'Primary Caretaker': Is It a Ruse?

BY RONALD K. HENRY

Old prejudices die slowly: Although the "tender years" doctrine of maternal preference has been widely repudiated by statute and case law, the reports of numerous state commissions on gender bias indicate that bias continues to taint custody decisions. As overt gender bias has become increasingly unacceptable, a more insidious sort of bias—one that masquerades as equality—has invaded the courts: the "primary caretaker" theory.

Origins

In *J.B. v. A.B.*, 242 S.E.2d 248 (W. Va. 1978), Justice Richard Neely freely acknowledged the bias of his court with unmistakable clarity:

> We reject this [father's] argument as it violates our rule that a mother is the natural custodian of children of tender years . . . .
>
> [The Court] rejects any rule which makes the award of custody dependent upon relative degrees of parental competence rather than the simple issue of whether the mother is unfit. . . .
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> [B]ehavioral science is yet so inexact that we are clearly justified in resolving certain custody questions on the basis of the prevailing cultural attitudes which give preference to the mother as custodian of young children . . . .

Id. at 251–52, 255

J.B. v. A.B. was so openly biased that it helped accelerate the end of its own era. In 1980, the West Virginia legislature statutorily abrogated Justice Neely's maternal preference with W. Va. Code 48-2-15 (1980). As investigators and gender bias commissions across the country have found, however, bias may simply change its form rather than disappear. Justice Neely's rejoinder, *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981), was issued the following year:

> [This case] squarely presents the issue of the proper interaction between the 1980 legislative amendment to W. Va. Code 48-2-15 which eliminates any gender based presumption in awarding custody, and our case of *J.B. v. A.B.*, W. Va., 242 S.E.2d 248 (1978) which established a strong maternal presumption with regard to children of tender years . . . .
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> While in *J.B. v. A.B., supra*, we expressed ourselves in terms of the traditional maternal preference, the Legislature has instructed us that such a gender based standard is unacceptable . . . .
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> Consequently, all of the principles enunciated in J.B. v. A.B., *supra*, are reaffirmed today except that wherever the words "mother," "maternal," or "maternal preference" are used in that case, some variation of the term "primary caretaker parent," as defined by this case should be substituted.

Id. at 358, 361, and 363

Thus was the "primary caretaker" doctrine born. Let us be as plain, concise, and honest as Justice Neely. The primary caretaker theory is first, foremost, and always a change-of-name device designed to maximize the number of cases in which the court will be compelled to preserve the bias of maternal preference and award sole custody to mothers.

Purposeful bias

"Primary caretaker" is a warm, fuzzy phrase with a superficial appeal. Like all legal terms, however, the substance is in the definition; every definition that has been put forward for this term has systematically counted and recounted the types of tasks mothers most often perform while systematically excluding the ways that fathers most often nurture their children. No effort has been made to hide this bias.

In fact, in some definitions, the very first credit on the list of factors to be considered goes to that parent, regardless of gender, "who has devoted significantly greater time and effort than the other to . . . breast-feeding." The duration of the credit extended to the parent who has performed such services is unlimited according to some definitions, despite the obvious fact that an historic role as breast-feeder has little relevance to the determination of custody of an adolescent who is contemplating the merits of rival street gangs. The more fundamental problem, of course, is the lack of any consideration for the father's efforts on behalf of the child and his involvement throughout the child's life. No one seriously disputes the role of father absence in street gang formation, teenage pregnancy, and other pathologies. Yet, the primary caretaker theory remains fixated on "mothering" and ignores "fathering."

The primary caretaker theory aggressively asserts that traditional "women's work" is meritorious while "men's work" is irrelevant. The typical definition of the primary caretaker gives credit for shopping but not for earning the money that permits the shopping; for laundering the Little League uniform but not for developing the interest in baseball; for vacuuming the floors but not for cutting the grass; and for chauffeuring the children, but not for driving to work.

Arbitrary tasks

Generally, the tasks that count in accumulating primary caretaker points do not involve great skill or invoke debates

about hormonal determination. For example, points are usually given for planning and preparing meals. In our house, the 8-year-old loves canned spaghetti in ABC shapes, but hates Ninja Turtle shapes; the 6-year-old hates the ABCs and loves the Ninja Turtles; and the 3-year-old can finger paint equally well with either. To establish a custody preference on the basis of opened-can counts is an affront to all parents and hardly squares with our understanding that many women entered the paid work force precisely because they were stupefied by the mindless tasks of daily child care.

Most unreasonable is the contempt for paid work that is apparent in the primary caretaker theory. Although time spent shopping counts, time spent doing work for pay does not. Often, grocery shopping, clothes shopping, and other shopping are counted separately. A single afternoon of shopping may be counted several times over, yet the paid work that makes the shopping possible is not counted at all. Which parent is really providing for the child's needs?

Going to work requires a parent's devotion and sacrifice. It is obscene to say that spending is nurturing while earning is mere, heartless cash waiting to be transferred under a child support order. I don't know any parent who is incapable of spending, but many are incapable of earning. Which is the better care giver?

In any childless, two-adult household, there is a division of the tasks necessary to simply carry on with life. Cooking, cleaning, and shopping are not counted as child care in a childless home any more than paid work, yard maintenance, and home repairs are so counted. The nature of these tasks does not change with the introduction of a child. Instead, all of the tasks—specifically *including* paid work—collectively support the child's environment.

The gender bias that is inherent in the primary caretaker theory is its insistence that the types of tasks most often performed by women—regardless of the presence of children—are more worthy than those most often performed by men. A child may increase the "task burden" in the household, but it does not cause one adult or one subset of tasks to suddenly become more valuable than the other: For every mother who reduces her hours doing paid work because of a "devotion to the child," there is a father who must increase his.

The real change that occurs with the arrival of a child is the commencement of his or her need to develop a relationship with both parents. Contrary to popular opinion, research shows that "fathers spend just as much time in primary interaction as do mothers." (Robinson, "Caring for Kids." 11 Am. Demographics at 52 (July 1989).) Additionally, with an ever-increasing number of two-career couples, the primary caretaker is likely to be a day-care center. Should the day-care center be awarded custody?

> *It is now time to acknowledge that men can do everything women can do*

Changing needs

Even if it were possible to remove the gender bias from the selection of "primary care" factors, the theory still suffers from the fact that its "freeze frame" analysis of who-did-what during the marriage ignores the reality that children's needs change. The best breast-feeder may be a lousy soccer coach, math tutor, or spaghetti-can opener.

The historical division of labor during a marriage also says nothing about the abilities of the parents and their actual behavior before or after the marriage. Just as mom and dad had to fend for themselves before the marriage, so also will they be compelled to fend for themselves after the divorce. The "primary caretaker" father will have to get a job. The "wage slave" mother will have to cook more meals and wash her own laundry. Similarly, each will have to provide for the needs of the children during their periods of residence. We know this is necessary and we know that it happens even in cases of the minimalist "standard" visitation order.

The allocation of tasks that existed during the marriage necessarily must change upon divorce. The agreed specialization of labor during the joint enterprise of marriage cannot continue after divorce. Each former spouse will have to perform the full range of tasks, and the difficulties encountered by the former full-time homemaker who must now learn to earn a wage have been a central concern of feminists. The primary caretaker theory, with its imposition of single parent burdens upon the spouse least able to cope with the need for earning a living is thus tangibly damaging to the very class that its bias aims to aid. As a growing number of leading feminists have come to understand:

> Shared parenting is not only fair to men and to children, it is the best option for women. After observing women's rights and responsibilities for more than a quarter-century of feminist activism, I conclude that shared parenting is great for women, giving time and opportunity for female parents to pursue education, training, jobs, careers, professions and leisure.

There is nothing scientific, logical or rational to excluding the men, and forever holding the women and children, as if in swaddling clothes themselves, in eternal loving bondage. Most of us have acknowledged that women can do everything that men can do. It is now time to acknowledge that men can do everything women can do.

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(Karen DeCrow, former president of the National Organization for Women, as reported in the *Syracuse News Times*, Jan. 5, 1994.)

Single parent overload also short-changes the children:

> Children [living in single-parent households] receive two to three fewer hours of care per week from the custodial parent than do children in two-parent households. Children who live only with their mothers, then, lose three hours a week of care from their mothers plus three hours a week of care by the absent father.

Bianchi. "America's Children: Mixed Prospects." 45 Population Bull. 1, 20 (June 1990).

Primarily because of the absence of a second parent, children in single-parent families spend considerably less time in one-on-one activities with a parent than children in intact families. What every child needs is the active, extended emotional and physical involvement of two parents, not a winner-loser dichotomy based upon historical spaghetti-can counts.

Predicting 'best interests'

The best defense of the primary caretaker theory was presented by University of Michigan Professor David L. Chambers in his article, "Rethinking the Substantive Rules for Custody Disputes in Divorce," 83 Mich. L. Rev. 477 (1984). None of the articles written since has matched his thorough analysis; many are bare claims for the mother's ownership and dominion over the child. Thus, Law Professor Mary Becker writes:

> I therefore suggest that more custody questions would be resolved correctly were we to defer to the decision of the mother with respect to the best custodial arrangement for her child as long as she is fit.

"Judicial Discretion in Child Custody, the Wisdom of Solomon?" 81 Illinois Bar J. (December 1993) 650, 657.

In contrast, Chambers analyzed mountains of research and more mountains have appeared since his article was published. Nothing before or since his article, however, shows that mothers are better parents than fathers or that either parent cannot readily take on the tasks that were allocated to the other parent during the marriage. However, the research *does* show that children suffer dire consequences when they are deprived of the active and continuous involvement of one of their parents. No one would suggest that the nation's gang members, drug addicts, pregnant teenagers, and school dropouts are suffering from excess fathering.

The interesting thing about the Chambers article is that, like a good mystery thriller, the reader is kept in suspense all the way to the end. As late as page 83, Chambers is forced to admit that "on the basis of the current empirical research alone, there is thus no solid foundation for concluding that children, even young children, will be typically better off if placed with their primary caretaker." Nevertheless, Chambers ultimately suggests a weak preference for the "primary caretaker" up to age five and no preference thereafter.

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Up to the concluding pages, he could have gone either way. What tipped the balance? Chambers offers three answers:

> 1. Research on the ties of children to secondary caretakers makes clear that such ties are typically stronger than once believed but leaves open the significant possibility that preserving the intimate interaction of the child with the primary caretaker is of greater importance to the child.
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> 2. [M]y earlier review suggests the probability that *primary caretakers will suffer more emotionally than secondary caretakers when shifted into a mere visitor's role.*
>
> 3. A primary caretaker preference will *reduce the incidence of litigation by letting one side know it is less likely to win* . . . . Whoever bears the burden of proof will be denied custody in those cases, probably substantial in number, in which the Judge concludes at the end of all the evidence that she has no strong basis for believing that the children will do better in one setting than the other.

Id. at 561, 563 (emphasis added).

Of these three rationales, only the first is related to the well-being of the child and the real problem identified by social science researchers is precisely the opposite of what Chambers posits. It is the bond between the so-called secondary caretaker and the child that is most severely threatened by reduction to the "mere visitor's role" in a typical custody order. The short attention spans and memories of small children create the greatest need for frequent and continuing contact with both parents. A judicially imposed limitation on a child's contact with his or her secondary caretaker causes broken or, at the least, weakened parent-child bonds. The winner-loser outcomes that are sought by the primary caretaker theory are inconsistent with what we know about a child's need for both of his or her parents. Child development specialists do not support primary caretaker driven custody determinations. (See, e.g., "Children of Divorce: A Need for Guidelines" by Ken Magid and Parker Osborne, 20 *Family Law Quarterly* 331 (Fall 1986).)

In response to Chambers' second rationale—his claim that the primary caretaker will be emotionally deprived by the failure to obtain sole custody—it is only necessary to recall that a child is not a toy. The idea that custody should be governed by one parent's emotional need to possess and own the child is precisely contrary to the trend of the law over the past 30 years away from the notion that the child is the property of

the custodial parent.

In California, for example, a court considering an award of sole custody must examine "which parent is more likely to allow the child or children frequent and continuing contact with the non-custodial parent. . . ." California Civil Code, § 4600(b)(1). Children want, love, and need two parents, not a rule that encourages hoarding.

Demilitarizing divorce

Chambers' third rationale, which sees virtue in bright-line rules limiting judges' discretion, supports no particular choice of arbitrary criteria. Awarding custody to the tallest parent is even easier to administer and probably no less rational. (Using the same backward look at carefully selected factors, we can determine which parent has historically provided the better shoulder seat at parades and reached the most toys on high shelves.) Before imposing arbitrary rules, however, we must remember that we are talking about the most personal and important decision that will occur in most people's lives.

Chambers' statement that "one side" (the secondary caretaker) is "less likely to win" implies that a child custody decision is a game, like blackjack—ties go to the dealer. The parent-child relationship is not a game, however, and real human beings are entitled to a real day in court. Cases of ties between two loving parents are precisely the cases where we should not want a mechanical preference to pick a winner and a loser. No one will argue that America suffers from an excess of good parenting. Why, then, do we focus on finding easier ways to place children in single-parent custody? The focus, instead, should be on developing a structure that demilitarizes divorce, that gets past winner-loser dichotomies, and that encourages the maximum continued involvement of both parents.

> *Children want, love, and need two parents*

Children are born with and need two parents. In all but the small number of cases that involve a pathological parent, courts should strive to strengthen the child's relationship with both. If distance or other factors prevent substantially equal relationships, preference should be given to the parent who shows the greater willingness and ability to cooperate and nurture the child's relationship with the other parent. Isn't that what being a caretaker is about? ■

Men Fight

(Continued from page 52)

minations. Within this broad rubric, a variety of flexible shared parenting arrangements may be tailored to meet the diverse and changing needs of the children.

2. Make the child support obligation conditional on the preservation of custodial status and function: The disastrous development of sole maternal custody would not have been possible without the court's power to push the father away from his children with one hand while pulling on his purse strings with the other. This unnatural bifurcation of custody and support by which a father is forced to finance the filching of his own children must be formally renounced by the law. Only to the extent that a father's custodial relationship is preserved by the court may the court justly stake a claim to his income for the benefit of the mother's custodial relationship. By so doing, the court would be correctly reconstructing the father's rights and responsibilities as they prevailed during the marriage. But by the same token, if a fit father is unwillingly relieved by the court of his custodial function, he must also be relieved of his support function. However, a fit father who rejects the court's preservation of his custodial function should not thereby be able to reject his support function unless, of course, the mother agrees and can otherwise adequately support the children. An undoing of the current reductionist approach to child support as an involuntary tax upon the noncustodial father for the benefit of the custodial mother is perhaps the number one task of reform in this area.

3. Fathers must organize politically: At the macro level, reform will not come about by itself. Fathers will have to organize politically and lobby potently against well-financed, politically correct feminist adversaries. The force, however, is with them. As divorce courts churn out more and more single-parent, support-dependent families, its claim to *parens patriae*—to being the ultimate parent to the children of divorce—will continue to lose credibility, and the very crush of the problem it has created will cry out for real change. *Après le deluge*, genuine joint custody will appear a lot more appealing than it does now.

4. Fathers must fight individually to beat the bias: On the micro level, every divorcing father must face down the bias on his own. He must fight hard for favorable temporary orders, for as much overnight time as possible, for substantial school vacation time, and for unrestricted, abundant telephone contact. He must educate his skeptical judge that his quest for custody is genuine, that his parenting skills are ample, that his close involvement is critical to the well-being of his children, and that the mother's opposition does not lessen any of this in the slightest.

Men, not victims

In the end, divorcing fathers must be men. They cannot wallow in self-pity and weep at being victims of the system. They must fight for their kids to the last. Many will lose, but, as time passes, more and more will win. As has happened so often before, the forces of change are already ahead of the law. ■