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GENDER BIAS IN A FLORIDA COURT: "MR. MOM" V. "THE POSTER GIRL FOR WORKING MOTHERS"

I. INTRODUCTION

The year is 1989, and Alice Hector is a lawyer rapidly ascending the ladder of success.¹ Robert Young is an architect who was previously involved in several successful business ventures.² Two years earlier, however, Young's investments crashed along with the stock market.³ Hector and Young have been married since 1982, they live in New Mexico, and they have two young daughters.⁴ Hector has just landed a job at a prestigious law firm in Miami, so she moves there with the couple's two daughters, while Young stays in New Mexico for four months to sell the family home and finish several projects.⁵ Hector hires a live-in nanny to watch the children until she gets home from work.⁶ When Young joins his family in Miami, he studies for and passes the Florida contractor's examination.⁷ Young, however, is computer illiterate and unable to find a job that does not require computer skills.⁸ Young returns to New Mexico to handle remaining business matters and visits his dying brother in Arkansas.⁹ He is away from his family for a total of fourteen months between 1990 and 1993.¹⁰ During one

1. *Young v. Hector*, 740 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1999). Hector was working for a small law firm in 1987, moved to a prestigious mid-size firm in 1989, and became a partner at one of Florida's largest firms in 1993. *See id.*

2. *See id.*

3. *See id.* Prior to the stock market crash, Young had been quite successful; when the couple was married in 1982, Young's business ventures included a publishing company and a custom-home building firm. *See id.* According to Joan Williams, "[i]n its original context, domesticity's descriptions of men and women served to justify and reproduce its breadwinner/housewife roles by establishing norms that identified successful gender performance with character traits suitable for those roles." JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1 (2000). Young's failure in the (stock) market, where a male is expected to be successful, was clearly at odds with this model.

4. *See Hector*, 740 So. 2d at 1159. The girls were born in 1985 and 1988. *See id.* After the children were born, both parents continued to work so they hired live-in nannies and housekeepers to assist with the children. *See id.* The children were ages ten and thirteen at the time of the decision.

5. *See id.*

6. *See id.*

7. *See id.*

8. *See id.* at 1155.

9. *See id.* at 1160.

10. *See id.*

year Hector spends more than three months away from home on business.¹¹ Between their arrival in Miami in 1989 until the fall of 1993, the live-in housekeeper cares for the children after school.¹² When Young returns to Miami in the fall of 1993, he is available for the children after school nearly every day.¹³ Hector, meanwhile, has become a partner in one of Florida's largest firms where her annual salary is \$300,000.¹⁴ Hector asks for a divorce in the Fall of 1993, but Young continues to live in the home and continues to care for the children during the day.¹⁵ Hector files for divorce in May 1995.¹⁶

Robert Young and Alice Hector assumed non-traditional roles during marriage and during child custody proceedings, they were each subjected to gender biases traditionally reserved for the opposite sex. For example, Hector was criticized for caring more about her career than her children.¹⁷ Young, on the other hand, was viewed as a less stable parent because he had fewer financial resources than his wife.¹⁸ Their case has garnered national attention largely because it both challenges and perpetuates gender stereotypes and raises serious questions about the manner in which custody decisions are made.¹⁹

As this Comment will show, gender bias in Florida's courts adversely affected the Hector/Young family, and on a national level the decision is harmful to men, women and children.²⁰ In recent years, numerous states

11. Melody Petersen, *The Short End of Long Hours: A Female Lawyer's Job Puts Child Custody at Risk*, NEW YORK TIMES, July 18, 1998, at D1.

12. See *Young v. Hector*, 740 So. 2d 1153, 1160 (Fla. 3d Dist. Ct. App. 1999).

13. See *id.* at 1154. By the Fall of 1993, the couple no longer employed a nanny, but Hector did hire a housekeeper ("Hattie") "who came to the house each weekday between the hours of noon and 8:00 p.m. to clean, pick up and babysit the children after school." *Id.* at 1160. The children were in school from 8:30 a.m. until 2:00-3:00 p.m. See *id.* When Young told the trial court that he was taking care of the children, the court questioned how much he was really doing and the following exchange took place: "[Court]: But you've got a nanny doing that. [Father]: No sir, I don't believe you can buy parents. Nannies can pick up. They can drop off. [The Court]: Why [sic] do you need the nanny for, if you're there doing it?" *Id.* at 1162.

14. See *id.* at 1160.

15. See *id.* The guardian ad litem found that Young was "the dominant caretaker during the day" once the family moved to Miami. *Id.* at 1155.

16. See *id.* at 1154. When she asked Young for a divorce, in 1993, Hector cited Young's refusal to seek gainful employment and his extramarital affair while in New Mexico. See *id.* at 1160.

17. See *id.* at 1177-78 (Goderich, J., dissenting). The panel's decision, for example, contrasted Hector's long hours as a litigator (minimum of 45-50 hours per week) with Young's involvement in the children's after-school activities (e.g. Brownie troop, soccer, and doctor appointments). See *id.* at 1155-56.

18. See *id.* at 1155.

19. See Harriet Johnson Brackey, *Custody Battle Pits Mr. Mom, Lawyer Wife*, ARIZONA REPUBLIC, Jan. 19, 2000, at E3. According to Brackey, several players in the drama have appeared in various public fora, including PEOPLE magazine, the BBC, the NEW YORK TIMES, the NEW REPUBLIC, the *Today Show*, and *Dateline NBC*. See *id.*

20. See Krista Carpenter, Comment, *Why are Mothers Still Losing: An Analysis of Gender Bias in Child Custody Determinations*, 1996 DET. C.L. REV. 33, 57 (1996) (arguing that

have commissioned studies confirming that gender bias permeates courtrooms across the United States.²¹ Frequently, this gender bias is the result of traditional gender stereotypes:

In no greater sphere do these outdated gender roles persist than in our nation's family court system. There, the state frequently not only denies the capability and desire of many men to participate actively and meaningfully in the care of their children, but also perpetuates the subjugation of women as mothers by deeming them weak and incapable of survival without the support of a man. This state-instituted romantic paternalization of mothers, combined with the narrowed view of the role of fathers, is largely responsible for the wholesale destruction of the post-divorce, father-child relationship. Consequently, the state creates increased psychological, educational, behavioral, and health disorders for children, and crime and violence for society.²²

Clearly, the persistence of gender stereotypes and biases is a major concern for men, women, and children. While recognizing the breadth of these concerns, this Comment focuses particularly on gender bias against fathers in custody cases.²³

This Comment assesses how deep-rooted gender bias is set in family courts, analyzes the underlying laws, and looks to the future to see what can be done to correct the problem. The Comment also considers how the continuing debate regarding gender bias sometimes interferes with the best interests of children. Part II discusses *Young v. Hector* in greater depth, first by reviewing Florida custody law, then turning to the evolution of the case through three lengthy stages, and concludes that the courts ultimately de-

"although it would appear on the surface that the gender bias prevalent in the courts only impacts the disputing parents, it is actually the child who becomes the true victim.")

21. See Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1 *passim* (1996). For example, the Utah study found that many attorneys advise fathers not to seek custody because mothers are presumed to be better parents. See *id.* at 61 tbl.10. With regard to women, the Michigan study found that mothers who appear to be primary caregivers often lose when fathers seek custody and mothers who pursue a career are considered less fit as parents. See *id.* at 36-37 tbl.5. In response, many commissions have made recommendations to reduce gender bias, and as the various task forces and commissions implement their recommendations, there seems to be a resulting decrease in gender bias in the courts. See *id.* at 70-78.

22. See Cynthia A. McNeely, Comment, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 894 (1998); see also Judith Bond Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 RUTGERS L. REV. 1141, 1142 (1991).

23. While a comparison between bias against both genders would be more ideal, the scope of such a study was beyond the time and space constraints of this Comment. I therefore chose to focus on bias against men. (For insight regarding the bias against women using *Hector* as paradigm, see Amy Ronner, *Women Who Dance on the Professional Track: Custody and the Red Shoes*, 23 HARV. WOMEN'S L. J. 173 (2000). During the early phases of my research, I was shocked to find that some father's rights groups will use severe tactics to convince the public that men are being treated unfairly in custody decisions. See *infra* Part IVA. I hope this Comment contributes something more concrete to the legitimate concerns many fathers have about custody awards.

cided this case wrongly. Part III discusses the impact of no-fault divorce on, and the evolution, of custody law in the United States, from children as property, to various gender-based presumptions, and finally to the current best interests of the child standard. Part IV discusses how mothers and fathers often mask the more important issues in custody cases by focusing attention on themselves as victims. The Comment concludes, in part V, by suggesting ways for improving the manner in which child custody is determined.

II. THE CASE: *YOUNG v. HECTOR*

This part will critically analyze the law and the decisions made at each level of *Young v. Hector* to show that Robert Young was the victim of gender bias because he assumed a role traditionally reserved for mothers, while his wife was the breadwinner, a role traditionally filled by fathers.

A. Florida Law

Under Florida law, “[t]he court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child.”²⁴ Shared parental responsibility is defined as “a court-ordered relationship in which both parents retain full parental rights and responsibilities with respect to their child and in which both parents confer with each other so that major decisions affecting the welfare of the child will be determined jointly.”²⁵ This joint custody presumption must be considered under the framework of the best interests of the child standard, which is the dominant standard in the United States.²⁶ While the parameters of the best interests of the child standard varies from state to state, most states provide factors to guide courts.²⁷

24. FLA. STAT. ch. 61.13(2) (1999). This is essentially a joint custody presumption.

25. FLA. STAT. ch. 61.046(14) (1999).

26. See Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 345, 348 (1993); Susan Beth Jacobs, Note and Comment, *The Hidden Gender Bias Behind “The Best Interest of the Child” Standard in Custody Decisions*, 13 GA. ST. U.L. REV. 845, 853 (1997).

27. See, e.g., FLA. STAT. § 61.13(3) (1999) (“For purposes of shared parental responsibility and primary residence, the best interests of the child shall include an evaluation of all factors affecting the welfare and interests of the child.”). These factors include:

- (b) the love, affection, and other emotional ties existing between the parents and the child.
- (c) the capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
- (d) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity . . .
- (f) the moral fitness of the parents . . .
- (i) the reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- (j) the willingness and ability of each parent to facilitate and encourage a close and con-

In addition, Florida judges may consider any factor they deem relevant to their decision,²⁸ thereby giving the trial judge a great deal of discretion. Once the custody determination is made, a Florida appellate court may only reverse for abuse of discretion "where no reasonable man would take the view adopted by the trial court."²⁹

B. The Evolution of the Case

Those who support Robert Young and Alice Hector³⁰ agree on very little,³¹ but they seem to agree that both are good parents.³² According to one observer, "[t]his is one of those cases where it could have gone either way. It says that parents' roles are changing, and that's going to have consequences on custody issues."³³ At the time of the divorce, Hector was a working mother, while Young was an unemployed, self-described "Mr. Mom."³⁴ Though the change in roles might seem to support a custody award to Young, the *guardian ad litem* (GAL), Ira Dubitsky, recommended that Hector be awarded primary residential custody.³⁵ Miami-Dade Judge W. Thomas Spencer³⁶ agreed, and then denied Young's request for permanent alimony, choosing instead to grant him four months of rehabilitative alimony at \$2,000 per month and \$10,000 in attorney's fees.³⁷

On June 24, 1998, a three-judge panel (hereinafter "the panel") of the

tinuing parent-child relationship between the child and the other parent . . . (l) evidence of domestic violence or child abuse.

FLA. STAT. chs. 61.13(3)(b)-61.13(3)(l) (1999).

28. See Fla. STAT. ch. 61.13(3)(m) (1999) ("Any other fact considered by the court to be relevant." (emphasis added)).

29. Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). Accord Schoonmaker v. Schoonmaker, 718 So. 2d 867, 868 (Fla. Dist. Ct. App. 1998) (per curiam).

30. See Young v. Hector, 740 So. 2d 1153, 1158 (Fla. Dist. Ct. App. 1999). The wife, Alice Hector, is now using her maiden name. See *id.*

31. See Editorial, *Case Blown Out of Proportion*, SUN-SENTINEL, July 17, 1999, at 12A (describing how the couples' supporters have made the case a battle between "Mr. Mom" and the "poster girl for working mothers").

32. See Paula McMahon, *Working Mom Gets Kids: Stay-at-Home Dad Blames Gender Bias in Ruling on Girls*, SUN-SENTINEL, July 15, 1999, at 1A.

33. Deborah Sharp, *Custody Clash Reflects Parents' Changing Roles*, USA TODAY, July 28, 1999, at 5A (quoting Nancy Duff Campbell of the National Women's Law Center).

34. *Young*, 740 So. 2d at 1161.

35. See *id.* at 1155. In his report, the guardian ad litem also recommended that Young be granted very liberal and frequent access to the children. At trial, Dubitsky cited three "determinative factors" that formed the basis of his decision: (1) the mother was more "economically stable" over the course of the marriage, (2) the mother's steady presence "over a continuum of time," and (3) the mother was more able to control her anger in front of the children. See *id.* at 1162-63.

36. Although Judge Spencer served in the Florida Legislature with Hector's father, Hector's father was in the courtroom during the proceedings, yet Spencer did not recuse himself and Young's attorney never raised the issue on appeal. See Brackett, *supra* note 19.

37. See *Young*, 740 So. 2d at 1156.

appeals court reversed the decision.³⁸ Hector then asked the Third District Court of Appeal for a rehearing *en banc*.³⁹ Her request was granted and on July 14, 1999, a full bench of the court of appeals (hereinafter “the bench”) withdrew the panel’s decision, affirmed the trial court’s custody decision, but reversed the trial court’s decisions regarding property distribution, attorney’s fees, and alimony.⁴⁰ According to the bench, the alimony awarded was “inadequate in light of [Young’s] rehabilitative plan presented to the court and the lifestyle established during the parties’ marriage”; the division of property was “inequitable”; and the attorney’s fees were “insufficient”.⁴¹ In spite of the court’s recognition that Young was treated unfairly with respect to property issues, the court rejected the father’s suggestion that he was the victim of gender bias with regard to the custody issue.⁴² The trial court did not abuse its discretion by granting custody to Hector, the bench concluded, and the evidence did not support Young’s gender bias argument.⁴³ The following sections discuss each decision in greater detail.

1. Round One: The Trial Court

The trial court followed the recommendations of Ira Dubitsky, the GAL, which portrayed Young as an excellent father.⁴⁴ When he testified, however, Dubitsky cited three “determinative factors” that he used in recommending Hector as the custodial parent.⁴⁵ First, “very clearly, [Hector] has been the more *economically stable* of the two throughout the relation-

38. See *id.* at 1158. The panel consisted of Judges Schwartz, Nesbitt and Goderich, all of whom dissented when the panel was reversed on rehearing *en banc*. The panel found abuse of discretion because the trial judge relied on improper factors, such as economic resources, and failed to preserve the caretaking roles the couple had established. See *id.*

39. Brackey, *supra* note 19. Brackey notes how rare such a request is granted: of 3,487 total cases in 1998, the court granted such hearings only 11 times. Brackey does not mention how many requests were made. See *id.*

40. See *Young v. Hector*, 740 So. 2d 1153, 1163-64 (Fla. Dist. Ct. App. 1999). See also McMahon, *supra* note 32 (noting the Court of Appeals must have been “troubled” by the issue because it “took an unusually long seven months after oral arguments to publish their decision”).

41. *Young*, 740 So. 2d at 1164.

42. See *id.* at 1162. Neither the panel nor the full bench ever mentioned shared parental responsibility.

43. See *id.* at 1153. In 1990, the Report of the Florida Supreme Court Gender Bias Study Commission concluded that “many of Florida’s courts tend to minimize the time, energy, and lost opportunity required to be a homemaker and primary caretaker of children. The Commission found the courts especially reluctant to acknowledge these contributions as a genuine partnership resource of marriage.” REP. OF THE SUPREME CT. GENDER BIAS STUD. COMM’N 45 (1990) [hereinafter FLORIDA STUDY]. The bench’s decision fits this category.

44. See 740 So. 2d at 1155-56. In the report, Dubitsky wrote that Young is “phenomenal” with his children, while Hector “tends to be somewhat cooler by nature.” *Id.* at 1155.

45. See *id.* at 1165 (recommending that Young should have liberal visitation rights because he “gives a tremendous amount to the kids.”).

ship."⁴⁶ Second, Hector was "the more constant factor throughout the entire relationship,"⁴⁷ because Young had been, "for whatever reasons, away from the home for substantial periods of time and Alice has been the dominant influence."⁴⁸ Dubitsky's final determinative factor was his opinion that Hector was better able to control her anger in front of the children.⁴⁹

A common theme emerges from Judge Spencer's comments at trial and from the briefs submitted by Hector's attorneys: Young should stop being lazy and get a job. For instance, Spencer asked Young: "Maybe I'm missing something. Why don't you get a job?"⁵⁰ According to Hector's court brief, a typical morning went like this: "Mother wakes up children, picks up the newspaper, gets the children dressed, feeds them breakfast, makes their lunch, cleans up the kitchen, feeds the animals, takes garbage and recycling to street, makes the beds and drives the children to school. Father in bed."⁵¹ Hector's attorneys, however, failed to mention that Young started and led a Brownie troop, "coached one of the children's soccer team, regularly volunteered at the children's school, and [took] the children to doctor and dentist appointments."⁵² In addition, one of the children's former pre-school teachers testified that Young made repairs to the classroom, attended field trips, and participated in various other activities.⁵³ In contrast, the same teacher testified that Hector's only involvement was that she dropped the children off at school approximately eight to ten times during the school year.⁵⁴

Hector's trial attorney excoriated Young's work ethic in his brief: "The decision of the highly motivated architect father to spend the rest of his life doing nothing economically productive was entirely his own."⁵⁵ These comments not only evidence bias against Young, but similar attacks could

46. *Id.* at 1155, 1165 (emphasis added).

47. *Id.*

48. *Young v. Hector*, 740 So. 2d 1153, 1162 (Fla. Dist. Ct. App. 1999) (emphasis added). Dubitsky clearly did not think Young's reasons for being away were worth considering. Young's absences, however, included a trip to New Mexico in order to improve the family's home so they could sell it, handle various business matters, visit his brother who died soon thereafter, and attempt to make money through a treasure hunt. *See id.* at 1178-79 (Goderich, J., dissenting).

49. *See Young*, 740 So. 2d at 1163 (basing this conclusion on conversations with the children and on Dubitsky's own experience seeing Young show his anger in front of the children).

50. *Id.* at 1176.

51. Petersen, *supra* note 11. According to Loyola Law Professor Randy Frances Kandel, "[s]chool age children neither have nor need primary caretakers to wash and dress them. Furthermore, merely because one parent is responsible for the washing, cooking, shopping, and cleaning, he or she is not necessarily the psychological parent." Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299, 343 (1994).

52. *Young*, 740 So. 2d at 1155.

53. *See id.* at 1156.

54. *See id.*

55. Richard Willing, *Stay-at-home Dad Fights to Keep His Kids Closely Watched Custody Battle Flips Traditional Roles*, USA TODAY, July 24, 1998, at 3A. Hector's male attorney apparently views masculinity as the accumulation of wealth.

also be lodged against mothers who choose the traditional role of stay-at-home mom.⁵⁶ Further, while a father staying home with the children may seem irresponsible if the family was agonizingly poor, the economic situation in this family was far from dire. Hector was making \$300,000 annually and the couple had always employed a live-in nanny or housekeeper.⁵⁷

2. Round Two: The Panel

In reversing the trial court's decision, the three-judge panel held that the trial judge abused his discretion because the decision did not continue the primary care-taking roles the parties had established.⁵⁸ According to the panel, "[s]uch a continuation would clearly be in the best interests of the child."⁵⁹ In the panel's view, the trial court's decision to grant custody to Hector did not continue the care-taking roles because Young had been the primary caretaker for three years and was clearly in the best position to provide care in the future.⁶⁰

The panel also criticized the trial judge for blindly relying on Dubitsky's recommendation.⁶¹ While Florida law provides that "the court *may* consider the information contained in the study in making a decision on the child's custody,"⁶² a trial court is not bound by testimony from a custody evaluator, but is "free to judge the persuasiveness and credibility of that expert's testimony, in light of the court's knowledge and experience and the evidence in the case."⁶³ The trial court was further criticized for emphasizing Hector's economic stability.⁶⁴ As the panel correctly pointed out, "the fact that one parent is the primary care-taker should always outweigh the fact

56. As Young's attorney stated, the court "defines the husband's role as having gainful employment. What about all the women who take care of their kids at home, are they not gainfully employed?" McMahon, *supra* note 32.

57. See *Young v. Hector*, 740 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1999).

58. See *Young*, 740 So. 2d at 1157. While the trial court and bench both concluded there was no agreement, acquiescence to the situation for a three-year period may be sufficient to constitute agreement. See *id.* at 1176 (Nesbitt, J., dissenting).

59. *Id.* at 1157. The panel relied on the PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, AMERICAN LAW INSTITUTE, Part I, § 2.09, 121 (Tentative Draft No. 3, 1998). However, Florida law also recognizes the importance of continuity. See FLA. STAT. ch. 61.13(3)(d) (1999).

60. See *Young*, 740 So. 2d at 1157. Judge Schwartz reiterated this conclusion in his subsequent dissenting opinion: "As the panel opinion, which has not in my view been successfully challenged by any of the contrary briefs or opinions, demonstrates, the children's parents, who know and care most about their welfare, had themselves established an arrangement prior to the dissolution as a part of which, upon any fair assessment, the father was the primary caretaker." *Id.* at 1172.

61. See *Young*, 740 So. 2d at 1157-58.

62. FLA. STAT. ch. 61.20(1) (1999) (emphasis added).

63. *Schoonmaker v. Schoonmaker*, 718 So. 2d 867, 868 (Fl. Dist. Ct. App. 1998) (per curiam).

64. See *Young*, 740 So. 2d at 1162. (noting that the trial court relied heavily on Dubitsky's recommendation in that regard).

that the other parent is more financially stable.”⁶⁵ If this factor were that important, significantly higher numbers of men would presently be custodial parents. A 1986 California Supreme Court opinion, discussing the application of the best interests standard, applies equally well to the trial court’s decision in this case:

The [trial] court’s reliance upon the relative economic position of the parties is impermissible; the purpose of child support awards is to ensure that the spouse otherwise best fit for custody receives adequate funds for the support of the child. . . . And all of the factors cited by the trial court together weigh less to our mind than a matter it did not discuss—the importance of continuity and stability in custody arrangements.⁶⁶

The trial court in *Young*, therefore, should have granted custody to Young and then awarded him adequate child support, thereby maintaining the emotional stability the children had established with Young as their primary caretaker.⁶⁷ Instead, the trial court placed undue emphasis on Hector’s superior financial position, thereby reversing the role that gender bias often plays in custody determinations.⁶⁸

The panel questioned the trial court’s reliance on Dubitsky’s second factor as well. Dubitsky used Young’s absence as a basis for concluding that Hector was the more constant factor in the children’s lives, but all the trips Dubitsky mentioned were necessary and all occurred prior to 1993.⁶⁹ When Young returned in 1993, he was the primary caretaker from that point until the couple divorced in 1996.⁷⁰ The panel thus correctly asserted that providing continuity and stability could most reasonably be achieved by granting custody to Young.⁷¹ In contrast, both the trial court and the bench minimized the continuity argument and admonished Young for not getting a job, thereby ignoring the relationship that Young had developed with his children.⁷²

Finally, the third determinative finding of Dubitsky pointed to Young’s inability to control his anger around the children. Yet, several neighbors and friends testified regarding the parents’ respective conduct around the chil-

65. *Id.* at 1157. See also *Burchard v. Garay*, 724 P.2d 486, 491 (Cal. 1986) (stating that economic advantage cannot be the sole basis for awarding custody).

66. *Burchard*, 742 P.2d at 488.

67. See *Young v. Hector*, 740 So.2d 1153, 1157 (Fla. Dist. Ct. App. 1999). (“The record clearly indicates that the architect [Young], with an adequate amount of child support, would continue to provide for the children.”).

68. See Susan Beth Jacobs, *supra* note 26, at 857 (arguing that courts typically place too much weight on fathers’ superior economic resources while minimizing the primary caretaker role that mothers play).

69. See *Young*, 740 So. 2d at 1178-79.

70. See *id.* at 1158.

71. See *id.* at 1157.

72. See *id.* at 1157 (arguing that Young was very dedicated to the children as demonstrated by his leading a Brownie troop, coaching one child’s soccer team, regularly volunteering at their school, and taking the the children to doctor and dentist appointments).

dren, and not one of them mentioned any problems with Young's anger control despite seeing both parents much more frequently than the GAL.⁷³ Moreover, Dubitsky's description of Young's anger indicates no violent tendencies on Young's part: "[Young] feels economically dependent. He feels that he is a victim and that he has not been treated right economically by Alice and has a tendency, although he tries to control it, to *verbalize* it more."⁷⁴ The fact that Young verbalized his anger in the midst of a divorce and custody battle hardly seems surprising. Hector was making \$300,000 annually, and yet supposedly divorced Young for not assuming his role as the primary breadwinner.⁷⁵ There were no allegations of any physical violence whatsoever.⁷⁶ While the trial court, therefore, has wide discretion to *consider* any factors, it was wrong to consider anger control as a determinative factor in this case.

3. Round Three: The Bench

In reinstating the trial court's decision, the full bench of the appeals court repeatedly emphasized that "[t]he simple issue for our consideration is whether the trial court abused its discretion when it determined that the best interests of the two minor children dictated that their mother be designated their primary custodial parent."⁷⁷ In other words, the bench tried to turn the case into a narrow, technical review in order to avoid the more difficult analysis required to resolve such a complex, high-profile dispute. The bench emphasized that a trial court's custody determination "should not be lightly second-guessed and overturned by an appellate court merely reviewing the cold-naked record."⁷⁸ The bench had no problem, however, in overturning the trial court's decision regarding alimony payments and property distribution,⁷⁹ despite the "almost unreviewable discretion" of trial courts under Florida's equitable distribution statute.⁸⁰ Since trial courts have such broad power to make each of these determinations, the bench's decision to reverse two of the three decisions is at least questionable. This decision by the bench provides support for my thesis that gender bias pervades the family courts, but appellate courts are extremely reluctant to overturn custody decisions.

The bench seemed to recognize the impropriety of Dubitsky's first fac-

73. See *Young v. Hector*, 740 So. 2d 1153, 1165 (Fla. Dist. Ct. App. 1999).

74. *Id.* at 1169 (emphasis added).

75. Hector asked Young for a divorce in 1993 and suggested that one of her grounds for doing so was Young's refusal to seek gainful employment. See *id.* at 1160.

76. See generally *Young*.

77. *Id.* at 1158.

78. *Id.* at 1164. (citing that the bench also dismissed Young's contention that gender biases underlay the trial court's opinion).

79. See *id.*

80. FLORIDA STUDY, *supra* note 43, at 7. See also FLA. STAT. ch. 61.075 (1999).

tor. The bench attempted to explain Dubitsky's reference to economic stability as having nothing to do with Hector's salary:

We believe, that what the guardian was attempting to convey was that the mother had shown a proclivity to remain steadily employed, unlike the father who unilaterally removed himself from the job market, although he was *employable* and the family needed the additional income. . . . Given a choice between the mother who maintained constant steady employment throughout the marriage to support the children (*regardless of the amount of her income*), and the father who unilaterally and steadfastly refused to do the same, the trial court's designation of the mother as custodial parent cannot be deemed an abuse of discretion.⁸¹

Even the bench, however, admitted that "the father *actively pursued job leads* in the Miami area prior to the couple's relocation."⁸² Hector did not have to encourage Young to seek work. He was diligent prior to his move to Miami and he went on interviews after he arrived.⁸³ Young emphasized to the trial court that he was trying to find work, but his lack of computer training eliminated him from most architectural jobs.⁸⁴

According to the bench, Hector sought a divorce "because of [Young's] continued refusal to seek gainful employment and due to his extramarital affair in New Mexico."⁸⁵ There is no indication, however, that Young was not seeking employment during this time. He testified that he had gone on several interviews, but again found that his lack of computer skills prevented him from being considered for most jobs.⁸⁶ A more plausible rationale for the divorce is Young's affair, considering Young only had one month to find a job in an industry that clearly demanded more computer education than Young possessed.

81. *Young v. Hector*, 740 So.2d 1153, 1162-63 (Fla. Dist. Ct. App. 1999) (emphasis added). The bench's attacks were unwarranted because Young's lack of computer skills arguably made him unemployable as an architect. The court also deemed "unreasonable" Young's desire to stay home with the children rather than seek "gainful employment." *Id.* at 1163 n.7. Again, the bench bases this conclusion on Dubitsky's report, which states: "[i]t is my belief that the Husband's plan to remain a full time parent is unrealistic; and although he rationalizes that things would be different if he were a woman, I don't believe that the Court would treat a woman with the same background and qualifications any differently from a man." *Id.* at 1163. Unfortunately for Young, his attorney's comments during closing arguments did not help him: "Mr. Young's position right now, which we all agree is unreasonable, is the best for the children. If you were to stay home and be supported and be with the children and get rid of the housekeeper that would be the best scenario. I don't think that's a fair scenario." *Id.* Gender bias apparently found its way into Young's camp.

82. *See Young*, 740 So. 2d at 1159 (emphasis added).

83. *See id.* at 1162.

84. *See Young v. Hector*, 740 So. 2d 1153, 1161-62 (Fla. Dist. Ct. App. 1999).

85. *Id.* at 1160.

86. *See id.* at 1161-62. Young also implied that he planned to get the necessary education: "Larry Foreman, who was court appointed as the career consultant, anticipated that I should go to graduate school to acquire these skills that I'm lacking right now. I've gone on interviews. They like me. They like what I have to offer but their offices are basically all computerized." *Id.*

In Chief Judge Schwartz's view, there was "no question whatever" that the trial court's decision was based on gender bias:

I believe that this is shown by contemplating a situation in which the genders of the hard working and high earning lawyer and the stay at home architect were reversed, but everything else remained the same. The male attorney's claim for custody would have been virtually laughed out of court, and there is no realistic possibility that the mother architect would have actually 'lost her children.' . . . It is, at best, naïve in the extreme to suggest, let alone find, that the result below was not dictated by the evil of gender bias.⁸⁷

Another member of the panel, Judge Goderich, also dissented. Calling the case "unique," Goderich seemed to sympathize with those who had difficulty finding the hidden gender bias in the trial judge's determination. When one parent stays home, he stated, "it is usually the mother."⁸⁸ In this case, however, it was the father "who has not worked outside of the home for the past three years in order to care for the minor children."⁸⁹ While the situation in *Young* may be unique, society and the legal system must realize that men and women are increasingly entering spheres traditionally reserved for the opposite sex.⁹⁰ The more society recognizes this reality, the easier it will become to eliminate gender bias from the courtrooms.

III. EVOLUTION OF CHILD CUSTODY LAW

Woe to the father who was incapable of financially supporting his family, because he would be deemed a failure not only as a father, but as a man.

. . . Woe to the mother who did not choose to selflessly and altruistically place her children above all else, for she would be deemed a failure as a

87. *Young*, 740 So. 2d at 1173-74 (Schwartz, C.J., dissenting).

88. *Id.* at 1179 (Goderich J., dissenting).

89. *Id.* (Goderich J., dissenting).

90. According to Cynthia McNeely, "[w]ith the reemergence of feminism in the early 1970s, many women realized that they needed a man about as much as 'a fish needs a bicycle.'" See McNeely, *supra* note 22, at 893. But see Erin Melnick, *Reaffirming No-Fault Divorce: Supplementing Formal Equality with Substantive Change*, 75 IND. L.J. 711 (2000). Melnick argues that:

While the promulgation of gender-neutral laws has helped break down some traditional gender norms, the law of equal opportunity has not achieved equality of results. For example, in the employment setting, formal equality has evolved into a 'separate but equal' doctrine that formally promises equal opportunity in the workplace, but actually gives rise to 'mommy tracks,' sexual harassment, and 'Darwinian selection.'

Id.

*mother, and as a woman.*⁹¹

While this quote was intended to capture the positions of men and women in the nineteenth century, these views have not drastically changed with the passage of time. Although scholars may disagree on the actual number of fathers who seek custody, a closer look at one study suggests that fathers sought custody in only 8.75% of cases studied over a five-year period.⁹² The study did not inquire into possible reasons for such a low number, thereby ignoring the possibility that gender biases and stereotypes may discourage men from seeking custody.⁹³ Most divorces involving children still result in the mother retaining sole custody of the children.⁹⁴ Such results suggest gender bias against fathers.

The following section will provide a history of custody law in the United States, showing how it has evolved from a paternal presumption prior to the mid-nineteenth century, to a maternal presumption lasting well into the latter half of the twentieth century, to more recent state law intended to eliminate gender-based presumptions completely. This section hypothesizes as to why these more recent laws have failed for the most part to remove gender bias from family courts.

A. Historical Overview: From Father's Property to Mother's Nurturing Nature

Prior to the nineteenth century, various legal systems gave fathers a dominant role in their children's lives.⁹⁵ Roman society, for example, viewed children as part of their father's property and, consequently, on divorce, fathers were automatically awarded custody.⁹⁶ English law also adhered to a paternal preference⁹⁷ and this tradition was imported into the

91. McNeely, *supra* note 22, at 900-01.

92. *See id.* at 956 n.117 (citing a study of 24,000 cases examined by the Massachusetts Supreme Judicial Court comparing custody sought by mothers and fathers, which found that when fathers sought custody in 2,100 of those cases they received primary custody in 609 cases (29%) and joint custody in an additional 969 cases (65%), whereas mothers received custody in 93.4% of the 24,000 cases studied). The Massachusetts study concluded, however, that "fathers who actively seek custody obtain either primary or joint physical custody over 70% of the time." *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 825 (1989) [hereinafter *Gender Bias Study*].

93. *See* McNeely, *supra* note 22, at 910.

94. *See* Jo-Ellen Paradise, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 518 (1998) (noting that nine out of ten custody decisions favor women and arguing that "[t]he belief that children belong with their mothers is firmly ingrained within in this country's social and legal tenets.").

95. *See* Jennison, *supra* note 22, at 1143.

96. *See* Paradise, *supra* note 94, at 525; Jennison, *supra* note 22, at 1143.

97. *See* Debra L. Swank, Comment, *Day Care and Parental Employment: What Weight Should They Be Given in Child Custody Disputes?*, 41 VILL. L. REV. 909, 916 (1996). Swank also notes, however, that divorce was very rare in England at the time. *See id.*

United States, as children here were considered their father's property.⁹⁸ Consequently, it mattered little if the personal relationship between child and father was less than ideal, as such a notion was irrelevant to the prevailing property-based presumption.⁹⁹

American courts began shifting from a paternal to a maternal presumption in the early nineteenth century.¹⁰⁰ While many factors contributed to this change, the Industrial Revolution played a dominant role because it forced fathers to seek employment away from home.¹⁰¹ As men spent less time at home, mothers were forced to assume the lion's share of childrearing.¹⁰² Over time, the "separate spheres" ideology developed.¹⁰³ Accordingly, men and women were placed in their appropriate spheres: "men 'naturally' belong in the market because they are competitive and aggressive; women belong in the home because of their 'natural' focus on relationships, children, and an ethic of care."¹⁰⁴ Only by changing society's views could women hope for change:

One can argue, therefore, that until changes occurred regarding married women's property, a woman's claim to custody of her children would almost always lose precisely because the best interests of the child directed that it stay with the parent who had legal control over property—that is, the father. . . . Although the 'separate spheres' ideology and the cult of domesticity gave women a voice and a claim for recognition of their reproductive labor, it also provided a new way of thinking about the family that bolstered patriarchal control.¹⁰⁵

Because women had no rights to property and were effectively banned from the economic sphere, women could not possibly support their children. Consequently, fathers were automatically awarded custody.¹⁰⁶

While the separate spheres ideology had some adverse affects on

98. See ROBERT L. GRISWOLD, *FATHERHOOD IN AMERICA: A HISTORY* 10-12 (1993), cited in Joan Williams, *Toward a Reconstructive Feminism: Reconstructing the Relationship of Market Work and Family Work*, 19 N. ILL. U. L. REV. 89, 110 (1998); Swank, *supra* note 97, at 915.

99. See Jennison, *supra* note 22, at 1142; Carpenter, *supra* note 20, at 36.

100. See Jennison, *supra* note 22, at 1144-45. See also Carpenter, *supra* note 20, at 37 (arguing that a Rhode Island court's decision in *United States v. Green*, 26 F. Cas. 30 (C.C.R.I. 1824), marks a shift from a conclusive to a rebuttable paternal presumption, thereby diluting the presumption and laying the foundation for later changes).

101. See McNeely, *supra* note 22, at 896-900.

102. See *id.* at 897-98.

103. In accordance with this ideology, women were considered "physically and temperamentally weaker, were deemed incapable of adapting to the rigorous demands of the workplace and were singularly charged with the management of the domestic sphere. . . . The stereotypical images of fathers as familial bread-winners and mothers as domestic caretakers and primary child-rearers were born." See McNeely, *supra* note 22, at 892-93.

104. WILLIAMS, *supra* note 3, at 1.

105. Danaya C. Wright, *De Manneville v. De Manneville: Rethinking The Birth of Custody Law Under Patriarchy*, 17 LAW & HIST. REV. 247, 303-04 (1999).

106. See Jennison, *supra* note 22, at 1143-44; Swank, *supra* note 96, at 915-917.

women, a new focus on the nurturing nature of mothers ultimately resulted in the "tender years doctrine."¹⁰⁷ This doctrine automatically granted custody of young children—usually age seven or under—to the mother unless she was deemed unfit.¹⁰⁸ The strength of the tender years presumption was reflected in an 1830 Maryland decision, where the court stated:

[E]ven 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.¹⁰⁹

Faced with such gender-based presumptions due to visitation awards limiting their contact following divorce, many fathers lost touch with their children.¹¹⁰ In spite of its deleterious consequences for the father-child post-divorce relationship, nearly all states adopted this presumption—the tender years doctrine—in one form or another, making it the accepted norm in custody determinations for a century.¹¹¹ As demand for gender neutral laws continued to mount however, and women entered the workforce in increasing numbers,¹¹² most states eliminated the tender years doctrine by the end of the 1970s.¹¹³ A new era in custody law was about to begin.

B. Modern Custody Laws

*No longer is the female destined solely for the home and the rearing of family, and only the male for the marketplace and the world of ideas.*¹¹⁴

By the mid-twentieth century, the tender years doctrine fell into disfa-

107. The tender years doctrine originated in England in 1839 when Parliament enacted Justice Talfourd's Act, 2 and 3 Vict. c. 54, which legalized the presumption that women should receive custody of children under age seven. See RICHARD A. WARSHAK, *THE CUSTODY REVOLUTION: THE FATHER FACTOR AND THE MOTHERHOOD MYSTIQUE* 29 (1992); McNeely, *supra* note 22, at 897-98.

108. See Jennison, *supra* note 22, at 1145 (noting that while the paternal presumption may have been strong, "the maternal bias under the tender years presumption was overwhelming."); Carpenter, *supra* note 20, at 38.

109. Devine v. Devine, 398 So. 2d 686, 689 (1981) (quoting Helms v. Franciscus, 2 Bland Ch. 544 (Md. 1830)).

110. See Theresa A. Peterson, *The State of Child Custody in Minnesota: Why Minnesota Should Enact the Parenting Plan Legislation*, 25 WM. MITCHELL L. REV. 1577, 1591-1592 (1999) (arguing that visitation arrangements require contact between two antagonistic parents, and the resulting "friction and difficulty of the encounters may cause fathers to give up trying . . . [and] become apathetic, and feel that the system is biased against them.").

111. See Jacobs, *supra* note 26, at 853.

112. See *id.*

113. See *id.*; see also Jennison, *supra* note 22, at 1145.

114. Stanton v. Stanton, 421 U.S. 7, 14-15 (1975).

vor with both feminists and fathers' rights groups.¹¹⁵ Standards favoring either gender seemed out of touch with reality as more women went to work and an increasing number of fathers became involved in childrearing.¹¹⁶ Around the same time, increased public acceptance of divorce led states to adopt no-fault divorce laws.¹¹⁷ Every American jurisdiction now provides for some form of no-fault divorce, whereby divorce may be granted when a couple can show that "the marriage is irretrievably broken, that the parties have irreconcilable differences, that the parties are incompatible, or that they have lived apart for a stated period of time."¹¹⁸ Traditional grounds for divorce under the fault-based system include adultery, abandonment, desertion and physical or mental cruelty.¹¹⁹ This shift from fault-based to no-fault divorce also changed the rules for custody, property distribution, and alimony.¹²⁰

Florida was not immune from these changes. As a result of no-fault divorce, Florida adopted the equitable distribution theory of property distribution on divorce, which entitles each spouse to an equal share of marital property.¹²¹ In spite of claims that equitable distribution acted to promote equal property division in divorce, the Florida Study concluded that equitable distribution has been "anything but equitable."¹²² The no-fault revolution also changed the rules for alimony by assuming that women can support themselves financially after divorce.¹²³ As a consequence, Florida witnessed "the virtual abandonment of permanent alimony" in favor of temporary or rehabilitative alimony.¹²⁴ Pointing to evidence that women earn less than men for similar work, the Florida Study suggests that "alimony should be considered as general compensation for the wife's lost opportunities rather than a claim for support based upon need."¹²⁵

115. See Carpenter, *supra* note 20, at 39.

116. See *id.*

117. See Sanford N. Katz, *Prologue*, 33 FAM. L.Q. 435, 437 (1999) ("In 1969, California became the first state to enact a divorce law without fault-based grounds.").

118. Marygold S. Melli, *Whatever Happened to Divorce?*, 2000 Wis. L. REV. 637, 637 n.1 (2000) (citing Linda D. Elrod et al., *A Review of the Year in Family Law: Children's Issues Dominate*, 32 FAM. L.Q. 661, 715 tbl.4 (1998)).

119. See Jane Biondi, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 613-14 (1999) (arguing that current no-fault divorce laws allow a couple to assess the viability of the marriage and judges typically will not interfere with the couple's decision).

120. See FLORIDA STUDY, *supra* note 43, at 54-62.

121. See *id.* at 56.

122. *Id.* at 59 (showing that Florida courts consistently award between sixty-five and seventy-five percent of the property to men, while women tend to receive only twenty-five to thirty-five percent of the property). One attorney in Florida tells female clients, even those who have contributed significantly to their marriage over many years, "that it will be a miracle . . . if she ends up with 50 percent of the assets." *Id.* at 61.

123. See *id.* at 56.

124. *Id.* at 56 (citing Florida State University Policy Studies Clinic, *Gender Bias and Family Law: A Study of Judicial Decisions in Florida* (Aug. 1988) (unpublished)).

125. *Id.* at 58. See also WILLIAMS, *supra* note 3, at 101-104 (discussing the Equal Pay

Much of the evidence collected in the Florida Study suggests that Florida courts strongly favor husbands when distributing marital property and awarding alimony,¹²⁶ but the divorce revolution also had a negative impact on divorcing fathers:

The increase in divorce promoted the marginalization of fathers far more extensively than the Industrial Revolution because divorce literally severed the father from the home on a permanent basis. Many fathers resigned themselves to continuing their role primarily as *financial providers* for their children and their now ex-wives, and adjusted to seeing their children approximately four days each month.

....

... Some realized that society, particularly divorce courts, nonetheless compelled them to remain in the outdated role as aloof *financial caretakers*, and they began to question and confront this gender bias.¹²⁷

In an attempt to achieve gender neutrality, state legislatures enacted child custody legislation that specifically forbids gender preferences.¹²⁸ State custody laws now focus on children's interests rather than their parents' gender, as most states now apply some variation of the "best interests of the child" standard.¹²⁹

1. *The Best Interests of the Child Standard*

*While the best interests standard is ostensibly gender neutral, there can be little debate that in practice, the courts favor mothers . . . the maternal presumption 'has disappeared . . . in terms of the law on the books,' but as a social norm 'it still persists. When two competent parents—a fit mother and a fit father—each want to be primarily responsible for the child following divorce, mothers usually end up with the children.'*¹³⁰

Act). *But see* Sanford L. Braver, *The Gender Gap in Standard of Living After Divorce: Vanishingly Small?*, 33 FAM. L.Q. 111 (1999).

126. *See* Florida STUDY, *supra* note 43, at 55 (concluding that as no-fault divorce disadvantages women and children, and is "highly advantageous for most men," theoretically, under the fault system women could use divorce as a bargaining chip by withholding divorce until their husbands agreed to more advantageous settlements).

127. McNeely, *supra* note 22, at 905-06 (emphasis added).

128. *See* Jennison, *supra* note 22, at 1146; Swank, *supra* note 97, at 920-21 (noting that a majority of state courts have held that custody laws which distinguish solely on the basis of gender violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States). For example, a Florida statute provides: "After considering all relevant facts, the father of the child shall be given the same consideration as the mother in determining the primary residence of a child irrespective of the age or the sex of the child." FLA. STAT. ch. 61.13(2)(b)(1) (1999).

129. *See* Law & Hennessey, *supra* note 26, at 348.

130. SANFORD BRAVER WITH DIANE O'CONNEL, *DIVORCED DADS: SHATTERING THE*

As its name suggests, the best interests of the child standard (hereinafter "best interests standard") focuses on children. The standard first emerged in the nineteenth century when courts were operating under the tender years presumption that young children belonged with their mother.¹³¹ In practice, therefore, the gender-biased tender years doctrine reflected the best interests of the child because it presumed that young children should only be separated from their mothers in exceptional circumstances.¹³² As mothers' roles changed in the second half of the twentieth century, however, it could no longer be assumed that it was in the best interests of children to be with their mothers.¹³³ Accordingly, Congress followed the lead of many states by enacting the Uniform Marriage and Divorce Act of 1970, which was intended to codify existing state laws.¹³⁴ The Act provided several factors for determining the best interests of the child.¹³⁵ Today, states that rely on the best interests standard usually provide similar guiding factors for courts to use in making their custody determinations.¹³⁶

The statutory factors provided are often inadequate, however, and may even increase the costs and incidence of litigation.¹³⁷ Since judges have wide discretion, parents may have an incentive to pursue litigation and try to convince the judge that they deserve custody.¹³⁸ Moreover, judges must deter-

MYTHS 219 (1998) (quoting ELLEN MACCOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD* 283 (1992)).

131. See Jennison, *supra* note 22, at 1144-45; Carpenter, *supra* note 20, at 39-40 (citing an 1895 Minnesota case as the first to declare that a child's interests and welfare are paramount).

132. See Jennison, *supra* note 22, at 1145-46.

133. See McNeely, *supra* note 22, at 904-06.

134. See UNIF. MARRIAGE AND DIVORCE ACT § 402, Comment, 9A U.L.A. (1998). This comment also supports the panel's decision: "the existing custodian is usually preferred to any new custodian because of the interest in assuring continuity for the child." See *id.*

135. See *id.*:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved. The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

136. See Carpenter, *supra* note 20, at 39-40.

137. See Swank, *supra* note 97, at 923 (noting that "[t]his approach has been widely criticized as too vague and failing to provide sufficient guidance to courts and to the parties seeking custody, thus increasing the cost and incidence of litigation."). As Swank notes, criticisms of the best interests standard include: (1) the standard often requires the court to determine who is the "better" parent, which thereby vests the court with too much discretion and results in judicial bias; (2) the court must also rely on the testimony of experts (psychologists, psychiatrists, social workers and sociologists), which is often expensive and time consuming; and (3) judicial discretion allows family court judges to base their decisions on anachronistic, gender-based assumptions about a woman's place in society and in the family. See *id.* at 924 n.85.

138. See *id.* at 923-24.

mine the best interests of a child of whom they know very little after reviewing only a small amount of information about the family, and this information itself is often presented in a biased way to favor one parent or another.¹³⁹ As a result of the wide discretion accorded judges in this area, coupled with their minimal familiarity with the families before them, judges will naturally rely on their own personal biases and beliefs, including any gender bias they may consciously or subconsciously hold, rather than on any carefully defined standards.¹⁴⁰ On the national level, this judicial reliance on internal personal factors is best reflected by the fact that even when both parents agree that the father should have custody, courts still grant custody to mothers in thirteen percent of the cases.¹⁴¹

Florida appellate courts provide an example of how reluctant courts are to reverse a custody determination, regardless of which parent receives custody.¹⁴² On appeal, a Florida parent must show that the trial judge abused his discretion in awarding custody to the other parent.¹⁴³ When custody is initially awarded to mothers, it is difficult to prove abuse of discretion in Florida because "[m]ost judges do not state that they are awarding custody to the mother because she is the mother; instead, they may base their decision on a finding that the mother is the more fit parent due to her role as the primary caretaker and that it is in the child's best interests to remain with her."¹⁴⁴ Exacerbating this problem is the fact that Florida does not require family court judges to make specific findings of fact for the record when determining custody.¹⁴⁵ In fact, judges need not articulate any reasons for their decisions, which "makes it highly difficult to prove exactly what motivated the judge's decision, and thus opens the door for the court to interject gender biases favoring mother-custody when making a custody determina-

139. See Jacobs, *supra* note 26, at 854-55.

140. See Carpenter, *supra* note 20, at 40-41, 56-59 (arguing for the elimination of any factors which permit judges to rely on open-ended discretion).

141. See Bonnie Miller Rubin, *Will County Judge's Decision Highlights New Tack on Divorce and Dads*, CHI. TRIB., Aug. 15, 1995, at Metro 1.

142. See *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203. Under Florida law, a judge abuses his discretion when:

[T]he judicial action is arbitrary, fanciful, or unreasonable . . . If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

. . . .

The discretionary power that is exercised by a trial judge is not, however, without limitation. . . . The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result.

Id.

143. See *id.* at 1203.

144. McNeely, *supra* note 22, at 942.

145. See *id.*

tion.”¹⁴⁶ As a result, good fathers are often denied custody or liberal visitation without explanation, thereby adversely affecting the best interests of the children.¹⁴⁷

Although there are obvious problems with the implementation of this approach, the best interests standard does one thing right: it emphasizes the needs and desires of children rather than focusing on their parents. Perhaps by fine-tuning the system so that implementation carries out this concept rather than perpetuating gender bias, this standard can work.

At the same time, courts “should make and enforce more equitable property and support agreements.”¹⁴⁸ For example, in *Young v. Hector* the trial court could have awarded custody to Young and then provided him with adequate child support and a more equitable division of property. If the trial court had done so, “economic stability” would not have been a consideration weighing against him. By not awarding custody to Young, the trial court abused its discretion and the panel properly reversed the decision.

2. Primary Caretaker Presumption

*While fathers are involved in child care, more now than in any period in recent history, they generally have not become the primary caretaker parent even today. The father generally is not the one who changes the diapers, dresses and bathes the child, takes the child to school, cares for the child's health, or interacts with others involved in the education of and caring for the child.*¹⁴⁹

Robert Young argued that he represented the exception. In his view, “[y]ou don’t have to be a female to be a parent. Dads can be moms, too.”¹⁵⁰ While Hector may have performed tasks traditionally associated with mothering, Young’s involvement in other activities involved emotional interaction with his children and was no less important than Hector’s contributions.¹⁵¹

The primary caretaker presumption assumes that the best interest of the

146. *Id.*

147. Robert Young voiced the frustration of many fathers when he said: “Throughout this entire process I have encountered gender bias and discrimination. I always thought this would be about the best interest of the children.” McMahon, *supra* note 32.

148. Jacobs, *supra* note 26, at 882.

149. FLORIDA STUDY, *supra* note 43, at 65.

150. Jim Oliphant, *A Woman's Work: Hard-driving Lawyer Loses Custody of Children to Unemployed Ex-Husband; Woman Loses Custody of Daughters to Ex-Husband; Judges Cite Demands of Her Successful Career*, MIAMI DAILY BUS. REV., July 1, 1998, at A1. Young’s own comment evidences the deep-seeded gender biases by assuming that dads have to be like moms to be good parents rather than simply taking on a distinct father’s role.

151. In fact, “[m]any men, whose wives work, do share in taking kids to school and back, do help with the grocery shopping, and do perform some of the household chores. The fact is, men have always had to combine work outside the home with fathering. Yet the fathering aspects have rarely been honored.” BRAVER & O’CONNEL, *supra* note 130, at 237 (quoting MARK BRYAN, *THE PRODIGAL FATHER: REUNITING FATHERS AND THEIR CHILDREN* 4 (1997)).

child lies with the parent who has taken on primary responsibility for managing the child's day-to-day activities, including cooking meals, bathing the child, monitoring the child's health needs, taking the child to school, arranging social activities, and disciplining the child.¹⁵² Critics argue that the presumption favors women because it focuses on activities typically associated with women.¹⁵³ Others argue, however, that the presumption is in the best interests of children because it places children with the parent who has taken on the most parental responsibility.¹⁵⁴

The primary caretaker presumption has been well received by scholars, but has been less successful in practice.¹⁵⁵ According to one commentator, the primary caretaker preference is fraught with problems:

First, the quantity of childcare may not correspond with either the quality of childcare or the quality of the parent-child relationship. Second, the presumption is unworkable in families where parents share or allocate parenting tasks or change parenting roles, either during marriage or after separating. Finally, it has generated huge quantities of litigation revolving around such petty issues as who changes the diapers, who does the supper dishes, or who makes the peanut butter sandwiches. The preference succeeds only in the easy case—where one parent is a full-time homemaker caring for small children.¹⁵⁶

After the panel decision in *Young*, the Florida legislature noted the panel's emphasis on the American Law Institute's (ALI) primary caretaker doctrine, but added "[i]t remains to be seen whether other district courts will follow the Third District and adopt the ALI's heavy emphasis on primary-

152. See Sanford N. Katz, 'That They May Thrive' Goal of Child Custody: Reflections on the Apparent Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker Presumption, 8 J. CONTEMP. HEALTH L. & POL'Y 123, 133 (1992), cited by Swank, *supra* note 97, at 925 n.89; Carpenter, *supra* note 20, at 51-52; Jacobs, *supra* note 26, at 895-96. The presumption differs from the primary caretaker factor under the best interests standard in that under the presumption, being the primary caretaker is the sole determinant of custody; whereas, under the best interest of the child standard, the primary caretaker is only one of many factors considered. See Jacobs, *supra* note 26, at 895-96 (arguing that the primary caretaker factor should be a very important consideration, but the primary caretaker presumption is probably not a better standard than the best interests of the child standard). I will use the term "presumption," however, to refer to the concept in general. Only West Virginia and Minnesota have adopted the primary caretaker presumption, and Minnesota later reduced the presumption to a mere factor. See Law & Hennessey, *supra* note 26, at 355.; Kandel, *supra* note 51, at 343 n.195. See also W. VA. CODE § 44 - 10 - 4 (1995); MINN. STAT. ANN. § 518.17(3) (1994).

153. See Swank, *supra* note 97, at 925-26; see also Letter from David R. Usher, Secretary, National Congress for Fathers and Children, to Missouri Supreme Court 5 (Sept. 21, 1997).

154. See Carpenter, *supra* note 20, at 61 (arguing that fathers who are truly the primary caretaker will not be disadvantaged and the standard will encourage fathers to take a more active role in their child's life); Paradise, *supra* note 94, at 535 (arguing that the system is a return to the tender years presumption).

155. See Kandel, *supra* note 51, at 342-43.

156. *Id.* at 343.

caretaker status in deciding primary residential custody.”¹⁵⁷ As the panel correctly concluded, the primary caretaker presumption should be extended to activities beyond those traditionally associated with mothers (e.g. feeding, clothing and bathing the children).¹⁵⁸ Narrowly speaking, such application clearly favors Robert Young, but it also may eliminate gender bias against fathers generally.

3. Shared Parental Responsibility

*There's a word for couples who coordinate child rearing, housekeeping, and financial duties equally—'married.'*¹⁵⁹

As previously discussed, Florida has adopted a shared parental responsibility presumption.¹⁶⁰ Since the trial court in *Young* made no specific finding that shared parental responsibility would be detrimental to the children, it can only be assumed that the *Young* court intended to award shared parental responsibility.¹⁶¹ Under this standard, the custodial and non-custodial parents are supposed to have equal say: “[e]ach party has input for example on issues relating to education, health, religion, discipline, etc. and as always, if the parties can’t agree, the Judge will decide for them.”¹⁶² The Florida Study made it clear however that Florida courts were not properly adhering to the shared responsibility doctrine. According to the Florida Study, “the judiciary is improperly converting this presumption into a mandate by ordering shared parental responsibility without due consideration of factors specified in the statute, including parental desires and the best interests of

157. The panel relied heavily on the PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, AMERICAN LAW INSTITUTE, Part I, § 2.09 (Tentative Draft No. 3, 1998). FLORIDA FAMILY LAW § 32.21 states: “According to the ALI’s tentative guidelines, perpetuation of existing caretaker roles should be the primary factor set forth in determining custody. The advantage of such an emphasis on parental roles is that it facilitates objective decisions concerning which parents should become primary residential custodians.” See *Principles of the Law of Family Dissolution: Analysis and Recommendations, Tentative Draft No. 3, Part I*, A.L.I. §§ 2.09, 108, 113, 120-21 (1998). Although the bench subsequently withdrew the panel’s decision, it is unclear whether the ALI’s standards will still be the dominant test in that district.

158. See Paul L. Smith, *The Primary Caretaker Presumption: Have We Been Presuming Too Much?*, 75 IND. L.J. 731, 747 (2000) (“My basic argument is that if we are going to use a list of [primary caretaker] factors as a proxy for which parent has the closest bond with a child, we should at least be sure that those factors actually represent that bond.”).

159. Janet Normalvanbreucher, *Stalking Through the Courts: The ‘Father’s Rights’ Movement - How to Legally Stalk, Harass, and Intimidate Victims of Domestic Violence after a Restraining Order has been Issued*, 29 (visited February 15, 2000) <<http://www.gate.net/~liz/liz/FRtactic.html>>.

160. See Section IIA, *supra*.

161. See, e.g., *Schoonmaker v. Schoonmaker*, 718 So. 2d 867, 868 (Fla. Dist. Ct. App. 1998) (per curiam).

162. Arnie Gruskin, “Florida Divorce and Children” (visited February 23, 2000) <<http://www.divorcesource.com/FL/ARTICLES/gruskin2.html>>.

the child."¹⁶³ Although Florida has attempted to eliminate historical stereotypes and gender biases from child custody determinations, family court judges continue to make decisions based on their individual biases and appellate courts must adhere to narrow standards of review, thus limiting their ability to hold family court judges accountable.

Perhaps it is time to place the decision in the hands of those most affected by custody determinations: the children. Professor Randy Frances Kandel of Loyola Law School in Los Angeles has proposed a "rule of children's choice" where "as between fit parental custodians who cannot agree on the child's custody, the choice of children six years old and older should be legally dispositive as to their custody."¹⁶⁴ According to Kandel, the law currently views children as psychologically "delicate, incompetent, and at risk."¹⁶⁵ Such a legal vision, Kandel argues, "unjustifiably denigrates the personhood of the child, depriving children of their fundamental liberty and decision-making autonomy."¹⁶⁶ A rule of children's choice, Kandel asserts, would result in fair settlements for all concerned and would clearly be in the best interests of the child.¹⁶⁷ The Florida legislature recognized the inherent fairness of the rule of children's choice by providing for "the reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference."¹⁶⁸ If parents or judges are unwilling to ask children to make such a difficult decision, however, and the courts are unable to fashion a solution to custody problems, it may be time to seek non-legal solutions to the dilemmas facing families going through divorce.¹⁶⁹

IV. CUSTODY BATTLES: THE REAL VICTIMS ARE THE CHILDREN

*Our children have too greatly suffered the consequences of a mythology that says most divorced men are irresponsible, deadbeat, runaway fathers. . . . If we relinquish our societal need to assign blame and identify a villain, if we can only recognize that real human beings are at stake here, that both mothers and fathers are trying their best under difficult circumstances, then we can be in a position to rescue our families from what Barbara Dafoe Whitehead in her recent book calls *The Divorce Culture*. The*

163. FLORIDA STUDY, *supra* note 43, at 7.

164. Kandel, *supra* note 51, at 375. The Uniform Marriage and Divorce Act also lists "the wishes of the child as to his custodian" as a factor. UNIF. MARRIAGE AND DIVORCE ACT § 402(2), 9A U.L.A. (1998).

165. Kandel, *supra* note 51, at 376.

166. *Id.*

167. *See id.*

168. FLA. STAT. ch. 61.13(3)(i) (1999).

169. *See* Jacobs, *supra* note 26, at 898-99 (arguing that mediation and legal education are two such avenues that might be utilized as an alternative to the typical route of the courtroom); *see also* BRAVER & O'CONNEL, *supra* note 130, at 231-32 (1998) (discussing an example of one such program in California).

*pendulum has inarguably swung too far. It is time to swing it back.*¹⁷⁰

One way to achieve this desired pendulum swing is for mothers and fathers to spend more time protecting the children's interests and less time creating ways to outsmart the opposite sex. Thus far, this Comment has provided evidence of gender bias in the *Young* decision and in various state statutory schemes. This section shows how battles between gender-based groups have manipulated gender biases to serve their own aims while exacerbating the custody problem by taking the focus away from the children and placing it on the parents. Both sides feel as though they are getting the short end of the stick. Consequently, child custody becomes a competition. In the meantime, children are the ones who are truly harmed by failed solutions.

A. *Fathers' Rights Groups: Legitimate and Illegitimate Groups*

Number of Families with Children Under 18 in 1997: 37.6 Million
Both parents: 25.6 million
Mother only: 10 million
*Father only: 2 million*¹⁷¹

Although many more mothers are single parents than fathers, single fathers' issues are no less significant than single mothers' issues. Partly in response to the perceived disrespect accorded them, fathers' rights groups have flourished.¹⁷² Illegitimate fathers' rights groups are often characterized by calls for changes in laws pertaining to restraining orders, child support, and advice for fathers seeking to defeat women in custody determinations.¹⁷³ According to one commentator, however, the key distinction between legitimate and illegitimate fathers' groups is simply the term "right."¹⁷⁴ Often times, fathers are led to believe that the system, not their lawyers or their own actions, has wronged them in some way.¹⁷⁵ As a consequence, passions rise and "[i]t only takes one or two legitimate cases of unfair treatment to convince an uneducated public unfamiliar with the inner workings of the ju-

170. BRAVER & O'CONNEL, *supra* note 130, at 247.

171. Petersen, *supra* note 11 (citing the U.S. Census Bureau to show rate of growth of single fathers and single mothers since 1980). *See also* McNeely, *supra* note 22, at 933 n.230 (citing Steve W. Rawlings, U.S. DEPT. OF COM. HOUSEHOLDS AND FAMILY CHARACTERISTICS, March 1993 XV: SVII 5-7 (1994), showing that in 1993, 87% of children living with one parent lived with their mothers and 13% lived with their fathers).

172. A simple search on the Internet produced forty web sites devoted to fathers' rights groups.

173. *See* David R. Throop, *Men CAN and DO Win Custody* (visited March 12, 2000) <<http://www.vix.com/pub/men/custody-divorce/resource/cando.html>>.

174. *See* Normalvanbreucher, *supra* note 159, at 5 (stating that, in other words, any group identifying itself as a father's rights group is not a part of the "legitimate men's movement.").

175. *See id.* at 24.

dicial process that *all* fathers are being discriminated against."¹⁷⁶

While fathers have many legitimate concerns regarding gender bias in custody determinations, these concerns are often trivialized by the rhetoric of illegitimate groups. The following document, entitled "The Father's Manifesto," was signed by dozens of leaders of fathers' rights groups, and is a prime example of the illegitimate material available to fathers:

We Signatories to the Fathers' Manifesto, responding to natural and Biblical laws, in defense of our nation and our families, hereby declare and assert our patriarchal role in society. America is an experiment in freedom, and the feminist experiment in freedom, under the guise of "equality," unleashed a panopoly [sic] of social ills which have become a cancer on our land, led to the moral and economic destruction of our nation, made America a house divided unto itself, created a vast underclass with a bleak and bankrupt future, and is the greatest national disaster we have ever faced.

Recognizing patriarchy to be the greatest creator of wealth, prosperity, and stability civilization has ever known, we hereby demand that our children, homes, lives, liberty, and property be unconditionally restored to us. We hereby demand replacement of the doctrine of *Parens Patria* with the Biblical doctrines upon which this nation was founded.

We hereby recognize and reaffirm that patriarchy is the order established under God and His Natural Law.

We, the posterity of this nation, hereby reclaim our ancestral liberties and God-given rights.¹⁷⁷

Similar pro-male documents can be found on numerous fathers' rights web sites.¹⁷⁸ The hyperbole of such language found on some of these web sites destroys the credibility of all fathers' rights groups and lessens the impact of valid statistical information that also can be found on these web sites. Statistics on one fathers' rights web site, for example, indicate that eighty-five percent of divorcing men lose custody battles.¹⁷⁹ While the percentage is probably closer to ninety percent,¹⁸⁰ these statistics indicate that

176. *Id.* at 29.

177. *Id.* at 16 (quoting the Reaffirmation of the Father's Manifesto (1997)).

178. One can easily find any number of pro-father documents by doing a search on the Internet using the words "fathers' rights."

179. See *The Fatherhood Coalition* (visited March 17, 2000) <<http://www.fatherhoodcoalition.org>>.

180. See Swank, *supra* note 96, at 928. Compare NAT'L CENTER ON WOMEN AND FAM. L. CHILD CUSTODY PROJECT, NAT'L CONF. OF STATE LEGISLATURES, *Joint Custody: An Attack on Women and Children 2* (undated), cited by FLORIDA STUDY, *supra* note 43, at 66 (arguing that "[f]athers are not discriminated against in custody or family law cases. The fact that 90 percent of children live with their mothers is not a result of judicial bias, but of paternal preference. This 90 percent figure includes those cases where fathers have abandoned their families, do not contest custody, or agree to custody in the mother."), with Paradise, *supra* note 93, at 579 n.239, arguing that:

[T]he cultural presumption that sole maternal custody is the best solution to custody disputes has led to nearly ninety percent of all custody battles ending with the

fathers have legitimate concerns that are often masked by the agendas of more radical groups.

Fathers with legitimate concerns often have nowhere to turn. John, a Massachusetts father who recently lost custody of his two sons,¹⁸¹ was told that the system would focus on the children and that GALs work for the children.¹⁸² John became disenchanted, however, when the GAL in his case paid very little attention to the children, never allowed the children to speak directly to him alone, and interviews with the GAL “turned into a he said/she said.”¹⁸³ The children “wound up feeling left out of the process after I had tried to tell them that the GAL worked ONLY FOR THEM [sic] no one else!”¹⁸⁴ John seemed disgusted by the whole process: “My feelings at this point are that the GAL was attempting to prove the boys were best left with their mother but was unable to find any reason why they shouldn’t come to live with me so his decision was to lean to the side of least resistance.”¹⁸⁵ Although the children were left out of the process, the judge followed the GAL’s recommendation and told John he would not change his mind, and that it would be a waste of time going to trial because he “does not take children away from their mothers in Massachusetts.”¹⁸⁶

John’s experience with the GAL reveals how embedded the problem of gender bias has become in family courts. Professional custody evaluators may wish to take the path of least resistance if they know a particular judge is biased one way or the other. In John’s case, the children should have been the focus, but apparently were not. Consequently, fathers like John are often “recruited” by illegitimate fathers’ rights groups, but these groups take advantage of emotional fathers and ultimately hurt their cause more than they help it. Perhaps the harmful effects of these groups can be overcome as legitimate fathers’ rights groups forge alliances with feminists, but the road to cooperation appears to be a long one.¹⁸⁷

mother retaining sole physical custody of her children. Society frowns upon women who relinquish custody of their children, due to the presumption that their rightful place is with their children. A joint custody presumption might change what society views as the norm in child custody, and could give fathers a better chance of maintaining contact with their children after divorce.

(citations omitted).

181. John is not his real name. The boys were ages 10 and 12 at the time. See e-mail from John to Craig Nickerson (March 14, 2000) (on file with author).

182. See *id.*

183. The GAL in John’s case recommended that the mother receive custody. See *id.*

184. *Id.* (emphasis in original).

185. *Id.* John was not given a copy of the report, and attempts to get a copy of the GAL report proved fruitless. See *id.* He could only see it by going to the court and asking to review it, and was told that GAL reports are “supposed to be one of the most confidential documents in the court . . . No one is allowed to copy it and it can NEVER be used against you in a court of law, outside the custody trial.” *Id.*

186. *Id.*

187. See Swent, *supra* note 21, at 85-86 (“Judicial education can continue and state legal systems can contemplate even significant reforms—as long as no one tells the (mostly) men at

B. Bias Against Women: The Feminist Perspective

[F]athers can, in the right circumstances, be turned into mothers, [but] the social reality is that moms are already moms. . . . It is surely in the best interests of children to recognize this social reality and guarantee the continuity of care which will be most protective of young children."¹⁸⁸

Although some feminists are willing to recognize that some fathers have legitimate concerns, many believe "the lingering effects of the tender years doctrine is largely due to the fact that, in most situations, the man truly is less involved with his children."¹⁸⁹ In addition, mothers may be less sympathetic to men's issues because they are also victims of gender bias in custody determinations; a common scenario involves women pursuing professional careers.¹⁹⁰ The bias, however, is often more far-reaching:

If [women] do not work, courts question their ability to support their children; yet, if they do, courts question their commitment as mothers. On the other hand, working fathers are viewed as normal and are not placed under the same scrutiny. The same bias is illustrated regarding the use of child care. Women who must rely on day care are often criticized for not being available to their children, while fathers are often praised for being able to support and provide for their children at the same time.¹⁹¹

After the panel's decision in *Young*, many feminists argued that Alice Hector was the victim of gender bias.¹⁹² Joan Williams, for example, argued that Hector continued to assume many of the parental responsibilities de-

the top that the topic is gender bias, the leaders are women and the approach is feminist.").

188. Phyllis T. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?*, 8 B.Y.U. J. PUB. L. 75, 85 (1993) (quoting Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 25 (1990)).

189. Normalvanbreucher, *supra* note 159, at 28. Normalvanbreucher admits, however, that "blanket assumptions that men, by virtue of being male, are less involved with their children than the mother still persist in some courts." *Id.*

190. See, e.g., *Greene v. French*, 641 P.2d 524 (N.M. Ct. App. 1982) (holding that a woman's employment outside the home is only one factor considered in a custody determination and generally is not enough by itself to cause her to be denied custody); *In re Marriage of Riddle*, 500 N.W.2d 718, 719-20 (Iowa Ct. App. 1993) (affirming a grant of custody to the father because the mother had devoted a great deal of time to education and work and rejecting the mother's argument that she was being punished for adopting a traditional male role). See also Normalvanbreucher, *supra* note 159, at 4 (arguing that "[a]s women began to work outside the home, men responded to their newfound role as nurturer with ambiguity . . . Feminism, with all of its trappings, seriously undermined a man's ability to dominate his family and control his spouse as women demanded equal opportunities in education, the workforce, and in the home.").

191. Carpenter, *supra* note 20, at 41-42.

192. One commentator called the panel's decision "a disservice to women" because it "compels women to choose between success as a stay-at-home mom and success in achieving a high level of professional status, but tells women that they may never choose both." Barbara George Johnson, Case Summary, *Young v. Hector: Stay-at-Home Dad vs. Professional Mom*, 20 WOMEN'S RTS. L. REP. 195, 197 (1999).

spite her hectic work schedule.¹⁹³ The press, Williams therefore contends, inappropriately characterized the panel's decision as a custody award to a stay-at-home dad because the facts of the case clearly distinguished it from cases where the mother stays at home.¹⁹⁴ As a contrast to such cases, Williams notes that Young only volunteered in the children's after-school activities after Hector filed for divorce.¹⁹⁵ In other words, he only became involved in their lives when he feared he might lose custody.¹⁹⁶

Recent cases involving Marcia Clark¹⁹⁷ and Sharon Prost,¹⁹⁸ two high-profile working mothers, provide further examples of the bias against professional moms and the passions that such cases bring about. A typical response to these cases was the following:

[T]he trial court effectively concluded that Prost's masculine commitment to her career was incompatible with her feminine role as a mother. The case law makes clear that it is not the mother's working outside the home per se that courts find problematic. Rather, evincing a masculine attitude toward work - seeming to place career before family - marks women as bad mothers.¹⁹⁹

Gender bias is clearly a hot-button issue that sparks intense debate between feminists and fathers' rights groups. More often than not, this debate masks the more important issues involved with the children's best interests. In Florida, some father's rights groups blame the shared parental responsibility standard for this gender-based friction because it "thrust[s] the participants, including the children, into a legal tug-of-war, compounding the very disputes the laws are intended to preclude. . . . The system of divorce as currently practiced in this state is the furthest thing from amicable and unnecessarily so."²⁰⁰ As one member of the National Women's Law Center stated: "[w]e don't need more polarization . . . more pro-male or pro-female."²⁰¹ Instead, what is needed is cooperation between the gender groups

193. See WILLIAMS, *supra* note 3, at 140.

194. See *id.*

195. See *id.* (referring to Hector's contention that such was the case).

196. See *id.*

197. See Tamar Lewin, *Demands of Simpson Case Land Prosecutor in Custody Fight*, N.Y. TIMES, Mar. 3, 1995, at B8. See also BRAVER & O'CONNEL, *supra* note 130, at 220 (quoting Judith Regan, *An Open Letter to Mr. Clark*, NEWSWEEK, March 13, 1995, at 57-58).

198. See *Prost v. Greene*, 652 A.2d 621 (D.C. 1995).

199. Note, *Patriarchy is Such a Drag: The Strategic Possibilities of a Postmodern Account of Gender*, 108 HARV. L. REV. 1973, 1996 (1995). Despite such emotional arguments, however, the appellate court rejected Prost's argument that the trial judge's decision was the result of "gender stereotyping"; rather, the "paramount" factor, concluded the appellate court, was Prost's uncooperative behavior toward her husband. See *Prost*, 652 A.2d at 623, 624-25, 627. For instance, Prost filled out a "Parent Information Form for an employment agency. . . . In the space for 'Father's Name' [Prost] wrote 'N/A.'" *Id.* at 625 n.6.

200. *Parents Without Rights: Analysis of Florida's Divorce Law* (visited March 14, 2000) <http://hometown.aol.com/PWRFlorida/PWR_08.html>.

201. Rubin, *supra* note 141 (quoting Elisabeth Donahue of the National Women's Law

in an effort to eliminate all forms of gender bias, whether it affects men or women.

C. The Evidence: Gender Bias Studies

According to most of the state studies on the subject, gender bias exists throughout law, but it is particularly prevalent in family courts.²⁰² In many cases, that bias injures fathers.²⁰³ Testimony reported by the Florida Study, taken from a Jacksonville Public Hearing, indicated that "courts still presume that mothers are the better residential parent: '[S]ociety views motherhood with a certain sanctity that mothers know what is best for their children, and that they will act in their children's best interests.'"²⁰⁴ The Study concluded:

[T]he overwhelming weight of evidence and research gathered by the Commission supports only one possible conclusion: Although some may ignore its existence, gender bias permeates the Florida legal system today. . . . [G]ender bias is practiced to a disturbing degree by members of this state's legal profession, often in forms that have become highly institutionalized. The refusal of some lawyers to acknowledge this fact is one of the primary mechanisms by which gender bias is perpetuated.²⁰⁵

Florida was not the only state to find gender bias against fathers. The Utah study found that men are often categorized as "less capable and less appropriate caretakers than women . . . many fathers do not seek custody because their attorneys advise them that their chances for success are mini-

Center).

202. See Swent, *supra* note 21, at 55, 60 (noting, for example, that gender bias studies uniformly found bias against women in child support even though they were automatically considered superior parents in custody determinations, and that fathers who work are praised as breadwinners while mothers who work are criticized for spending too much time away from their children). See generally McNeely, *supra* note 22.

203. According to Swent, "The majority of states found that courts unjustly presume men to be inferior parents to women." See Swent, *supra* note 21, at 55, 60. Studies, however, reveal that gender bias also adversely affects mothers. For example, the Michigan task force found mothers who appear to be primary caregivers often lost custody cases when fathers show the slightest interest in obtaining custody, while mothers who actively pursue careers were considered less fit as parents than similarly ambitious fathers. See Carpenter, *supra* note 20, at 58 (citing MICH. SUPREME CT. TASK FORCE ON GENDER ISSUES IN THE CTS. 69 (1989)). The Florida Study also concluded: "the most recent and reliable research indicates that women experience a cognizable degree of bias in custody decisions." FLORIDA STUDY, *supra* note 43, at 63. According to a Massachusetts study, "fathers who actively seek custody obtain either primary or joint physical custody over 70% of the time." *Gender Bias Study*, *supra* note 92, at 825. However, the results of the Massachusetts study have been challenged: "[a]n analysis of the methodology underlying this conclusion . . . demonstrates fundamental flaws that seem to confirm a results-oriented analysis." Mcneely, *supra* note 22, at 908-09.

204. FLORIDA STUDY, *supra* note 43, at 64.

205. *Id.* at 42. One Florida attorney, however, flatly concludes that "[t]here is no presumption in favor of women in Florida with regard to custody." Gruskin, *supra* note 162.

mal.”²⁰⁶ According to the New York task force, “men are perceived as uninvolved parents who must explain their reasons for seeking custody whereas women are seen as natural parents whose desire for custody is not only acceptable but expected.”²⁰⁷ The Georgia study listed the following beliefs held by some judges: “a mother is a better parent than a father”; “a father cannot work outside the home and be a nurturing parent”; “because a mother is presumed to be the better parent, fathers must prove the mother ‘unfit’ in order to gain custody”; “if a court grants custody to a father, it brands the mother as unfit and unworthy.”²⁰⁸

Two recent Florida decisions show that progress in that state may be slow. In *DeCamp v. Hein*,²⁰⁹ a Florida family court paid lip service to the Florida Legislature’s clear intent to abolish the tender years doctrine, but in granting custody of a one-year-old to the mother, the court stated:

It is true that the doctrine can no longer be dispositive because the 1983 amendment to the statute added the ‘irrespective of age’ language; however, we do not believe the doctrine has been totally abolished. For example, a six-month-old baby being nursed by her mother should *obviously* be in her mother’s custody, unless the judge found her unfit. In the case at bar, there is no mention of whether the one-year-old was being nursed by the mother. Nonetheless, our version of common sense suggests that, under the facts of this particular case, the one-year-old female and her three-year-old sister preferably should reside with the mother.²¹⁰

The court’s conclusion is remarkable in light of the Legislature’s language, which evinces a clear intent to abolish the tender years doctrine.²¹¹ More recently, in *Ayyash v. Ayyash*,²¹² the court stated: “Even though this doctrine was overturned by the legislature’s gender neutral policy, there remains a temptation for many judges to consider the right to custody as the mother’s to lose and unless her fitness is legitimately challenged, the father’s right of equal consideration is often ignored.”²¹³ These cases clearly indicate that gender bias against Florida fathers persists. The bench’s refusal to recognize this bias in *Young v. Hector* could be masked by the difficult abuse of discretion standard. The fact that the bench was willing to overrule the trial court in all aspects other than custody, despite similarly stringent

206. Lynn Hecht Schafran, *Gender Bias in Family Courts*, FAM. ADVOC. 26 (1994).

207. McNeely, *supra* note 22, at 943.

208. *Id.* (citing COMM’N ON GENDER BIAS IN JUD. SYS., GENDER & JUSTICE IN THE CTS.: A REP. TO THE SUPREME CT. OF GEO. BY THE COMM’N ON GENDER BIAS IN THE JUD. SYS. (1991), reprinted in 8 GA. ST. U. L. REV. 539, 657 (1992)).

209. 541 So. 2d 708 (Fla. Dist. Ct. App. 1989), *rev. denied* by *Hein v. DeCamp*, 551 So. 2d 461, *overruled* by *Kuutti v. Kuutti*, 645 So. 2d 80 (Fla. Dist. Ct. App. 1994).

210. *DeCamp*, 541 So.2d at 710.

211. *See* FLA. STAT. ch. 61.13(2)(b)(1) (1999) (stating, “[t]he father shall be given the same consideration as the mother in determining the primary residence of the child irrespective of the age of the child.”).

212. 700 So. 2d 752 (Fla. Dist. Ct. App. 1997).

213. *Id.* at 755 n.3.

standards of review, permits no other conclusion.

V. CONCLUSION: LOOKING AHEAD

*A court's custody determination is one of the most critical decisions that will ever impact the life of a child. It is crucial to that child's welfare and future that the judge makes the best possible decision—a decision not influenced by gender bias—a decision that truly is in the best interest of the child.*²¹⁴

Gender bias injures mothers, fathers and children. Common sense, therefore, tells us that everyone will benefit from eradication of gender bias and its insidious effects on child custody decisions. Gender bias has infected custody determinations for over one hundred and fifty years,²¹⁵ and despite numerous attempts to bring gender neutrality into custody law, it continues to permeate family courts. While the decision in *Young v. Hector* is disagreeable, at least it has created substantial public debate regarding custody decisions and perhaps will provide an impetus for change.

The current best interests standard is properly directed because it focuses on children, but the application of that standard continues to perpetuate gender bias and essentially ignore the children's perspective.²¹⁶ As divorce rates continue to climb, however, it is children who will be most affected by custody decisions.²¹⁷ Now may be time to get the children involved by asking for their preference. Young children are capable of making important decisions for themselves.²¹⁸ Regardless of whether children's input is sought, trial judges should be required to make specific findings of fact. Although appellate courts can only base their decisions on a "cold record," by demanding clearer reasons for custody decisions they may go a long way toward uncovering trial judges' hidden gender biases, and can therefore hold judges accountable for their decisions.

Whatever the solution, one thing is clear: the time has come to stop focusing on child custody as a competition between the parents and the gen-

214. Jacobs, *supra* note 26, at 901.

215. See McNeely, *supra* note 22, at 906. Ironically, an article appeared in the *New York Times* on July 13, 1999, in which the author concluded "[*Young v. Hector*] is also powerful evidence that society and the law have moved far past the presumption that the mother, unless she is shown to be unfit, should automatically get custody." Petersen, *supra* note 11. However, another article was probably more accurate: "[w]hat this case [*Young*] shows the most is that the way things work now is a no-win situation for everyone." Oliphant, *supra* note 149 (quoting Ellen Bravo, co-founder of "9 to 5," The National Association of Working Women.).

216. See Carpenter, *supra* note 20, at 57 (1996). See also McNeely, *supra* note 22, at 906 (arguing that family courts only give lip service to the needs of children).

217. See Swank, *supra* note 96, at 928.

218. See Kandel, *supra* note 51, at 365 (citing ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968), for the proposition that children become developmentally ready to choose their custodian by the age of six).

der-based groups that support them. Now is the time to remove the focus from mom and dad and return it where it belongs—on the children.

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