Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody

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I. INTRODUCTION

When parents warring with each other in divorce cases cannot decide what is in their children's best interests, it is left for the court to strip away the numerous layers of litigation-induced grime and determine, like a clairvoyant with robes, which arrangement will maximize the benefits to a child both short and long-term. In order to accomplish this task, the result of which may affect the course of history, the court only need apply the simple "best interest of the child" standard and act accordingly. But how can a judge, or anyone for that matter, objectively determine with precision what is in a child's best interest? The psychological and social needs of the child and other complexities inherent in understanding a child's needs are of such a nature to defy any certain definition:

the situations in which children live are so various, complex and unpredictable that no adequately comprehensive, detailed, and principled set of standards could be drawn up that would satisfactorily guide courts or agencies in making decisions about children. Furthermore, in a large pluralistic society it is hard to reach a satisfactory social agreement about what kind of adults we want children to become, about what child-rearing methods will produce what kind of adults, or about what child-rearing methods will produce what kind of adults . . . .

The best interest standard, used by courts to resolve custody disputes for nearly thirty years, is an indeterminate standard dependent upon the subjective values and life experience of the fact finder and psychological experts. Because of the uncertainties of such a standard, critics have argued that the standard is simply worthless. Oftentimes the process of determining a child's best interest is in itself deleterious to the best interest of the child.

But what better options are available in resolving a dispute concerning the placement of children, and the decision-making rights of their parents? Should the law automatically prefer a particular parent because of her sex? Should the law simply maintain the status quo of relative parenting time prior to the commencement of the divorce? Should we flip a coin as coyly suggested by some commentators?5

This article will discuss the history of how disputes concerning child placement and decision-making were resolved. The author will examine the historical preferences in favor of fathers and then mothers, ultimately replaced with the “best interest of the child” standard. The author will review the literature criticizing the best interest standard and conclude that despite its many profound flaws, there simply is no better way to resolve contested issues affecting children. The article will conclude with practical suggestions to enhance the effectiveness of a legal standard that is designed to promote the best interests of children, but which currently falls short of that worthy goal.

II. A SHORT HISTORY OF ALLOCATION OF CHILD CUSTODY

A. THE EVOLUTION FROM RULES-BASED ADJUDICATIONS TO A DISCRETIONARY STANDARD

The history of the adjudication of custody disputes has shown an evolution from specific rules and standards on which courts could rely to a more discretionary standard. “The history of the legal standards governing custody disputes between a child’s parents reveals a dramatic movement from rules to a highly discretionary principle gradually shorn of narrowing procedural devices.”6 This unfolding of the law in the area of contested child custody reflects the inherent conflict in Anglo-American law, which seeks to reconcile the competing preferences for clear rules and standards of law against the need for judicial discretion.7

5. See Elster, supra note 3, at 16.
6. Mnookin, supra note 3, at 233-34.
7. See Gary Crippen, Stumbling Beyond the 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, 430-31 (October 1990).

This dilemma is perhaps the foremost recurrent example of the struggle in Anglo-American law to reconcile a preference for decision making according to the rule of law with a conflicting desire for trial court discretion sufficient to meet the interests of justice. Generations of Americans have ceremonially honored a long history of dedication to the rule of law, a tradition begun in the seventeenth century in England. Ameri-
1. Paternal Preferences

Until the late nineteenth century, English law automatically mandated that children be placed with their father in the event of a dispute concerning their care and control.8 This rule was derived from ancient Rome where the pater-familias ruled and dominated all aspects of domestic as well as public life.9 The history of Western culture reflected children as the property of their father, which resulted in their total control by that father.

In the colonial American era, the father, as the economic head of the household, was awarded custody of children due largely to their importance as an asset in an economy with a deficient labor force.10 In light of the father’s supervision of apprentices and other laborers, it was assumed that the father, rather than the mother, would better supervise the children.11

Revolutionary America was the genesis of the erosion of the patriarchal preference. Murray comments on the American experiment of liberty and the impact on the family:

The American Revolution, with its fierce opposition to patriarchy, began a transformation in our understanding of the family and the place of children within it. The family, rather than an organic whole with the patriarch as its head, gave way to a collectivity of individuals, each with his or her own rights and interests.”12

Just as colonial America rejected the absolute authority of the British Monarch, the family also evolved into a quasi-democratic institution.

Nineteenth century American jurisprudence continued to reject the rule of the absolute paternal preference.13 While the father still dominated can dedication to a system of rigid laws, however, has been willingly diminished to permit discretionary resolution of an exploding number of legal conflicts. This desire for discretionary justice reflects a tentative faith in the ability of decision makers to carefully assess individual situations while avoiding undisciplined abuse of general principles. The resulting tension between the conflicting goals of discretion and certainty is apparent in many family law matters and has become more troubling as courts increasingly assume the responsibility of settling such cases.

Id.

9. Id.
11. Id.
12. Id. at 54.
as the head of the family, individual rights of other members of the family saw some nascent protection:

In nineteenth-century America, the family still had a patriarch at its head; the law still consigned women and children to inferior legal status. But judges could and, over time, increasingly did intervene in family matters to protect individual members of the family. The patriarch's powers were restrained as new ideas about the nature of marriage, of women, and of children took hold under the sway of convictions about the importance of individual, autonomous choice and the superior significance of accomplishment over that of status inherited by birth.\(^{14}\)

For example, in 1838, a Maine judge wrote on the topic of children's rights in custody determinations and stated that "[C]hildren do not become property of the parents. As soon as the child is born, he becomes a member of the human family, and is invested with all of the rights of humanity." In that same decision, the court commented on notions of fault and the child's interests in determinations of custody:

If instead of treating his child with tenderness and affection . . . he treats him with such cruelty that he cannot be safely left in his custody . . . [the court] will interpose and deprive him of the exercise of a power, which having been allowed for the benefit of the child is perverted to his injury and perhaps his ruin.\(^{15}\)

Early American jurisprudence was already rejecting notions of children as property, refocusing consideration on their welfare.

2. **A Transitive Period**

According to Mnookin, a transitive period emerged between the earlier absolute preference for fathers and the later preference in favor of mothers. "While some statutes expressed a preference for the father, it appears a rule based on fault emerged: 'The children will best be taken care of and instructed by the innocent party.'"\(^{16}\)

This transitive period saw the origination of the maternal preference rules. In the late nineteenth century and into the twentieth century, the wife

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14. Murray, supra note 8, at 54.
15. Id. at 54-55.
typically filed for divorce, necessarily requiring her to plead and prove fault in order to prevail. The award of custody to the mother became a byproduct of that social convention. The rules in favor of maternal preference were also the genesis of courts' consideration of a child's best interest in custody awards.

3. The Maternal Preference and the Tender Years Doctrine

Gradually into the twentieth century, the law more formally evolved in favor of a maternal preference for custody. The shift from a paternal to a maternal preference reflected a societal reevaluation of the status of women. "As women began to obtain greater social and economic power, their ability to provide for their children's maintenance and education increased proportionately." It was also during this period that women came to be recognized as being better able to care for children as a result of "maternal instincts." "Building upon the Victorian reverence for Mother, often described as the 'Cult of True Womanhood,' advocates for women used arguments about women's essential nature as a wedge to gain legal rights in their children."

Statutes that were designed to obviate the paternal preference in order to place mothers on equal footing were interpreted by courts to prefer mothers when children were young. Also known as the "tender years doctrine," this maternal preference rule became incorporated into statutes and the common law. The law came to accept women as having superior morals and nurturing skills, better suiting them for the care and rearing of children. Thus, by the end of the eighteenth century, the focus on children as economic tools of their father evolved into a consideration of the needs of the children and the parent better able to provide for those needs. This paradigm shift implicitly recognized the importance of children's interests distinct from the needs of the parents.

17. Id. at 234-35.
19. Mason & Quirk, supra note 10, at 220.
20. Id.
21. Id.
23. Mnookin, supra note 3, at 235.
24. Id.
25. Mason & Quirk, supra note 10, at 220.
B. FAMILY LAW TRANSFORMED

In the mid-twentieth century, America saw a general transformation in family law, including the rules affecting child custody. Grossberg commented on many of the factors affecting this transformation. For example, the emergence of feminism as a political force combined with the increasing federalism in family law changed society's attitudes towards children and families. Ironically, feminism, with its implicit reliance on theories of equal rights between the sexes, largely contributed to the demise of maternal preferences for custody.

Citing psychologist Arlene Skolnick, Grossberg noted that it was the turmoil of the 1960s and 1970s and the resultant disregard of social convention that contributed to the demise of the maternal preference:

Maternal preference had remained unchallenged until the family upheavals of the 1960s and 1970s. In the wake of rising divorce rates, challenges to women's traditional roles, and men's claims of sex discrimination in custody awards, most states abandoned the maternal presumption in favor of a more gender neutral "best-interests" standard.

It is that standard that largely prevails today in determining child custody. Between 1960 and 1990, the maternal preference was eviscerated in all states, leaving a void filled with a "best interest standard" to determine child custody and placement.

While applied differently in different jurisdictions, the general notion of a best interest standard rejects legal presumptions in favor of a particular sex and seeks to adjudicate issues of custody in a gender-neutral way. Simply put, a court is to consider a number of different circumstances involving the family and attempt to resolve custody issues with the goal of enhancing the children's circumstances. However, in adopting this admirable standard, courts have been universally challenged in their application of it.

26. See, Grossberg, supra note 2, at 3.
27. A partial listing of the repudiated rules document a range of family law changes clearly worthy of the label transformation: maternal preference, bans on interracial marriage, fault based divorce, laws against abortion and birth control, refusals to accept charges on marital rape, circumscribed juvenile rights, and even basic legal definitions of families. Each of these family law orthodoxies was replaced with a new rule and practice. We remain in the new era created by these changes.
28. Mason and Quirk, supra note 10, at 220.
Despite these challenges, the best interest standard remains the preferred paradigm nationally. While presumably no credible social or legal critic challenges the notion that a child’s interests should be paramount in adjudicating custody, critics have questioned the standard, claiming that it ironically is harming those children it is designed to benefit.

III. THE BEST INTEREST STANDARD: IS THERE A BETTER WAY?

The American Law Institute in *Principles of the Law of Family Dissolution: Analysis and Recommendations* challenges the continued efficacy of the best interest standard:

[t]oday, the test is uniformly disparaged. Critics charge that the unpredictability of results encourages parents to engage in strategic behavior, take their chances in litigation, and hire expensive experts to highlight each other’s shortcomings rather than work together to make the best of the inevitable. The test is also condemned because of the room it allows for those who apply it to express biases based on gender, race, religion, unconventional behaviors and life choices and economic circumstances.

The American Law Institute and its literature raise three primary objections to the notion of a best interest standard:

1. The standard is indeterminate and unpredictable
2. The standard is impossible to adjudicate
3. The standard is unjust

A. INDETERMINACY AND PREDICTABILITY OF THE BEST INTEREST STANDARD

Inherent in custody law as well as all areas of law is the conflict between law designed to predictably suggest an outcome before the litigation commences and the need for individualization to achieve a just result. Predictable standards encourage settlement, expedite resolution of contested

31. *Id.*
33. See *Id.* See also, Elster, *supra* note 3, Mnookin, *supra* note 3, and Crippen, *supra* note 7.
34. Crippen, *supra* note 7, at 429.
custody cases and constrain both conscious and subconscious rogue and subjective rulings based upon fact-finder biases.35

Therein lies the basic problem with adjudicating custody. The best interest standard must necessarily be open ended because each individual child and family situation is unique.36 "Custody law today reflects a complicated and chaotic multiplicity of such factors as the doctrinal thread invoked, the identity of the disputants, their prior relationship to the child, and the setting from which the dispute arose."37 But by having an open-ended standard, judges can exercise their discretion so broadly as to neutralize any effective standard in this regard. Mnookin, citing Fuller, relates that when a judge relies on the best interest standard, he is not applying law or legal rules at all, but is exercising administrative discretion which by its nature cannot be rule-bound. The statutory admonitions to decide the question of custody so as to advance the welfare of the child is as remote from being a rule of law as an instruction to the manager of a state owned factory that he should follow the principle of maximizing output at the least cost to the state.38

The indeterminate standard also contributes to the problem of the reliance on the subjective preferences of the fact finder.39 How can a judge or fact finder exclude personal preferences, biases and life experiences under an indeterminate standard that provides little concrete guidance in determining what is in a child’s best interest? This is the basic criticism of a best interest standard.40

35. Id. at 440-44.
36. AMERICAN LAW INSTITUTE, supra note 32, at 1.
37. Mnookin, supra note 3, at 227.
38. Id. at 255, n. 152.
39. Elster, supra note 3, at 6 states that:
   If a judge or psychologist tried to make an informed choice on behalf of
   the child, she in general would have to add some preference of her own.
   Although she might be justified in correcting the child’s tendency to
   seek immediate gratification, she would in addition have to engage in
   morally objectionable paternalism. Her decisions often would amount to
   telling one of the parents: “Because we don’t like your lifestyle, you
don’t get the child.”
40. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION:
   ANALYSIS AND RECOMMENDATIONS 97 (2002).
   For example, a court may need to choose between a parent who provides
greater emotional security for the child and one who emphasizes intellec-
tual stimulation, or between a home life emphasizing the values of
conformance and obedience and an upbringing that encourages creativity
and challenge to authority. One parent may be deeply religious while the
The Illinois custody statute, for example, directs a court to consider various generic factors in adjudicating custody.\(^4\) The standards in the Illinois Statute are based on the provisions of the Uniform Marriage and Divorce Act approved in 1974.\(^2\) The Uniform Act's Commissioner comments report that the factors cited are those factors most relied upon by appellate courts in reviewing custody rulings.\(^3\)

None of these factors, however, give a court concrete guidance in picking the preferred custodian, especially with young children who cannot express any preferences because of their age. If there is no issue of mental other parent has no religious faith. The parents may use different disciplinary styles, have different attitudes about sex education, or disagree about the need for bedtime routines. With the only guidance for the court is what best serves the child's interests, the court must rely on its own value judgments, or upon experts that have their own theories of what is good for children and what is effective parenting.


\(^2\) UNIF. MARRIAGE AND DIVORCE ACT § 402 (1973).

\(^3\) Id. at § 402 cmt.

This section . . . is designed to codify existing law in most jurisdictions. It simply states that the trial court must look to a variety of factors to determine what is in a child's best interest. The five factors mentioned specifically are those most commonly relied upon in appellate opinions; but the language of the section makes it clear that the judge need not be limited to the factors specified.


\[^{42}\] UNIF. MARRIAGE AND DIVORCE ACT § 402 (1973).

\[^{43}\] Id. at § 402 cmt.
or physical health, domestic violence or alienation, how does a court pick a preferred custodian? The custody case effectively becomes a combination beauty contest and circus sideshow with both parents attempting to woo the judge with their respective strengths and the concurrent weaknesses of their spouse.

B. CAN SCIENCE QUANTIFY A CHILD’S BEST INTEREST?

In an attempt to scientifically quantify the respective parent’s attributes, courts using a best interest standard rely largely on the questionable scientific testimony of expert witnesses called upon to scrutinize the particular quirks of each parent. “Today, the courts seem not only to accept psychological expert testimony on complex family issues but to demand it to effect what they see as a reasonable resolution to problems with no single correct solution.” The court’s reliance on these experts holds many inherent problems. “Psychology is an undeveloped and controversial discipline even at the best of times; and the context of a custody dispute is far from the best time to study the dispositions of children and parents.” Is a psychologist in any better position to peer into the soul of a litigant during this crisis period than the average lay person with good common sense?

The average custody determination relies on a determination of the parents’ respective values and their import on the development of the child. Courts naturally wish to rely on the expertise of a clinician, but is that expertise truly material, in most cases, to a determination of what is in a child’s best interest? Psychological experts are as prone to bias as any fact finder. Hagen opines:

[w]hen hired psychological experts pretend that their evaluation of respective parental values is a scientific en-

45. Elster, supra note 3, at 6.
46. See HAGEN, supra note 37, at 8.

Psychological professional also claim to have special skills that allow them to detect unerringly what is in the best interest of a child. They tell our courts who will be the better parent, who is too crazy to have custody of a child, whether moving from one place to another will disturb the child's mental health, and whether the child was abused by one parent or another. Are mental health professionals any more knowledgeable than you or I about whether a child has been abused in the home? About whether the child is better off removed from the home? About whether the child will grow up better under Mother’s custody or under Father’s? Of course not. How could they be? There are no special secret tests for any of the factors that child clinicians claim are so crucial to their so-called professional opinions.

Id.
deavor rather than a strictly personal echoing of their own values hierarchy, they will see every aspect of the custody evaluation through lenses ground by that delusion. Having decided which parent they most respect or admire, they then find evidence everywhere to support that bias and distort every piece of the report to make the preferred parent look better to the judge.47

Hagen’s observations support the argument that the best interest standard relies substantially on the values and personal bias of the fact finder in determining resolution of custody cases. If in effect no concrete standard is in place, litigants are encouraged to litigate and gamble on a sympathetic judge who shares the same values presented by the litigants.

Such a scenario encourages litigation and discourages settlement. As a result, there are increased costs to children.48 As noted by Elster:

[f]irst, more cases will be brought than if there existed a strong presumption rule or an automatic decision procedure because both parties may persuade themselves that they stand a chance of getting custody. Second, for any given case brought, the legal process will be more protracted since it is not simply a case of deciding whether one parent is unfit.49

An irony of the best interest standard is the burden imposed on the children who are its designated beneficiaries.

C. THE BEST INTEREST STANDARD IS DIFFICULT TO ADJUDICATE

Inherent in deciding custody and child placement under a best interest standard is the requirement that a court make predictions of future conditions affecting a child’s welfare. In this way, child custody litigation is unique:

[adjudication usually requires the determination of past acts and facts, not a prediction of future events. Applying the best-interests standard requires an individualized prediction: with whom will this child be better off in the years to come? Proof of what happened in the past is relevant

47. Id. at 206.
49. Id.
only insofar as it enables the court to decide what is likely to happen in the future.\textsuperscript{50}

The imposition of the burden on a court to predict the future, with all the possible variables, is daunting and effectively impossible. Modern life changes at lightning speed, and the requirement that a court somehow weigh the uncertainties of the future places all concerned in a position of insecurity.\textsuperscript{51}

Adding to the dilemma of a trial court having to make predictions involving the unknown and unknowable, appellate review is emasculated. Mnookin refers to the best interest standard as being people oriented instead of act oriented.\textsuperscript{52} Acts are determinate and are a concrete basis for courts to rely on. A person-oriented rule, on the other hand, "requires an evaluation of the 'whole person viewed as a social being.'"\textsuperscript{53}

Appellate review of the best interest standard as a person-oriented rule lacks certain precedential value for subsequent decisions. Each case presents the trial court with unique facts spanning the spectrum of the entire human condition. Thus, it is virtually impossible to rely on precedent as no two fact patterns can be similar enough to merit reliance on precedent.\textsuperscript{54} The Illinois standard of review for custody determinations is whether the decision is against the manifest weight of the evidence.\textsuperscript{55} A review of Illi-

\textsuperscript{50}Mnookin, supra note 3, at 226.

In contrast to the time and resources spent on the initial custody determination, little attention is given to anticipating future changes and how to respond to them. Even though changes may be expected to occur at the time of the custody determination they are treated not as the inevitably unpredictable evolution of events for which advance provision should be made, but as contingent risks to be allocated at the time of the divorce.

\textit{Id.}

\textsuperscript{52}Mnookin, supra note 3, at 250.
\textsuperscript{53}\textit{Id.} at 226.
\textsuperscript{54}\textit{Id.}

A determination that is person-oriented and requires predictions necessarily involves an evaluation of the parties who have appeared in court. This has important consequences for the roles of both precedent and appellate review in custody cases. The result of an earlier case involving different people has limited relevance to a subsequent case requiring individualized evaluations of a particular child and the litigants. Prior reported cases now provide little basis for controlling or predicting the outcome of a particular case.

\textit{Id.}

\textsuperscript{55}See e.g., In re Marriage of Kennedy, 94 Ill. App. 3d 537, 418 N.E.2d 947 (1st Dist. 1981) (the appellate court will not interfere with the proper exercise of a trial court's discretion in awarding custody, as custodial decision rests on temperaments, personalities
inois case law reveals no recent cases where a trial court has been reversed for substantive reasons.56

Thus, not only is a trial court required to struggle through the thicket of the unknown, the appellate court does not consider itself in a position, because of the trial court’s unique opportunity to evaluate the witnesses first hand, to challenge the trial court’s omniscience.57 The whole notion of appellate review is thus emasculated, posing concerns for litigants who are unsuccessful in the trial court.

D. THE STANDARD IS UNJUST

For the reasons stated above, the standard is unjust both implicitly and as applied. Due to the indeterminacy of the possible outcome, litigation is literally invited. “Under the best interests principle the outcome in court will often be uncertain: each spouse may be able to make a plausible claim for custody, and it may be impossible to predict how a court would decide a disputed case.”58 Mnookin speaks to the unfair bargaining advantage of a parent who is not risk averse:

...and capabilities, and the trial judge is in best position to evaluate such factors. Only where an award is contrary to the manifest weight of evidence will it be reversed.); In re Marriage of Karonis, 296 Ill. App. 3d 86, 693 N.E.2d 1282 (2d Dist. 1998) (having had superior opportunity to observe witnesses, evaluate evidence, and consider needs of children, the trial court is in a better position than the reviewing court to determine the children's best interest with respect to custody, and thus, determination of custody will not be overturned on appeal unless the trial court's decision is contrary to manifest weight of the evidence).


57. See Pikula v. Pikula, 374 N.W.2d 705, 713 (Minn. 1985).

The inherent imprecision heretofore present in our custody law has, in turn, diminished meaningful appellate review. We have repeatedly stressed the need for effective appellate review of family court decisions in our cases, and have required specificity in written findings based on the statutory factors. We are no less concerned that the legal conclusion reached on the basis of those findings be subject to effective review. We recognize the inherent difficulty of principled decisionmaking in this area of the law. Legal rules governing custody awards have generally incorporated evaluations of parental fitness replete with ad hoc judgments on the beliefs, lifestyles, and perceived credibility of the proposed custodian. It is in these circumstances that the need for effective appellate review is most necessary to ensure fairness to the parties and to maintain the legitimacy of judicial decisionmaking.

Id. (citations omitted).

[a]ssume that both the parents would like to have custody. The father is risk-neutral; he would be indifferent if given a choice between (1) having custody of his child half the time; or (2) being exposed to adjudication under the best interests standard and having a fifty percent chance of winning full custodial rights. The mother, on the other hand, we will assume is risk-averse; she would much prefer the certainty of half the child’s time to the risk of adjudication with a fifty percent chance that she might end up only with visitation. We would predict that under the best interests standard the mother, because she is risk-averse, will accept less in order to avoid the gamble inherent in adjudication.59

The more cautious parent, exposed to significant risks, may settle a contested custody case rather than accept an adverse ruling that would be considered disastrous.

The irony of such a compromise is that it would frequently expose children to a “split the baby” shared custody arrangement that may be deleterious to their emotional welfare, forcing them to commute between two frequently warring homes.60 Reminiscent of the Biblical story of Solomon offering to cut a child in half to resolve an ancient custody dispute, the risk-averse parent, perhaps the better parent due to her caution, is willing to accept less rather than risk the possible negative consequences inherent in contested litigation.61

Other practical problems arise with the standard that militate against the fairness of the litigation. Due to the uncertainty of the outcome, litigation costs are increased.62 Since it is unclear what parcel of evidence may tip the scale in favor of a litigant, custody advocacy virtually invites throwing the kitchen sink at a court in order to influence it. Contested custody cases can last for weeks while earnest litigants attempt to portray their strengths and impugn his or her spouse’s weaknesses. Discovery must nec-

59. Id. at 979.
60. See Id.
The fact that uncertainty about the outcome in court concerning custody disadvantages the relatively more risk-averse parent is a peculiarly ironic and tragic result. Most of us would assume that a good parent would be unwilling to take a gamble in which one outcome would substantially diminish his or her relationship with the child. And yet the consequence of a vague, discretionary rule is to disadvantage such a parent if he or she is negotiating with a spouse who is more of a gambler.

Id.
61. Id. at n.98 (“Solomon’s threat to cut the child in half was perhaps founded on a belief that the child’s real mother would be more risk-averse than the false claimant.”).
62. Id.
necessarily be exhaustive. Experts need to be retained to prognosticate and guardians ad litem need to be appointed to investigate the competing allegations for the court.63

In addition, due to these imprecise standards, the role of the attorney becomes more significant. With no specific formula that a court can rely on in evaluating the competing claims, the skill of the advocate becomes all the more important in persuading the court of the correctness of her client’s position. Skilled litigators can mean the difference between a positive or negative result. While the level of advocacy affects all litigation, the indeterminacy of the best interest standard provides particular rewards for skilled and creative presentations of evidence.

A custody lawyer must not only be knowledgeable in the rules of evidence and trial procedure, but he must also be learned in procedures of custody evaluators and be able to cross examine an improper administration of psychometric tests and other procedures relied upon by custody experts. He must have the time, resources, and stamina necessary to prepare and try an extended trial with literally thousands of facts. When so much emphasis is placed on the skills of the advocate, it is unfair to force a litigant, fighting for the lives of his or her children, to rely so heavily on the competence of a possibly sub-par attorney.

While Illinois law allows for the leveling of the playing field in attorneys fees during custody litigation, it does not secure the equality of the advocacy; only the promise of payment.64 A first-year lawyer could try a case against the most seasoned veteran. While this is not unique to custody cases, because the court has no concrete standard to rely on in adjudicating the issues, the divergence in skill level can be catastrophic—not only to the client, but to the children who are the subject of the litigation.

III. OTHER ALTERNATIVES TO THE BEST INTEREST STANDARD

For the reasons set forth, adjudicating contested custody and child placement issues relying on the best interest standard poses many serious and profound problems. Due to the indeterminacy and the vagaries inherent in person-based evaluations, the standard as applied is problematic.65 But what other options are available to a court in determining custody? Essentially the law is limited in what standards it can rely on in resolving these

64. 750 ILL. COMP. STAT. 5/501(c) (2004) (interim fee statute allows fees during the pendency of the litigation “to enable the petitioning party to participate adequately in the litigation.”).
65. See discussion infra Part II.B-D.
disputes. The law could rely on previously invalidated rules based upon the preference for a particular sex. Alternatively, the law could rely on a standard based upon preferences in favor of the primary caretaker prior to the dispute. In the extreme, the law could rely on a coin toss or other arbitrary determinant to resolve custody. Perhaps the law could rely on a standard that considers “the least detrimental alternative for safeguarding the child’s growth and development” as suggested by Goldstein, Freud and Solnit. How these alternatives compare to the current best interest standard is a subject for closer examination.

A. SEX-BASED STANDARDS

A standard that relies on the sex of the parent has been universally rejected. Nobody can argue reasonably that a return to a patriarchal standard, which treats children as property, would serve children or society. Further, a maternal preference, while more recently providing some element of predictability and stability in custody determinations, has eroded due to society’s reevaluation of women in the workplace and the advent of father’s rights.

Formerly, Illinois courts relied on a standard known as the “tender years doctrine” to presume that a mother should be awarded custody of young children, due to her “natural” ability to provide the “tender care which nature requires.” While Illinois courts can consider the sex of the parent as it relates to his or her ability to parent a particular child, the for-

66. See discussion infra Part II.A.1-3.
67. AMERICAN LAW INSTITUTE, supra note 51, at § 2.08.
68. See Elster, supra note 3, at 1.
70. See Mason & Quirk, supra note 10.
71. AMERICAN LAW INSTITUTE, supra note 51, at 2.

For many years, the chancery courts of this State had subscribed to the view that “the best interest of the child must be primarily consulted. It is upon this consideration that an infant of tender years is generally left with the mother, (if no objection to her is shown to exist,) even when the father is without blame, merely because of his inability to bestow upon it that tender care which nature requires, and which it is the peculiar province of a mother to supply.”

Id.
mer presumption that a child of tender years should be awarded to the mother has been rejected.\(^{74}\) The current best interest standard essentially arose in the absence of the court’s ability to decide cases solely based upon the sex of the parents seeking custody.\(^{75}\)

Besides constitutional considerations,\(^{76}\) awarding custody based exclusively on sex is an outdated and unfair way to adjudicate child placement. To be sure, having a standard that is concrete and easily determinable has certain advantages over the ambiguity of the current best interest standard. The maternal preference standard would dramatically reduce litigation costs due to the more certain outcomes. A more certain result would replace the subjective determinations by fact finders. However, the arbitrary placement based upon sex simply makes no sense in light of society’s evolution and the realignment of formerly static parenting roles.

B. PRIMARY CARETAKER PREFERENCES

In an attempt to avoid the uncertainty inherent in the use of a best interest standard, the American Law Institute (ALI) has proposed adopting a standard that relies predominantly on the past allocation of parenting responsibilities in determining custody. Under the ALI model, in order to

\(^{74}\) See id.

There is no rule in Illinois that unless she is shown to be unfit, custody should be given to the mother . . . . Furthermore, our 1970 Illinois Constitution provides that equal protection of the law shall not be denied or abridged because of sex. (Ill. Const. (1970), art. 1, sec. 18.) Anagnostopoulos v. Anagnostopoulos, 22 Ill.App.3d 479, 482, 317 N.E.2d 681, 683 (1st Dist. 1974); King v. Vancil, 34 Ill.App.3d 831, 836, 341 N.E.2d 65 (5th Dist. 1975); Carlson v. Carlson, 80 Ill.App.2d 251, 255, 225 N.E.2d 130 (1st Dist. 1967); accord Randolph v. Dean, 27 Ill.App.3d 913, 917, 327 N.E.2d 473 (3rd Dist. 1975). “There is no longer a presumption in favor of the mother” in a contest for custody of children of tender years. (Strand v. Strand, 41 Ill.App.3d 651, 657, 355 N.E.2d 47, 52 (2d Dist. 1976); Drake v. Hohimer, 35 Ill.App.3d 529, 530, 341 N.E.2d 399 (1st Dist. 1976); People ex rel. Irby v. Dubois, 41 Ill.App.3d 609, 612-13, 354 N.E.2d 562 (4th Dist. 1976)). The rule is well-established and the 14th Amendment of the United States Constitution adds nothing to it. The so-called “tender years” presumption, which the above-cited cases have so clearly condemned, is, as stated by a New York court, “a blanket judicial finding of fact, a statement by a court that, until proven otherwise by the weight of substantial evidence, mothers are always better suited to care for young children than fathers.” (State ex rel. Watts v. Watts, 77 Misc.2d 178, 350 N.Y.S.2d 285, 287 (Fam. Ct., City of N. Y. 1975)). This presumption has been commonly referred to as the “tender years doctrine.”

\(^{75}\) See discussion infra Part II.A-B.

determine the best interest of children, courts are to consider "parental planning and agreement about the child's custodial arrangements and upbringing" and "continuity of existing parent-child attachments." At the time of the dissolution of the marriage, the allocation of time post-divorce should roughly approximate the allocation of time pre-divorce.

The purpose of the proposal is to avoid the value judgments about what is best for children in favor of a standard that "builds on certain principles of child welfare about which there is clear consensus." The ALI model is designed to preserve the "continuity of parent-child attachments" after the divorce in order to generally enhance the children's welfare. Many states require consideration of past caretaking roles in determining custody.

In a study conducted by Mason and Quirk reviewing appellate decisions in 1920, 1960, 1990 and 1995, they concluded that rhetoric in appellate decisions has shifted in favor of considerations of parenting time. "The rhetoric of judicial decision making has been completely transformed since the 1920s; maternal preference and moral fitness have been replaced by relationship criteria such as the amount of time spent with children and the stability of the child's relationships." The Illinois statute implicitly considers past responsibilities by denoting that a factor for the court to consider is "the interaction and interrela-

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77. AMERICAN LAW INSTITUTE, supra note 51, at §§ 2.02.1.a-b.
78. Id. at 2.08.
79. Id. at 98.
80. Id. at 98-99.
81. See e.g. IOWA CODE ANN. § 598.41 (3)(d) (West 2003). "[W]hether both parents have actively cared for the child before and since the separation." Id. WASH. REV. CODE ANN. §26.09.187(3)(a)(i) (West 2004). "The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child." Id. N.J. STAT. ANN. §9:2-4 (c) (West 2001). "[T]he extent and quality of the time spent with the child prior to or subsequent to the separation." Id.
82. See Mason & Quirk, supra note 10, at 235.
tionship of the child with his parent or parents, his siblings and any other person who may significantly affect the child’s best interest.83 The Illinois statute is based upon the Uniform Marriage and Divorce Act,84 which similarly makes no specific reference to preferences in favor of a primary caretaker.

The question thus arises whether presumptive reliance on implicit considerations of past caretaking responsibilities would enhance the arbitrary best interest standard. While originally many scholars embraced the concept of a primary caretaker presumption to avoid the uncertainty of the best interest standard, nationally, only West Virginia and later Minnesota have adopted the presumption as law.85

In 1985, the Minnesota Supreme Court adopted a presumption in favor of primary caretakers. In Pikula v. Pikula,86 that state’s high court “announced a firm preference for placement of custody with a child’s primary caretaker. The court emphasized the importance of the stability of the child’s relationship to a primary caretaker as a measure of the child’s best interests.”87

Both the Minnesota legislature and later the Minnesota Supreme Court subsequently rejected the presumption in favor of a standard that considers caretaking as a non-exclusive factor in determination of custody.88 In his analysis of Minnesota’s experience with the primary caretaker preference, Judge Gary Crippen commented on the rationale for such a preference:

[i]nterest in a caretaker preference constitutes the current state in a well-developed body of thought on placement of children after divorce. Although potential defects in the standard are apparent, the underlying rationale is thoughtful and important. Proponents of a preference assert that such a standard benefits all interests involved in the custody decision, including interests of the judiciary. They provide three justifications for the primary caretaker preference: protection of the child’s most vital parent-child relationship, avoidance of error, litigation and abusive threats of litigation, and compatibility with gender neutrality and the child’s many interests.89

85. See WOODHOUSE, supra note 22, at 822-23.
86. 374 N.W. 2d 705 (Minn. 1985).
87. See CRIPPEN, supra note 7, at 428.
88. Id. at 428-30.
89. Id. at 440.
Addressing the many concerns with a subjective best interest standard, the caretaking preference is an attractive way for courts to avoid the pitfalls that plague the application of the best interest standard with a somewhat more concrete formula.\textsuperscript{90}

In practice however, despite its many worthy and legitimate goals, the primary caretaker preference in Minnesota failed miserably. "The failure is principally the result of the lack of a usable definition of primary caretaking, which is necessary to achieve any of the standard's asserted benefits."\textsuperscript{91} Ironically and counter-intuitively, the Minnesota experience actually created more custody litigation than before the advent of the caretaker preference.\textsuperscript{92} Crippen points out that in the year before \textit{Pikula} was decided, the Minnesota Court of Appeals decided nine original custody cases, whereas in the years after \textit{Pikula} (1986 through 1988) the Court decided an average of thirty cases each year.\textsuperscript{93} He also surveyed family law practitioners who confirmed the explosion in litigation.\textsuperscript{94}

Judge Crippen points to several possible explanations causing the ironic increase in litigation. First, he notes that while the goal of the primary caretaking standard was to provide a more precise standard for courts to rely on, there is some question whether, in practice, the standard forced an enhanced consideration of past behavior as opposed to the more material considerations of who could better provide in the future.\textsuperscript{95} By focusing on

\textsuperscript{90.} \textit{Id.} at 442-43.

The justification for a primary caretaker preference, however, includes more than a desire to preserve bonded parent-child relationships. Supporters also propose the preference as a needed reform for a flawed process of decisionmaking. Their criticism reflects the historic political and legal concern about broad legal rules that provide virtually unlimited discretion to decision makers. Proponents of the preference contend that it is a means to avoid delegation of a dangerous breadth of discretion. \textit{Id.}

\textsuperscript{91.} \textit{Id.} at 452.

\textsuperscript{92.} \textit{Id.} at 452-53. "Two family law commentators observed that \textit{Pikula} 'spawned an incredible amount of litigation concerning who changed more diapers, the unfitness of parents and the threshold age at which a child is old enough to express a preference.' \textit{Id.}

\textsuperscript{93.} \textit{Id.} at 453.

\textsuperscript{94.} \textit{See Crippen, supra} note 7, at 455-60.

\textsuperscript{95.} \textit{Id.} at 462.

Understandably, studies of past parenting behavior include evaluation of the character of the caregiver and the quality of care, not just the quantity of care. The investigation of parental care patterns, aimed at identifying concrete actions, often produces self-serving claims intended to establish that one party is the more caring, giving and sacrificial parent. As in litigation of the child's wide-ranging best interests, the actual inquiry tends to focus on identifying the "best" parent. Thus, inquiry into past patterns of behavior often produces bitter disputes along with the
historical conduct as opposed to the more determinative future ability to parent, the primary caretaker standard requires a full exposition of virtually all contributions by both parents, despite their often-marginal relevance in future parenting responsibilities.

Besides the litigation explosion, Judge Crippen noted other problems with the primary caretaker preference. For example, critics complained that the standard, while not ineffective in principle, resulted in disguised biases in favor of women inasmuch as women typically served as caretakers of young children.96 Also, critics charged that the general injustices emanated from the formulaic approach to deciding custody. By relying on a “mechanical standard,” courts are limited in their ability to adjudicate a just result.97

Also, new definitional problems of determining primary caretakers replaced the former problems of defining a child’s best interest. In addition, the standard also created a destructive emphasis on the past instead of the future, leading to heightened tension and hostility. Other problems included possible sexual bias in application. It is clear that the panacea that Minnesota hoped for was an abject failure.

C. THE LEAST DETRIMENTAL ALTERNATIVE STANDARD

Goldstein, Freud and Solnit, in their landmark study on adjudicating child placement disputes, Beyond the Best Interests of the Child,98 suggest an alternative standard that acknowledges that a child is “already a victim of his environmental circumstances, that he is greatly at risk, and that speedy action is necessary to avoid further harm being done to his chances of healthy psychological development.”99 The authors describe the stan-

distorted claims, accusations and denials that are common in divorce conflicts.

Id. 96. Id. at 486.
97. Id. at 487.

These opponents are not concerned with the ineffectiveness of the standard. Rather, they contend that injustices result from the zealous application of a mechanical standard. Opponents, for example, criticize appellate courts not because of their failure to define the preference, but because of their affirmance of its application. The assertion of these concerns has produced much litigation relating to the preference; as advocates of a best interests standard engage in successful attacks on the preference, its clarity diminishes, thus encouraging more litigation. In Minnesota, this opposition eventually led to a legislative rejection of the primary caretaker preference.

Id. 98. See GOLDSTEIN, ET AL., supra note 69.
99. Id. at 54.
dard as "the least detrimental available alternative for safeguarding the child's growth and development."\textsuperscript{100}

By adopting such a standard, the authors suggest that a more realistic assessment can be made to assure that a child's interests are in fact prioritized. Specifically, the standard allows a court to take a more realistic look at children's needs in the context of a divorce.\textsuperscript{101} Goldstein, Freud and Solnit acknowledge that such a standard is an imperfect attempt to shift the focus of legislatures and courts into a more realistic realm. However, they opine that the standard would ultimately dislodge the current problems of reliance on the indeterminate best interest standard.

Although it has a worthy goal, critics have challenged the standard as having no more determinacy than a best interest standard.\textsuperscript{102} Further, the standard is problematic in that it sets the standards of parents too low, avoiding harm instead of attempting to inspire parenting excellence.\textsuperscript{103} All of the same hazards confronting the best interest standard would be present with this standard as well. Imprecise definitions, as always, will invite litigation. Here however, characterological flaws will be magnified and litigation will shift into a more negative focus on which parent will be more hazardous to the child. As a theoretical framework, no one can disagree that the least detrimental alternative standard, the negative reflection of the best interest standard, stimulates debate on priorities for children. However, as a practical solution to the problems of the best interest standard, it falls short.

D. COMPARISONS OF VARIOUS STANDARDS

On balance, the literature suggests that there simply is no better alternative to the existing best interest standard relied on by virtually all jurisdictions in this country. While each jurisdiction has different ways of determining best interests, the standard remains the substantive formula courts nationwide rely on in determining contested custody disputes. Each alter-

\textsuperscript{100} \textit{Id.} at 53.
\textsuperscript{101} \textit{Id.} at 63-64.

The proposed standard is less awesome and grandiose, more realistic, and thus more amenable to relevant data-gathering than "best interest." It should facilitate weighing the advantages and disadvantages of actual options. Yet, it too can be compromised and litigated. But there is in any new formulation an opportunity, at least, for legislatures, courts, and agencies to reexamine their tasks and thus to perceive more easily factors of low visibility which have resulted in decisions actually against "the best interests of the child" as it has come to be understood and applied.

\textit{Id.}

\textsuperscript{102} \textit{American Law Institute, supra} note 51, at §§ 2.02.1.a-b.
\textsuperscript{103} \textit{Id.}
native suggested by commentators has inherent flaws, which probably suggests why legislatures have rejected alternative approaches. If there were some simple formula to resolve contested custody litigation, it would have been adopted to facilitate this traumatic and destructive form of family law litigation. Regardless of what standard courts use, one thing is certain: parents will use every legal means at their disposal to attempt to achieve their respective goals.

Oftentimes, the goal is illicit:

  [p]arents might desire to contest custody for a variety of reasons, such as the hostility of a divorce, the vulnerability felt from loss of the marriage, and the pressure imposed by some attorneys. Furthermore, because divorce laws do little to mitigate the strong wish of an injured husband or wife to punish an unfaithful spouse, a parent might litigate custody as a substitute means of imposing punishment and seeking justice.\(^\text{104}\)

A realistic assessment of the dilemma suggests that the problem is not with the appropriate legal standard to use, but with the means by which the court system administers custody actions in order to both minimize harm (as suggested by Goldstein et al.)\(^\text{105}\) and promote the child’s interests.

It is naïve to think that some magical formula is available that can solve the very real problem of parents warring over children. While mediation became popular in the 1990s as a means of diverting contested custody actions from the courts, contested custody litigation will remain an unavoidable fact of life. Further, preferences have not worked, as evidenced by the Minnesota experience, for the same reasons that the best interest standard does not work effectively. In person-oriented litigation, as opposed to act oriented,\(^\text{106}\) discretion must necessarily be broad in order to achieve a just result.

The indeterminacy of the best interest standard, rightfully challenged by critics as troubling, actually is a necessary component of litigation that needs to take into account all of the intricacies of human nature. By definition, a custody trial judge must be a “legal pragmatist,”\(^\text{107}\) with the broad

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104. CRIPPEN, supra note 7, at 459.
105. See GOLDSTEIN, et al., supra note 69.
106. See MNOOKIN, supra note 3.

So the pragmatist judge regards precedent, statutes, and constitutional text both as sources of potentially valuable information about the likely best result in the present case and as signposts that he must be careful not to obliterate or obscure gratuitously, because people may be relying
discretion to consider all relevant and material circumstances to promote children's best interests. Presumptions and preferences, while attractive, are in practical reality empty promises of salvation.

Unfortunately, unpredictability is inherent with this type of litigation because of the competing considerations and somewhat random values of the fact finder. It is troubling for all persons involved in a legal system to acknowledge this unpredictability. The dissonance impels a search for a concrete and thus more predictable formula. The solution, a finite standard that relies on past considerations, may achieve some certainty. However, while certainty may be achieved by preferences, children may have to pay for this privilege if an unworthy custodian succeeds based solely on historical considerations. If Minnesota's experience is any indication, preferences may only fuel more litigation, despite the predictability the standard is designed to achieve.

There is no doubt that custody litigation is particularly hazardous to families. There is also no doubt that no easy solution can be found in a theoretical legal vacuum. If the best interest standard is simply unavoidable, solutions to the trauma of custody litigation must be found elsewhere.

IV. PRACTICAL SOLUTIONS TO THEORETICAL PROBLEMS

In light of the foregoing, an analysis must shift to the practical problems of administering the expansive best interest standard with the goal of achieving that end for children in a real-world context. Many practical solutions are available to a system that is charged with the awesome responsibility of protecting children during the tumultuous period of family disharmony.

A. LITIGATION CONTROLS

1. Expedited Litigation

One of the most detrimental results of custody litigation is the time it takes to adjudicate contested custody cases. While the experience is inherently painful for all participants, allowing the wound to fester over years of litigation is unconscionable. Courts need to actively manage contested custody litigation to provide closure for the family at the earliest practicable upon them. But because he sees these "authorities" merely as sources of information and as limited constraints on his freedom of decision, he does not depend on them to supply the rule of decision for the truly novel case. He looks to the sources that bear directly on the wisdom of the rule that he is being asked to adopt or modify.

Id.
time. Towards that end, Kane County, Illinois, in a committee chaired by the Honorable Keith Brown,¹⁰⁸ has formulated proposed local court rules designed to expedite and micromanage custody litigation. The rule provides for regular and substantive pre-trial conferences that allow a trial court to monitor the proceeding to make sure the case is progressing at a reasonable pace.¹⁰⁹

¹⁰⁸. Ad hoc committee chaired by the Honorable Keith Brown to review the present court rules pertaining to custody formed in 2004.

¹⁰⁹. Draft of proposed revised local Court Rule 15.26 of the 16th Judicial Circuit, Illinois.

15.26 PETITIONS FOR DISSOLUTION OF MARRIAGE WHERE CUSTODY IS AN ISSUE
(a) The goal of this court is to have all custody issues set for trial within twelve months after the filing of the Petition for Dissolution of Marriage. Therefore, in all Petitions for Dissolution of Marriage where custody is an issue, the procedure shall be:
(1) FILE PETITION FOR DISSOLUTION OF MARRIAGE
Discovery shall be subject to Local Rule 15.24
(2) SIXTY DAY INITIAL STATUS DATE AFTER FILING
(A) Any initial custody agreement worked out between the parties shall be tendered to the court in a written disclosure and proof of compliance with Local Rule 15.23 should be tendered at this time.
(B) If a petition for temporary custody has been entered or a custody issue remains, the parties shall attend mandatory mediation, under Local Rule 15.22, in an attempt to resolve outstanding custody issues.
(C) If at any time during the proceedings for dissolution of marriage, the court finds that it is in the best interests of the children and the process; the court, in its discretion, may order the parties to participate in mediation under Local Rule 15.22.
(D) A return date shall be established that is not greater than 115 days from filing status.
(3) AT A DATE NO GREATER THAN ONE HUNDRED AND FIFTEEN DAYS FROM FILING STATUS
(A) Any custody mediation agreement between the parties and the mediator's written report shall have been tendered to the court no later than 115 days from filing status date.
(B) If no mediation agreement was achieved between the parties, the court will set an initial pretrial conference, to be conducted in the judge's chambers.
   i. At the initial pretrial conference the parties shall present to the court a memorandum indicating whether they are requesting a guardian ad litem, an attorney for the child or a child representative, and; whether a 750 ILCS 604(b) evaluation is being requested, including names of proposed evaluators as provided by Local Rule 15.27. The memorandum shall include proposed dates for deposition and completion of written discovery, the estimated length of the trial, and when it is reasonably anticipated that parties will be ready for trial.
   ii. A first pretrial order will be completed and signed by the judge that will appoint, if appropriate, a guardian ad litem and/or 750 ILCS 604(b) evaluators, and allocate costs for the same. In addition, the court will
The purpose of the proposed rule is to allocate responsibility to the trial court to assure that custody proceedings conclude within one year from the filing of the petition for dissolution. The rule provides many directives to the court to monitor discovery progress on a regular basis to guarantee that the litigation does not languish.

In addition, financial issues are bifurcated from the custody issues, which serves two purposes. First, it disallows a party to attempt to use financial issues as a bargaining chip on custody considerations. If the issue of custody is resolved first, that threat would obviously become ameliorated. Second, by segregating financial issues, time-sensitive custody issues can proceed more quickly and efficiently.

order appropriate discovery cutoff dates, and a second custody case management conference date shall be set within ninety days thereafter.
(4) SECOND PRETRIAL CONFERENCE
(A) A second pretrial conference shall be set ninety days after the initial pretrial conference, at which time all written reports shall be tendered to the court and the guardian's report shall be presented. All Supreme Court Rule 213(f)(1) and 213(f)(2)-opinion witnesses and their opinions shall be disclosed by this date. At this time the realistic expected length of trial in light of all disclosed witnesses shall be discussed.
(B) The court shall enter any appropriate orders regarding a discovery and Supreme Court Rule 213(f)(3) disclosure schedule, including cutoffs, and set a trial date. A final pretrial conference shall be set one week prior to trial.
(5) FINAL PRETRIAL CONFERENCE
The final pretrial conference shall be conducted the week prior to trial, at which time the parties shall present all proposed exhibits pre-marked, any motions in limine, a disclosure of witnesses testifying and the order of proofs, and a trial memorandum.
(6) TRIAL
(A) All custody trials shall commence within twelve months after the filing of the Petition for Dissolution of Marriage, unless good cause is shown.
(B) Each custody trial should be held on consecutive days if possible.
(C) All custody trials shall have a record.
(E) Court rulings shall conform to Local Rule 15.26(b) and other rules and statutes, where applicable.
(b) RULING BY THE COURT
(1) At the conclusion of the trial, the court shall decide the issue custody not more than forty-five days after closing arguments are presented or tendered.
If there are other property issues that the court has yet to resolve, a bifurcated ruling should be made, with the court indicating its final custody ruling in advance of its complete decision being rendered. The bifurcated ruling shall be implemented immediately by final custody order pending the court's full decision being released.

Id.
If contested custody litigation is inevitable, it must move swiftly to conclusion. While the case is pending, people are under tremendous pressure. Normal family life is an anomaly. While the trauma of a contested custody case is irreparable, the sooner the case concludes, the sooner the children and the parents can start the healing process of their post-divorce life. Courts must proactively manage their court calls in order to help achieve this closure sooner rather than later.

2. Less Reliance on Conclusions of Custody Evaluators Regarding Children’s Best Interest

Another litigation control to consider is the reevaluation of the court’s reliance on expert testimony. Judicial reliance on expert testimony has become ubiquitous in recent years. The court should exercise greater control over custody experts. Professor Daniel Shuman advocates for enhanced scrutiny of mental health professionals’ credentials. He challenges the courts’ traditional reliance on expert testimony to assist them in making a determination concerning the best interest of children:

If less rigorous scrutiny of mental health professional’s clinical inference about the best interests of the child turns on a belief that mental health professionals possess some special predictive abilities according to a nonstandardized metric, an abdication of careful judicial assessment of the scientific validity of the reasoning or methodology is misplaced.

What is troubling to Shuman is not the court’s reliance on concrete data concerning an individual’s mental health, but the expert going “beyond the data to predict outcomes in particular cases and a natural belief on the part of the mental health professionals that because of their qualifications


111. Id. at 567.
they are capable of doing so, even when they can point to no research to support that belief.\textsuperscript{112}

Trauma to children would be mitigated as well. Relying on so-called expert opinions concerning these matters adds costs and layers to an already complicated custody matter. Frequently, parents hire competing experts to rebut earlier expert opinions. Children are thus forced to meet with consecutive experts hired to probe their psyches to draw conclusions concerning their best interests.

If mental health experts' testimony was limited to the objective indicia they are trained to evaluate (e.g. psychometric testing and the parents' respective emotional and possibly intellectual functioning), the trial would be dramatically shortened and much influential and possibly prejudicial expert testimony, mistakenly offered under the banner of science, would be unnecessary. A mental health professional has no greater capacity to determine a child's best interest than the court and their testimony simply usurps the court's ultimate role as a custody determiner.

Again, in an attempt to address concerns about the influence of mental health professionals testifying as the court's witnesses in custody cases, the custody task force in Kane County, Illinois courts has drafted preliminary proposed court rules to monitor both the appointment of the evaluator as well as the procedures used.\textsuperscript{113}

\begin{itemize}
\item[112.] \textit{Id.} at 568-69.
\item[113.] Draft of proposed revised local Court Rule 15.26 of the 16th Judicial Circuit, Illinois.
\end{itemize}

15.27 CHILD CUSTODY EVALUATION
(a) AUTHORIZATION
Pursuant to the court's inherent powers to protect and act in the best interests of the children under the Illinois Marriage and Dissolution Act, the court may order an evaluation of the parties in any pre or post-judgment contested issue of parental responsibility, custody, visitation, removal or any other non-economic issue of contested custody involvement. Such Court Ordered Evaluations are authorized under the following provisions:
(1) 750 ILCS 5/604(b)
(2) 750 ILCS 5/605
(3) 750 ILCS 5/602.1
(4) 750 ILCS 5/607.1, and any other statutes as may be added or amended in time.

(b) ESTABLISHMENT OF 604(b) WITNESS CERTIFICATION
The 16th Judicial Circuit shall establish a 604(b) Witness Program of certified custody evaluators, each of whom shall be appointed to serve in the Court Ordered 604(b) Witness Program, under the direction and at the discretion of the Presiding Judge of the Family Law Division. All 604(b) evaluators shall be subject to the following rules.
(1) APPLICANTS
Applicants for the program must file the required application with supporting documentation and meet the following criteria:

(A) Academic: Applicants must possess one of the following degrees or licenses: Ph.d; Psy.d; LCSW; LCPC; MD; Master's Degree in Mental Health field, and possess the requisite active practice licenses required by the State of Illinois;

(B) Professional: Applicants must have completed five (5) years of post licensure practice. Practice must include education or training in the areas of domestic violence, physical/sexual abuse, and substance abuse;

(C) Applicants must have the capacity to conduct evaluations within a reasonable distance of Kane County;

(D) Experience: Post licensure practice must include work with families in distress, child or family experience and domestic violence;

(E) Each applicant must sign a statement that they will comply with the ethical rules established by the 16th Judicial Circuit in regards to custody evaluations;

(F) Each applicant must complete an orientation program to become familiar with our local system and report requirements, expectations; and

(G) Applicants must accept one pro bono assignment annually.

(2) CERTIFICATION

a. The roster of 604 (b) evaluators shall be maintained by the Kane County Diagnostic Center. The Director the Diagnostic Center or his designate shall review each application to determine if they posses the required educational background, and experience to qualify as a Child Custody Evaluator. Upon receiving an application the Kane County Diagnostic Center shall post the name and business address of the applicant in order for any interested party may forward comments concerning the application to the Center.

b. After review of the application, the Diagnostic Center shall forward its recommendation to the Presiding Judge of the Family Division for approval.

c. The Kane County Diagnostic Center shall maintain the roster of Custody Evaluators. Each approved Custody Evaluator must send proof of current licensure, current professional liability insurance and any change of address in a timely fashion to the Kane County Diagnostic Center.

d. An approved custody evaluator has the affirmative duty to inform the Kane County Diagnostic Center of any change in their licensure or any formal disciplinary action. Upon receipt of this information the Kane County Diagnostic shall inform the Presiding Judge of the Family Division along with any recommendation as to how such information may affect the Evaluators current status as a Court Appointed Evaluator. In determining whether or not an applicant shall remain a Child Custody Evaluator, amongst factors to be considered is whether the evaluator has complied with the rules for custody evaluators, and has filed their evaluations on a timely basis.

e. The Kane County Diagnostic Center shall monitor each evaluator's conduct, quality assurance, and adherence to previously established guidelines for conducting custody evaluations.

f. The Presiding Judge of the Family Division may remove a Custody Evaluator from the approved list at any time.
The proposed rule would certify custody evaluators and monitor their conduct to assure proper adherence to all appropriate court rules. Currently, no statutory oversight program is in place for court appointed custody evaluators in Illinois.14

This proposed local court rule fills this statutory gap in order to provide quality assurance of those persons testifying as custody evaluators. The more fundamental question, however, has yet to be answered; should family courts allow expert opinions concerning the best interest of children? In light of the speculative benefits, weighed against the increased emotional and economic costs brought on by the court’s reliance on this testimony, one could argue persuasively that the court’s reliance is misplaced and should be reevaluated.

3. **Better Appellate Review**

As noted above, in the proposed Kane County Rule, there needs to be a record for all contested custody litigation.15 Currently, except for in-camera interviews with children, nothing in the Illinois statute or court rules mandates that a court reporter record the proceedings. Certainly, without a record, appellate review of any substantial custody proceeding is effectively impossible. While Illinois law allows a bystander affidavit to be filed with the appellate court in lieu of an actual transcript, days of testimony cannot be accurately captured through such a means. However, it is important to note that even with a record, review has not produced substantial benefits

(3) **PROCEDURE**

The 16th Judicial Circuit shall develop and maintain the following:

a. A standard 604(b) Witness Appointment Order. Said order shall contain a section that will enable the court to direct the evaluator to perform specific acts, including (or excluding) tests, collateral interviews, certain investigative actions (interviewing school officials, reviewing court records) and the like.

b. A 604(b) Witness Report Form, for use by the witnesses in submitting their reports to the judiciary. Said form shall consist of a summary sheet, to give the court a “quick glance” at the witness’s recommendation and salient findings; and a narrative report which shall include a section in which the witness addresses the statutory factors set forth in Section 602 and their significance and impact, if any, on the witness’s report and recommendations (if requested by the court).

Id.

114. 750 ILL. COMP. STAT. 5/604(b) (2004) (although this section provides for the appointment of a professional psychologist to assist the court in making custody determinations, no guidelines or administrative rules are provided concerning the qualifications of the expert).

115. See Goldstein et al., supra note 69, at 53.
for aggrieved litigants due to the reviewing court's reluctance to overturn trial courts.\textsuperscript{16}

This is rightfully so. Trial courts are obviously in a better position to review the witnesses' demeanor and evaluate their credibility. A dry record will not reflect that. However, inasmuch as the law allows trial courts very broad latitude under a best interest standard, the trial court needs to provide enhanced findings to assist the appellate court in the review process. Currently under Illinois law, no specific findings of fact are necessary as long as the record in its entirety supports the trial court's decision.\textsuperscript{17} This is problematic in a number of ways.

First, as noted above, very few trial court decisions are overturned due to the fact that they are given wide discretion. But with power comes responsibility. What did the trial court think important and why? The criteria relied upon needs to be set forth clearly in findings in order that the appellate court has a guidepost in which to measure the court's ultimate findings and conclusions.

Next, and equally important, written and detailed findings force a trial judge to confront his own biases and predispositions. The court must wrestle with the evidence in order to prepare a cogent opinion supported by the evidence. This not only will assist the trial court in refining its opinions, but it will also allow both the appellate court as well as a chief judge in a circuit to monitor the reasoning process of a judge charged with the awesome responsibility for children. While the task of preparing an opinion containing all findings and conclusions is burdensome, the interests of justice demand sufficiently detailed findings as an added layer of protection in an undoubtedly imprecise process.

4. \textit{Enhanced Trial Skills of Practitioners and Jurists}

In medicine, residents must train with experienced surgeons before they can independently perform a surgery. In law, the passing of a generic bar examination entitles a practitioner to function independently in the court

\textsuperscript{16} See discussion infra Part II.C.

\textsuperscript{17} There is no requirement that a court making custody determination enumerate all of its specific findings. See e.g. \textit{In re Koca}, 636 N.E. 2d 672 (1st Dist. 1993). \textit{In re Marriage of Diehl}, N.E. 2d 281, 290 (2nd Dist. 1991) (the factors enumerated in child custody statute are not an exclusive list of factors, and the trial court is not required to make specific findings for each factor as long as the record reflects that evidence of the factors was considered by the trial court before making its decision). \textit{But see} Hall v. Hall, 589 N.E. 2d 553, 555 (3d Dist. 1991) (the statutory list of child custody factors is not exclusive, and the trial judge is not required to recite each factor upon which the court's determination is made; however, when nonstatutory factors are considered determinative of the custody decision, such factors should not remain obscure, and the weight of the record must support the final custody decision).
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system. In custody litigation, where a true expertise of the rules of evidence, presentation of evidence, knowledge of effective expert impeachment and a plethora of other skills are necessary, it is unconscionable that inexperienced lawyers can participate alone in such a proceeding.

Under Illinois law, an experienced trial counsel is necessary to try a capital criminal case. To a parent at risk of losing custody of her child, the stakes are almost as high. Either the Supreme Court of Illinois should certify a lawyer to engage in such litigation or, alternatively, require mandatory minimum experience to insure full and adequate representation.

The benefits of requiring such certification are substantial. First and most obvious, certification would protect a litigant from being outmatched by a far superior lawyer in the adversarial contest. Next, the court is assisted by being presented balanced evidence and not having to compensate from the bench for an individual lawyer's inadequacies. The evidence presented will not be as disjointed or arbitrary in its presentation, and the trial will thus proceed more efficiently. Experienced lawyers will be in a better position to know what evidence is cogent and pertinent and what evidence to disregard as marginal.

To be sure, this solution is not a panacea. Issues would arise concerning parties' inability to afford certified trial counsel. Will only the rich be able to try contested custody cases? Would the imposition of such requirements limit a litigant's abilities to try a case pro se? Clearly, our courts and legislatures should explore and consider these issues. But the concept of an elite custody trial bar provides some attractive advantages to the current system that lacks any type of regulation.

Likewise, a better understanding by a trial judge of children and their needs would help assure better results. Programs to assist trial judges gain a better understanding of the psychodynamics of families would be a worthwhile addition to their regular continuing education curriculum. As noted above, one of the problems with expert witnesses is their imposition of personal values under the cloak of science. A more enlightened trial judge could be better able to sift through the morass of evidence presented by both experts and parties.

Arguably, because the best interest standard allows for individual values-based rulings, a panel of three judges with diverse backgrounds could be an alternative to the traditional use of one judge to try custody cases. For that same reason, jurors would also be a viable substitute to the solitary decision maker paradigm. Because of the high stakes involved, creative procedural options need to be explored that will refine and enhance the adjudication of contested custody cases.

118. ILL. SUP. CT. RULE 714.
V. CONCLUSION

Contested custody issues have been notable since Solomon offered to wield his sword in biblical times. In our modern era, we as a society have struggled to find a just and palatable way to resolve contested custody disputes. By changing the focus from a determination based upon the sex of the parent to a gender-neutral best interest standard, the law evolved with a focus not on the parents, but upon the needs of children. While laudable, problems ensued with the indeterminateness of the standard, leading scholars, legislatures and courts to search for other means to resolve custody cases. Alternative legal standards using preferences and presumptions in favor of primary caretakers have been unsuccessful. The law has simply been unable to develop any workable standard that is equitable and efficient enough to accommodate all concerned.

In the 1990s, mediation became popular as a means of resolving custody disputes outside of court. But the problem remains when two parents cannot resolve, on their own, what is in the best interests of their children. They look to the courts as the only viable alternative to resolve those disputes. Thus, courts must sift through all of the competing claims and determine what arrangement will ultimately benefit the children at the heart of the dispute.

There is no solution to the problems facing courts in this formidable task. Academically and legislatively, we have failed to construct a standard to resist the many problems confronting custody litigants. Instead of trying to avoid contested litigation, the courts need to embrace its inevitability. Courts must develop a means of accommodating an indeterminate best interest standard, and work to refine its implementation through concrete means designed to resolve custody disputes as efficiently and fairly as possible.

Better lawyers, judges and court administrators can all help maximize children's interests despite a legal standard, necessarily broad, that inherently may not meet that promise.