PARENTING BY THE CLOCK:

THE BEST-INTEREST-OF-THE-CHILD STANDARD, JUDICIAL DISCRETION, AND THE AMERICAN LAW INSTITUTE'S "APPROXIMATION RULE"

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ABSTRACT

The American Law Institute proposes that in contested physical custody cases, the court should allocate to each parent a proportion of the child's time that approximates the proportion of time each spent performing caretaking functions in the past. Examined through the lens of child development research, the approximation rule is unlikely to improve on the best-interests-of-the-child standard. The approximation rule is difficult to apply, creates a new focus for disputing parents, renders a poor estimate of parents' contributions to their child's best interest, and overlooks parents' intangible, yet significant, contributions to their child's well-being. Measuring past-caretaking time is difficult, and quantity of care does not correlate with quality of care. A best-interests standard that retains the benefits to children of individualized decision making is preferable in the context of contemporary reforms that accommodate new knowledge and encourage non-adversarial resolutions of custody disputes.

Keywords: approximation rule, child custody, divorce, custody disputes, best-interests-of-the-child, joint custody, equal custody, primary-caretaker presumption, friendly parent presumption, American Law Institute.

There is always an easy solution to every human problem—neat, plausible, and wrong.

— H. L. Mencken

I. INTRODUCTION

In 1972, the best-interest-of-the-child standard (the best-interest standard) replaced a centuries-old reliance on stereotyped gender-based assumptions in child custody matters.[1] In recent years, the emphasis on individualized multi-factored custody determinations has come under assault. Critics raise two main concerns related to the broad judicial discretion inherent in the prevailing standard: the vague standard increases the likelihood of psychologically harmful litigation (and decreases the rate of pre-trial settlements), and it serves as a conduit for personal biases to influence outcomes.[2] Of the various remedies proposed, the one poised to replace the best-interest standard, by virtue of its endorsement from the prestigious American Law Institute (ALI), is the approximation rule.[3] The rule divides the child's time with each parent according to the proportion of time that each parent participated in caretaking prior to the separation.[4]

ALI's Restatements of the Law—formulated by influential jurists, bar leaders, and law professors—profoundly influence American law, even prior to legislative endorsement. After a slow start, the approximation rule is gaining ground. Its impact is felt in courts. In *In re Marriage of Hansen*, the Iowa Supreme Court, electing not to adopt the approximation rule absent legislative approval, nevertheless praised the rationale behind the rule: "By focusing on historic patterns of caregiving, the approximation rule provides a relatively objective factor for the court to consider."[5] In *In re The Marriage of Powers*, the same court favorably cites a rationale for the approximation rule offered by ALI's reporter: "'[P]ast caretaking

1. *See, e.g.*, *Ex parte* Devine, 398 So. 2d 686, 696 (Ala. 1981); Stephen J. Bahr, *Trends in Child Custody Awards: Has the Removal of Maternal Deference Made a Difference?*, 28 FAM. L.Q. 247, 249 (1994). Professor Guggenheim points out, "Even though as late as 1976 in more than thirty states the mother was awarded custody of her young children, so long as she was fit, the tender years doctrine was rapidly replaced by gender-neutral rules." MARTIN M. GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 147 (2005) (endnote omitted).
2. *See* Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 508 (1987).
3. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002) [hereinafter PRINCIPLES].
4. *See* Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared Parenting*, 25 N. ILL. U. L. REV. 347, 353 (2004).
5. *In re* Marriage of Hansen, 733 N.W.2d 683, 697 (Iowa 2007).

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.'"[6] The Massachusetts Supreme Judicial Court cited the approximation rule in *In re Custody of Kali* to support a preference for the continuity of current relationships.[7]

In addition to case law citations, the approximation rule has been adopted by West Virginia;[8] must be considered by judges in Catalan, Spain when making custody determinations;[9] and is under serious consideration in other jurisdictions, including Illinois and Pennsylvania.[10] Even when the rule falls short of adoption, proponents' arguments present formidable obstacles to other family law reform proposals, such as joint custody presumptions. In debates over child custody reform, the approximation rule has become the pivotal issue.[11]

6. *In re* Marriage of Powers, No. 07-0006, 2008 WL 2312873, at *2, *3 (Iowa May 16, 2008) (quoting Katharine T. Bartlett, *Child Custody in the 21st Century: How the American Law Institute Proposes to Achieve Predictability and Still Protect the Individual Child's Best Interests*, 35 WILLAMETTE L. REV. 467, 473 (1999)).
7. *In re* Custody of Kali, 792 N.E.2d 635, 642 (Mass. 2003).
8. W. VA. CODE ANN. § 48-11-106 (West 2007).
9. *See* Andrina Hayden, *Shared Custody: A Comparative Study of the Position in Spain and England*, INDRET, Jan. 2011, at 14–16, *available at* http://www.indret.com/pdf/795_en.pdf.
10. Illinois is currently considering a proposal that adopts verbatim ALI's description of caretaking functions and incorporates the approximation rule as one factor in determining best interests. H.B. 4158, 94th Gen. Assemb., (Ill. 2005). In testimony before the House Judiciary Committee, Subcommittee on Family Law of the Pennsylvania House of Representatives, Pennsylvania Supreme Court Justice Baer recommends adoption of the approximation rule as the next standard in custody legislation. *Hearing on H.R. 418, H.R. 463, and H.R. 1639 Before the Subcomm. On Family Law of the H. Judiciary Comm.*, 2010 Legis., Reg. Sess. 32–33 (Pa. 2010) (statement of Justice Baer), *available at* http://www.legis.state.pa.us/cfdocs/legis/tr/transcripts/2010_0022T.pdf.
11. *See* Young v. Hector, 740 So. 2d 1153, 1157–58, 1162–64, 1172-73 (Fla. Dist. Ct. App. 1999) (upholding a trial court's custody determination; withdrawing the ruling of an appellate panel that relied on the approximation rule; refusing to adopt a dissenting judge's reliance on the approximation rule); Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189, 1193 ("[B]ecause many influential jurists, law professors, and bar leaders helped to create it, it is certain to find a receptive audience in at least some lawmaking, legal, and academic circles."); Robin Fretwell Wilson, *Introduction to* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 1, 2 n.5 (Robin Fretwell Wilson ed., 2006) ("It is difficult to overstate the degree of the ALI's influence. As of March 1, 2004, state and federal courts have cited the Restatements 161,486 times."); *id.* at 3 ("Because of the prestige of the ALI, judges will

Steeped in assumptions about child and family development, yet lacking reliable social science support, the approximation rule begs for closer examination before judges and legislators embrace it. This article examines the strengths and weaknesses of the best-interest standard as it is applied in contemporary cases, and compares it with the alternative proposed by the ALI. Results from the first survey of lawyers and child custody evaluators regarding the approximation rule support the conclusion that the rule is unlikely to do a better job than the status quo in securing children's best interests.[12] The rule provides incentives to increase rather than reduce parental conflict.[13] It mistakenly assumes that past caretaking is an index of qualitative aspects of parent–child relations; this assumption reflects a simplistic and faulty understanding of the science of child development.[14] Furthermore, the exceptions to the rule enumerated by the *Principles of the Law of Family Dissolution* (*Principles*) are precisely the issues raised in custody disputes; thus, the exceptions swallow the rule and undermine the *Principles*' goals of reducing the incidence of custody

undoubtedly rely on the PRINCIPLES as they have relied on the ALI's Restatements. Legislators are also likely to turn, rightly or wrongly, to the PRINCIPLES for guidance . . . ."); Robert J. Levy, *Custody Law and the ALI's Principles: A Little History, a Little Policy, and Some Very Tentative Judgments*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 67, 74 (Robin Fretwell Wilson ed., 2006) ("Because the drafters' proposal comes with the prestigious imprint of the American Law Institute, whose products in the past have attracted state Supreme Court approvals even without legislative enactment, and because the proposal has already been enacted by one legislature, the scheme is likely to receive widespread legislative scrutiny.") (footnote omitted); Carl E. Schneider, *Afterword: Elite Principles: The ALI Proposals and the Politics of Law Reform*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 489, 491 (Robin Fretwell Wilson ed., 2006) ("The ALI has wielded influence beyond the fantasies of its founders. The Model Penal Code and the Restatements are as close to binding precedent as nongovernmental authority can be, and they are only part of the Institute's agenda."). For a contrary view describing "the anemic influence of the *Principles* with rule makers" see Michael R. Clisham and Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L. Q. 573, 608 (2008).

12. Richard A. Warshak, *The Approximation Rule Survey: The American Law Institute's Proposed Reform Misses the Target*, 5 S. B. TEX. SECT. 22 (2011).
13. *See* Rachel M. Colancecco, Note, *A Flexible Solution to a Knotty Problem: The Best Interests of the Child Standard in Relocation Disputes*, 1 DREXEL L. REV. 573, 600 (2009).
14. *See* Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297, 297 (2000).

litigation, narrowing the scope of custody trials, and decreasing judicial discretion in custody cases.[15]

Though courts are fallible, in contested custody cases children's best interests are more likely to be discerned through a multi-factored inquiry than by restricting courts to judging the merits of parents' competing claims about past caregiving time.[16] The best-interest standard is preferable when it is applied in the context of reforms that encourage and support non-adversarial approaches to resolving custody disputes.[17] Such reforms, currently in place in many jurisdictions and endorsed by the *Principles*, lower the incidence of protracted litigation, reduce the conflicts to which children are exposed, and reflect contemporary understanding of factors associated with optimal adjustment of children whose parents live apart from each other.[18]

II. GENDER STEREOTYPES AND THE EVOLUTION OF THE BEST-INTEREST STANDARD

Gender-based presumptions, reflecting stereotypes about the nature of men, women, and children, have ruled child custody decisions throughout history.[19] Until the early part of the nineteenth century, common law gave fathers an automatic right to child custody.[20] By virtue of laws regarding property ownership, fathers

15. PRINCIPLES, *supra* note 3, § 2.08(1)(a)-(h); *id.* ch. 1, topic 1 (discussing the goals of the PRINCIPLES); *see also* Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 6 (2002) ("The goal of these Principles, which address property distribution, spousal support, child support, unmarried cohabitation and agreements as well as custodial arrangements for children, is to achieve greater determinacy in family law while preserving the autonomy of partners and parents to make their own decisions about the terms under which relationships, entered into as if permanent, are dissolved.").

16. Richard A. Warshak, *Punching the Parenting Time Clock: The Approximation Rule, Social Science, and the Baseball Bat Kids*, 45 FAM. CT. REV. 600, 613 (2007) ("Instead of elevating any one factor above all others, a contemporary application of the best interests standard allows a multifactored inquiry into children's needs that can be regularly updated as new knowledge emerges.").

17. *Id.* at 600–01.

18. *Id.* at 600.

19. For a detailed discussion of the evolution of child custody law, see LaKeisha J. Johnson, *The Best Interests Standard: How Broad Judicial Discretion and Influences of Social and Political Suggestion Have Led to an Abandonment of the Rule's Primary Purpose in Child Custody Decisions* 1, 7 (Bepress Legal Series, Working Paper No. 435, 2004), *available at* http://law.bepress.com/expresso/eps/435.

20. *Id.* at 4.

were best able to provide financially for children.[21] Also, fathers were considered to be children's natural guardians who could best bestow love on them.[22] Over time, this sentiment was replaced with the belief that children of tender years needed nurturing that a mother could best provide.[23] What became known as the tender years doctrine emerged as early as 1813 in the Pennsylvania decision, *Commonwealth v. Addicks*.[24] Overlooking the mother's adultery, Chief Justice William Tilghman ruled:

> We cannot avoid expressing our disapprobation of the mother's conduct, although as far as regards her treatment of her children, she is in no fault. They appear to have been well taken care of in all respects. It is to them, that our anxiety is principally directed; and it appears to us, that considering their tender age, they stand in need of that kind of assistance, which can be afforded by none so well as a mother. It is on their account, therefore, that exercising the discretion with which the law has invested us, we think it best, at present, not to take them from her.[25]

In England, the Talfourd Act of 1839 formalized the tender years doctrine by giving courts the authority to award mothers custody of children under the age of seven years.[26] Over time, the tender years doctrine was extended to include children of all ages.[27]

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21. *Id.* at 4–5.
22. *Id.*
23. *Id.* at 7–8.
24. Commonwealth v. Addicks, 5 Binn. 520 (Pa. 1813).
25. *Id.* at 521–22. But, three years later, the Court granted custody to the father because
    > the mother has fallen into a fatal error, on a fundamental point of morals—the obligation of the marriage contract. It is the more incumbent on us, therefore, to guard the children against the consequences of this pernicious mistake, and to fortify their minds, by inspiring them with fixed principles . . . .

    Commonwealth v. Addicks, 2 Serg. & Rawle 174, 177 (Pa. 1816). For another early expression of the tender years doctrine, see Helms v. Franciscus, 2 Bland 544, 563 (Ch. Md. 1830) ("The father is the rightful and legal guardian of all his infant children; and in general, no court can take from him the custody and control of them . . . . Yet even a court of common law will not go so far as to hold nature in contempt, and snatch helpless, puling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father. The mother is the softest and safest nurse of infancy, and with her it will be left in opposition to this general right of the father.").
26. The Talfourd Act was also known as the Custody of Infants Act. The Act was spearheaded by Lady Caroline Norton and is regarded as the first piece of feminist legislation passed into law. *See 1830 Custody of Children Act*, SPARTACUS EDUC.,

In the 1960s, the movement to liberate our culture from the straitjacket of rigid gender stereotypes challenged maternal preference rules.[28] The rise of mothers in the workplace, along with growing concern about unequal treatment of men and women, contributed to the decline in a preference for sole maternal custody.[29] In addition, results of social science studies throughout the United States converged to support the position that most children need more contact with their father after divorce than they were having.[30] The benefits of father involvement, especially for boys, are most apparent when the mother values the father–child relationship, the children witness little overt conflict between parents, and the father is reasonably well-adjusted, supportive, and authoritative.[31] Based on these research findings, some scholars advocated replacing the maternal preference presumption with a joint custody presumption, whereas other scholars sought to preserve the familiar presumption but modify its application to provide children more contact with noncustodial fathers.[32]

http://www.spartacus.schoolnet.co.uk/Wcustody39.htm (last visited Nov. 28, 2011); *Custody Rights and Domestic Violence*, www.parliament.uk, http://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/overview/custodyrights/ (last visited Nov. 28, 2011).

27. *See* The Custody of Infants Act, 1873, 36 & 37 Vict. c. 12 § 1 (Eng.); *Women & History: Marriage & Civil Law*, ABOUT.COM, http://womenshistory.about.com/library/etext/bl1911_womeng.htm (last visited Nov 28, 2011) (quoting an entry from the 1911 Encyclopedia Britannica).

28. *See generally* BETTY FRIEDAN, THE FEMININE MYSTIQUE (W.W. Norton & Co. 1963).

29. For a discussion of the literature on feminist opposition to the tender years presumption, see, e.g., Robert J. Levy, *A Reminiscence About the Uniform Marriage and Divorce Act—and Some Reflections About Its Critics and Its Policies*, BYU L. REV. 43, 49 (1991). *See generally* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS 124 (1994) (discussing the history of American Child Custody Law).

30. *See, e.g.*, SANFORD L. BRAVER & DIANE O'CONNELL, DIVORCED DADS: SHATTERING THE MYTHS (1998) (Arizona); E. Mavis Hetherington, Martha Cox, & Roger Cox, *Effects of Divorce on Parents and Children*, *in* NONTRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT 233 (Michael E. Lamb ed., 1982) (Virginia); in California: JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980) (California); RICHARD A. WARSHAK, THE CUSTODY REVOLUTION (1992) (Texas); Richard A. Warshak, *Father-Custody and Child Development: A Review and Analysis of Psychological Research*, 4 BEHAV. SCI. & L. 185 (1986) (Texas).

31. Richard A. Warshak, *Social Science and Children's Best Interest in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83, 90 (2000).

32. Shannon Dean Sexton, Note, *Custody System Free of Gender Preferences and Consistent with the Best Interests of the Child: Suggestions for a More Protective and*

By 1972, lawmakers and judges began replacing the tender years presumption with a gender-neutral best-interest-of-the-child standard[33]—although fathers' rights advocates assert that the legacy of the tender years presumption continues to favor mothers in court,[34] and women's advocates claim that the pendulum has swung too far in the other direction and that judges are biased in favor of fathers.[35]

Equitable Custody System, 88 KY. L.J. 761, 775–76 (2000). *See* Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 964–66 (2005).

33. *See* Johnson, *supra* note 19, at 4–5.

34. *See, e.g.*, William C. Smith, *Dads Want Their Day: Fathers Charge Legal Bias Towards Moms Hamstrings Them as Full-Time Parents*, 89 A.B.A. J. 38, 41 (2003); *see also* Leighton E. Stamps, *Age Differences Among Judges Regarding Maternal Preference in Child Custody Decisions*, 18 CT. REV. 18, 20–21 (2002) (reporting the results of a survey of judges in Alabama, Louisiana, Mississippi, and Tennessee). The study found a "fairly consistent tendency toward maternal preference by the judges." *Id.* At 20 This bias was more prevalent among older judges. Results indicated that 36% of younger judges and 71% of older judges agreed that "[m]others are the preferred custodian when children are under the age of 6," while none of the younger judges and only 1% of the older judges agreed that fathers are the preferred custodian. *Id. See generally* David Dotterweich & Michael McKinney, *National Attitudes Regarding Gender Bias in Child Custody Cases*, 38 FAM. & CONCILIATION CTS. REV. 208, 215 (2000) (reporting that 44% of judges in Maryland, Missouri, Texas, and Washington agreed that custody awards are made "based on the assumption that young children belong with their mothers," and only 33% believed that courts give fair consideration to fathers); William V. Fabricius, Sanford L. Braver, Priscila Diaz & Clorinda E. Velez, *Custody and Parenting Time: Links to Family Relationships and Well-Being After Divorce*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 201, 212–13 (Michael E. Lamb, ed., 5th ed. 2010) (reporting a study in which about 60% of family law attorneys thought the Arizona legal system was biased in favor of mothers, and only 35% thought the system was not gender-biased). Views of bias did not differ between female and male attorneys or between attorneys whose clients are predominantly mothers or fathers. *Id.* at 212. The same study reported that the general public was even more likely to perceive a "slant" toward mothers (83%) with only 16% perceiving the legal system as unbiased. *Id.* at 213 *see also* BRAVER & O'CONNELL, *supra* note 30, at 103 (reporting that divorcing parents, both mothers and fathers, believe that the family law climate favors mothers); Sanford L. Braver, Jeffrey T. Cookston & Bruce R. Cohen, *Experiences of Family Law Attorneys with Current Issues in Divorce Practice*, 51 NAT'L COUNCIL ON FAM. REL. 325, 327–30 (2002) (reporting that experienced divorce attorneys, female and male, believe that the legal system is biased toward mothers); Sanford L. Braver, Ira M. Ellman, Ashley M. Votruba & William V. Fabricius, *Lay Judgments About Child Custody After Divorce*, 17 PSYCHOL. PUB. POL'Y & L. 212, 214 (2011) ("Whatever the objective truth about judicial decision-making, several studies have shown that the public has the widespread *perception* that the custody process is heavily biased in favor of mothers.").

35. Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 236 (1982); Lynn H.

Referencing legislation that supposedly created an equal playing field for fathers and mothers, *State ex rel. Watts v. Watts* reversed a decision based on the tender years presumption:

> [T]here has been a pattern of at least cursory invocation by the courts in New York and elsewhere, of the presumption that children of tender years, all other things being equal, should be given into the custody of their mother. . . . As Foster and Freed, authors of the comprehensive treatise Law and the Family, New York, Vol. 2 (1967) stated[,]
>
> "The statutory mandate in practice is ignored and instead of equality as between the parents, the mother's claim to the child is paramount." . . .
>
> The "tender years presumption" is actually a blanket judicial finding of fact, a statement by a court that, until proven otherwise by the weight of substantial evidence, mothers are always better suited to care for young children than fathers. This flies in the face of the legislative finding of fact underlying the specific command of [the statute], that the best interests of the child are served by the court's approaching the facts of the particular case before it without sex preconceptions of any kind.[36]

The Uniform Marriage and Divorce Act advanced the provision that "[t]he court shall determine custody in accordance with the best interest of the child."[37] The Act then instructs the court to "consider all relevant factors," including the wishes of the parents and children; the children's relationships with parents, siblings, and other people who may significantly affect the children's best interests; the children's adjustment to their home, school, and community; and "the mental and physical health of all individuals involved."[38] But the comments to the UMDA contemplate retaining a preference for maternal custody of young children and regard such a "rule of

Schafran, Gender Bias in Family Courts, 17 FAM. ADVOC. 22–23 (1994). Braver, Cookston & Cohen, *supra* note 34, at 330, report that 29% of family law attorneys believe their "average female clients" would judge the legal system as biased in favor of fathers and 29% thought these clients would perceive bias in favor of mothers. *But see* Fabricius et al., *supra* note 34, at 236, in which only 5% of family attorneys and about 1% of Tucson citizens thought the Arizona legal system was biased in favor of fathers.

36. State *ex rel*. Watts v. Watts, 350 N.Y.S.2d 285, 287–88 (N.Y. Fam. Ct. 1973).
37. UNIF. MARRIAGE AND DIVORCE ACT § 402 (amended 1973), 9A U.L.A. 282 (1998).
38. *Id.*

thumb" as a shorthand expression of the best interest of children.[39] By 1981 twenty states expressly abolished the tender years doctrine by statute or court decision.[40] The doctrine did, however, remain in effect in some form in at least twenty-two states.[41] In states that formally abolished the doctrine, it continued to be applied both by parental decisions and court decisions without formal acknowledgment.[42] By the mid-1990s, it was apparent that the legal framework for child custody decisions had undergone a revolution with many more statutes explicitly prohibiting the centuries-old reliance on gender preferences.[43] This freed courts to individually determine the best decision-making and residential arrangements for children whose parents lived apart from each other.

Operating without the safety net of an explicit presumption leaves courts with broad discretion. Critics raise several concerns about the best-interest standard. The chief concerns are that (1) any indefinite standard increases the likelihood that parents will take their chances in court rather than settle custody disputes[44] and (2) the standard provides no objective basis for predicting which custody disposition will promote a particular child's best interest and thus the vague standard serves as a conduit for personal biases to influence the court's decisions.[45]

Various alternatives have been proposed to remedy the perceived problems of the current standard. These include a primary-caretaker

39. *Id.* cmt. ("Although none of the familiar presumptions developed by the case law are mentioned here, the language of the section is consistent with preserving such rules of thumb. The preference for the mother as custodian of young children when all things are equal, for example, is simply a shorthand method of expressing the best interest of children—and this section enjoins judges to decide custody cases according to that general standard.").

40. *Ex parte* Devine, 398 So. 2d 686, 691, 691 n.4 (Ala. 1981).

41. *Id.* at 691 & n.3. Tennessee applied a tender years presumption as late as 1996: "In the case of a child of tender years, the gender of the parent may be considered by the court as a factor in determining custody after an examination of the fitness of each party seeking custody." TENN. CODE ANN. § 36-6-101(d) (1996).

42. *See* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CALIF. L. REV. 615, 617–22 (1992).

43. *See id.* at 619–23.

44. *See, e.g.*, Jon Elster, *Solomonic Judgements: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 23–24 (1987); GUGGENHEIM, *supra* note 1, at 158.

45. *See, e.g.*, Robert E. Emery, *Rule or Rorschach? Approximating Children's Best Interests*, 1 CHILD. DEV. PERSP. 132, 134 (2007); Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191, 197 (1993); Mary E. O'Connell, *When Noble Aspirations Fail: Why We Need the Approximation Rule*, 1 CHILD. DEV. PERSP. 129, 130 (2007).

presumption, generally favored by mothers' rights advocates;[46] a presumption that the child's time will be divided equally between homes, generally favored by fathers' rights advocates;[47] and an emphasis on empowering children by giving significant weight to their expressed wishes, preferred by some scholars who write about children's rights.[48]

In its *Principles of the Law of Family Dissolution*, the ALI enters the debate by proposing an approximation rule to govern court decisions in cases where parents cannot agree on physical (residential) custody.[49] The rule divides the child's time with each parent according to the proportion of time that each parent had participated in caretaking prior to the separation.[50] The *Principles* assumes that quantity of past caretaking provides a straightforward proxy for qualitative psychological factors associated with children's best interests.[51] Some mental health professionals share this assumption and believe that the approximation rule will ameliorate the indefiniteness of the best-interest standard, be easier to implement

46. For discussions, both pro and con, of the primary caretaker presumption, also known as the primary parent presumption, see, e.g., Phyllis T. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?*, 8 BYU J. PUB. L. 75, 83–85 (1993); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 770–73 (1988); Joan B. Kelly, *The Determination of Child Custody*, 4 FUTURE CHILD. 121, 130 (1994); Kathryn L. 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, 403–14 (1997); Marcia O'Kelly, *Blessing the Tie That Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, 533–34 (1987); Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2283–88 (1991) (analyzing and critiquing the primary caretaker presumption); Paul L. Smith, *The Primary Caretaker Presumption: Have We Been Presuming Too Much?*, 75 IND. L. J. 731, 732–46; Richard A. Warshak, *The Primary Parent Presumption: Primarily Meaningless*, *in* 101+ PRACTICAL SOLUTIONS FOR THE FAMILY LAWYER 123, 123–25 (Gregg M. Herman ed., 2d ed. 2003).

47. For arguments favoring and opposing joint physical custody, see, e.g., JOINT CUSTODY & SHARED PARENTING (Jay Folberg ed., 2d ed. 1991); WARSHAK, THE CUSTODY REVOLUTION, *supra* note 30, at 177–205.

48. *See, e.g.*, Katherine Hunt Federle, *Children's Rights and the Need for Protection*, 34 FAM. L.Q. 421, 434–40 (2000); Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299 (1994).

49. PRINCIPLES, *supra* note 3, § 2.08(1).

50. *Id.*

51. *See id.* § 2.08(1)(d).

than the current standard, reduce the incidence and scope of custody litigation, and provide a clear and efficient measure of children's best interests.[52]

III. BENEFITS OF THE BEST-INTEREST-OF-THE-CHILD STANDARD

Most aspects of the law involve a tension between rules and discretion, and between objectivity, predictability, and ease of administration versus individualization and flexibility. Take the simple act of granting a driver's license to a teen. In Texas, a child looks forward to becoming eligible for a license on her sixteenth birthday.[53] The law makes no accommodation for the wide range of physical and psychological traits related to competent driving. Regardless of a child's judgment, eye–hand coordination, speed of reflexes, maturity, and ability to maintain attention versus distractibility, all teens become eligible for a driver's license the day they turn sixteen.[54] This law is easy to administer. The date is objective and predictable. Although some people will not be truly capable of safe driving until a year later, and some were capable a year earlier, the law shows no flexibility to take into account individual circumstances.

Until the last third of the twentieth century, child custody decisions were guided by presumptions that provided a level of predictability and ease of administration comparable to that of laws regarding drivers' licenses.[55] Few allowances were made for individual family circumstances.[56] A presumption in favor of maternal custody served as the backdrop of negotiations.[57] It was clear to all parties that, absent a showing of severe unfitness or such

52. Emery, *supra* note 45, at 134; Robert E. Emery, Randy K. Otto & William T. O'Donohue, *A Critical Assessment of Child Custody Evaluations: Limited Science and a Flawed System*, 6 PSYCHOL. SCI. PUB. INT. i, i-ii (2005); Robert F. Kelly & Shawn L. Ward, *Allocating Custodial Responsibilities at Divorce: Social Science Research and the American Law Institute's Approximation Rule*, 40 FAM. CT. REV. 350, 352–53 (2002); Eleanor E. Maccoby, *A Cogent Case for a New Child Custody Standard*, 6 PSYCHOL. SCI. PUB. INT. I, i–ii (2005); GARY B. MELTON, JOHN PETRILA, NORMAN G. POYTHRESS & CHRISTOPHER SLOBOGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 546 (3d ed. 2007).

53. TEX. TRANSP. CODE ANN. § 521.204 (West 2011).

54. *Id.*

55. Emery, *supra* note 45, at 133; Smith, *supra* note 34, at 40.

56. *See* State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285, 287–88 (N.Y. Fam. Ct. 1973).

57. *See* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979).

an exception as adultery, mothers had the upper hand in custody disputes.[58]

The a priori preference for mothers clashed with the movement in society away from gender-stereotyped roles and with the trend in law toward equal treatment of men and women.[59] Perhaps more important, the science of child development progressed to the point where it documented the widespread harm to children who were pigeonholed into a one-size-fits-all custody arrangement that reduced daily contact with fathers to a mere few days per month at most.[60] Although such arrangements were not dictated by a maternal preference presumption per se, they did proceed from the same belief that children belonged primarily with their mother.

Society's response was to replace the maternal-custody presumption with an indeterminate best-interest-of-the-child standard.[61] Though most jurisdictions provide a list of factors for the court to consider, these are quite general and allow much room for judicial discretion.[62] The primary purpose of the best-interest standard, at least formally, is to underscore the priority of the welfare of the child who is an innocent bystander to the parents' adversarial litigation, as opposed to any presumption that treats the child's welfare as subordinate to parental rights and entitlements.[63] The New Jersey Supreme Court expresses this purpose:

> The "best-interest-of-the-child" standard is more than a statement of the primary criterion for decision or the factors to be considered; it is an expression of the court's special responsibility to safeguard the interests of the child at the center of a custody dispute because the child cannot be presumed to be protected by the adversarial process. That responsibility was perhaps best articulated by Judge Cardozo:

58. *Watts*, 350 N.Y.S.2d at 287–88.

59. Levy, *supra* note 29, at 48–50.

60. *See* Elizabeth Scott & Andre Derdeyn, Symposium: *The Parent–Child Relationship and the Current Cycle of Family Law Reform: Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 458–60 (1984).

61. ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 162 (2004).

62. *Id.* at 163–64.

63. It might be argued, though, that a best-interest determination could mask highly personal decisions that may not elevate children's needs over other considerations, as in the example of a judge who rules against a mother because of her adulterous affair.

> "[The Chancellor] acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate, and careful parent' and make provision for the child accordingly. . . . He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights 'as between a parent and a child,' or as between one parent and another. . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child."[64]

Beyond the emphasis on children's welfare trumping other concerns, defenders of the best-interest standard regard its indeterminacy as ensuring two benefits: flexibility and adaptability.[65] The best-interest standard is flexible because it prioritizes individualized decisions over the expediency of relying on the same formula for all families.[66] Professor Andrew Schepard regards this aspect of the standard as "a great moral virtue" and "a tribute to our society's collective sense that relationships between children and parents are unique and should be judged individually."[67] A similar view is found in *Bazemore v. Davis*:

> A court in a child custody case acts as [p]arens patriae. It is not enough to suggest that the task of deciding custody is a difficult one, or that the use of a presumption would result in a correct determination more often than not. A norm is ill-suited for determining the future of a unique being whose adjustment is vital to the welfare of future generations. Surely, it is not asking too much to demand that a court, in

64. Kinsella v. Kinsella, 696 A.2d 556, 577–78 (N.J. 1996) (alterations in original) (quoting Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) (quoting Queen v. Gyngall, [1893] 2 Q.B. 232, at 241(Eng.)).

65. *See infra* pp. 98–102 and accompanying notes.

66. *See* Kelly, *supra* note 46, at 128 ("The best interests standard indicated a willingness on the part of the legal system to consider custody outcomes on a case-by-case basis, rather than adjudicating children as a class or homogeneous grouping."); E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR WORSE: DIVORCED RECONSIDERED 275 (2002) ("Be suspicious of averages and focus on diversity. Averages conceal the great variability in how individual men and women, boys and girls function in intimate relationships, and how they cope when these relationships alter or break down and they have to build a new life. It is the diversity rather than the predictability or inevitability of pathways in intimate relationships over the course of life that is striking. . . . [T]here is great diversity in routes taken after marital breakup, in life in a single-parent household, and in new cohabiting or remarried relationships.").

67. SCHEPARD, *supra* note 61, at 164.

> making a determination as to the best interest of a child, make the determination upon specific evidence relating to that child alone. . . . [M]agic formulas have no place in decisions designed to salvage human values.[68]

The open-ended best-interest standard frees courts to craft decisions on a case-by-case basis, drawing on a comprehensive inquiry into each child's needs and the extent to which various outcomes can be expected to meet these needs. In so doing, it avoids elevating one factor above all others and, at least formally, avoids relying on stereotypes and parental entitlements. When applying the best-interest test most courts focus on multiple factors enumerated either in statutes or in prior legal cases.[69] The reliance on multiple factors finds support in the social science literature regarding children's positive and negative outcomes after divorce.[70] In a comprehensive and erudite review of this literature, Kelly and Emery conclude:

> In the last decade, researchers have identified a number of protective factors that may moderate the risks associated with divorce for individual children and that contribute to the variability in outcomes observed in children of divorce. These include specific aspects of the psychological adjustment and parenting of custodial parents, the type of relationships that children have with their nonresident parents, and the extent and type of conflict between parents.[71]

The best-interest standard allows courts to consider such protective factors and to apply knowledge from psychological

68. Bazemore v. Davis, 394 A.2d 1377, 1382–83 (D.C. 1978) (en banc) (citation omitted) (citing Lemay v. Lemay, 247 A.2d 189, 191 (N.H. 1968)).

69. Such factors generally include (but are not limited to): the child's relationship with each parent; the child's wishes; the child's involvement with each parent; the child's adjustment at home, school, and in the community; the capacity of each parent to meet the child's developmental needs; special needs of the child; the impact on the child of the mental and physical health of the parents; evidence of family violence; substance abuse; each parent's support for the child's relationship with the other parent; and the degree of cooperation and communication between the parents. *See* MICH. COMP. LAWS ANN. § 722.23 (3)(a)–(k) (West 2011); MINN. STAT. ANN. § 518.17 (West 2011); TEX. FAM. CODE ANN. § 153.134 (West 2005).

70. Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 FAM. REL. 352, 356–58 (2003).

71. *Id.* at 356.

research to the specifics of each custody case. The various proposed alternatives to the best-interest standard, including the approximation rule, fail to take such factors into account.[72]

The second benefit related to the best-interest standard's indeterminacy is adaptability. It is able to accommodate new knowledge and understanding about children's needs and to respond to changing legal and social trends.[73] For instance, in the 1980s, studies began accumulating that documented a strong association between positive father-child relationships and child development, along with an alarming rate of deterioration in father-child relationships following divorce.[74] Legislatures learned of these results from advocacy groups and extensive media coverage.[75] Courts learned about these results through expert witness testimony and briefs.[76] After filtering through political process complexities and ideological influences, legislatures and courts began interpreting a child's best interest as including more frequent contact with fathers to offset the loss of daily contact.[77] Also, research that revealed the

72. *See, e.g.*, PRINCIPLES, *supra* note 3, § 2.08.

73. Kelly, *supra* note 46, at 129.

74. *See, e.g.*, Nicholas Zill, Donna R. Morrison & Mary J. Coiro, *Long-Term Effects of Parental Divorce on Parent–Child Relationships, Adjustment, and Achievement in Young Adulthood*, 7 J. FAM. PSYCHOL. 91, 100 (1993) (stating that although grown children of divorce were more likely than those from intact families to have a number of problems, most were in the normal range on all measures except one: the only problem that affected a majority of the divorced group was the quality of relationship with their father). Two out of three children of divorce suffered chronically poor relationships with their fathers that failed to improve with time. *Id.* at 96. For a review of the literature on the father's role in child development, see HENRY B. BILLER, FATHERS AND FAMILIES: PATERNAL FACTORS IN CHILD DEVELOPMENT (1993); THE ROLE OF THE FATHER IN CHILD DEVELOPMENT (Michael E. Lamb ed., 3d ed. 1997); ROSS D. PARKE, FATHERS (1981); WARSHAK, THE CUSTODY REVOLUTION, *supra* note 30. It is important to note that social science studies can differ in methodology or scientific rigor. When results converge from different studies, using different sample selection procedures and different procedures, and few if any studies reveal contrary results, scientists have more confidence in the findings.

75. *See* Kelly, *supra* note 46, at 122–23.

76. *See, e.g.*, Brief of Richard A. Warshak et al. as Amici Curiae on behalf of LaMusga Children, *In re* Marriage of LaMusga, 88 P.3d 81 (Cal. 2004) (No. S107355), *available at* http://www.warshak.com/publications/articles-comp.html; Brief for Leslie Ellen Shear et al. as Amici Curiae Supporting Respondent, In re Montenegro v. Diaz, 27 P.3d 289 (2001) (No. S090699), *available at* https://public.me.com/lescfls (click "LAAC Relocation" then "Montego Amicus Brief.wpd).

77. *See* Kelly, *supra* note 46, at 127–28.

harm to children of witnessing their parents' hostile interchanges,[78] eventually found its way into court decisions (and negotiated settlements) that put in place parenting plans that minimized contact between hostile parents during the child's transition between homes (e.g., instead of children going directly from one home to the other, one parent takes the children to school in the morning, the other parent picks the children up from school in the afternoon).[79] Such changes are compatible with, and require no modification of, the best-interest standard.[80] By contrast, a fixed presumption about custody arrangements would not adapt to or benefit from new discoveries about how best to help children whose parents live apart from each other.[81]

It must be emphasized that the best-interest standard, and proposed alternative presumptions such as the approximation rule, are default positions that generally come into play only when couples are unable to agree on the division of parenting responsibilities and take their disputes to court. In the vast majority of cases, parents exercise the widest discretion in reaching settlements out of court,

78. For a review, see Janet R. Johnston, *Research Update: Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 FAM. & CONCILIATION CTS. REV. 415, 420 (1995).

79. Joan B. Kelly, *Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research*, 46 FAM. PROCESS 35, 45 (2007).

80. *See generally* Kelly, *supra* note 46, at 128–29 (discussing the flexibility of the best-interest rule and determining custody on a case-by-case individualized basis to lower conflict). Systematic changes in the way custody decisions are made may not even require new legislative public policy statements. *See* Fabricius et al., *supra* note 34, at 209, 217 (reviewing studies that report increased rates of joint legal custody and fathers' parenting time in Washington, Wisconsin, Arizona, and Maine that occurred in the absence of changes in statutes). The authors attribute such changes to parents' receptivity to professional guidance and conclude:

> Attaining desirable changes in de jure parenting arrangement practice may not require legislation, court rulings or any other kind of official imprimatur. Since parents' bargaining appears to be strongly affected by the informal guidance they receive from judges, custody evaluators, parent educators, and mediators, and (especially) attorneys, all that is likely required is a change in this informal professional culture of belief.

Id. at 231.

81. *See generally* E. Mavis Hetherington & Margaret M. Stanley-Hagan, *The Effects of Divorce on Fathers and Their Children*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 191, 202 (Michael E. Lamb ed., 3d ed. 1997) (illustrating issues with nonresident fathers).

and courts typically approve their agreements.[82] But the prevailing legal standard influences even out-of-court agreements by creating a context for negotiations.[83] This context allows each side to weigh settlement offers against the perceived likely outcome in court, what mediators refer to as the BATNA (best alternative to a negotiated agreement).[84]

IV. CRITICISMS OF THE BEST-INTEREST STANDARD

Critics lodge four arguments against the best-interest standard.

1) The best-interest standard "is too subjective to produce predictable results"; thus, because the BATNA is so uncertain, parents are less likely to reach out-of-court settlements and more likely to engage in strategic bargaining and prolonged litigation, all to the detriment of children.[85] Professor Jon Elster cogently expresses this concern:

82. GUGGENHEIM, *supra* note 1, at 154. Parents' discretion to "privately order" their post-divorce custody arrangements has some limits. *See* PRINCIPLES, *supra* note 3, § 2.06 reporter's note a. Under the best-interest standard, courts retain the right to reject an agreement reached by the parties if the court finds the settlement not in the child's best interest. GUGGENHEIM, *supra* note 1, at 154; Levy, *supra* note 11, at 67, 78 (both noting that judges rarely set aside agreements reached in uncontested divorces). It is noteworthy, though, that the Stanford Child Custody study, ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 103, 303 (1992), found that in 46% of cases in which both parents requested joint physical custody, and the petitions indicated no evidence of parental conflict, the court's final decree rejected joint physical custody (with a much higher proportion of these cases resulting in maternal custody). Some of the discrepancy between the original petitions and the final outcome may be due to changes in family circumstances and parental preferences that occurred after the petitions were filed. *Id.* at 103. But some may be due to a judge rejecting the uncontested agreement, either because the judge is dubious about joint physical custody, or because of a special ad hoc aspect of the arrangement. *See* PRINCIPLES, *supra* note 3, § 2.06 reporter's note a. An example of why this might occur is the case of a woman whom the court believes was intimidated into an agreement to share custody with a violent man. *Id.* Nevertheless, as GUGGENHEIM, *supra* note 1, at 154, reasons, "Even in the rare instance that a court rejects a settlement and imposes a child custody arrangement that neither parent wants, parents who agree among themselves need not enforce the order once they are out of court."

83. Mnookin & Kornhauser, *supra* note 57, at 978.

84. *See* WILLIAM URY, THE POWER OF A POSITIVE NO: HOW TO SAY NO AND STILL GET TO YES 58 (2007).

85. PRINCIPLES, *supra* note 3, § 2.08 cmt. b; *see also* Katharine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project*, 36 FAM. L.Q. 11, 14 (2002) ("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

> The best interest principle increases costs to children in two ways. First, more cases will be brought than if there existed a strong presumption rule or an automatic decision procedure because both parties may persuade themselves that they stand a chance of getting custody. Second, for any given case that is brought, the legal process will be more protracted since it is not simply a case of deciding whether one parent is unfit.[86]

Critics assume that an uncertain BATNA not only increases the prevalence of trials and the length of litigation, it encourages abusive bargaining in those cases that do settle:

> The greatest damage from the lack of clarity in the law occurs in those divorces, the overwhelming majority, that are settled by the parties before trial. . . . To the extent that it is impossible to get or give sound advice on how a court is likely to resolve a given issue—and a large measure of discretion means exactly that—the economically stronger party gains negotiating leverage from the superior ability to prolong negotiation, to engage in expensive pretrial discovery, and to use preliminary court appearances for harassment.[87]

Professor Martin Guggenheim argues, as does Elster, that any clearly defined rule (both seem to prefer a primary caretaker presumption) would do the least harm to the fewest children because it would reduce the uncertainty of the likely judicial outcome and thus spare children the hostilities attendant to adversarial custody negotiations and litigation.[88]

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of both."); Robert F. Cochran, Jr., *Reconciling the Primary Caretaker Preference, the Joint Custody Preference, and the Case-by-Case Rule*, *in* JOINT CUSTODY & SHARED PARENTING 218, 220–21 (Jay Folberg ed., 2d ed. 1991); Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO. ST. L.J. 615, 630 (2004) ("The discretion judges retain under [the best-interest] standard encourages litigation. . . . Prior to litigation, the parties cannot know which of two fit parents a judge is likely to prefer. Thus, they may refuse to negotiate a settlement under the mistaken belief that they will win.").

86. Elster, *supra* note 44, at 24.

87. Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1170 (1986).

88. GUGGENHEIM, *supra* note 1, at 172–73; *see* Elster, *supra* note 44, at 43–44.

2) Because the best-interest standard does not focus exclusively on one factor as the basis for decisions or identify which factors will carry the most weight in the court's decision, the parties may believe that the way to prevail is to engage in broad character assassinations.[89] The *Principles* asserts that, under the best-interest standard, a parent may attempt "to influence the child, the child's teachers, and others to see the other parent in a negative light," perhaps even hiring experts to assist in highlighting the other parent's flaws.[90] Litigation that sinks to this level leaves a legacy of hostility that can, and on many occasions does, undermine subsequent effective coparenting.[91]

3) The best-interest standard provides courts with broad discretion and no guidance or objective basis to choose between two fit parents.[92] According to Professor David L. Chambers, one of the

89. *See, e.g.*, Emery, Otto & O'Donahue, *supra* note 52, at 5–7, 18–19.

90. PRINCIPLES, *supra* note 3, § 2.02 cmt. c. For a description of the motives and means by which parents negatively influence their children's attitudes toward the other parent, and the difficulties this creates for their children, see RICHARD A. WARSHAK, DIVORCE POISON: HOW TO PROTECT YOUR FAMILY FROM BAD-MOUTHING AND BRAINWASHING 79–123 (2010). For preliminary, small-sample studies on the impact of such negative parental influence on children, see AMY J.L. BAKER, ADULT CHILDREN OF PARENTAL ALIENATION SYNDROME: BREAKING THE TIES THAT BIND (2007); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 196 (1989); Aaron J. Hands & Richard A. Warshak, *Parental Alienation Among College Students*, 39 AM. J. FAM. THERAPY 45 (2011); Janet R. Johnston, Marjorie G. Walters & Nancy W. Olesen, *The Psychological Functioning of Alienated Children in Custody Disputing Families: An Exploratory Study*, 23 AM. J. FORENSIC PSYCHOL. 39 (2005). In its most severe form, such malignant parental behavior can result in the complete rupture of the child's relationship with the other parent and extended family. There is a vast literature covering theories, research, and experience in the fields of child development and psychotherapy that demonstrates the handicapping effects of damaged, conflicted, and absent parent–child relationships on future psychological adjustment. The principle that family-of-origin relationships influence our future relationships and life adjustment is not only the foundation of many different schools of psychotherapy and developmental psychology, it has reached the status of a truism in contemporary culture. The loss is multiplied when the child is unable to receive and share love with an entire extended family.

91. *See generally* RICHARD A. GARDNER, CHILD CUSTODY LITIGATION: A GUIDE FOR PARENTS AND MENTAL HEALTH PROFESSIONALS (1986); CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE (1994); WARSHAK, THE CUSTODY REVOLUTION *supra* note 30; WARSHAK, DIVORCE POISON, *supra* note 90.

92. Elster, *supra* note 44, at 2 ("[T]here usually is no rational basis for preferring one parent over another."); *see also* Robert A. Burk, *Experts, Custody Disputes, & Legal Fantasies*, 14 PSYCHIATRIC HOSP. 140, 141 (1983) ("[T]he attempt to determine which parent is the better child custodian depends on such fine-grained distinctions as to

advisers to ALI's project, "The concept of 'children's best interests,' unlike such concepts as distance or mass, has no objective content."[93] Often, courts must choose between different parenting styles and between different ideas and values about raising children.[94] An indeterminate standard allows decisions based on gender biases, subjective value judgments, and speculation in place of objective considerations. Professor Robert J. Levy, an adviser to the *Principles*, suggests the possibility that judges might occasionally "award custody to those litigants whose attributes and values most closely resemble their own."[95] Even when best-interest criteria are explicitly listed, courts are given no guidance in assigning relative weights to each factor.[96] Particularly when there is no requirement that a list of factors be equally and reasonably considered, judges may "support preferential rulings whenever they so desire by ignoring those factors which conflict with personal points of view and making much ado over those that do not."[97]

4) Because the best-interest standard invites an in-depth inquiry, critics believe it encourages courts to appoint and depend too heavily on mental health professionals who conduct evaluations and offer recommendations.[98] Such critics further contend that child custody evaluators (and courts) operate with no objective definitions of what is effective parenting and what are good outcomes for children.[99] Thus, evaluators lack an objective basis to predict which custody arrangements will promote a particular child's best interest in the

make this, in the context of a custody dispute, a choice between two essentially indistinguishable alternatives . . . .").

93. David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 488 (1984).

94. PRINCIPLES, *supra* note 3, § 2.02 cmt. c; Barbara A. Atwood, *Comment on Warshak: The Approximation Rule as a Work in Progress*, 1 CHILD. DEV. PERSP. 126, 127 (2007); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminancy*, LAW. & CONTEMP. PROBS. 226, 260–61 (1975); O'Connell, *supra* note 45, at 130.

95. Levy, *supra* note 45, at 197.

96. *See* Robert F. Cochran, Jr., *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 U. RICH. L. REV. 1, 13–16, 18 (1985).

97. Johnson, *supra* note 19, at 11.

98. Emery et al., *supra* note 52, at 19–20.

99. Timothy M. Tippins & Jeffrey P. Wittman, *Symposium Issue on Child Custody Evaluation: Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 FAM. CT. REV. 193, 215 (2005); Emery, *supra* note 45, at 133–34.

present and the future.[100] In general, critics believe that the best-interest standard, as currently conceived, is impossible to implement and results in over-reliance on inadequate science.[101] As Professor Mary Ann Glendon, another adviser to ALI's project, cogently argues, "The 'best interests' standard is a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge. . . ."[102]

V. THE BEST-INTEREST STANDARD AND JUDICIAL DISCRETION

The four central criticisms of the best-interest standard all relate to its discretionary quality and the lack of objective and scientifically valid rules to guide courts in determining best interests.[103] The value of scientifically-based expert contributions to custody decisions is debated, and the debate's relevance to the best-interest standard will be discussed later in this article.[104] But there is no doubt that the best-interest standard does confer broad discretion and that such discretion carries the potential for abuse. This concern is central to Robert H. Mnookin's lucid and influential critique of the best-interest standard: "[B]ecause what is in the best interests of a particular child is indeterminate, there is good reason to be offended by the breadth of power exercised by a trial court judge in the resolution of custody disputes."[105]

Professor Mnookin contrasts the court's task in custody litigation with what he terms "traditional adjudication" and he argues that the discretion of the best-interest standard is anomalous and unduly excessive.[106] In a masterful, balanced, and incisive analysis, though, Carl E. Schneider reveals the ubiquity of discretion in American law,

100. *See, e.g.*, Emery, *supra* note 45, at 133–34; Robert J. Levy, *Custody Investigations as Evidence in Divorce Cases*, 21 FAM. L.Q. 149, 149, 151–52 (1987); Sheila Rush Okpaku, *Psychology: Impediment or Aid in Child Custody Cases?*, 29 RUTGERS L. REV. 1117, 1144–45 (1976); O'Connell, *supra* note 45, at 130.

101. Tippins & Wittman, *supra* note 99, at 215.

102. Glendon, *supra* note 87, at 1181 ("Its vagueness provides maximum incentive to those who are inclined to wrangle over custody, and it asks the judge to do what is almost impossible: evaluate the child-caring capacities of a mother and a father at a time when family relations are apt to be most distorted by the stress of separation and the divorce process itself."); *see also* Atwood, *supra* note 94, at 127; Emery et al., *supra* note 50; O'Connell, *supra* note 45, at 130; Tippins & Wittman, *supra* note 99, at 215.

103. Emery et al., *supra* note 52, at 19.

104. *Id.* at 23; Tippins & Wittman, *supra* note 99, at 193, 198, 204; *see infra* notes 255-62 and accompanying text.

105. Mnookin, *supra* note 94, at 230.

106. *Id.* at 249–55.

and shows that the elements that Mnookin characterizes as paradigmatic of custody litigation are common to other areas of law, such as nuisance law and public law.[107] For instance, Mnookin views traditional adjudication as usually focused on "the determination of past acts and facts," whereas custody adjudication focuses on a prediction of the future and on the character of people.[108] Professor Schneider counters that "[n]uisance law does require a determination of past acts, but often it also requires a determination of the future effects of various possible remedies."[109] Schneider quotes Professor Abram Chayes's work on public law litigation to make a similar point: "In public law litigation, '[t]he fact inquiry is not historical and adjudicative but predictive and legislative,' and the decree that concludes that litigation often 'seeks to adjust future behavior, not to compensate for past wrong.'"[110] Even Mnookin recognizes other areas in which courts focus broad discretion on "person-oriented" issues, such as in sentencing, pretrial detention, and—an issue drawing considerable attention at the time of this writing—preventive detention.[111] As with custody determinations, decisions on these matters carry significant and long-term impacts on the litigants and the litigants' families.[112]

Professor Frederick Schauer provides a broader context in which to consider the role of discretion in American law by describing a tradition and legal theory with roots in "American Legal Realism" and Aristotle's concept of equity:

> The tradition starts with an intuitively appealing goal—getting *this case* just right. But that goal and the tradition embracing it are in tension with the very idea of a rule, for implicit in rule-based adjudication is a tolerance for some proportion of wrong results, results other than the results that would be reached, all things other than the rule considered, for the case at hand. In many of the most important areas of American adjudication, the tolerance for

107. Schneider, *supra* note 46, at 2239–42.

108. Mnookin, *supra* note 94, at 249, 251.

109. Schneider, *supra* note 46, at 2240. It must be noted, though, that nuisance law does not carry the personal and emotional aspect endemic to custody disputes. *See generally* GARDNER, *supra* note 91.

110. *Id.* at 2241 (alteration in original) (footnote omitted) (quoting Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302, 1298 (1976)).

111. *See* Mnookin, *supra* note 94, at 251–52 (footnotes omitted).

112. *See id.* at 252–53.

> the wrong answer has evaporated, often for good reason, and the current paradigm for adjudication in the American legal culture may already have departed from rule-bound decisionmaking. This new paradigm instead stresses the importance not of deciding the case according to the rule, but of tailoring the rule to fit the case. . . . [B]ecause this new jurisprudence treats what look like rules as continuously subject to molding in order best to maintain the purposes behind those rules in the face of a changing world, we can say that what emerges is a jurisprudence not of rules but of reasons.[113]

Whether or not the court's discretionary authority in custody adjudication is anomalous or well within the mainstream of American jurisprudence, Schneider persuasively argues that judicial discretion is "less unfettered and menacing than it initially appears."[114] He catalogs a range of informal deterrents to abuse of discretion, including self-imposed constraints; concern about the opinions of colleagues, journalists, and the public at large; the influence of social norms; the acquisition of habits of thought in law school that restrict the kinds of decisions a judge will consider acceptable; hearing evidence that carries the moral force of a disinterested party such as that provided by a guardian ad litem; and an aversion to having one's ruling reversed by a higher court.[115] These constraints are in addition to the more formal checks on discretion such as those placed by court rules, procedural and evidentiary limitations, legislative mandates, case law or statutory custody guidelines, restrictions, and policy (which, e.g., may oblige judges to explain the rationale for custody decisions[116]), the hierarchy of courts that oversee lower courts' procedures and rulings, and periodic reselection of judges.[117]

The ubiquity of discretion and limits on its exercise suggest, but do not prove, that discretion is inevitable (about which there is limited dispute) and desirable (about which there is enormous

113. Frederick Schauer, *The Jurisprudence of Reasons*, 85 MICH. L. REV. 847, 847 (1987) (reviewing RONALD DWORKIN, LAW'S EMPIRE (1986)).

114. Schneider, *supra* note 46, at 2218.

115. *Id.* at 2254–59.

116. *See, e.g.*, MINN. STAT. ANN. § 518.17 (West 2006) ("The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child."). Nevertheless, this need not constrain the influence of personal biases. According to Professor Levy (personal communication, Mar. 12, 2009): "Ask (as I do) a group of students to write an opinion on each side of a specific custody dispute—they have no trouble."

117. Schneider, *supra* note 46, at 2258–60.

dispute).[118] Most legal scholars recognize that the issue is not a choice between rules and discretion.[119] Rather, the search is for the optimal balance between the two, a mix that maximizes advantages while minimizing disadvantages.[120] This leaves us with the question of whether the benefits of broad discretion in contemporary custody adjudication outweigh the drawbacks, and—more to the point—whether a more determinate rule can adequately address legitimate concerns about the best-interest standard while avoiding hazards such as an unacceptable degree of harm to children's welfare. This is the topic we take up next.

VI. PROPOSALS FOR DETERMINATE CUSTODY STANDARDS

Critics of the best-interest standard advise a return to firm legal rules and presumptions as a remedy for the perceived problems of an indeterminate standard.[121] Some scholars propose a resurrection of the maternal custody presumption.[122] Others seek to place special emphasis on one factor chosen from a list of criteria that comprise a multi-factored best-interest inquiry.[123] For scholars who identify themselves as "children's rights advocates," the chosen factor is the preferences of a child who has reached a specific age.[124] Others emphasize the criterion of which parent is most apt to foster the child's relationship with the other parent, sometimes referred to as the "friendly parent doctrine."[125]

118. *Id.* at 2239.
119. *Id.* at 2217–19.
120. *Id.* at 2218–19.
121. *See* Patrick Parkinson, *The Past Caretaking Standard in Comparative Perspective*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 446, 449 (Robin Fretwell Wilson ed., 2006).
122. *See, e.g.*, Mary Becker, *Maternal Feelings: Myth, Taboo and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133, 139 (1992); Martha Minow, *Consider the Consequences*, 84 MICH. L. REV. 900, 908 (1986); Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 130 (1978).
123. *See* GUGGENHEIM, *supra* note 1, at 152.
124. *See, e.g.*, Federle, *supra* note 48, at 440; Kandel, *supra* note 48, at 361.
125. For discussion and critique of the "friendly parent" doctrine, including the conclusion that it does not solve the problem of indeterminancy, see Margaret K. Dore, *The "Friendly Parent" Concept: A Flawed Factor for Child Custody*, 6 LOY. J. PUB. INT. L. 41, 42 (2004).

A. Primary Caretaker Presumption

A proposal that has attracted considerable support as a replacement for a multi-factored best-interest inquiry is a presumption in favor of the parent who is designated the primary caretaker (sometimes referred to as the primary parent) based on the pre-separation history of childcare.[126] Some commentators assert that the primary caretaker presumption closely resembles the approximation rule in cases where one parent can be shown to have devoted a majority of caretaking time in the past.[127] But a key difference is that the primary caretaker presumption requires only that a litigant demonstrate who provided the most care in order to be named the parent with primary custody.[128] The approximation rule induces litigants to document the exact percentage of care in order to earn a larger share of custody (and perhaps a commensurate share of child support).[129] Nevertheless, many of the arguments for and against the primary caretaker presumption apply equally to the approximation rule.[130] Therefore, a more detailed analysis of these arguments is reserved for the subsequent examination of the approximation rule.

Briefly, those in favor of a primary caretaker presumption argue that it 1) is a determinate standard that will reduce litigation rates and hostile, manipulative negotiations; 2) is gender-neutral; 3) protects the child's relationship with the parent who is most central to the child's emotional welfare; and 4) recognizes that the parent who has the most experience providing childcare is the one who will most competently manage these responsibilities after divorce.[131] Those who oppose a primary caretaker presumption argue that it 1) may fuel hostile litigation by provoking disputes over which parent is "primary"; 2) favors mothers despite its gender-neutral language; 3)

126. Those favoring a primary caretaker presumption include Chambers, *supra* note 93, at 478–79 (for preschool children); Fineman, *supra* note 46, at 773–74; Glendon, *supra* note 87, at 1182; Johnson, *supra* note 19, at 4–5; Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 7 (2008); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 185–86 (1984).

127. Bartlett, *supra* note 6, at 480; *see also* Parkinson, *supra* note 121, at 449 ("To the extent that the past caretaker standard is used to select who should be the primary caregiver, it is indistinguishable from the primary caretaker presumption.").

128. *See* Parkinson, *supra* note 121, at 449.

129. *See id.* at 454.

130. *See id.* at 449.

131. *See, e.g.*, Glendon, *supra* note 87, at 1182; Parkinson, *supra* note 121, at 454–55.

relies on a distinction between primary and secondary parent that is meaningless, particularly for children beyond preschool age; 4) ignores changes in the family that occur after divorce; and 5) elevates quantity over quality of care and mistakenly assumes that the amount of time a parent spends with a child is an index of the parent's importance to the child, of the quality of their relationship, and of the parent's competence in child-rearing.[132]

B. Joint Custody Presumption

Other than the primary caretaker presumption, the proposal that has garnered the most attention is one that bypasses the list of best-interest criteria. Instead of emphasizing one factor, the proposal calls for a default presumption of joint physical custody, with the exact division of the child's time between parents varying among proposals, ranging from undefined to an equal split.[133]

Supporters of a joint physical custody presumption believe that it 1) is a determinate, win-win standard that will reduce litigation rates and hostile, manipulative negotiations, 2) avoids gender bias, 3) recognizes the value of, and promotes, the child's relationship with both parents, 4) is associated with better outcomes for children, 5) is preferred by most children and the public, and 6) protects the rights of both parents.[134] Critics of a joint physical custody presumption believe that it 1) requires a level of cooperation that is not feasible for parents who cannot agree on custody, 2) favors fathers by giving those who do not genuinely want this much parenting responsibility an advantage in negotiations, 3) disrupts the stability and continuity of care provided by the child's historical primary caretaker, 4) increases the child's harmful exposure to ongoing parental conflict, 5) is impractical because it requires divorced parents to live in close proximity to each other, and 6) exposes children to violence and abuse.[135]

132. Those opposing the primary caretaker presumption include Kelly, *supra* note 46, at 136; Schneider, *supra* note 46, at 2283 (for an exceptionally thoughtful analysis); Smith, *supra* note 46, at 746; Warshak, *supra* note 46, at 125.

133. For discussions of the arguments for and against joint physical custody see WARSHAK, THE CUSTODY REVOLUTION, *supra* note 30, at 177.

134. Jay Folberg, *Custody Overview*, *in* JOINT CUSTODY AND SHARED PARENTING 12–13 (Jay Folberg ed., 2d ed. 1991); WARSHAK, THE CUSTODY REVOLUTION *supra* note 30, at 177–205.

135. Arguing against a joint custody presumption, Sanders, in an otherwise thoughtful and scholarly analysis, unfortunately cites an advocacy group's citation of a 1996 (incorrectly cited as 1999) report, AM. PSYCHOLOGICAL ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK

Advocates of the primary caretaker presumption and the joint physical custody presumption share the goal of replacing the discretion inherent in the best-interest standard with a bright-line rule or a rebuttable presumption.[136] One proposal is seen as favoring most mothers; the other is seen as favoring most fathers.[137] Perhaps

FORCE ON VIOLENCE AND THE FAMILY (1996), to support an alarming wholesale indictment of family courts: "Abusive parents are more likely to seek sole custody than nonviolent ones and are successful about 70% of the time." Molly Sanders, *Should Child Custody Awards Be Based on Past Caretaking? The Effect of the Approximation Standard Ten Years After its Adoption*, 30 CHILD. LEGAL RTS. J. 17, 25 (2010). Before sounding the alarm of a national epidemic of judges placing children with known abusers, it is important to note that the task force has been criticized for allowing bias and an advocacy agenda to shape their report. This criticism is supported by the American Psychological Association (APA)'s subsequent repudiation of the report. A request addressed to the APA for a copy of the report, or for a location where the report could be viewed on the APA Website, received the following reply: "Thanks for your interest in the APA 1996 report. It is no longer available because it is outdated and needs review. APA has no plans to review and reprint it." Email from Julia M. Silva, Director, Violence Prevention Office, Pub. Interest Directorate, Am. Psychological Ass'n, to Richard A. Warshak, Clinical Professor, Div. of Clinical Psychology, Univ. of Tex. Sw. Med. Ctr. (Dec. 14, 2010, 10:35 CT) (on file with author). A similar response from the APA is found at Glenn Sacks, *American Psychological Association Distances Itself from Old APA Publication*, FATHERS AND FAMILIES (Mar. 6, 2011), http://www.fathersandfamilies.org/?p=13578. For strong evidence that judges are not delivering children into the hands of abusive parents and that the 1996 report is far off the mark in concluding that 70% of violent spouses prevail in custody trials, see T.K. Logan, Robert Walker, Leah S. Horvath & Carl Leukefeld, *Divorce, Custody, and Spousal Violence: A Random Sample of Circuit Court Docket Records*, 18 J. FAM. VIOLENCE 269, 274–75 (2003). These well-known authorities on domestic violence report on a random sample of divorce cases. Of thirty-two cases with spousal violence, only five were decided in a trial and, of those, all were decided in favor of the mother (four sole custody and one joint custody with mother as the primary residential parent). Of the remaining twenty-seven cases that settled without a trial, twenty-four were decided in favor of the mother, one received joint legal custody with equal residential time, and three were decided in favor of the father. *Id.* In this sample, 11% of the domestic violence orders were petitioned by fathers, so it is likely that the 9% decided in favor of fathers reflect the few cases in which the father received a domestic violence order against the mother. *Id. But see* T.K. Logan, Robert Walker, Carol E. Jordan & Leah S. Horvath, *Child Custody Evaluations and Domestic Violence: Case Comparisons*, 17 VIOLENCE AND VICTIMS 719, 737 (2002) (expressing concern about violent parents receiving weekly access to, but not custody of, their children).

136. *See* Elster *supra* note 44, at 7, 11–12, 14–15, 21; Chambers *supra* note 93, at 481, 559, 568–69; Fineman *supra* note 46, at 727–29, 770; Glendon *supra* note 87, at 1180, 1182–83, 1195; Laufer-Ukeles *supra* note 126, at 18–20, 22, 47–50, 65–66; WARSHAK, THE CUSTODY REVOLUTION, *supra* note 30, at 177–205.

137. *See* Chambers *supra* note 93, at 481; GUGGENHEIM *supra* note 1, at 148–51.

Schneider is correct in suggesting that "the driving force" behind family law reform "has not been so much a distrust of discretion as a dissatisfaction with some specific results that courts have been reaching and a desire to alter those results by whatever method comes most easily to hand."[138]

In the real world of crowded dockets, with limited funds for comprehensive custody evaluations and legal representation, a rule has strong appeal. It promises to clarify the expected outcome of trials and thus promote settlements, remove some incentives for protracted and hostile negotiations and thus relieve children's exposure to toxic levels of conflict, and expedite the court's processing of cases that fail to settle. No serious scholar believes that a custody rule will work best for all children. Rather, the assumption is that such a rule will work best for most children.[139]

VII. THE APPROXIMATION RULE: PRESUMPTION, EXCEPTIONS, AND DEFINITION OF CARETAKING

A. The Presumption and Its Exceptions

Responding to the call for a rule that can be applied automatically and that bypasses judicial discretion, the *Principles* adopts an idea first articulated in a seminal article by Professor Elizabeth S. Scott.[140] The proposal directs courts to look to the family's past to decide contested physical custody cases: "[T]he 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 caretaking functions for the time prior to the parents' separation . . . ."[141] The same sentence that sets out the approximation rule continues with elaborations that expand the court's discretion, and two paragraphs later, the *Principles* reintroduces an indeterminate best-interest standard, albeit with an emphasis on past caretaking.[142] Such elaborations fulfill Professor

138. Schneider, *supra* note 46, at 2231.

139. Elster, *supra* note 44, at 24–25 (explaining that a maternal-preference rule would benefit children who would do best in the custody of their mother, as well as those who should be in the custody of their father but for whom the emotional toll of custody litigation would outweigh the benefits of a father-custody disposition).

140. Scott, *supra* note 42, at 617–19, 630, 637–38.

141. PRINCIPLES, *supra* note 3, § 2.08(1).

142. *Id.* § 2.08(3) ("If the court is unable to allocate custodial responsibility under Paragraph (1) because there is no history of past performance of caretaking functions, as in the case of a newborn, or because the history does not establish a sufficiently clear pattern of caretaking, the court should allocate custodial responsibility based on

Schneider's prediction, twenty-one years earlier, regarding the attempt to abandon discretion in custody adjudication: "We will see that, once you establish an apparently flat rule like the primary caretaker standard, you immediately run into conflicting interests and arguments that can only be accommodated by writing ever more elaborate rules or by conceding judges some discretion."[143]

The past-caretaking presumption is overcome as needed to fulfill at least one of the following objectives enumerated by the *Principles*:

> (a) to permit the child to have a relationship with each parent which, in the case of a legal parent or a parent by estoppel who has performed a reasonable share of parenting functions, should be not less than a presumptive amount of custodial time set by a uniform rule of statewide application;
>
> (b) to accommodate the firm and reasonable preferences of a child who has reached a specific age, set by a uniform rule of statewide application;
>
> (c) to keep siblings together when the court finds that doing so is necessary to their welfare;
>
> (d) to protect the child's welfare when the presumptive allocation under this section would harm the child because of a gross disparity in the quality of the emotional attachment between each parent and the child or in each parent's demonstrated ability or availability to meet the child's needs;
>
> (e) to take into account any prior agreement, other than one under § 2.06, that would be appropriate to consider in light of the circumstances as a whole, including the reasonable expectations of the parties, the extent to which they could have reasonably anticipated the events that occurred and their significance, and the interests of the child;
>
> (f) to avoid an allocation of custodial responsibility 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, each parent's and the

the child's best interests, taking into account the factors and considerations that are set forth in this Chapter, preserving to the extent possible this section's priority on the share of past caretaking functions each parent performed.").

143. Schneider, *supra* note 46, at 2283.

child's daily schedules, and the ability of the parents to cooperate in the arrangements;

(g) to apply the Principles set forth in § 2.17(4) if one parent relocates or proposes to relocate at a distance that will impair the ability of a parent to exercise the presumptive amount of custodial responsibility under this section;[144]

(h) to avoid substantial and almost certain harm to the child.[145]

The application of the approximation rule, with its exceptions, is further limited by the requirements of § 2.11 to protect the child and the child's parent from domestic violence and other serious parental failures.[146] The other serious parental failures include child abuse, substance abuse, and persistent interference with a parent's access to the child.[147]

B. Parenting Versus Caretaking Functions

To evaluate the approximation-rule proposal and its chances of achieving widespread acceptance, it is essential to understand what the *Principles* includes and excludes from the definition of caretaking functions.[148] Tasks that are regarded as parenting functions but excluded from caretaking functions (i.e., a parent's investment in these tasks has no bearing on the allocation of physical custody) include

(a) providing economic support;

(b) participating in decisionmaking regarding the child's welfare;

(c) maintaining or improving the family residence, including yard work, and house cleaning;

(d) doing and arranging for financial planning and organization, car repair and maintenance, food and clothing purchases, laundry and dry cleaning, and other tasks

144. *See generally* PRINCIPLES, *supra* note 3, § 2.17(4)(a) ("The court should allow a parent who has been exercising the clear majority of custodial responsibility to relocate with the child if that parent shows that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose.").

145. *Id.* § 2.08(1).

146. *See id.* § 2.11.

147. *Id.* § 2.11(1).

148. *See id.* § 2.08(1).

> supporting the consumption and savings needs of the household.[149]

Parenting functions that are considered caretaking functions for the purpose of the approximation rule (i.e., the proportion of time a parent invested in these activities serves as the basis for the allocation of custodial time with the child) are

> tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others. Caretaking functions include but are not limited to all of the following:
>
> (a) satisfying the nutritional needs of the child, managing the child's bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child's personal hygiene needs including washing, grooming, and dressing, playing with the child and arranging for recreation, protecting the child's physical safety, and providing transportation;
>
> (b) directing the child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;
>
> (c) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to the child's needs for behavioral control and self-restraint;
>
> (d) arranging for the child's education, including remedial or special services appropriate to the child's needs and interests, communicating with teachers and counselors, and supervising homework;
>
> (e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;
>
> (f) arranging for health-care providers, medical follow-up, and home health care;
>
> (g) providing moral and ethical guidance;
>
> (h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.[150]

149. *Id.* § 2.03(6).
150. *Id.* § 2.03(5).

VIII. THE APPROXIMATION RULE: GOALS, RATIONALE, AND ASSUMPTIONS

A. Default Rule for Trials, BATNA for Negotiations

The *Principles* emphasizes that the approximation rule is a default rule to be used only in disputes decided by a court.[151] As with the best-interest standard, the approximation rule would provide a backdrop for negotiations.[152] In fact, the *Principles* explicitly encourages parents to reach agreements within the negotiating context set by the approximation rule.[153] If the rule works as intended, it would have the following impact on the settlement process. The approximation rule would tilt negotiations regarding custody, and issues related to custody such as child support, in favor of the parent who is asking for a division of the child's time that is in line with the apparent past division of time. For instance, if the mother seeks a majority of time with the children and the father seeks an equal division of time, and both sides agree that the court is likely to find that the parents contributed equal time to caretaking functions in the past, this would give leverage to the father in the negotiations. On the other hand, the rule disadvantages spouses who want to expand their contacts with their children after the marital separation.[154]

For the approximation rule to have the intended impact on the bargaining context, two assumptions must be made. The first assumption is that the parties will agree on the proportion of time that each has contributed to the caretaking tasks defined by the *Principles*, or at least agree on how the court is likely to decide this issue. The second assumption is that neither party to the custody dispute will raise any of the exceptions that trump the application of the approximation rule. These assumptions are examined in the subsequent analysis of the rationale presented by the *Principles* for the proposed reforms.

151. *See id.* ch. 1, topic 1, at 8–10.

152. *Id.* § 2.08 cmt. a ("This section states the criteria for allocating custodial responsibility between parents when they have not reached their own agreement about this allocation. These criteria also establish the bargaining context for parents seeking agreement.").

153. *Id.*

154. Levy, *supra* note 11, at 76.

B. Refinement or Replacement of the Best-Interest Standard?

Despite its explicit intent to dislodge the best-interest standard and substitute a past-caretaking standard, the *Principles* characterizes the approximation rule as a clarification and refinement, rather than a radical reform and replacement, of the best-interest standard.[155]

The historical context provided earlier identifies two essential defining features that differentiate the best-interest standard from its predecessors. First, it places a priority on children's welfare over parental entitlements.[156] Second, it confers broad discretion on the court, a discretion that, since the latter third of the twentieth century, is usually exercised via a multi-factored individualized inquiry as originally envisioned in the Uniform Marriage and Divorce Act.[157]

The approximation rule shares the first defining characteristic of the best-interest standard: its primary objective is "to serve the child's best interests,"[158] with a subsidiary objective of achieving "fairness between the parents."[159] But it directly contradicts the second defining characteristic of the best-interest standard: judicial discretion with the intent to promulgate individualized custody decisions.[160] Rather than lodging broad discretion with the court, the approximation rule overtly aims to limit the court's discretion and restrict the process of custody adjudication to a single desideratum.[161] Lacking the second defining feature of the best-interest standard, it is conceptually untenable to attach this term to a rule that is its conceptual opposite. Fundamentally, the approximation rule does not supplement the best-interest standard. It supplants it.

ALI posits the approximation rule as a more reliable means of securing children's welfare, and, thus, it is understandable that we are asked to regard the rule as possessing the moral cachet associated with the best-interest standard.[162] But the virtue of the prevailing standard is found in its individualized, as opposed to formulaic, treatment of children and families. The approximation rule forfeits its claim to this virtue because it does not merely clarify or refine the level of judicial discretion that secures the virtue; it severely restricts

155. PRINCIPLES, *supra* note 3, § 2.02 cmt. c ("Chapter 2 attempts to clarify and refine the best-interests standard rather than to eliminate it.").
156. *Id.* § 2.02(2) cmt. b.
157. *Id.* § 2.02(1).
158. *Id.*
159. *Id.* § 2.02(2).
160. *Id.* § 2.02 cmt. c.
161. *Id.*
162. *Id.* §§ 2.02 cmt. d, 2.06 (1), (3).

it.[163] This does not mean that the approximation rule lacks virtue. But whatever virtues the rule may possess, an individualized broad-brush approach for adjudicating custody disputes is not one of them.

C. Rationale

The approximation rule improves upon earlier custody presumptions in two important respects. It is gender-neutral rather than gender-centered.[164] And instead of imposing one template on all families, the approximation rule is pluralistic, in the sense that each family's custodial allocation is based on its own historical pattern of caretaking.[165] As the *Principles*' reporter notes:

> 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.[166]

The *Principles* regards the approximation rule as an optimal solution to the problems critics attribute to the discretionary nature of the best-interest standard.[167] Furthermore, the hope is that the rule will be palatable to interest groups that take an ever-increasingly powerful role in shaping family law legislation.[168] In addition to gender-neutrality and pluralism, the *Principles* offers several arguments for relying on past caretaking:

1) The amount of time invested in past caretaking is a determinate standard that makes the outcome of a custody trial more predictable.[169] This makes it more likely that parents will reach an

163. *Id.*
164. Bartlett, *supra* note 6, at 480–81.
165. *Id.* at 479–80.
166. *Id.* at 480; s*ee also* Atwood, *supra* note 94, at 126 (discussing the rule's pluralism).
167. Bartlett, *supra* note 6, at 482.
168. *See id.* at 472.
169. PRINCIPLES, *supra* note 3, § 2.08 cmt. b.

agreement without the financial and emotional costs of a trial.[170] It is commonly believed that custody litigation escalates conflict, so the hope is that a determinate standard will ultimately benefit children by reducing their harmful exposure to parental conflict.[171]

2) The approximation rule not only promotes settlements, it creates a clear BATNA that facilitates less protracted and more amicable negotiations with less opportunity for strategic, manipulative bargaining.[172]

3) In cases that fail to settle, the approximation rule reduces the complexity and length of trials by restricting the scope of fact-finding to a single, relatively easy to measure, factor.[173] This reduces the need for costly, comprehensive custody evaluations and expert witnesses.[174] Revealing a jaundiced view of the contributions of mental health experts to custody litigation, the ALI believes, "Avoiding expert testimony is desirable because such testimony, within an adversarial context, tends to focus on the weaknesses of each parent and thus undermines the spirit of cooperation and compromise necessary to successful post-divorce custodial arrangements . . . ."[175]

4) The parents' past decision about how to divide caretaking time is the best guide to what the parents would decide if they were functioning rationally and focused on their child's interests during their custody negotiations.[176] Additionally, the approximation rule facilitates effective negotiations because "[t]he way the parents chose to divide responsibility when the family lived together anchors the negotiations in their own lived experience rather than in unrealistic or emotion-based aspirations about the future."[177]

5) The *Principles* recognizes that any determinate standard carries the potential to simplify, expedite, and reduce the incidence of trials and protracted negotiations.[178] The goal, though, is to obtain a determinate standard's benefits while retaining a focus on children's welfare.[179] The *Principles* believes that the approximation rule

170. Bartlett, *supra* note 85, at 19 ("[T]he 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.").
171. *See id.* at 13, 19.
172. *See* PRINCIPLES, *supra* note 3, § 2.08 cmt. b.
173. *Id.*
174. *See* Bartlett, *supra* note 85, at 19.
175. PRINCIPLES, *supra* note 3, § 2.08 cmt. b.
176. *Id.*
177. *Id.*
178. *See id.*
179. *See id.*

accomplishes this elusive feat.[180] It assumes that the quantity of past caretaking is an adequate proxy for qualitative aspects of children's best interests that are difficult to measure.[181] Specifically, the *Principles* assumes that the difference between the parents in the amount of time that each cared for the child in the past is an index of the difference in 1) the strength of the child's emotional ties to each parent, 2) the quality of the child's relationship with each parent, 3) the parents' relative competence to raise children, and 4) the parents' motivation to put the child's interests first.[182] The *Principles* recognizes limitations of this index, but prefers a rule to the prevailing standard in which expert testimony and judicial discretion are seen as intolerably subjective.[183]

If the assumptions underlying the approximation rule were accurate, there is no doubt that the rule would represent a child-friendly improvement on the best-interest standard. But seen in the light of relevant social science literature and a realistic view of the socio-legal context of custody disputes, it becomes clear that the approximation rule will not—indeed cannot—deliver on its promises.

IX. ANALYZING THE RATIONALE AND ASSUMPTIONS OF THE APPROXIMATION RULE

A. Gender-Neutrality Versus the Perception of Gender Bias

Regardless of how beneficial a legal reform would be in practice, it must be politically palatable if it is to enjoy acceptance by state legislatures and application by courts. Discussing the anemic judicial response to West Virginia's legislated approximation rule, Professor Sanders observes that, "The success of the standard will also depend upon the support of various interest groups."[184] The approximation rule was conceived as a rapprochement between the primary

180. *See id.*

181. *Id.* § 2.08 cmt. b.

182. *Id.* ch. 1, topic 1, subch. II, pt. c ("How caretaking was divided in the past provides a relatively concrete point of reference which is likely to reflect various qualitative factors that are otherwise very hard to measure, including the strength of the emotional ties between the child and each parent, relative parental competencies, and the willingness of each parent to put the child's interests first."); *see also id.* § 2.08 cmt. b ("It assumes that the division of past caretaking functions correlates well with other factors associated with the child's best interests, such as the quality of each parent's emotional attachment to the child and the parents' respective parenting abilities.").

183. *See id.*

184. Sanders, *supra* note 135, at 26.

caretaker presumption advocated by mothers' rights groups and a joint custody presumption advocated by fathers' rights groups.[185] Like the best-interest standard, the approximation rule is gender-blind in its language.[186] But as history has shown with the best-interest standard, gender-neutral statutes can be implemented in a gender-biased manner.

In evaluating its political viability, it is relevant that most commentators, including advisers to the ALI *Principles*, are convinced that the rule would tilt the negotiating field and trial outcome in favor of the mother.[187] Recalling Schneider's suggestion that proposals to restrict judicial discretion in custody cases are motivated by the desire for a particular outcome, and given the legislative trend toward joint custody statutes, the approximation rule may be seen as a move in the direction of reversing the trend and establish a bargaining context that favors mothers, in addition to its goal of reducing indeterminacy.[188] If so, Professor Guggenheim's analysis of the primary caretaker presumption may fit the approximation rule: "The primary caretaker presumption was offered as a gender-neutral way to achieve the same result the maternal preference yielded. Its transparency was hard to miss. It was promulgated by interested parties who knew ahead of time who would benefit most by its use."[189] Guggenheim predicts "that more women will back the approximation presumption than men. Women will appreciate how they will gain if the presumption became law; men will understand how they will lose both leverage in negotiating a divorce settlement and the prospects of securing custody

185. *See* Scott, *supra* note 42, at 615–16, 628, 630–32.

186. *See* SCHEPARD, *supra* note 61, at 162, 167.

187. *See, e.g.*, Shelley A. Riggs, *Is the Approximation Rule in the Child's Best Interests? A Critique from the Perspective of Attachment Theory*, 43 FAM. CT. REV. 481, 489 (2005) ("[B]ecause the working parent in contemporary society is most often the father, the approximation rule may be unfairly biased against fathers and end up resembling little more than the maternal preference standard of the past."); Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L.Q. 27, 43 (2002) ("[The *Principles*'] list of caretaking functions . . . is likely to spell mother in many, if not most, households."); Margaret F. Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 301, 302, 313 (2001) (declaring that "feminist principles permeate the Chapter" and including an entire section on "selling" the ALI PRINCIPLES to men).

188. *Cf.* Kay, *supra* note 187, at 38. This esteemed scholar and adviser to the PRINCIPLES believes that the rule was "crafted by women" as an alternative to joint custody, which they perceive as the "handiwork of men." *Id.* at 27, 38.

189. GUGGENHEIM, *supra* note 1, at 150.

themselves."[190] Professor Levy groups the approximation rule with the primary caretaker standard and the maternal deference standards as proposals "which seem to route the law implicitly in the direction of the maternal presumption of earlier days."[191]

The charge that the approximation rule masks a maternal preference presumption is answered by the primary draftsperson and reporter of the *Principles*' chapter on custody, Professor Kathleen Bartlett: "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."[192]

Other proponents of the approximation rule correctly point out that it would benefit fathers who assume more responsibility for child-care during the marriage, in some cases allocating more time than they would receive under the best-interest standard.[193] Emery cites

190. *Id.* at 151. However, to be most accurate, we should not equate the interests and preferences of mothers in a custody dispute with those of all women. Women in the father's life other than the divorcing spouse, such as his mother, sisters, and friends, may favor a standard that gives the father more time with his children. Also, some women who identify themselves as feminists favor custody rules that encourage less traditional gender-based divisions of parenting roles. *See, e.g.*, CATHY YOUNG, CEASEFIRE!: WHY WOMEN AND MEN MUST JOIN FORCES TO ACHIEVE TRUE EQUALITY 211, 213, 217–19 (1999).

191. Levy, *supra* note 11, at 88.

192. Bartlett, *supra* note 6, at 481; *see also* Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 18 (2002) ("The ALI past-caretaking standard . . . is indifferent to the nature of the past-caretaking arrangements."). In Richard A. Warshak, *The Approximation Rule, Child Development Research, and Children's Best Interests After Divorce*, 1 CHILD DEV. PERSP. 119, 123 (2007) and in Warshak, *supra* note 16, at 618 n.67, I mistakenly cited this quote to emphasize the rule's disregard of quality of care in favor of an exclusive focus on quantity of care. However, upon reviewing the context while preparing this article, it is clear that this particular statement regarding indifference is intended to underscore the fact that the rule makes no assumptions about the nature of past divisions of child-care. Although, as I show subsequently, the rule is indifferent to the quality of care except in the extreme cases of child abuse or neglect, the indifference referred to in the above sentence clearly has a separate connotation. *See also* Atwood, *supra* note 94, at 127 ("[the approximation rule] will favor women only to the extent that parents adhere to traditional gender roles.").

193. Atwood, *supra* note 94, at 126; *see also* O'Connell, *supra* note 45, at 130 (noting that the approximation rule would reward the increasing number of fathers in dual-earner households who provide primary child-care); Fabricius et al., *supra* note 34, at 213. In a representative sample of Arizona citizens who responded to a hypothetical custody case in which the mother and father provided equal amounts of child-care before the divorce, more than 75% thought that courts would award mothers most of

national survey data to predict that the approximation rule would give the average father more than 120 nights annually with his children, the equivalent of joint physical custody.[194]

I include this brief discussion of gender implications because the subject invariably arises when the merits of the approximation rule are debated and, the issue is important in assessing the odds of the rule's widespread adoption. But the question of whether the approximation rule is likely to become law need not distract us from the focus of this article, which is whether the rule should become law. The answer to this question lies not in whether mothers or fathers benefit from the past caretaking standard, but whether children benefit. This topic we take up next, examining each of the main arguments offered in defense of the approximation rule:

> 1) Will the rule reduce the incidence, scope, and complexity of trials?[195]
> 2) Will the rule minimize the motivation for manipulative and hostile bargaining?[196]
> 3) Will the rule secure the custodial arrangements that parents would agree to if they were functioning rationally in accord with child-rearing choices they made in the past?[197]
> 4) Most importantly, is the quantity of past caretaking a sufficient index of qualitative factors associated with children's best interests?[198]

B. Impact of the Approximation Rule on Custody Trials

ALI believes that the approximation rule will result in less frequent and less complicated litigation with less judicial discretion than under the best-interest standard.[199] ALI's charge that the best-interest standard encourages custody trials (and the corollary expectation that the rule will reduce their incidence)[200] is difficult to defend. No national data exist on the rate at which custody is decided by trial versus settlement. The best available evidence from which to extrapolate reveals a very high settlement/low litigation rate under

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the parenting time. *Id.* In this hypothetical, parenting time would be equally divided under the approximation rule.

194. Emery, *supra* note 45, at 134.
195. *See infra* pp. 124–37 and accompanying notes.
196. *See infra* pp. 137–39 and accompanying notes.
197. *See infra* pp. 139–42 and accompanying notes.
198. *See infra* pp. 142–60 and accompanying notes.
199. *See* PRINCIPLES, *supra* note 3, § 2.08 cmt. b.
200. *See id.*

the best-interest standard. A Stanford study of 1,124 families in California found that custody was either uncontested or decided after negotiations in 80% of the cases.[201] Most of the remaining cases were settled through mandatory mediation (11%), or through negotiations following a custody evaluation or prior to the completion of a trial (7.5%).[202] Only 1.5% of the cases proceeded to a complete trial.[203] Two additional studies report greater than 90% rates of pretrial settlements.[204]

The high rate of out-of-court settlements leaves little room for improvement and suggests that, contrary to the concerns of critics, the best-interest standard allows most couples to reach agreements rather than go to trial.[205] Even proponents of the approximation rule concede that ALI's assumption that the rule will reduce litigation (a key rationale offered for the proposal) is unrealistic. As Professor Mary E. O'Connell writes, "[C]hanging the law to decrease this already low litigation rate is of dubious value."[206]

Experience with other attempts to replace the best-interest standard with a clear-cut default rule have not delivered the hoped for reduction in litigation rates.[207] A primary-caretaker preference in Minnesota produced "a frenzy of litigation" that two authors who support the preference attribute to an overly loose and flexible application.[208] Similarly, Oregon's experience with a default joint custody presumption led to unanticipated consequences, such as

201. MACCOBY & MNOOKIN, *supra* note 82, at 137.

202. *Id.*

203. *Id.*

204. BRAVER & O'CONNELL, *supra* note 30, at 90–91 (reporting that 5% of a random sample of divorcing parents took their dispute to court); Logan et al., *Divorce, Custody, and Spousal Violence*, *supra* note 135, at 275 (reporting that 9% of a random sample of divorce cases with children were decided in a trial).

205. It is possible that the low contest rate reflects, in part, the operation of an implicit maternal preference rule held by parents and their attorneys, particularly when young children and girls of any age are involved. *See* State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285, 286–89 (N.Y. Fam. Ct. 1973) (discussing past use of the maternal presumption and mothers' reliance upon it).

206. O'Connell, *supra* note 45, at 130; *see also* Atwood, *supra* note 94, at 126 ("[T]he ALI's presumption is unlikely to reduce litigation for those few couples who cannot resolve matters on their own.").

207. *See, e.g.*, Gary L. Crippen & Sheila M. Stuhlman, *Minnesota's Alternatives to Primary Caretaker Placements: Too Much of a Good Thing?*, 28 WM. MITCHELL L. REV. 677, 682 (2001).

208. *Id.* at 681–85.

increases in the number of abuse actions and post-divorce custody motions.[209]

It is possible that for some litigants the uncertainty of a trial's outcome is a deterrent rather than an inducement to proceed to trial. We should not assume, though, that a reduction in litigation rates necessarily represents "improvement." Although the ordeal of a custody trial undoubtedly takes a toll on the family, in some cases the alternative may be less desirable, such as an emotionally healthy parent capitulating to a seriously disturbed parent's demands in the interest of avoiding a trial.[210]

There are two additional reasons why the approximation rule will not make a significant dent in the existing low litigation rate and is unlikely to simplify and expedite trials as envisioned by ALI. 1) Under the best-interest standard, disputes over past caretaking are common among custody litigants, and the *Principles* provides additional fuel for such disputes.[211] Furthermore, adjudicating such disputes is more complicated than ALI acknowledges. 2) The exceptions and circumstances that modify the approximation rule provide plenty of focus for litigation with a high level of judicial discretion.[212]

1. Disputes over Past Caretaking

Under the best-interest standard, parents who proceed to trial usually do not agree on the proportion of their relative contributions to past caretaking.[213] In the Approximation Rule Survey, 88% of attorneys and child custody evaluators confirmed that, if the approximation rule were operative, the litigants in their last custody trial would have disputed the past division of caretaking functions and still proceeded to trial.[214] The approximation rule could fuel a higher rate of such disputes because it grants significant status and

209. *See* Douglas W. Allen & Margaret F. Brinig, *Bargaining in the Shadow of Joint Parenting* 10–12 (Oct. 2005) (Univ. Iowa Legal Studies Research Paper No. 05-25), *available at* http://ssrn.com/abstract=820104.

210. *See, e.g.*, Logan, et al., *Divorce, Custody, and Spousal Violence*, *supra* note 135, at 276 ("Settling out of court can provide an opportunity for a husband to coerce the wife into accepting a lower financial payment in exchange for custody of the children.").

211. *See* PRINCIPLES, *supra* note 3, § 2.08 cmt. b.

212. *See* Warshak, *The Approximation Rule*, *supra* note 192, at 121.

213. *See* PRINCIPLES, *supra* note 3, § 2.08 cmt. b.

214. Warshak, *supra* note 12, at 25. It is possible that some respondents took the survey with preconceived attitudes about the approximation rule and skewed their answers to support these attitudes.

prerogatives to the parent whom the court decides has spent the most time performing past caretaking functions.[215]

Although the *Principles* explicitly discourages an adversarial divorce paradigm, it repeatedly describes the approximation rule as requiring the court to "allocate primary custodial responsibility."[216] The awarding of "primary" custodial responsibility to one parent implicitly demotes the other parent to "secondary" status.[217] Rank ordering parents is likely to fuel discord, particularly at a time when parents are struggling to preserve their identities as parents in the face of the loss of their identities as spouses.[218] Professor Schepard regards this process as "reminiscent of the search for a single psychological parent."[219] Awarding primary custody is possible under the best-interest standard, but other options also are possible under this standard such as designating a parenting plan without labeling either parent as primary.

Litigation over how much time each parent actually invested in caring for the children, whose account of the childcare status quo is most accurate, and, thus, who deserves recognition as the primary custodial parent is especially likely if either parent anticipates a future dispute over relocating with the child. In such cases, the primary parent is in the driver's seat when it comes to the freedom to move a considerable distance away from the other parent with the child.[220] The *Principles*' position on relocation is that "[t]he court should allow a parent who has been exercising the clear majority of

215. *See* Warshak, *The Approximation Rule*, *supra* note 192, at 121–23.

216. *See, e.g.*, PRINCIPLES, *supra* note 3, § 2.08 cmt. b, illus. 1 ("The past caretaking standard requires the court to allocate primary custodial responsibility to Sandra."); *see also id.* § 2.08 cmt. c, illus. 5 ("That parent ordinarily will be allocated primary custodial responsibility for the child."); *id.* § 2.08 cmt. c, illus. 5 ("[T]he court should allocate primary custodial responsibility to Marie."). In this illustration, Marie's husband assumed the majority of childcare responsibilities for the entire year prior to the separation, but not for the years prior to that. *Id.*

217. Warshak, *supra* note 16, at 604.

218. *Id.*

219. SCHEPARD, *supra* note 61, at 169. The notion that children have only one psychological parent has been discredited by a large body of evidence that demonstrates that infants normally develop close attachments to both of their parents and that they do best when they have the opportunity to establish and maintain such attachments. *See, e.g.*, BILLER, *supra* note 74, at 11–12; Michael E. Lamb & Charlie Lewis, *The Development and Significance of the Father-Child Relationships in Two-Parent Families*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 280–81; PARKE, *supra* note 74, at 47–48; WARSHAK, THE CUSTODY REVOLUTION, *supra* note 30, at 35–36; Brief for Lamusga Children, *supra* note 76, at 5–6.

220. PRINCIPLES, *supra* note 3, § 2.17(4)(a).

custodial responsibility to relocate with the child if that parent shows that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose."[221] With such a premium placed on having the primary or majority of custodial responsibility, and this designation riding on the single factor of how much time each parent invested in caring for the children, one can expect that this single factor will become a focus of dispute.

The *Principles* recognizes that disputes about past caretaking may introduce difficulties in applying the approximation rule but expects that disputes over the relative amounts of the parents' past child-care are easier to resolve objectively than are those over the parents' relative ability to meet their children's needs and the quality of their child-care.[222] If this expectation were grounded in the practical realities of parenting, the outcome of litigation might be more predictable and the rule might accomplish its mission of reducing the incidence of trials and simplifying the court's task when trials do occur. However, tracking parental time devoted to children's care is discouragingly complicated.[223] The difficulties in implementing the approximation rule become evident in the following example.

A family in which the wife is a full-time homemaker and the husband is employed outside the home might seem the easiest in which to designate a primary caregiver. Allowing for variations, in such families the husband typically leaves for work about an hour before the child leaves for school. He returns home about two hours after the child returns home. Assuming that there is no structured after-school activity and that the child is not under the care of any other adults during this time, such as dance instructors, music teachers, and sports coaches (an unlikely assumption in many, if not most, families of school-age children), in each school week the mother has fifteen hours more than the father during which the child is under her care (three hours a day * five days a week). Research has established that less than two-thirds of this time involves direct personal interaction between mother and child.[224] In fact, on a typical weekday, children in intact families spend only an average of two

221. *Id.*

222. *Id.* § 2.08, cmt. a-b.

223. Warshak, *supra* note 16, at 609.

224. *Id.*; *see, e.g.*, Steven L. Nock & Paul W. Kingston, *Time with Children: The Impact of Couples' Work-Time Commitments*, 67 SOC. FORCES 59 (1988); W. Jean Yeung & Frank Stafford, Intra-Family Child Care Time Allocation: Stalled Revolution or Road to Equality? 22, 26, 61–62 (Jan. 2003) (unpublished manuscript) (on file with the author).

hours and fifteen minutes directly interacting with either parent.[225] Nevertheless, for the sake of argument, assume that the mother has this fifteen-hour advantage during the school week.

The example becomes complicated, and the division of childcare difficult to estimate, when it includes real-life permutations. If the father coaches his child's soccer team, or attends the practices with the child, this gives the father about two more hours of caretaking each night of practice, assuming that some time is spent preparing to leave the house and driving to and from the soccer field. However, if the mother takes the child to soccer practice, this gives her two more hours, unless she drops the child off at the field and has no contact with the child until she picks her up at the end of practice. Add to the equation inconvenient facts such as work holidays about one day per month, overnight Scout camp-outs, and part-time jobs, and it is apparent that the task of estimating caretaking time is not clear-cut. Making matters even more complicated, parents often spend different amounts of time with each child in the family. Multiply the difficulty when the relevant time investments are in the past.

Sociologists who use sophisticated methods to track parental time devoted to children find the task complex and daunting.[226] The scientists dispute methods and findings, arguing issues such as to what degree does a parent's being available to, as opposed to engaged with, offspring qualify as caretaking?[227] As Professor Michael E. Lamb explains, "Involvement is a multifaceted concept that comprises interaction, supervision, availability, and various types of cognitive and emotional engagement . . . ."[228] If the experts have trouble agreeing on contemporaneous measures of parental childcare

225. Frank Stafford & W. Jean Yeung, *Parental Childcare Time and Children's Cognitive Development*, ATUSUSERS.UMD.EDU (Oct. 19, 2007) http://www.atususers.umd.edu/wip2/papers_i2007/Stafford_Children.pdf.

226. Michelle Budig & Nancy Folbre, *Activity, Proximity, or Responsibility? Measuring Parental Childcare Time, in* FAMILY TIME: THE SOCIAL ORGANIZATION OF CARE 51 (Nancy Folbre & Michael Bittman eds., 2004); Frank Stafford & W. Jean Yeung, *The Distribution of Children's Developmental Resources*, *in* ECONOMICS OF TIME USE 289 (Daniel Hamermesh & G.A. Pfann ed., 2005); *see also* Fabricius et al., *supra* note 34, at 218–20.

227. Budig & Folbre, *supra* note 226; Stafford & Yeung, *supra* note 226; *see also* Fabricius et al., *supra* note 34, at 218–20 (describing complications in measuring father–child contact, and concluding, "[n]ew measures of amount of parenting time are needed that have good psychometric properties and that are sensitive to different parenting time schedules").

228. Michael E. Lamb, *The "Approximation Rule": Another Proposed Reform that Misses the Target*, 1 CHILD DEV. PERSP. 135–36 (2007).

time, surely parents in a custody battle, with so much riding on the numbers, will dispute each other's estimates of past time invested in caretaking. Unless parents have been punching time clocks every time they interact with their children, and saving the time cards, this will be one more arena for "he said/she said" arguments.

The example above highlights only the problems in measuring what is observable about what each parent does with the child. Apart from the extreme of severely harsh, abusive, and irrational parenting, much of what goes on between parents and children is subtle and indirect, neither immediately apparent nor easy to quantify.[229] Hired help can perform the same chores as a parent, yet the parent's efforts carry additional impact.[230] Parents who mow the lawn or clean the house demonstrate to their children pride in the home, responsibility, discipline, delay of gratification, and maturity in completing work before play.[231] These values cannot be measured by the time it takes to perform the chores.[232]

Two of the caretaking functions that the *Principles* lists are "helping the child to develop and maintain appropriate interpersonal relationships" and "providing moral and ethical guidance."[233] The time each parent spent instilling social skills and moral values cannot be reduced to the time each parent spent lecturing the child in these areas (assuming that such time could be measured, which of course is impossible).[234]

An axiom of child rearing is that children learn their lessons more from what their parents do than what their parents say.[235] When parents work forty hours a week outside the home, they demonstrate important moral virtues, as do parents who mow the lawn or do the laundry.[236]

Empathy is the bedrock of successful high quality relationships, for children and for adults. It is what partners in successful relationships and effective therapists have in abundance and what

229. *See* Stephen A. Small & Gay Eastman, *Rearing Adolescents in Contemporary Society: A Conceptual Framework for Understanding the Responsibilities and Needs of Parents*, 40 FAM. REL. 455, 455–57 (1991) (discussing the many different functions of effective parenting).

230. *See id.* at 455.

231. *See* Mary Holland Benin & Debra A. Edwards, *Adolescents' Chores: The Difference between Dual- and Single-Earner Families*, 52 J. MARRIAGE & FAM. 361, 361–65 (1990); Small & Eastman, *supra* note 229, at 457.

232. *See* Budig & Folbre, *supra* note 226, at 51, 63.

233. PRINCIPLES, *supra* note 3, at § 2.03 (5).

234. Warshak, *The Approximation Rule*, *supra* note 192, at 122.

235. *See* Small & Eastman, *supra* note 229, at 457.

236. *See id.*

serial killers lack.[237] A Yale University twenty-six-year study found that the one factor most predictive of empathy in adults is growing up with a father in the home.[238] The study was conducted in an era when the distribution of time the average child spent with her mother versus her father was even more skewed than it is today.[239] How does one measure the amount of time that the father contributed to the development in his children of this most critical personality trait?

A group of boys I call "the baseball bat kids" provide the last example illustrating that the approximation rule is not only difficult to implement, it is impossible.

I have treated several boys who slept with baseball bats under their bed. This was not the reason they consulted me. But in the course of our work together, either the mother mentioned it, or the boy confided in me a concern about his behavior.

The baseball bat kids all lived with their mothers after their parents' divorce, and were not seeing their fathers as much as they wanted. In every case it wasn't until after Dad moved out of the home that the baseball bat migrated to the place where monsters hide when boys are little, and girly magazines hide when they're not so little.

We can speculate that keeping the baseball bat close was compensation for the absence of the parent most closely identified with the sport. Or that the bat provided a sense of comfort through its association with a relaxed and rewarding portion of the boy's life, where the biggest worry was losing the game, not losing a parent. Or that the bat represented a world far removed from domestic turmoil, where conflict is encapsulated and expressed in a harmless and entertaining manner, according to rules that are predictable and consistently applied.

Speculations aside, according to the boys, their conscious intention in parking the baseball bat under the bed was to keep it handy for self-defense. Quite simply, when Dad left the home he

237. *See* John M. Gottman & Alan L. Porterfield, *Communicative Competence in the Nonverbal Behavior of Married Couples*, 43 J. MARRIAGE & FAM. 817, 822 (1981); Alan L. Sillars & Michael D. Scott, *Interpersonal Perception Between Intimates: An Integrative Review*, 10 HUM. COMM. RES. 153, 167 (1983); ROBERT D. HARE, WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US (1999) (1993); Leslie S. Greenberg et al., *Empathy*, 38 PSYCHOTHERAPY: THEORY, RES., PRAC., TRAINING 380, 382 (2001).

238. Richard Koestner, et al., *The Family Origins of Empathic Concern: A 26-Year Longitudinal Study*, 58 J. PERSONALITY & SOC. PSYCHOL. 709, 713 (1990).

239. Warshak, *supra* note 16, at 610.

took with him his children's sense of physical protection and safety.[240]

Herein lies a central problem with the approximation rule. How do we measure the amount of time that a father devotes to providing his children with an atmosphere in which they feel physically protected? It cannot be done.

Given the extent to which litigating couples currently dispute each other's account of past caretaking, and adding the *Principles*' incentives for disputes over past caretaking and the difficulties in objectively measuring this factor, it is reasonable to assume that the approximation rule will fail to provide the more certain outcome that significantly reduces the incidence of trials. Although focusing on one factor may simplify the court's task, the task is far from simple.[241]

2. The Exceptions Swallow the Rule

Even without the difficulties in determining relative contributions to past caretaking, the exceptions to the approximation rule make it unlikely that the rule will reduce the incidence, scope, and complexity of trials, the extent of judicial discretion, or the

240. *Id.* at 611.

241. Laufer-Ukeles, *supra* note 126, at 53. Laufer-Ukeles argues that the approximation rule is similar to a best interests inquiry in that

> it is intensely factual and subject to dispute . . . . Nailing down who has done what for what percentage of time over the course of the marriage could be a difficult exercise, particularly in hostile situations where custody determinations are highly contested. . . . This inquiry could potentially bring the same indeterminacy and fear of litigation that exists under the best interest standard.

Id. For a similar point regarding the primary caretaker presumption, see Levy, *supra* note 11, at 71 ("Determining which parent was in fact 'primary' can cause as many proof problems as the 'best interests' test."); Hoover v. Hoover, 764 A.2d 1192, 1194 (Vt. 2000) (underscoring the difficulty of adjudicating the amount of time spent in caregiving). The appellate court in *Hoover* affirmed that the trial court record supported the court's finding of fact that the father had "a slightly more active engagement in the child's lives." *Hoover*, 764 A.2d at 1194. The "[f]ather testified that he had dinner with the children every week night but Tuesdays and would then help them with their homework before they returned to their mother's house for bed." *Id.* at 1195. The dissent argued that "[f]irst and foremost, the court erred in its findings related to how much time the children spent with each parent." *Id.* at 1197 (Johnson, J. dissenting). The dissent added that the trial court's finding "use[d] the wrong measure of waking hours by looking only at the after-school hours rather than at all the children's waking hours." *Id.* at 1198. As opposed to the trial court's ruling and the appellate court's affirmation, the dissent calculated that the mother spent more than twice as many hours in past caregiving than the father did. *Id.* at 1198.

involvement of child custody evaluators.[242] The exceptions and circumstances that modify the approximation rule (such as gross disparity in parental abilities or availability, the preferences of a child, domestic violence, child abuse, or interference with access to a child) are the very issues central to most of the relatively few cases that go to trial.[243] Professor Parkinson notes that the *Principles*' exceptions are the rule in litigated cases.[244] It is likely that in cases that go to trial, attorneys will mine exceptions to the approximation rule and trigger traditional best-interest inquiries no different from current practices.[245]

The results of the Approximation Rule Survey support these observations. Ninety-five percent of respondents reported that under the approximation rule one or both of the litigants in their last custody trial would have raised one or more of the exceptions to the rule.[246] In the smaller subsample of child custody evaluators, 100% reported that the approximation rule's exceptions were raised in the last case they were involved in that went to trial and that enactment of the approximation rule would not have caused the case to settle.[247]

Litigants who believe that the past caretaking standard will work against them are most likely to invoke one of the exceptions.[248] For instance, the child's preference, if judged to be reasonable, is one exception that trumps the application of the rule.[249] Could this exception lead some parents to pressure their children to express preferences for one parent and against the other? Such destructive manipulation of children's affections occurs under the prevailing best-interest standard.[250] But it may be even more likely under the approximation rule because the *Principles* notably fails to include in its list of exceptions gross disparities in each parent's support of the child's relationship with the other, a factor common to many best-

242. *See* Warshak, *supra* note 16, at 604.
243. *See id*.
244. Parkinson, *supra* note 121, at 451.
245. *See* Smith, *supra* note 46, at 742 ("When discretion allows an exception to 'swallow the rule,' then the rule is doomed to failure.").
246. Warshak, *supra* note 12, at 25.
247. *See id.*
248. Parkinson, *supra* note 121, at 450–51.
249. *See* PRINCIPLES, *supra* note 3, § 2.08(1)(b).
250. *See id.* § 2.02 cmt. c.

interest inquiries[251] that might discourage attempts to undermine the child's relationship with the other parent.[252]

251. *See, e.g.*, FLA. STAT. § 61.13(3)(a), (l), (r) (2009).

252. It might be argued that a parent who attempts to turn children against the other parent would trigger one of the existing exceptions to the rule, such as a gross disparity in each parent's demonstrated ability to meet the child's needs, *see* PRINCIPLES, *supra* note 3, § 2.08(1)(d), or, in extreme cases, it might constitute persistent interference with a parent's access to the child. *See id.* § 2.11(1)(d). Nevertheless, had the PRINCIPLES included an explicit "unfriendly parent" exception, this might serve as a disincentive to manipulate the children's affections. But see Dore, *supra* note 125, at 42, who views the "friendly parent" concept with alarm and argues that it encourages conflict and prevents parents from protecting themselves and their children from abuse, violence, and neglect because of the fear of losing custody if labeled a non-friendly parent. This concern may have contributed to the conspicuous absence of an unfriendly parent exception to the approximation rule. *See* PRINCIPLES, *supra* note 3, at 2.08 cmt. j, Reporter's Note ("Friendly parent provisions have been criticized on the grounds that they disfavor a parent who may have good reasons for not wanting the children to have significant contact with the other parent."); Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 394 (2008) ("On one side [friendly parent provisions] simultaneously protect against unwarranted withholding of parenting time and frivolous allegations of abuse or unfit parenting, while on the other side they may hinder reasonable inquiry into inappropriate or questionable parenting practices if such inquiries are labeled 'unfriendly.'"). Rather than eliminate a factor that clearly is associated with good parenting in the majority of families, statutory and case law can qualify that a parent's support of the child's relationship and contact with the other parent is not a factor to be considered in evaluating the best interest of a child when a parent has good reasons to be concerned that such contact would endanger the health or safety of either the parent or the child and is acting in good faith to protect the child. *E.g.*, ALASKA STAT. § 25.20.090(6)(E) (2008).

Also, good faith opposition to joint legal or physical custody should not per se earn a litigant the designation of "unfriendly parent." Just as some legal and mental health professionals raise concerns about whether it is reasonable to expect divorced parents to cooperate on joint decision-making, and about the potential destabilizing impact of a child having two home bases rather than one, a parent can have the same concerns. *See supra* notes 92–93. Even if these opinions ignore social science evidence, children's preferences, or public policy in favor of joint custody, even if the opinions reflect unwarranted bias against joint custody, such a bias addresses itself to the structure of decision-making and the parenting time plan, and does not in and of itself mean that the parent fails to support the child's healthy relationship with the other parent.

One question that the court may consider is whether the parent is apt to comply with court orders if these include joint custody provisions. The court may examine the parent's behavior under temporary orders to assess whether the parent's opposition to joint custody is reflected in behavior that fails to support, or undermines, the child's relationship with the other parent, and whether the parent's behavior violates temporary orders for joint decision-making or for the child's access to the other parent. Even here, it is important to distinguish between a parent's initial and short-

In addition to defeating the goals of reducing the incidence and scope of litigation, the exceptions to the approximation rule open a wide door for judicial discretion. Labeling the exceptions "escape hatches," Professor Levy notes, "The exceptions to the rigid 'approximate the time spent' doctrine seem to give judges as much discretion as the 'best interests' test does."[253] Indeed, the three cases where the West Virginia appellate courts referenced the approximation rule statute all involved exceptions to the approximation rule and triggered a best-interest analysis.[254]

The exceptions also undermine the *Principles*' goal to diminish the court's reliance on expert testimony.[255] The value, limitations, scope, and reliability of expert testimony are hotly contested in the literature and are vital issues to explore.[256] But it is unclear how the

term responses fueled by emotions surrounding the marital separation and responses that are likely to be more lasting.

253. Levy, *supra* note 11, at 76–77 ("'Consider the provision which requires the judge to vary the custody award to 'protect the child's welfare when the presumptive allocation . . . would harm the child because of a gross disparity in the quality of the emotional attachment between each parent and the child or in each parent's demonstrated ability or availability to meet the child's needs.' What good trial judge would not be able to reach any outcome consistent with the judge's view of the facts and beliefs as to the child's 'best interests?'") (alteration in original) (footnote omitted) (quoting PRINCIPLES, *supra* note 3, § 2.08(d)).

254. *In re* Adoption of Jon L., 625 S.E.2d 251, 253–55, 260 (W. Va. 2005); Lindsie D.L. v. Richard W.S., 591 S.E.2d 308, 313–14 (W. Va. 2003); Marriage of B.M.J. v. J.D.J., 575 S.E.2d 272, 276–77 (W. Va. 2002). Professor Sanders's analysis reveals that West Virginia courts have virtually ignored the approximation rule legislation:

> Instead of citing the current legislation, the courts have cited *Carter v. Carter*, which held that '[i]n visitation as well as custody matters, we have traditionally held paramount the best interest of the child.' Decided in 1996, this case was before the approximation standard was adopted. The *Carter* case has been cited twenty-eight times for the use of the best interest of the child standard since the legislature passed the approximation standard.

Sanders, *supra* note 135, at 25 (alteration in original) (footnotes omitted) (citing Carter v. Carter, 470 S.E.2d 193 (W. Va. 1996); Misty D.G. v. Rodney L.F., 650 S.E.2d 243, 245 (W. Va. 2007); Mary R. v. Billy D., 637 S.E.2d 618, 622 (W. Va. 2006)). Sanders argues that the PRINCIPLES' authors use language in the exceptions, such as "gross disparity" and "manifestly harmful" to signal their intention that the exceptions will be applied rarely and only in the most exceptional cases. *Id.* at 22. In view of West Virginia's experience, Sanders advocates creating more precise guidelines for judges to allocate past caretaking, *id.* at 26, and refining the approximation rule to reduce judicial discretion in its application. *Id.* at 26–27.

255. *See* PRINCIPLES, *supra* note 3, § 2.08 cmt. b; Sanders, *supra* note 135, at 19–20.

256. *See, e.g.*, Tippins & Wittman, *supra* note 99, at 193, 198, 204. The same journal issue contains eight commentaries on Tippins & Wittman and the authors' rejoinder to the

approximation rule, with its exceptions, necessitates any difference in the court's propensity to appoint experts.[257] Although the *Principles* favors custody adjudication without expert testimony, which it sees as a costly and undesirable byproduct of the best-interest standard,[258]

commentaries. *Id.* at 218. For more on expert testimony, see Emery et al., *supra* note 52, at 7; RICHARD A. WARSHAK, CUSTODY CONSULTATION WITH DIVORCING FAMILIES: HOW TO AVOID THERAPEUTIC PITFALLS (BMA Audio Cassettes 1983); Daniel W. Shuman, *What Should We Permit Mental Health Professionals to Say About "The Best Interests of the Child"?: An Essay on Common Sense,* Daubert, *and the Rules of Evidence*, 31 FAM. L.Q. 551, 551, 553, 566–67 (1997); WARSHAK, THE CUSTODY REVOLUTION, *supra* note 30, at 214–17; WARSHAK, *supra* note 90, at 298–301. *See generally* Logan et al., *supra* note 135 (reporting the results of a random sample of custody evaluations in Kentucky, forty-six of which were classified as cases with domestic violence, and concluding that custody evaluators did a poor job of investigating and considering domestic violence issues in their procedures and recommendations).

257. *See* PRINCIPLES, *supra* note 3, § 2.13(1); *see also id.* § 2.13 cmts. a-c.

258. *Id.* § 2.02 cmt. c. Although expert child custody evaluations add to litigant's expenses, if the evaluation assists in settling the case without a trial, it is possible that such evaluations result in a net reduction of expenses. *See* WARSHAK, THE CUSTODY REVOLUTION, *supra* note 30, at 215. The PRINCIPLES offers no evidence to support its skewed claim that expert testimony tends to focus on parental weaknesses. *See* PRINCIPLES, *supra* note 3, § 2.02 cmt. c. To the contrary, guidelines for custody evaluators issued by professional organizations suggest the importance of a balanced assessment of psychological factors relevant to the best interest of the child. *See, e.g.*, American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings*, 49 AM. PSYCHOLOGIST 677, 678 (1994) ("The values of the parents relevant to parenting, ability to plan for the child's future needs, capacity to provide a stable and loving home, and any potential for inappropriate behavior or misconduct that might negatively influence the child also are considered. Psychopathology may be relevant to such an assessment, insofar as it has impact on the child or the ability to parent, but it is not the primary focus."); *see also* American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, AM. PSYCHOLOGIST 863, 864 (2010) ("Psychologists strive to identify the psychological best interests of the child. To this end, they are encouraged to weigh and incorporate such overlapping factors as family dynamics and interactions; cultural and environmental variables; relevant challenges and aptitudes for all examined parties; and the child's educational, physical, and psychological needs. . . . The most useful and influential evaluations focus upon skills, deficits, values, and tendencies relevant to parenting attributes and a child's psychological needs."); *see also* Task Force for Model Standards of Practice for Child Custody Evaluation, *Model Standards of Practice for Child Custody Evaluation*, 45 FAM. CT. REV. 70—80 (2007). Similarly, learned treatises on custody evaluations describe procedures for, and stress the importance of, assessing parental strengths. *See* RICHARD A. GARDNER, FAMILY EVALUATION IN CHILD CUSTODY MEDIATION, ARBITRATION, AND LITIGATION 127 (1989); JONATHAN W. GOULD & DAVID A. MARTINDALE, THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS 185–87 (2007); PHILIP MICHAEL STAHL, CONDUCTING CHILD CUSTODY EVALUATIONS: A COMPREHENSIVE GUIDE 80–81 (1994).

it simultaneously recognizes the potential value of expert involvement and explicitly grants courts the option of appointing experts to assist the court.[259] The exceptions to the approximation rule give courts as much reason to exercise this option as they have under the best-interest standard.[260] For instance, when a parent proffers a child's firm preference as an exception to the rule, the *Principles* directs the court to determine if the preference is "reasonable."[261] To assist in its determination, the court may appoint an expert to examine the reasons for the child's preference and the maturity and independence of the child's judgment.[262]

C. Impact of the Approximation Rule on the Bargaining Process

Critics of a discretionary standard argue that uncertainty about the likely outcome of a trial leads to more abusive and hostile bargaining.[263] Twenty-eight years ago Professor Schneider noted the lack of empirical foundation for this assumption, and this lack has not yet been rectified.[264] Thus, arguments about how legal presumptions influence divorce negotiations must remain at the level of speculation. Professor Schneider also observed the link between judicial discretion and the range of freedom in negotiation: "The less certain the litigants are what result a court would reach, the greater the practical scope for bargaining: the clearer it is that a court would reach a particular result, the less incentive the party who would benefit from that result has to make concessions."[265] We simply do not know if presumptions would enhance the fairness of negotiations.

ALI anticipates that the approximation rule will reduce strategic and manipulative bargaining because the rule is seen as establishing a clear determinate criterion that will minimize the opportunity to use

Also, the court can rely upon attorneys to elicit testimony from expert witnesses about their client's strengths. GARDNER, *supra*, at 131.

259. PRINCIPLES, *supra* note 3, § 2.13 (1) ("The court may order a written investigation or evaluation to assist it in determining any issue relevant to proceedings under this Chapter. The court should specify the scope of the investigation or evaluation and the authority of the investigator or evaluator.").

260. *Id.* § 2.13(1); *see also id.* § 2.13 cmts. a-c.

261. *Id.* § 2.08(1)(b).

262. *See* Richard A. Warshak, *Payoffs and Pitfalls of Listening to Children*, 52 FAM. REL. 373 (2003).

263. Schneider, *supra* note 46, at 2276 (quoting Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1170 (1986)).

264. *Id.* at 2276–79.

265. *Id.* at 2278.

positions on custody as leverage in bargaining financial aspects of the divorce.[266] In addition to a potentially fairer outcome, this would benefit children because pre-litigation maneuvers often exacerbate parental conflict, which in turn can affect children adversely.[267] As shown above, though, the difficulties in measuring past caretaking and the exceptions to the rule combine to make the rule less determinate than ALI intends.[268]

Only 25% of respondents to the Approximation Rule Survey believe that the approximation rule would have reduced strategic and manipulative behaviors during negotiation in their last case that proceeded to trial.[269] These results suggest that a minority of practitioners believe the rule would have the effect on negotiations anticipated by ALI. We need to know more about those cases that might experience this benefit. It may be that in certain types of cases, other legal presumptions that purport to reduce judicial discretion would have a beneficial impact on the tone of negotiations. The Approximation Rule Survey supports this hypothesis. Slightly more respondents (28%) thought that manipulative bargaining would be reduced with a presumption in favor of a school-year schedule dividing the child's time between homes nine days/five days during every two-week period.[270] This reflects what is known in Texas as the extended Standard Possession Order.[271] Attorneys who practice in Texas and thus have experience with this presumption were even more likely to credit it with reducing manipulations (37%) during negotiations.[272] A presumption in favor of an equal division of time between homes was endorsed by 32% of respondents as likely to

266. Concern about trading time for financial concessions is expressed frequently. Garska v. McCoy, 278 S.E.2d 357, 360–62 (W. Va. 1981) ("[U]ncertainty about the outcome of custody disputes leads to the irresistible temptation to trade the custody of the child in return for lower alimony and child support payments. . . . [Uncertainty is also] very destructive of the primary-caretaker parent because he or she will be willing to sacrifice everything else in order to avoid the terrible prospect of losing the child in the unpredictable process of litigation."); *see also* Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 177 (1984); Chambers, *supra* note 93, at 499; Fineman, *supra* note 46, at 761; Mnookin & Kornhauser, *supra* note 57, at 971–73. *But see* Fabricius et al., *supra* note 34, at 211 (arguing that empirical research fails to support this concern).

267. *See* Cassandra Brown, Comment, *Ameliorating the Effects of Divorce on Children*, 22 J. AM. ACAD. MATRIMONIAL L. 461, 462–64 (2009).

268. *See supra* Part IV.B.1–2.

269. Warshak, *supra* note 12, at 26.

270. *Id.*

271. *See* TEX. FAM. CODE ANN. § 153.311 (West 2011).

272. *See* Warshak, *supra* note 12.

reduce manipulative bargaining.[273] Thus, although a minority of respondents agree with ALI that the approximation rule would improve the bargaining atmosphere, comparable numbers of respondents attribute such a benefit to other custody presumptions, and the majority of respondents believe that manipulative bargaining tactics in cases that proceed to trial would be unaffected by any legal presumptions.[274]

One recent development in family law poses a special challenge to critics who regard the best-interest standard as creating an environment that encourages hostile, adversarial, negotiations and litigation: the birth and spread of collaborative divorce.[275] Even if collaborative divorce appeals to parents only because they fear the uncertainty of a trial based on the best-interest standard, and not for more benevolent reasons, the fact remains that an entire movement opposing adversarial negotiations and litigation arose in the shadow of the best-interest standard.[276] This directly contradicts the argument that the best-interest standard necessarily results in hostile negotiating environments and higher litigation rates.[277]

In addition to collaborative divorce, other law reforms, some endorsed by the *Principles*, have been adopted within the context of the best-interest standard and have helped to reduce the adversarial process of custody decision-making.[278] These are discussed in a subsequent section on contemporary applications of the best-interest standard.[279]

D. Implications of Parents' Past Decisions

The *Principles* assumes that "when parents do not agree, past divisions of responsibility may be the most reliable proxy for the shares of responsibility they would agree upon if they were focused on their child."[280] As the *Principles* explains:

273. *Id.*
274. *Id.*
275. PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION 5, 179 (2001).
276. *See id.* at 179.
277. *See* Linda D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 PACE L. REV. 869, 900 (2007).
278. *See* Warshak, *supra* note 16, at 612–13.
279. *See infra* Part X; *see also* Warshak, *supra* note 16, at 611–13.
280. PRINCIPLES, *supra* note 3, ch. 1, topic 1, pt. II, cmt. c.

> [E]xpectations and preferences are often complicated at divorce by feelings of loss, anxiety, guilt, and anger—feelings that tend not only to cloud a parent's judgment and ability to make decisions on behalf of the child, but also to exaggerate the amount of responsibility a parent wants to assume for a child, or the objections he or she has to the other parent's level of involvement in the child's life. The way the parents chose to divide responsibility when the family lived together anchors the negotiations in their own lived experience rather than in unrealistic or emotion-based aspirations about the future.[281]

The divorce research literature supports the *Principles*' observation that parents' decisions during a divorce often unduly reflect strong, transient emotions rather than a rational appreciation of their children's needs and of the likely consequences of various alternative plans.[282] Bypassing the risk of irrational and uninformed decisions is an important goal. Relying on the parents' division of responsibilities during the marriage, though, is not necessarily the best detour around these hazards. In some instances, the past division of responsibilities does offer valuable guidance when formulating optimal parenting plans; but in other instances, the past is a poor index of what disputing parents would agree to if they were functioning rationally and with a realistic view of the future.[283] Additional considerations, such as anticipated changes in parents' availability to the children, are relevant to such decisions.[284]

In addition, the *Principles* seems to regard past decisions in a narrow and simplistic manner and fails to consider the context of past parental decisions.[285] Consider the case of a woman who decides to keep her job outside the home while her husband remains at home with their infant for the first year of life. They discussed the possibility of switching roles in the future, but had no understanding of any specific time frame. After one year, the husband and wife divorce. Should this mother now be locked into a schedule that gives her relatively little time with her daughter for the next seventeen years?[286] When a couple decides on a homemaker–breadwinner

281. *Id.* § 2.08 cmt. b.

282. Warshak, *supra* note 16, at 605.

283. *Id*. at 605–06; *see* PRINCIPLES, *supra* note 3, §§ 2.02 cmt. d, 2.08 cmt. b.

284. PRINCIPLES, *supra* note 3, § 2.08 cmt. h.

285. Warshak, *supra* note 16, at 605; *see* PRINCIPLES, *supra* note 3, § 2.08 cmt. d.

286. ALI might object that PRINCIPLES § 2.08 (1) (e)'s exception for prior agreements covers this contingency. The exception is made in order

division of roles, they are not necessarily making a long-term agreement that one parent will give up outside career opportunities and the other will spend less time with the children despite any changes in their circumstances, including the loss of daily contact with the children which accompanies divorce. Decisions made during the marriage are choices about how responsibilities will be divided in the present and given the current context, not how responsibilities will be divided in the future and in contexts far different from those of a harmonious marriage. Primary wage earners in the family would most likely argue that the rule does not apply to their situation because of the exception to the rule regarding reasonable expectations.[287] They did not expect that their role as wage earner would marginalize their postdivorce parental prerogatives.[288]

Further, one parent might spend less time with the children than the other, not because the children are better off in the other parent's care, but because the other parent acts as a gatekeeper, regulating the scope and amount of contact that his or her spouse has with the children.[289] Also, in unhappy marriages, one spouse commonly escapes the tension of an unhappy marriage by spending more time away from the home.[290] This reduces difficult interactions between the parents and, consequently, the overt conflict to which the children might be exposed.[291] Given such conditions, the choice to spend more time with the children following the separation might be a

> to take into account any prior agreement, other than one under § 2.06, that would be appropriate to consider in light of the circumstances as a whole, including the reasonable expectations of the parties, the extent to which they could have reasonably anticipated the events that occurred and their significance, and the interests of the child.

Id. Section 2.06 (1) (b) prohibits agreements that "would be harmful to the child." The father in this scenario would undoubtedly argue that no prior agreement existed, and even if it did, it would be harmful to interrupt the familiar pattern of caretaking. This scenario illustrates the manner in which the exceptions to the rule undermine the goal of increasing the predictability of the outcome of litigation. *See also* Warshak, *supra* note 16, at 605.

287. Warshak, *supra* note 16, at 605; *see* PRINCIPLES, *supra* note 3, § 2.08(1)(e). *Id.*

288. Warshak, *supra* note 16, at 605.

289. *See* Joan B. Kelly, *Children's Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, J. AM. ACAD. CHILD. & ADOLESCENT PSYCHIATRY 963, 965 (2000).

290. *See, e.g., id.*

291. *See id.* at 963–66.

rational decision rather than one anchored in "emotion-based aspirations."[292]

Other sections of the ALI *Principles* recognize that decisions made in another context, prior to the contemplation of divorce, may be poor guides to fair post-divorce outcomes. With respect to premarital agreements, for instance, the *Principles* proposes:

> The law's usual assumption that contracting parties are capable judges of their own self-interest is put in doubt when the judgment is so distant in time and circumstance from its consequences. This capability problem is exacerbated by another uncommon feature of premarital agreements: its principal terms speak exclusively to a marital dissolution that the parties do not expect to occur, and so the agreement has no expected application. Finally, agreements are static, but relationships are not. The agreement may have contemplated a relationship very different than the one that the parties in fact later lived.[293]

It seems inconsistent for the *Principles* to allow such reasoning to modify financial agreements, but not agreements about the division of childcare tasks.[294] Indeed, the *Principles* recommends that courts should limit the effects of past parental agreements for dividing custodial responsibility rather than defer to such prior agreements: "Prenuptial agreements are typically made in contexts, and with respect to matters, as to which individuals are unable to predict and assess realistically either the events that will happen in the future, or the significance of the interests they are bargaining away."[295]

E. Is Past Parenting Quantity a Proxy for Past, Present, and Future Parenting Quality?

Traditional wisdom holds that the past is the best predictor of the future. This may be true in the absence of knowledge about likely future outcomes and in the absence of any significant change that could alter established patterns. But when a substantial body of social science research allows reliable predictions, society

292. *See* PRINCIPLES, *supra* note 3, § 2.08 cmt. b.
293. *Id.* ch. 1, topic 1, subch. I.
294. *See id.* § 2.08 cmt. i.
295. *Id.*

shortchanges children if this knowledge is ignored in planning for their futures.[296]

1. Promoting Stability and Continuity of Parent–Child Relationships in the Face of Divorce-Related Changes in the Family

Relying on the past for decisions about the present and the future reflects a static view of family relationships; the *Principles* makes no accommodation for the kinds of changes that are likely to occur in the family after divorce and the effects that these changes may have on parenting time.[297] Being a single parent is a very different challenge from being one of two parents in the same home. For instance, after divorce the average mother has less time and energy for her children and more problems managing their behavior, particularly that of her sons.[298]

Unless we regard custody as a reward for past deeds, the decisions about parenting plans should reflect judgments about what arrangements will best meet children's needs now and in the future.[299] Differences in past performance are relevant only if they predict differences in future parental competence and child adjustment.[300] But they do not.

The amount of contact in the past, prior to divorce, does not even predict the amount of contact in the future, after divorce.[301] Among the factors that account for this discontinuity are the following: 1) most mothers who spent proportionally more time with the children either reenter the workforce or work longer hours away from home,

296. *See, e.g.*, David H. Demo & Alan C. Cook, *The Impact of Divorce on Children*, 50 J. MARRIAGE & FAM. 619 (1988); William F. Hodges et al., *The Cumulative Effect of Stress on Preschool Children of Divorced and Intact Families*, 46 J. MARRIAGE & FAM. 611 (1984); Kelly, *supra* note 289, at 963–73.

297. *See* PRINCIPLES, *supra* note 3, § 2.08 cmt. a.

298. *See, e.g.*, Hetherington et al., *supra* note 30, at 252.

299. SCHEPARD, *supra* note 61, at 168 ("The approximation presumption may also be looked at as a return on investment in child-rearing, the legal system's reward for the parent who spent the most time and energy caring for the child during the marriage. . . . A custody award to a parent, however, should not be a form of indirect compensation for time expended on child rearing. This argument is inconsistent with the partnership theory of marriage, which generally prohibits the allocation of the marital estate accumulated by the spouses according to their roles in creating the wealth."); *see also* Richard A. Warshak, *Gender Bias in Child Custody Decisions*, 34 FAM. & CONCILIATION CTS. REV. 396, 404 (1996).

300. Warshak, *supra* note 16, at 606.

301. *Id.*

2) as children grow older, they spend more time outside the orbit of their parents in school and with peers, and 3) the father can now interact with the children apart from the backdrop of a tense marital relationship, which, as discussed above, keeps some men in unhappy marriages spending more time than they would prefer away from the home and children.[302]

The approximation rule makes no allowance for normal changes in the proportion of mother's versus father's caretaking time.[303] In a family with a homemaker–breadwinner division of roles, the difference between the parents in proportion of parenting time is much greater before than after the children begin elementary school (unless they are home-schooled).[304] For separations that occur when children are pre-schoolers, the rule freezes the allocation of custodial time at a level that maximizes the difference in the amount of time the children spend with each parent.[305] A reduction in this difference would occur only with the consent of the parent who is awarded the most time with the children.[306] The *Principles* fails to recognize that even if the family were to remain intact, there would be a significant reduction in the difference when the children entered elementary school, and the relative amount of time each parent spends with each child would most likely change over the course of the child's life.[307]

The *Principles* values the importance of both parents, calls for a minimum presumptive amount of parenting time, and asserts that the approximation rule "is calculated to preserve the greatest degree of stability in the child's life."[308] Nevertheless, the *Principles* places a clear priority on maintaining the stability of the child's relationship with the parent who is designated the primary caretaker: "[T]he parents' separation may make it necessary for them to change their work schedules and rearrange other obligations. The inevitability of such changes, however, makes it all the more desirable that there be stability as to those matters the court can affect, especially the child's

302. *Id.* at 606–07; *see* E. Mavis Hetherington, *Coping with Family Transitions: Winners, Losers and Survivors*, 60 CHILD. DEV. 1 (1989).

303. Warshak, *supra* note 16, at 607.

304. *Id.*

305. *Id.*

306. *Id.*

307. Warshak, *The Approximation Rule*, *supra* note 192, at 122; *see also* Montenegro v. Diaz, 27 P.3d 289 (2001) (No. S090699) (recognizing that children's needs change over time and that custody arrangements should respond to such changes: "[T]he changed circumstance rule should be flexible and should reflect the changing needs of children as they grow up.").

308. PRINCIPLES, *supra* note 3, § 2.08, cmt. b; Warshak, *The Approximation Rule*, *supra* note 192, at 123.

relationships with the primary caretaker."[309] This begs the question, if stability is desirable, why not develop a parenting plan that preserves the stability of the child's relationship with both parents? Such a dual-parent focus is consistent with the section of the *Principles* that defines children's best interests as including "continuity of existing parent–child attachments" and "meaningful contact between the child and each parent."[310]

In contrast, the best-interest standard assigns no priority to either parent–child relationship.[311] In some cases, a court-imposed residential schedule will resemble an approximation rule outcome.[312] In other cases, the schedule may increase the proportion of time with a parent to accommodate postdivorce changes and to offset the loss of daily contact.[313] The best-interest standard employs this flexibility; the approximation rule does not.[314]

The *Principles*' emphasis on preserving the child's relationship with the primary caretaker may be influenced by research with children in sole-custody arrangements.[315] In general, this research reports a relatively high correlation between children's positive adjustments after divorce and the psychological adjustments and quality of parenting provided by the residential parents.[316] In addition, some psychologists believe that children have a more salient attachment to one parent than to the other.[317] Such findings should be considered alongside research that documents the damage suffered by children who experience a dramatic loss in frequency of contact with their nonresidential fathers compared with the pre-separation daily contact to which they were accustomed.[318] Also, studies begun in the 1950s and 1960s, when the division of caregiving time between

309. PRINCIPLES, *supra* note 3, § 2.08 cmt. b.

310. *Id.* § 2.02 (1); Warshak, *supra* note 16, at 607.

311. Warshak, *The Approximation Rule*, *supra* note 192, at 123.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. For a review of this literature, see Kelly & Emery, *supra* note 70, at 352, 354, 356, 358.

317. Zeynep Biringen et al., *Commentary on* "Blanket Restrictions: Overnight Contact Between Parents and Young Children" 40 FAM. CT. REV. 204,–205 (2002). *But see* Richard A. Warshak, *Who Will be There When I Cry in the Night?: Revisiting Overnights—A Rejoinder to Biringen et al.*, 40 FAM. CT. REV. 208, 210–11 (2002) (highlighting significant flaws in the arguments made by Biringen et al.).

318. For reviews of this literature see Kelly, *supra* note 79, at 35–36, 43–44; Joan B. Kelly, *Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce*, 19 J. AM. ACAD. MATRIMONIAL L. 237, 237–38, 240, 242–43 (2005).

mothers and fathers was more pronounced than in contemporary times, show that long-term physical health risks are associated with poor childhood relationships with fathers as well as with mothers.[319] Whatever its inspiration, the *Principles*' emphasis on past caretaking time and on preserving the stability of the child's relationship with one parent risks undermining its own declared value of the child's relationship with both parents after the divorce, a value that has widespread consensus among developmental researchers.[320]

The importance of preserving high-quality relationships with both parents is highlighted by research that documents the deterioration of postdivorce father–child relationships[321] and the benefits of greater father involvement.[322] The literature is inconsistent regarding the relationship between children's adjustment and frequency of contact with fathers (which is different from amount and type of contact).[323] Better predictors of child outcomes are the amount of contact with the father, the father's responsiveness to the child's needs, and the

319. These studies are reviewed in William V. Fabricius, Karina R. Sokol, Diaz & Sanford L. Braver, *Parenting Time, Parent Conflict, Parent–Child Relationships, and Children's Physical Health*, *in* PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT, (Kathryn Kuehnle & Leslie Drozd, eds. Forthcoming 2012) .

320. *See, e.g.*, Warshak et al., *supra* note 76. The brief was endorsed and signed by twenty-eight social science experts. *Id.* See *infra* text accompanying note 348 for a consensus statement of eighteen experts. For more on the value of a child developing strong relationships with both parents, see Michael E. Lamb, Kathleen J. Sternberg, & Ross A. Thompson, *The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment*, 35 FAM. & CONCILIATION CTS. REV. 393, 393, 400–01 (1997).

321. BILLER, *supra* note 74, at 1–2; HETHERINGTON & KELLY, *supra* note 66, at 118–20; Patrick Parkinson & Bruce Smyth, *Research: Satisfaction and Dissatisfaction with Father-Child Contact Arrangements in Australia*, 16 CHILD. & FAM. LAW Q. 289, 289–304 (2004); Seth J. Schwartz & Gordon E. Finley, *Mothering, Fathering, and Divorce: The Influence of Divorce on Reports of and Desires for Maternal and Paternal Involvement*, 47 FAM. CT. REV. 506, 506–522 (2009); Zill et al., *supra* note 74, at 91, 96, 100.

322. *See, e.g.*, K. Alison Clarke-Stewart & Craig Hayward, *Advantages of Father Custody and Contact for the Psychological Well-Being of School-Age Children*, 17 J. APPLIED DEV. PSYCHOL. 239, 260–63, 265 (1996); Kelly, *supra* note 79, at 43–45; Kelly, *supra* note 287, at 969; Lamb et. al, *supra* note 320, at 400–01; Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases:* Burgess *Revisited*, 34 FAM. L.Q. 83, 90–94 (2000); Richard A. Warshak & John W. Santrock, *The Impact of Divorce in Father-Custody and Mother-Custody Homes: The Child's Perspective*, *in* CHILD. & DIVORCE 29, 38, 42–43 (Lawrence A. Kurdek ed. 1983); Warshak et al., *supra* note 76.

323. Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557, 557–559 (1999); Kelly, *supra* note 79, at 44–45; Kelly, *supra* note 318, at 247.

emotional quality of the relationship.[324] The benefits of father involvement are most apparent when the mother values the father-child relationship, the children witness little overt conflict between parents, and the father is reasonably well-adjusted, supportive, and authoritative.[325] Other factors that mediate the impact of father–child contact are the length of the contacts, the types of activities that fathers share with their children, the extent to which transitions between homes avoid exposing children to inter-parental conflict (transfers can take place at a neutral location, such as a school, without parents being in close proximity to each other), and whether the contact disrupts the children's social lives and extracurricular activities (which is more likely to occur with relocation).

Across studies, active involvement by competent divorced fathers is linked to more positive adjustment in children, but an influential 1999 analysis of research revealed a relatively weak link between frequency of contact and child outcomes such as depression, aggression, and school performance.[326] This analysis led some researchers to doubt the value of increasing the amount of divorced fathers' parenting time.[327] A closer look at the research shows inconsistent results due to unreliable measures that confuse frequency of contact with amount of parenting time.[328] Additional support for giving greater weight to type of involvement than to frequency of contact comes from a Department of Education survey of nearly 17,000 children.[329] Reporting an association between fathers' greater participation in school activities and their children's better grades and behavior, the study concluded, "[I]t is not contact, per se, that is important, but rather other dimensions of involvement that go along with contact that are beneficial to children's lives. Indeed, contact

324. BILLER, *supra* note 74, at 111, 130, 190; Kelly, *supra* note 79, at 45.

325. Paul R. Amato & Sandra J. Rezac, *Contact with Residential Parents, Interparental Conflict, and Children's Behavior*, 15 J. FAM. ISSUES 191, 192–93, 205 (1994); Kelly, *supra* note 79, at 41, 45.

326. Fabricius et al., *supra* note 319, at 13; Daniel N. Hawkins, Paul R. Amato & Valerie King, *Nonresident Father Involvement and Adolescent Well-Being: Father Effects or Child Effects?*, 72 AM. SOC. REV. 990, 990–91 (2007).

327. *See, e.g.*, Hawkins, et al., *supra* note 326, at 1003; Susan D. Stewart, *Nonresident Parenting and Adolescent Adjustment: The Quality of Nonresident Father–Child Interaction*, 24 J. FAM. ISSUES 217, 218 (2003).

328. Fabricius et al., *supra* note 319, at 4–5.

329. CHRISTINE WINQUIST NORD, DEEANN BRIMHALL & JERRY WEST, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., FATHERS' INVOLVEMENT IN THEIR CHILDREN'S SCHOOLS, at v, 75–76 & n.30 (1997), *available at* http://nces.ed.gov/pubs98/98091.pdf.

may be a mixed blessing if the contact is enough to tantalize children but not enough to satisfy."[330]

Recent studies find that college-aged children's relationships with their father improve the more post-divorce time they shared, a benefit seen up to and including the children having equal time with each of their parents.[331] Not only does the long-term father–child relationship improve with more parenting time, but this benefit takes nothing away from the security of the mother–child relationship which remains constant as fathers' parenting increases up to and including equal time.[332]

Because most custody arrangements are decided without a trial, the question remains about the extent to which existing research data serve as a useful guide in crafting a default rule for custody decisions made by the court.[333] In particular, are the benefits to children of increased parenting time seen in families with high inter-parental conflict? Studies that measure frequency of contact rather than amount of contact report mixed results.[334] Some studies report that frequent father–child contact in high-conflict families is linked to poorer child outcomes.[335] Some studies find no harmful effect of

330. *Id.* at 75–78 (footnote omitted).

331. A potential alternative explanation of the link between parenting time and emotional security is that the amount of parenting time reflects the pre-existing quality of the relationship. For instance, disinterested fathers might choose or be awarded little time; highly committed and capable fathers might end up with more time. For data that cast doubt on this alternative hypothesis, see Fabricius et al., *supra* note 319, at 13 (explaining that the evidence to date is consistent with the hypothesis that "amount of parenting time exerts a causal effect on [father-child] relationship security."). Fabricius et al., *supra* note 34, at 214, view with skepticism the self-selection explanation of the link between parenting time and subsequent emotional security. They point to evidence that most children and fathers want more time together but fathers are prohibited or dissuaded from obtaining additional time. *Id.*

332. *See generally* Fabricius et al., *supra* note 34, at 225–27.

333. *Id.* at 210; Kelly, *supra* note 79, at 36, 40.

334. Fabricius et al., *supra* note 34, at 228–29.

335. *See, e.g.*, E. MAVIS HETHERINGTON, *Should We Stay Together for the Sake of the Children?*, *in* COPING WITH DIVORCE, SINGLE PARENTING, AND REMARRIAGE 93, 99 (E. Mavis Hetherington, ed., 1999). The study most often cited in support of limiting the court's discretion to impose more equally balanced parent-contact schedules for high-conflict couples (which advocates sometimes equate with any couple who take their custody dispute to trial) is Janet R. Johnston, Marsha Kline & Jeanne M. Tschann, *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AM. J. ORTHOPSYCHIATRY 576, 588 (1989). *See, e.g.*, *In re* Marriage of Gayden, 280 Cal. Rptr. 862, 865 (Cal. Ct. App. 1991); Matter of Adoption of Franciso A., 866 P.2d 1175, 1188 (N.M. 1993); *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 440 (Wis. 1995). Commentators often overlook the fact that, although Johnston et al. report a link between frequent contact and negative outcomes in high-conflict

frequent contact in high-conflict families.[336] One study finds negative effects of frequent father contact for boys but not girls.[337] Another study finds negative effects for girls but not boys.[338] Other studies report better child adjustment linked to more frequent father–child contacts in high-conflict families.[339]

One explanation for the inconsistent results is that some measures of frequency of contact are proxies for frequency of child transfers between homes.[340] Frequent transfers in the presence of two parents who manage their conflicts poorly expose children to more tension.[341] Parenting time plans that more equally balance a child's time between homes can reduce the likelihood of such harmful exposure[342] by scheduling longer blocks of time with each parent, which reduces the number of transitions between homes,[343] and by using locations

families, this result was restricted to sole custody families. *See* Johnston, et al., *supra* note 335, at 583–84. Children in high-conflict families who spent twelve to thirteen days a month with their fathers did not have worse adjustments than those in sole mother-custody homes. *Id.*

336. *See, e.g.*, CHRISTY M. BUCHANAN, ELEANOR E. MACCOBY & SANFORD M. DORNBUSCH, ADOLESCENTS AFTER DIVORCE 159–60 (1996); Margaret Crosbie-Burnett, *Impact of Joint Versus Sole Custody and Quality of the Coparental Relationship on Adjustment of Adolescents in Remarried Families*, 9 BEHAV. SCI. & L. 439, 446 (1991).

337. *See* Amato & Rezac, *supra* note 325, at 200.

338. *See* Johnston et al., *supra* note 335, at 585.

339. *See, e.g.*, William V. Fabricius & Linda J. Luecken, *Postdivorce Living Arrangements, Parent Conflict, and Long-Term Physical Health Correlates for Children of Divorce*, 21 J. FAM. PSYCHOL. 195, 202 (2007); J. M. Healy, Jr., J. E. Malley & A. J. Stewart, *Children and Their Fathers After Parental Separation*, 60 AM. J. ORTHOPSYCHIATRY 531, 541 (1990); Lawrence Kurdek, *Custodial Mothers' Perceptions of Visitation and Payment of Child Support by Noncustodial Fathers in Families with Low and High Levels of Preseparation Interparent Conflict*, 7 J. APPLIED DEV. PSYCHOL. 307, 320 (1986).

340. *See e.g.*, Johnston et al., *supra* note 335, at 588.

341. *See* Kelly, *supra* note 79, at 44–45.

342. *See, e.g.*, *id.* at 45.

343. Longer blocks of time allow children a sense of living with each parent rather than temporarily staying with them. But developmental psychologists caution that younger children need shorter periods of time away from each parent. *See, e.g.*, Kelly, *supra* note 79, at 46 (citing Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions*, 38 FAM. & CONCILIATION CTS. REV. 297–311 (2000) ("To maintain and consolidate attachments formed with both parents prior to separation, it is important for infants and toddlers to have frequent contacts, including overnights, with their adequate nonresidential parents, without prolonged separations from either parent.")). Marsha K. Pruett, *Applications of Attachment Theory and Child Development Research to Young Children's Overnights in Separated and Divorced Families*, *in* OVERNIGHTS AND YOUNG CHILDREN: ESSAYS FROM THE FAMILY COURT REVIEW 5–12 (2005); Marsha K.

and procedures for transfers that shield the child from tense exposure to bickering parents, such as one parent taking a child to school in the morning and the other parent retrieving the child in the afternoon.[344]

Adjusting the structure and location of transitions to reduce the child's exposure to conflict avoids the drawbacks of reducing parenting time from what might otherwise be optimal for the child. And reducing parenting time in response to conflict carries the drawback of giving the wrong message to parents that generating or sustaining conflict can be an effective strategy to override shared custody. Also, a uniform policy of discouraging shared parenting time when conflict is present overlooks the heterogeneity of the dynamics of inter-parental conflict.[345] In weighing the implications of conflict for custody dispositions, courts, operating under the best-interest standard, can hear evidence that goes beyond identifying the presence of conflict and sheds light on the dynamics of the conflict and the contributions of each party to it.[346]

Pruett, Rachel Ebling, & Glendessa Insabella, *Critical Aspects of Parenting Plans for Young Children*, 42 FAM. CT. REV. 39–59 (2004); Richard A. Warshak, *Blanket Restrictions: Overnight Contact Between Parents and Young Children*, 40 FAM. CT. REV. 204–207 (2002).

344. *E.g.*, Kelly, *supra* note 79, at 47 ("[B]ecause children typically love both parents, reduced contact may not be the most beneficial solution. Instead, one searches for arrangements and interventions that will reduce the conflict and its impact on children. The presence of buffers that protect children from parental conflict should be assessed and encouraged, transitions arranged that occur in neutral sites such as school and day care, and mediation or parenting coordination interventions implemented.").

345. *See* Braver et al., *supra* note 34, at 212, 229, 232.

346. Several authors call attention to a common phenomenon in custody disputes where one parent seeks to marginalize the other parent's relationship with the children, and conflict is generated merely because the other parent refuses to accept being removed from the children's lives. *See, e.g.*, Joan B. Kelly, *Parents with Enduring Child Disputes: Multiple Pathways to Enduring Disputes*, 9 J. FAM. STUD. 37, 38 (2003) ("[I]n as many as one third of entrenched parental disputes, several years after separation or divorce, one parent is clearly *the* high-conflict parent. In these cases, the other parent has emotionally disengaged and is being financially depleted and emotionally abused by the continuing legal and child-focused conflict. The high-conflict parent continuously pulls the other into legal battles through unending petitions to the court, including repeated unfounded allegations, noncompliance with orders, and inappropriate behaviors such as spying and harassment that require remedy. The failure of professionals to differentiate these parents contributes not only to the disengaged parent's stress and great frustration, but also fails to lead to appropriate remedies."); Michael E. Friedman, *The So-Called High-Conflict Couple: A Closer Look*, 32 AM. J. FAM. THERAPY 101, 114 (2004) ("[Regarding conflict driven by parents with borderline or narcissistic personality disorder, t]here seems to be general agreement that the ex-spouses of narcissistically disturbed individuals can do little to avoid a conflictual relationship short of acceding to their wishes. . . . [T]he

Studies that measure amount of parenting time (more relevant for evaluating proposals such as the approximation rule) as opposed to frequency of contacts report consistent evidence that more parenting time is not associated with poorer child outcomes in high-conflict families and in fact strengthens parent–child relationships and may protect children against some of the negative effects of exposure to inter-parental conflict.[347]

A 1997 review of research led to this consensus statement from eighteen expert researchers:

> To maintain high-quality relationships with their children, parents need to have sufficiently extensive and regular interaction with them . . . . Time distribution arrangements that ensure the involvement of both parents in important aspects of their children's everyday lives and routines—including bedtime and waking rituals, transitions to and from school, extracurricular and recreational activities—are likely to keep nonresidential parents playing psychologically important and central roles in the lives of their children.[348]

narcissistically disturbed parent is capable of essentially unilaterally creating and maintaining post-divorce conflict."); *id.* at 116 ("When the concept of the high-conflict couple is used to obscure what is really a conflict over custody/access and used to weight the outcome of that conflict in favor of the parent creating it in an attempt to exclude or marginalize the other parent, we have a serious miscarriage of justice . . . . We lose opportunities to make interventions that may deescalate the fight."). The court's reflexive assumption that all conflict is bilaterally instigated is reflected in the bromide, "Mother Teresa does not marry Saddam Hussein." For a critique of this assumption, see Richard A. Warshak, *Stop Divorce Poison*, HUFFINGTON POST (Nov. 8, 2010), http://www.huffingtonpost.com/richard-warshak/stop-divorce-poison_b_778889.html. For evidence that the dynamics of conflict affects how the public would allocate parenting time, see Braver et al., *supra* note 34, at 232–33, in which, when conflict and bad-mouthing is mutual, respondents favor awarding equal parenting time, but when one parent typically initiates conflict, respondents favor awarding a lot more time to the parent who refrains from fighting in front of the children and bad-mouthing the former spouse and is the target of the other parent's bad-mouthing.

347. For a review and results of a new study, see Fabricius et al., *supra* note 319, at 24, 26, 28 (concluding that more parenting time is associated with better father-child relationships for college students reporting frequent parent conflict and severe parent conflict; cautioning against applying these findings to families where there is violence or abuse).

348. Lamb et al., *supra* note 320, at 400.

Based on a more recent review, Kelly reinforces this expert consensus: "[I]t seems apparent that children's contacts with their adequate and interested fathers should occur during some part of each school week, as well as on alternate weekends, resulting in, more time with their children than has been possible with the alternating weekend schedule."[349]

One problem with merely replicating the proportion of past parenting time is that a relatively smaller percent of time being cared for by a parent, when the parent and child live together full-time and the child is around the parent every day, may be sufficient to give the child an adequate sense of the parent's presence and involvement.[350] But when the parent's daily presence is gone, the child may need proportionally more time in order to sustain the sense of connection and a feeling of living with, rather than visiting, a parent.[351] Because of its exclusive emphasis on past caretaking, the application of the approximation rule can result in decisions far removed from optimal parenting time plans consistent with contemporary understanding of the needs of children whose parents live apart from each other.[352]

Studies of children living in joint-custody homes also support the importance of stability of relationships with both parents.[353] Professor Bauserman's meta-analysis of thirty-three studies, with a total sample of 1846 sole-custody and 814 joint-custody children, reported better adjustments for children in joint custody compared with those in sole custody, regardless of the level of parental strife.[354]

349. Kelly, *supra* note 318, at 247; *see also* Fabricius et al., *supra* note 34, at 231 ("In the typical family, more parenting time than the traditional alternating weekend visitation is required to achieve the well-recognized benefits of two involved parents, each with a close relationship to the child. An emerging consensus is that that a minimum of one-third time is necessary to achieve this criterion and that benefits continue to accrue as parenting time reaches equal (50-50) time."); Kelly, *supra* note 79, at 46; Warshak et al., *supra* note 76, at 16 ("[T]he highest quality relationships are maintained with access arrangements that promote a breadth of involvement between parent and child. Though this may not be tied in a perfect linear relationship to the frequency or amount of contact, the schedule of contacts does need to afford opportunities for each parent's involvement in the child's daily life and routines, including supervision of homework and chores, setting and enforcing limits, arranging and supervising interactions with peers, and dealing with conflicts.").

350. *See supra* pp. 145–47.

351. *See* Kelly, *supra* note 318, at 237–40.

352. *See supra* pp. 142-51.

353. *See* Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOL. 91, 99 (2002).

354. *Id.* at 93 (noting that the category of joint custody included joint legal custody and joint physical custody, but both groups of children spent "a substantial proportion of time . . . living with each parent."); *see also* Mo-Yee Lee, *A Model of Children's*

Advocates may wish to cite this research in support of replacing the best-interest standard with a default rule dividing the child's time between homes exactly equally, but most of the joint-custody studies involved families in which the division of time between homes was not necessarily equal.[355]

Public opinion polls and research show high levels of support for equal parenting after divorce.[356] It is conceivable, though, that a

Postdivorce Behavioral Adjustment in Maternal- and Dual-Residence Arrangements, 23 J. FAM. ISSUES 672, 691 (2002).

355. The Bauserman analysis was published in a top-tier, anonymous, peer-review American Psychological Association journal, but it has been criticized. *See, e.g.*, David A. Martindale, Diplomate in Forensic Psychology, Keynote Address at the New York State Interdisciplinary Forum on Mental Health and Family Law 2011 Annual Program: Imposed Joint Custody: Does it Work?, at 3–5 (May 14, 2011) (arguing that the adjustment of children whose parents chose joint custody is irrelevant to predicting adjustment when imposed by the court on one or both parents who sought sole custody). Martindale hypothesizes that couples who voluntarily choose joint custody have lower levels of pre-divorce conflict and that the lower conflict may be the source of their children's better adjustment rather than the custodial arrangement. *Id.* Beyond initial lower levels of conflict, it may be argued that the same factors that play a role in parents' agreeing to joint custody may also contribute to the positive outcomes in these families. *Id.* For convincing data that supports another view, see BRAVER & O'CONNELL, *supra* note 30, at 194 (reporting that even when joint legal custody (which approximated de facto joint physical custody) was awarded over the mothers' objections, child support compliance was high); Fabricius et al., *supra* note 319 (drawing on data from the Stanford Child Custody Study (data set now available at http://www.socio.com/srch/summary/afda/fam25–27.htm) and finding that in the majority (79.5%) of joint residential custody families, one or both parents did not initially want and agree to the arrangement); Marjorie Lindner Gunnoe & Sanford L. Braver, *The Effects of Joint Legal Custody on Mothers, Fathers, and Children Controlling for Factors that Predispose a Sole Material Versus Joint Legal Award*, 25 LAW & HUM. BEHAV. 25, 25 (2001); Eleanor E. Maccoby et al., *Postdivorce Roles of Mother and Fathers in the Lives of Their Children*, 7 J. FAM. PSYCHOL. 24, 34–35 (1993) (explaining that children in joint residential arrangements compared with other children were most satisfied with the custody plan and showed the best long-term adjustments, even after controlling for factors that might predispose parents to select joint physical custody (such as education, income, and initial levels of parental hostility)).

356. *See, e.g.*, William V. Fabricius & Jeff A. Hall, *Young Adults' Perspectives on Divorce: Living Arrangements*, 38 FAM. & CONCILIATION CTS. REV. 446, 454 (2000) (reporting that 70% to 80% of university students, regardless of whether they were male or female or from divorced or intact families, selected equal amounts of time with both parents as the best living arrangement for children after divorce). A 2009 Nanos Research poll commissioned by a member of the Canadian Parliament found 78% of those surveyed nationally (86% in Quebec) support legislation to create a presumption of equal parenting in child custody cases. Dads on the Air, Comment to *DOTA: Shared Parenting Why it Works*, FAM. L. WEB GUIDE (Jul. 06, 2009),

public opinion poll of other presumptions, including the approximation rule, would receive similar endorsement. A survey that allows participants to select which presumption they prefer among several options may yield more convincing data on public opinions regarding standards for adjudicating parenting time. In a study that comes close to this design, Arizona citizens were asked how they would allocate parenting time in response to hypothetical custody cases in which either the mother or father provided 75% of the childcare during the marriage.[357] The most preferred postdivorce living arrangement selected by the participants was equal time with both parents.[358] The next most preferred arrangement was to award more time to the parent who provided more predivorce childcare, but the division of time did not come close to the 75/25 allocation of time mandated by the approximation rule.[359] Thus, more citizens favored awarding equal parenting time than awarding more time to the parent who provided 75% of predivorce child-care; even those who favored an unequal distribution of parenting time did not favor replicating the predivorce division of caretaking time—they favored a more evenly balanced division of parenting time.[360]

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http://www.familylawwebguide.com.au/forum/pg/topicview/misc/4171/index.php&keep_session=2049584127. In 2004, 85% of Massachusetts voters cast a "yes" ballot for the following nonbinding proposition:

> Presumption in child custody cases in favor of joint physical and legal custody, so that the court will order that the children have equal access to both parents as much as possible, except where there is clear and convincing evidence that one parent is unfit, or that joint custody is not possible due to the fault of one of the parents.

Braver et al., *Lay Judgments About Child Custody After Divorce*, *supra* note 34, at 217–18 (citing *2004 Massachusetts General Election Results*, BOSTON.COM (2004), http://www.boston.com/news/special/politics/2004_results/general_election/questions_all_by_town.htm). The same proposition received 90% agreement when presented in a public opinion poll of a representative sample of Arizona adult citizens. *Id.* At 218. Variables such as gender, age, income, political persuasion, marital status, or child support status (ever paid or received support) had no impact on the results. *Id.*

357. Braver et al., *Lay Judgments About Child Custody After Divorce*, *supra* note 34, at 222.

358. *Id.* at 223–25.

359. *Id.*

360. *Id.* A second study with the same sample provides further evidence that the public prefers equal parenting time over the approximation rule. *Id.* at 230 (asking citizens to respond to a hypothetical custody case in which the division of predivorce child-care was described as "about like average families in which both parents work full-time (both M-F, 9-to-5)"). About 66% said that if they were the judge they would award equal amount of times to each parent. *Id.* at 231. Respondents who preferred

Naturally, prevailing public opinion is not an infallible guide to the best custody standards; but the stability and enforcement of family law and public policy reforms is related to cultural norms.[361] Also, recall that the Approximation Rule Survey shows that experienced attorneys and child custody evaluators have little confidence that the approximation rule would deliver the benefits anticipated by ALI; instead, they believe that presumptions of sixty-four/thirty-six time allocation or of equal time are somewhat more likely to improve pre-trial settlement rates and reduce manipulative bargaining.[362]

Public policies that encourage children's involvement with both parents after divorce are consistent with the scientific literature and with prevailing public sentiment.[363] Legislation can define the best interests of children to include parenting plans that maximize parenting time when feasible and when no circumstances exist that endanger the health, safety, or well-being of the children or a parent, such as violence, abuse, gross neglect, severely compromised parenting due to severe mental illness or severe substance abuse, or extremely poor and harmful behavior toward the children.[364] Such policies clarify an aspect of children's best interests and establish an important context for custody negotiations.[365] Evidence is accumulating that closer to equal distributions of time are linked to better outcomes for most children and parents.[366] An exact equal-time presumption, though, may bring similar liabilities as presumptions that elevate a single factor (e.g., gender, past caretaking, or children's preferences) above all others.[367] For instance, if a parent uses additional time with the children to undermine their love and respect for the other parent, this behavior may offset the benefits of more time with the parent who manipulates the children in this manner.[368] But more time with the parent who is

time distributions that memorialized the past would have endorsed the option of awarding more parenting time to the mother. *Id.* at 235.

361. *See* Braver et al., *Lay Judgments About Child Custody After Divorce*, *supra* note 34, at 215 (discussing three reasons why policy-makers pay attention to public values and opinions).

362. Warshak, *supra* note 12.

363. Fabricius et al., *supra* note 319, at 16.

364. *See id.* at 27–28.

365. Warshak, *supra* note 16, at 611–12.

366. *Id.*

367. *Id.*

368. *See* Richard A. Warshak, *Bringing Sense to Parental Alienation: A Look at the Disputes and the Evidence*, 37 FAM. L.Q. 273, 279 (2003).

the target of bad-mouthing may help children resist efforts to turn them against that parent.[369]

2. Quantity of Caretaking Time as an Index of Relative Strength and Quality of Parent–Child Relationships

Notwithstanding the complications in measuring past caretaking time and the likelihood of the exceptions swallowing the rule, and even if the approximation rule could deliver on its promise to streamline family court cases, it is a mistake to assume that quantity of past caretaking is an objective index of the strength and quality of the parent–child relationship or of the relative ability of each parent to meet the child's needs after divorce.[370] Some threshold of interaction is necessary to form and maintain a parent–child bond, but evidence from a variety of studies argues against equating the quantity of early caretaking with the quality of parent–child relationships.[371]

Professor Lamb gives a scathing critique of the approximation rule, faulting it for

> institutionalizing a presumption that the relative psychological and formative importance of each parent's relationship with a child is directly proportional to the extent of the parent's involvement in prior care of the child. The available social science literature offers no empirical support for this presumption . . . .
>
> . . . Other studies also show that, when questioned, children of divorce commonly complain that they had insufficient opportunities to interact with and be with their nonresident parents. Implementation of the approximation rule will not address the bases of this concern at all, because it focuses only on the amounts of time, not on children's psychological and emotional needs.

369. *See, e.g.*, *id.* at 294–97; Warshak, *supra* note 192, at 126–27; Braver et al., *Lay Judgments About Child Custody After Divorce*, *supra* note 34, at 232, (discussing a survey in which a representative sample of the Arizona public would award more parenting time to the parent who is the target of bad-mouthing).

370. Warshak, *supra* note 16, at 604–09.

371. *See* Michael E. Lamb,*The Role of the Father: An Overview*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 4 (Michael E. Lamb ed., 1976) (citing multiple studies to support the conclusion that, "[E]mpirical and theoretical considerations indicate that the amount of time spent together is a poor predictor of the quality of the infant's relationship with either mother or father").

> . . . Research on topics as diverse as the effects of child care, the determinants and formative importance of parent–child attachment, and the effects of postdivorce parenting arrangements on children's adjustment shows the dangers of confusing the quantity and quality of parenting or child care, yet the approximation rule places its emphasis exclusively and unashamedly on the quantity of time spent by parents with their children.[372]

Further evidence for the lack of relationship between caretaking quantity and quality comes from studies that show comparable adjustments of children in the custody of mothers and fathers who did not have the majority of custodial responsibility in the marriage.[373]

In addition, as recognized in several decisions, a child can spend more time with, and have a stronger tie to, the parent who is less equipped to meet his or her needs.[374] For instance, a boy may have a strong tie and close identification with a father who treats the mother violently. Children who are regularly and brutally beaten by their parents usually have very strong and tenacious attachments to these parents.[375] If offered a choice between a removal from their home or remaining in the abusive environment, many children will choose to remain with the abuser.[376] The strength of a child's attachment to a

372. Lamb, *supra* note 228, at 136. University of Cambridge Professor Lamb is generally regarded as one of the world's leading scholars on parent–child relations. *See also* NICHD Early Child Care Research Network, *The Effects of Infant Child Care on Infant-Mother Attachment Security: Results of the NICHD Study of Early Child Care*, 68 CHILD. DEV. 860, 877 (1997) ("[C]hild care by itself constitutes neither a risk nor a benefit for the development of the infant-mother attachment relationship . . . ."); Nadya Pancsofar & Lynne Vernon-Feagans, *Mother and Father Language Input to Young Children: Contributions to Later Language Development*, 27 J. APPLIED DEV. PSYCHOL. 571, 582–83 (2006) (reporting that although mothers spoke more with their young children than did fathers, fathers had a greater impact than mothers on language development in two-year-olds).

373. Warshak, *Father-Custody and Child Development*, *supra* note 30; Richard A. Warshak, *How Children Fare in Father-Custody Homes*, 15 FAM. ADVOC. 38 (1993).

374. *See, e.g.*, *In re* Marriage of Bukacek, 907 P.2d 931, 936–37 (Mont. 1995); West v. West, No. 2059–93–4, 1994 WL 583195, at *1–2 (Va. Ct. App. Oct. 25, 1994); Loveland v. Loveland, No. 92–3144, 1994 WL 178559, at *5 (Wis. Ct. App. May 12, 1994).

375. *See* Douglas F. Goldsmith et al., *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, 55 JUV. & FAM. CT. J. 1, 1, 6 (2004).

376. *Id.* at 1 ("[C]hildren find themselves torn between forming an attachment to their foster parents while simultaneously longing to return to their parents. It may be surprising to some that this longing develops even when there has been a documented

parent, by itself, is a poor index of the quality of the relationships, the competence of that parent, or the ability of that parent to meet the child's current and future needs.[377]

Similarly, there is no evidence that parents who spend more time interacting with their children do so more competently.[378] A so-called "helicopter" parent's excessive involvement in caretaking, for example, can inhibit the child from developing an age-appropriate sense of autonomy,[379] and parents can be highly effective issuing firm appropriate limits with minimal conversation, just as parents can be ineffective engaging in lengthy explanations.[380] A parent who spends thirty minutes nagging, cajoling, threatening, and yelling to get a child to do his homework is not doing a better job than the parent who relies on the strength of her authority and a five-second reminder to secure the child's compliance.

Contrary to the quantitative standard of the approximation rule, developmental psychologists strongly agree that the impact of the parent–child relationship is better predicted by models that include factors in addition to the amount of parent–child interaction, such as the parent's sensitivity and responsiveness to the child's needs and the emotional quality of the relationship.[381] When adolescents

history of maltreatment."); *see also* Stephanie D. Block et al., *Abused and Neglected Children in Court: Knowledge and Attitudes*, 34 CHILD ABUSE & NEGLECT 659, 659 (2010) ("[M]ost children wanted to return home.").

377. *See* Goldsmith et al., *supra* note 375, at 1, 4, 6.

378. *See* PETER N. STEARNS, ANXIOUS PARENTS: A HISTORY OF MODERN CHILDREARING IN AMERICA 99–103, 212–13 (2003).

379. *Id.* at 46–47.

380. *See, e.g.*, E. Mavis Hetherington, Martha Cox, & Roger Cox, *Family Interactions and the Social, Emotional, and Cognitive Development of Children Following Divorce*, *in* THE FAMILY: SETTING PRIORITIES 71, 72 (V. C. Vaughan & T. Berry Brazleton eds., 1979); KYLE PRUETT, FATHERNEED: WHY FATHER CARE IS AS ESSENTIAL AS MOTHER CARE FOR YOUR CHILD 33–34 (2000) ("Over and over again in the science of father care, researchers point out that it is the quality of interaction between father and child—that is, whether the father is sensitive to the child's needs and reactions—that determines the overall value of his involvement in his child's life, not the quantity. Counting the minutes that child and father are in each other's company tells us very little about the ultimate influence of the father on the development of his child. What fathers do with their children, *how* they do it, and, probably most important, how they *are* with their kids matter more than how often or long they do it."); Richard A. Warshak & John W. Santrock, *Children of Divorce: Impact of Custody Disposition on Social Development*, *in* LIFESPAN DEVELOPMENTAL PSYCHOLOGY: NON-NORMATIVE LIFE EVENTS 241, 255 (Edward J. Callahan & Kathleen A. McCluskey eds., 1983).

381. Empirical support for this model is reported in Fabricius et al., *supra* note 34, at 224. In this model, parenting time exerts a causal relationship on child outcomes by setting a ceiling on the potential amount of parent–child interaction. Amount of time spent doing things together, in addition to the parent's responsiveness and low exposure to

describe the essence of their relationships with their parents, they focus on the same factors: the amount of time spent doing things together, the ability to rely on the parent to meet the child's needs (e.g., "She's always there for me."), and the emotional valence of the relationship.[382]

Kelly faults the approximation rule for failing to "consider the quality and meaning of children's relationship [sic] with each parent, the age and developmental needs of children, or the substantial changes in parental role and function necessarily precipitated by the separation of the parents."[383] In her appraisal of the primary caretaker presumption Kelly describes concerns that are equally applicable to the approximation rule:

> [I]t ignores the quality of the relationship between the child and the primary caretaker in favor of counting hours and rewarding many repetitive, concrete behaviors. Indeed, the most important emotional and interactive behaviors promoting children's development and psychological, social, and academic adjustment, such as love, acceptance, respect; encouragement of autonomy, learning, and self-esteem, [and] moral guidance . . . are not considered.[384]

The *Principles* anticipates arguments about the importance of quality over quantity and offers the defense that it is better to rely on quantitative measurements because these are easier to make and thus avoid qualitative disputes.[385] Legal reforms do involve trade-offs between multi-factored, nuanced, and individualized decision making versus ease of administration.[386] But as the earlier analysis showed, it is not clear that the approximation rule would be easier to administer than the best-interest standard.[387] Even if it is easier, defending a measure merely because it is convenient brings to mind the story of

inter-parental conflict, contributes to the emotional security of the relationship. *See* Kelly & Emery, *supra* note 70, at 356; Michael E. Lamb, *Placing Children's Interests First: Developmentally Appropriate Parenting Plans*, 10 VA. J. SOC. POL'Y & L. 98, 106-07 (2002).

382. Fabricius et al., *supra* note 34, at 223.

383. Kelly, *supra* note 318, at 241.

384. Kelly, *supra* note 46, at 130.

385. PRINCIPLES, *supra* note 3, § 2.08, cmt. c ("Any different measure, *even if it is otherwise reasonable*, would only reintroduce the kinds of qualitative disputes that the caretaking-functions factor is intended to reduce.") (emphasis added).

386. Warshak, *supra* note 16, at 609.

387. *See supra* Part IX.B.1.

the man searching for his lost keys in the wrong place because the light is better. The man will not find his keys and courts will not define children's best interests by relying on what is easier to measure merely because it is easier to measure. When legislators weigh the potential of the approximation rule to streamline family court cases, they should not assume that time invested in past caretaking is an objective index of the strength of a child's attachment to a parent, the quality of the relationship, the competence of the parent, the ability of the parent to meet the child's needs, or the motivation of the parent to do so.[388]

X. REVISITING THE BEST-INTEREST STANDARD

We began with the question of whether the benefits of broad discretion in contemporary custody adjudication outweigh the drawbacks, and whether a more determinate rule can adequately address legitimate concerns about the best-interest standard while avoiding hazards such as an unacceptable degree of harm to children's welfare.[389] This question has no simple answer. Professor Schneider is probably correct that, with respect to custody disputes, "[A] motley mix of discretion, guidelines, and rules may be the best we can do. . . . [B]oth a purely discretionary and a purely rule-based system would have intolerable drawbacks."[390] Such a mix of discretion and parameters for its exercise is precisely what has evolved in contemporary applications of the best-interest standard.[391]

Statutory and case law guidelines include elucidation of criteria to be considered in defining best interests,[392] which helps provide a uniform framework for the court's application of the standard through a nuanced investigation of a wide range of factors relevant to children's welfare.[393] Other parameters include public policy statements promoting frequent and continuing access to both parents,[394] specific parenting plans,[395] mandates for mediation in cases with no domestic violence, and specification of factors, such as

388. Warshak, *supra* note 16, at 608.
389. *See supra* Part V.
390. Schneider, *supra* note 46, at 2219.
391. *See, e.g.*, John J. Sampson, *Bringing the Courts to Heel: Substituting Legislative Policy for Judicial Discretion*, 33 FAM. L.Q. 565 (1999) (discussing Texas legislative restrictions on judicial discretion in custody trials).
392. Kelly & Emery, *supra* note 70, at 356.
393. Warshak, *supra* note 16, at 612.
394. *See, e.g.*, CAL. FAM. CODE § 3020(b) (Deering 2010); TEX. FAM. CODE ANN. § 153.001(a)(1) (West 2010).
395. *See, e.g.*, TEX. FAM. CODE ANN. §§ 153.311-17 (West 2011).

family violence and children's exposure to parental conflict, that limit the range of permissible outcomes.[396]

In addition to statutory and case law parameters, the best-interest standard operates in a contemporary context of programs and supports that provide attractive alternatives to litigation.[397] This context includes a menu of model parenting time plans that educate parents about the range of options and the benefits and drawbacks of each;[398] parent education programs about the impact of divorce on children;[399] encouragement of non-adversarial dispute resolution, such as therapeutic mediation[400] and collaborative law approaches;[401] involvement of mental health professionals as consultants, evaluators, and counselors; and post-mediation settlement conferences.[402] It is reasonable to speculate that the contemporary context of the application of the best-interest standard contributes to the very low rate of custody trials. Support for this speculation is found in studies that demonstrate significantly lower trial rates as a result of mediation.[403]

396. *See, e.g.*, TEX. FAM. CODE ANN. § 153.004 (West 2011).

397. Warshak, *supra* note 16, at 603.

398. *See, e.g.*, PLANNING FOR PARENTING TIME: ARIZONA'S GUIDE FOR PARENTS LIVING APART, ARIZ. SUPREME COURT (2001), *available at* http://www.supreme.state.az.us /dr/pdf/parenttime/parenttime1a.pdf; OR. JUDICIAL DEP'T, BASIC PARENTING PLAN GUIDE FOR PARENTS (2008), *available at* http://courts.oregon.gov/OJD/docs/OSCA /cpsd/courtimprovement/familylaw/COVER.Ver08FINAL2008.pdf.

399. Jill R. Bowers et al., *A Review of Online Divorce Education Programs*, 49 FAM. CT. REV. 776 (2011); Tamara A. Fackrell et al., *How Effective Are Court-Affiliated Divorcing Parents Education Programs? A Meta-analytic Study*, 49 FAM. CT. REV. 107 (2011); Amanda Sigal et al., *Do Parent Education Programs Promote Healthy Postdivorce Parenting? Critical Distinctions and a Review of the Evidence*, 49 FAM. CT. REV. 120 (2011).

400. *See, e.g.*, Marsha K. Pruett & Janet R. Johnston, *Therapeutic Mediation with High-Conflict Parents: Effective Models and Strategies*, *in* DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 92, 95 (J. Folberg, A. Milne & P. Salem, eds. 2005).

401. TESLER, *supra* note 275, at 86.

402. Reforms aimed at helping couples avoid litigation are endorsed by the PRINCIPLES. *See*, O'Connell, *supra* note 45, at 129 (clarifying that most of these programs would be unaffected by adoption of the approximation rule, which is intended to operate solely as a default provision for parents who are unable to reach an agreed-upon division of parenting time).

403. Robert E. Emery, Lisa Laumann-Billings, Mary C. Waldron, David A. Sbarra & Peter Dillon, *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCHOL. 323, 323 (2001).

The parameters and programs that set the contemporary context for the application of the best-interest standard, while bending to the current of political pressures from advocacy groups, also reflect the immense progress that social scientists have made in understanding children's adjustment after divorce.[404] As psychologists Robert Emery and Joan Kelly summarize, "A continuing stream of sophisticated social science and developmental research has contributed a more complex understanding of factors associated with children's positive outcomes and psychological problems in the context of both marriage and divorce."[405]

The contemporary mix of judicial discretion, parameters, and programs to assist parents in reaching informed and mutually agreeable custody decisions should renew confidence in the viability of a standard that carries the moral superiority of treating each child as an individual.

XI. CONCLUSIONS

The approximation rule represents a return to a 19th-century mechanistic view of the universe. It assumes that a complex system—a family—can be understood by breaking it down into discrete measurable units without regard for the transactions and balance among the units.[406] It reduces the intricate rhythms of a family's life together to only those interactions that can be measured with a stopwatch. In so doing, it no more captures the essence of the family than the number of words and lines convey the meaning, value, and essence of a poem.

Proponents of the approximation rule believe it is more straightforward than the best-interest standard and is a reasonable proxy for children's best interests.[407] I have shown that the rule is more difficult to implement than its supporters acknowledge and fails to provide an acceptable short-cut to determining best interests.[408]

We have no data to suggest that a past caregiving presumption will reduce the likelihood of litigation or of children's harmful exposure to parental conflict. But we do have data that tie other variables to child well-being. Why should we require judges to ignore variables that are supported in the scientific literature in favor of one variable

404. Warshak, *supra* note 16, at 611–12.
405. Kelly & Emery, *supra* note 70, at 352.
406. Warshak, *supra* note 16, at 613.
407. Richard A. Warshak, *Best Interests and the Fulfillment of Noble Aspirations: A Call for Humbition*, 1 CHILD. DEV. PERSP. 137, 139 (2007).
408. *Id.*

that has no support?[409] In the few cases that go to trial, courts can better discern children's needs if the court's vision extends beyond the narrow confines of judging the merits of parents' competing claims about their parenting histories.[410]

The best-interest test is not easy or efficient. Facing such a complex task, we naturally welcome anything that can make the job easier.[411] But a default rule that is difficult to implement and is out of touch with current knowledge of child development is no improvement. The approximation rule strives to relieve courts of a comprehensive and individualized inquiry into children's best interests.[412] Instead of elevating any one factor above all others and treating children as a homogenous group, a contemporary application of the best-interest standard allows a multi-factored inquiry into individual children's needs that can be regularly updated as new knowledge emerges.[413] By reducing the decision to a single factor, the approximation rule cannot capture the depth and richness of each parent's role in a child's life.[414]

Rather than abandon a comprehensive inquiry to shape a parenting plan, public policy should continue to encourage private, amicable, settlements while giving those few custody cases that reach the courtroom all the attention that children deserve.

409. Lyn R. Greenberg, Diana J. Gould-Saltman & Robert Schnider, *The Problem With Presumptions–A Review and Commentary*, 3 J. CHILD. CUSTODY 139, 143 (2006).

410. Warshak, *supra* note 407, at 139.

411. *See* Smith, *supra* note 46, at 745–46 ("Law reformers are constantly seeking magical solutions or formulas for determining who should be awarded custody in divorce cases. While mathematical formulas might work in determining child support payments, there are no such mechanical tests for child placement. The focus in child custody today should not be placed on searching for such tests, but rather on humanizing the process by which custody disputes are resolved. This requires the judge to approach each case with an open mind, apply the appropriate standards, and support the decision with specific reasons.").

412. Warshak, *supra* note 407, at 139.

413. *Id.*

414. *Id.*