In the Interest of a Child: A Comparative Look at the Treatment of Children Under Wisconsin and Minnesota Custody Statutes

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IN THE INTEREST OF A CHILD: 
A COMPARATIVE LOOK AT THE 
TREATMENT OF CHILDREN UNDER 
WISCONSIN AND MINNESOTA CUSTODY 
STATUTES 

THOMAS J. WALSH* 

Perhaps the best course is to try to distinguish them... to examine how they differ from one another and which is to be preferred.¹  

I. INTRODUCTION 

In the Book of Kings, King Solomon must decide who will be awarded custody of an infant. Rather than turning to a statute book to determine which was to be preferred, his first request was, "Get me a sword."² He then announced that he would "[c]ut the living child in two, and give half to one woman and half to the other."³ When the biological mother protested and was willing to give up her child on the condition that the baby's life be spared, the king gave his custodial judgment, "'Give the first one the living child! By no means kill it, for she is the mother.'... When all Israel heard the judgment the king had given, they were in awe of him, because they saw that the king had in him the wisdom of God for giving judgment."⁴ 

While the methods used and factors considered by King Solomon are somewhat shocking, the problem remains the same in today's family courts—how to decide the best living arrangements for children in divided families. Judges today, unlike King Solomon, may be required to consider a more lengthy list of factors when deciding custody, but the methods that each judge uses in applying them remain as diverse as the number of judges themselves. 

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2. 1 Kings 3:24 (The New American).  
3. 1 Kings 3:25.  
When analyzing the strengths and weaknesses of a statutory system and the methodology used in applying that system, a comparison to another system for a point of reference is helpful in order to distinguish them and determine which is to be preferred. This Article will examine the child custody and placement statutes of Wisconsin and Minnesota. While these states have a history of producing similar legislation, they have some marked differences in the area of child custody and placement. The comparison of these two systems will facilitate a better understanding of the strengths and weaknesses of each system.

This Article will examine the history of custody and placement in the United States generally and then specifically in Wisconsin and Minnesota. Next, the Article will compare the specific custodial factors that Wisconsin and Minnesota family court judges currently have to consider when making a custody decision. Finally, based upon this comparison, this Article will discuss the concept of parenting plans, which can be viewed as the next progressive step in the development of methods to resolve custody and placement disputes. This discussion will also include recommendations for changes in the custodial statutes of each state.

II. HISTORICAL PERSPECTIVE

A. The Common Law

King Solomon's resolution of a custody dispute between two individuals in ancient Israel may be one of the first recorded accounts of a dispute over children being decided in a public forum. Yet, married couples have been getting divorced for as long as they have been getting married.\(^5\) Divorce was recognized as far back as the Code of Hammurabi in 2100 B.C., the Assyrian Code of Ashur in 1100 B.C., the Hebrew Code in 600 B.C., the Egyptian Code of 300 B.C., and under Roman law.\(^6\)

Given that the United States's legal system is generally based upon the common law model of Great Britain, it is no surprise that early child custody laws in the United States were based upon the common law principles set forth in that country. Under early Anglo-Saxon law, a wife was free to leave a marriage and take her children and one-half of

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6. *Id.*
the property with her. However, the situation changed upon the rise of the feudal order and the power of the church. For approximately 900 years, the subordination of mothers prevailed in the English family law system. The husband had almost absolute control over his children and the mother almost no control. As an extension of this control, the husband and father also possessed the lion's share of the rights upon dissolution of the marriage. In the realm of child custody, English law viewed children as possessions of the father and thus custody of those children was the absolute right of the father irrespective of the child's best interests. The father supported the children and they were considered his property. As a result, when the marriage split up, he was entitled to his children's services. Moreover, because the mother was also considered the property of the father, she was not even entitled to visitation rights. This control continued as long as the feudal system remained and came to the United States when the colonies were founded.

In the United States, custody theory seems to have developed in three stages. The first stage is represented by a legislative and judicial preference for the father in custody cases. The second stage is represented by a swing in favor of the mother. This stage led to the development of what was subsequently called the "tender years" doctrine or the "mothers love" preference. The final stage, which also has various developmental substages of its own, is focused upon the abolition of preferences and the creation of a set of "factors" by which a court analyzes the "best interests of the child."

7. Henry H. Foster & Doris Freed, Life With Father: 1978, 11 FAM. L.Q. 321, 321 (1978) (citing Dooms of Aethelbert, Nos. 79–81, reprinted in I ANCIENT LAWS AND INSTITUTIONS OF ENGLAND (1840) ("[I]f she wish to go away with her children, let her have half of the property. If the husband wish to have them, (let her portion be) as one child. If she bears no child, let paternal kindred have the 'fich' and the 'morgengyfe.'").
8. Foster & Freed, supra note 7, at 321.
9. Id.
13. Id. n.14.
15. See Foster & Freed, supra note 7, at 321–22.
16. See infra notes 17–27 and accompanying text for a discussion of these stages.
The common law preference for the father, adopted from England, continued in the United States until the late nineteenth or early twentieth century. In *Chapsky v. Wood*, the Kansas Supreme Court clearly articulated the common law rule which prevailed in the United States:

The father is the natural guardian and is *prima facie* entitled to the custody of his minor child. This right springs from two sources: one is, that [it is] he who brings a child, . . . into life . . . ; the other reason is, that it is a law of nature that the affection which springs from such a relation as that is stronger and more potent than any which springs from any other human relation.

The late nineteenth to early twentieth century saw a shift away from the paternal presumption in custody cases. At that time, the courts generally started to express the notion that the best interests of the child should be of paramount importance when deciding custody. However, while this became the stated standard, in reality, there was a shift in focus from a presumption favoring the father to the diametrically opposed presumption in favor of the mother. In *Ullman v. Ullman*, the Supreme Court of New York, Appellate Division, expressed this new preference. It stated that "[t]he child at tender age is entitled to have such care, love, and discipline as only a good and devoted mother can usually give."

Since the later part of the nineteenth century, the courts in the United States have started to express the notion that the predominant factor in deciding custody is the best interests of the child. It is generally accepted that the best interests of the child standard was formulated in

17. Lewis Kapner, *Joint Custody and Shared Parental Responsibility: An Examination of Approaches in Wisconsin and Florida*, 66 MARQ. L. REV. 673, 679 (1983). There is no absolute ending date for the presumption in favor of the father. The process appears to be more of a slow evolution rather than precise date. Thus, throughout this Article, citations to different cases will reflect the various presumptions still in effect in one location while a different location may have evolved into the next stage.

18. 26 Kan. 650 (1881).

19. Kapner, *supra* note 17, at 679–80 (alterations in original) (quoting Chapsky v. Wood, 26 Kan. 650, 652 (1881)); see also Commonwealth v. Briggs, 33 Mass. (16 Pick.) 203, 205 (1834) (noting that while the good of the child is the predominant consideration, "the Court will feel bound to restore the custody, where the law has placed it, with the father, unless in a clear and strong case of unfitness on his part to have such custody").


21. *Id.* at 1083.
two separate cases.\textsuperscript{22} As indicated above, in the case of \textit{Chapsky v. Wood},\textsuperscript{23} the Kansas Supreme Court clearly articulated the "father oriented" standard that prevailed at that time. Nevertheless, that court rejected the view that parent's rights were the most important focus in a custody dispute and indicated that the best interests of the child were the proper focus.\textsuperscript{24} Justice Brewer wrote the opinion of the court\textsuperscript{25} prior to his appointment to the United States Supreme Court. In 1925, Judge Cardozo reiterated this position:

The chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as \textit{parens patriae} to do what is best for the interest of the child.\textsuperscript{26}

The influence of the best interests of the child standard continued to grow in prominence throughout the United States as the twentieth century progressed. However, it was not until the presumption favoring the mother was subsumed that the child's best interests became the exclusive focus. Currently, most states have statutes that either specifically require a determination of the child's best interests by the family court or have a case law based analysis focused on the child's needs and welfare.\textsuperscript{27}

\textbf{B. Wisconsin}

The common law view favoring the father also prevailed in the State of Wisconsin and is evidenced by the statements of the Wisconsin Supreme Court in the case of \textit{In re Stillman Goodenough}.\textsuperscript{28} In \textit{Goodenough}, the court reiterated the prevailing custodial rule: "[T]he father has a legal and paramount right to the custody and services of his

\begin{itemize}
  \item \textsuperscript{22} See Ralph J. Podell et al., \textit{Custody—To Which Parent?}, 56 MARQ. L. REV. 51, 51–52 (1972) (noting that the best interest standard was formulated by Justice Brewer in \textit{Chapsky}, 26 Kan. 650 and by Justice Cardozo in \textit{Finlay v. Finlay}, 240 N.Y. 429 (1925)).
  \item \textsuperscript{23} 26 Kan. 650.
  \item \textsuperscript{24} \textit{Id.} at 652.
  \item \textsuperscript{25} \textit{Id.} at 654.
  \item \textsuperscript{26} \textit{Finlay}, 240 N.Y. at 433.
  \item \textsuperscript{28} 19 Wis. 274 (1865).
\end{itemize}
child." In fact, the Wisconsin statutory scheme governing placement of children in divorce situations reflected this common law view. That statute indicated:

The father of the minor, if living, and in case of his decease, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the custody of the person of the minor, and to the care of his education. In 1921, the Wisconsin statutory presumption favoring the father was eliminated.

Despite the statutory presumption in favor of the father, in the late nineteenth century, a new and contrary presumption began to develop in the case law. This presumption, often called the tender years presumption or the mother's love preference, started to develop in the last decade of the 1800s. In Johnston v. Johnston, the tilt of the balance toward the maternal preference is evidenced. "Strong natural affection of a devoted mother living an industrious and reputable life, though she be in straitened circumstances, is a very sufficient assurance that she will tenderly care for and properly nurture and educate her children." This presumption seemed to hit its zenith in Jenkins v. Jenkins. In that case, the court stated:

29. Id.
30. 1858 Wis. Laws ch. 112, § 5.
32. When determining custody, section 3964 of the Wisconsin Session Laws in 1921 indicated that the court should consider:

The father and mother of the minor, if living together, and if living apart then either as the court may determine for the best interests of the minor, and in case of the death of either parent the survivor thereof, being themselves respectively competent to transact their own business and not otherwise unsuitable, shall be entitled to the custody of the person of the minor, and to the care of his education. 1921 Wis. Laws § 3964.
33. See infra notes 34-40 and accompanying text.
34. 89 Wis. 416, 62 N.W. 181 (1895).
35. Id. at 420, 62 N.W. at 182.
36. 173 Wis. 592, 181 N.W. 826 (1921).
For a boy of such tender years nothing can be an adequate substitute for mother love—for that constant ministration required during the period of nurture that only a mother can give because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love. She alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood in this respect is fundamental and the law should recognize it unless offset by undesirable traits in the mother. Here we have none so far as mother love is concerned.37

However, this preference for the mother never reached the level of a statutory requirement.38 Rather, the tender years doctrine simply remained a case law guideline.39 In fact, between 1921 and 1971, the Wisconsin statutory scheme regarding custody after divorce simply indicated that the "court may make such further provisions therein as it deems just and reasonable concerning the care, custody, maintenance and education of the minor children...."40

While the beginning of the best interests of the child standard is frequently traced to the statements of Mr. Justice Brewer in Chapsky and Judge Cardozo in Finlay, in the State of Wisconsin there were suggestions that the best interests of the child standard was being formulated as early as 1873.41 In the case of Welch v. Welch,42 the Wisconsin Supreme Court indicated that "[t]he welfare of the children, and how their interests will be best subserved, are the matters of primary consideration with the court; and whatever order is made respecting the care and custody of them, these [factors] should constitute the governing motives of judicial action."43 Nevertheless, the Welch court went on to reiterate the paternal preference that "[i]n general, all other circumstances being equal, the paramount common law right of the father to the children will be recognized."44

Like the tender years presumption, the best interests of the child

37. Id. at 592, 181 N.W. at 827.
38. See Hofer, supra note 31, at 349.
39. Id.
41. See infra notes 42–44 and accompanying text.
42. 33 Wis. 534 (1873).
43. Id. at 542.
44. Id. at 541.
standard started out as a case law guideline rather than as a statutory scheme. In 1971, section 247.24 of the Wisconsin Code (the precursor to the current chapter 767) was amended to codify the best interests of the child standard and to specifically overturn the preference in favor of either parent based upon sex. The new scheme indicated that "[i]n determining the parent with whom a child shall remain, the court shall consider all facts in the best interests of the child and shall not prefer one parent over the other solely on the basis of the sex of the parent."  

C. Minnesota

In the State of Minnesota, developments in child custody laws proceeded in a similar fashion to that of its neighboring State of Wisconsin. The common law presumptions, adopted from this country's English heritage, also prevailed in Minnesota's early custody laws. The case of State ex rel. Flint v. Flint illustrates the competing trends that developed in the late nineteenth century in Minnesota. At that time, Minnesota's statutory scheme, like Wisconsin's, provided for a father's paramount right to custody of his children. In Flint, Justice William Mitchell noted:

"Now, while, under our statutes, the father is given the right to the custody of his minor children, yet this right is not an absolute legal right, beyond the control of the courts. The cardinal principle in such matters is to regard the benefit of the infant paramount to the claims of either parent. While the courts will not lightly interfere with what may be termed the "natural rights" of parents, yet the primary object of all courts, at least in America, is to secure the welfare of the child, and not the special claims of one or the other parent."

While Justice Mitchell suggested that in America the primary object of custody laws was to "secure the welfare of the child," one commentator noted that decisions from the late nineteenth century

45. See Hofer, supra note 31, at 349.
46. 1971 Wis. Laws § 247.24(3).
47. Id.
48. 65 N.W. 272 (Minn. 1895).
49. Id. at 273.
50. Id.
51. Id.
"through the early twentieth century referred to, although often failed to adhere to, the 'best interests of the child' principle."^{52}

When surveying Minnesota case law from the late nineteenth and early twentieth centuries, this view of the precedent appears to be true. In fact, as in Wisconsin, it was under the guise of applying the best interests of the child standard that the preference for the mother came into existence.^{53} This can be clearly seen in the Minnesota Supreme Court case of *Christianson v. Christianson.*^{54} In that case, the court addressed a post-judgment motion to modify the placement of a ten-year-old girl.^{55} The court noted that "[t]he rule is well settled that the welfare of the child is the prime consideration in determining to whom its custody shall be given."^{56} Nevertheless, despite voicing adherence to this principle, the court went on to note that "[o]rdinarily, a child of tender years should have the care, love, and affection of its mother... because for these, under normal circumstances, there is no adequate substitute."^{57} The court affirmed the trial court's order denying the mother's motion to grant her request for physical custody of the child.^{58} The court, however, entered that order based upon the finding that "even a mother's care, love, and affection must yield to the child's welfare, and where it appears, as here, that the mother's care and custody will be detrimental to the welfare of the child, she should not be awarded its custody."^{59} Thus, the supreme court indicated that the child's best interests are paramount, but it was prepared to apply the presumption favoring the mother, barring evidence showing that the application of the presumption would be detrimental to the child. This preference prevailed in the State of Minnesota into the late 1960s.

In 1969, the Minnesota legislature revised the state's custody statute

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52. See Ahl, supra note 12, at 1348.
53. Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference,* 75 MINN. L. REV. 427, 433 (1990) ("Early in the twentieth century, most courts adopted a new parental preference derived from the child's best interests. This preference, the tender years doctrine, presumed that children of tender years should be in the custody of their mother.").
54. 15 N.W.2d 24 (Minn. 1944).
55. Id. at 25.
56. Id. (citing State ex rel. Peterson v. Sanders, 10 N.W.2d 387, 388 (Minn. 1943)).
57. Id. at 26 (citing Spratt v. Spratt, 187 N.W. 227, 229 (Minn. 1922)).
58. Id. at 24.
59. Id.
by codifying the best interests of the child standard. In addition, it mandated that "[i]n determining the parent with whom a child shall remain, the court shall consider all facts in the best interests of the children and shall not prefer one parent over the other solely on the basis of the sex of the parent." By 1974, the Minnesota legislature deleted the vestige of sex as a factor in placement disputes. Language was deleted from the statute which allowed the courts to give "due regard to the age and sex of . . . [the] children." In the case of *Erickson v. Erickson*, the Minnesota Supreme Court verified that the presumption favoring mothers in custody disputes was dead. The court noted that in a custody dispute, "the mother should not be given an absolute or arbitrary preference in the custody of young children." Thus, by the mid 1970s, both Wisconsin and Minnesota had statutory language preventing family court judges from preferring either parent simply on the basis of sex. Both states now had statutes that were pure best interests of the child statutes rather than statutes that were laboring under a tender years presumption.

II. CURRENT STATUTORY SCHEMES

Divorce affects a large number of Wisconsin and Minnesota residents. As a result, a large number of children are affected by the

60. 1969 Minn. Laws 1030.
61. Id. (emphasis omitted).
63. Id.
64. 220 N.W.2d 487 (Minn. 1974).
65. Id. at 489.
66. According to the Wisconsin Department of Health and Family Services, in 2000 there were 17,388 divorces in the State of Wisconsin. *See* DEPT. OF HEALTH & FAMILY SERV., WIS. MARRIAGES AND DIVORCES 1999, at 12 (Aug. 2000), available at http://www.dhfs.state.wi.us/stats/marriages.htm. Of those divorces, fifty-five percent involved families with children under the age of eighteen. *Id.* Among those divorces that affected families with children, an average of 1.8 children were affected by each of those divorces. *Id.*

According to the Minnesota Department of Health, in 2000 there were 15,895 divorces in the State of Minnesota. *See* MINN. DEP'T OF HEALTH, 1999 MINNESOTA HEALTH STATISTICS ANNUAL SUMMARY (Feb. 2001), available at http://www.health.state.mn.us/divs/chs/99annsum/divorce.pdf. In 1998, there were 15,165 divorces in the State of Minnesota. Interview with Department of Health and Family Services (June 8, 2000). Of those divorces, 6316 involved children, 4822 involved no children, and 4027 did not fully complete the statistical form. *Id.* This is the most current data available from Minnesota because according to an official at the Minnesota Department of Health and Family Services, they no longer maintain statistics on the number of children involved in divorces.
family court systems of these two states. The statutory schemes for legal custody and physical custody in both Wisconsin and Minnesota require that such determinations by a court be based upon the best interests of the child. In Wisconsin, this requirement is codified in section 767.24 of the Wisconsin Statutes, which indicates that:

In 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.

67. See supra note 66.
68. The Wisconsin Family Code uses the terms "legal custody" and "physical placement" when addressing the living arrangements of a child and the decision-making arrangements regarding the child. "Legal custody" is defined as "the right and responsibility to make major decisions concerning the child, except with respect to specified decisions as set forth by the court or the parties in the final judgment or order." Wis. STAT. § 767.001(2) (1999-2000). The term "physical placement" is defined as: "the condition under which a party has the right to have a child physically placed with that party and has the right and responsibility to make, during that placement, routine daily decisions regarding the child's care, consistent with major decisions made by a person having legal custody." Id. § 767.001(5).
69. The Minnesota Family Code uses the terms "legal custody" and "physical custody" when addressing the living arrangements of a child and the decision-making arrangements regarding the child. "Legal custody" is defined as "the right to determine the child's upbringing, including education, health care, and religious training." Minn. STAT. ANN. § 518.003(3)(a) (West. Supp. 2002). The term "physical custody and residence" is defined as "the routine daily care and control and the residence of the child." Id. § 518.003(3)(c).
70. Wis. STAT. § 767.24(5). A complete list of the factors enumerated in section 767.24(5) is as follows:

(a) The wishes of the child's parent or parents, as shown by any stipulation between the parties, any proposed parenting plan or any legal custody or physical placement proposal submitted to the court at trial.
(b) The wishes of the child, which may be communicated by the child or through the child's guardian ad litem or other appropriate professional.
(c) The interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest.
(cm) The amount and quality of time that each parent has spent with the child in the past... and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.
(d) The child's adjustment to the home, school, religion and community.
(dm) The age of the child and the child's developmental and educational needs at different ages.
In Minnesota, this standard is set forth in section 518.17 of the
Minnesota Statutes, which indicates that "[i]n determining custody, the
court shall consider the best interests of each child and shall not prefer
one parent over the other solely on the basis of the sex of the parent."
Minnesota also has a separate set of factors for the court to consider when contemplating an award of joint custody.\textsuperscript{72}

Wisconsin and Minnesota have experienced developments in their respective child custody and physical placement laws over the last several years that have had a dramatic impact on the way courts in both of those states decide the living arrangements for children of divorce. In fact, sweeping changes have been attempted in both Wisconsin and Minnesota within the last two years.\textsuperscript{73} While some of those attempts have been successful and others unsuccessful, the attempts at change in both states, in and of themselves, are very revealing about the trends in child custody theory in our society.

\textbf{A. Wisconsin}

On October 6, 1999, the Wisconsin legislature passed a budget bill and religion or creed, if any;

(11) the child's cultural background;

(12) the effect on the child of the actions of an abuser, if related to domestic abuse, as defined in section 518B.01, that has occurred between the parents or between a parent and another individual, whether or not the individual alleged to have committed domestic abuse is or ever was a family or household member of the parent; and

(13) except in cases in which a finding of domestic abuse as defined in section 518B.01 has been made, the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child.

The court may not use one factor to the exclusion of all others. The primary caretaker factor may not be used as a presumption in determining the best interests of the child. The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child.

\textit{Id.} § 518.17(1)(a).

72. Section 518.17(2) of the Minnesota Statutes specifies:

In addition to the factors listed in subdivision 1, where either joint legal or joint physical custody is contemplated or sought, the court shall consider the following relevant factors:

(a) The ability of parents to cooperate in the rearing of their children;
(b) Methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods;
(c) Whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and
(d) Whether domestic abuse, as defined in section 518B.01, has occurred between the parents.

\textit{Id.} § 518.17(2).

73. \textit{See infra} Part II.A–B.
for the state that made several changes to the existing child custody and placement statutes.\textsuperscript{74} The child custody and placement language was based upon a bill commonly called the "Gary George Bill."\textsuperscript{75} Wisconsin State Senator Gary George had introduced legislation affecting custody and placement in previous years and his attempt in 1999 was to include the language of Senate Bill 107 in the budget bill.\textsuperscript{76} The legislation had a number of parts. First, it proposed to eliminate the best interests of the child standard in the State of Wisconsin.\textsuperscript{77} It did so by creating a rebuttable presumption in favor of joint or equal placement of children.\textsuperscript{78} The legislation also proposed to eliminate the role of the guardian ad litem in the family courts of the state.\textsuperscript{79} "Fathers groups," who believed that all too often fathers did not get a fair shake in family court custody disputes, spurred the legislation.\textsuperscript{80} Their concerns reached sympathetic ears with Wisconsin Governor Tommy G. Thompson who proclaimed June 13, 1999 through June 19, 1999 as "Wisconsin Fatherhood Week."\textsuperscript{81} The proclamation indicated that "the State of Wisconsin is committing itself to more actively involving fathers in the lives of their children through the Wisconsin Fatherhood Initiative and calling on all state agencies to make themselves more father friendly."\textsuperscript{82} The legislation had some powerful backers and a real chance of success.\textsuperscript{83}

The Wisconsin State Bar Association Family Law Section lobbied against Senate Bill 107\textsuperscript{84} as did other groups.\textsuperscript{85} Ultimately, the coalition

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\textsuperscript{75} Id.

\textsuperscript{76} Id.

\textsuperscript{77} Id.

\textsuperscript{78} Id.

\textsuperscript{79} Id.; \textit{See also} Gregg Herman, \textit{Budget Brings Myriad Family Law Changes}, Wis. Opinions, Nov. 10, 1999, at 6.

\textsuperscript{80} Herman, \textit{supra} note 79, at 6.

\textsuperscript{81} Walther, \textit{supra} note 74, at 35.

\textsuperscript{82} Id.

\textsuperscript{83} \textit{See id.} at 34–35 (noting that the Family Law Section of the Wisconsin Bar Association "had been warned by its lobbyists, and various members of the legislature, that major custody legislation would be included in the state budget, and politically there was a reasonable chance that Senate Bill 107 would be enacted into law").

\textsuperscript{84} Id. at 34.

\textsuperscript{85} Jane Pribek, \textit{Family Law Portion of Budget Bill Seeks to Improve Status Quo}, 13 Wis. Opinions, Oct. 20, 1999, 1, at 8 (noting that the introduction of Senate Bill 107 by Senator George brought the Family Law Section, the state's family court commissioners,
which formed against the Gary George Bill was successful in making changes to the legislation that was eventually passed and signed into law by Governor Thompson on October 28, 1999. Among the various and final changes that were made to the Wisconsin Family Code were additional factors that judges must consider in making custody and placement decisions. Those additional factors include: (1) "The amount and quality of time that each parent has spent with the child in the past . . . and any reasonable lifestyle changes that a parent proposes to make to be able to spend time with the child in the future." (2) "The age of the child and the child's developmental and educational needs at different ages." (3) "The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child." (4) "The cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party." (5) "Whether each party can support the other party's relationship with the child, including encouraging and facilitating frequent and continuing contact with the child, or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party." (6) "The reports of appropriate professionals if admitted into evidence.

These additional factors were not the only changes made to the Wisconsin Family Code as of May 1, 2000. However, these additions to

parents groups and some domestic violence prevention advocates together in order to come up with alternatives).

88. Id. § 767.24(5)(dm).
89. Id. § 767.24(5)(em).
90. Id. § 767.24(5)(fm).
91. Id. § 767.24(5)(f).
92. Wis. Stat. § 767.24(5)(jm) (1999-2000). Prior to this factor being set forth in section 767.24(5)(jm), it was part of the preamble to the entire subsection 767.24(5) of the Wisconsin statutes. Id.
93. There have been other significant changes to the Wisconsin Family Law Code. These changes include: 1) When there is a contest for legal custody or physical placement, a parent "shall file a parenting plan with the court before any pretrial conference." Wis. Stat. § 767.24(1m) (see infra note 181 for required components of the parenting plan). 2) The court must seek to set a placement schedule that "maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for
section 767.24(5) complete the list of factors to be considered by courts in Wisconsin custody and placement cases.

For purposes of analysis, these "custodial factors" can be grouped into four broad categories. These broad categories of factors include: (1) factors that analyze the wishes of the parents and the child; (2) factors that analyze the stability and consistency of the parents' relationship with the child; (3) factors that focus on the physical and mental health of the parties and the children; and (4) factors that look at the behaviors of each party.

The first custodial category would include those factors relating to the wishes of the parents and the child. In Wisconsin, the wishes of the parents are demonstrated by any stipulation that they may have reached or any proposals that they may submit to the court, including a parenting plan submitted to the court at the divorce pretrial pursuant to different households. The court shall consider the factors in section 767.24(5) when making this determination.

[94] See MARC J. ACKERMAN & ANDREW W. KANE, PSYCHOLOGICAL EXPERTS IN DIVORCE ACTIONS 156–57 (3d ed. 1998) (citing American Psychological Association, Guidelines for Child Custody Evaluations in Divorce Proceedings). Ackerman and Kane note that custody and placement analysis for psychologists is generally focused on four broad areas:

1. the adult's capacity for parenting; 2. the psychological functioning and developmental needs of the child, and the wishes of each child, when appropriate; 3. the functioning ability of each parent to meet these standards; and 4. the interaction between each adult and each child.

[95] Id. at 157. They also opine that these broad categories are closely aligned with the factors set forth in the Uniform Marriage and Divorce Act of 1979 (UMDA). Id. at 158. This Act was passed by Congress in 1979 and has been used as a model for custody and placement statutes in many states. Id. The four "custodial categories" set forth in this Article are based upon those set forth in the UMDA and the Ackerman and Kane study.

[96] An effort to create a legal presumption of the child's best interests in any stipulation between the two parties that is submitted to the court regarding legal custody and physical placement failed to make it into the 1999 budget bill. See Pribek, supra note 85, at 8.
section 767.24(1m) of the Wisconsin Statutes.97 Obviously, the wishes of the parents are of very little use in resolving a contested custody dispute in a divorce setting because if the parents did not have different views on the matter there would be no dispute.98 Nevertheless, Wisconsin seeks to have each parent set forth in writing an actual proposal outlining their vision of the custody arrangement.99 The use of these parenting plans is a new requirement of the Wisconsin Family Code, the purpose of which is to "get people to think about what they're asking for, and to get them off of 'I want equal rights.'"100 In addition to the parent's wishes, the wishes of the child have been a factor in custody disputes for quite some time.101 While there appears to be some misconception that a child who is the subject of a custody dispute can, at a given age, make a choice about where to live and have a judge obligated to follow that choice, there is no such magic age.102 Rather, a child's input is merely considered by the court as one factor and only if the child is "sufficiently mature to be able to formulate and express a rational opinion and desire as to its custody."103 Furthermore, the mere preference of a child is not controlling unless the child can give substantial reasons why it would be in his or her best interests to have the court follow such an expressed preference.104 This means, of course, that a mature eight-year-old might have some influence on his or her placement arrangement while an immature sixteen-year-old may not.105

97. WIS. STAT. § 767.24(1m).
98. Furthermore, the mere fact that the wishes of a parent are included as a factor in the custody and placement provisions of section 767.24 does not create an absolute right of a fit and able parent to custody of his or her children in the face of compelling reasons to the contrary. Barstad v. Frazier, 118 Wis.2d 479, 568-69, 348 N.W.2d 479, 489 (1984).
99. WIS. STAT. § 767.24(1m).
100. See Pribek, supra note 85, at 8 (quoting an interview with Milwaukee Family Court Commissioner, Lucy Cooper).
101. There is no particular method by which the court must inform itself of the wishes of a child. Hughes v. Hughes, 223 Wis. 2d 111, 131, 588 N.W.2d 346, 355 (Ct. App. 1998). The various methods could include in camera interviews by the court, statements through the guardian ad litem or other professional, and testimony from the child. See id. at 131-33, 588 N.W.2d at 355-56.
102. See WIS. STAT. § 880.09(1) (noting that, under certain circumstances, a minor over the age of 14 years may nominate his or her own guardian).
103. State ex rel. Hannon v. Eisler, 270 Wis. 469, 482, 71 N.W.2d 376, 384 (1955).
104. Haugen v. Haugen, 82 Wis. 2d 411, 417, 262 N.W.2d 769, 772 (1978).
105. One survey of psychiatrists, psychologists, and social workers found that the mean age at which such professionals believe children should be allowed to choose the parent with whom they live is 15.1 years old. Marc J. Ackerman & Melissa C. Ackerman, Custody Evaluation Practices: A Survey of Experienced Professionals (Revisited), PROF. PSYCHOL.: 2002]
The ultimate determination of how much weight to give the children's desires is left to the court.

Several of the factors set forth in section 767.24(5) are specifically directed toward maintaining stability and consistency in a child's life—a goal of undeniable merit. For example, the court must consider "[t]he interaction and interrelationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest." 106 In addition, while Minnesota requires the courts to look at which parent was the child's primary caretaker, 107 Wisconsin requires the court to consider the similar notion of "[t]he amount and quality of time that each parent has spent with the child in the past." 108 The court must also look at "[t]he child's adjustment to the home, school, religion and community." 109 The newly added custodial factor of "[t]he need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child" 110 must also be addressed by the court. Included in the analysis of this factor would be the very practical and very important issue of the parent's work schedule. In a custody dispute between two parents of equal caliber, the work schedule of each party often produces the definitive answer to the placement schedule. Thus, if a parent is not available because of work, they can not have the child. While this is a new

106. Wis. Stat. § 767.24(5)(c). For a more in-depth discussion of the extent to which third party relationships may affect a placement arrangement, see Barstad v. Frazier, 118 Wis. 2d 549, 348 N.W.2d 479 (1984). The Barstad case involved a dispute over children between a parent and a relative, with whom the parent and child had been residing. Id. at 551-53, 348 N.W.2d at 480-81. The court noted that "[a] biological parent who has never borne any significant responsibility for the child and who has not functioned as a member of the child's family unit is not entitled to the full constitutional protections [accorded a parent]." Id. at 563, 348 N.W.2d at 486.


108. Wis. Stat. § 767.24(5)(cm). Again, the case of Barstad sheds further light on the way in which this factor is applied. The case suggests that a child will not necessarily be placed with a parent who has not given that child any significant amount of time.

109. Id. § 767.24(5)(d); see also Welker v. Welker, 24 Wis.2d 570, 576, 129 N.W.2d 134, 138 (1964) (noting that the court's inquiry into religious issues is limited to whether a prospective custodian has religious views which might reasonably be considered dangerous to the health or morals of the child).

110. Wis. Stat. § 767.24(5)(em). While this factor ostensibly seeks to provide "predictability and stability for the child," evidence that one parent has been uninvolved with the day-to-day care of the child may result, upon application of this statutory factor, in significant change and short term instability in the life of a child.
custodial factor in the State of Wisconsin, it is not without some precedent in the court system. In the divorce case of *Patrick v. Patrick*,\(^{111}\) the Wisconsin Supreme Court noted that "[m]inor children are entitled to the love and companionship of both parents insofar as this is possible and consistent with their welfare."\(^{112}\) All of these stability and consistency factors suggest that trial courts need to consider the pattern that was set up for the child during the course of the marriage and determine whether any adverse affect might result from disrupting that pattern.\(^{113}\) While stability and consistency have undeniable merit, a question arises as to whether it is even possible to continue a consistent pattern after the dissolution of the marriage, given the changes that are bound to occur. Thus, the goal that is the focus of this custodial category may be illusory.

There are several factors that essentially direct trial courts to focus on the physical and mental health of the parties and the child. Certainly, psychological evaluations of parties to a divorce action are not uncommon.\(^{114}\) In fact, those evaluations often involve at least an interview with the child to assist in evaluating the specific needs of the child.\(^{115}\) Thus, the court must consider "[t]he mental and physical health of the parties, the minor children and other persons living in a proposed custodial household."\(^{116}\) In addition, "[t]he age of the child and the child's developmental and educational needs at different ages"\(^{117}\) must specifically enter into the court's deliberations. Opinions about the needs of children at different ages and about a particular child's developmental needs are generally helpful to the court. Further, courts usually require the expert opinion of a psychologist or trained counselor, which can come at a very high economic cost to the parties.

\(^{111}\) 17 Wis. 2d 434, 117 N.W.2d 256 (1962).
\(^{112}\) Id. at 439, 117 N.W.2d at 259 (quoting Block v. Block, 15 Wis.2d 291, 298, 112 N.W.2d 923, 927 (1961)).
\(^{113}\) The court must also consider the availability of day care arrangements, which may also play into the consistency factors if a child is already established in a given day care facility. Wis. Stat. § 767.24(5)(f).
\(^{114}\) Section 767.24(5)(jm) permits that court to evaluate "[t]he reports of appropriate professionals if admitted into evidence." Id. This factor used to be contained in the preamble of section 767.24(5) of the Wisconsin Statutes, but was designated as a separate factor as of May 1, 2000. Id.
\(^{115}\) See ACKERMAN & KANE, supra note 94, at 159–60.
\(^{116}\) Wis. Stat. § 767.24(5)(e).
\(^{117}\) Wis. Stat. § 767.24(5)(dm). For a more complete discussion on the different needs of each age group of children in divorce situations, see ACKERMAN & KANE, supra note 94, at 223–28.
In the end, courts will generally not inquire into the mental health issues unless some evidence is brought forth suggesting that a problem exists.

The fourth custodial category, which looks at the behavior of each party, is similar to these psychological factors. Behavioral considerations include such factors as the "cooperation and communication between the parties and whether either party unreasonably refuses to cooperate or communicate with the other party"\(^\text{118}\) and "[w]hether each party can support the other party's relationship with the child, . . . or whether one party is likely to unreasonably interfere with the child's continuing relationship with the other party."\(^\text{119}\) These two factors, when looked at in conjunction with the new injunction provisions that were added to the Wisconsin Family Code,\(^\text{120}\) suggest that the legislature wants to crack down on parents who intentionally create problems for the other parent either by failing to communicate or by communicating in a harmful way. Additional considerations when assessing the behavior of a parent include "[w]hether either party has or had a significant problem with alcohol or drug abuse"\(^\text{121}\) and whether or not there is evidence that a party has engaged in or engages in physical abuse of a child,\(^\text{122}\) interspousal battery,\(^\text{123}\) or domestic abuse.\(^\text{124}\)

Of the additions to section 767.24 in the year 2000, at least three of them seem to be focused on directing courts toward joint physical placement arrangements. For example, the notion of setting "a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent"\(^\text{125}\)

\(^{118}\) Wis. Stat. § 767.24(5)(fm).

\(^{119}\) Id. § 767.24(5)(g).

\(^{120}\) See id. § 767.242; see also supra note 93.

\(^{121}\) Wis. Stat. § 767.24(5)(j). Minnesota does not have a similar factor relating to drugs and alcohol in its statutory scheme.

\(^{122}\) Id. § 767.24(5)(h). See Neblett v. Neblett, 274 Wis. 574, 578, 81 N.W.2d 61, 63 (1957) (holding that a father who had imposed a sadistic type of punishment on the children and had treated them in a harsh and violent manner was not entitled to have the care and custody of the children nor was he entitled to have visitation with the children).

\(^{123}\) Wis. Stat. § 767.24(5)(i). See Bertram v. Kilian, 133 Wis. 2d 202, 204–05, 394 N.W.2d 773, 774 (Ct. App. 1986) (holding that the husband's violent conduct toward the wife was sufficient justification to award the children to the wife despite the wife's failure to show that the violence affected the children).

\(^{124}\) Wis. Stat. § 767.24(5)(i).

\(^{125}\) Id. § 767.24(4)(a)(2).
suggests that a court will need to consider a placement arrangement that is substantially equal. Further, the statute identifies that "[t]he need for regularly occurring and meaningful periods of physical placement\(^{126}\) must be a factor the court considers in placement decisions, which suggests that there may be a given schedule that does not provide a parent with meaningful periods of placement. "[T]he amount and quality of time that each parent has spent with the child in the past . . . and any necessary life-style changes that a parent proposes to make to be able to spend time with the child in the future\(^{127}\) raises images of a father from a more traditional family arrangement, where he was the bread winner and the mother stayed at home, coming into a divorce court and trying to argue that he should not be prejudiced because he agreed to work outside the home. Despite changes in the societal roles of men and women, this is not an uncommon sequence of events.

The fact that some of these additions to the Wisconsin Family Code direct a court toward joint placement should not, however, be surprising to anyone given that the genesis of these factors was the Gary George Bill, which originally recommended a legal presumption in favor of joint placement.\(^{128}\) Nevertheless, it is just that genesis which should be cause for concern in the State of Wisconsin. Senate Bill 107 was not the first time that Senator George attempted to pursue such a presumption,\(^{129}\) and the mere fact that the legislature requires courts to specifically look at same-time arrangements suggests that such a presumption could surface again.

**B. Minnesota**

Minnesota's child custody statutory scheme is very similar to Wisconsin's in that the Minnesota courts are also required to consider certain factors based upon the best interests of the child when entering a placement order.\(^{130}\) Minnesota has thirteen such factors, and similar to the Wisconsin custodial factors, the Minnesota custodial factors fit loosely into the four broad custodial categories outlined above.

The first category of factors includes those that seek to evaluate the wishes of the parents and the wishes of the child. As with the State of

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\(^{126}\) *Id.* § 767.24(5)(em).

\(^{127}\) *Id.* § 767.24(5)(cm).

\(^{128}\) See supra notes 74–78 and accompanying text.

\(^{129}\) See Walther, *supra* note 74, at 34.

\(^{130}\) MINN. STAT. ANN. § 518.17(1)(a) (West Supp. 2002).
Wisconsin, Minnesota looks to the wishes of the child's parents as a factor in any physical custody arrangement.\textsuperscript{131} Again, looking to the wishes of each parent is of limited use in a custody dispute during a divorce because there would likely not be a custody dispute if the parents were in agreement. Minnesota does not have a mandatory parenting plan requirement similar to the one set forth in section 767.24(1m) of the Wisconsin Statutes. It does, however, have a voluntary parenting plan statute which, under certain circumstances, could be utilized to communicate the wishes of the parent.\textsuperscript{132} The only requirement for a parenting plan in the State of Minnesota arises when a parent seeking physical custody or visitation has been convicted of certain specified criminal offenses.\textsuperscript{133}

The wishes of the child must be considered by Minnesota courts just as in Wisconsin.\textsuperscript{134} The preference of a child can be considered at any age, but Minnesota's statute provides more guidance than Wisconsin's statute. The Minnesota statute indicates that the court may consider the preference of a child "if the court deems the child to be of sufficient age to express preference."\textsuperscript{135} The Minnesota courts have noted that they will respect the wishes of the child if the child's "decision is intelligently made."\textsuperscript{136} Obviously, this language leaves room for each party to argue that the child is or is not of "sufficient age to express preference." The courts will also address the question of whether the child was "coached" in his or her preference.\textsuperscript{137} Nevertheless, courts have noted that this factor does not permit the court to delegate the responsibility of setting the appropriate visitation schedule to a child.\textsuperscript{138} Wisconsin courts would, of course, take a similar view, that children will not be put in a position of being forced to choose between parents nor in a position of dictating

\begin{itemize}
  \item \textsuperscript{131} Id. § 518.17(1)(a)(1).
  \item \textsuperscript{132} See infra note 186 and accompanying text.
  \item \textsuperscript{133} MINN. STAT. ANN. § 518.179.
  \item \textsuperscript{134} Id. § 518.17(1)(a)(2).
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} State ex rel. Waslie v. Waslie, 152 N.W.2d 755, 757 (Minn. 1967).
  \item \textsuperscript{137} See Schwamb v. Schwamb, 395 N.W.2d 732, 735 (Minn. Ct. App. 1986) (noting that the children's preferences were not reliable based upon a social workers finding that their opinions had been "coached"); see also Sucher v. Sucher, 416 N.W.2d 182, 185 (Minn. Ct. App. 1987) (noting that a child of seven years had not exhibited sufficient maturity and that it appeared the father had "coached" the children before they were interviewed); Mowers v. Mowers, 406 N.W.2d 60, 64 (Minn. Ct. App. 1987) (noting that a child who was seven years and ten months old was of sufficient age to express her preference and was not "coached" regarding said preference).
  \item \textsuperscript{138} Barrett v. Barrett, 394 N.W.2d 274, 279 (Minn. Ct. App. 1986).
\end{itemize}
to the court the nature of a physical custody schedule. In Minnesota, however, there is some precedent for a court at the trial level to follow a child's wish to be placed with a non-parent over a biological parent. That is, the Minnesota Supreme Court has specifically opined that a child's wishes may, in certain circumstances, supersede the right of a parent to have custody of his or her child. While that situation may seem to place too much authority in the hands of children, it also demonstrates that the parties can not ignore the thoughts of a child.

There are also several factors set forth in section 518.17 of the Minnesota Statutes which direct trial courts to focus on maintaining stability and consistency in a child's life. In this regard, the court must look to "the child's adjustment to [the] home, school, and community" in which the child is living. This is the same factor that exists in Wisconsin with the exception that Wisconsin includes religion as part of this factor. One significant problem with this requirement in both states is that it places a great deal of emphasis on who gets the marital residence in the final divorce. If a child has lived in a particular house for several years during the marriage, the parent who gets the house has an advantage. Further, if the other parent relocates to a different school district because of the need to leave the house, there is an additional disadvantage. This factor can also have a negative impact on a person

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139. See In re Hohmann, 95 N.W.2d 643 (Minn. 1959). In Hohmann, the Minnesota Supreme Court addressed a dispute between a biological father and a step-father, where the deceased mother had been granted physical custody in the divorce from the father. Id. at 645. The court noted that "[a]lthough the right of a parent to the care and custody of his minor child is paramount and superior to the right of a third person, that right must always yield to the best interest of the child." Id. at 647. The court went on to state:

where children of sufficient maturity to express an intelligent opinion have a factual basis for passing judgment on their surviving father's parental attitude, and have not been wrongfully influenced by others, their definitely expressed desire not to be transferred to the custody of their father is entitled to considerable weight in determining whether it is wise to uproot them from their present custodial home. Id. The court further stated that the standard to be used in determining the best interest of the child in such cases is based upon the court's analysis of the prospect of "future right treatment" and fidelity by the parent who has left his or her child to the care of others. Id. at 648. For a comparison with the standard used in Wisconsin, see Barstad v. Frazier, 118 Wis. 2d 549, 563–64, 348 N.W.2d 479, 486–87 (1986).

140. MINN. STAT. ANN. § 518.17.

141. Id. § 518.17(1)(a)(6). See Petersen v. Petersen, 394 N.W.2d 586, 587–88 (Minn. Ct. App. 1986) (finding that even though both parents would provide stable environments for the child, the fact that the mother would need to remove the children from the community and school in which they were residing would tip the scale in favor of the father).
who has been removed from the marital residence by a restraining order or injunction just prior to the commencement of the divorce. Taking this line of thinking to its logical conclusion, a physical custody dispute could be concluded the moment one parent leaves the marital residence. This, of course, leads to the often harmful advice from opposing counsel to their clients that they must stay in the marital residence until the case is over. The pressure and stress in the home, while difficult for parents, can be an impossible situation for a child.

As additional stability and consistency custodial factors, the Minnesota courts look to "the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity" in that environment. The Minnesota courts also look to "the permanence, as a family unit, of the existing or proposed custodial home." Wisconsin does not have these two factors in its statutory scheme. Nevertheless, avoiding insecurity in a child's life regarding home, school, and community is an important part of keeping a child's life stable after the finalization of a divorce. In *Petersen v. Petersen*, the Minnesota Court of Appeals clearly applied these two factors in affirming an award of custody to the father. The court noted that the child had lived for three years with the father and his parents, both of whom had provided the child with a stable environment. The court also noted that the mother's living arrangements were less stable and that by awarding the children to the mother, the children would be required to change communities and change schools.

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142. *Minn. Stat. Ann.* § 518.17(1)(a)(7); *see also* Regenscheid v. Regenscheid, 395 N.W.2d 375 (Minn. Ct. App. 1986). In *Regenscheid*, the court of appeals noted that the trial court found that the mother "took more responsibility for cooking, cleaning, and laundering clothes." *Id.* at 378. Nevertheless, the court looked with favor on the husband's "ability to offer the boys continued emotional and psychological stability in their home, school and community." *Id.* at 379-80. Despite the fact that the mother took primary responsibility for the day-to-day care of the children, the court noted that "[t]he strong emotional bonding between respondent and the boys in this case overcomes the presumption [that] the primary caregiver is the parent who provides the most physical care." *Id.* at 379. The appellate court stated that, based upon the above stated factors, the trial court did not abuse its discretion in awarding custody of children to the father despite the mother's role in providing physical care. *Id.*

145. 394 N.W.2d 586.
146. *Id.* at 588–89.
147. *Id.* at 587.
148. *Id.*
In an effort to maintain stability and consistency in the bonds that a child has with other individuals, Minnesota looks toward "the intimacy of the relationship between each parent and the child"149 as well as the interaction that a child may have with "parents, siblings, and any other person who may significantly affect the child's best interests."150 In the case of Rosenfeld v. Rosenfeld,151 the court noted that despite the fact that both parents were concerned and loving parents, the mother should receive physical custody because she had "provided the most continuity of care and [had] the closest relationship with the [three-year-old daughter]."152 While Wisconsin does not have a factor focusing on the intimacy of the parent-child relationship, it does have one that seeks to inquire into the interaction of other people who may affect the child's best interests.153

The factor that has recently been the focus of a great deal of debate in Minnesota examines which parent has provided the most stability and consistency in the child's life prior to the divorce. That factor is the "primary caretaker" factor.154 The Wisconsin Family Code does not have a similarly worded factor in its statute, but Wisconsin's legislature could learn a great deal from an analysis of Minnesota's experience with the primary caretaker custodial factor.155 The primary caretaker of a child has been defined by Minnesota courts as the parent responsible for the caring and nurturing duties of the child including:

(1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and care of clothes; (4) medical care . . . ; (5) arranging for social interaction among peers after school . . . ; (6) arranging alternative care . . . ; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining . . . ; (9) educating . . . ; and,

149. MINN. STAT. ANN. § 518.17(1)(a)(4) (West Supp. 2002).
150. Id. § 518.17(1)(a)(5). See Simonson v. Simonson, 292 N.W.2d 12, 13 (Minn. 1980) (noting that it was an abuse of the trial court's discretion to award physical custody of a child to "a mother who is cohabiting with a person who has a record of sexually molesting children").
151. 249 N.W.2d 168 (Minn. 1976).
152. Id. at 172.
154. MINN. STAT. ANN. § 518.17(1)(a)(3).
155. The closest that the Wisconsin custodial factors get to a primary caretaker analysis is the newly enacted mandate to look at the "amount and quality of time that each parent has spent with the child in the past." WIS. STAT. § 767.24(5)(cm).
Recognizing that there may be an extended period of time that the parents are separated prior to the actual granting of a divorce, the courts have noted that a trial judge could not refuse to apply the primary caretaker factor simply because too much time had passed between the date of initial separation and trial. Thus, despite the fact that the parents had been separated for several months or a year and were operating under an agreed upon schedule, the courts can go into the past and determine who was the primary caretaker before the separation.

Minnesota also has certain custodial factors that focus on the health of all parties involved in the custody dispute. Specifically, Minnesota courts must look to "the mental and physical health of all individuals involved." Furthermore, a parent's psychological health may have a negative impact on physical custody rights even if it has not directly impacted the child. Minnesota also requires courts to look at "the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in the child's culture and religion or creed, if any." Wisconsin does not have

156. Steinke v. Steinke, 428 N.W.2d 579, 583 (Minn. Ct. App. 1988) (citing Pikula v. Pikula, 374 N.W.2d 705, 713 (Minn. 1985)); see also infra note 217 and accompanying text.
158. MINN. STAT. ANN. § 518.17(1)(a)(9). However, a disability as defined in section 363.01 is not "determinative of custody of the child, unless the proposed custodial arrangement is not in the best interest of the child." Id.
159. Id. See Vandewege v. Vandewege, 170 N.W.2d 228, 229 (Minn. 1969) (noting that the wife's course of conduct toward the husband and children demonstrated that the wife had a serious emotional disorder and that an award of physical custody to the husband was appropriate).
160. Schumm v. Schumm, 510 N.W.2d 13, 15 (Minn. Ct. App. 1993). In Schumm, the court noted that the mother's mental health problems, which rendered her unable to work because of depression, raised a prima facie case of disability for the purpose of evaluating the statutory custody factors. Id. However, the court also made note that the mother's psychological problems caused her to be unable to engage in most activities for several days. Id.
161. MINN. STAT. ANN. § 518.17(1)(a)(10). See Trebelhorn v. Uecker, 362 N.W.2d 342 (Minn. Ct. App. 1985). In Trebelhorn, the court of appeals affirmed the award of physical custody to the father. Id. at 347. The court noted that the father's relationship with his two-year-old son was one of "genuine affection and love," that the father had "provided live-in day care at the family home" for several months to allow the wife to work outside the home, and that the father was very "well versed" in nurturing the child. Id. at 345. The court concluded with the determination that the father was better able to provide guidance and values for the child than was the mother. Id. See also Johnson v. Johnson, 424 N.W.2d 85,
a similar factor. While this consideration appears to address the level of consistency that a child will have with any given parent, its focus on the parent's capacity suggests that this factor focuses mainly on a parent's mental state. Minnesota courts must also consider the "child's cultural background." This factor does not exist in Wisconsin and it is difficult to see how it is to be applied. That is, if the court expounded on this factor to any great extent, it would be difficult to avoid raising concerns about ethnic and religious prejudice.

Within the general category of assessing the parent's behavior, the courts in Minnesota also consider "the effect on the child of the actions of an abuser." Further, except in cases in which such domestic abuse has occurred, the court must evaluate "the disposition of each parent to encourage and permit frequent and continuing contact by the other parent with the child." Obviously, if evidence exists that one parent will discourage or hinder contact by the other parent with the child, the court will seek to ameliorate the problem in fashioning a physical custody arrangement. Such a physical custody arrangement would likely afford the offending parent with significantly less time than the non-offending parent. Wisconsin has behavioral factors similar to both of the above.

Both Wisconsin and Minnesota have custodial factors in each of the four general custodial categories outlined above. Addressing the

88–89 (Minn. Ct. App. 1988) (noting that an award of physical custody of the children who had been raised Catholic, to the father, who intended to raise the children Lutheran, failed to give realistic consideration to the parties' ability, capacity and disposition to continue raising the children in their religion).

162. MINN. STAT. ANN. § 518.17(1)(a)(11).

163. See WIS. STAT. § 767.24(5)(d) (1999–2000) (noting that Wisconsin courts must consider the adjustment of the child to the child's religion, but does not include a reference to culture or creed).

164. See MINN. STAT. ANN. § 518.17(1)(a)(10) (indicating that the court must consider the disposition and capacity of a parent in "raising the child in the child's culture and religion or creed").

165. Although any inquiry into this area is problematic, compare the restrictions that Wisconsin places on this inquiry, which are present in the case of Welker v. Welker, 24 Wis.2d 570, 575–78, N.W.2d 134, 137–39 (1964).

166. MINN. STAT. ANN. § 518.17(1)(a)(12). See Uhl v. Uhl, 413 N.W.2d 213 (Minn. Ct. App. 1987). In Uhl, the court considered the abuse perpetrated by the mother upon the children. Id. at 214–15. Nevertheless, the court awarded physical custody of the children to the mother because the mother's actions were not repetitive, but were mitigated by the stress she was under and she seemed willing to change. Id. at 217.

167. MINN. STAT. ANN. § 518.17(1)(a)(13).

168. WIS. STAT. § 767.24.
parenting issues in each of those general categories is important to achieving a healthy placement arrangement for a child. Nevertheless, there are a large number of judges applying those custodial factors in each state and an equally large number of appellate judges reviewing the manner in which those custodial factors are applied at the trial level. While neither state has a statute that is defective on its face, the extent to which the best interests of children are served in Wisconsin and Minnesota depends largely on the way that a judge applies those factors. Thus, a third party, in the form of a trial court judge or an appellate court judge, decides what is best for the children of a divorcing family when he or she is probably in the worst position to evaluate what is best for that family. In recognition of this problem, and in an attempt to rectify it, a new concept has been introduced into both states—parenting plans.

C. A New Option: Parenting Plans

The trial court process is not the most therapeutic setting in which to resolve a family's disagreements about raising children. In fact, when engaged in a conflict about the living arrangements for their children, parents can easily lose sight of the traumatic situation into which they are placing their children. In a report on the ABC News program 20/20, that traumatic situation was seen first hand in an interview with a child whose parents were involved in a divorce. When asked about the effect of the divorce process on his life, the child indicated "my parents couldn't talk to each other. They started fighting. My dad . . . stopped coming around as much. My mom stopped coming around as much because of court. And from then on everything is just different." When asked if he wanted to tell his father anything about the divorce, he indicated "[j]ust stop, just end it. Forget about it. If you stop, my mom will stop. And if you give up, my mom will give up. That's it. And whatever happens, happens. Start a new life. Turn over a new leaf and start from the beginning. It's got to stop." These are the types of situations which can be created by the current custody and placement laws in the various states. While custody and placement laws may not even be needed in those situations where two divorcing parties communicate extremely well about their children and focus their energy

170. *Id.*
on helping their children work within the reality of a divided family, those same laws can create tragic dynamics for the children of divorcing couples.

In an effort to prevent that dynamic from arising in the context of a divorce, many states have turned to the concept of parenting plans. Parenting plan legislation is seen by its supporters as a more "fact specific" and "individualized" way of resolving custody issues. Washington was one of the first states to enact legislation mandating parenting plans for divorcing couples. Wisconsin passed parenting plan legislation in 1999, while Minnesota passed such legislation in 2000. As it has developed throughout the United States, the goal of parenting plan legislation is to provide parents with a way to direct their own parenting arrangement and avoid a resolution through application of custodial factors by a judge who can not possibly be fully informed on the needs of a divorcing family.

The genesis of parenting plans appears to have been in the ever increasing movement by many states over the past few decades toward the creation of joint custody statutes. These joint custody statutes followed on the heels of the above-mentioned tender years statutes and pure best interests of the child statutes. The concept of parenting plans arose from "mental health and family law professionals affiliated with the Association of Family and Conciliation Courts." The goal of those professionals, recognizing the benefit of consistent contact with both mother and father, was to encourage better cooperation between parents following the breakup of their marriage. One commentator noted that parenting plan legislation nationwide has historically focused on two goals: "(1) shared parenting, and (2) limitations on shared

175. Crosby, supra note 172, at 490–91.
176. Id. at 509 n.80.
177. Ellis, supra note 171, at 70 n.10.
178. Id.
parenting. That is, they attempt to provide meaningful access to children by both parents, yet at the same time recognizing that one of the parents may come into a divorce process in a weaker position and needing protection because of abuse or financial insecurity.

In Wisconsin, development of parenting plan legislation mirrors that of the national trend. That is, at the same time the Wisconsin legislature was considering joint placement legislation and legislation that required divorce courts to look at maximizing the amount of time each parent spent with the children, the parenting plan statute came into existence. Wisconsin's parenting plan law mandates that each parent complete and submit to the court a detailed scheme of parenting duties and responsibilities. The concept of the parenting plan has been a part of

179. Id. at 79.
180. Id at 79–80.
181. WIS. STAT. § 767.24(1m) (1999–2000). This section reads as follows:

In an action for annulment, divorce or legal separation, an action to determine paternity or an action under s. 767.02(1)(e) or 767.62(3) in which legal custody or physical placement is contested, a party seeking sole or joint legal custody or periods of physical placement shall file a parenting plan with the court before any pretrial conference. Except for cause shown, a party required to file a parenting plan under this subsection who does not timely file a parenting plan waives the right to object to the other party's parenting plan. A parenting plan shall provide information about the following questions:

(a) What legal custody or physical placement the parent is seeking.

(b) Where the parent lives currently and where the parent intends to live during the next 2 years. If there is evidence that the other parent engaged in interspousal battery, as described under s. 940.19 or 940.20 (1m), or domestic abuse, as defined in s. 813.12(1)(a), with respect to the parent providing the parenting plan, the parent providing the parenting plan is not required to disclose the specific address but only a general description of where he or she currently lives and intends to live during the next 2 years.

(c) Where the parent works and the hours of employment. If there is evidence that the other parent engaged in interspousal battery, as described under s. 940.19 or 940.20(1m), or domestic abuse, as defined in s. 813.12(1)(a), with respect to the parent providing the parenting plan, the parent providing the parenting plan is not required to disclose the specific address but only a general description of where he or she works.

(d) Who will provide any necessary child care when the parent cannot and who will pay for the child care.

(e) Where the child will go to school.

(f) What doctor or health care facility will provide medical care for the child.

(g) How the child's medical expenses will be paid.

(h) What the child's religious commitment will be, if any.

(i) Who will make decisions about the child's education, medical care, choice of
the Wisconsin Family Code for over one year with results that are somewhat uncertain. That is, quite often courts will not even require the submission of such a plan even though they are mandatory according to the statute. For these litigants, the parenting plan process is of no benefit. Nevertheless, for those that do engage in the process, parenting plans have two benefits. First, parenting plans force couples to think about various issues that are often overlooked at the time of divorce, such as day care, recreational activities, and education related issues for children who have not yet entered school. Second, requiring the parties to a divorce to think about these issues prior to the pre-trial conference may induce settlement of custody and placement disputes prior to the final hearing.

Minnesota's parenting plan legislation was initially introduced in the Minnesota House of Representatives by Representative Andy Dawkins in 1997. His purpose in doing so was to bring change to the "winner-take all system of choosing one parent over the other when we have two good, experienced parents." Ironically, the Minnesota parenting plan law did not arise with a corresponding change in the Minnesota

child care providers and extracurricular activities.

(j) How the holidays will be divided.

(k) What the child's summer schedule will be.

(L) (sic) Whether and how the child will be able to contact the other parent when the child has physical placement with the parent providing the parenting plan.

(m) How the parent proposes to resolve disagreements related to matters over which the court orders joint decision making.

(n) What child support, family support, maintenance or other income transfer there will be.

(o) If there is evidence that either party engaged in interspousal battery, as described under s. 940.19 or 940.20(1m), or domestic abuse, as defined in s. 813.12(1)(a), with respect to the other party, how the child will be transferred between the parties for the exercise of physical placement to ensure the safety of the child and the parties.

Id.


183. Id.


185. Id.

186. MINN. STAT. ANN. § 518.1705 (West Supp. 2002). This section states in part:

Subdivision 1. Definition. "Domestic abuse" for the purposes of this section has the meaning given in section 518B.01, subdivision 2.

Subd. 2. Plan elements. (a) A parenting plan must include the following:
custodial factors as occurred in Wisconsin. That is, Minnesota did not pass any further legislation in support of joint physical custody. Initial attempts to pass the reform legislation failed, but the legislature formed a task force to study the concept of parenting plans.

In his push for parenting plan legislation, one of the proposals made by Representative Dawkins, which found its way into the final bill, was that the terminology used in the realm of custody and placement laws be revised based upon the fact that the current custody and visitation language represented concepts of possession or control. Minnesota's parenting plan legislation permits parents to use whatever labels they choose as long as those terms are defined by the parents. In Wisconsin, the opposite is true. Wisconsin requires each parent to set forth the exact legal custody or physical placement arrangement that the

(1) a schedule of the time each parent spends with the child;
(2) a designation of decision-making responsibilities regarding the child; and
(3) a method of dispute resolution.

(b) A parenting plan may include other issues and matters the parents agree to regarding the child.

(c) Parents voluntarily agreeing to parenting plans may substitute other terms for physical and legal custody, including designations of joint or sole custody, provided that the terms used in the substitution are defined in the parenting plan.

Subd. 3. Creating parenting plan; restrictions on creation; alternative. (a) Upon the request of both parents, a parenting plan must be created in lieu of an order for child custody and parenting time unless the court makes detailed findings that the proposed plan is not in the best interests of the child.

(b) If both parents do not agree to a parenting plan, the court may create one on its own motion, except that the court must not do so if it finds that a parent has committed domestic abuse against a parent or child who is a party to, or subject of, the matter before the court. If the court creates a parenting plan on its own motion, it must not use alternative terminology unless the terminology is agreed to by the parties.

(c) If an existing order does not contain a parenting plan, the parents must not be required to create a parenting plan as part of a modification order under section 518.64.

(d) A parenting plan must not be required during an action under section 256.87.

(e) If the parents do not agree to a parenting plan and the court does not create one on its own motion, orders for custody and parenting time must be entered under sections 518.17 and 518.175 or section 257.541, as applicable.

Id. 187. Rother, supra note 174, at 27.
188. Id.
189. Id. at 28.
190. Id.
parent is seeking. In this sense, Minnesota's legislation is preferable. Quite often divorce litigants get caught up in obtaining a label rather than in obtaining a particular parenting arrangement. Minnesota addresses that situation and Wisconsin does not.

Wisconsin's legislation clearly provides more structure for parties in designing their parenting plan. There are fifteen items that parents must address for the court prior to the pre-trial conference. These items range from schooling, day care, and health care to such things as a parent's plan for living arrangements over the next two years. Minnesota simply directs its divorcing parents to three broad categories—a schedule, a designation of decision-making responsibilities and a method of dispute resolution. This difference in structure may simply be a reflection of the biggest difference between these two parenting plan models—Wisconsin's is mandatory while Minnesota's is voluntary.

Advantages and disadvantages exist for both Wisconsin's mandatory and Minnesota's voluntary parenting plans. Wisconsin requires parenting plans to be submitted to the court prior to the pre-trial conference. In a sense, this forces parents to undertake the detailed analysis of the necessities of raising their children. The detailed list of items that parents must consider is useful in prodding those who otherwise might not reflect on the needs of the children and give the process the in-depth thought it needs. In Minnesota, however, parents are only undergoing the process of designing a parenting plan because they want to do so. In that sense, they are already mentally invested in the process and can probably be given a little more latitude in what they need to consider. Nevertheless, neither state permits much latitude when it comes to domestic abuse.

192. Despite the fact that the parenting plan legislation requires parents to set forth legal custody and physical placement designations, one commentator has noted that Wisconsin's parenting plan legislation actually helps litigants get past the "fighting words" of legal custody and physical placement. Walther, supra note 86, at 19.
193. Wis. Stat. § 767.24(1m).
194. Id.
196. Wis. Stat. § 767.24(1m).
198. Wis. Stat. § 767.24(1m).
victims of such abuse in their parenting plan legislation.  

Parenting plan statutes are legislative attempts at evolution in the custody and placement realm. Just as custody theory has evolved from children as property of the father, to a paternal presumption, to a maternal presumption, and finally, to an analysis of custodial factors under pure best interests of the child statutes, so too are parenting plans an attempt to evolve custody disputes beyond the stage that is typified by the 20/20 excerpt. The jury is still out on how complete that evolution will be or whether parenting plans will simply be a dead-end that fades out after a few years. However, to the extent that parenting plans are not mandatory for divorcing couples, there will never be a complete departure from custodial factors.

III. RECOMMENDATIONS

The custodial factors of Wisconsin and Minnesota were designed to assist trial judges in determining which parent is the more appropriate one to have custody of the children in a divorce, while parenting plan legislation was designed in an effort to avoid the need to apply those custodial factors. Certain conclusions can be drawn based upon the current implementation of the custodial factors in Wisconsin and Minnesota, and based upon the current implementation of parenting plan statutes in both states.

A. Parent's Rights in the Wisconsin Custodial Factors

As the above example from the ABC News Program 20/20 indicates, a child in a divorce action can be in a tumultuous circumstance. Yet, a child's position in a divorce action is different than a child's position in an action under the Wisconsin Children's Code. Under the Wisconsin Children's Code, a court has the straight-forward task of assessing the best interests of the child regarding placement. In fact, under the Children's Code, the courts are often in the position of placing a child outside of the parent's home based upon egregious conduct by the parents. In a divorce action, however, the court must necessarily balance a child's best interests with the rights of parents to see their children. Thus, there is a dual focus in divorce actions despite the standard of the best interests of the child—a focus on the child's needs.

200. Id.
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and a focus on the parent's rights.

Several of the new factors that were added to section 767.24(5) of the Wisconsin Statutes, as well as the requirement that the court look toward maximizing the amount of time that the child spends with each parent, seem to focus on the rights of the parent rather than the needs of the child. This is evident from the legislative history of those factors. There is certainly no problem with adding factors that demonstrate the reality of the court's task. However, the Wisconsin legislature should take a cautious approach to expanding the parental rights type factors in the future given the extent to which they have emphasized those paternal rights in the most recent legislation. While the guardian ad litem system gives children a somewhat limited voice, the parents are the driving force behind custody fights. Continual emphasis on parental rights type factors may have the unintended effect of increasing the volume of litigation over placement of children.

Further, through the parental rights factors and the requirement to maximize the amount of time with each parent, a parent who has otherwise had a negative impact on a child may be given a renewed sense of power. That is, when preparing his or her parenting plan, a parent who has a motive other than the best interests of the child may see the parenting plan legislation as simply an opportunity to exercise those rights rather than as an opportunity to help the child.

B. The Resurgence of Presumptions

Along these same lines, developments in Minnesota custody and placement laws over the last fifteen years provide significant instruction for Wisconsin, especially in light of Wisconsin's recent experience with these new factors and the original Gary George Bill. As stated above, the original Senate Bill 107 contained a provision that created a presumption of joint physical placement. The possibility of a joint physical placement presumption suggests that Wisconsin is exploring the possibility of eliminating the focus on the child's best interests and focusing instead on a presumption. This is a very ominous turn in the debate about custody and placement in Wisconsin because with such a turn, we begin to lose sight of the need to view each and every child as an individual with individual needs. Minnesota's recent experience with

202. See supra notes 87–92 and accompanying text.
203. See supra notes 74–86 and accompanying text.
204. See supra notes 74–78 and accompanying text.
a primary caretaker presumption should be a warning to Wisconsin that instituting a presumption into child custody cases can be disastrous for everyone involved, especially the children.

Minnesota's experiment with the primary caretaker presumption started with the case of Pikula v. Pikula. That case addressed the issue of the physical custody of Dana and Kelly Pikula's two daughters. The trial court heard evidence for two days, including testimony from the parties and from relatives, and a custody evaluation report based on the recommendations of three separate social workers. Ultimately, the trial court awarded physical custody to the father. The mother appealed this decision. The Minnesota Court of Appeals reversed the trial court, noting that the evidence did not support the award of custody to the father. In fact, the intermediate appellate court not only reversed the trial court's decision, but also changed the custody order and awarded custody to the mother.

The Minnesota Supreme Court granted discretionary review of the case and reversed the court of appeals. The court noted that "the evidence was adequate to support the findings which the trial court did

205. 374 N.W.2d 705 (Minn. 1985).
206. Id. at 707.
207. Id. at 707-08.
208. Id. at 708-09. In its Amended Finding 11, the trial court noted, inter alia,

That there is a strong, stable, religious family group relationship within the Pikula family, including respondent and the children, that has been developed, nurtured and cultivated over the years. It has stood like a bedrock through the depression years and post-war years of plenty and permissiveness. This environment has inbred in the family, including respondent, a unity, respect, loyalty and love that for the most part has been destroyed and lost in most modern American families. It is in the best interests and welfare of the children that their custody be awarded to respondent, who shares these attributes and who will assure that these children will be raised in the present cultural, family, religious and community environment . . . .

Id. at 709. In its Amended Finding 12, the trial court noted, inter alia,

That the environment in which petitioner finds herself is almost the exact opposite of that in which the respondent lives and will raise the children, it would subject the children to considerable uncertainty and instability in home, community, culture, persons and religion, should custody be awarded to petitioner . . . .

Id.
209. Id. at 707.
210. Id. at 709.
211. Id. at 709-10.
212. Id. at 714.
However, having decided to reverse the court of appeals, the Minnesota Supreme Court remanded the case, finding that the trial court had misinterpreted Minnesota Statute section 518.17. The court noted:

[T]he factors set forth in section 518.17, subd. 1, require that when both parents seek custody of a child too young to express a preference for a particular parent and one parent has been the primary caretaker, custody be awarded to the primary parent absent a showing that that parent is unfit to be the custodian.

The court went on to further discuss the meaning of primary caretaker. The court set forth a non-exclusive list of child rearing tasks, the performance of which by any given parent, would help direct the court toward the parent that was the primary caretaker. These tasks included:

1. preparing and planning of meals;
2. bathing, grooming and dressing;
3. purchasing, cleaning, and care of clothes;
4. medical care, including nursing and trips to physicians;
5. arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings;
6. arranging alternative care, i.e. babysitting, day-care, etc.;
7. putting child to bed at night, attending to child in the middle of the night, waking child in the morning;
8. disciplining, i.e. teaching general manners and toilet training;
9. educating, i.e., religious, cultural, social, etc.; and,
10. teaching elementary skills.

Prior to Minnesota's adoption of the primary caretaker presumption in *Pikula*, only one state had adopted a similar presumption in child custody situations. The Supreme Court of the State of West Virginia

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213. Id. at 710.
214. Id. at 713–14.
215. Id. at 713.
216. Id.; see also supra note 156 and accompanying text.
adopted such a presumption in the case of *Garska v. McCoy*\(^{219}\) in 1981. The West Virginia court argued that by controlling the discretion held by trial courts and providing predictability to the results, it would reduce the number of custody cases that were litigated at the trial court level.\(^{220}\) Minnesota, apparently, was attempting to accomplish the same objectives. As one commentator noted, "Minnesota's experience [with the primary caretaker presumption] exemplifies the tension in child custody law between a need for predictable results and an equally compelling need to freely consider variations in each family situation."\(^{221}\) Nevertheless, while supporters of the presumption argued that it would reduce litigation on custody issues because it would inject some certainty into the result,\(^{222}\) the opposite proved to be true.\(^{223}\)

Criticisms of the primary caretaker presumption were plentiful in Minnesota.\(^{224}\) One commentator noted that critics of the primary caretaker presumption viewed the presumption as disregarding "at least five primary child interests."\(^{225}\) The first of those interests was that the "application of the standard can imperil important parent-child bonds."\(^{226}\) The second way in which the child's interest was being sacrificed by the primary caretaker presumption was that the presumption had an "inevitable emphasis on the past."\(^{227}\) Third, "that greater consideration should be given to which parent is the better provider of certain types of critical care, such as health care, education and religious training."\(^{228}\) It was also believed that the presumption might be harmful to parent–child bonding "because it might imperil close child contact with both parents."\(^{229}\) Lastly, the presumption did not protect the children "against harmful caretaking that does not constitute

\(^{219}\) 278 S.E.2d 357.

\(^{220}\) Id. at 361.

\(^{221}\) Crippen, *supra* note 53, at 429.

\(^{222}\) Id. at 446 (citing *Pikula*, 374 N.W.2d at 713). The Minnesota Supreme Court predicted that the primary caretaker presumption would largely eliminate custody disputes from divorces. *Id.*

\(^{223}\) See *id.* at 452 (noting that the primary caretaker presumption actually "caused an explosion of litigation in Minnesota").

\(^{224}\) See generally Ahl, *supra* note 12; Crippen, *supra* note 53.

\(^{225}\) Crippen, *supra* note 53, at 489.

\(^{226}\) *Id.*

\(^{227}\) *Id.* at 490.

\(^{228}\) *Id.* at 491.

\(^{229}\) *Id.*
unfitness or clearly dangerous conduct.\textsuperscript{230}

As in Wisconsin's struggle with the Gary George Bill, the Minnesota State Bar Association helped bring down the primary caretaker presumption created in \textit{Pikula}.\textsuperscript{231} At a meeting of the Minnesota State Bar Association in February 1989, the Family Law Section recommended eliminating the preference.\textsuperscript{232} Fathers groups urged the state bar association to abolish the preference which they perceived as disregarding their parent-child relationship,\textsuperscript{233} while mothers groups lobbied against abolishing the preference.\textsuperscript{234} Despite this experimentation with a presumption favoring the traditional care provider, the primary caretaker presumption eventually went the way of past custody presumptions. In 1989, the Minnesota legislature abolished the primary caretaker preference by passing an amendment to section 518.17 of the Minnesota Statutes which states that "[t]he primary caretaker factor may not be used as a presumption in determining the best interests of the child."\textsuperscript{235}

While Minnesota no longer labors under a legal presumption in custody cases, some of the problems Minnesota experienced with the primary caretaker presumption provide lessons for Wisconsin. Each set of circumstances in a divorce situation are different. The parties and the children have different needs from one case to the next. Further, the parties have different capacities to provide those needs from one case to the next. In fact, one psychologist has noted that, when he was asked whether a particular schedule serves the best interests of a child, his response was, "it depends."\textsuperscript{236} This comment reflects the idea that any particular placement schedule must be a reflection of various factors affecting a child.\textsuperscript{237} By continuing to toy with a joint placement

\begin{itemize}
\item \textsuperscript{230} \textit{Id.} at 492.
\item \textsuperscript{231} \textit{See supra} note 205 and accompanying text.
\item \textsuperscript{232} Crippen, \textit{supra} note 53, at 494 n.227.
\item \textsuperscript{233} \textit{Id.}
\item \textsuperscript{234} \textit{Id.}
\item \textsuperscript{235} MINN. STAT. ANN. 518.17(1)(a) (West Supp. 2002).
\item \textsuperscript{236} Kenneth H. Waldron, Don't Split the Baby, Physical Placement and the Developmental Needs of Children, Seminar (May 26, 1995).
\item \textsuperscript{237} \textit{Id.} Doctor Waldron cited seventeen separate factors that should be considered when fashioning a schedule that will reflect the child's best interests. Those factors are: age of the children, sex of the child, temperament of the child, past experiences of the child, children with special needs, siblings, supports for the child, supports for the parents, geographic distance between homes, work hours of parents, financial resources, personal needs of the parents, conduct problems, parenting strengths and weaknesses, consistency and stability,
presumption, Wisconsin will continue to be at risk of placing the children of its divorcing couples into problematic situations and into placement arrangements that bear no relationship to their needs or to the parents' abilities to provide for those needs. Wisconsin's legislators need to be wary of this fact and avoid the temptation to try and make custody decisions "easy." While preferences and presumptions favoring one parent or the other have been part of Wisconsin's history since its inception, these presumptions can subvert the best interests of the child standard, which is the basis for the state's custody laws. The example offered by Minnesota's recent experiment with a primary caretaker presumption is illustrative.

C. Minnesota and Joint Physical Custody

While Minnesota's recent past provides some useful lessons to Wisconsin, some of Wisconsin's recent legislation is also instructive for Minnesota. As discussed earlier, the joint placement provisions in Senate Bill 107, also known as the Gary George Bill, did not succeed in passing the Wisconsin legislature. Nevertheless, the resulting compromise bill did provide several things for Minnesota to consider. As stated above, several of the new factors recently incorporated into Wisconsin Statute section 767.24(5) focus on the parent's rights of access to the child. While the Wisconsin legislature needs to exercise caution in incorporating further factors into its statutory scheme that focus on parents rights, those recent additions do not appear in Minnesota's statutory scheme.

In Minnesota, there is a line of case law that discourages joint physical custody in divorce cases. In the case of Rosenfeld v. Rosenfeld, a Minnesota intermediate appellate court addressed the issue of joint physical custody. In that case, a husband and wife had reached a stipulated physical custody schedule for their children at the time of their final divorce. The schedule called for, *inter alia*, the two oldest children to live with the mother during the school year and with the father during the summer months. There were additional periods

\[\text{communication and cooperation between parents, and access to both parents. Id.}\]
\[238.\text{ Hofer, supra note 31, at 343.}\]
\[239.\text{ Id.}\]
\[240.\text{ See supra notes 74–78 and accompanying text.}\]
\[241.\text{ 529 N.W.2d 724 (Minn. Ct. App. 1995).}\]
\[242.\text{ Id. at 725.}\]
\[243.\text{ Id.}\]
of overnight physical custody for each parent during the period of time when the other parent had physical custody.\textsuperscript{244} The mother subsequently filed a motion requesting that she be awarded sole physical custody because the schedule was not working for the parties or the child.\textsuperscript{245} However, the court noted that the mother was simply requesting a change in the label that was being given to the current schedule, rather than an actual change in the schedule itself.\textsuperscript{246} Thus, the mother already had sole physical custody for nine months out of the year and the father had sole physical custody for the other three months.\textsuperscript{247} The court of appeals rejected the request by the mother for a change in the label to "sole physical custody" because the court determined that the mother had not presented a "justiciable controversy."\textsuperscript{248}

During its analysis, the court noted that the term joint physical custody was not precisely defined by Minnesota Statutes.\textsuperscript{249} However, the court loosely defined it as any arrangement where "the routine daily care and control and the residence of the child is structured between the parties."\textsuperscript{250} The court went on to note that such arrangements are not looked upon favorably.\textsuperscript{251} The court indicated that "[j]oint physical custody is not a preferred custody arrangement due to the instability, turmoil, and lack of continuity inherent in such an arrangement and is not generally in a child's best interest."\textsuperscript{252} The court further stated "that the designation of a placement depends on its characteristics, not its label."\textsuperscript{253} Two cases were cited in support of the court's view that joint physical custody was not a preferred arrangement under Minnesota law.\textsuperscript{254} However, while Minnesota has a line of cases that appears to discourage joint physical custody arrangements, it also has a statute that must be applied in the event a trial court seeks to enter a joint physical

\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{246} Id. at 727.
\textsuperscript{247} Id. at 726.
\textsuperscript{248} Id. at 726.
\textsuperscript{249} Id. at 726.
\textsuperscript{250} Id. (quoting MINN. STAT. ANN. § 518.003(3)(d) (West 1992)).
\textsuperscript{251} Id.
\textsuperscript{252} Id.
\textsuperscript{253} Id.
\textsuperscript{254} Wopata v. Wopata, 498 N.W.2d 478, 483 (Minn. Ct. App. 1993) (noting that while mother and father may be "equally qualified to raise the children ... [that] does not mean that they are qualified to raise them jointly"); see also Peterson v. Peterson, 393 N.W.2d 503, 506 (Minn. Ct. App. 1986).
placement order.\textsuperscript{255}

These three cases were not the only occasions in which the Minnesota appellate courts had expressed this view. In the case of \textit{Steinke v. Steinke},\textsuperscript{256} the court of appeals addressed a situation in which a mother appealed an award of joint physical custody to the father by the trial court.\textsuperscript{257} The court noted that the trial court had made three errors:\textsuperscript{258} First, the trial court had failed "to determine which parent was the primary caretaker" under the \textit{Pikula} standard.\textsuperscript{259} Second, the court had failed to justify its disregard of the preference of the ten-year-old child.\textsuperscript{260} Finally, the court had disregarded the preference against joint physical placement absent "exceptional circumstances."\textsuperscript{261} While it is important to note that this case occurred during the era when the primary caretaker presumption reigned supreme, the court made a separate finding that Minnesota had a preference against joint physical placement.\textsuperscript{262}

Under Wisconsin's new factors and the new directive that courts attempt to maximize the amount of time that children have with their parents, the aforementioned case law would likely be overturned. Minnesota should look carefully at Wisconsin's shared placement statutory scheme and consider adopting some of its provisions. Of particular interest to the State of Minnesota should be the factor that addresses "'[t]he amount and quality of time that each parent has spent with the child in the past ... and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future.'"\textsuperscript{263} This factor appears to encompass Minnesota's focus on the primary caretaker while offering an additional dimension. It offers a parent, who entered into an agreement with his or her spouse to be the bread winner in the family, the opportunity to reassess that role in light of the divorce. That parent would have the opportunity to change that

\begin{itemize}
\item \textsuperscript{255}\textsc{MINN. STAT. ANN.} § 518.17(2) (West Supp. 2002).
\item \textsuperscript{256} 428 N.W.2d 579 (Minn. Ct. App. 1988).
\item \textsuperscript{257} \textit{Id.} at 581.
\item \textsuperscript{258} \textit{Id.} at 584.
\item \textsuperscript{259} \textit{Id.}
\item \textsuperscript{260} \textit{Id.}
\item \textsuperscript{261} \textit{Id.}
\item \textsuperscript{262} \textit{Id.} at 583 (noting that, in awarding joint physical custody, the trial court had ignored "the preference against divided physical custody, which applies unless there is 'evidence of unusual circumstances, either special reasons for the arrangement or special accommodations to ease disruption and instability for the child'.")
\item \textsuperscript{263} \textsc{WIS. STAT.} § 767.24(5)(cm) (1999–2000).
\end{itemize}
role of bread-winner-only to the role of bread winner and caretaker. When two people, contemplating an indefinite marital union, enter into an agreement to structure their lives in a certain way in order to maximize efficiency, it is not fair to penalize one parent because he or she failed to consider the effect of that decision if the parties divorced. The Minnesota legislature should carefully consider this issue with a view toward eliminating the court-created preference against joint physical placement.

D. Wresting the Wisdom From Solomon—Parenting Plans

Parenting plans have arisen as a method to avoid protracted litigation about children. They are meant to provide parents with a way of thinking through the custody arrangements that will best work for their family once the divorce is finalized without the need to resort to a judge. While it is certainly appropriate to provide parents the opportunity to design their own placement arrangement, there is no doubt that the custodial factors can influence the design of that plan. Thus, if a parent perceives that his or her chances in contested litigation are minimal, they will have a greater incentive to propose a parenting plan that is closely aligned with those litigious expectations. With this in mind, it is easy to see how changes in the focus of the custodial factors, such as occurred in Wisconsin, can have a dramatic impact on how a parent views their chances in court and, consequently, the parenting plan which they submit. The custodial factors become the "hammer" that encourages parents to reach an agreement.

Certainly, the creation of a presumption in favor of joint physical custody of children would have an impact on the way a parent designs his or her parenting plan. Further, it may impact the willingness of a parent to settle on a given parenting plan. Therefore, parenting plan legislation is not, in an absolute sense, parent driven. Rather, it is a legislatively directed settlement.

Despite this attempt by the legislature to direct parties toward settlement, there are two assumptions built into parenting plan legislation.

264. The Minnesota legislature accurately expressed the five main goals behind parenting plans: 1) to reduce the number of costly legal battles in custody and visitation proceedings; 2) to eliminate the deep wounds that result from custody and visitation litigation; 3) to improve the future relations between the parties; 4) to improve the involvement of both parents; and 5) to create healthier families. Audio Tape: Parenting Plans, 2000: Hearings on H.F. 3311 Before the House Civil Law Committee, 81st Leg., 2000 Reg. Sess., Tape 1, Side B (March 2, 2000) (statement of Rep. Andy Dawkins).
legislation that can lead to problems. First, there is an assumption that, given the right information, parents will tend to come up with an agreement on how they are going to structure their parenting arrangement after a divorce. However, this fails to recognize that parents can oftentimes have a genuine and reasonable disagreement about certain issues involving the raising of their children. These types of disagreements arise even for intact families. However, in families that are intact, there is usually a compromise worked out between the parents based upon their own internal desire to reach agreement with each other. Yet, in divorced families the same cannot always be said. These "reasonable disagreement" situations may not lend themselves to solutions with a parenting plan.

The second problem with the parenting plan theory is that it is based upon the assumption that parents are motivated to propose schedules that serve the best interests of their children. However, most couples who are disposed to reaching agreements with their spouse were already doing so without parenting plans. Rather, they are successfully reaching agreements in the mediation process, which is mandatory in Wisconsin,265 but voluntary in Minnesota.266 In addition, there is nothing about the parenting plan theory that can adequately address the conflict and problems that arise when one or both of the parents have other motives besides their children's best interests.

For those parents, it is not a genuine disagreement that prevents a successful resolution, nor is it a lack of information that creates in parents an inability to reach agreement in the best interests of their children, rather, it is a character defect—the parent or parents are unwilling to put their children's needs ahead of their own. In situations where parents have that type of disposition, there is nothing, including a comprehensive parenting plan, which will avoid litigation.

It is clearly important for both states to continue pursuing legislation that seeks peaceful resolutions to custody and placement disputes. However, it is unlikely that parenting plans will become a panacea for resolving such disputes in either state. There will be a certain segment of divorce litigants who will be able to solve their disputes through the parenting plan process, but there will also be those couples who, for whatever reasons, will simply not agree and need to litigate. While some potential settlements may be missed in Minnesota because of the

non-mandatory nature of parenting plans, Wisconsin courts need to be more vigilant in enforcement of the parenting plan requirement or an equal number of settlement opportunities may be missed. It goes without saying that the legislatures of both states need to continue to monitor the implementation of the parenting plans in order to make improvements when indicated.

IV. CONCLUSION

A Wisconsin appellate court noted in the case of *Kerkvliet v. Kerkvliet* that the statutory factors that a family court must consider in making an initial award of physical placement are not exhaustive. The court noted that "there is no hard-and-fast rule or formula... for determining what combination of factors will ultimately assure the future welfare of a child... of a broken home." This is certainly the case. Each custody and placement dispute is distinct. However, it is not so much the actual factors considered by the court as it is the fact that the court has some discretion in fashioning a placement schedule that meets the needs of the child. While it could certainly be debated that bright line rules and presumptions are the only way that all parties can be assured that a trial court's prejudices will not influence its decisions, it is equally true that such bright line rules could diminish a child's ability to cope with the breakup of his or her family.

It goes without saying that a child should be afforded the opportunity to learn and grow from each of his or her parents. However, it is equally true that a parent should be afforded the opportunity to learn and grow from his or her children. Wisconsin's increased awareness of the need for each parent to have meaningful access to his or her children should be seen as a positive development in physical custody and placement laws—as long as this awareness does not turn into some form of a weapon in child support disputes or a vendetta by a vindictive spouse.

Minnesota would do well to consider increasing its awareness of this issue as well. While Minnesota does not have a prohibition against joint physical custody, such arrangements are not necessarily encouraged. It is certainly not possible to continue after the divorce the same level of frequent and continuing contact that both parents had with the child.

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267. 166 Wis. 2d 930, 480 N.W.2d 823 (Ct. App. 1992).
268. Id. at 935, 480 N.W.2d at 827.
269. Id. (quoting King v. King, 29 Wis. 2d 586, 590, 139 N.W.2d 635, 637 (1966)).
before the divorce. However, by being aware of the benefits of joint physical placement and by seeking to apply it in cases where it might work, Minnesota would be affording its children and parents the opportunity to benefit from one another.

Along the same lines, Wisconsin's recent adventure with Senate Bill 107 should be a concern to all people involved with the family law system. From deep into the past comes the lesson that presumptions cause more harm than good. The Roman law, the Anglo-Saxon law, the English common law, and the American common law all demonstrate that presumptions usually cause one party to lose a custody dispute for reasons that are inexplicable and unrelated to the best interests of the child. Wisconsin should heed the lessons taught by Minnesota's experience with the primary caretaker presumption. In the end, it heightened litigation and resulted in decisions that were not based on the reality of the divorced parties. While family court judges in Wisconsin and Minnesota may not have the "wisdom of Solomon," they need to be given the discretion to fashion placement schedules that work for the children of divorce.

Parenting plans try to address these statutory defects and subjective use of custodial authority of the courts by giving parents the ability to design their own postdivorce parenting arrangement. They try to allow parents the opportunity to exercise the "wisdom of Solomon." By investing themselves in that process and in the best interests of their children, divorcing mothers and fathers may avoid the need for a divorce court to "examine how they differ from one another and which is to be preferred."  

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270. See supra notes 5–27 and accompanying text.

271. See PLATO, supra note 1, at 106.