

Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project

KATHARINE T. BARTLETT*

I. Introduction

It is appropriate that the *Principles of the Law of Family Dissolution* by the American Law Institute (ALI) are among the topics discussed at a symposium to mark Robert Levy's retirement. This ambitious project began in 1989 and went through many stages and reporters. I did not become a reporter for the custody provisions until 1994. Levy was part of the original group of advisers, and through ups and downs, stayed with the project as one of its most steadfast, active contributors. This is so even though the project adopted a number of rules with which Levy actively disagreed. In the case of each issue on which he would have taken a different position, Levy would state his case, fight for it vigorously and respectfully, and be ready to move on whatever the outcome, often inviting those with whom he disagreed out for cocktails when the debate was over and settled. A number of other contributors to this symposium were also central to this project. Ira Ellman, the chief reporter, was responsible for the chapters dealing with property distribution, spousal compensation, separation agreements, and unmarried cohabitants. Herma Hill Kay was responsible for having the ALI take on this project to begin with, and as member of the institute's council and an ever-wise adviser, she was perhaps the most influential

*A. Kenneth Pye Professor of Law, Duke University School of Law.

supporter of the project, although she did not always get her way, either—no one did. Gary Skoloff and John Gregory were very active advisers on the project although they, too, had points of disagreement.

The central goal of the ALI's Family Dissolution Project was to develop standards that provide surer, quicker, more certain results when families break up. Levy was not entirely sympathetic to this goal, at least in the custody area. In this regard, it is interesting that throughout most of the nation's history, custody cases did have fairly predictable results. Law gave fathers the right of custody to their children in the nineteenth century, gradually giving way in the twentieth century to a legal presumption in favor of mothers who, until the 1980s or so, were assumed to be the natural guardians of children. However, predictability alone does not make a rule sound, and it was a huge leap forward for custody law in the 1970s and 1980s when, with the leadership of Bob Levy and Herma Hill Kay, the Uniform Marriage and Divorce Act abandoned sex-based presumptions and preferences in favor of the best-interests test.¹ Today, this test remains the most widely applied custody standard.

There is something very appealing about the best-interests test for deciding custody questions. Certainly, as between the interests of squabbling adults who have not been able to keep their commitments to one another and dependent, defenseless children, the best-interests test prefers the right set of parties. However, is the best-interests test necessarily the best approach to settling custody disputes when a family breaks down? It was the premise of the ALI's Family Dissolution Project that enough is known now, in part because of the work of Levy and others, to make the test better. The test is made better in the ALI Project by turning what is known into preferences or presumptions which, if well chosen, can accomplish all the best-interests test can accomplish and more. To choose well, one needs to know something about children and one also needs to be cognizant of the different roles and purposes preferences and presumptions can serve in the different contexts in which they can be made to function. In particular, one needs to judge the utility of the available preferences and presumptions with respect to their impact at different points in time (before and during marriage and at divorce), with respect to the different groups or individuals affected by them (that is, children generally, and the specific child whose custody is at issue in a specific case). This article is an effort to evaluate the ALI's *Principles* from these different perspectives.

1. See Uniform Marriage & Divorce Act § 402 (1973).

II. The Child's Best Interests: Who, What, Where, When, and How

Many have written at length about the negative side effects of the best-interests test.² Most critiques focus on the indeterminacy of the rule, especially in closely contested cases in which, as it happens, a clear standard is most necessary. What one judge may feel is in a child's best interest (for example, stability, with the parent with the most consistent routines and firm discipline) may not be what another judge believes is in a child's best interests (for example, love and acceptance with the parent possessing the most warmth, creativity, and spontaneity). Because of the potential variability of result, the story goes, parents cannot be sure of the outcome and are thus more likely to litigate custody. Litigation means conflict, often prolonged, during which parents feel the need to hire experts to highlight defects in the other parent rather than working with parents together to minimize the effects of divorces on children. These consequences are not realized in every case, of course, but they are made more likely by an open-ended, indeterminate standard than by a more predictive one.

Another criticism of the best-interests standard is that it invites qualitative judgments of parents even though they are not unfit. Here, the problem is not indeterminacy but quite the opposite. This society puts great value on both parental autonomy and family diversity. The best-interests standard risks these values if judges, whose variability with respect to parenting norms tends to stay within a certain mainstream range, penalize parents who do not conform their parenting practices within this range.

These critiques relate, in the first instance, to how the best-interests test functions at the time there is a custody dispute to resolve. At this time, there is legitimate concern about the impact of the best-interests rule on different actors: (1) judges, whose exercise of power should be controlled and should not intrude on matters that are best left to parents;

2. The classic critiques include Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TULANE L. REV. 1365 (1986); Gary Crippen, *Stumbling Beyond the Best Interests of the Child: Re-examining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990).

(2) parents, whose conduct should focus on acting together on behalf of the child rather than fighting as adversaries in a zero-sum game; and (3) the child, whose welfare depends on the law's ability to steer both judges and parents into making good decisions on his or her behalf. The best-interests standard does little to constrain or steer judges; it encourages parents to contest custody; and it leaves children vulnerable to the effects of both.

Ironically, it is in the context of the dispute itself that the best-interests test also looks most appealing, for it is when faced with the specific circumstances of some individual cases that rules that were settled in advance sometimes appear to produce the wrong result. At this point in time, those settled rules appear abstract and pre-packaged when what seems to be called for is a more open-ended, flexible test. This is so even though it is the result-oriented impulse that the rule of law is ordinarily praised for restraining.

The best-interests test looks a little different viewed from the time before a custody dispute arises. Then, the focus on "best interests" of the child would seem to send the correct, beneficially vague message about the priority to be placed on children.

The difference between *ex ante* and *ex post* perspectives become quite significant in evaluating specific rules that might be used to refine the best-interests test. Consider, for example, a joint custody preference. Viewed only at the time of divorce, a joint custody preference appears to encourage joint parenting regardless of past circumstances, which arguably is a legitimate goal, although not entirely consistent with this society's commitment to family diversity and autonomy. Even if joint parenting is a legitimate public goal, however, viewed while the family is intact, the rule has the effect of deferring an incentive toward joint parenting until divorce. If joint custody is to be preferred at divorce regardless of prior parental involvement in a child's caretaking, during marriage a parent is probably better off leaving it up to the other parent to raise a child—if he can get away with it—while developing his human capital in the workplace, where time and experience could yield significant personal value over the long haul.

The importance of evaluating a rule's side effects on conduct outside the context of an actual legal dispute can also be illustrated by weighing the benefits of a strong parental rights rule against those of a rule that liberally recognizes parent-like relationships between non-parents and children. The stronger the protection of parents from interference by others as they try to carry out their parental responsibilities (*ex ante*), the stronger the normative message to parents that they are responsible for loving and protecting their children. At the time of a dispute, how-

ever, such a rule might stand in the way of a state's protecting children when parents do not act as expected. In other words, a rule of strong parental autonomy looks good until it results in a seven-year-old child's being shipped off to live with his father, who had hardly any contact with the child, instead of being kept with his stepfather, who functioned as the child's real father for five of his seven years. In this case, a law focused on getting the best result (*ex post*) might not be the rule that best prevents such a dispute (*ex ante*).

An example from child support law highlights the difference still further. A support rule that requires an automatic jail sentence or perhaps even sterilization if a support obligation is not met might provide the strongest inducement for payment of child support obligations (*ex ante*). However, it might not be wise to apply such a rule to parents who do not meet their obligations; for such parents, second-best solutions such as wage garnishment and automatic wage withholding would enable them to stay employed and to support their children. Yet, the softer alternatives undermine the strength of the message sent by the stronger rule, making it likely that more parents will fail to pay their child support. Viewed *ex ante*, the most effective rule may not be a very good approach as to those for whom the rule does not do the trick, and the most effective rule *ex post* may be a poor way to bring about the desired result: payment of child support without the constant need for legal machinery.

Just as the *ex ante* and *ex post* perspectives may point toward different ideal rules, so might the way the protected group is defined. Should custody rules focus on the welfare of all children in general or the welfare of a specific child who is the subject of a custody dispute? It is generally thought, for example, that it is best for children if race, sex, and religion are not factors in custody disputes. If these factors were allowed to come into play, they would reinforce racism, sexism, and religious intolerance and allow prejudice to outweigh other factors more relevant to children's welfare. Nevertheless, when a specific child being raised by a parent who adheres to the strict tenets of an isolationist religion keeps a child from mainstream education, friends, and material advantages, society becomes concerned about the individual child's best interests. In the abstract, it is parents' business, not society's, to judge their children's interests (in a world many of us would have to admit is too materialistic), but when society hears of a child who has no exposure to a world outside her racist, backward, and militaristic survivalist sect, society may discern a clear sense of the child's interests that betrays abstract principles. There is a sense, then, this real, specific child deserves something better. Ironically, the rule that seems to elicit

the specific result many want in this specific, unusual case is the most general, best-interests standard.

The weaknesses of the best-interests standard, viewed *ex ante* and from the point of view of children, are less clear than the weaknesses *ex post* from the perspective of specific individual children. Viewed *ex ante*, the general message conveyed by the best-interests standard is probably as useful as it can be, and greater specificity might risk committing a state to a preferred set of parenting practices. What the ALI's *Principles* assume, however, is that the determinacy of the best-interests standard can be improved for *ex post* purposes without compromising this positive, child-centered message. This improvement is based on presumptions and preferences that refine the best-interests standard without abandoning it.

A number of presumptions and preferences are already incorporated into custody law. One example is that when a child is born, her parents take primary responsibility for her upbringing. This reflection is not made on a case-by-case basis in accordance with who has the highest parenting skills, or the most economic resources, or the highest educational level; instead, the child's parents are chosen. Why? Because society has determined, *ex ante*, that it is in the best interests of children generally, and society at large, if parents are charged with primary responsibility for their children. It is assumed that if parents have relatively unrestricted custody and control of their children, the children are better off as a general matter, even though that is not always the case. It is also assumed that parents with autonomy are more likely to make the kind of emotional and financial investment that children need and that parent-child relationships (and thus children) gain from having these relationships secure and stable rather than subject to interruption from the outside, even though these factual predicates are not present in many specific cases. It is assumed that the insecurity and instability of a less certain rule about parental prerogatives is bad for children even though there are strangers who would be able to offer many children greater stability, economic support, and better parenting skills than what the children's own parents offer. The parental autonomy rule is preferred not just because society wants to eliminate case-by-case conflicts over children but because affirming parents' responsibility makes parents more responsible—in other words, because of the *ex ante* impact.

The role of presumptions and preferences in refining rather than eliminating the best-interests standard is important to a greater general understanding of custody conflict. Public debates over David Koresh's children, the children of Ruby Ridge, Baby M., Baby Jessica, and Elian

Gonzales are often presented as debates over the best interests of a child versus the best interests of a parent or, in some cases, a state. This is rarely a fair or helpful framing of the issue. Almost always the subject at hand is not the best interests of a child versus someone else but rather competing visions of a child's best interests from different standpoints. What often passes as the right of parents to trump the interests of their children—the parental autonomy rule—is actually one sensible and very well-founded child-centered principle designed to put children's interests above all others. It does not always seem that way in the exceptional cases that are in the headlines because they illustrate how rules, designed in advance with the benefit of all children in mind, have failed to produce the desirable conduct in an individual case when, say, a mother names the wrong father, a raft capsizes, or a foreign policy intrudes. The rules in these circumstances do not seem to work, and an open-ended best-interests standard would seem to offer a safety valve to that result. Without presumption-based rules, however, nothing would prevent the treating of every case as if it were unusual, which would leave a pure discretion-based system with all of the difficulties outlined earlier.

Generalizations cannot be avoided: Whether in the context of specific rules designed before a specific conflict arises or discretionary rules allowing the greatest possible flexibility at the time of a specific conflict, a case is decided by generalizations. The question is who makes those generalizations and when—judges, at the time of custody decisions, or rule makers, in advance.

The ALI's family dissolution project seeks to work from the best available generalizations about what is in the best interests of children, in advance of the conflict to be resolved. In so doing, the ALI's principles of family dissolution take into account the virtues of having rules that predict actual results in specific cases along with the impact of custody rules on parental behavior before custody cases arise.

III. The ALI *Principles*: Anchoring Best Interests in the Family Itself

The central principle of the ALI's custody provisions is that custodial responsibility at family dissolution should be allocated in a way that roughly approximates the proportion of time each parent spent caring for a child when the family was intact.³ This is the bedrock principle

3. AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS*, § 2.08 (Proposed Final Draft, Part II, 2002).

of the custody chapter. The standard requires courts to determine how caretaking responsibilities are approximately divided between parents, and it gives this rough allocation presumptive weight. The estimate must be used as a guide for allocating custodial responsibility at family dissolution, subject to a limited number of qualifications that justify alteration of that allocation. Those qualifications—each in its own way is a different presumption or preference—are as follows: (1) Each parent who has been minimally responsible with respect to a child in terms of child support or other manifestations of responsibility is guaranteed a minimum level of access. The jurisdiction chooses a specific period of time, which can be tailored to the age or other circumstances of the child, to constitute that minimum level of access.⁴ (2) A child's preferences may alter the allocation if those preferences are firm and reasonable and if the child has reached the age specified by a legislature or other rule-making body.⁵ (3) Adjustments are possible when necessary to keep siblings together for their own welfare.⁶ (4) An allocation may be altered if necessary to protect a child and to take account of a gross disparity in the quality of each parent's emotional attachment to the child, ability, or availability to meet the child's needs.⁷ (5) Prior agreements by a couple may be taken into account if necessary to protect reasonable expectations of the parents and the interests of the child.⁸ (6) Adjustments may be made if necessary to avoid extremely impractical arrangements.⁹ (7) The standard is not applied to the extent necessary to protect a child or parent from domestic abuse.¹⁰ (8) The standard is not applicable if it would require an allocation that would be manifestly harmful to the child.¹¹

The *Principles* not only guide an initial custodial allocation but also impact on later decisions to modify the allocation, such as when one parent relocates. To give custodial orders stability, they may ordinarily not be modified unless there is a substantial change of circumstances making modification necessary to a child's welfare.¹² However, when parties agree or when caretaking patterns have changed, it is presumed that the parental agreement, including any acquiescence in new de facto arrangements, would be better for a child than an arrangement origi-

4. *Id.* at § 2.08(1)(a).

5. *Id.* at § 2.08(1)(b).

6. *Id.* at § 2.08(1)(c).

7. *Id.* at § 2.08(1)(d).

8. *Id.* at § 2.08(1)(e).

9. *Id.* at § 2.08(1)(f).

10. *Id.* at § 2.08(1).

11. *Id.* at § 2.08(1)(h).

12. *Id.* at § 2.15.

nally ordered by a court.¹³ With respect to relocation, actual caretaking patterns prevail. If one parent has been exercising a significant majority of custodial time, that parent may relocate with the child as long as the relocation is in good faith, for a legitimate purpose, and to a location that is reasonable. As a kind of presumption within a presumption, a number of purposes are designated as being presumptively legitimate, including a move to be close to significant family or other support networks, for significant health reasons, to protect a child from domestic abuse, to pursue reasonable employment or educational objectives, or to be with one's domestic partner.¹⁴

The approach of the *Principles* to third parties also reflects an emphasis on past caretaking. Only third parties who have actually engaged in caretaking for a child qualify to have standing (either as a de facto parent or as a parent by estoppel). While parents are given some priority in the allocation of primary custodial responsibility, the proportion of caretaking time is the primary factor in determining how much custodial time a third party will be allocated.

This rule is defensible as the best rule to deal with the interests of an individual child at the time of divorce. Its strengths are that (1) the past caretaking standard¹⁵ focuses courts on determinate matters of historical fact, with which courts are accustomed, rather than indeterminate and evaluative judgments about the future; (2) the standard focuses on concrete acts and patterns of caretaking, rather than subjective or qualitative judgments about parenting, the strength of emotional relationships, and the like; (3) without requiring courts to resolve indeterminate questions about emotional relationships and quality of parenting, the shares of past caretaking by each parent are nonetheless likely to reflect the strength and quality of each parent's relationship with a child; (4) the past caretaking standard does not require experts, who tend to highlight the weaknesses of each parent rather than their strengths, and how the parents can best work together for the child; and (5) because of its greater determinacy, the past caretaking standard makes it easier for parents to predict the outcome of a case and, thus, more likely to settle the case earlier and more amicably.

All of these rationales are centered on a particular conflict, where the case for greater determinacy is compelling, as long as there is a

13. *Id.* at § 2.06.

14. *Id.* at § 2.17.

15. The term *past care-taking standard* was based on a test first proposed by Elizabeth S. Scott, who referred to as the "approximation standard." See Elizabeth S. Scott, *Pluralism, Parental Preferences, and Child Custody*, 80 CAL. L. REV. 615 (1992).

more determinate rule that is viable on policy grounds (which the past care-taking rule is). How does one compare an open-ended best-interests-of-the-child test against the past caretaking test from an ex ante perspective? To be sure, the best-interests test sends a strong child-focused message. It sets children up on a pedestal and insists that children's interests, not the interests of adults, should be paramount—so far, so good, ex ante. That children's interests should be paramount is a salutary message and helps to construct society in child-centered ways.

However, is it an adequate message? The best-interests standard tries to have it all possible ways, offering parents the freedom to decide for themselves what is in their children's best interests during marriage while allowing a state to make its own determination about what is best for children at divorce. In this sense, it hides the ball, failing to give adequate notice of what a state will take as relevant in the event of family dissolution.

The emphasis on past caretaking addresses this issue. For custodial purposes, past caretaking is the factor that matters most. For certain purposes (custody), caretaking is not fungible with other roles nor are individuals fungible when it comes to caretaking. This does not mean that other roles are not important or that both parents are not important, but a past caretaking standard states that the best interests of children with respect to post-divorce custody are most closely tied to the provision of actual caretaking to the child.

The fact that the standard relates back to decisions parents made is also significant from an ex ante perspective. The past caretaking standard does not decide in the abstract whether a joint parenting model is the ideal or specialization by each parent in either caretaking or bread-winning. It allow parents to decide that for themselves and then builds on this foundation.

With custodial time linked to actual caretaking, a parent (rather, informed parent informed in the law) knows that the extent of his future relationship with a child may depend on actual caretaking for the child. For some families this may be a powerful incentive but not for all families. Despite the odds, it is well known that most couples do not believe that they will ever divorce.¹⁶ Moreover, even those whom the message reaches will not necessarily be influenced to change their be-

16. See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is above Average*, 17 *LAW & HUM. BEHAV.* 439, 443 (1993) (reporting survey data showing that median response of marriage license applicants assessing likelihood that would get divorced was 0%).

havior. Parents allocate responsibility for the care of their children in many different ways and for many good reasons. For some families nothing makes more sense than parental role specialization, in which one parent invests heavily (on behalf of the family) in the workplace while the other devotes herself (on behalf of the family) to managing household and children.

It is important to note that it is not the purpose of the ALI that parents change their behavior on account of the past caretaking rule. Faithful to the objective of recognizing and supporting family autonomy and diversity, the ALI's *Principles* attempt to remain neutral as between this traditional set of arrangements and a more jointly shared caretaking pattern, establishing only that whatever parents do will be reflected to the extent possible in post-divorce custody arrangements.

The past caretaking rule would act as an incentive for changed behavior only if it produced a different result at divorce than a parent might seek in the (usually unanticipated) event of divorce and if the parent values his or her desired result enough and perceives the likelihood of divorce sufficiently high to change behavior accordingly. How often this will occur cannot be reliably known and does not matter. The success of the rule should not be judged by how many couples rearrange their caretaking roles more evenly. Roles will and should be rearranged only if how roles will be allocated in the event of divorce matters enough to parents. The important thing is that the rule gives clearer notice than the more general best-interests test, both of the potential consequences of one's caretaking arrangements and, if one cares enough about it, of what one could do to produce a different future result.

The past caretaking rule is also highly realistic, taking into account the costs and benefits of every decision a parent makes about caretaking and market employment. Under the ALI's approach, the potential effects of an investment in child-rearing are not unlike those expected for the investment many individuals make in their own careers. An employed individual anticipates not only the immediate return of a paycheck and the pleasures of doing a job well but also more opportunity in the future because her experience and skill level will increase. The more an employee puts into a job, the more she expects to get back in the future. While the analogy is not perfect, a parent's investment in child-rearing likewise can be valued both for its present benefits (and costs) to parent and child and for the potential value of the investment to the future welfare of the pair. This is not to say that one is entitled to a return in child-rearing, as one might expect a return from investing

in one's human capital in the workplace, but rather to point out that the ALI's *Principles* should not be viewed as unfair (if fairness is even an appropriate criterion) simply because they afford a kind of return on a parent's investment in caretaking.

A number of other presumptions embedded in the ALI's project further demonstrate the advantages of presumption-based rules, which if correctly chosen, make common sense. First, the *Principles* prohibit decision-makers from taking into account of a number of prohibited factors, including race, sex, religion, sexual orientation, extramarital sexual conduct, and the economic circumstances of the parties. As to some of these factors, there are qualifications or subtleties to these prohibitions. For example, the fact that a parent is unable to support a child's self-esteem with respect to the child's race or sex may matter in appropriate circumstances even if the race or sex of the parent may not. Outside this and other narrow exceptions, it is presumed that these factors are either not relevant to a child's best interests or are of such importance to other social objectives that they should not be taken into account. Thus, the *Principles* do not allow courts to assume that mothers raise teenaged girls better, that adolescent boys benefit most from living with their fathers, or that biracial children of white and black descent are better raised by their black parents than by their white ones. Assumptions to the contrary are simply too likely to be the product of stereotypes about gender and too unlikely to help guide good decisions for children.

The presumption that the gender of a parent is not relevant to a child's best interests is difficult to implement fully since gender bias is so often engaged unintentionally or with benign neglect. Despite efforts to avoid gender bias, courts tend to give fathers more credit than mothers for doing what is expected of mothers,¹⁷ to penalize mothers more than men for extramarital affairs,¹⁸ and to think that a mother's in-

17. *See e.g., In re Fennell*, 485 N.W.2d 863, 864 (Iowa Ct. App. 1992) (court stated that it was "careful to approach the issue without sexual stereotypes" but affirmed a custody award to the father after observing that "[the father,] as an at-home parent, has relieved [the mother] of the numerous child raising problems that occurred during her waking hours," although the mother worked from 5:30 A.M. to 2 P.M. and assumed all responsibility for the family during her non-working hours); *Patricia Ann S. v. James Daniel S.*, 435 S.E.2d 6, 16 (W. Va. 1993) (Workman, C.J., dissenting) (pointing out that "both the family law master and the circuit court appear to have been bowled over by the fact that the father helped in the evenings and the weekends," thereby equating the father's limited hours with the child to those of the mother who had given up her career to be a full-time, at-home parent).

18. *See, e.g., Linda R. v. Richard E.*, 561 N.Y.S.2d 29, 31 (App. Div. 1990) (reversing custody award to father that had resulted from extensive testimony regarding a mother's alleged affair when no similar line of questioning was allowed regarding the father).

vestment in her career is selfish while a father's is the act of a responsible provider.¹⁹ One advantage of a strong past care-taking standard over a best-interests test—although any standard can be misapplied as a result of gender bias—is that there is less room to give rein to one's gender biases with this more concrete, fact-based standard.

The *Principles* make presumptions about domestic abuse that are also instructive. They require a court to assume that if a parent abused a child, inflicted domestic abuse, abused drugs, or persistently interfered with another parent's access to a child, limits on the first parent's access are necessary to protect the child or the other parent from harm. A nonexclusive list of these limits appear in the Blackletter. Written findings are required to support any allocation of custodial or decision-making responsibility to a parent, which justify allocation in light of the assumed dangers of these behaviors. Presumptions are used in this context because courts have historically failed to take sufficiently serious evidence of domestic abuse. Without such assumptions, it has been too easy for courts to ignore evidence of domestic abuse or to assume that it will not happen again. As with the limitations on consideration of the gender of a parent or child, presumptions function to counteract the proven tendency of some courts to make judgments based on ignorance or stereotypes.

As a final example, the *Principles* address third-party parent figures. The best-interests test is playing an increasing role in such cases. Hawaii has the most liberal rule, allowing a custody award to "persons other than the father or mother whenever the award serves the best interests of the child."²⁰ Other states, such as New Jersey²¹ and Colorado,²² apply a best-interests standard when a child has been in the custody of a third party for a sufficient period of time. The ALI's principles recognize individuals in addition to biological parents whose continued care-taking role is presumed to be beneficial to the child. These categories

19. See, e.g., *Olive v. Olive*, No. 91CA005200, 1992 WL 139997, at *1, 10 (Ohio Ct. App. June 17, 1992) (Cook J., concurring) (affirming award of custody to father, notwithstanding fact that mother had been the primary caretaker of their four children, because during the last year before the divorce the mother worked part-time, attended school, and was away from home for large amounts of time, which led trial court to conclude that her motivation was "selfish"); *Masek v. Masek*, 229 N.W.2d 334 (S.D. 1975) (affirming custody to father who worked full-time rather than mother who was a part-time music teacher after concluding that mother was unfit because her "primary interests are in her musical career and outside the home and family").

20. HAW. REV. STAT. § 571-46(2) (Supp. 1999).

21. See, e.g., *Todd v. Sheridan*, 633 A.2d 1009, 1010 (N.J. Super. Ct. App. Div. 1993); *Zack v. Fiebert*, 563 A.2d 58 (N.J. Super. Ct. App. Div. 1989).

22. 1. See COLO. REV. STAT. §§ 14-10-123(1)(c); 14-10-124(1.5)(1) (2000); *In re Custody of C.C.R.S.*, 892 P.2d 246, 248 (Colo. 1995), *cert. denied*, 116 S. Ct. 118 (1995).

are strictly and concretely defined; they include adults who functioned as parents and believed in good faith that they were the children's legal parents, adults who have functioned as parents and are accepted by legal parents (parents by estoppel), and parents who gradually took over the primary caretaking role even though realizing they were not legal parents (de facto parents).

The principles tread very carefully here because of traditional concern of displacing legal parents as the expected and strong first resort in parenting. Presumptions function in this framework to hold a legal parent's priority and to identify as clearly as possible when that priority has to give way to others. For example, a third party is not recognized as a de facto parent unless he lived with a child for at least two years for reasons primarily other than financial compensation and formed a parent-child relationship with the agreement of a legal parent or as a result of a complete failure of parenting. In addition, the person must have regularly performed a majority of the caretaking or at least as much caretaking as the parent with whom the child primarily lived. Even when the *Principles* recognize a de facto parent, he cannot be allocated primary residential responsibility unless the legal parent is not able to assume responsibility or has not been assuming a minimal amount of responsibility for a child or unless the available alternatives meet a rather high threshold of being harmful to the child.

IV. Conclusion

The best-interests rule has the advantage of making children's interests paramount and subordinating the interests of others. The problem is not with this elevation of children's interests but with its lack of specificity. Specificity is required to resolve tough cases when rules are the most necessary and have the most significant consequences. If specificity is based on sound generalizations and common sense, it can serve this purpose without undermining the broad message to parents to act in the welfare of their children. This is what the ALI's *Principles* seek to achieve.

In recent years, legislators have tried to make many types of rules more determinate; federal criminal sentencing standards and immigration laws are but two examples.²³ The principle motivation for greater determinacy in these areas has been the desire to check the discretion

23. 12. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. 11, ch. 2, 98 STAT. 1987 (1984) (codified at 18 U.S.C. §§ 3551-3673; 28 U.S.C. §§ 991-998 (1984)).

of decision-makers and to make them more accountable. This is a concern about the power of judges. This concern exists in family law cases. One of the virtues of the past caretaking standard is that it relieves courts of making difficult determinations such as who is the best parent, who has the strongest emotional connection to the child, or who will be the best parent. The standard requires only that courts make the kinds of decisions they are accustomed to making: what happened in the past. It leaves the rest up to parents themselves. This leaves courts out of the best-interests business as much as is possible, and by leaving things in parents' hands, it preserves the tradition of family diversity that runs deep in U.S. culture. When preferences and presumptions track past parental decisions, no longer at risk is the kind of standardization that comes when courts decide what is best nor are decisions so vulnerable to gender or religious bias.

The ALI's *Principles of the Law of Family Dissolution* make sense not only from the perspective of limiting judges at the time of a custody conflict but also from the standpoint of the messages to parents who are not in custody conflicts that they get to choose how their children will be cared for, that those decisions have possible consequences if the family does not remain intact, and that the most relevant factor to children's future caretaking arrangements is the past allocation of caretaking responsibility. The principles use the preferences or presumptions that encapsulate what common sense tells about children.

My hat is off to Bob Levy for all he has done in an interdisciplinary context to refine the understanding of what is good for children. More than anyone I know, he would concede that this work is not done. Disagreements might remain, but these should be disagreements not about whether there should be presumptions but about how to make preferences and presumptions better.

