

# HOW THE ALI CHILD CUSTODY PRINCIPLES HELP ELIMINATE GENDER AND SEXUAL ORIENTATION BIAS FROM CHILD CUSTODY DETERMINATIONS

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## I. INTRODUCTION

For many years, the law has resolved the issue of child custody at divorce or separation by giving one parent primary custody of the child and the other parent visitation rights. Although a recent trend in the law has favored joint decisionmaking authority between parents post-separation, divorce has often meant that the parent with custody would have greater decisionmaking authority for the child while the parent with visitation rights would have most of the responsibility for child support. Most often, this has meant that the mother gets the responsibility for custody of the child and the father gets responsibility for supporting the child.

This commentary considers the changes proposed in the American Law Institute's *Principles of the Law of Family Dissolution* and the effects they will have on child custody law.<sup>1</sup> It also considers how gender fairness plays into child custody determinations. The *Principles* begin with the notion that the parents are the best arbiters of a parenting plan for their children after their marriage or relationship has ended. The *Principles* call upon the parents to make a parenting plan that will work for their children and the relationships in their family. When the parents are unable to do so, the *Principles* provide a means for a decisionmaker to develop the parenting plan.

The parenting plan is divided into component parts of custodial responsibility and significant decisionmaking responsibility. The *Principles* contain an objective formula for making each determination.

The *Principles* also make it much less likely that a decisionmaker will be influenced inappropriately by matters of gender. The *Principles* make it clear that neither the sex of a parent, or of a child, or the sexual orientation of a parent can be considered as factors in determining a parenting plan. The *Principles* also make it possible for the decisionmaker to consider the rights of a *de facto* parent, a person who may not be a legal parent but who has spent significant time raising the child, so that person has standing in the proceeding to develop the parenting plan.

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1. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES 2000]. Chapter 2 provides Principles Governing the Allocation of Custodial and Decisionmaking Responsibility for Children.

This commentary highlights the changes in the law that the *Principles* propose in order to make it more possible for parents to develop a parenting plan, either on their own or with the help of a decisionmaker, that will be less likely to be tainted by gender and sexual orientation bias.

## II. CHILD CUSTODY LAW

### A. A Brief History of Child Custody Law

During the nineteenth and early twentieth centuries, fathers had the right to custody of their children. Sometime during the early twentieth century when divorce became more prevalent, many jurisdictions began to follow the so-called "tender years presumption" which held that mothers should be favored for custody of young children. Children needed their mothers to help nurture them after a divorce, and mothers were favored as the physical and legal custodians of children at divorce. During the last thirty years, all of that has changed, no doubt in part due to the changing roles of mothers and fathers in the nurturing of their children.<sup>2</sup>

Custody law now provides that there is no appropriate presumption for favoring either mother or father--the law is gender neutral. At the same time, notions about who should have custody of children following divorce have also changed. Joint custody has grown as an option in divorce that provides both parents with a role in physical custody and decisionmaking post-divorce.<sup>3</sup> As a result of the decrease in popularity of laws preferring maternal custody, more fathers are awarded custody today. Although statistics tell us that, for the most part, the post-divorce family looks much the same as it has for fifty years (i.e., the mother has custody of the children) in many current cases, dad also has custody of the children.<sup>4</sup> The structure of the custody law has changed to accommodate the interests of both parents, but the standard by which custody is to be determined has remained constant. Several jurisdictions focus on the primary-caretaker standard for determining custody, but most jurisdictions continue to rely on the best-interests standard in deciding which of the two parents should have custody of the children. The Legislatures of many states have adopted criteria for the decisionmaker to consider in determining best interests. In many cases, these criteria include the emotional ties between the child and the parents, the ability of a parent to cooperate with the other parent on visitation issues, and the presence of any form of abuse. Many statutes make it clear that the gender of a parent is not a valid factor in determining custody. Some statutes even state that the conduct, marital status, income, social environment, or

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2. See generally Mary Ann Mason, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS* (1994) (discussing the history of American Custody Law).

3. See generally Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393 (1998) (discussing joint custody).

4. See Lee E. Teitelbaum, *Divorce, Custody, Gender, and the Limits of Law: On Dividing the Child*, 92 MICH. L. REV. 1808, 1810 (1994) (discussing the results of Maccoby and Mnookin's research compiled in *Dividing the Child*).

lifestyle of a parent may be considered if those factors may have an adverse impact on the child.<sup>5</sup>

A difficulty with the best-interests standard is its broadness. Even though the decisionmaker may articulate a decision based on the appropriate facts and factors, the broadness of the standard makes it possible for a judge to insert his or her own biases into the process, intentionally or unintentionally. The best-interests standard invites a decisionmaker to look at what he or she regards as in the best interests of the children. A decisionmaker's own moral and ethical beliefs will likely influence this decision, even when the decisionmaker believes that they do not.

#### B. ALI PRINCIPLES

First, the *Principles* emphasize the goal of having the parents of a child cooperate to develop a parenting plan that will work for their family. The *Principles* also encourage the decisionmaker to accept a parent-proposed plan, unless it is not entered into knowingly and voluntarily or it could be harmful to the child.<sup>6</sup>

If the parents are unable to develop their own parenting plan, the *Principles* state that child caretaking responsibility is determined by focusing on how the child has been cared for up to time that the parenting plan is needed. The *Principles* state that "the court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing care-taking functions for the child prior the parents' separation. . ."<sup>7</sup> The *Principles* recognize that the circumstances in a particular case may be such that it would be harmful to allow the caretaking functions to be assumed by the primary caretaker, and in those cases different arrangements would be made. The goal is to provide an objective standard for determining caretaking responsibility that is based on the circumstances that existed before the separation and that takes the court out of the business of making a determination of which of the two parents would create the home that would, hypothetically, provide the child with the best circumstances. The new standard moves us from conjecture about the best placement for the child and focuses more on the patterns of caretaking established in the past.

The determination of decisionmaking responsibility is made separately from the determination of caretaking responsibility. The *Principles* draw the distinction between the two functions of parents associated with childrearing. The *Principles* recognize that a division of labor for caretaking should follow along the lines of how caretaking has been handled in the past. Additionally, they recognize that for most parents, shared decisionmaking is the preferred

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5. See Kathryn Mercer, *The Ethics of Judicial Decision-Making Regarding Custody of Minor Children: Looking at the "Best Interests of the Child" and the "Primary Caretaker" Standards as Utility Rules*, 33 IDAHO L. REV. 389 (1997) (critiquing the best-interests standard).

6. See ALI PRINCIPLES 2000, *supra* note 1, § 2.07 (providing that "(1) the court should order any provision of a parenting plan agreed to by the parents unless the agreement (a) is not knowing or voluntary, or (b) would be harmful to the child.").

7. See *id.* § 2.90.

form of decisionmaking, and unless there are special reasons to do it differently, parents will share that responsibility after the parents have separated.<sup>8</sup> This method of sharing allows both parents to have continued involvement in the life of the child; even a parent who spent little time with a child undoubtedly has had a role to play in making decisions about the child's welfare.

The *Principles* also make it clear that certain factors may not be considered in making determinations about child custody. Such factors as the race, gender, religious practices, sexual orientation, extramarital sexual conduct and a parent's earning capacity are not to be taken into consideration in making a determination about a parenting plan for the child.<sup>9</sup>

The other aspect of the *Principles* that represents a change from well-established law is the expansion of those parties who have standing to participate in a custody proceeding. The *Principles* include legal parents, parents by estoppel, *de facto* parents and other adults who have been allocated decision-making responsibility under a parenting plan.<sup>10</sup> This makes it possible for a much broader group of persons to have standing to participate in the custody proceeding. For instance, a gay parent who has helped raise the natural child of a gay partner will have standing as a *de facto* parent to participate in the custody proceeding. This is true even though there had been no adoption of the child by the partner.

### III. SIGNIFICANCE OF THE PRINCIPLES FROM A GENDER-FAIRNESS PERSPECTIVE

The *Principles* provide the parents of a child an opportunity to work out the details of a plan without the intervention of a third party, in this case the state. To the extent that the parents are able to do so, the plan will not be infected with the gender or sexual orientation biases of a third party. The parents can arrange their lives according to what works for them and their child. In making their plan, the parents undoubtedly will be influenced by the standards in the law that emphasize how parents have ordered caretaking and decisionmaking responsibilities in the past. The standards are not biased in favor of either parent, and they make it clear that the gender or sexual orientation of either parent is not relevant to making a parenting plan.

To the extent that a parent believes that either her gender or sexual orientation, or the gender or sexual orientation of the other parent, may be relevant to the creation of the parenting plan, the *Principles* discourage this belief. The *Principles* encourage the parents to consider childcare and decisionmaking responsibilities as functions that can be attended to by both parents equally well. Thus, neither parent is preferred as the primary caretaker of the child in the post-separation family.

The *Principles* also make it much more difficult for a decisionmaker to consider the gender and sexual orientation of a parent in determining post-divorce caretaking responsibility of parents. The facts to be considered are primarily those that examine how caretaking was handled before the separation. Requir-

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8. See *id.* § 2.10.

9. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.14 (Tentative Draft No. 3, Part I, 1998) [hereinafter ALI PRINCIPLES 1998].

10. ALI PRINCIPLES 2000, *supra* note 1, § 2.04.

ing a determination on the parents' established caretaking practices gives the decisionmaker much less discretion to determine caretaking responsibility than under the best-interests standard.

By providing the decisionmaker with less discretion, it follows that the decisionmaker will have less opportunity to insert his or her own cultural biases into the process. For example, the decisionmaker cannot as easily insert his or her own biases about the appropriate role of men and women in the rearing of children. That is not to say that bias will not play a role in decisionmaking, but that the decision concerning the child's best interests will be based upon a more concrete standard of how the caretaking functions have been shared during the child's life, instead of upon a standard of review. To further ensure gender and sexual orientation fairness, the *Principles* make it impermissible for a decisionmaker to consider factors that have been regarded as relevant to determining custody in the past. For instance, although most statutes have excluded the tender years presumption as a basis for a custody determination and have made it clear that there is no custody preference for either parent because of gender, some decisionmakers have considered placement of a child with a same-sex parent as an advantage to the child's development. Similarly, decisionmakers have taken the extramarital sexual relationships of a parent and the sexual orientation of a parent into account in determining child custody. The *Principles* provide that the gender and sexual conduct of a parent are generally not relevant to the determination of caretaking and decisionmaking responsibility.<sup>11</sup> Given the creation of objective standards that disallow gender or sexual orientation bias, one could argue this prohibition in the *Principles* is unnecessary. Yet, it stands as a clear-cut articulation of a standard that promotes gender and sexual orientation fairness.

One might argue that it does not really matter whether the standard is changed because, in most cases, it is in the best interests of the child to have the parent who has exercised the most significant caretaking responsibilities during the marriage, continue to have those responsibilities after a divorce. To a great extent, this is an accurate observation. But for those few cases where the decisionmaker will apply the best-interests standard in what appears to be a biased and unprincipled way, the *Principles* will prevent such action. Perhaps the *Principles* cannot take all of the bias out of such a determination, but they offer a standard that comes closer to accomplishing that goal than the best-interests standard has done.

Most importantly, the *Principles* emphasize that the caretaking responsibility after divorce is determined largely by how the parties ordered caretaking responsibilities during the marriage. This sends a message to the parties that if they are unable to agree on how caretaking responsibilities should be ordered following their divorce, their ability to negotiate caretaking responsibility depends upon how much they have participated in these activities in the past. It encourages the parties to focus on that variable rather than other issues related to how either perceives the other's effectiveness in parenting the child. This is a much more objective standard than the more ambiguous best-interests standard, which may have encouraged parents to continue bickering about custody be-

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11. *Id.* § 2.14.

cause the ambiguity of the standard made it impossible to conclude who might prevail.

Another significant aspect of the *Principles* from the gender fairness standpoint is that they recognize that caring for a child involves more than the day-to-day caretaking function. It also involves the economic and other supports needed to provide a good standard of living for the caretaker and the child. For example, parenting functions include working to support the child and the caretaker, performing financial planning, and caring for and maintaining the family home. By separating and distinguishing caretaking functions from parenting functions, the *Principles* recognize not only the contributions of parents for the "hands-on" care of a child, but also recognize the more indirect but still important contribution of parents in providing financial and other support for the child and the primary caretaker. This broader understanding of parenting functions influences the determination and allocation of decision-making responsibilities.

The *Principles* provide that both parents should have a continuing role in the rearing of a child by establishing a presumption that decisionmaking responsibility should be allocated jointly so long as the parents have been sharing the parenting functions for their child. This presumption gives both the parent who has been working outside the home to provide for the child and the caretaking parent an opportunity to continue in his or her decisionmaking role, and to continue being involved in the life of the child. It also recognizes gender equity in that it encourages the continued involvement of both parents with the child after separation.

The *Principles* also provide a broader definition of parent than many decisionmakers have accepted in the past. A legal parent and a *de facto* parent may have standing to participate as a party in proceedings allocating responsibility for the caretaking and decisionmaking for a child. The definition of *de facto* parent includes a person who has cared for a child, but does not have another legally recognized connection to the child as a parent.<sup>12</sup> Most notably, this definition provides a gay partner with standing to appear in a custody proceeding even though that partner may not be recognized as a legal parent to the child. If the partners have lived together, and one is the legal parent and the other is not, but both have cared for and raised the child, the *Principles* assure the non-legal parent an opportunity to be heard on the issues of custody.

By opening up the proceedings, the *Principles* encourage us to look at parenthood differently. Parenthood does not consist only of an intact nuclear family with a mother and father who are raising a child. By expanding the definition of parent, we recognize a broader concept of parent that transcends gender or sexual orientation. Two dads, two moms, or a mom and a dad all may effectively provide for the care and nurturing of a child. This more expansive definition will encourage us all to concentrate less on the gender of a parent and more on the care that a parent provides.

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12. *Id.* § 2.03 (stating that a *de facto* parent is someone who has lived with the child for a significant period of time and with the consent of a legal parent, has performed a substantial amount of the caretaking functions for the child).

## IV. GENDER-NEUTRAL LAWS MAY NOT HAVE GENDER-NEUTRAL IMPACTS

Making the child custody laws gender-neutral is not a new or novel concept. What the *Principles* do is create new standards that incorporate the gender-neutral concepts that have long been a part of the law. Some would argue that previous attempts at creating gender-neutral laws for determining child custody have been gender-biased in the impact they have had on parents. For instance, proponents of a change in the sole custody rule which prevailed in the 1960's and 1970's argued that this law unfairly deprived dads of opportunities to parent their children following divorce. Similarly, the joint custody laws caused controversy for those who believed the law favored fathers (who tended to work more hours, at higher paying jobs with consequently with less time devoted to caretaking of their children) at the expense of mothers (who had sacrificed more in terms of their careers and their lives to raise their children than had fathers). Both of these approaches to determining child custody appeared gender-neutral and still produced unfair results, according to the opponents of the laws. Thus, making the law appear gender neutral may not resolve the bias and prejudice that a law has in application.

On the other hand, perhaps the express law has less impact on the child custody determination than we might expect. In Mnookin and Maccoby's study of divorcing parents in California, they learned that even though California law contains a presumption that favors joint custody, in 70 percent of the cases the children live with their mother in an arrangement that either provides mom with sole custody or joint legal custody, but results in mom being the primary physical custodian of the children. This suggests that the law favoring joint custody has not greatly impacted the living arrangements that parents make for their children following the divorce.<sup>13</sup> The authors conclude that "despite some revolutionary changes in the law to eliminate gender stereotypes and to encourage greater gender equity, the characteristic roles of mothers and fathers remain fundamentally different."<sup>14</sup> Yet, as Professor Teitelbaum suggests in his book review of the Mnookin and Maccoby study, perhaps it is impossible to measure the impact that the change in the law has had on divorcing partners in California. He states that:

it might be suggested, although cautiously—because of lack of data from an earlier time—that the very high level of commitment to joint legal custody, the substantial levels of expressed paternal interest in sole or joint physical custody, and the somewhat lower but still substantial level of requests for sole or dual physical custody by fathers do indicate a change in attitudes and behaviors that is influenced by the legal context.<sup>15</sup>

Ultimately, it is difficult to determine what impact a change in law has on the behavior of those impacted by the change.

Following Mnookin and Maccoby's approach, we may ask how the adoption of the *Principles* will impact the outcome of custody cases. One possible an-

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13. See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 268 (1992).

14. *Id.* at 271.

15. See Teitelbaum, *supra* note 4, at 1835.

swer follows the conclusion posited by Mnookin and Maccoby: the law will have little if any impact on the outcome because the determination of living and caretaking arrangements for children is arranged by their parents in a process that is affected very little by the law. Another possible answer is that the new law will impact how the parties bargain for childcare responsibilities following separation. The law that gives the caretaking parent the right to custody of the child will give that parent more bargaining power in the process of resolving the issue than he or she would have in a system that bases the decision on other criteria. It may also give the primary caretaking parent more bargaining power than he or she would have in a system that has a presumption favoring joint custody. In addition, the research suggests that in most cases the primary caretaking parent is the mother. To the extent the law affects the bargaining process, it will give her more power, not because she is the mom, but because she is the person who has spent the most time performing caretaking functions and who has sacrificed the most in her career or in other endeavors in order to provide for her child. Of course, the law may favor the stay-at-home dad over the career mom, and it favors both parents as joint decisionmakers if they both have performed parental functions in the past.

Thus, despite the changes made in the law by the *Principles*, it may be that mothers will, in most cases, continue to have the primary caretaking role with children after separation from fathers. Meanwhile fathers typically will have to be satisfied with a role as joint decisionmaker and more limited rights to the daily caretaking of a child.

So, in the end, what do the *Principles* do to help eliminate gender bias from the law that is more effective than previous attempts to do so? The *Principles* create a structure in the law that is more nuanced and complex and which gives the decisionmaker an opportunity to better replicate the roles and responsibilities of both parents post-divorce. For instance, the role of a parent as caretaker is considered, but so is the role of a parent in performing non-caretaking parental functions. All of these activities are figured into the calculation for determining who should have decisionmaking power post-separation. The third party decisionmaker can assign a significant role for both parents post-divorce, and can better meet the needs that both parents have to fulfill their responsibilities to their children.

By creating this new structure for the responsibility of parents post-dissolution, the law promotes gender equity in that both parents will be regarded, to the extent possible, in the same manner that they were regarded before the separation or divorce. This structure will attempt to replicate parental contributions as they were made before the family was transformed by separation. For instance, if the parents have lived in an arrangement in which one parent worked outside of the home and the other parent assumed most of the caretaking for the child, the parent who performed the work outside the home will be recognized for the performance of these parenting functions. The parent in the home will be recognized for both caretaking and parental functions performed for the child. When creating a parenting plan, the decisionmaker will strive to create an arrangement that gives primary caretaking responsibility to the parent who has stayed with the child, but both parents will share decision-making functions. This more clearly replicates how the parents have ordered

their responsibilities during their marriage or relationship. To a great extent, this is different from past standards that did not have the capacity to replicate the dynamic of the family before the divorce.

The *Principles* encourage parents to work all of this out without the help of another party. If the parents are unable to do that, the *Principles* provide a system which removes the opportunities for the third party decisionmaker to insert his or her own biases regarding gender or sexual orientation into determinations about custody and parental responsibilities. Additionally, the *Principles* provide a more expansive definition of parent to include those who otherwise might be omitted even though they have played a significant role in rearing a child.

If mothers continue to have primary caretaking responsibilities most of the time, the law assures us that the assignment is based on the actual time spent with children rather than the fact that she is the mother and not the father. Gender bias in the law as written is not causing mothers to have custody more often than fathers. While law establishes gender-neutral criteria, the results of its application may not be. To the extent that the impact of this law is not gender-neutral, it sends a message to dads that if they desire a larger role in the caretaking of a child post-separation, they must assume a greater caretaking role before separation.<sup>16</sup> If they do, their role will be recognized in the same way that a father's role is recognized.

## V. CONCLUSION

The *Principles* take us farther along the path to a child custody law that is focused on making custody determinations that will be the best for the child. They do this by focusing the determination of custody on objective data related to how the parents have provided caregiving and parenting functions for their child. The objective standard takes the mystery out of the determination. At the same time, the *Principles* provide an opportunity for both parents to be involved in the care of their child post-separation.

Additionally, the *Principles* create a standard that focuses on the needs of the child, and seeks to remove any gender or cultural bias from the decision-making process. To the extent that the results are skewed to favor mothers over fathers as caretakers for children post-divorce, it is a reflection of mothers' greater involvement in direct caretaking (as opposed to other parental functions) before dissolution. That result is not a failing of the law as a result of gender bias, rather it is a statement about the cultural differences in the roles of mothers and fathers in our society.

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16. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 773 (1988) where the author observes:

As with most gender-neutral rules, its impact may not be gender neutral . . . but currently operate to the advantage of mothers, but, if we value nurturing behavior, then rewarding those who nurture seems only fair. If fathers are 'left out,' they can change their behavior and begin making sacrifices in their careers and devoting their time during the marriage to the primary care and nurturing of children. Men can exercise the same 'free' choice that women traditionally have in these matters, adjusting their outside activities to care for their children. Men who choose not to devote their time and attention to the children during the marriage but wish to care for them after the marriage ends can bargain against the mother's entitlement as primary caretaker by making financial or emotional concessions at divorce.