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# CHILD CUSTODY IN THE 21ST CENTURY: HOW THE AMERICAN LAW INSTITUTE PROPOSES TO ACHIEVE PREDICTABILITY AND STILL PROTECT THE INDIVIDUAL CHILD'S BEST INTERESTS*

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There is widespread agreement on what child custody decisions should achieve: *Everyone* wants to do what is in the child's best interests. We are so much agreed on this goal that we tend to assume that if we knew the full facts of any particular

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case, we would all agree on what a judge should order. "The child's interests should come first," we demand, as if nothing more need be said—as if, like Justice Stewart's understanding of pornography, we know it when we see it.[1] Yet, if we know what is in a child's best interests when we see it, and if everyone agrees that the child's best interests should have priority, why does it so often seem that someone else's interests trump the child's in a custody case?

The answer, of course, is that there are many ways to think about the child's best interests. In serving these interests, there are many different goals we might be trying to achieve—continuity, emotional security, discipline, safety, citizenship values, creativity, academic achievement, absence of race or sex bias—and these goals might not all point in the same direction. If I favor a custody solution that best serves the goal I think is most important and you prefer another, either one of us may conclude that the other is not supporting the child's best interests.

Another problem is that approaches that yield the greatest good for the greatest number of children often yield lousy results for some *individual* children. We protect the rights of parents because we assume, as a general matter, parents best provide for their children. But, in any particular case, rules designed to ensure parental autonomy may push aside a nonparent we may think has a stronger relationship with a child and thus is more suitable as the child's custodian. In short, as much as we agree that the child's interests should be paramount, this agreement leaves much to be clarified about what this means, and what are the rules best designed to bring this about.

For the past five years, I have been serving as a Reporter on the American Law Institute's Project on Family Dissolution, where my primary responsibility has been drafting principles to guide child custody decisions. The American Law Institute (ALI), as most of you know, is the organization of judges, academics, and practicing lawyers who produce the various Restatements of the Law that attempt to summarize and defend the best of the common law on various subjects—the Restatement of Contracts, the Restatement of Torts, and so on. It is an organization of which one of the faculty members of this law school,

1. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

Professor Hans Linde, is a prominent leader. In addition to its Restatements in the common law fields, the ALI has entered into a number of areas generally controlled by statutory law; the family law project is one of these. Through my connection with this project, I have developed a fuller appreciation of both the strong reliance of our legal system on the concept of the child's best interests and the inadequacy of the best-interests concept as a guide to decisionmaking.

This Article begins by considering the strengths and weaknesses of the best-interests-of-the-child test for determining child custody questions. It then traces some of the alternatives. It concludes by reviewing the approach the ALI proposes in its *Principles of Family Dissolution* and explaining why these *Principles* offer the best solution for doing what is best for children.

## I. THE OPEN-ENDED BEST-INTERESTS-OF-THE-CHILD TEST

Let us consider the case of Jane and David. Like most couples today, both work outside the home, and both are actively involved in the caretaking of their two children, Sara, 8, and Jamelle, 10. David works longer hours and earns more money than Jane. Jane, who works thirty hours per week outside the home, assumes primary responsibility for the children. She makes the after-school arrangements, goes to the parent-teacher conferences, sees to the children's doctor's appointments, and performs a majority of the bedtime and morning routines, weekend care, and meal preparation.

Jane and David have different parenting styles. David believes in firm rules, high expectations, and regular chores. He will not negotiate bedtimes, dinner menus, homework routines, or the children's choice of movies. Jane is a freer spirit who is more spontaneous and creative with the children. She does not interrupt her quality time with the children with an artificial bedtime or rigid schedule for homework and chores. The children have more fun when they are with Jane, but they are better behaved when with David. There are other differences as well. David goes to church; Jane does not. David reads voraciously and has tried to pass on his love of literature, fine art, and classical music to the children; Jane enjoys board games, cards, television, and rock and roll.

A year ago, Jane had an affair, for which David has not for-

given her. Their relationship has deteriorated, they have decided to divorce, and now they each want custody of the children. Who should win? What rule should govern the case?

For a long time, the rule thought to best serve the child's interests at divorce was the best-interests-of-the-child test. This test simply adopts the goal as the standard itself, leaving it to the judge to determine what custodial arrangement, on a case-by-case basis considering all of the relevant facts, produces the best result for the child. The advantages of the test are obvious: (1) it relies on individualized determinations for Sara and Jamelle specifically, not generalizations about what is good for all children or the average child; (2) it focuses decisionmaking on the child, rather than on the interests of the state of Oregon or on Jane's or David's own desires; and (3) it creates the greatest amount of flexibility in decisionmaking.

As many others have pointed out,[2] this broad, individualized standard also has a number of flaws. Most especially, the standard allows so much judicial discretion that Jane and David may find it hard to predict what the court will do. Either party *may* win and, thus, each has reason to secure his or her respective advantage, most likely at the expense of cooperation with the other. For example, David may ask for primary custody, even if he does not want it, to create some negotiating room. He may attempt to build his reputation as the more responsible parent by alienating Jane from the court-appointed psychiatrist, the children's teachers, or the parents of the children's friends. Jane, for her part, may begin to exclude David from decisionmaking, or suggest to the children in subtle, or not-so-subtle, ways, that their father is a real drag. None of these strategies is likely to benefit the children.

To convince the court that he or she is the better parent, David and Jane will each hire experts. These experts can be expensive. What will they do to earn their fees? Jane is likely to

2. Many scholars have criticized the best-interests test. Among the classic critiques are Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (Summer 1975); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1365 (1986); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

want experts who will give testimony in open court about how flexible, caring, and nurturing she is, and what a cold, uncaring, rigid and distant figure their father is. David's experts, in turn, will attempt to highlight Jane's irresponsibility, her sexual immorality, and her lack of discipline of the children, while emphasizing David's rock-steady parenting skills. This dirty linen will be aired in custody reports or in open court, furthering the alienation between the parents.

After hearing from the experts, the teachers, the friends, Jane and David themselves, and perhaps even the children, how will the court decide? Under the best-interests test, any sense the court makes of the evidence will be determined by what it determines is best for children. The judge cannot separate that determination from the judge's beliefs about what matters to the child's welfare. If the judge thinks organized religion is beneficial for children, he or she will favor David on that account. If the judge thinks that what matters most is how much time a parent has spent caring for the child, Jane will have the edge, unless the judge believes that a *good* mother would have stayed home and spent her time caring for children rather than trying to advance her career. If the judge thinks that spontaneity and creativity are better for children than firm routines, Jane wins. On the other hand, if Jane's extramarital affair makes her a bad parent in the judge's eyes, she is more likely to lose.

No matter who gets custody, the matter is not necessarily over, for the facts may change. For example, assume Jane wins primary custody, but then her boyfriend moves in with her and the children. While the judge may have been willing to overlook Jane's marital infidelity episode before the divorce, he may feel differently about her engaging on an ongoing basis in behavior he deems immoral. David may think it is worth a try to find out. If so, the whole case will be relitigated—as it may be also if Jane decides to relocate to Idaho or takes a job that requires her to rely more heavily on day care.

## II. ALTERNATIVES TO THE BEST INTERESTS TEST

Any standard example like the one outlined demonstrates a number of difficulties with the best-interests test: uncertainty and unpredictability, stimulation of strategic behavior, encouragement of litigation, and the requirement of costly experts in a

setting that emphasizes finger-pointing over cooperation. In light of these and related difficulties, policy-makers and scholars have been attempting for years to refine the best interests test, in order to achieve, with a greater degree of predictability, decisions that are best for children. It is important to see that these refinements are *alternatives* to the best-interests *test*, not alternatives to the child's *best interests*. They represent efforts to determine the child's interests without producing the "anti-child consequences." After examining the alternatives, this part explains why the ALI approach is the most promising one.

### *A. "Laundry List" Approach*

The first—and by far the most common—way legislators have attempted to make the best-interests test more specific and predictable is to detail a "laundry list" of factors that courts must consider in applying the best-interests test. Oregon's statute, for example, lists the following factors: (1) the emotional ties between the child and other family members; (2) the parties' interest in and attitude toward the child; (3) the desirability of continuing an existing relationship; (4) the abuse of one parent by the other; and (5) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.[3] Other statutes mention the child's physical, emotional, mental, religious, and social needs and the capability and desire of each parent to meet these needs, the child's preferences, and the stability of each home environment.[4]

The laundry-list approach to determining the child's best interests appears to add specificity and concreteness. Two difficulties, however, make this approach less likely to produce a predictable result than the best-interests test itself. First, the lists focus on factors such as parenting abilities and the quality of relationships, which are as intangible and difficult to measure as the child's best interests. Second, the approach fails to prioritize the factors under consideration. A court may decide that Jane has a stronger emotional bond with her children, but that David is more mature and has better parenting abilities. Who, then,

3. OR. REV. STAT. § 107.137 (1998).

4. *See, e.g.*, ALASKA STAT. § 25.24.150(c) (Michie 1998).

should win? When the factors do not all point in a single direction—that is, when guidelines are needed *most*—they leave the decisionmaker to decide which factors matters most, with no useful guidance from the rule itself.

### *B. Primary Caretaker Presumption*

A different approach for operationalizing the best-interests test, an approach popular among scholars and commentators, is a primary caretaking presumption.[5] A primary caretaker presumption requires a court to identify the parent who has spent the greatest amount of time caring for the child and then award custody to that parent, unless the other parent establishes that the primary caretaking parent is unfit. The approach is defended on the grounds that the parent who has been taking primary care of the child has the better parenting skills and the stronger emotional connection with the child.[6] If the presumption is applied to the facts set forth above, Jane would win custody because she spent more time during the marriage caring for the children than did David.

The primary caretaker approach has been criticized as favoring women because women are most often the primary caretakers of children.[7] This claim of bias is an interesting topic in itself: Should the fact that women have assumed (or been assigned) the primary responsibility for raising children in this society mean that when they get custody, the system is biased in *favor* of them? If so, it should also be viewed as sex discrimination to pay men more than women in paid employment, even if men have more work experience, or education, or ambition, or work longer hours, in accordance with the roles socially assigned

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5. *See, e.g.*, David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1985) (focusing on children between six months and five years); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988) (focusing on all children); Laura Sack, *Women and Children First: A Feminist Analysis of the Primary Caretaker Standard in Child Custody Cases*, 4 YALE J.L. & FEMINISM 291 (1992).

6. This argument is sometimes augmented by the claim that the primary caretaking parent has the most invested in the child and thus deserves primary custody. Because this argument is about the rights of the parent, and not the best interests of the child, I disregard it here.

7. *See, e.g.*, Ronald K. Henry, *"Primary Caretaker": Is It a Ruse?*, 17 FAM. ADVOC. 53 (Summer 1994).

to them.

Ironically, the experiences of the only two states that have worked with a primary caretaking presumption—West Virginia, from 1981 through 1999,[8] and Minnesota for four years between 1985 and 1989[9]—appear to show that gender bias against mothers, especially those who do not conform to gender role stereotypes, is as least as serious a problem as bias against fathers.[10] The problem comes from the fact that in identifying who has been the primary caretaking parent, many courts tend to reward fathers for doing more than judges expect them to do, while tending to penalize mothers who work or who are otherwise less available to their children than the traditional stay-at-home mother.[11] A number of trial courts have characterized a woman who intends to put her child in day care as an uncaring mother, while treating a father who intends to do so as simply a responsible provider.[12] Courts are also said to be harder on mothers who have had an extramarital affair than they are on fathers who have done so,[13] or to find mothers more emotionally unstable

8. *See* Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981). Effective January 2000, West Virginia has abandoned the primary caretaker presumption in favor of the ALI approach. *See* W. VA. CODE ANN. § 48-11-206 (Michie 1999).

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

10. *Id.* at 452-86; *see also* Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 193-96 (1992).

11. *See, e.g.,* Patricia Ann S. v. James Daniel S., 435 S.E.2d 6 (W. Va. 1993) (upholding the trial court finding that neither the father, who was a full-time architect, nor the mother, who was a stay-at-home parent, was the children's primary caretaker, because father typically made the children's breakfast, cooked some weekend meals, attended some school functions, and engaged in weekend activities with the children). This same bias also affects how the trial courts apply the best-interests test. *See, e.g., In re* Marriage of Holcomb, 888 P.2d 1046 (Or. Ct. App. 1995) (overturning trial court decision to place a child with the father based in part on the conclusion that the mother's plans to attend graduate school out of state, as well as her continued breast-feeding of the 19-month-old child, demonstrated that she placed her concerns for herself above those of her child); Prost v. Greene, 652 A.2d 621 (D.C. 1995) (accepting trial court findings that the father assumed the greater portion of parental obligations for the children, based on evidence that focused more on what the mother did *not* do than on what the father did).

12. *See, e.g.*, Tresnak v. Tresnak, 297 N.W.2d 109 (Iowa 1980) (reversing custody award to the father that had been based, in part, on an assumption that the mother's pursuit of a legal education would be detrimental to the children, while no such assumption was made about the father, who was engaged in full-time employment outside the home).

13. *See* Becker, *supra* note 10, at 194 n.238; Sack, *supra* note 5, at 304.

even when that instability might be due to severe domestic abuse.[14]

If gender bias in the application of the presumption could be eliminated, the primary caretaker approach would produce more determinate results than the best-interests test. The primary caretaker approach, however, has additional problems. First, it presupposes that every family has a primary caretaker or, if not, that it should have one. I am talking about two different types of norms here: an empirical one—how a child *has* been cared for, *before* the divorce—and a normative one—how the child *should* be cared for, *after* the divorce. A primary caretaker rule perpetuates a particular norm—that one parent specializes (and should) in childrearing while the other parent specializes (and should) in supporting the family economically. That is a reasonable description of many families. But it is not the only reasonable reality or ideal, and it is not a reality or ideal that should be sponsored by a society that prides itself on—indeed, gives constitutional recognition to—the importance of family diversity and cultural pluralism.[15]

Second, a primary caretaker approach does not apply when there has been no primary caretaker. This fact substantially reduces its utility, for it is when there is no primary caretaker that the other factors typically considered relevant to what is in a child's best interests (see laundry list discussion) are most likely to be indecisive. A primary caretaker rule then, like the best-interests test, fails most in those circumstances in which it is needed most.

Third, a primary caretaker approach is an either/or, winner-take-all approach that fails to account for the wide variation in circumstances in which a caretaker may have been providing primary care. Jane gets custody whether she spent only slightly more time caring for the children than David, or whether she was a stay-at-home parent providing virtually *all* caretaking functions. At the same time, small differences in the parents' respective shares of past caretaking that may determine who is the primary caretaker make a big difference to the outcome, thus

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14. *See, e.g., Patricia Ann S.*, 435 S.E.2d at 6.

15. For the constitutional grounding of these values, see Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Wisconsin v. Yoder, 406 U.S. 205 (1972); Meyer v. Nebraska, 262 U.S. 390 (1923).

encouraging strategic behavior and litigation.

*C. Joint Custody Approach*

Another alternative to the best-interests test, and the favored solution of many legislators, is joint custody. Joint custody, its advocates argue, serves the child's best interests by treating both parents as important to the child, with their own strengths and unique contributions to the child's well-being.[16]

Reformers have sought to make joint custody a more likely option in custody cases by enacting measures that require judges to consider, or to prefer, joint physical custody. The strength of the presumption varies. Some states, such as Oregon, recognize a presumption in favor of joint custody only when parents agree to it.[17] Other states have rules that affect only the burden of proof, making joint custody the default rule but allowing an order other than joint custody if one parent establishes that joint custody is not in the child's best interests.[18] A few states impose a stronger presumption. In Florida, for example, shared parenting responsibility is required unless shown to be detrimental to the child.[19]

Leaving aside the special practical difficulties of working out equally shared physical responsibility in many family circumstances, a joint custody rule is inadequate for the same reason a primary caretaker rule is inadequate: it presumes that one particular form of custody is best in all cases. A joint custody rule represents a judgment by the state that both parents should have equal caretaking roles with respect to their children. While this norm, again, might make sense to many of us in our individual lives, it is not the choice many families have exercised and should not be imposed as a general standard.

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16. *See* Henry, *supra* note 7. Joint custody also has been defended as a matter of parental rights, along the lines that each parent has an equal right to access to the child just as each parent has an equal duty of support. I ignore this argument here, however, because I am talking about ways of achieving the child's best interests, rather than the parents'. *See supra* note 6.

17. *See, e.g.*, OR. REV. STAT. § 107.169(4) (1998); CAL. FAM. CODE § 3080 (West 1998). In Oregon, the presumption is accompanied by a rule against joint custody when the parents do not agree to it. *See* OR. REV. STAT. § 107.169(3) (1998).

18. *See, e.g.*, IDAHO CODE § 32-717B(1)-(4) (1998).

19. FLA. STAT. ANN. § 61.13(2)(b)2 (West 1998).

### *D. Why the Alternatives to the Best-Interests Tests Have Not Replaced It*

Although both a primary caretaker presumption and a joint custody approach have their adherents, neither approach has caught on as the way to implement the goal of the child's best interests. The reason, in my view, is that neither norm is suitable as a *starting point.* As I mentioned above, a primary caretaker presumption presupposes that there is, and ought to be, a primary caretaking parent; there often is not, and it is inappropriate to presume that there should be. A joint custody presumption states the norm that parents should divide the caretaking responsibilities for their children more or less equally at divorce; they often have not done so up to that point, and it is inappropriate to compel them to do so in the future. Each presumption may work well for some families—or at least do little harm—but may impede achievement of the child's interests in the substantial number of cases in which it does not fit the family's circumstances.

The mismatch between the ideals of each of these presumptions and the family realities within which they must be implemented has caused substantial difficulties for courts. Few states have enacted a primary caretaker presumption. Those that have—West Virginia and Minnesota—have had a disproportionate number of appellate cases in which trial court decisions have been reviewed and often overturned. The joint custody movement has produced new laws in at least thirteen states but has not made child custody decisions substantially more predictable and certain. As noted above, those legislatures enamored of the notion of joint custody as an ideal have enacted legislation that is largely symbolic, applying only when the parties have agreed to joint custody, or as a burden of proof rule. The few states that have a stronger presumption in favor of joint custody typically follow rules that counteract its effects. Louisiana, for example, presumes that joint custody is in the child's best interests unless shown to the contrary by clear and convincing evidence, but at the same time requires the designation of a domiciliary parent, with whom the child shall primarily reside.[20] In ordering shared parental responsibility in Florida, the courts also assign the child

20. LA. REV. STAT. ANN. § 9:335(B)(1)-(2) (West 1998).

a primary residence and may order "sole parental responsibility" when it is in the best interests of the child.[21] In addition, Florida courts have resisted joint custody by developing a counter presumption against rotating custody,[22] a counter presumption the legislature has tried to cure[23] with unclear results. Because joint custody does not suit the individual needs and circumstances of many families, interest in joint custody seems to be subsiding. Montana recently repealed its joint custody preference.

### *E. The ALI Alternative*

The ALI has proposed a set of default rules or "*Principles*" in the custody area that go some way toward avoiding the difficulties described above. These *Principles* provide that, unless parents agree otherwise, a parent should be allocated custodial responsibility in rough proportion to the share of responsibility the parent assumed before the divorce or the circumstances giving rise to the custody action.[24] Exceptions to this rule exist, but these exceptions for the most part are either clear and easily applicable, or require that the necessary findings be established under a heightened standard of proof. For example, a presumptive amount of custodial time is set aside for each parent, regardless of the amount of past caretaking he or she performed for the child, to assure a minimal level of post-divorce visitation for each parent. In addition, the firm and reasonable preferences of a child above a specified age must be accommodated. Exceptions also are allowed in the few cases when necessary: (1) to keep siblings together who would otherwise have different custodial arrangements, if necessary to their welfare; (2) to avoid *harm* to the child because of a *gross disparity* in the emotional attachments between each parent and the child or in each par-

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21. FLA. STAT. ANN. § 61.13(2)(b)2.a. (West Supp. 1999).

22. *See* Garvie v. Garvie, 659 So. 2d 394 (Fla. Dist. Ct. App. 1995); Caraballo v. Hernandez, 623 So. 2d 563 (Fla. Dist. Ct. App. 1993); Sullivan v. Sullivan, 604 So. 2d 878 (Fla. Dist. Ct. App. 1992).

23. The new Florida statute permits rotating custody if the court finds that it is in the child's best interests. *See* FLA. STAT. ANN. § 61.121 (West Supp. 1999).

24. *See* PRINCIPLES, *supra* note **, § 2.09. The "approximation" concept adopted in the ALI approach was first proposed by Elizabeth S. Scott in her article, *Pluralism, Parental Preferences, and Child Custody*, 80 CAL. L. REV. 615, 630 (1992).

The *Principles* apply equally to marital and nonmarital children, although much of the discussion that follows in the text assumes that custody is being determined in the context of a divorce.

ent's demonstrated ability of availability to meet a child's needs; (3) to avoid custodial arrangements that would be *extremely impractical* or that would interfere *substantially* with the child's need for stability in light of economic, physical, or other circumstances, including the distance between the parents' residences, the cost and difficulty of transporting the child, the parents' and child's daily schedules, and the parents' ability to cooperate in the arrangement; and (4) to prevent *substantial and almost certain* harm to the child. The *Principles* also require reasonable limits in access to a child to protect the child or child's parent where the other parent, regardless of the past level of caretaking, is found to have engaged in child abuse, domestic abuse, or drug or alcohol abuse.[25] In fact, when domestic abuse is established, the abusing parent cannot be allocated custodial access without findings that the child and the other parent can be protected.[26]

The *Principles* encourage the development of parenting plans, requiring that parties submit either a joint plan or separate plans that describe past parenting arrangements and a proposed future one.[27] The court is given discretion to require the appointment of a guardian ad litem or an attorney for the child (in limited circumstances) and to have an independent investigation of the family's circumstances. It may also require the parents to participate in a parenting education program and to obtain other services, including mediation, although it cannot compel face-to-face mediation if a party objects.[28] Many of the *Principles* are aimed at helping parents to agree on a parenting plan. When they do agree, courts must accept their agreement, unless the court determines that the plan will harm the child.[29]

The ALI approach to allocating custodial responsibility prioritizes a factor that courts increasingly emphasize in applying

25. PRINCIPLES, *supra* note **, § 2.13.

26. *Id.* § 2.13(3).

27. *See id.* § 2.06.

28. *Id.* § 2.08.

29. *Id.* § 2.07(1)(b). In most jurisdictions, the court retains the authority to reject a parental custody agreement under the best-interests standard. *See, e.g.*, OHIO REV. CODE ANN. § 3109.04(D)(1)(a)(i) (Baldwin 1999) (specifying that a jointly filed parenting plan shall be approved after the court reviews it and determines it is in the best interests of the child); TEX. FAM. CODE ANN. § 153.007(b) (West 1997) (directing that a court shall order agreement between the parties if it finds that the agreement is in the child's best interests).

the best-interests test: past parenting involvement.[30] The approach, however, makes this reliance more explicit and predictable. In effect, it amounts to a primary caretaker presumption when one parent has been exercising a substantial majority of the past caretaking, and it amounts to a joint custody presumption when past caretaking has been shared equally in the past. It responds to all variations and combinations of past caretaking patterns between those two poles, declining to impose some average, idealized family form on all families and instead favoring solutions that roughly approximate the caretaking shares each parent assumed before the divorce or before the custody issue arose.

The benefits of the ALI alternative are substantial. First, it focuses a factfinder on historical facts rather than on subjective questions about what is good for children, comparative judgments about the quality of emotional bonds and parental abilities, or future speculation about the different outcomes that might result from different custodial arrangements. Questions about who did what in the past can be contentious, but courts and court procedures are set up to resolve what happened in the past; they are not accustomed to predicting the future.

Because questions about past parenting patterns are factual and do not require normative judgments or speculative predictions, they should be answerable in most cases without resort to experts. At the same time, past caretaking patterns likely are a fairly reliable proxy of the intangible qualities such as parental abilities and emotional bonds that are so difficult for courts to ascertain. If the parent has been more involved with the child in the past, it may reasonably be supposed that parent is more experienced and emotionally connected to the child. Past caretaking patterns also are likely to mirror the strength of each parent's preference to spend time with the child, which means less distortion in the bargaining process.[31]

Relying on past caretaking patterns also reduces the potential for bias in custody decisions, which may be based on gender, race, religion, and other prejudicial factors. Under the best-

30. *See* Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes—1920, 1960, 1990, and 1995*, 31 FAM. L.Q. 215, 224 (1997).

31. Scott, *supra* note 24, at 637, 651-52.

interests test, it is difficult to eliminate the bias stemming from an unconscious belief that a mother's primary occupation should be raising her children, while a father should be engaged in the full-time economic support of the family. If custody must be apportioned based on each parent's past share of caretaking efforts, however, this bias has far less room to operate. A parent who obtains a greater share of custodial time because of a more extensive prior role as the caretaking parent does so not because of the court's gender bias but because of the parents' own past choices about the best way to care for the child.

Aligning post-divorce shares of custodial time with past caretaking produces better incentives for caretaking, appropriate to the circumstances and preferences of parents. A parent who expects an equal share of parenting time in the event of divorce will know that this share depends on equal caretaking participation during the marriage. In contrast, a joint custody presumption provides no incentive for a parent to increase his or her caretaking responsibility during the marriage. Even a primary caretaker presumption provides no incentive for a parent exercising little caretaking responsibility to enhance that responsibility, unless he or she is prepared to become the primary caretaker.

The ALI approach also helps resolve the very difficult disputes that arise over the relocation of a custodial parent. Currently, the debate over relocation has focused on whether the primary custodial parent should have the benefit of a presumption allowing relocation with the child, or whether the burden should be on that parent to show that a relocation is in the child's best interests.[32] Instead of picking one or the other of these approaches, the *Principles* line up each parent's burdens in accordance with past caretaking patterns. Thus, the primary caretaking parent is allowed to relocate with the child *if* that parent has been exercising a *significant majority* of custodial responsibility and intends to move for a *legitimate* reason to a loca-

32. For a representative sampling of the extensive literature in this debate, compare Carol S. Bruch & Janet M. Bowermaster, *The Relocation of Children and Custodial Parents: Public Policy, Past and Present*, 30 FAM. L.Q. 245 (1996) (arguing that relocation rules should give priority to the child's relationship with the custodial parents) with Frank G. Adams, *Child Custody and Parent Relocations: Loving Your Children from a Distance*, 33 DUQ. L. REV. 143 (1994) (arguing that greater weight should be given to the importance of the noncustodial parent-child relationship).

tion that is reasonable in light of the purpose. The *Principles* specify legitimate reasons for relocation to eliminate repetitive litigation over scenarios that pose standard relocation problems and yield inconsistent results. Those reasons deemed legitimate include: (1) significant health justifications; (2) pursuit of a significant employment or educational opportunity for oneself or one's spouse; (3) proximity to significant family or other support networks; and (4) protection of the child or another family member from abuse.[33] If the move is for any other reason, the burden is on the moving parent to show that the relocation is in good faith, for a legitimate purpose and to a location that is reasonable in light of the purpose.[34] If the parent does not meet that burden or has not been exercising a significant majority of custody responsibility, the relocation triggers a reconsideration of the allocation of custodial responsibility and, possibly, the shifting of primary custody to the nonrelocating parent.

## III. CONCLUSION

I close where I began, by emphasizing that the approach I have described is not an alternative to the child's best interests. The ALI approach is, I believe, the best test *for achieving* the child's best interests. It recognizes that determining the child's best interests under a wide-open, subjective best-interests standard leaves too much discretion to judges and their individual views about childrearing and what is good for children, and in so doing, creates an unpredictability that enhances conflict and harms children. It recognizes, in short, that the best-interests test is not best for children.

The *Principles* also acknowledge that the child's best interests cannot be determined by comparing the alternatives against a set of substantive state-prescribed norms. The state should not be in the business of defining either the ideal childhood or the circumstances in which such an ideal could be achieved. Even if you and I could decide what is best for children, I question whether we would really want everyone to agree with us and rear their children accordingly. We live in a society that not only *tolerates* variety in parenting arrangements and styles, but values

33. PRINCIPLES, *supra* note **, § 2.20.

34. *See id.*

that variety. It is in keeping with this value that the ALI *Principles* choose continuity in who has parented the child the past over conformity to a future division of responsibilities that the state deems "best." The approach finds its determinacy and substance in the norms of the individual family, not in the norms of individual judges or state legislators. It achieves, as far as is reasonably possible, predictability consistent with the child's best interests and with this society's commitment to pluralism.