children. The court explained that despite "past actions [that] do require protective measures [to] be taken," custody should reside within the mother. In Klat, the trial court denied custody to the father. By contrast, in Crowe the trial court granted custody to the father, but the appellate court reversed and granted custody to the mother. Regardless, the practical effect of both decisions was that the mother obtained custody of the children and the father was relegated to non-custodial parental status. This result is consistent with the maternal presumption that continues to affect the current custody system.

---

193 See id. at 536-37
194 See id. at 537-38 (reasoning that due to the child's age he had been influenced by the father to make such a request).
195 See id. at 537
196 See id. at 538.
198 See id. at 973.
199 See id. at 974 (reasoning her threatened return to Germany was only "speculation").
200 Id.
201 See Klat, 575 N.Y.S.2d at 536-37
B. Other Examples of Biased Custodial Standards

There are, of course, other established state standards that evidence the existence of bias within custody determinations. When arguments for a change in custody arise, several states use a strict standard in making their custodial decisions. Minnesota, for instance, requires evidence of actual emotional harm or impairment before a change in custody will be granted. In other states, such as Kentucky, a procedural requirement creates biased outcomes.

1. Substantive Standards

Strict substantive standards can have a dramatic effect on the ability of the non-custodial parent to protect the best interests of their child through a change in physical custody, and the practical effect of such standards is that “mothers are effectively assured continued custody.” The case of Harkema v. Harkema provides a poignant example of how this biased standard works against the child’s best interests. After a divorce, the husband and wife were awarded joint custody, and the mother was awarded physical custody of the children. Shortly thereafter, the wife remarried and the father learned that his children were being harassed (and possibly abused) by their stepfather. The father applied for a change in physical custody, citing the testimony of his children that they wished to live with him because of their stepfather’s “verbal abuse, threats, and fits of

1999) (suggesting that at least in custody terminations after a prior joint custody agreement or decree, New York may be more progressive than several states; its apparently less-stringent “changed circumstances” standard allows for more considered custody determinations pursuant to the best interests of the child).

204 See Jennison, supra note 16, at 1159-60 (noting that most states require a “significant change in circumstances” for a custody modification).

205 See id. at 1159.

206 See Stinnet v Stinnet, 915 S.W.2d 323, 323-24 (Ky. Ct. App. 1996); Mennemeyer v Mennemeyer, 887 S.W.2d 555, 558 (Ky. Ct. App. 1994). These cases hold that a de novo hearing in a joint custody modification case is only proper if “there has been an inability or bad faith refusal of one or both parties to cooperate.” Stinnet, 915 S.W.2d at 324.

207 See Jennison, supra note 16, at 1159-60.

208 Id. at 1161.


210 See id. at 11.

211 See id. at 11-12.
anger." The father presented further evidence in the form of affidavits from various witnesses and the testimony of the guardian ad litem, both describing the children's ordeals with their stepfather. Despite the overwhelming evidence that staying with their mother was not in the children's best interests, the trial court held there were no grounds for a hearing to consider changing physical custody. This decision was attributable to the stringent "actual emotional harm" standard under Minnesota law.

A more protective standard for children would be a "change in circumstances" test. The court suggested that a less-stringent "change in circumstances" standard likely would have resulted in the trial court granting physical custody to the father. "Minor changes may make the noncustodial parent the 'better' parent, and yet not qualify as 'significant' changes." As seen in this case and others, the more-stringent standard is not only biased against fathers, its usage may also contravene the child's best interests.

### 2. Procedural Standards

Kentucky also has strict procedures for settling disputes as to who will be the primary physical custodian after an initial joint custody agreement or decree. To successfully argue for a change in physical custody within

---

212 Id. at 12 ("[W]hen Al gets mad I get scared he is going to hit me or something he yells and like hits the walls, takes it out on everybody else [and] when he drives the car, he drives like a maniac, he scares us.").

213 See id.

214 See id. at 13 (holding that there was "insufficient evidence of endangerment" to justify a hearing).

215 See Jennison, supra note 16, at 1159-60 (discussing Niemi v. Schachtschneider, 435 N.W.2d 117 (Minn. App. 1989)).

216 See id. at 1160 (noting that a "change in circumstances" standard increases the possibility of a change in custody).

217 Id.

218 See, e.g., Niemi, 435 N.W.2d at 117 (upholding the trial court's refusal to change custody despite acknowledgment by the trial court that "[t]here is evidence to suggest that the present home environment is not as suitable as the proposed environment concerning the emotional health of children")). This is another example of a case where there was overwhelming evidence suggesting that the father should gain physical custody, but the best interests of the child were not met because of the stringent proof requirement.

a joint custody arrangement, one of two requirements must be met: there must be a showing either (1) that there has been bad faith among one or both parties with respect to custody cooperation,220 or (2) "that the child's present environment in the custody of the other parent endangers his physical, mental, or emotional health."221 One of these two conditions must be established before the trial court can conduct a de novo hearing to determine (according to the child's best interests) with whom the child should physically reside.222 Such standards represent substantial procedural hurdles to clear before a parent, typically the father,223 can attempt to argue for a change of primary physical custody.224

This procedural obstacle appears to be yet another mechanism by which children are kept with their mothers and the status quo is maintained. As previously noted, the mother obtains physical custody of the child in almost ninety percent of the cases.225 These probabilities have proven very difficult to overcome because most cases end in a determination that procedural requirements have not been met and, therefore, the child's custody cannot be changed.226 Given the strictness of standards, it has become extremely difficult for a non-custodial father to seek physical custody if the parties had originally entered into a joint custody agreement.227

220 See id. at 558.
221 Briggs v. Clemons, 3 S.W.3d 760, 762 (Ky. Ct. App. 1999). This is a more difficult standard for modifying sole custody. The court's interpretation of Mennemeyer expanded the grounds for review of joint custody to include consideration of a stricter standard. The court reasoned that although cooperation is important, parents could have met the cooperation standard and yet the well-being of the child might still be "endangered" by placing the child in the custody of a particular parent. The court held neither standard was met in this case, however. See id. at 763.
223 See Paradise, supra note 14, at 518.
224 See Jacobs, 959 S.W.2d at 784; see also Briggs, 3 S.W.3d at 762.
225 See Paradise, supra note 14, at 518.
226 See Briggs, 3 S.W.3d at 760 (holding that the threshold requirement for modification was not established); see also Stinnett v. Stinnett, 915 S.W.2d 323, 323-24 (Ky. Ct. App 1996) (reversing the trial court's modification of joint custody due to lack of findings that "there was an inability or bad faith refusal of one or both parties to cooperate").
227 See generally Briggs, 3 S.W.3d at 760 (involving a court's refusal to grant a hearing to a father who claimed his child's well-being was endangered by the mother's instability); Jacobs, 959 S.W.2d at 781 (holding that even though the threshold requirement was met on account of the mother's alcohol consumption,
In addition to the statistical evidence that this procedural requirement is biased against fathers, a closer look at the case that created the standard adds credence to the theory that latent prejudices of judges (many of whom still believe that it is better for a child to remain with its mother) played a role in the creation of the standard. In *Mennemeyer*, the trial court modified the original joint custody award and made the father primary physical custodian. The appellate court reversed, however, creating a "bad faith cooperation" standard. The appellate court held that a court cannot even consider changing the primary physical residence of a child unless both parties have previously attempted to cooperate. In this case the woman was the primary physical custodian, as is true in ninety percent of divorced families. The father in *Mennemeyer* was granted physical custody by the trial court because it saw fit to do so pursuant to the best interests of the child. The appellate court rejected the trial court's change of custody from the mother to the father; the trial court did not have the authority to make a de novo review of the physical custody issue given that it found no bad faith on the part of either parent. Once again, the end result reflected the status quo: the mother maintained custody of the child due to gender bias in current custody standards.

The stated policy behind Kentucky's stringent custodial standards is to provide stability to a child—stability that could be put at risk as a result of continued custodial litigation. Scholars, however, attack the logic of this system. A system that allows pleas of abused children to fall on deaf ears because the state wants to promote stability results in a system that

---

229 See id.
230 See id. at 557-58.
231 See *Paradise, supra* note 14, at 519 (emphasizing that it is the mother who usually has primary physical custody of the child).
232 See *Mennemeyer*, 887 S.W.2d at 557-58.
233 See id. at 555.
234 See *Paradise, supra* note 14, at 519.
235 See *Mennemeyer*, 887 S.W.2d at 556.
236 See id. at 557-58.
237 See *Paradise, supra* note 14, at 518.
238 See *Mennemeyer*, 887 S.W.2d at 558.
239 See *Jennison, supra* note 16, at 1160-61 (suggesting that courts' use of stability as justification for the "significant change in circumstances" standard often neglects the best interests of the child).
240 See *Jacobs v. Edelstein*, 959 S.W.2d 781, 782 (Ky. Ct. App. 1998) (providing an example where the children were left in the home despite evidence of
“make[s] it impossible for fathers to obtain custody even when a change would be in the child’s best interest.”

One scholar put it best when she said “[c]hild-rearing cannot have become such an easy task that it is not necessary for the child to be placed in the best possible environment, but merely in an environment that is not causing him harm ‘to such a degree.’” Stability is an important consideration in the “best interests of the child” analysis, but it is not the only consideration. The fact remains that “minor changes may make the non-custodial parent the ‘better’ parent, and yet not qualify as ‘significant’ changes.” The less-stringent “changed circumstances” standard takes into account these potential changes, thereby ensuring that the child is placed in the best possible environment.

C. Bias Against the Non-Custodial Parent’s Role

While the effects of the maternal presumption continue to linger in the custody determinations of gender-neutral states, there also exists another type of bias—a bias against the non-custodial parent due to the dominant role of the custodial parent. Kentucky Revised Statutes section 403.330, the statute concerning judicial supervision of the custody decree, states that “the custodian may determine the child’s upbringing, including his

alcohol abuse); Harkema v. Harkema, 474 N.W.2d 10, 11 (Minn. Ct. App. 1991) (citing examples where children were left in homes where there was evidence of verbal abuse); see also Squires v. Squires, 854 S.W.2d 765, 768 (Ky. 1993) (noting that “trial courts are faced with the task of formulating a custody arrangement which will minimize disruption of the life of the child”).

241 Jennison, supra note 16, at 1160.
242 Id.
243 See K.R.S. § 403.270 (Banks-Baldwin 1999).
244 Jennison, supra note 16, at 1160.
245 See id. at 1160-61, see also Schimmel v. Schimmel, 692 N.Y.S.2d 291 (App. Div 1999) (modifying a joint custody agreement and awarding primary custody to the father based on a “sufficient change in circumstances,” namely the child’s declining school attendance); Dube v. Dube, 688 N.Y.S.2d 356 (App. Div 1999) (modifying a joint custody arrangement and awarding sole custody to the father due to the “acrimonious relationship” of the divorced couple). While these cases reflect how a “changed circumstances” standard is more sensitive to the innumerable factors which determine the best interests of the child, a “changed circumstances” standard should only operate to change the primary physical custody of the child within joint custody, not to change a custody determination from joint to sole custody (thereby depriving the child of much-needed contact with both parents).
education, health care, and religious training.”

This statute clearly reveals the disadvantage a non-custodial parent faces in becoming involved in the life of his or her child, and suggests that a non-custodial parent cannot play a significant role in the child’s life. The custodial parent is granted the ability to make the most important decisions in the child’s life, while the non-custodial parent is relegated to a secondary, supplemental parental status.

Not only is this bias detrimental to the parental ability of the non-custodial parent, it is also inconsistent with the best interests of the child.

The Kentucky Supreme Court in *Squires* stated that “it would be in a child’s best interest to be reared by two parents who are married to each other. With the occurrence of divorce, however, such a circumstance is not possible. As such joint custody would appear to be the best available solution.”

This dicta from *Squires* conflicts with the contention that the custodial parent should make the majority, if not all, of the most important parental decisions. It is in the best interests of the child to have a well-rounded upbringing. A child who has considerable contact with both parents after divorce is much more likely to adapt to the trauma of divorce, as compared to a child who is isolated from a parent. Thus, the bias against non-custodial parents not only has a detrimental impact upon the isolated parent but also harms the child.

---

246 K.R.S. § 403.330 (Banks-Baldwin 1999). This statute reads in full:

(1) Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child’s upbringing, including his education, health care, and religious training, unless the court after hearing, finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian’s authority, the child’s physical health would be endangered or his emotional development significantly impaired.

(2) If both parents or all contestants agree to the order, or if the court finds that in the absence of the order the child’s physical health would be endangered or his emotional development significantly impaired, the court may order the local probation, another appropriate local entity, or if currently involved in the case, the child welfare department to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out.

Id.

247 See id.

248 See supra notes 87-155 and accompanying text.

249 *Squires v Squires*, 854 S.W.2d 765, 768 (Ky. 1993) (citation omitted).


251 See supra notes 87-155 and accompanying text.
IV THE JOINT CUSTODY PREJUSMPTION IN KENTUCKY CUSTODY DETERMINATIONS

Kentucky’s primary custody statute is Kentucky Revised Statutes section 403.270. It declares that custody determinations are to be made

252 K.R.S. § 403.270 (Banks-Baldwin 1999). It reads in full:

Custodial Issues; best interests of child shall determine; joint custody permitted; de facto custodian

(1) (a) As used in this chapter and KRS 405.020, unless the context requires otherwise, “de facto custodian” means a person who has been shown by clear and convincing evidence to have been the primary caregiver for, and financial supporter of, a child who has resided with the person for a period of six (6) months or more if the child is under three (3) years of age and for a period of one (1) year or more if the child is three (3) years of age or older or has been placed by the Department for Social Services. Any period of time after a legal proceeding has been commenced by a parent seeking to regain custody of the child shall not be included in determining whether the child has resided with the person for the required minimum period.

(b) A person shall not be a de facto custodian until a court determines by clear and convincing evidence that the person meets the definition of de facto custodian established in paragraph (a) of this subsection. Once a court determines that a person meets the definition of de facto custodian, the court shall give the person the same standing in custody matters that is given to each parent under this section and KRS 403.280, 403.340, 403.350, 403.420, and 405.020.

(2) The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian. The court shall consider all relevant factors including:

(a) The wishes of the child’s parent or parents, and any de facto custodian, as to his custody;

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interests;

(d) The child’s adjustment to his home, school, and community;

(e) The mental and physical health of all individuals involved;

(f) Information, records, and evidence of domestic violence as defined in KRS 403.720;

(g) The extent to which the child has been cared for, nurtured, and
under the “best interests of the child” standard.\textsuperscript{253} It also sets forth the principle that “[t]he court may grant joint custody to the child’s parents, or to the child’s parents and de facto custodian, if it is in the best interest of the child.”\textsuperscript{254} Thus, the Kentucky Supreme Court has held that “[w]ith its 1980 enactment of the foregoing statute, the General Assembly expressly declared the right of trial courts to grant joint custody to the parents of a child with the only standard being ‘best interest’”\textsuperscript{255} As held in \textit{Squires}, however, Kentucky courts are not permitted to prefer sole custody determinations.\textsuperscript{256} In \textit{Squires}, the trial court and court of appeals recognized a presumption in favor of joint custody. The trial court explained its decision in favor of joint custody on public policy grounds.\textsuperscript{257} The court

\begin{itemize}
  \item[(h)] The intent of the parent or parents in placing the child with a de facto custodian; and
  \item[(i)] The circumstances under which the child was placed or allowed to remain in the custody of a de facto custodian, including whether the parent now seeking custody was previously prevented from doing so as a result of domestic violence as defined in KRS 403.720 and whether the child was placed with a de facto custodian to allow the parent now seeking custody to seek employment, work, or attend school.
  
  \item[(3)] The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child. If domestic violence and abuse is alleged, the court shall determine the extent to which the domestic violence and abuse has affected the child and the child’s relationship to both parents.
  
  \item[(4)] The abandonment of the family residence by a custodial party shall not be considered where said party was physically harmed or was seriously threatened with physical harm by his or her spouse, when such harm or threat of harm was causally related to the abandonment.
  
  \item[(5)] The court may grant joint custody to the child’s parents, or to the child’s parents and a de facto custodian, if it is in the best interest of the child.
  
  \item[(6)] If the court grants custody to a de facto custodian, the de facto custodian shall have legal custody under the laws of the Commonwealth.
\end{itemize}

\textit{Id.}

\textsuperscript{253} See id.

\textsuperscript{254} \textit{Id.} \S 403.270(5).

\textsuperscript{255} \textit{Squires v. Squires}, 854 S.W.2d 765, 766 (Ky. 1993).

\textsuperscript{256} See \textit{id.} at 770.

\textsuperscript{257} See \textit{id.} at 767 See generally Judith Brown Grief, \textit{Joint Custody: A Sociological Study}, in \textit{CHILD CUSTODY DISPUTES} 309, 309-12 (Gary E. Stollak & Michael G. Lieberman eds., 1985) (discussing social science research that suggests
noted that although the disputing parents had some history of conflict, they both appeared to be good parents, and conflict alone did not prevent a joint custody determination. The court stated that the "availability of subsequent custody litigation" is greater in joint custody determinations than in sole custody determinations. In other words, it is very difficult for the non-custodial parent to gain custody after a court has issued sole custody to the other parent. Thus, a sole custody determination can effectively end the non-custodial parent's ability to have a significant role in his or her child's life.

The court of appeals affirmed the decision of the trial court and further explained why there should be a presumption in favor of joint custody. The court gave three reasons why a joint custody determination is more beneficial than a sole custody determination. First, joint custody allows parents to have an equal role in deciding their child's future. Second, joint custody increases the non-custodial parent's involvement in child-rearing activities. Third, a joint custody determination creates a more amiable relationship between the divorcing parents.

there should be changes in child custody law and that a child should have access to both parents); Diane Trombetta, Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes, in CHILD CUSTODY DISPUTES, supra, at 313, 315-22 (discussing how joint custody can mitigate the ill effects divorce has on children as well as parents and arguing that if both parents agree to joint custody it should be presumed to be in the best interests of the child).

258 See Squires, 854 S.W.2d at 767

259 Id.

260 See id.

261 See id. at 768; see, e.g., Parker, supra note 133, at A9 (stating that fathers have a right to be upset about custody because of the way the system works, as most fathers do not get custody even if they are capable). But see Janice Drakich, In Whose Best Interest? The Politics of Joint Custody, in FAMILY PATRONS, GENDER RELATIONSHIPS 331, 339-40 (Bonnie J. Fox ed., 1993). In her work, Drakich cites studies suggesting that "men do not want to have these [day-to-day] responsibilities for their children." Id. at 339. She argues that, even if there were a joint custody presumption, mothers would still serve the dominant parental role because of the apathy of fathers.

262 See Squires, 854 S.W.2d at 767

263 See id.

264 See id. The dissenting opinion, however, argued that the court should make a joint custody determination only after finding that the parents possess sufficient maturity to suppress their animosity toward one another and can avoid having their personal issues affect the upbringing of the child. See id. at 772 (Leibson, J., dissenting).
The Kentucky Supreme Court affirmed the decision of the court of appeals, but did not accept the logic of the lower courts. The mother argued that without "substantial parental cooperation" there should be no joint custody determination, because the conflict in the relationship would have an adverse affect upon the children.265 The father argued that the supreme court should defer to the broad discretion of the trial court. Moreover, he argued, to employ a parental conflict analysis within joint custody determinations would allow one custodial parent to destroy the possibility of joint custody by creating conflict himself or herself.266 The supreme court decided against applying a parental conflict analysis within joint custody determinations.267 The court explained that, while some studies suggest joint custody should not be granted where there is a history of conflict between the ex-spouses, if the courts created a "no conflict" prerequisite in joint custody determinations "the role of the noncustodial parent would be diminished to a point of insignificance."268

The court also intimated that there should be no presumption in favor of sole custody determinations.269 The court explained,

\[\text{[S]o long as KRS 403.270(4) remains the law of Kentucky, joint custody must be accorded the same dignity as sole custody and trial courts must determine which form would serve the best interest of the child.}\]

\[\text{Just as it is impermissible to prefer one parent over the other based upon gender, it is now impermissible to prefer sole custody over joint custody.}\]

While this ruling was a victory for the joint custody standard, the court did not go as far as the trial and appellate courts, which had created a presumption in favor of joint custody271 The court explained that to do so would go beyond the dictates of the applicable custody statutes passed by the General Assembly272 In other words, the court stopped short of what it

265 See id. at 767
266 See id., see also supra notes 116-135 and accompanying text.
267 See Squires, 854 S.W.2d at 768-69.
268 Id. at 768.
269 See id. at 769-70.
270 Id. at 770.
271 See id. at 769-70 (citing Chalupa v. Chalupa, 830 S.W.2d 391 (Ky. Ct. App. 1992)) (specifically rejecting Chalupa's judicial policy favoring joint custody).
272 See id. at 768.
felt to be judicial legislation and gave deference to what it believed to be the intent of the General Assembly.

The court interpreted Kentucky Revised Statutes section 403.270 as placing upon the courts the burden of determining sole or joint custody, based upon the best interests of the child. Interestingly, however, the court conceded that joint custody is most consistent with the best interests of the child. It explained:

We begin with the assumption that it would be in a child's best interest to be reared by two parents who are married to each other. With the occurrence of divorce, however, such a circumstance is not possible and trial courts are faced with the task of formulating a custody arrangement which will as nearly as possible replicate the ideal and minimize disruption of the life of the child. As such, and prior to any particularized assessment of the parents and child, joint custody would appear to be the best available solution. In theory, the child would continue to be reared by both parents and have the benefit of shared decision-making with respect to important matters, with neither parent being designated as the primary custodian and the other relegated to a secondary status. Clearly, it was this ideal which motivated the General Assembly to declare that trial courts may grant joint custody, but place it within the context of the best interest test.

Thus, the idea of a joint custody presumption is not foreign to Kentucky's courts. The lower courts have recognized the value of joint custody and have identified policy considerations favoring joint custody determinations. The Kentucky Supreme Court also recognized the benefit of the joint custody standard and described it both as the ideal solution to a divorce and consistent with the best interests of the child. The court practically invited the General Assembly to review the limitations of

---

273 See id., see also Mennemeyer v Mennemeyer, 887 S.W.2d 555, 557 (Ky. Ct. App. 1999) (stating that courts should look to the best interests of a child when deciding whether to grant sole or joint custody).

274 See Squires, 854 S.W.2d at 768.

275 Id. at 768-69 (citation omitted).

276 See Chalupa, 830 S.W.2d at 393 (“In finding a preference for joint custody is in the best interest of the child, even in a bitter divorce, the court is encouraging the parents to cooperate with each other and stay on their best behavior.”).

277 See Squires, 854 S.W.2d at 768-69.
Kentucky Revised Statutes section 403.270. However, the court stopped short of declaring a joint custody presumption because of the limiting language of the statute. It is time for the Kentucky General Assembly to recognize the importance of a statutory joint custody presumption and abandon the prejudice and bias prevalent throughout the history of child custody law.

V CONCLUSION

The history of child custody reveals a system that has been, and continues to be, dominated by gender preferences. The presence of these gender preferences has created a system that traditionally isolates the child from the non-custodial parent, and this isolation has been proven to be in opposition to the best interests of the child. A joint custody presumption is one step toward creating a gender-blind custody system, and would provide some continued contact between the child and both parents. While there are many more steps that must be taken in order to erase the detrimental effects of gender preferences in the custody system, this is a relatively easy process for the General Assembly. The Kentucky Court of Appeals has already sought to create a policy favoring joint custody and the Kentucky Supreme Court recognized joint custody as the most beneficial arrangement for Kentucky’s children. The Kentucky Supreme Court further explained that it declined to follow the lead of the court of appeals because of the limitations imposed by the court’s interpretation of Kentucky Revised Statutes section 403.270. This limitation can and should be lifted by the General Assembly. Scholars and Kentucky courts agree that this is the best option for children of divorce.

---

278 See id. at 768.
279 The court made clear that it considers joint custody the best possible solution for the child and then stated, “so long as KRS 403.270(4) remains the law of Kentucky, joint custody must be accorded the same dignity as sole custody and trial courts must determine which form would serve the best interest of the child.” Id. at 770.
280 See supra notes 22-86 and accompanying text.
281 See supra notes 87-115 and accompanying text.
282 See supra notes 252-279 and accompanying text.
284 See Squires, 854 S.W.2d at 768-69.
285 See id. at 768.
286 See supra notes 116-135 and 252-279 and accompanying text.
General Assembly needs to evaluate the limitations of the statute and create a joint custody presumption pursuant to the best interests of Kentucky’s children.

While this statutory revision would be an important step in the search for the best interests of the child, there are other aspects of the problem that need to be addressed. For instance, the Mennemeyer custodial standard, which creates a tall procedural hurdle to a court granting a de novo hearing on a possible change of custody, must be reevaluated. While this standard does promote stability in that it discourages litigation by the non-custodial parent, we must ask at what price. The case law shows how this stringent standard ignores children’s needs simply for the sake of discouraging custodial litigation. The Kentucky General Assembly and Kentucky courts must consider the detrimental effects of this stringent custodial standard if Kentucky is to provide a custody system free of gender preferences and consistent with the best interests of the child. A more appropriate standard is the less-rigid “changed circumstances” standard. This standard, operating as a mechanism to change primary physical custody within a joint custody situation, would allow children to develop in the best possible environment. It would also avoid abusive and dangerous environments, and represent another step toward erasing the detrimental gender preferences prevalent throughout the history of child custody law.

---


288 See Jacobs, 959 S.W.2d at 782 (providing an example where children were left in the home notwithstanding evidence of alcohol abuse); Harkema v. Harkema, 474 N.W.2d 10, 12 (Minn. Ct. App. 1991) (providing an example where children were left in the home where there was evidence of verbal abuse).

289 See Jennison, supra note 16, at 1160-61, see also Schummel v. Schummel, 692 N.Y.S.2d 291 (App. Div. 1999); Dube v. Dube, 688 N.Y.S.2d 356 (App. Div. 1999). New York has adopted the “changed circumstances” standard and the foregoing cases provide clear examples of how the custody process is both more equitable and more protective of the child as a result. See also supra notes 204-245 and accompanying text. Using this less-stringent standard to change primary physical custody, while at the same time maintaining joint custody where appropriate, allows the child to live in the best possible environment and maintain continued contact with both parents. Although the New York cases are more sensitive to the children’s needs, it would have been even more beneficial for the children to have remained in joint custody.
For too long the custody laws have operated under gender bias and prejudice. For centuries it was the mother who was forced to lose contact with her child. For approximately the past 150 years the father has suffered a similar fate. During this time, the best interests of the child were not served because it is in the best interests of the child to have continued contact with both parents. No one denies that the best possible situation for a child is to have two loving parents. If the custody system’s true purpose is to achieve the best interests of the child, then let the child be nourished, cherished, and loved by both parents. One of the primary ways by which parents express love for their children is by spending time with them. If a child is fortunate enough to have two parents who love him or her, notwithstanding their own disagreements, the current custody system should not place inexplicable and biased obstacles between the child and parent.

290 See supra notes 22-86 and accompanying text.
291 See supra notes 116-135 and accompanying text.