WISCONSIN JOURNAL OF LAW, GENDER & SOCIETY

VOLUME XXIX, NUMBER 1 SPRING 2014

COMMENT

THE FAÇADE OF A BEST INTEREST STANDARD: MOVING PAST THE PRESUMPTION TO ENSURE DECISIONS ARE MADE FOR THE RIGHT REASONS

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INTRODUCTION

Custody and placement decisions resulting from, among other things, paternity[1] or divorce actions, can be some of the most trying times in a young child's life.[2] Given the prevalence of both in modern society,[3] children are inevitably affected by not only the parents' decision to separate, but also by the court's determination of where the children will live. How a court determines where the child will live and deciding what is in the best interest of the child is of the greatest concern.

Numerous studies have shown that children involved in a divorce action face increased social and psychological burdens over other children.[4] Courts appear to have acknowledged these adverse effects, and, in an effort to reduce the impact on children, have shifted the custody and placement standard. The standard is meant to guide the court in determining what is in the best interest of the child.[5]

However, this has not always been the case.[6] These decisions have seen a huge pendulum swing with respect to the factors that a court will consider when deciding custody and placement.[7] Historically, these custody and placement determination have shifted from the inherent right of the father,[8] to the "tender years doctrine,"[9] and settling in the current iteration of "the best interest of the child" standard.

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1. Paternity cases are used in this context to mean custody decisions between unmarried parents. *See* Steven T. Cook & Patricia Brown, *Recent Trends in Children's Placement Arrangements in Divorce and Paternity Cases in Wisconsin*, 2005 INST. FOR RES. ON POVERTY U. WIS. MADISON (*revised* 2006), http://www.irp.wisc.edu/research/childsup/cspolicy/pdfs/Cook-Brown-Task3-2006.pdf.

2. *See* Carol R. Lowery & Shirley A. Settle, *Effects of Divorce on Children: Differential Impact of Custody and Visitation Patterns*, 34 FAM. REL. 455, 455 (1985); *see also* Jonathan Gruber, *Is Making Divorce Easier Bad for Children? The Long Run Implications of Unilateral Divorce*, 22 J. LAB. ECON. 799 (2004).

3. *See* Paul R. Amato, *Interpreting Divorce Rates, Marriage Rates, and Data on the Percentage of Children with Single Parents*, NAT'L HEALTHY MARRIAGE RES. CTR, www.healthymarriageinfo.org/download.aspx?id=325 (last visited October 23, 2012).

4. Gruber, *supra* note 2, at 805.

5. WIS. STAT. § 767.41(5)(am) (2011-12) (describing the factors that a court will use in determining custody and physical placement).

6. *See infra* Part I.A-B (discussing paternity and custody decisions based on the inherent rights of the father, and later on a maternal presumption).

7. *See infra* Part I.A-B.

8. *See In re* Goodenough, 19 Wis. 291, 296 (1865); *see also* Ronald R. Hofer, *The Best Interest of the Child Doctrine in Wisconsin Custody Cases*, 64 MARQ. L. REV. 343, 344 (1980).

9. *See* Jenkins v. Jenkins, 173 Wis. 592, 181 N.W. 826, 827 (1921) (holding that the tender years or motherly love doctrine was analogous to the best interest of the child). This

On paper, the current standard in Wisconsin appears to fulfill the overall goal of limiting adverse effects of paternity or divorce cases on children by basing these judicial decisions on the best interest of the child.[10] But a closer look shows a different story. This is best illustrated by looking at statistical analysis of divorce decisions in Wisconsin.[11] The divorce data, coupled with statistical trends of custody and placement decisions stemming from divorce, shows that instead of the best interest of the child standard, there remains a stronger presumption in favor of the tender years motherly presumption.[12]

The question is, then, why do these statistics show the lingering existence of the tender years doctrine when it is explicitly forbidden in Wisconsin?[13] An analysis of judicial determinations in this area has yielded little evidence to help answer this question.[14] The courts have had decades to implement and refine the best interest standard,[15] yet statistical analysis indicates that the courts have failed to depart from the tender years doctrine and its motherly presumption. The real question is, given the gravity and potential burden facing all those involved, are the courts in the best position or even equipped[16] to make these decisions based on the best interest of the child?

Part I of this comment explores the evolution of Wisconsin custody standards over time, from the inherent rights of the father to the tender years doctrine (also known as the motherly presumption). Part II.A of this comment focuses on the current Wisconsin custody standard of the best interest of the child and how the courts have applied such a standard. Part II.B then looks to analyze the disconnect between the statutory language and the statistical results courts have reached. While the current standard prohibits the courts from preferring one parent over the other on the basis of sex, data indicates that the court is reluctant to let go of the motherly presumption. Part III of this

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decision may preview some of the issues courts are faced with today distancing the best interest of the child standard from the motherly presumption.

10. *See* WIS. STAT. § 767.41(5)(am)(2011-12).

11. *See* WIS. DEP'T OF HEALTH SER., STATE VITAL RECORDS OFFICE, WISCONSIN MARRIAGE & DIVORCES (2011) [hereinafter WISCONSIN MARRIAGE & DIVORCES].

12. *Id.; see also* Cook & Brown, *supra* note 1, at 6-7.

13. *See* WIS. STAT. § 767.41(5)(am)(2011-12) (stating that a "court may not prefer one parent . . . over the other on the basis of the sex . . . .")

14. *See* Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 LAW & SOC'Y REV. 769 (2004).

15. The applicable statute in effect in 1979 is substantially similar to the current version. *Compare* WIS. STAT. § 767.24(2) (1979-80) (stating that "[i]n making a custody determination, the court shall consider all facts in the best interest of the child and shall not prefer one . . . custodian over the other on the basis of the sex . . . ."), *with* WIS. STAT. § 767.41(5)(am) (2011-12) (stating that "in determining legal custody and . . . physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one parent . . . over the other on the basis of the sex . . . .").

16. "Equipped" is used in reference to the increased burden the current legal system as a whole has placed on the court, and the amount of available resources the court has to effectively administer the law. It in no way implies that the court is incapable, but rather that, given the limited resources with which to work, a proper application of the best interest of the child standard may be unattainable.

comment provides potential reasons underlying the court's inability to depart from the tender years motherly presumption. Part IV of this comment concludes with the idea that, given the current legal landscape and court congestion, proper consideration and application of the best interest of the child standard by the courts may be unrealistic. This Part explores alternatives, including mandatory provisions prior to court intervention (placement presumptions), or taking these decisions out of the court's hands and placing them with decision-making bodies that may be better equipped to fully appreciate and adhere to the best interest of the child standard (mandatory mediation).

I. HISTORY OF THE STANDARD USED IN CUSTODY AND PLACEMENT DECISIONS IN WISCONSIN

Like most everything in life, societal ideals, values, and policies adapt to changing times. The law is no different, and in an effort to reflect shifts in societal values, the law must evolve and adapt.[17] In the context of the custody and placement standards, the pendulum has swung between two extremes.[18] Initially, these decisions were based on the inherent right of the father, only to shift to a tender years doctrine and the maternal presumption.[19]

Part of the difficulty in understanding the current iteration of the best interest of the child standard is that throughout history, this standard has been synonymous with both the inherent right of the father (paternal preference) and the tender years motherly presumption.[20] While courts have been more pronounced in equating the best interest of the child standard with the tender years motherly presumption,[21] hints can be found in early decisions that somehow the inherent right of the father is in the best interest of the child.[22]

A. Fatherly Presumption: A Sign of the Times

The fatherly presumption, founded on the idea that the father had an inherent right to custody of his children, was most certainly a product of the times.[23] This idea seems founded on the doctrine of coverture.[24] Upon marriage,

17. There are probably no clearer examples than the Thirteenth (outlawing slavery) and the Nineteenth (granting women's suffrage) Amendments to the United States Constitution to illustrate these shifts. *See* U.S CONST. amend. XIII, § 1; U.S. CONST. amend. XIX.

18. *See infra* Part I.A-B.

19. *Compare Jenkins*, 173 Wis. 592, 181. N.W. 826 (1921) (holding that a mother is preferred), *with In re* Goodenough, 19 Wis. 291, 296 (1865) (holding that the father's rights in custody decisions are most important).

20. *See* discussion *infra* Part I.A-B.

21. *See infra* Part I.B.

22. *See infra* Part I.A.

23. *See infra* Part I.A.

24. 2 WILLIAM BLACKSTONE, COMMENTARIES *441.

the wife's economic and legal identities merged with that of the husband's.[25] As a result of this merger, the wife's identity was nonexistent.[26] This concept not only appeared in early case law,[27] but was also established in the Wisconsin statutes.[28]

The best interest of the child is not a new concept, as can be seen by its application in early case law. However, as suggested in the introduction to Part I, this standard had evolved and, as a result, became murky in its application by the courts. In *In re Goodenough*, the Wisconsin Supreme Court provided a prime example of the father's inherent right to custody.[29] The *Goodenough* Court held it would make the best interest determination when children were under certain ages.[30] But the court adhered to the fundamental rights of the father, which created a presumption of paternal placement.[31] In effect, the father was in the best interest of the child. This forced upon the mother the burden to show that the father was unfit or that placement with the father was not in the best interest of the child.[32]

In the years to follow, courts gradually shifted away from the holding in *Goodenough*. In *Welch v. Welch*, the Wisconsin Supreme Court diverted from the inherent right of the father, holding that the child's welfare was the court's primary concern and consequently, it had the discretion to place the child with either parent.[33] Although this decision appeared to eliminate any paternal presumption, the court struggled with totally abandoning the idea.[34] Therefore, it added that, all things equal, the "paramount . . . right of the father . . . will be recognized."[35]

Welch hinted at the shifting standard courts would use in custody and placement decisions from the paternal presumption to motherly presumption.[36] In *Jensen v. Jensen*, the Wisconsin Supreme Court, struggling with the statutory language that preserved the father's inherent rights, refused to take a daughter of tender years away from her mother.[37] The court held that the

25. Ann Laquer Estin, *Marriage and Belonging*, 100 MICH. L. REV. 1690, 1692 (2001).

26. David J. Miller, *Joint Custody*, 13 FAM. L.Q. 345, 351 (1979).

27. *See In re* Goodenough, 19 Wis. 291, 295 (1865).

28. *See* WIS. STAT. §§ 3964-3965 (1917). This can be found in Chapter 170 of the statute.

29. *In re Goodenough*, 19 Wis. at 295 (holding that the father's rights are paramount and should not be denied).

30. *Id*. at 296.

31. *Id*.

32. *Id*.; *see also* State v. Richardson, 40 N.H. 272, 273 (1860) (explaining the burden placed on the mother and cited by *Goodenough, Goodnenough* 19 Wis. at 295).

33. Welch v. Welch, 33 Wis. 534, 541-542 (1873).

34. *Id*.

35. *Id*.

36. *See* Jensen v. Jensen, 168 Wis. 502, 170 N.W.2d 735 (1919); *see also supra* Part I.B (discussing the maternal presumption).

37. *Jensen*, 170 N.W.2d 735, 736 (1919).

inherent right must also be in the best interest of the child, as this was the controlling consideration.[38]

The *Jensen* Court gives great insight into what is to follow. The pendulum has begun to swing and will do so in dramatic fashion with the shift from the inherent right of the father to a motherly presumption.

B. Motherly Presumption: Equating the Best Interest of the Child with the Tender Years Doctrine

Women's expanding societal role[39] naturally eroded custody and placement decisions founded on a father's "inherent rights." This shift may also shed light on the difficulty in understanding the best interest of the child standard today. As the *Jensen* case illustrates,[40] the women's new role in society laid a foundation for what would become known as the "tender years" motherly presumption doctrine.[41]

Following on the heels of the *Jensen* decision, the Wisconsin Supreme Court granted certiorari of yet another custody decision in *Jenkins v. Jenkins*.[42] After finding both parents fit, the court awarded the mother custody.[43] In contrast to the previous determinations based on the inherent rights of the father,[44] the court held that "for [children] of such tender years nothing can be an adequate substitute for mother love . . . . [The mother] alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment."[45] Accordingly, the court added a presumption in favor of the mother unless it was shown that the she was unfit.[46]

Courts reiterated this sentiment over the years,[47] but the Wisconsin Supreme Court drew back from that holding in 1975.[48] In *Scolman v. Scolman*, the court said that preference for one sex over the other could not be the sole consideration used in custody in placement decisions.[49] However, the court added that all things being equal, the usual motherly presumption would

38. *Id*. at 735.

39. *See* Andre P. Derdeyn, *Child Custody Contests in Historical Perspective*, 133 AM. J. PSYCHIATRY 1369, 1370-71 (1976).

40. *See supra* note 37 and accompanying text.

41. Court decisions and secondary sources use both the tender years doctrine and the motherly love doctrine interchangeably. In this comment, reference to the tender years doctrine or the motherly presumption are synonymous.

42. Jenkins v. Jenkins, 173 Wis. 592, 181 N.W. 826 (1921).

43. *Id*. at 826.

44. *See* discussion *supra* Part I.A.

45. *Jenkins*, 181 N.W. at 826.

46. *Id*. at 827.

47. *See, e.g.*, Peterson v. Peterson, 13 Wis. 2d 26, 108 N.W.2d 126, 128 (1961) (stating acceptance of the tender years doctrine expressed in *Jenkins*, *Jenkins* 181 N.W. at 826); Acheson v. Acheson, 235 Wis. 610, 294 N.W. 6, 7 (1940) (holding that preference will normally be given to the mother for children of tender years).

48. Scolman v. Scolman, 66 Wis. 2d 761, 226 N.W.2d 388 (1975).

49. *Id*. at 390.

prevail.[50] This is a complete reversal from the 1873 holding in *Welch*, which stated that the inherent rights of the father would prevail as a tie-breaking mechanism.[51]

The years between the *Jenkins* and the *Scolman* decisions seem to show judicial support for the tender years approach, but hesitation was moving to the front of judicial concerns. Both the courts in *Bohn v. Bohn* and *Greenlee v. Greenlee* cited the tender years doctrine as coterminous with the best interest of the child.[52] *Greenlee* reiterated the proposition from *Bohn* that this is not a rule of law, but rather one consideration.[53]

What emerged from these later decisions was an emphasis on the best interest of the child standard.[54] The trouble in fully understanding the best interest of the child standard lies in the subjective nature of the statutory criteria,[55] as well as the court analogizing the standard with the tender years motherly presumption.[56] In other words, the courts held the belief that placement with the mother was, by default, in the best interest of the child.[57] Given this past, this may be a good indication why the courts have had trouble straying from the tender years maternal presumption.[58]

II. THE BEST INTEREST OF THE CHILD: THE CURRENT STATUTORY LANGUAGE AND CASE ANALYSIS COMPARED TO STATISTICAL RESULTS

Given the progression from a decision based on the inherent rights of the father to a maternal presumption, the term "best interest of the child" has

50. *Id*.

51. The *Welch* court explained an identical standard but the preference in the event of a tie went to the father. Welch v. Welch, 33 Wis. 534, 541 (1873). This comparison illustrates the courts' dramatic shift form decisions founded on the inherent rights of the father to decisions that equated the best interest of the child to being with the mother, better known as the tender years doctrine.

52. Greenlee v. Greenlee, 23 Wis. 2d 669, 127 N.W.2d 737, 740 (1964); Bohn v. Bohn, 16 Wis. 2d 258, 114 N.W.2d 423, 425 (1962).

53. *Greenlee*, 127 N.W.2d at 740. The trial court in *Greenlee* changed custody from the mother to the father. On its face, the decision seems to cut against the tender years doctrine. However, the custody was changed after the father remarried, indicating that a motherly figure was present in the father's home.

54. *See supra* Part I.B.

55. WIS. STAT. § 767.41(5)(am)1-16 (2011-12).

56. *See supra* Part I.B.

57. *See* discussion *supra* Part I.B.

58. *Pergolski v. Pergolski* further illustrates the uncertainty that surrounds the distinction between the best interest of the child standard and the maternal presumption. *See* Pergolski v. Pergolski, 143 Wis. 2d 166, 420 N.W.2d 414 (1988). The importance of *Pergolski* lies in the substantial distance between the year in which the case was decided, 1988, and when the courts appeared to distance themselves from the maternal presumption. *See* discussion *infra* Part II. The court held that there was no statutory violation in situations that awarded custody to the mother in situations of equality because other factors were considered. *Pergolski*, 420 N.W.2d at 416).

moved to the forefront in decision-making.[59] This gives hope that the courts have progressed to a standard in determining custody and placement decisions that emphasize what is truly important—the child and what is in his or her best interest. However, as foreshadowed in Part I, courts have struggled with distinguishing between the maternal presumption and the subjective nature of the best interest of the child standard. The two are often used interchangeably, as the statute offers little guidance or direction, and thus requires the judge to draw on his or her own personal experiences or background to decide these unique situations.[60]

A. Wisconsin's Statutory Interpretation of The Best Interest of The Child Standard

Custody and placement decisions, whether stemming from paternity or divorce, have been shown to be some of the most trying times in a child's life.[61] Courts have sought to apply the best interest of the child standard in an effort to mitigate these adverse effects.[62] Wisconsin, in particular, has laid out a set of factors that a court should consider when making custody and placement decisions.[63] The current language states:

> [I]n determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. The court may not prefer one parent or potential custodian over the other on the basis of the sex or race of the parent or potential custodian.[64]

Wisconsin statute § 767.51(5)(am) lists sixteen enumerated factors for the court to consider. These include such considerations as: the wishes of the child, the relationship of the child with his or her parents or siblings, the amount of time each parent has spent with the child, the child's need to adjust to the community, and the age and health[65] of the child.[66] Other factors include

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59. *See* WIS. STAT. § 767.41(5)(am)(2011-12) (listing the sixteen factors a court must use in determining custody and placement decisions).

60. *See supra* Part I.B; *see also* discussion *infra* Part IV.

61. Miller, *supra* note 26, at 351.

62. *Id*. at 352.

63. *See* Children's Bureau, *Determining the Best Interests of the Child*, U.S. CHILD WELFARE INFO. GATEWAY (Nov. 2011), 3, https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf#Page=2&view=Fit (noting that twenty one states and the District of Columbia had listed factors for courts to consider when determining the best interest of the child standard); *see also supra* note 59.

64. WIS. STAT. § 767.41(5)(am)(2011-12).

65. This included physical, mental, and emotional health considerations. *See* WIS. STAT. § 767.41(5)(am)(7).

66. WIS. STAT. § 767.41(5)(am) (2011-12).

predictability and stability considerations, and the party's relationship with and ability to support the child.[67]

Though the statute's purpose seems easy to understand, its application has proved quite difficult.[68] While the statutory criteria offer some objective determinations,[69] the majority of the provisions are subjective and thus offer little guidance to the decision-makers.[70] Adding to this lack of direction, the statute is void of any indication of priority or importance for weighing the factors.[71] Furthermore, the statute adds that a court may consider any other element that it determines to be relevant.[72] This provision essentially allows the court to consider any and all of the statutory factors, and gives judicial decision-makers the opportunity to mask decisions based on sex with anything they may find relevant. A closer look at court decisions will provide a better understanding of how courts have interpreted the statute, and more importantly the enumerated factors they are to consider.

Scolman hinted that custody and placement decisions based on sex alone do not satisfy the statutory requirement.[73] Yet *Scolman's* hesitation to depart from the motherly presumption was exhibited by the court's analysis, which demonstrated that all things being equal, the mother would prevail.[74] Two weeks after *Scolman*, *Kraemer v. Kraemer* departed further from the motherly presumption.[75] The mother was awarded custody but the trial court failed to explain the reasoning behind its decision.[76] On review, the Supreme Court acknowledged the vast amount of discretion courts have in making custody decisions,[77] but reiterated that sex *alone* cannot be the basis of these decisions.[78] Rather, custody decisions should be based on the best interest of the child.[79]

Scolman and *Kraemer* did little to define the best interest of the child standard, and the question still remained whether the court could consider sex

67. *Id.*

68. *See infra* Part II.B.

69. WIS. STAT. § 767.41(5)(am)(9) (2011-12) (allowing consideration for custody and placement decisions based on the availability of public or private child care services).

70. WIS. STAT. § 767.41(5)(am)(4) (2011-12) (allowing consideration for the amount of quality time each parent spent with the child); *see also infra* Part IV.

71. WIS. STAT. § 767.41(5)(am) (2011-12); *see also infra* Part IV.

72. WIS. STAT. § 767.41(5)(am)(16) (2011-12).

73. S*ee* Scolman v. Scolman, 66 Wis. 2d 761, 226 N.W.2d 388 (1975) (holding that all things equal in custody decisions, the mother shall prevail); s*ee also supra* Part I.B.

74. *Scolman*, 226 N.W.2d at 391.

75. Kraemer v. Kraemer, 67 Wis. 2d 319, 227 N.W.2d 61 (1975) (lacking any language indicating approval of the test pronounced in *Scolman*: all things being equal, the mother prevails, *Scolman*, 226 N.W.2d at 391).

76. *Id.* at 62.

77. *Id.*

78. *Id.*

79. *Id.*

at all in paternity and custody decisions.[80] The trouble in both understanding and trying to answer this question lies in the subjective standard and the court's broad discretion in deciding these matters.[81] *Johnson* illustrates tension between decisions based on the sex of the parent, and the wide degree of discretion courts have in deciding custody and placement disputes.[82] In *Johnson*, the mother was awarded custody by the lower court.[83] However, the trial court, in its broad discretion, found it in the best interest of the children to have the father responsible for all medical decisions, decisions typically assigned to the custodial parent.[84] The court rationalized its decision to grant physical custody to the mother, while allowing limited decision-making authority to the father, based on the fact that he was a pediatrician and "was concerned with the welfare of his children."[85] It is hard to reconcile the best interest determination in *Johnson*. The discretion created a disconnect; although it was in the best interest of the children to be with the mother, medically, the father knew best.

The subjective nature of nearly all sixteen criteria grants the trial courts a vast amount of power when deciding what is, and what is not in the best interest of the child.[86] However, the true depth of the court's discretion is found under Wisconsin statute § 767.41(5)(am)(16), stating that a court can consider any factors relevant to the particular situation.[87] Reviewing courts will uphold the discretionary determinations of the lower courts as long as the relevant facts are considered as *applied to the current standard of law*.[88] Therefore, when we consider the current statutory standard that directs the court's considerations,[89] it becomes clear that the current statutory language may not be as gender-neutral or truly based on the best interest of the child as initially led to believe.[90]

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80. *See Scolman*, 226 N.W.2d at 391 (holding that sex *alone* cannot be the sole consideration in custody determinations) (emphasis added); *Kraemer*, 227 N.W.2d at 62 (citing *Scolman* for the principle that sex *alone* cannot be the sole consideration).

81. *See* Kuesel v. Kuesel, 74 Wis. 2d 636, 247 N.W.2d 72, 73 (1976) (holding that the public interest in promoting the best interest of the child is the dominant factor, and for that reason, the deciding court has a wide degree of discretion when considering what is and what is not in the best interest of the child).

82. *See* Johnson v. Johnson, 78 Wis. 2d 137, 254 N.W.2d 198 (1977).

83. *Id.*

84. *Id.* (adding that the mother could only make medical decisions in emergency situations or to deal with minor matters).

85. *Id.*

86. *See* WIS. STAT. § 767.41(5)(am)(1)-(16) (2011-12) (listing the factors that a court must consider when attempting to determine what is in the best interest of the child).

87. WIS. STAT. § 767.41(5)(am)(16) (2011-12).

88. *See* Gooberville v. Gooberville, 2005 WI App 58, ¶ 3, 280 Wis. 2d 405, 694 N.W2d 503 (stating that a lower court does not need to "exhaustively analyze each piece of evidence, but it must articulate its findings and reasoning").

89. *See* WIS. STAT. § 767.41(5)(am) (2011-12).

90. *See infra* Part II.B.

B. The Best Interest of the Child: The Current Standard and Its Operation on the Ground

The best interest of the child standard has shifted dramatically from one extreme to another throughout history in Wisconsin.[91] Initially, courts were concerned with protecting the father's inherent right to custody and placement of the children,[92] followed by equating the care and love of the mother with the best interest of the child.[93] At first blush, the current statutory language[94] seems to create a standard that has eliminated the ability of the court to base its decisions on either the inherent right of the father to custody or a tender years motherly presumption.[95] However, the subjective nature of the language, coupled with the discretion granted to the courts, foreshadows what is really happening in today's custody and placement decisions.[96] Statistically, the current best interest of the child standard is left by the wayside,[97] replaced by the court's unwillingness to depart from the maternal presumption.[98]

A look at the types of situations which require court intervention and application of the best interest of the child standard will help to better understand how the standard is applied.[99] Court intervention and application of the best interest of the child standard typically occurs in divorce or paternity proceedings or even custody/placement modification requests.[100] With a decrease in marriage,[101] the acceptance of alternative relationships (e.g., both single and same-sex parents),[102] and an increase in divorce rates overall,[103] courts are faced with deciding these issues more than ever before. Additionally,

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91. *Compare* discussion of custody decisions based on the inherent rights of the father *supra* Part I.A, *with* discussion of custody decisions based on a tender years maternal presumption *supra* Part I.B.

92. *See supra* Part I.A.

93. *See supra* Part I.B.

94. *See supra* Part II.A (looking at court decisions and the interplay between the attempt to distance itself from a maternal presumption and the attempt to apply an independent best interest of the child standard).

95. *See* WIS. STAT. § 767.41(5)(am) (2011-12) (stating that a court *may* not prefer one parent over the other on the basis of the sex or race of the parent); *see also* discussion *supra* Part II.A.

96. *See infra* Part II.B.

97. *Id.*

98. *See supra* Part I.B.

99. *See* Cook & Brown, *supra* note 1, at 6; *see also* WISCONSIN MARRIAGE & DIVORCES, *supra* note 11.

100. *See infra* Part II.B.

101. *See* Shahar Lifshitz, *The Liberal Transformation of Spousal Law: Past, Present and Future*, 13 THEORETICAL INQUIRIES L. 15, 21 (2012); *see also* WISCONSIN MARRIAGE & DIVORCES, *supra* note 11.

102. Lifshitz, *supra* note 101, at 21.

103. WISCONSIN MARRIAGE & DIVORCES, *supra* note 11.

given the ease with which parents can file,[104] divorce has become one of the most familiar events in recent years, with paternity decisions being another.[105]

Many of the statutory limitations historically associated with divorce have been removed over the past century.[106] As a result of the ease with which divorces can be obtained, the number of first-time marriages that end in divorce have increased in the recent half-century to nearly 50%.[107] Furthermore, in Wisconsin, 54% of *all* divorce cases involve families with children under the age of eighteen.[108] That is not to say that 50% of all divorces involve custody disputes, but rather, highlights the prevalence of custody disputes in modern society.[109]

Divorce carries with it the potential to be one of the most trying times in a parent's life, but more importantly, these decisions adversely impact the children involved.[110] Given the adversity on the children, this underscores the need for courts to apply a standard that is truly in the child's best interest. These adversities can be attributed to three factors or characteristics common in divorce situations.[111] These include: (1) instability in family life, (2) inter-parental conflict, and (3) ineffective parenting.[112] Studies have shown that children who have experienced the divorce process are faced with significant increases in adversity and difficulties adjusting to life after the divorce as a result.[113] Adverse effects may include significant psychological impairments.[114]

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104. *See* Gruber, *supra* note 2, at 803-04.

105. Cook & Brown, *supra* note 99, at 11-12; *see also* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE U.S., *International Statistics*, at 840 tbl.1334 (2011).

106. *See* WIS. STAT. § 767.315 (describing the grounds for granting a divorce); Lifshitz, supra note 101, at 20.

107. Casey E. Copen, Kimberly Daniels, Jonathan Vespa, William D. Mosher, *First Marriages in the United States: Data from the 2006–2010 National Survey of Family Growth*, 49 NAT'L HEALTH STAT. REP. 1 (2012) (explaining that 50% of first time marriages end in divorce; *see also* Amato, *supra* note 3.

108. *See* WISCONSIN MARRIAGE & DIVORCES, *supra* note 101, at 5.

109. *Id.* (discussing the ratio of Wisconsin marriages to Wisconsin divorces was 1.8:1 in 2011, compared to 9.2:1, the same ratio of Wisconsin marriages to divorces from 1920); *see also* Diana B. Elliot & Tavia Simmons, *Marital Events of Americans: 2009*, U.S. CENSUS BUREAU (August 2011), 10, http://www.census.gov/prod/2011pubs/acs-13.pdf (noting that over 1.1 million children lived in the home of a parent that was divorced that same year).

110. *See* Lowery & Settle, *supra* note 2, at 455; *see also* Gruber, *supra* note 2, at 799; Megan Miller, *Marriage and Divorce*, 9 GEO. J. GENDER & L. 1017, 1028 (2008) (acknowledging the adverse effects divorce has on the children involved but also pointing out those effects may be caused by both the separation of the parents and the adversarial nature of the legal system).

111. Gruber, *supra* note 2, at 827-28; *see also* Cassandra Brown, *Ameliorating the Effects of Divorce on Children*, 22 22 J. AM. ACAD. MATRIM. LAW 461, 462 (2009); Miller, *supra* note 26, at 348.

112. *Gruber, supra* note 2, at 827-28.

113. Lowery & Settle, *supra* note 2, at 455; *see also* Wendy Jansen, Children and Divorce How Little We Know and How Far We Have to Go, MICH. BAR J., Sept. 2001, at 50, 51; Karen DeBord, *The Effects of Divorce on Children*, N.C. COOP. EXT. (1997), 2, http://www.ces.ncsu.edu/depts/fcs/pdfs/fcs471.pdf (discussing the adverse effects on children at different age groups).

Children may feel as if they have been rejected, and as a result, are faced with a greater risk for depression.[115] Depression can lead to a number of debilitating adversities, such as low self-esteem, anxiety, and an increased dependency on others.[116] These potential cognitive impairments are increased and become more severe in younger children.[117]

Not only do these adverse effects include psychological impairments and hurdles, they may also increase child delinquency.[118] At a young age, children are found to be more aggressive, anti-social, and even uncontrollable.[119] While the intensity of these adversities may be more severe in younger children, adolescents experience them as well and also face additional obstacles.[120] Adolescents are more likely to drop out of school, due to poor academic performance, lack of social skills, or depression.[121] Furthermore, divorce may increase the rate at which teens are sexually active and experiment with drugs and alcohol.[122] Consequently, these teens are also more likely to become pregnant at younger ages.[123]

Divorce clearly plays an important role in shaping the future for those children involved.[124] Divorce rates provide a better understanding of the potential exposure and adverse consequences these children face.[125] However, exploring marriage rates as well shall provide the necessary background to fully understand the need to minimize the adverse consequences by a proper application of the best interest of the child standard.[126]

In Wisconsin, the population married at a rate[127] of 8.4 out of every 1,000 people in 1920.[128] Although this rate fluctuated over the next ninety years, there

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114. Gruber, *supra* note 2, at 805.

115. *Id*.; *see also* David J. Miller, *supra* note 26, at 348-49.

116. Gruber, *supra* note 2, at 805; *see also* DeBord, *supra* note 113, at 2.

117. Lowery & Settle, *supra* note 110, at 457.

118. *See* Gruber, *supra* note 2, at 805.

119. See i*d*.

120. *See* Lowery & Settle, *supra* note 110, at 457; *see also* Gruber, *supra* note 2, at 805.

121. Gruber, *supra* note 2, at 805.

122. *Id*. (noting that there may be an overlap between delinquent and psychological adversities; as any of the delinquent behaviors that children of divorce exhibit can be attributed to psychological adversities, such as depression and a lack of self-esteem).

123. *Id.*

124. *See supra* Part II.B.

125. *See generally* WISCONSIN MARRIAGE & DIVORCES, *supra* note 11 (discussing both marriage and divorce statistics from 1920-2011).

126. *See supra* Part II.B (discussing the current statutory language and laying the foundation for the disconnect between the statutory language and the courts' interpretation of that language on the ground).

127. The rates of both marriage and divorce are in number of marriage/divorce per 1,000 total population, not the traditional 100%. For example, a rate of 8.4 in 1920, discussed above, is equal to .84% under the traditional approach.

128. *See* WISCONSIN MARRIAGE & DIVORCES, *supra* note 11, at 7, and accompanying text.

has been a steady decline starting in 1990.[129] In 2010, the rate fell to 5.3.[130] This trend extends nationally as well.[131] The national rate vacillated from 1920, with a marriage rate of 12.0, until around 1990, when it began to decline steadily.[132] In 2010, the most recent year for which data is available, the rate had fallen by almost 50%, to 6.8.[133]

An opposite trend can be seen in the rate of divorce for the same periods, as rates have steadily been on the rise. In Wisconsin during 1920, the divorce rate[134] was 0.9.[135] Contrary to the marriage rate, since 1920, the divorce rate has climbed, with few annual exceptions.[136] In 2010, the rate had increased over 300%, to 3.0.[137] Again, national divorce rates have mirrored this Wisconsin trend.[138] In 1920, the nation experienced a rate of divorce at 1.6 per 1,000, while in 2010, had climbed to 3.6.[139]

With the decreasing marriage rate and the increasing divorce rate, the potential for court determinations in custody and placement disputes grows. First, as marriages decline,[140] the population still grows. Society has become more accepting of unwed or same-sex parents,[141] which increase the potential for paternity adjudications with associated custody proceedings. Furthermore, as the divorce rate increases, the court is faced with a greater frequency of making custody decisions.

The increased potential for court intervention[142] and the adverse impacts involved,[143] from infants to adolescent, and from psychological to delinquent, illustrate the importance in protecting children from these harms. The best interest of the child standard is meant as a way to effectively minimize any

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129. *Id.*

130. *Id.*

131. *See generally* WISCONSIN MARRIAGE & DIVORCES, *supra* note 11 (comparing the Wisconsin rates (per 1000 total population) to the national rates).

132. *Id.*

133. *Id.*

134. The rate again is per 1,000 total population and not the traditional 100.

135. *See* WISCONSIN MARRIAGE & DIVORCES, *supra* note 11, at 12.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See supra* note 131 and accompanying population discussion.

141. Lifshitz, *supra* note 101, at 20.

142. *See supra* Part II.B.

143. It is important to note that, while this is not a comment on the adversities faced by children of divorced families, there are competing studies that argue that divorce does not adversely impact children. *See* Jui-Chung Allen Li, The Kids Are OK: Divorce and Children's Behavior Problems (RAND Corporation 2007), *available at* http://www.rand.org/pubs/working_papers/2007/RAND_WR4 89.pdf. This argument is based on the premise that that divorce is related to socioeconomic status, and the lower the status, the higher the divorce. *Id.* As a result, some of the adverse effects may be attributed to a child's socioeconomic status rather than the divorce itself. *Id; see also* Gruber, *supra* note 2, at 807-808. However, the overwhelming majority of studies agree with the summary of adversities discussed in this section. *See* discussion *supra* Part II.B.

traumatic effects a divorce may have on the children involved.[144] The standard is intended to allow the courts the opportunity to understand vastly differing situations, and seek to reduce the potential adverse effects in custody decisions.[145]

While it is important to note the history and the purpose underpinning the best interest of the child standard,[146] as well as why there may be an increased potential for court intervention and determination,[147] understanding how these cases are actually decided plays a larger role in showing the shortcomings of the current standard.[148] An examination of the statistical makeup of these decisions and their final outcomes will provide a look at how the best interest of the child standard operates on the ground.[149] This provides the best opportunity to evaluate the effectiveness of the court's application of the best interest of the child standard.

The statutory language and case analyses illustrate that sex should not be considered when making custody decisions;[150] rather both the mother and father are to have an equal right to custody.[151] However, there are studies throughout the United States detailing that in adjudicated custody cases, a mother prevails over 90% of the time, or that she is granted sole custody four times more than the father.[152] Statistics such as these are not rare, and although this percentage has certainly decreased,[153] there remains a substantial divide between the mother and father in custody and placement decisions. For example, in 1992 divorce cases, the mother was awarded sole physical custody between 71.9% and 74.6% of the time.[154] In contrast, the fathers, while theoretically afforded the same opportunity under the best interest of the child standard, were granted sole physical custody between 8.5% and 8.7% of the time.[155] Although the difference between maternal and paternal sole physical custody in divorce cases was reduced due to shared placement,[156] in 2001 the disparity remained

144. *See* Pfeifer v. Pfeifer, 62 Wis. 2d 417, 215 N.W.2d 419, 423 (1974) (addressing the best interest of the child standard in terms of custody modification).

145. *Id.*

146. *Id.*

147. *See supra* Part II.B.

148. *See* Matthew B. Firing, *In Whose Best Interests? Courts' Failure To Apply State Custodial Laws Equally Amongst Spouses And Its Constitutional Implications*, 20 QUINNIPIAC PROB. L.J. 223, 251 (2007); *see also* Cook & Brown, *supra* note 1.

149. *See* Cook & Brown, *supra* note 1.

150. *See* WIS. STAT. § 767.41(5)(am) (2011-12); *see also* discussion *supra* Part II.A

151. Firing, *supra* note 148, at 251.

152. *Id.* (citing State v. Watts, 350 N.Y.S.2d 285, 286 (N.Y. Fam. Ct. 1973)). Furthermore, in Virginia, which has a similar best interest of the child standard, over an eighteen-month period, no father was granted sole custody unless the mother had agreed to the father's custody ahead of time. *See id.*; *cf.* Children's Bureau, *supra* note 63, at 3.

153. *See supra* Part II.B.

154. *See* Cook & Brown, *supra* note 1, at 7, 9.

155. *Id.*

156. *Id.* (finding that in 1996 divorce cases, the mother was awarded sole custody between 59.2% and 63.1% of the time, while the father's rate was between 8.6% and 9.4%).

substantial—the court awarded sole physical custody to the mother nearly 59% of the time, compared to only 7.1% of the time to the father.[157]

While the disparate divorce results are certainly troubling, given the purpose of the best interest standard, the inequity is even more pronounced among unmarried individuals and the resulting paternity cases.[158] In 1992, sole physical custody was awarded to the mother 99% of the time, and the remaining 1% was shared. Thus, the father was never awarded sole physical custody.[159] Again, like the disparity in divorce rates, the motherly preference in paternity cases has decreased, but insignificantly. Mothers were granted sole physical custody in paternity decisions 97% of the time in 2001, fathers a miniscule 1%, and the remaining 2% were shared physical custody decisions.[160] Given the increased social acceptance of unwed parents[161] and the prevalence of divorce,[162] the vast disparity among custody and placement decisions in a system that is supposed to rely on the best interest standard rather than on gender should be cause for concern.

Courts have tried to justify these skewed results by simply stating that it is in the best interest of the child to be with the mother.[163] This response displays remnants of the maternal preference,[164] and the courts hesitation to depart from the doctrine. To properly apply a best interest of the child standard, we must explore *why* courts have had such trouble letting go of the motherly presumption, followed by alternatives to ensure that the potential adversity children and families face during these times are minimized.

III. A LOOK INTO THE POTENTIAL REASONING FOR THE COURT'S INABILITY TO DEPART FROM THE MOTHERLY PRESUMPTION

The cases[165] discussed in Part I and Part II are highlighted to show a shift in attitude; originating with the father, swinging to the mother, and finally arriving at a standard that seeks to make custody and placement decisions based on the best interest of the child.[166] However, the statistical trend illustrated in Part II.B stands in stark contrast to these cases and the statutory language.[167] The case decisions are useful to show the progression of custody and placement determinations, not necessarily to measure how far the progression has moved from a fatherly right, to a tender years mentality, and subsequently to a best

157. *Id.*

158. *See id*. at 13.

159. *Id.*

160. *Id.*

161. *See* Lifshitz, *supra* note 101, at 20.

162. *See* WISCONSIN MARRIAGE & DIVORCES, *supra* note 11, and accompanying text.

163. Firing, *supra* note 148, at 251.

164. *See supra* Part I.B.

165. *See generally In re* Goodenough, 19 Wis. 291, 296-98 (1865); Jenkins v. Jenkins, 173 Wis. 592, 181 N.W. 826 (1921); Acheson v. Acheson, 235 Wis. 610, 294 N.W. 6, 7 (1940); *see also supra* Part I for a discussion of the paternal and maternal presumptions.

166. *See infra* Parts I & II.A.

167. *See* WIS. STAT. § 767.41(5)(am) (2011-12) .

interest of the child standard. Given the reality of placement and custody decisions,[168] the statistics show a troubling sign that, although the statute specifically denounces decisions based on gender,[169] courts appear to have failed to adhere to such requirements.

There may be a number of reasons for judicial decision-makers' reluctance to depart from a tender years motherly presumption. The problem stems from the court's general inability to differentiate from the current best interest of the child standard and the tender years doctrine.[170] Deciphering this reluctance may shed light into not only the reasoning for keeping the tender years doctrine alive, but also possible solutions to move forward and make these decisions in the best interest of the children.

Gender plays one of the largest roles in trying to understand judges' inability to depart from the tender year motherly presumption.[171] The gender bias of judgeships in state courts is nearly as pronounced and uneven as custody decision decided in favor of the mother.[172] Nationally, in both the highest court of appeals and the intermediate level appellate divisions in state-level courts, women accounted for 32% of the judicial decision-makers.[173] However, when looking at the states' lowest court, the courts of general jurisdiction, one in four judges were women, only 25%.[174] More specifically, in Wisconsin, women account for only 16% of judges, a figure that falls well below the national average between 25% and 32%.[175]

Gender is pivotal because it may help to understand a judge's view of gender roles. A judge who is found to support a more traditional viewpoint of gender roles, is also likely to support adherence to a tender years motherly

168. *See supra* Part II.B.

169. *See* WIS. STAT. § 767.41(5)(am) (2011-12) (stating that the court may *not* prefer one parent over the other based on sex).

170. Leighton E. Stamps, *Age Differences Among Judges Regarding Maternal Preference in Child Custody Decisions*, 38 CT. REV. 18, Winter 2002, at18; *see also* Julie E. Artis, *supra* note 14, at 799.

171. *See* Artis, *supra* note 14, at 793.

172. *See supra* Part II.B; *see also 2012 Representation of United States State Court Women Judges*, NAT'L ASS'N. OF WOMEN JUDGES, http://www.nawj.org/us_state_court_statistics_2012.asp (last visited January 13, 2013) (citing THE AMERICAN BENCH: JUDGES OF THE NATION (2012 ed. 2012).

173. NAT'L ASS'N OF WOMEN JUDGES, *supra* note 172.

174. *Id.* It is important to note this distinction, as the lower courts typically decide many of the custody and placement decisions discussed.

175. *Id.* (explaining that Wisconsin has 42 female judges out of 264 total; four on the Supreme Court (57%), five on the Court of Appeals (31%), and 33 out of 241 on circuit courts (14%) throughout the state). While custody and placement decisions are not ordinarily decided on a federal level, it is worth noting that the disparity in the gender of the judicial makeup is not unique to state level courts. In fact, the disparity is even greater on a federal level. *See generally* Mark S. Hurwitz & Drew Noble Lanier, *Judicial Diversity in Federal Courts: A Historical and Empirical Exploration*, 96 JUDICATURE 76, 79 (2012). *See also* Susan M. Holden, *Diversity in the Profession: Is it Still an Issue?*, BENCH & BAR MINN., August 2005, at 5, available at http://www.mnbar.org/benchandbar/2005/aug05/prespg.htm (stating that of the total federal judgeships, women occupy only 15% of those positions).

presumption.[176] Males in general have a greater tendency to support and apply these more traditional views of gender roles,[177] and as a result, may be using their discretionary powers to apply the various subjective factors to grant placement to the mother.[178] Women judges, on the other hand, may hold a more egalitarian, gender-neutral approach.[179]

In addition to looking at the gender makeup of the court, age also may play an important factor in explaining why a judge adheres to the tender years motherly presumption.[180] In general, younger judges typically oppose the tender years doctrine and its application, while older judges are reluctant to take a child away from his or her mother.[181] Once again, this may be directly attributed and tied to the judges' view of gender roles, accepting a traditional perspective and equating the mother and the best interest of the child as one and the same. Furthermore, coupling age and gender together tends to show that one out of five female judges support the tender years doctrine.[182] In the same age group, three out of four male judges supported the motherly presumption in the tender years doctrine.[183]

These results support the same conclusion: courts may be unable to distinguish between the current, gender-neutral, best interest of the child standard and the foregone tender years motherly presumption denounced under current statutes.[184] The concern in the makeup of the court is then surrounded by the judge's view of gender roles. A more traditionally oriented judge may adhere to the motherly presumption; as a result, these judges do not necessarily look to validate the father in custody and placement decisions, but rather invalidate the mother before the father would be determined a better choice.[185] Custody rights of one's child should not be adversely affected by the age or gender of the judge. The judicial best interest determination needs to be one based on the parent-child dynamic, and not the judge's view of the parent-to-parent relationship.[186]

176. Artis, *supra* note 14, at 792 (explaining the difference between a traditional view of gender roles and one that is more egalitarian).

177. *Id.*

178. *E.g.*, WIS. STAT. § 767.51(5)(am) (2011-2012).

179. Artis, *supra* note 14, at 792.

180. *See* Stamps, *supra* note 170, at 22.

181. Artis, *supra* note 14, at 793 (explaining that over one-half (54%) of judges under the age of 50 years oppose the tender years doctrine as opposed to only a 25% opposition for those judges over the age of 50 years).

182. *Id.*

183. *Id.*

184. *Id.* at 799 (stating that many judges simply equate the best interest of the child standard and maternal custody as the same thing); Wis. Stat. § 767.41(5)(am) (2011-12).

185. Artis, *supra* note 14, at 786.

186. Firing, *supra* note 148, at 257-58.

IV. ALTERNATIVE DECISION-MAKING APPROACHES: GIVEN ITS HISTORY, THE COURTS MAY NOT BE EQUIPPED TO PROPERLY APPLY THE BEST INTEREST OF THE CHILD STANDARD

In theory, courts have been afforded a great deal of discretion when applying the best interest of the child standard[187] in an effort to make the standard more flexible.[188] However, history has shown a judicial inability to depart from a tender years motherly presumption.[189] This, coupled with the current judicial makeup,[190] makes it nearly impossible to evaluate what is truly in the best interest of the child.[191] Unlike most proceedings that involve a retrospective approach, custody and placement decisions and application of a best interest of the child standard require the court to predict the future.[192]

The court is ill-equipped to tackle such a task, and the resulting outcomes are speculative at best. The best interest of the child standard is too subjective, offering no indication of priority or importance.[193] As a result, judges are asked to make these decisions on personal presumptions, predictions, and often on imperfect information.

Furthermore, without objective determinants for parents to use and understand, it is nearly impossible to gauge the outcome of any custody and placement decisions.[194] Because of the lack of certainty or predictability found in the best interest of the child standard, the adversarial nature of the system then takes over.[195] Faced with uncertainty, parents believe the only way to prevail is to attack the character and abilities of the other party.[196] This certainly does not allow the court to properly understand and evaluate what is truly in the best interest of the child.

The best interest of the child standard was meant to shift the courts' decision-making criteria away from the gender of the parents: away from a

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187. *See* WIS. STAT. § 767.41(5)(am)1–16 (2011-12).

188. *See* Bernd Walter, Janine Alison Isenegger & Nicholas Bala, *"Best Interests" In Child Protection Proceedings: Implications and Alternatives*, 12 CAN. J. FAM. L. 367, 381 (1995).

189. *See supra* Part II.

190. *See supra* Part III; *see also* Stamps, *supra* note 170, at 22 (discussing that without objective direction, judges are left to decide the best interest of the child standard by their own family experiences and their own childhood).

191. Walter, Isenegger & Bala, *supra* note 188, at 377.

192. *Id.* at 378.

193. Richard A. Warshak, *Parenting By the Clock: The Best-Interest-Of-The-Child Standard, Judicial Discretion, and the American Law Institutes "Approximation Rule,"* 41 U. BALT. L. REV. 83, 102 (2012).

194. *Id.* at 102, 104; *see also* discussion *supra* Part II.B (explaining the statistical trend in custody and placement decision – there may be predictable outcomes stemming from adherence to the tender years motherly presumption, but not from the criteria enumerated under WIS. STAT. § 767.41(5)(am)(2011-12)).

195. *See* Ben Barlow, *Divorce Child Custody Mediation: In Order To Form A More Perfect Disunion?* 52 CLEV. ST. L. REV. 499, 499, 517 (2005) (offering alternative resolution vehicles to lessen the adverse affects divorce has on the children involved).

196. Warshak, *supra* note 193, at 104.

paternal right or motherly presumption.[197] However, given the unpredictability of the application of this standard, focus has once again shifted, but now it has shifted away from protecting the children.[198] The focus needs to be realigned and returned to a best interest of the child standard that is meant to prioritize and protect the rights of the child, and prevent the adverse effects that divorce may have on them.[199] However, if the determination is left in the court's hands, the best interest of the child standard may in fact create an inability to decide these cases with the children and their best interests in mind.

To move forward, alternatives must take into account the shortcomings of the current system and standard. The court, with its inherent retrospective look, must acknowledge the inability to predict the future.[200] Furthermore, the nature of these decisions requires any decision-making body to understand and supervise interpersonal relationships.[201] The question then becomes: is the court currently equipped to do so?

A. Creating a 50/50 Presumption in Custody and Placement Decisions: The Good and the Bad

A number of alternatives exist that might better fulfill the purpose and intent behind the best interest of the child standard. One such alternative that has gained substantial attention is one that creates a presumption of joint custody and placement.[202] The goal of this, or any alternative, would be to replace the discretionary best interest of the child standard with a bright-line rule.[203] Here, a presumption of an equal 50/50 split would replace the need of a court to evaluate the best interest of the child. This would allow for a relationship to be fostered with both parents. As previously mentioned, shared placement and time with both parents has been shown to potentially limit the adverse effects divorce may have, and therefore be in the best interest of the child.[204] Not only does such a presumption create predictability, but it may also eliminate the ongoing maternal bias in custody and placement decisions.[205] The

197. *See supra* Part I & Part II.

198. *See* Max F. Gruenberg, Jr. & Robert D. Mackey, *A New Direction for Child Custody in Alaska*, 6 ALASKA L. REV. 34, 35 (1977) (explaining that a best interest of the child standard without objective direction may create a situation where the focus is not on the best interest of the child, but rather on the inadequacies of the parents).

199. *Id.*; *see also* Lowery & Settle, *supra* note 2, at 457.

200. Gruenberg & Mackey, *supra* note 198, at 39.

201. *Id.*

202. Warshak, *supra* note 193, at 111. It is worth noting that the article offers other alternatives as well, such as continuing a maternal presumption or a primary caretaker presumption. The problem then lies in the court's ability, or inability, to create a suitable definition of "caretaker." The same problems then arise with unpredictability and subjective judicial application as in the current best interest of the child standard.

203. *Id.* at 112 (noting that reform is not as a result of distrusting the courts with such discretion, but rather people are unsettled and upset with the results). *See* discussion *supra* Part II.B on results of current custody and placement decisions.

204. *See* Miller, *supra* note 110, at 1028; *see also* Cook & Brown, *supra* note 1, at 5.

205. Warshak, *supra* note 193, at 111.

hostile adversarial process that shifted the focus from the best interest of the child to the shortcomings of either parent is eliminated, and the process is able to protect the rights of both parents.[206] Finally, from an administrative standpoint, court congestion and costs for all involved would be greatly reduced.[207]

Wisconsin sought to enact such a presumption. In 2011, Assembly Bill 54 was introduced, seeking to equalize placement in custody decisions.[208] The bill would have required the courts to only deviate from the presumption by announcing its reasoning, found by clear and convincing evidence.[209] However, the bill failed to pass.[210] Critics stated that the current statute allows for a decision based on "child focused" factors that are integral to the interest of the child.[211] Furthermore, critics argue that, because these cases arose mainly out of divorce, the level of cooperation required by both parents in a 50/50 presumption standard is unworkable in practice, and would require divorced parents to remain in close proximity after divorce.[212]

However, the flexibility and discretion found in the current best interest of the child standard has led to many of its shortcomings.[213] Therefore, arguing that Assembly Bill 54's 50/50 presumption is inadequate because the statute allows the courts the needed flexibility to meet the needs of a family's circumstances[214] is an implausible justification to maintain the current best interest of the child standard.[215] The subjective, flexible nature of the current factors a court may take into consideration when determining what is in the best interest may shift the focus from the child.[216] As a result, many of these decisions are no longer based on what is best of the child, but rather on some outside factor, such as the parents' gender or judicial backgrounds and beliefs.[217]

B. Additional Alternatives - A Rebuttable Presumption: The Middle Ground to Safeguard the Best Interests of the Child are the Proper

206. *Id*.

207. *Id.*

208. *See* Assemb. B. 54, 2011-2012 Sess. (Wis. 2011); *see also* State Bar of Wisconsin, *Final Legislative Report: 2011-2012 Legislative Session* 25 (2013) [hereinafter *Final Legis. Rep*.]. Assembly Bill 211 was introduced May 17, 2013 and would seek to create a rebuttable statutory presumption that equal physical placement was in the child's best interest. *See* Assemb. B. 211, 2013-2014 Sess. (Wis. 2013). No further action has been taken on this measure. *Id.*

209. Assemb. B. 54, 2011-2012 Reg. Sess. (Wis. 2011).

210. Assemb. B. 54, 2011-2012 Reg. Sess. (Wis. 2011).

211. *See Final Legis. Rep.*, *supra* note 208, at 26.

212. Warshak, *supra* note 193, at 111.

213. *See* Walter, Isenegger & Bala, *supra* note 188, at 381; *see also* discussion *supra* Part IV.

214. *See* WIS. STAT. § 767.41(5)(am) (2011-12).

215. *See Final Legis. Rep.*, *supra* note 208, at 26.

216. *See supra* Part III-IV.A

217. *See supra* Parts I-III.

Determinants in Custody and Placement Decisions

Understanding that the court may not be in the best position to depart from a tender years maternal presumption and sufficiently protect the best interest of the child, it is necessary to properly address the problem.[218] Creating a more objective, rebuttable presumption may improve the shortcomings in the court's ability to properly assess the best interest of the child standard.[219] Given the statistical history[220] and the subjective nature of the current best interest of the child standard, it is likely that a number of decisions do not consider what is truly in the best interest of the child involved. A rebuttable presumption would also protect the flexibility needed to apply to a number of differing family situations and dynamics.[221]

A 50/50 presumption in placement is not the only alternative for potentially eliminating a maternal preference and ensuring the outcomes are based on the best interest of the child. Mandatory mediation, for example, seeks to reduce the adversarial nature of custody and placement determination in an effort to reduce negative effects court proceedings may have on the children involved.[222]

The adversarial nature of the proceedings turns custody and placement decisions into "property" fights over the children.[223] From the onset, this equates the child to a piece of property, rather than a person whose physical and emotional wellbeing are supposed to outweigh all other considerations.[224] The volatility and hostility contained in these adversarial processes make out-of-court settlements virtually impossible.[225]

Mandatory mediation, in an effort to reduce the adversarial nature of these proceedings and in turn limit the adverse effects they may have on the children involved, works towards a facilitated interaction between the parents.[226] Participation in mediation depends greatly on the motives behind the dispute and decisions sought to be answered.[227] Therefore, for an effective and successful mediation process, the motives spurring mediation need to be the

218. *See* Stamps, *supra* note 169, at 22.

219. Warshak, *supra* note 193, at 112.

220. *See* discussion *supra* Part II.B on custody and placement decisions favoring the mother.

221. *See Final Legis. Rep.*, *supra* note 208, at 26.

222. *See* Ben Barlow, *Divorce Child Custody Mediation: In Order To Form A More Perfect Disunion?* 52 CLEV. ST. L. REV. 499, 510 (2005) (noting that the adverse effects, either from divorce or the legal process, may be greater in an adversarial setting).

223. *See* Gruenberg & Mackey, *supra* note 198, at 35.

224. *Id.*; *see also* WIS. STAT. § 767.41(5)(am) (2011-12).

225. *See* Warshak, *supra* note 193, at 102 (noting that there may be less out of court resolution due to the adversarial process, but also that parents seek to engage in strategic bargaining or prolonged litigation in an effort to show that they are somehow the better option, all to the detriment of the children involved).

226. *See* Barlow, *supra* note , 222 at 503.

227. *Id.* at 504.

children and limiting any adverse effect, and not the parents pitted against one another, as in an adversarial court proceeding.[228]

Shifting this focus away from the parents and rightly to the children should be a priority in any decision-making body or process. After all, the statute seeks to protect the best interest of the child, not the better interest of either parent. Both the presumptive 50/50 placement or mandatory mediation seek to reduce the hostility commonly found in these proceedings,[229] and in turn, allowing the focus to be on the best interest of the child, rather than the parents.[230]

CONCLUSION

While it is unclear what alternative would better serve the interest of protecting children involved in custody and placement decisions, what is certain is that change is needed. The current best interest of the child standard, while enacted to shift from a tender years motherly presumption to one more focused on the interest of the children, does not allow a court to adequately determine what would be best for the child. By subjective evaluation, the judge is offered little guidance or direction about importance or priority concerning any of the sixteen enumerated factors found in the statute. Rather, the statute requires the judge to draw on his or her own subjective beliefs for evaluations and to predict the future. In turn, given the current judicial makeup, the tender years motherly presumption, while denounced in the statute, remains a constant in today's custody and placement decisions. Under the current standard, the court has shown its inability to decide these cases based on the best interest of the child. Change is needed to ensure that the best interest of the children is the guiding light; limiting any of the adverse effects the adversarial process may inflict, and protecting not only the rights of the children, but also ensuring equal treatment and protecting the rights of both parents involved.

228. Miller, *supra* n. 110, at 1028-29.

229. *See* Miller, *supra* note 110, at 1028-29 (explaining that, while it is uncertain whether a child's adverse affects stem from the divorce or the adversarial proceedings, reducing such affects through mediation is in the best interest of the child).

230. Warshak, *supra* note 193, at 111.