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Bridge Over Troubled Water: Changing the Custody Law in Tennessee

JUDGE DON R. ASH*

I. INTRODUCTION

I hate closing arguments in custody cases. After days of hearing testimony from each spouse about the misdeeds of the

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This Article contains the Author's personal views and should not be construed as a probable decision in any particular matter that may come before the Circuit Court, 16th Judicial District, Part III.

other, I am as worn out as the parties and their attorneys. Each side has brought relatives, friends, and business acquaintances to testify that his or her home would provide the best environment for the minor children. It seems as if both husband and wife have forgotten their wedding vows, which included the words "for better or for worse, for richer or poorer, in sickness and in health." Perhaps in today's society, we should add to those vows the caveat, "unless we get into a contested divorce, in which case both my family and I have the right to bring up every piece of trash, whether true or false, that we can possibly create."

Parties to divorce typically review the criteria listed in Professor Walton Garrett's book, *Tennessee Divorce, Alimony and Child Custody*[1] and cite the appropriate Tennessee Code section.[2] One of them will read from *Bah v. Bah*[3] the section quoted in almost every divorce/custody case: "[W]e are in agreement that the child's best interest is the paramount consideration. It is the polestar, the *alpha and omega.*"[4] These are fancy words for a difficult situation.

Since coming to the bench, I have developed my own checklist incorporating these difficult elements. Throughout the trial, I attempt to keep score, checking off who proves what. My mind flashes back through my fifteen years of legal practice, remembering well the cases in which I represented the husband and we "won" custody of the children. My mind also reflects back to cases where I represented wives and lost custody. I recall the heartbreak and emptiness of the losing party. I remember leaving the courtroom and conjuring a just result for this horribly unjust decision. Since becoming a judge, I have decided many custody cases and often wonder about the children whose lives I have affected. I wonder how these children are doing today.

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1. W. WALTON GARRETT, TENNESSEE DIVORCE, ALIMONY AND CHILD CUSTODY (1996).

2. *See* TENN. CODE ANN. § 36-5-101 (1996) (decree for support of spouse and children).

3. 668 S.W.2d 663 (Tenn. Ct. App. 1983).

4. *Id.* at 665.

The score is now eight to seven. The attorneys conclude and, as usual, I announce my findings of fact and conclusions of law. The divorce is awarded to the wife, although both contributed to the breakup of the marriage. Next, I announce the custody decision. No joint custody will be awarded here. The parties have said under oath they cannot work together or even stand to be in one another's presence. Each believes that they want all or nothing, oblivious to the fact that they are gambling on the well-being of their children. After describing the criteria I considered, I announce the award of custody to the father. I hear what approximates a death rattle exude from the mother of these two small children. Extensive visitation and required notice for extracurricular activities and medical needs are granted. The parties are ordered to attend "Families First—Children Cope with Divorce," a four-hour seminar explaining what each parent can expect their children to experience growing up in a divorced home. The seminar provides some warning about what the future may hold including feelings of frustration and anger toward the other parent over returning children late, having them arrive in soiled clothes, and the issue of how to cope with stepparents. Perhaps the seminar will be of some help to these parents.

Next, I read the words of a judge from Minnesota, sent to me during my first days on the bench:

> Your children have come into this world because of the two of you. Perhaps you two made lousy choices as to whom you decided to be the other parent. If so, that is *your* problem and *your* fault.
>
> No matter what you think of the other party—or what your family thinks of the other party—those children are one half of each of you. Remember that, because every time you tell your child what an idiot his father is, or what a fool his mother is, or how bad the absent parent is, or what terrible things that person has done, you are telling the child that half of *him* is bad.
>
> That is an unforgivable thing to do to a child. That is not love; it is possession. If you do that to your children, you will destroy them as surely as if you had cut them into pieces, because that is what you are doing to

their emotions.

> I sincerely hope you do not do that to your children. Think more about your children and less of yourselves, and make yours a selfless kind of love, not foolish or selfish, or *they* will suffer.[5]

The father's attorney will draw the order. The court officer barks, "all rise," and while exiting the courtroom, I see out the corner of my eye the mother of the two children collapse into the arms of her own mother. The father's family has rushed to his side. It would not surprise me if they pick him up on their shoulders and carry him out of the courtroom for a victory celebration. As the door to my chambers closes, I also collapse into my chair. My stomach aches and a feeling of frustration floods over me. The decision I have made will affect two children's lives forever. They will have graduations, weddings, and holidays to share with their parents, but separately. Instead of working together, these two parents have decided to do everything they can to hurt each other and somehow try to even the score. Can we not do something better? I think we can.

This Article will address: (1) statistical information about the number of divorces as well as custody disputes in Tennessee and nationwide; (2) the past and present status of Tennessee custody and divorce law; (3) the current status of custody and divorce law in other states; (4) alternatives to current law proposed in other legal writings; and (5) the proposal of a new statute in Tennessee providing for several different choices to help prevent decisions like the one previously described. This Article will discuss why our society must promote the parent-child relationship after divorce rather than set the stage for litigation and heartache for years to come.

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5. Letter from Judge Dotson Haas, Walker, Minnesota (on file with the author).

II. STATISTICAL OVERVIEW OF CHILD CUSTODY IN THE UNITED STATES

In the United States, approximately one million children each year experience the divorce of their parents.[6] Almost ninety percent of all custody matters are resolved before the parents ever get to court.[7] Currently, more than eighteen million children, over fifty percent of all children, live in a home with only one parent.[8] This figure has doubled from 1970 to 1993.[9]

The most important issue revolves around determining what helps the children of divorced families flourish. In every divorce case, the attorneys, litigants, and judges must be aware of the psychological effects of custody disputes on children. Statistically, one-third of divorced parents continue to be hostile to each other five years after the separation. The children of these marriages are vulnerable to various psychological problems,[10] and children whose parents continue to be hostile toward one another suffer for many years.[11]

A 1991 study examined 135 children and their parents from forty-three divorcing families, twenty-seven of whom were involved in custody disputes and sixteen who had settled the issue of custody themselves.[12] The data supports associating continued parental conflict with problems such as juvenile de-

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6. *See* MARY MCCARTHY, U.S. COMM'N ON CHILD AND FAMILY WELFARE, PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION, A REPORT TO THE PRESIDENT AND CONGRESS (Sept. 1996).

7. *See* E. Mavis Hetherington, *Coping with Family Transitions: Winners, Losers and Survivors*, 60 CHILD DEV. 1 (1989).

8. *See id.* at 11.

9. *See id.* at 12.

10. *See* Janet R. Johnston et al., *Impasses to the Resolution of Custody and Visitation Disputes*, 55 AM. J. ORTHOPSYCHIATRY 112, 119 (1985).

11. *See* JANET R. JOHNSTON, JUDICIAL COUNCIL OF CAL., FINAL REPORT TO THE STATEWIDE OFFICE OF FAMILY COURT SERVICES, HIGH CONFLICT AND VIOLENT DIVORCING PARENTS IN FAMILY COURT: FINDINGS ON CHILDREN'S ADJUSTMENT AND PROPOSED GUIDELINES FOR THE RESOLUTION OF CUSTODY AND VISITATION DISPUTES (1992).

12. *See* Richard A. Wolman & Keith Taylor, *Psychological Effects of Custody Disputes on Children*, 9 BEHAV. SCI. & L. 399, 401 (1991).

pression, conduct disorders, sleeping disturbances, and difficulty with communication skills.[13] These children potentially face many of their own conflicts arising from their parents' battle, including: (1) involvement in marital hostilities; (2) parent-child role confusion and role reversals; (3) living in a highly volatile emotional climate; (4) being lobbied by each parent regarding presentations of radically different and competing views of reality; and (5) disillusionment.[14] Study authors, Johnston, Gonzales, and Campbell stated:

> In summary, children who are the objects of custody disputes face a profoundly painful experience. They live in limbo while lengthy legal battles are waged, and they are faced with complicated conflicts and stresses. Their loyalties are tested. The accuracy of their perceptions is questioned. They may be used as agents to carry messages between parents who will not communicate directly, or to elicit information about one parent for the other. They may be used as witnesses, to substantiate a parent's viewpoint. Children are routinely used as currency in emotional transactions in which their availability to a parent (and that parent's availability to them) is made contingent upon timely receipt of child support.[15]

The authors of the study suggest the importance of discussing the impact of conflict on children with parents engaged in custody litigation in order to provide both the parents and the children with valuable information about family issues. The ability to openly discuss and to escape pressures for interdependence between parents and children may foster the necessary and desirable boundaries in the parent/child relationship. Such discussions may also help relieve the anxiety associated with separation and renegotiation of relationships. In this context, the discussions may preserve or even enhance the child's ability to maintain a positive view of self and family.[16]

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13. *See* Janet R. Johnston et al., *Ongoing Postdivorce Conflict and Child Disturbance*, 15 J. ABNORMAL PSYCHOLOGY 493, 502 (1987).

14. *See* Wolman & Taylor, *supra* note 12, at 406.

15. *See id.* at 408.

16. *See id.* at 415.

In another study, 108 divorced parents (fifty-four pairs of former spouses) were randomly selected from the 1977 divorce court records in Dane County, Wisconsin.[17] Of these divorced couples, all mothers had court-ordered custody.[18] Approximately eighty-five percent of the divorced spouses maintained direct contact with each other one year after the divorce. The other fifteen percent, who did not maintain personal contact, either had strict court-ordered visitation or, for older children, the child determined the manner of visitation.[19] The larger group essentially consisted of parents who shared child-rearing issues and interacted most frequently. These parents perceived their relationship as mutually supportive.[20]

A disturbing article about paternal participation and children's well-being after divorce[21] reported that between one-third and one-half of all children in the United States will experience their parents' marital dissolution. Few fathers retain custody of these children and most noncustodial parents greatly decrease their involvement in child rearing. The children in the study were between the ages of eleven and sixteen, and sadly, their frequency of paternal contact was very limited.[22] Approximately twenty-three percent of the fathers had no contact with the children during the previous five years. Twenty percent did not see their children at all in the preceding year. At least twenty-one percent spent one to twelve days with the children that year, and another eleven percent spent between thirteen and twenty-four days. Twenty-six percent spent twenty-four days or more with their children during the previous year.[23]

Based upon these statistics, the level of paternal contact even in high-contact categories was too low to produce statis-

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17. *See* Constance R. Ahrons, *The Continuing Co-Parental Relationship Between Divorced Spouses*, 51 AM. J. ORTHOPSYCHIATRY 416, 416 (1981).

18. *See id.* at 420.

19. *See id.* at 421.

20. *See id.* at 424-25.

21. *See* Frank F. Furstenberg, Jr. et al., *Paternal Participation and Childrens' Well-Being After Marital Dissolution*, 52 AM. SOC. REV. 695 (1987); *see also supra* note 6 and accompanying text.

22. *See* Furstenberg, *supra* note 21, at 696.

23. *See id.*

tically significant results. The study, therefore, found no measurable distinction between the high contact and the low contact categories, possibly because of the low threshold needed to meet the high contact category. This absence of the effects of paternal participation on children's well-being is surprising in view of the widespread belief that children benefit from maintaining contact with both parents.[24] In fact, this report seems to relate the level of child support, by itself, to the incidents of problem behavior.[25]

Child support figures reported in the study were even more dismal. The figures illustrated that sixty percent of the custodial parents received no money at all; nine percent received less than $1,200; and sixteen percent received between $1,200 and $2,400. Only sixteen percent received more than $2,400.[26]

Joseph Healy, Jr., Janet E. Malley, and Abigail J. Stewart, nevertheless, reached a different conclusion in their research.[27] In their study, data was collected from 121 children from families in which the parents recently separated and the mother had custody. The authors assessed the father-child relationship in three different aspects: frequency of visits, regularity of visits, and the closeness of the father and child from the child's perspective.[28] Their research suggests that the relationship between a noncustodial father and his child has many implications for the child's adjustment, especially during the early, post-separation period.[29] There is little doubt that in a divorce, a child's age and gender are influential factors in the relationship between a noncustodial parent and a child.

Tennessee has seen a tremendous increase in domestic relations cases since 1982. During the past fourteen years, approximately 506,000 divorces were filed and 473,000 cases were disposed of in the Tennessee court system.[30] Almost

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24. *See id.* at 699.
25. *See id.* at 699-700.
26. *See id.* at 698.
27. *See* Joseph M. Healy, Jr. et al., *Children and Their Fathers After Parental Separation*, 60 AM. J. ORTHOPSYCHIATRY 531, 543 (1990).
28. *See id.* at 535.
29. *See id.* at 540.
30. *See* ADMINISTRATIVE OFFICE OF THE COURTS, ANNUAL REPORTS (1982-

40,000 divorce cases were filed statewide in the 1995-1996 fiscal year alone.[31] Sixty-five percent of all civil filings in the 16th Judicial District involved either divorce, child custody, or child support.[32]

III. HISTORY OF CUSTODY IN TENNESSEE

Tennessee law followed Roman law[33] and eventually English common law[34] ruling that fathers had absolute power and control over their children. In *Ex parte Skinner*,[35] an English court denied a mother custody, although the father was in prison and his mistress was providing care for the children. In addition, regular prison visits were included in the visitation order.[36] In a nineteenth century case, *Paine v. Paine*,[37] William Paine sued his wife, Eliza Paine, under a writ of habeas corpus, commanding Mrs. Paine to bring the child before the court. The court summarized the law in Tennessee in the mid-nineteenth-century as follows:

> The father has the natural and legal right to the custody of his children—even against the mother. This is a universal principle in civilized nations. It is the natural law—the Christian law. It is founded in the physical, moral and intellectual superiority of the male sex. It results from the duty devolved by law on the father to maintain, educate, and protect his children. To discharge the duty requires the power, and involves the right. The right is a legal right, and it is coupled with an interest, and will be enforced at law.

1995/1996).

31. *See id.*

32. *See* ADMINISTRATIVE OFFICE OF THE COURTS, ANNUAL REPORT (1995/1996).

33. *See* WILLIAM FORSYTH, A TREATISE ON THE LAW RELATING TO THE CUSTODY OF INFANTS IN CASES OF DIFFERENCE BETWEEN PARENTS AND GUARDIANS 7-9 (1850).

34. *See* Allen Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 425-28 (1976-77).

35. 27 Rev. Rep. 710 (1824).

36. *See Ex parte* Skinner, 27 Rev. Rep. at 714.

37. 23 Tenn. (4 Hum.) 523 (1843).

> The mother, as such, has no authority over her children.[38]

The court indicated that there must be a clear case of unfitness in order to deny a father his children—the case of a vagabond or an act of some other mischief.[39] Other cases indicated that the husband's fitness was not affected by the fact that he was living with another woman;[40] the child was not in fact his offspring;[41] he had no home;[42] he had ill treated his wife;[43] the children were infants;[44] the children were female;[45] the mother was fit;[46] he was impoverished; or he had himself caused the divorce.[47] The court in *Paine*, however, modified the trial court's ruling allowing the oldest son to be reared by the father, but awarding custody of the two younger children to the mother because of their tender age. The court deemed the mother worthy and well qualified for their protection.[48]

These cases demonstrate the tremendous burden the mother had to overcome to obtain custody in early Tennessee cases. This burden, however, changed in 1898 with the case of *State v. Kilvington*.[49] In *Kilvington*, the court ruled that the welfare of the child was superior to the affection of such parents as they could not show themselves qualified to properly care for, educate, and train them.[50] Three decades later, the Tennessee General Assembly adopted a code section that declared fathers

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38. *Id.* at 526 (citations omitted).
39. *See* Commonwealth v. Briggs, 33 Mass. (16 Pick.) 203, 205 (1834).
40. *See* The King v. Greenhill, 111 Eng. Rep. 926 (1836).
41. *See* The King v. De Manneville, 102 Eng. Rep. 1054 (1804) (*Murray's Case*).
42. *See* Lyons v. Blenkin, 37 Eng. Rep. 842 (1821) (citing *Westmeath's Case*).
43. *See* People ex rel. Nickerson, 19 Wend. 16 (N.Y. Sup. Ct. 1837).
44. *See* The King v. Greenhill, 111 Eng. Rep. 926 (1836).
45. *See id.*
46. *See id.*
47. *See* The King v. De Manneville, 102 Eng. Rep. 1054, 1055 (1804) (*Murray's Case*).
48. Paine v. Paine, 23 Tenn. (4 Hum.) 499 (1844).
49. 45 S.W. 433 (Tenn. 1898).
50. *See id.*

and mothers joint and equal natural guardians of their minor children.[51] Unfortunately, the courts did not follow the wisdom of the legislature.

Shortly after passage of *Tennessee Code Annotated* § 8463, the pendulum began to swing toward favoring the mother in custody cases. The judicial system fired the first salvo in *Newburger v. Newburger*[52] by holding that except in extraordinary circumstances, a mother should be with her child of tender years. Courts repeatedly recognized the tender years concept as a primary doctrine. Commonly, a child would not be taken away from his mother unless there was clear evidence showing that leaving a child with the mother would jeopardize the child's welfare in a physical or a moral sense. In *Bevins v. Bevins*,[53] the trial court awarded custody of the minor children to the husband because the wife suffered from Multiple Sclerosis and related mental conditions. Judge Avery reversed the trial court and adopted the opinion of Special Judge McCampbell who wrote, "'a mother, except in extraordinary circumstances, should be with her child of tender years.'"[54] Interestingly, however, the courts also allowed the father some companionship with his child.[55] In *Weaver v. Weaver*,[56] the court developed the theory of the weekend parent that reduced the noncustodial parent to the status of a visitor in the child's life.

In 1983, the Tennessee Court of Appeals rendered a decision in *Bah v. Bah*[57] that would be discussed for years to come. In *Bah*, the court awarded custody of a two and a half year-old child to the father. The mother appealed the award of custody, arguing that the trial court erred in rejecting the "tender years" doctrine and in finding the best interest of the child

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51. *See* TENN. CODE ANN. § 8463 (1934).
52. 10 Tenn. App. 555 (1930).
53. 383 S.W.2d 780 (Tenn. Ct. App. 1964).
54. *Id.* at 788 (quoting Weaver v. Weaver, 261 S.W.2d 145, 148 (Tenn. Ct. App. 1953)).
55. *See* Grider v. Grider, 187 S.W.2d 613 (Tenn. 1945).
56. 261 S.W.2d 145 (Tenn. Ct. App. 1953).
57. 668 S.W.2d 663 (Tenn. Ct. App. 1983).

was served by giving full custody to the father.[58]

Although the court used the terminology cited in *Riddick v. Riddick*[59] indicating that the child's best interest was "the polestar, the *alpha and omega*,"[60] the *Bah* court adopted Judge Avery's conclusion in *Bevins v. Bevins*:

> "The real matter to be considered is what is the best thing to do with these children that they may be left in a home where they are nurtured, loved, appreciated and where the environment is such that is conducive not only to the physical welfare of the child, but to its emotional and moral welfare, and where it can have the instructions from those who have control over it to inspire it to activities so as to develop a personality prepared for a life of service, and to successfully compete in the society which the child faces when an adult."[61]

The court listed several factors such as age, habits, and mental and emotional makeup of the child; the emotional and mental make up of the parties competing for custody; education and experience of those seeking to raise the child; their character and propensities as evidenced by their past conduct; the financial and physical circumstances available in the home of each party seeking custody and the special requirements of the child; the availability and extent of third-party support; the associations and influences to which the child is most likely to be exposed, both positive and negative; and where there was more likely to be a warm, loving, stable, supportive, caring, concerned, consistent, and physically and spiritually nurturing environment for the child.[62] The court articulated, and other

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58. *See id.* at 665.

59. 497 S.W.2d 740 (Tenn. Ct. App. 1973) (superseded by statute as stated in *Bah v. Bah*, 668 S.W.2d 663 (Tenn. Ct. App. 1983) and superseded by rule as stated in *Hass v. Knighton*, 676 S.W.2d 554 (Tenn. 1984)), *overruled by* Musselman v. Acuff, 826 S.W.2d 920 (Tenn. Ct. App. 1991).

60. *Bah*, 668 S.W.2d at 665.

61. *Id.* (quoting Bevins v. Bevins, 383 S.W.2d 780, 783 (Tenn. Ct. App. 1964)).

62. *See Bah*, 668 S.W.2d at 665 (citing *Bevins*, 383 S.W.2d at 783).

courts have adopted, the "doctrine of comparative fitness."[63] Finally, the court ruled that the "presumption of tender years" espoused in *Weaver* was no longer a substitute for a case-by-case analysis in every custody determination.[64] Based upon this landmark decision, the court affirmed the trial court and awarded Mr. Bah custody of his minor daughter.[65]

Professor Walton Garrett's book, *Tennessee Divorce, Alimony and Child Custody*,[66] lists additional factors to consider when awarding custody.[67] These factors include agreement of the parents, the wishes of a mature child, the rights of the parents, the special needs of young children, and the gender of the child and the custodian.[68] The court of appeals recently added another item to consider in *Varley v. Varley*.[69] In *Varley*, the court was concerned with the mother's attempt to alienate the children from the father.[70] The court stated that love and respect for each parent would improve the self image of the children.[71]

The Tennessee legislature asserted the State's collective ideas regarding the child custody issue in the passage of *Tennessee Code Annotated* § 36-6-101(d).[72] In that section, gender cannot be considered in awarding custody.[73] Additionally, *Tennessee Code Annotated* § 36-6-106[74] directs Tennessee courts in matters of child custody as follows:

> In a suit for annulment, divorce, separate maintenance, or in any other proceeding requiring the court to make a custody determination regarding a minor child, such *de-*

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63. *Id.* at 666.
64. *Id.*
65. *See id.* at 667.
66. GARRETT, *supra* note 1.
67. *See id.* § 24-1.
68. *See id.*
69. 934 S.W.2d 659 (Tenn. Ct. App. 1996).
70. *See id.* at 661.
71. *See id.* at 667.
72. Child custody and visitation provisions are codified in *Tennessee Code Annotated* §§ 36-6-101 to 36-6-304 (1996).
73. *See* TENN. CODE ANN. § 36-6-101(d) (1996).
74. TENN. CODE ANN. § 36-6-106 (1996).

> *termination shall be made upon the basis of the best interest of the child.* The court shall consider all relevant factors including the following where applicable:
>
> (1) The love, affection and emotional ties existing between the parents and child;
>
> (2) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary caregiver;
>
> (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
>
> (4) The stability of the family unit of the parents;
>
> (5) The mental and physical health of the parents;
>
> (6) The home, school and community record of the child;
>
> (7) The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preferences of the older children should normally be given greater weight than those of younger children;
>
> (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; and
>
> (9) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child.[75]

This section adopts a best interest standard in all disputes. The statute provides that in determining custody, the court may order custody to either or both parents or to some other suitable person as the welfare and the interest of the child may demand.[76] Nevertheless, even with this statute, Tennessee courts have been hesitant to abandon the common law rule giving preference to natural parents.[77]

The Tennessee legislature also enacted guidelines for courts in making custody awards. *Tennessee Code Annotated* § 36-6-

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75. *Id.* (emphasis added).

76. *See* TENN. CODE ANN. § 36-1-101 (1996).

77. *See* Janet L. Richards, *Custody Conflicts Between Parents and Third Parties: Protecting the Child's Interests*, 29 TENN. BAR J., July/Aug. 1993, at 16-17.

301 provides in pertinent part:

> After making an award of custody, the court shall, upon request of the non-custodial parent, grant such rights of visitation as will enable the child and the non-custodial parent to maintain a parent-child relationship unless the court finds, after a hearing, that visitation is likely to endanger the child's physical and emotional health.[78]

The legislature has also spoken out against a presumption of joint custody in its adoption of *Tennessee Code Annotated* § 36-6-101(a)(2) which states in pertinent part:

> Unless the court finds by clear and convincing evidence to the contrary, there is a presumption that joint custody is in the best interest of a minor child where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child. . . . The burden of proof necessary to modify an order of joint custody at a subsequent proceeding shall be by a preponderance of the evidence.[79]

In today's mobile society, one of the most controversial issues relating to children of divorced parents arises when a custodial parent, or primary custodial parent in a joint custody relationship, desires to move out of state with the minor child. A noncustodial parent who is involved in the daily activities of the child, either in school, church, or extracurricular activities, may be severely limited in his or her ability to parent when the custodial parent moves away. In 1993, the Tennessee Supreme Court addressed this issue in *Taylor v. Taylor*.[80] The court attempted to set rules and establish a burden of proof to be used in removal cases. In a recent case, *Aaby v. Strange*,[81] the court seemingly abandoned the *Bah v. Bah*[82] standard. The court balanced the interests of the child and the custodial parent and set forth a new test in cases where the custodial parent

78. TENN. CODE ANN. § 36-6-301 (1996).
79. TENN. CODE ANN. § 36-6-101(a)(2) (1996).
80. 849 S.W.2d 319 (Tenn. 1993).
81. 924 S.W.2d 623, 629 (Tenn. 1996).
82. *See supra* notes 57-65 and accompanying text.

plans to move. The test allows the custodial parent

> to remove the child from the jurisdiction unless the non-custodial parent can show, by a preponderance of the evidence, that the custodial parent's motives for moving are vindictive—that is, intended to defeat or deter the visitation rights of the non-custodial parent.
>
> . . . [W]here removal could pose a specific, serious threat of harm to the child . . . the non-custodial parent may file a petition for change of custody based on a material change of circumstances . . . . [But] common phenomena—[such as] the fact of moving and the accompanying distress—cannot constitute a basis for the drastic measure of a change of custody.
>
> . . . [I]f the parties cannot agree on an acceptable visitation schedule, the custodial parent seeking to remove must file a petition with the court to reapprove or revise, as the case may require, the existing visitation schedule . . . . [T]he non-custodial parent may . . . present evidence that the custodial parent's motives for moving are vindictive; also, any petition for a change of custody . . . shall be heard at this time.[83]

The Tennessee Supreme Court in *Aaby* also stated that expert psychological and/or psychiatric testimony regarding removal of the child from the state would usually not be sufficient justification for a change of custody.[84] The court gave an example of "serious harm" which could occur if the child had a serious medical condition and no hospital existed where the custodial parent chose to live.[85] The court determined that the continual involvement with the custodial parent was secondary only to the life or death of the child. Under this approach, it appears that *Aaby* stands for the proposition that continuity with one parent is more important for a child than continuity in one place with both parents. Therefore, a trial lawyer opposing a move by the custodial parent has a tremendous burden

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83. *Id.* at 629-30; *see also* Donna Brown Wilkerson, *Child Custody and Visitation Update*, 16 TENN. TRIAL LAWYER 10-12 (Dec. 1996).

84. *See Aaby*, 924 S.W.2d at 629-30.

85. *See id.* at 629 n.2.

in proving that the move is vindictive. In October 1996, the Tennessee Court of Appeals, Western Section, in *Perry v. Perry*,[86] determined that *Aaby* applied even in instances where joint custody was provided.[87]

The history of custody in Tennessee would be incomplete without a brief discussion of the issue of grandparent visitation. The Tennessee General Assembly established grandparent visitation in 1971 when it passed the Grandparents Visitation Act, now codified at *Tennessee Code Annotated* § 36-6-302.[88] The statute grants reasonable visitation privileges to grandparents, except in cases of adoption by unrelated parents, when grandparents show that visitation is in the best interest of the child.[89]

The history of the statute is well described in *Clark v. Evans*.[90] In *Clark*, the court recognized that under normal circumstances, children are "fortunate to have caring and loving grandparents, and . . . that everything possible should be done to foster and maintain a close, loving relationship between the grandparents and [their grandchildren]."[91]

Tennessee Attorney General Charles W. Burson addressed the issue of the constitutionality of the grandparents visitation rights statute in a March 1991 opinion:

> Assuming that the grandparent carries his burden of proof that visitation is in the best interest of the child, the compelling interest of the state in the well being of the child outweighs any liberty interest of the parent in the care, custody and control of his child.[92]

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86. No. 01A01-9602-CH-00088, 1996 WL 558304 (Tenn. Ct. App. Oct. 2, 1996).

87. *See id.* at *2-*3.

88. Grandparents' Visitation Act of 1971, TENN. CODE. ANN. § 36-6-302 (1996).

89. *See* TENN. CODE ANN. § 36-6-302 (1996). The statute provides an exception for adoption by parents unrelated to the grandparents. *See id.*

90. 778 S.W.2d 446, 448-49 (Tenn. Ct. App. 1989).

91. *Id.* at 449.

92. Constitutionality of the Grandparents Visitation Rights Statute, 91 Op. Tenn. Att'y Gen. 21 (1991).

Subsequently, however, in *Hawk v. Hawk*,[93] the test established by the statutory provision was found unconstitutional.[94] The Tennessee Supreme Court found that the trial court imposed its own opinion of the best interests of the child over the parents' opinion. In *Hawk*, the parents had agreed that visitation with the grandparents was inappropriate.[95] The court held that the use of the state's *parens patriae* power to impose visitation in the "best interests of the children" was unreasonable.[96] Based upon this state's strong protection of parental rights and the reasoning of federal constitutional cases, the court found that a fundamental liberty interest existed under Article I, Section 8 of the Tennessee Constitution, although the court did not mention this right of privacy.[97] The court reasoned:

> Implicit in Tennessee case and statutory law has always been the insistence that a child's welfare must be threatened before the state may intervene in parental decision-making. In a divorce case, for example, the harm from the discontinuity of the parents' relationship compels the court to determine child custody "as the welfare and interest of the child or children may demand . . . ."[98]

The Tennessee Supreme Court adopted an approach requiring the trial court to make an initial finding of substantial harm before evaluating the best interest of the child.[99] The court further relied on a law review article, *Grandparent Visitation: Can the Parent Refuse?*, which stated in part:[100]

> If the courts attempt to resolve these disputes when the only thing at stake is a grandparent's argument that visitation is a "better" decision for the child, the placement

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93. 855 S.W.2d 573 (Tenn. 1996).
94. *See id.* at 577.
95. *See id.*
96. *See id.*
97. *See id.*
98. *Id.* at 580 (quoting TENN. CODE ANN. § 36-6-101 (1991)).
99. *See id.* at 580-81.
100. Kathleen S. Bean, *Grandparent Visitation: Can the Parent Refuse?*, 24 U. LOUISVILLE J. FAM. L. 393 (1985-86).

> of the child with the parent becomes subject to the court's supervision and judgment of what are the best decisions for that child.[101]

It is disturbing that in footnote ten of the *Hawk* decision, the Tennessee Supreme Court stated that although they "do not address the Grandparents Visitation Act as it applies to situations involving unmarried parents, [they] note that the state has a stronger argument for court intervention to protect the extended family when the nuclear family has been dissolved."[102] Unfortunately, this conflicts with the ruling in *Floyd v. McNeely*[103] wherein the Western Section of the Court of Appeals declared unconstitutional the application of the statute to allow visitation for natural paternal grandparents when the natural mother and adoptive father opposed it. The court stated: "We conclude that the right afforded to the parents in *Hawk* extends equally to [the natural mother] despite the death of [the] children's father and her subsequent remarriage."[104]

Vanderpool v. Boone,[105] a 1996 Tennessee Court of Appeals decision, may have opened the door for grandparent visitation. Here the court upheld such visitation when the parents had previously consented to grandparent visitation instead of noncustodial parent visitations at the time of the divorce thus distinguishing *Hawk*. There is currently a major effort in the state legislature to reinstate a form of this type of visitation.

IV. CUSTODY TYPES AND TESTS

A. Types of Custody Arrangements

Normally, custody disputes attempt to protect one parent against the loss of attachment, not only to the ex-spouse, but to the ex-spouse's family as well. Individuals respond in different

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101. *See id.* at 441.

102. *Hawk*, 855 S.W.2d at 580 n.10.

103. Floyd v. McNeely, No. 02A01-9408-CH-00187, 1995 WL 390954 (Tenn. Ct. App. July 5, 1995).

104. *Id.* at *3-*4

105. No. 01-A-01-9508-CH00358, 1996 WL 135109 (Tenn. Ct. App. March 27, 1996).

ways to the inner desperation and extreme separation anxiety resulting from a divorce. These responses include clinging to the spouse or child, taking a battle stance and refusing to negotiate at all, or shifting constantly between dependency and counter dependency.[106] To fully appreciate the wide spectrum of custodial provisions and the importance of individual responses, it is important to understand the different types of custody arrangements.

The first type of custody is sole custody. Sole custody can be divided into two separate areas, sole legal custody and sole physical custody. In sole legal custody, the custodial parent is assigned all legal rights and powers as a parent, making all decisions affecting the welfare of the child. Under this arrangement, the noncustodial parent has limited rights and powers but generally has access to the child's medical and school records.[107] In sole physical custody, the custodial parent has primary physical custody of the child, while the noncustodial parent generally has visitation rights.[108]

Joint custody, like sole custody, can also be divided into joint legal custody and joint physical custody.[109] In joint legal custody, both parents retain the rights and powers to make decisions regarding the child's health and welfare. Many states direct courts to grant joint legal custody in order to preserve decision-making authority in both parents.[110] In joint physical custody, both parents retain the right to share, although not always equally, in the daily residential care of the child. This is also sometimes referred to as shared residency. The purpose is to grant substantial periods of time to each parent.[111]

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106. *See* JANET R. JOHNSTON & LINDA E.G. CAMPBELL, IMPASSES OF DIVORCE —THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT (1988).

107. *See* Joan Kelly, *The Determination of Child Custody*, 4 THE FUTURE OF CHILDREN, CHILDREN AND DIVORCE 124 (1994); *see also* Rust v. Rust, 864 S.W.2d 52 (Tenn. Ct. App. 1993).

108. *See* Kelly, *supra* note 107, at 124.

109. South Carolina is currently the only state that does not recognize some form of joint custody. *See* Stephanie B. Goldberg, *Make Room for Daddy*, A.B.A. J., Feb. 1997, at 48-49.

110. *See id.*

111. *See id.*

Many advocates of joint custody propose that continued litigation would be less frequent than in cases of sole custody. Early studies confirm this result under joint custody arrangements made with the consent of both parents. Some authorities maintain that a statutory policy favoring joint custody promotes less litigation because the party seeking sole custody may fear judicial disfavor. This concern increases if there is a friendly parent provision that considers which parent is more likely to allow access by the other to the child.[112] Currently, fourteen states and the District of Columbia have such a presumption.[113] Court-ordered joint custody, in which one parent was forced to accept the arrangement, nevertheless showed litigation rates similar to those found in sole custody arrangements.[114] The President's Commission on Child and Family Welfare discussed, but did not adopt, this type of joint custody.[115] More recently, studies have shown that court ordered joint custody results in the least successful relationships, and the parties are most likely to litigate again.[116] Because of this information, California recently amended its joint custody statute to clarify its lack of a presumption favoring joint custody. Supporters of this amendment cited research evidencing the harmful effects of court-ordered joint custody.[117] Joint legal custody was not significantly linked to greater levels of paternal involvement in either decision-making or time spent with the children, nor did it result in greater compliance with child support orders.[118]

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112. *See* Elizabeth & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 473 (1984).

113. *See* Goldberg, *supra* note 109, at 49.

114. *See* Frederick W. Ilfeld, Jr. et al., *Does Joint Custody Work? A First Look at the Outcome Data of Relitigation*, 139 AM. J. PSYCHOLOGY 62, 64-65 (1982).

115. *See* MCCARTHY, *supra* note 6, at 21.

116. *See, e.g.*, Susan B. Steinman et al., *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court?*, 24 AM. CHILD PSYCHOLOGY 545 (1985).

117. *See Family Law Issues Related to S.B. 1296, S.B. 1306, and S.B. 1341 (and S.B. 13): Hearing Before the California Assembly Comm'n on the Judiciary, 1987 Regular Session*, 49-87 (Dec. 14, 1987).

118. *See* Joan Kelly, *Current Research on Children's Post-Divorce Adjustment—No Simple Answers*, 31 FAM. & CONCILIATION CTS. REV. 29 (1993).

Two other types of custody are divided custody and split custody. In divided custody, each parent has the child for part of the year or for alternate years. While the child is in the parent's custody, that parent has the legal right of decision making.[119] In split custody, each parent has custody of one or more children and the noncustodial parent has visitation rights.[120]

The National Center for Health Statistics in 1990 found that fifty-three percent of all divorces involved children. Where custody was specified, seventy-two percent of mothers had sole custody, nine percent of fathers had sole custody, and joint custody was specified in sixteen percent of the cases.[121] Regional data suggests that joint legal and sole maternal physical custody are the most common forms of custody in today's society, followed by sole legal and physical custody to the mother. Divided and split custody orders are unusual, accounting for less than five percent of the orders.[122]

B. Standards in Custody Determinations

Recognizing the various standards considered in custody determinations is also important. These can be divided into four distinct areas. First is the "best interest standard," which allows parents to compete for custody on equal footing.[123] The second standard, adopted in a few states, is the primary caretaker standard.[124] The third standard is the child's preference standard, taking into account whether the child is old enough and mature enough to participate in the decision.[125] The fourth is the maternal preference standard which recognizes and reinforces the traditional role of mothers as the primary caretakers of children, especially for very young children.[126]

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119. *See* Kelly, *supra* note 107, at 124.

120. *See id.*

121. *See* U.S. Department of Health and Human Services, National Center for Health Statistics, *Monthly Vital Statistics*, Vol. 43, No. 9, Supp., March 22, 1995.

122. *See id.*

123. *See* Kelly, *supra* note 107, at 128.

124. *See id.* at 130.

125. *See id.* at 131.

126. *See* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*,

During the 1970s the vast majority of the states adopted a case-by-case best interest analysis.[127] The Uniform Marriage and Divorce Act (UMDA)[128] lists several factors to consider when determining the best interest of the child, including: (1) the wishes of the child's parents; (2) the wishes of the child; (3) the interaction of the child with his parents or siblings or other person(s) living in the residence; (4) the child's adjustment to his home/school/community; and (5) the emotional and physical health of all parties involved.[129] Such a standard, however, does not take into consideration the conduct of the present or proposed custodian which does not directly affect the relationship of the child.

The main advantage of the best interest test is that the court's decision is centered on the child's developmental and psychological needs rather than on parental demands, societal stereotypes, or legal tradition.[130] This test also places the ultimate responsibility for the decision on the judge, thereby lessening the pressure on the child to make custody choices. The judge would normally consider the interests of all the family members on a case-by-case basis, allowing a certain amount of flexibility.[131] The greatest disadvantage is that judges, without clear guidelines, make decisions relying upon their own value judgments and life experiences. Often, this results in inconsistent decisions across or within various jurisdictions. Unfortunately, the court's decision is sometimes unpredictable and poorly reasoned, and often motivates the losing parent to litigate again.[132] Chief Judge Hood of the District of Columbia Court of Appeals describes the most difficult part of making a

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80 CAL. L. REV. 615, 616 (1982).

127. For a review of the various standards employed by states in making custody determinations, see the cases and statutes cited in Doris Jonas & Henry H. Foster, Jr., *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229, 263-66 (1981).

128. UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

129. *See* Kelly, *supra* note 107, at 128.

130. *See id.*

131. *See* Lawrence A Moskowitz, *Divorce—Custody Dispositions: The Child's Wishes in Perspective*, 18 SANTA CLARA L. REV. 427 (1978).

132. *See* Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988).

determination regarding the best interests of the child in *Coles v. Coles*:[133]

> [The best interests of the child] principle is easily stated but its application in a particular case presents one of the heaviest burdens that can be placed on a trial judge. Out of a maze of conflicting testimony, usually including what one court called "a tolerable amount of perjury," the judge must make a decision which will inevitably affect materially the future life of an innocent child. In making his decision the judge can obtain little help from precedents or general principles. Each case stands alone. After attempting to appraise and compare the personalities and capabilities of the two parents, the judge must endeavor to look into the future and decide that the child's best interests will be served if committed to the custody of the father or mother . . . . When the judge makes his decision, he has no assurance that his decision is the right one. He can only hope that he is right. He realizes that another equally able and conscientious judge might have arrived at a different decision on the same evidence.[134]

Statistical data suggest that one key to understanding a judge's behavior in custody cases is the age of the judge. There are suggestions that while judges older than forty grew up with a maternal preference, judges younger than forty hold more flexible parenting views.[135]

One problem in applying the best interest standard is its failure to link custody and past parental care.[136] This problem is directly addressed in the "primary caretaker's standard" which favors the person who cared for the child most of the time during the marriage. No one can predict who will best care for the child in the future so the courts are forced to rely

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133. 204 A.2d 330 (D.C. 1964).

134. *Id.* at 331-32.

135. *See* Jessica Pearson & Marie A. Luchesi Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703 (1983).

136. *See* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 282.

on the parents' past performance in making their decision.[137] The "primary caretaker" presumption is, nevertheless, touted as being predictable and easy to apply. It may therefore lead to less custody litigation than the best interests standard.[138] One proponent of this standard, Dr. Martha Fineman, wrote that she would apply this rule to all contested cases, not just those involving very young children.[139] Although the standard is intended to be gender neutral, many view it as a proxy for the maternal preference standard.[140]

The primary caretaker is defined as the parent who undertook the most parental duties during the marriage including spending the most time preparing meals, bathing, dressing, purchasing clothes, obtaining medical care, putting the child to bed, disciplining, and educating the children.[141] One advantage is that both parents will know who gets custody, unless they overcome the presumption. This may discourage litigation and threats of custody battles.[142] The most serious drawback of the primary caretaker's standard is that it ignores the quality of the relationship between the child and the primary caretaker in favor of counting the number of hours each parent spends with the child.[143]

The third standard is the child's preference standard, which is considered if the court determines that the child is of sufficient age and capacity to form an intelligent opinion.[144] Obviously, there can be many dangers in involving children in custody disputes. In many jurisdictions, judges will interview the child in chambers in an attempt to avoid these dangers. There is an added problem in that parents will pressure children into assuming different positions regarding their future custody.

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137. *See id.*

138. *Coles*, 204 A.2d at 332.

139. *See* Fineman, *supra* note 132, at 771.

140. *See* Kelly, *supra* note 107, at 130.

141. *See id.*

142. *See* Robert F. Cochran, Jr., *Reconciling the Primary Caretaker Preference, The Joint Custody Preference and the Case-by-Case Rule, in* JOINT CUSTODY AND SHARED PARENTING 218-40 (J. Folberg ed., 2d ed. 1991).

143. *See id.*

144. *See* Kelly, *supra* note 107, at 131.

There are advantages in using the child's preference approach to child custody: (1) It treats children more like full citizens by giving them power to influence the decisions that affect their lives;[145] (2) It keeps the state out of the business of defining what a good family is, leaving that judgment in private hands;[146] (3) It recognizes that children often do as well as judges in ascertaining and protecting their interests.[147] Another problem with this approach is a child may be too young to express a preference. It is not beneficial to involve a child in a custody determination when the child is incapable of expressing a preference.

The fourth standard is the maternal preference standard. Until the 1970s, most states had a rule favoring mothers in custody disputes because of the character of parenting and a belief "that the future roles of parents in the child's life should be based on the past."[148] During the 1880s, the economic usefulness of children began to dwindle with the passing of both child welfare and child labor laws. This was the motivating factor toward the trend of finding the mother as the primary person to nurture the child, especially a very young child.[149] As the "tender years doctrine" grew, through both legislation and judicial opinion,[150] there was continual reference to the mother's "natural superiority" in caring for the children.[151] Children were awarded to the mother unless the father proved the mother could not provide reasonable care because of mental illness or lack of moral fitness.[152]

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145. *See* Belloti v. Belloti, 443 U.S. 622 (1979).

146. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 505-06 (1977).

147. *See* Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 FAM. L.Q. 287, 309-20 (1993).

148. Scott, *supra* note 126, at 619.

149. *See* 2 JOHN P. MCCAHEY ET AL., CHILD CUSTODY AND VISITATION LAW (1988).

150. *See* Andre P. Derdeyn, *Child Custody, A Reflection of Cultural Change*, 7 J. CLINICAL CHILD PSYCHOLOGY 169-73 (1978).

151. *See* HERBERT JACOB, SILENT REVOLUTION 128-31 (1988).

152. *See* Jay Folberg & Martin Graham, *Joint Custody of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523 (1979).

When making custody determinations, one should remember that children have certain rights. These rights include: (1) the right to be with their natural parents and siblings; (2) the right to good physical care with adequate food, clothing, and shelter; (3) the right to education; (4) the right to emotional security; (5) the right to diagnosis and treatment of medical and emotional conditions; (6) the right to be protected from harm, injury, and neglect; (7) the right to controlled use of any estate or property of the child for preservation and conservation of such property in the child's best interests; and (8) the right to all guarantees and protections of the federal and state constitutions.[153]

In considering how other states make custody determinations, it is important to look at judicial attitudes regarding custody. Recently, two studies examined judicial attitudes toward custody and visitation in Quebec, Ontario[154] and in Louisiana.[155] The most prevalent physical custody arrangement allowed the children to be with one parent during the school year and the other parent during the summer.[156] The most preferred visitation in Louisiana involved every other weekend, while the least preferred was less than one weekend per month.[157] The following custody factors were ranked in order of importance: (1) love, affection and emotional ties between a parent and child; (2) parents' ability to give love, affection and guidance to continue the child's education and religious training; (3) willingness of each parent to encourage a close parent-child relationship with the other parent; (4) continuity of placement; (5) mental and physical health of the parties; (6) permanence as a family unit of the proposed custodial home; (7) moral fitness of the parties; (8) capacity of the parents to provide food, clothing, medical care and material needs; (9)

153. *See* Vincent De Francis, Termination of Parental Rights—Balancing the Equities, *Legal Right of Children*, Practicing Law Institute, New York City, NY, 1973.

154. *See* Leighton E. Stamps et al., *Judicial Attitudes Regarding Custody and Visitation Issues*, 25 J. DIVORCE & REMARRIAGE 39 (1996).

155. *See id.*

156. *See id.* at 34.

157. *See id.*

preference of a child more than twelve years old; (10) home, school and community record of the child; (11) distances between the residences of the parties; (12) preference of a child between the age of six and twelve; and (13) preference of a child less than six years old.[158]

With such a wide range of factors to consider, it is readily apparent why the system frustrates litigants. Often, the person making these decisions may never have practiced family law, nor taken a course on the psychological impact of divorce on children. Therefore, it seems the most qualified persons to discuss the future of their children are the parents.

V. CUSTODIAL DECISION THEORIES

Elizabeth Scott, in her article, *Pluralism, Parental Preference, and Child Custody*,[159] discusses the theory of an approximation framework. Under her proposed custody decision-making framework, approximating past patterns of care is critical. Evidence is limited to parental participation in the child's life during the marriage. Although similar to the primary caretaker's preference, it differs because it is not used to choose one parent over another, but instead provides for an allocation of time and decision-making authority between the parents who hopefully will continue in the parental roles they shared during the marriage.[160] There is no evidence presented regarding the parent's moral character, lifestyle, quality of past care, depth of attachment, or potential capacity to provide care.[161] The limited amount of evidence limits the opportunity for the judge's personal views and biases to affect the outcome. There are difficulties, however, because custody arrangements that adequately mirror the complicated patterns of care and responsibility that existed during the marriage are often impossible for courts to duplicate in newly created separate

158. *See id.* at 33.
159. Scott, *supra* note 126, at 638.
160. *See id.*
161. *See id.*

households.[162]

The approximation theory can help alleviate some adversarial litigation in most custody cases. First, by using this theory, the parents should not deem visitation as a prize to be captured by one parent or the other. Neither parent loses if both have developed a relationship with the child and an agreement has been reached which best reflects the past relationship. Next, antagonistic tones of the proceedings lessen because the factors to be considered in court do not focus on personal attacks, but instead focus on each parent's past care of the child.[163]

Robert F. Cochran, Jr., in his article discussing the reconciliation of the primary caretaker preference, also proposed a new policy for courts to follow when making custody decisions.[164] In his proposal, he combined the primary caretaker and the joint custody preferences into a single preference based on the importance to the child's psychological well-being of regular contact with both parents.[165] He suggests that when parents are unable to agree, they will prefer a standard custody arrangement. He proposes the parents have joint physical custody and the child will spend the most time with the primary caregiver and spend substantial and regular periods of time with the other parent. It would be up to the legal custodian to make decisions as to the child's life not affecting the physical custody relationship.[166] The preference for this custodial arrangement would only be overcome by clear and convincing evidence presented by either parent showing that another custodial arrangement would be better for the child. Initially, it would appear that this proposal is little more than the primary caretaker's preference with a proposal that the noncustodial parent has joint custody. The mere label of joint physical custody is an important aspect of the proposal because it signals to the parties and the public that they are establishing a custo-

162. *See id.* at 639.
163. *See id.* at 641.
164. *See* Cochran, *supra* note 142, at 229.
165. *See id.*
166. *See id.*

dial relationship that is significantly different from the traditional custodial parent/visiting parent relationship.[167] The label also sends a signal to the child that both parents want to be involved in the child's well-being, even after the divorce. Nevertheless, the approach presents a problem when the parents have a history of conflict and are, therefore, likely to disagree. There is always a possibility of continued animosity between the parents which could harm the children. Interestingly, Cochran believes that the result of this approach mirrors the result reached by most couples in mediation.

In 1987, the State of Washington passed a new law defining the best interests of the child.[168] This sweeping legislation provides for a mandatory settlement conference, when provided under court rule, and requires the parties to participate in that settlement conference in good faith.[169] The formation of the parenting plan provides for dispute resolution. Any specified agency or individual can resolve disputes when agreed to by the parties.[170] As for residential provisions, the courts are directed to place the child in "a loving, stable, and nurturing relationship . . . consistent with the child's developmental level and the family's social and economic circumstances."[171] Interestingly, under the statute, the primary caretaker[172] is to be given the greatest weight in the decision.[173]

The weight of the primary caretaker was litigated in *In re Kovacs*,[174] where the court held that the Parenting Act of 1987 did not create a presumption in favor of the primary caregiver. When a Washington court uses these factors, it must take scrupulous care in applying the residential provisions of

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167. *See id.* at 229-30.

168. *See* WASH. REV. CODE ANN. § 26.09.184 (West 1997).

169. *See id.* § 26.09.181(5).

170. *See id.* § 26.09.184(3).

171. *Id.* § 26.09.187(3).

172. *See id.* § 26.09.187(3)(a)(i) (discussing the strength of the child's relationship with each parent).

173. *See* Jane W. Ellis, *The Washington State Parenting Act in the Courts: Reconciling Discretion and Justice in Parenting Plan Disputes*, 69 WASH. L. REV. 679, 693 (1994).

174. 854 P.2d 629 (Wash. 1993).

the Act. It requires, at a minimum, concrete factual findings in relation to each of the statutory factors previously described. Courts would be wise to specify their reasons and supporting evidence in their findings and conclusions.[175]

The Washington statute also discusses proposed temporary parenting plans and creates visitation rights for grandparents.[176] Modifications of the parenting plan or custody decree, especially in circumstances when one parent is leaving the state, are frowned upon in Washington.[177] There continues to be litigation in this controversial area when custody changes because one party relocates out of state.[178] Of course, there is continued revisiting of this issue as courts are reminded of the difficult issues they face in such modifications.[179]

VI. PROPOSED TENNESSEE STATUTE AND RECOMMENDATIONS

Prompted by the recent discussions concerning the custody laws in Tennessee, this Author,[180] proposes to redraft the Tennessee custody statutes.[181] These proposals track the statute currently in effect in Washington.[182] Commentaries on these proposals were requested from different judges and attorneys across the state. One attorney commented:

> While there may be adequate statutes on the books to address the problems we all address every day, the present system isn't working. Perhaps that's because we don't really have a system and we never have had one to deal with the special legal problems posed by families and human relationships. I agree with you that we need to stop dead in our tracks and start all over again. We are basical-

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175. *See* Ellis, *supra* note 173, at 736.

176. *See* WASH. REV. CODE ANN. §§ 26.09.194, 26.09.240 (West 1994).

177. *See id.* § 26.09.260

178. *See, e.g., In re* Marriage of McDole, 859 P.2d 1239 (Wash. 1993).

179. *See* Virginia A. Peterson, *In re* Marriage of McDole*: Modifying Child Custody by Ignoring Statutory Standards*, 69 WASH. L. REV. 1143 (1994).

180. This Author was assisted by Doug Clark and Shelly Andrews, students at Vanderbilt University School of Law, in redrafting the custody statutes.

181. See *infra* section VIII. for the proposed revisions.

182. *See supra* notes 168-73 and 176-77 and accompanying text.

> ly still operating in the 'Stone Age' where women always get custody and fathers are ordered to pay support and see their children every other weekend. This process turns a father [or a non-custodial mother] into an uncle [or aunt]. It seems to manufacture friction instead of alleviating conflict. It is all too easy to litigate or threaten to litigate. There is very little energy devoted to the specific needs of the specific human beings (the children) who are involved and who are basically helpless in asserting themselves in this process. I see your proposal as exalting the rights/needs of the children by requiring the parents to attempt to cooperate. In fact, your proposal seems to reward those who cooperate and to sanction those who don't.
>
> I think the most beneficial thing to result from a total revision of the custody, visitation, etc. laws is that we would all have to start anew with fresh insights and approaches. This approach could be shared with the client upon the initial interview.
>
> Let me be frank by stating that I think your proposal will create work for judges and lawyers. Yet, I think it is the sort of work in which we should be engaged. It's good work that has laudable goals.[183]

This Article suggests six new areas of child custody and visitation law that must be addressed as we move into the 21st century.

The first priority is establishing a parent education program. Courts should provide intake and referral services appropriate to the individual needs of separating, divorcing, and unmarried parents.[184] Clinical observations show the experience of separation for some couples is often the crucible within which parents brew and crystallize negative views of each other.[185] Early intervention could help resolve some initial

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183. Letter from R. Steven Waldron, Esq., an attorney with the firm of Waldron and Fann, Murfreesboro, Tennessee, Oct. 3, 1996 (on file with the author).

184. *See* MARY R. CATHCART & ROBERT E. ROBLES, PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION, REPORT OF THE U.S. COMMISSION ON CHILD AND FAMILY WELFARE 32 (1996).

185. *See* Kelly, *supra* note 107, at 122.

difficulties. Courts also need the ability to refer parties to other services in the community to help the families of divorce.[186] They should be able to refer divorcing parents to a more intensive counseling program if the parties suffer from difficulties such as substance abuse or domestic violence.[187] Many of these programs could be offered through nonprofit agencies. Videotapes have been developed for classes and a question and answer period is suggested at the end of the presentations.[188]

Such a parent education program would provide divorcing parents with (1) information regarding potential effects of divorce on their children, (2) information on child development and discipline,[189] (3) communication techniques which could help parties resolve their difficulties,[190] (4) a basic framework for understanding the battle they are preparing to face as they separate,[191] (5) information on various custodial and parenting arrangements, (6) information regarding the court process,[192] including mediation alternatives, (7) information on the effect their decisions will have on their children,[193] and (8) suggestions on how to make children the number one priority.

It would be beneficial if, at the very beginning, the parties understood not only the effect of divorce on themselves, but also the effect on their children. The archaic terms "custody" and "visitation" convey ownership over the child and imply that one party is merely a visitor in the home.[194] These terms should be replaced with more user-friendly words.

Second, establishing mandatory mediation is important in contested child custody cases. Resolving parental disputes through negotiation is better than through confrontation.[195]

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186. *See* CATHCART & ROBLES, *supra* note 184, at 32.
187. *See id.*
188. *See id.* at 33.
189. *See* Kelly, *supra* note 107, at 133.
190. *See id.*
191. *See* CATHCART & ROBLES, *supra* note 184, at 32.
192. *See id.* at 33.
193. *See id.*
194. *See id.* at 30.
195. *See* Jessica Pearson & Maria A. Luchesi Ring, *Child Custody: Why Not Let Parents Decide?*, 20 JUDGES 4 (1981).

Over the past twenty years, many professionals have challenged the idea that the only way to resolve family disputes is through adversarial court proceedings.[196] Additional state funds must be raised to defray the cost for those who cannot afford such services. A small increase in filing fees may accomplish this. Some courts have established a fund to cover mediation costs by increasing filing fees and assessing mediation fees on those who can afford to pay.[197] Ideally, if the courts require that parties attend mediation, those parties should not have to pay for such services, just like many do not have to pay for judicial services.[198] Increased filing fees for marriage licenses, divorce petitions, and modifications could also fund mediation services by specifically setting aside a percentage for that purpose.[199]

Mediation should be the first step for all parents disputing custody.[200] Judicial oversight is very important to ensure the success of mandatory mediation.[201] In the Sixteenth Judicial District, the Special Master, who is also an attorney, holds a settlement conference before each divorce trial. Although this conference is held at a point near the end of the litigation process, it still settles almost seventy-five percent of all contested divorces. It is reasonable to believe that if a settlement conference is held at the initial filing of the lawsuit, a greater number of cases could be resolved without litigation. Rule 31 of the *Tennessee Rules of Civil Procedure*[202] allows the court to order mediation or other forms of alternative dispute resolution.[203] Judicial support of mediation, however, is critical in

196. *See* Ann Milne & Jay Folberg, *The Theory and Practice of Divorce Mediation: An Overview*, *in* DIVORCE MEDIATION: THEORY AND PRACTICE (1988).

197. *See* CATHCART & ROBLES, *supra* note 184, at 40.

198. *See id.*

199. *See* Pearson, *supra* note 195, at 10.

200. *See* TENN. CODE ANN. § 36-6-105(5) (1996); *infra* section VIII.

201. *See* CATHCART & ROBLES, *supra* note 184, at 41.

202. TENN. R. CIV. P. 31. For a discussion of alternative dispute resolution materials, see Symposium, *Alternative Dispute Resolution*, 26 U. MEM. L. REV. 1085 (1996) (discussing alternative dispute resolution methods and the impact of alternative dispute resolution).

203. For a discussion of alternative dispute resolution as it applies to family law

its acceptance.[204] There is substantial evidence that couples obtaining divorces through the adversarial process spend more in total fees than those who use divorce mediation to resolve all issues.[205] Currently, twenty-seven states have laws that either permit or require courts to offer such services as mediation when parenting disputes are involved.[206] In California, mandatory mediation has reduced custody trials from twenty percent to five percent of the docket in domestic litigation.[207] Additionally, parties who reach settlement through mediation are much more satisfied with the result than if the judge makes the determination.[208] Of course, there are circumstances where parties should not be required to attend mediation. Some of these exceptions include: (1) cases in which the parties have developed a parenting plan on their own and have attended the court orientation and education program and (2) cases of domestic abuse, substance abuse, mental impairment, or other factors.[209]

There are specific procedures to be used when one applies mediation to domestic violence cases. These procedures include: (1) obtaining any history of spousal abuse before mediation; (2) using a male/female mediator team; (3) employing separate interviews for the husband and wife, and only joint interviews

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in Tennessee, see Judge Marietta Shipley, *Family Mediation in Tennessee*, 26 U. MEM. L. REV. 1085 (1996).

204. *See* Milne & Folberg, *supra* note 197. For a discussion of alternative dispute resolution from the judicial perspective, see Judge R. Allan Edgar, *A Judge's View—ADR and the Federal Courts—The Eastern District of Tennessee*, 26 U. MEM. L. REV. 995 (1996) and Justice Penny J. White, *Yesterday's Vision, Tomorrow's Challenge: Case Management and Alternative Dispute Resolution in Tennessee*, 26 U. MEM. L. REV. 957 (1996).

205. *See* Joan B. Kelly, *Is Mediation Less Expensive? Comparison of Mediated and Adversarial Divorce Costs*, 8 MEDIATION Q. 15, 23 (1990).

206. *See* Craig A. McEwen, *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1340 n.131 (1995).

207. *See* Kelly, *supra* note 107, at 134.

208. *See* Jessica Pearson & Nancy Thoennes, *A Preliminary Portrait of Client Reactions to Three Court Mediation Programs*, 21 MEDIATION Q. 31-32 (1984); CATHCART & ROBLES, *supra* note 184, at 39.

209. *See id.* at 39.

if safe and both parties agree; (4) having police available to escort parties; and (5) having the option to refer the case to investigators to protect the parties and mediators.[210]

Third, it is essential that courts continue using the best interest standard, employing the criteria that delineate the important factors to be considered.[211] In Appendix A of this Article, discussing the policy provision, it states clearly that the best interest of the child should be the standard by which the court determines and allocates the parties' parental responsibilities.[212] This is different from the Washington statute which gives greater weight to the primary caretaker provision.[213] The problem with maintaining the best interest standard is that it allows too much judicial discretion. The lawyer's victory may very much depend on the accurate perception and manipulation of the court's leanings, or upon creating them.[214] The court must do a better job in its application of this standard.

The fourth recommendation is the establishment of parenting plans, on a temporary basis, when the divorce is filed and then as the litigation process proceeds.[215] Parenting plans and residential agreements would replace traditional custody provisions.[216] A parenting plan is superior to the other forms of custody because it is generally more specific, and the parents arrive at the agreement jointly in an attempt to remove potential confusion.[217] Parenting plans should reflect the personal choices of the two people in charge of rearing their children and should address the changing needs of the children.[218] A plan should be divided into five different sections, including:

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210. *See* Holly A. Magnana & Nancy Taylor, *Child Custody Mediation and Spouse Abuse: A Description Study of a Protocol*, 31 FAM. & CONCILIATION CTS. REV. 50 (1993).

211. *See* TENN. CODE ANN. § 36-6-107(3)(a) (1996); *infra* section VIII.

212. *See id.* § 36-6-101.

213. *See* WASH. REV. CODE ANN. § 26.09.191(i) (West 1997). For a discussion of the Washington provisions, see *supra* notes 169-77 and accompanying text.

214. *See* A. STRICK, INJUSTICE FOR ALL (1977).

215. *See infra* app. B.

216. *See* CATHCART & ROBLES, *supra* note 184, at 31.

217. *See id.* at 36.

218. *See id.* at 35.

(1) the time a child is with the parent overnight with the parent at home; (2) the actual time the parent and the child spend together; (3) the portion of the time the child and the parent spend in recreation or projects together or activity time; (4) how the parents will work together to make day-to-day decisions, which would include, for example, discipline, curfew, allowances, health care habits, and other short term activities; and (5) how the parents will make major decisions about such things as education, religious affiliation, critical or long-term medical care, and for older children, sports, the purchase of cars, and decisions about college.[219]

Parenting plans should contain built-in provisions for alternative dispute resolution to resolve issues on which the parties cannot agree.[220] The advantage of a mediator is that he or she can help parents focus on making the children a priority, and also stress the importance of maintaining an ongoing relationship with one another for the benefit of the children. The courts should attempt to follow the agreed parenting plans with the exception of arrangements as to child support payments. These payments should meet the minimum federally mandated child support guidelines.[221] Nevertheless, in instances where domestic violence, substance abuse, mental impairment, or any other dangerous circumstance is involved, a fair mediation process may be precluded.[222]

Goals such as the following should be set when establishing a parenting agreement: (1) to provide a more humane thoughtful and private alternative to the adversarial process permitting self determination; (2) to provide a negotiation model that could remove the negative atmosphere and create a more businesslike working relationship; (3) to remove the legal

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219. *See* Isolina Ricci, *Mediation and Joint Custody and Legal Agreements—A Time to Review, Revise and Refine, reprinted in* ABA SECTION OF FAMILY LAW, 1989 ANNUAL MEETING COMPENDIUM.

220. *See* Isolina Ricci, *Parenting Plans: Making the Court System Work for People*, U.S. COMMISSION ON CHILD AND FAMILY WELFARE, San Francisco Public Hearings, May 9, 1995; *see also* CATHCART & ROBLES, *supra* note 184, at 37.

221. *See* CATHCART & ROBLES, *supra* note 184, at 37.

222. *See id.* at 39; *see also supra* note 209-10 and accompanying text.

jargon and replace it with common, everyday terms and to set the framework to develop a family reorganization; and (4) to encourage both parents to make their children the number one priority and to recognize the childrens' need to maintain a close, continuing relationship with each parent.[223]

To make the parenting plan work, there should be a written guidebook complete with the necessary forms. In addition, a mediator should be available to assist the parties in developing the plan if necessary. Sanctions for noncompliance should be in place. The plan should be reviewed for specificity and the potential for noncompliance. A detailed agreement for modification should be included, and a requirement to review all segments of mediated parenting plans whenever there is a threat to a child's safety, welfare, or the child's best interests due to domestic violence, abuse, neglect or parental incompetence.[224]

The fifth consideration is to make provisions for our mobile society and also the additional issues of stepparent and grandparent visitation. Some states recommend that all motions requesting modification of child custody be prohibited for up to two years unless there is a serious danger to the child's environment, either in the home of the custodial or noncustodial parent.[225] We must make these statutes pass constitutional muster based upon the cases of *Aaby v. Strange*[226] and *Hawk v. Hawk*.[227] The proposed legislation requires a different standard of clear and convincing evidence to show that there is a sufficient existing relationship and that it is in the best interests of the child.[228] The best interests standard must be applied in custody cases, and the constitutional right of privacy for par-

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223. *See id*

224. *See id.*

225. *See* C. Gail Vasterling, *Child Custody Modification Under the Uniform Marriage and Divorce Act: A Statute to End the Tug of War*, 67 WASH. U. L.Q. 923 (1989).

226. 924 S.W.2d 623 (Tenn. 1996).

227. 855 S.W.2d 573 (Tenn. 1993).

228. *See* Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J.L. & SOC. PROBS. 319 (1994).

ents is inapplicable.

Last is the issue of judicial and bar education. With more efforts being made to educate the parents and the attorneys, the judiciary must accept responsibility for educating itself. Courts should be given the appropriate resources for educating judges and other court personnel. The judges need reasonable caseloads in order to apply their education, using both effective management and coordination of different systems available to the members of the judiciary.[229] Great latitude is given to judges under the best interest of the child statutes for custody decisions. Nevertheless, few judges have received the special training necessary to formulate visitation or custody plans for children of different ages. Judges must be familiar with family law and have a basic knowledge of family dynamics and an understanding of the needs of children.[230] Improvement from the bench is important, but the development of *pro bono* help in family law cases is essential.[231] Attorneys require additional education in this area because the attitudes of attorneys in custody cases play a central role. Attorneys should remember their role as counselor and must learn how to explain the law, the extent of negotiations, and the appropriate expectations to their clients.[232]

In one study, a comparison was made between judges and mental health officers regarding which criteria should be considered in custody cases. For mental health professionals, the primary question seems to be which parent is a better match for having the primary responsibility for the child, while the court is more likely to ask which parent is the better adult.[233] Obviously, a patterned program of judicial education to help further explain the relevant psychological issues would be bene-

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229. *See* CATHCART & ROBLES, *supra* note 184, at 31.

230. *See id.* at 41.

231. *See id.*

232. *See* Lenore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 471 (1979).

233. *See* Carol R. Lowery, *The Wisdom of Solomon*, 8 LAW & HUM. BEHAV. 371 (1984).

ficial to all.[234] In cases where the "best interests" rule is applied, a thorough knowledge of the sociological tools available in custody matters is crucial.[235]

In many jurisdictions, there is support for the creation of a unified family court. Supporters state that benefits include easier public access, reduction of emotional trauma for the parents, coordination of information on family law cases, avoidance of duplication, and provision of additional services such as orientation and mediation.[236] Additionally, an effective court coordination and information system must be developed, and communication must be improved between courts in different states.[237] Such a management information system could guarantee: (1) screening, assignment and tracking of cases; (2) coordination of referrals to appropriate social services; (3) collection of information on prior judgments and opinions; (4) information on current and past court actions affecting the family; (5) confidentiality on sensitive issues; and (6) tracking of enforcement orders of the court.[238]

VII. CONCLUSION

The family institution is continuously changing in a society where everything seems based on immediate gratification. It is time we step back and find a better way to handle difficult issues such as child custody. As stated by Linwood Slayton, Jr., "Attorneys have an affirmative duty to zealously advocate on behalf of the client but they also have a duty to ensure that the children . . . suffer as little as possible as the process unfolds and ultimately comes to a conclusion."[239]

Judges also have a responsibility to be thoroughly prepared

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234. *See* Kelly, *supra* note 107, at 136.

235. *See* Timothy B. Walker, *Measuring the Child's Best Interests—A Study of Incomplete Considerations*, 44 DENV. L.J. 132 (1967).

236. *See* Judge Robert W. Page, *Family Courts: An Effective Judicial Approach to the Resolution of Family Disputes*, 44 JUV. & FAM. CT. JUDGES 1 (1993).

237. *See* CATHCART & ROBLES, *supra* note 184, at 35.

238. *See id.*

239. Linwood R. Slayton, Jr., *Custody, Visitation, Divorce: Factors to Consider When Representing the Father*, NBA MAGAZINE July/Aug. 1996, at 16.

and educated about how to handle the difficult issues they face on a daily basis in family court. They must be flexible and innovative in dealing with the pressures that families face on a regular basis. Former Justice Penny White wrote in her dissent in *Aaby v. Strange*: "I dissent from the decision reached by the majority . . . because the formulation of the rule, in my estimation, undermines the important efforts of those non-custodial parents who work diligently to be more than every other weekend mothers and fathers."[240]

It is important that judges, lawyers, and litigants recognize that children continue to need both parents after their parents have divorced. There is sufficient evidence that most children do best when they receive both emotional and financial support from each parent.[241] Many children see divorce as a solution to a difficult home life. We must realize that the idea of divorce for children is the absence of a parent from their daily existence. It is, in fact, the loss of a significant emotional relationship.[242] Our laws must be drawn to educate parents about children's perceptions and needs both before and after divorce.

In *Bah v. Bah*, the Tennessee Court of Appeals stated, "It is of critical importance that this and any other child have a meaningful relationship with both parents where possible, irrespective of where primary custody is placed."[243] This directive must be followed. As Joan Kelly wrote in her article, *The Determination of Child Custody*,

> As society's cultural and family traditions continue to change, it is likely that child custody and visiting arrangements will reflect, at least in part, these evolving attitudes and customs. The effort to ensure that children have post-divorce parenting arrangements which promote good social and psychological adjustment is an ongoing one, involving

240. 924 S.W.2d 623, 631 (Tenn. 1996) (White, J., dissenting).

241. *See* JUDITH WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN. A DECADE AFTER DIVORCE (1990).

242. *See* R. Neugebauer, *Divorce, Custody, and Visitation: The Child's Point of View*, 2 J. DIVORCE 153, 165 (1989).

243. *Bah*, 668 S.W.2d at 667.

> dialogue and debate at all levels. Our children deserve no less than this.[244]

For too long we have disregarded an issue that thousands of families in our country face on a regular basis. It is time we rethink how our society and legal system can best deal with this opportunity to positively affect future generations. Katharine Bartlett, in her law review article, *Re-Expressing Parenthood*,[245] discussed changing how we look at these issues:

> I propose that we attempt to re-direct the law applicable to disputes over parental status toward a view of parenthood based on responsibility and connection. The law should force parents to state their claims, and courts to evaluate such claims, not from the competing, individuated perspectives of either parent or even of the child, but from the perspective of each parent-child relationship. And in evaluating . . . that relationship, the law should focus on parental responsibility rather than reciprocal "rights," and express a view of parenthood based upon the cycle of a gift rather than the cycle of exchange.[246]

We can do better for our children; they deserve our best.

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244. *See* Kelly, *supra* note 107, at 137.

245. *See* Katharine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988).

246. *Id.* at 295.

VIII. Appendix A
Proposed Changes to the Tennessee Code

36-6-101. (amended) Policy

Parents have the responsibility to make decisions and perform other parental functions necessary for the care and growth of their minor children. In any proceeding between parents under this chapter, the best interests of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities. The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

36-6-102. (amended) Definitions The definitions in this section apply throughout this chapter.

(1) "Temporary parenting plan" means a plan for parenting of the child pending final resolution of any action for dissolution of marriage, declaration of invalidity, or legal separation which is incorporated in a temporary order.

(2) "Permanent parenting plan" means a plan for parenting the child, including allocation of parenting functions, which plan is incorporated in any final decree or decree of modification in an action for dissolution of marriage, declaration of invalidity, or legal separation.

(3) "Parenting functions" means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child.

Parenting functions include:

(a) Maintaining a loving, stable, consistent, and nurturing relationship with the child;

(b) Attending to the daily needs of the child, such as feeding, clothing, physical care, and grooming, supervision, health care, and day care, and engaging in other activities which are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;

(c) Attending to adequate education for the child, including remedial or other education essential to the best interests of the child;

(d) Assisting the child in developing and maintaining appropriate interpersonal relationships;

(e) Exercising appropriate judgement regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances; and

(f) Providing for the financial support of the child.

36-6-103. (amended) Enforcement and gender

(1) Nothing in this chapter shall be construed to alter, modify or restrict the exclusive jurisdiction of the juvenile court pursuant to § 37-1-104.

(2) It is the legislative intent that the gender of the party seeking custody shall not give rise to a presumption of parental fitness or cause a presumption in favor of or against the award of custody to such party.

(3)(a) In an action for dissolution of marriage involving minor children, or in a post-judgement proceeding involving minor children, each parent shall attend an educational seminar concerning the effects of the dissolution of marriage on the children, as well as information regarding the legal process. The program may be divided into sessions, which in the aggregate shall not exceed four (4) hours in duration. The program shall be educational in nature and not designed for individual therapy. The minor children shall be excluded from attending these sessions. This requirement may be waived upon motion by either party and the agreement of the court upon the showing

of good cause for such relief.

(b) The fees or costs of the educational sessions under this section, which shall be reasonable, shall be borne by the parties and may be assessed by the court as it deems equitable. Fees may be waived for indigent persons.

36-6-104. (amended) Failure to comply with decree or temporary injunction—Obligation to make support or maintenance payments or permit contact with children not suspended—Penalties

(1) The performance of parental functions and the duty to provide child support are distinct responsibilities in the care of a child. If a party fails to comply with a provision of a decree or temporary order of injunction, the obligation of the other party to make payments for support or maintenance or to permit contact with children is not suspended.

(2)(a) A petition may be filed to initiate a contempt action to require a parent to comply with an order establishing residential provisions for a child. If the court finds there is reasonable cause to believe the parent has not complied with the order, the court may issue an order to show cause why the relief requested should not be granted.

(b) If, based on all the facts and circumstances, the court finds after hearing that the parent, in bad faith, has not complied with the order establishing residential provisions for the child, the court shall find the parent in contempt of court. Upon a finding of contempt, the court may order: (i) the noncomplying parent to provide the moving party additional time with the child. The additional time shall be equal to the time missed with the child, due to the parent's noncompliance; (ii) the parent to pay, to the moving party, all court costs and reasonable attorneys' fees incurred as a result of the noncompliance, and any reasonable expenses incurred in locating or returning the child.

(3) For purposes of subsections (1) and (2) of this section, the non-complying parent shall be deemed to have the present ability to comply with the order establishing residential provisions unless he or she establishes otherwise by a preponderance

of the evidence. The non-complying parent shall establish a reasonable excuse for failure to comply with the residential provision of a court-ordered parenting plan by a preponderance of the evidence.

(4) Subsections (1) and (2) of this section authorize the exercise of the court's power to impose remedial sanctions for contempt of court and this power is in addition to any other contempt power the court may possess.

(5) Upon motion for contempt of court under subsections (1) and (2) of this section, if the court finds the motion was brought without reasonable basis, the court shall order the moving party to pay to the nonmoving party all costs and reasonable attorneys' fees.

36-6-105. (amended) Procedure for determining permanent parenting plan

(1) Submission of proposed plans.

(a) In any proceeding under this chapter, except a modification, each party shall file and serve a proposed permanent parenting plan on or before the earliest date of: (i) Thirty (30) days after filing and service by either party of a notice for trial; or (ii) One hundred twenty (120) days after commencement of the action. Said 120 days may be extended by stipulation of the parties.

(b) In proceedings for a modification of custody or a parenting plan, a proposed parenting plan shall be filed and served with the petition for modification and with the response to the petition for modification.

(c) No proposed permanent parenting plan shall be required after filing of an agreed permanent parenting plan, after entry of a final decree, or after dismissal of the cause of action.

(d) A party who files a proposed parenting plan in compliance with this section may move the court for an order of default adopting that party's parenting plan if the other party has failed to file a proposed parenting plan as required in this section, as long as the Court determines the plan is in the child(ren)'s best interest.

(2) Amending proposed parenting plans. Either party may file

and serve an amended proposed permanent parenting plan according to the rules for amending pleadings.

(3) Good faith proposal. The parent submitting a proposed parenting plan shall attach a verified statement that the plan is proposed by that parent in good faith and is in the best interest of the child(ren).

(4) Agreed permanent parenting plans. The parents may make an agreed permanent parenting plan. In such instances, a mandatory settlement conference is not required.

(5) Mandatory settlement conference. In the event that the parents cannot agree on a parenting plan, they shall attend a mandatory settlement conference within one hundred twenty (120) days after the filing of an answer or thirty (30) days after filing of notice for trial, whichever occurs first. The mandatory settlement conference shall be presided over by a judge, independent mediator, special master, or any person approved by the Court, who shall apply the criteria in §§ 36-6-107 and 36-6-108. The parents shall in good faith review the proposed terms of the parenting plan and any other issues relevant to the cause of action with the presiding judge or court commissioner. Facts and legal issues that are not then in dispute shall be entered as stipulations for purposes of final hearing or trial in the matter. This requirement may be waived by the court upon the showing of good cause for such relief.

(6) Trial setting. Trial dates for actions involving minor children brought under this chapter shall receive priority.

36-6-106. (amended) Permanent parenting plan

(1) Objectives. The objectives of the permanent parenting plan are to:

(a) Provide for the child's physical care;

(b) Maintain the child's emotional stability;

(c) Provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future modifications to the permanent parenting plan;

(d) Set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in §§ 36-6-107 and 36-6-108;

(e) Minimize the child's exposure to harmful parental conflict;

(f) Encourage the parents, where appropriate under §§ 36-6-107 and 36-6-108, to meet their responsibilities to their minor children through agreements in the permanent parenting plan, rather than by relying on judicial intervention; and

(g) To otherwise protect the best interests of the child consistent with § 36-6-101.

(2) Contents of the permanent parenting plan. The permanent parenting plan shall contain provisions for resolution of future disputes between the parents, allocation of decision-making authority, and residential provisions for the child.

(3) Dispute resolution. A process for resolving disputes, other than court action, shall be provided unless precluded or limited by § 36-6-107 or § 36-6-108. A dispute resolution process may include counseling, mediation, or arbitration by a specified individual or agency, or court action. In the dispute resolution process:

(a) Preference shall be given to carrying out the parenting plan;

(b) The parents shall use the designated process to resolve disputes relating to the implementation of the plan, except those related to financial support, unless an emergency exists;

(c) A written record shall be prepared of any agreement reached in counseling or mediation and of each arbitration award and shall be provided to each party;

(d) If the court finds that a parent has used or frustrated the dispute resolution process without good reason, the court shall award attorneys' fees and financial sanctions to the prevailing parent;

(e) The parties have a right of review from the dispute resolution process to the Circuit or Chancery Court; and

(f) The provisions of (a) through (e) of this subsection shall be set forth in the decree.

(4) Allocation of decision-making authority.

(a) The plan shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing. The parties may incorporate an agree-

ment related to the care and growth of the child in these specified areas, or in other areas, into their plan, consistent with the criteria in § 36-6-107 and § 36-6-108. Regardless of the allocation of decision-making in the parenting plan, the parties may agree that either parent may make emergency decisions affecting the health or safety of the child.

(b) Each parent may make decisions regarding the day-to-day care and control of the child while the child is residing with the parent.

(c) When mutual decision-making is designated but cannot be achieved, the parties shall make a good-faith effort to resolve the issue through the dispute resolution process.

(5) Residential provisions for the child. The plan shall include a residential schedule which designates in which parent's home each minor child shall reside on given days of the year, including provision for holidays, birthdays of family members, vacations, and other special occasions, consistent with the criteria in § 36-6-107 and § 36-6-108.

(6) Parents' obligation unaffected. If a parent fails to comply with a provision of a parenting plan or a child support order, the other parent's obligations under the parenting plan or the child support order are not affected. Failure to comply with a provision in a parenting plan or child support order may result in a finding of contempt, under § 36-6-104.

(7) Each parenting plan shall specifically include, but not be limited to the following:

(a) Telephone conversations with each individual parent at least two times a week at reasonable times;

(b) The child or children will be permitted to receive unopened and uncensored mail from each parent as long as reasonable;

(c) Each parent is to receive at least forty-eight (48) hours notice, if possible, of all extra-curricular activities including but not limited to the following: (i) School activities; (ii) Athletic activities; (iii) Church activities; (iv) Other social activities in which parental participation would be appropriate.

(d) Each parent is entitled to receive twenty-four (24) hours notice from the other parent of any hospitalization, major

illness, or death of the child or children.

(e) Each parent is entitled to receive each semester from the other parent notice of school attendance, names of teachers, and school schedule for the child or children.

(f) In the event the other parent leaves the state with the minor child or children for more than ten (10) days, the removing parent will provide an itinerary to the non-removing parent in the event of an emergency.

(g) Each parent shall make their best efforts not to make derogatory remarks about the other parent or his/her family.

(h) Each parent is to have access to the minor child's school for lunch and other activities so long as such access is reasonable and does not interfere with the day to day operation of the school.

(8) Provisions to be set forth in the permanent parenting plan. The permanent parenting plan shall set forth the provisions of subsections (3)(a) through (c), (4)(b) and (c), and (6) of this section.

36-6-107. Criteria for establishing permanent parenting plan

(1) Dispute resolution process. The court shall not order a dispute resolution process, except court action, when it finds that any limiting factor under § 36-6-108 applies, or when it finds that either parent is unable to afford the cost of the proposed dispute resolution process. If a dispute resolution process is not precluded or limited, then in designating such a process the court shall consider all relevant factors, including:

(a) Differences between the parents that would substantially inhibit their effective participation in any designated process;

(b) The parents' wishes or agreements and, if the parents have entered into agreements, whether the agreements were made knowingly and voluntarily; and

(c) Differences in the parents' financial circumstances that may affect their ability to participate fully in a given dispute resolution process.

(2) Allocation of decision-making authority.

(a) Agreements between the parties. The court shall approve agreements of the parties allocating decision-making

authority, or specifying rules in the areas listed in § 36-6-106, when it finds that: (i) The agreement is consistent with any limitations on a parent's decision-making authority mandated by § 36-6-108; (ii) The agreement is knowing and voluntary; (iii) The agreement is in the best interest of the child(ren) and is agreed to by the Guardian Ad Litem, if one has been appointed by the court.

(b) Sole decision-making authority. The court shall order sole decision-making to one parent when it finds that: (i) A limitation on the other parent's decision-making authority is mandated by § 36-6-108; (ii) Both parents are opposed to mutual decision-making; (iii) One parent is opposed to mutual decision-making, and such opposition is reasonably based on the criteria in (c) of this subsection;

(c) Mutual decision-making authority. Except as provided in (a) and (b) of this subsection, the court shall consider the following criteria in allocation decision-making authority: (i) The existence of a limitation under § 36-6-108; (ii) The history of participation of each parent in decision-making in each of the areas in § 36-6-106; (iii) Whether the parents have a demonstrated ability and desire to cooperate with one another in decision-making in each of the areas in § 36-6-106; and (iv) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

(3) Residential provisions.

(a) The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances. The child's residential schedule shall be consistent with § 36-6-108. Where the limitations of § 36-6-108 are not dispositive of the child's residential schedule, the court shall consider the following factors: (i) 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; (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily; (iii)

Each parent's past and potential for future performance of parenting functions, including the willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent; (iv) The disposition of the parents to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent has been the primary care giver; (v) The emotional needs and developmental level of the child; (vi) The child's relationship with siblings and with significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities; (vii) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule. The reasonable preference of the child if twelve (12) years of age or older. The court may hear the preference of a younger child upon request. The preference of older children should normally be given greater weight than those of younger children; (viii) Each parent's employment schedule, and the court shall make accommodations consistent with those schedules; (ix) The love, affection, and emotional ties existing between the parents and child; (x) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment; (xi) The mental and physical health of the parents; (xii) Evidence of physical or emotional abuse to the child, to the other parent or to any other person; and (xiii) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child.

(b) The court may order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time only if the court finds the following: (i) No limitation exists under § 36-6-108; (ii)(a) The parties have agreed to such provisions and the agreement was knowingly and voluntarily entered into; or (b) The parties have a satisfactory history of cooperation and shared performance of parenting functions; the parties are available to each other, especially in geographic proximity, to the

extent necessary to ensure their ability to share performance of the parenting functions; and (iii) The provisions are in the best interests of the child.

36-6-108. Restrictions in temporary or permanent parenting plans

(1) The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in any of the following conduct:

(a) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions;

(b) Physical, sexual, or a pattern of emotional abuse of a child; or

(c) A history of acts of domestic violence as defined in § 36-3-601(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

(2)(a) The parent's residential time with the child shall be limited if it is found that the parent has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; or (iii) a history of acts of domestic violence as defined in § 36-3-601(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm. This subsection shall not apply when (c) of this subsection applies.

(b) The parent's residential time with the child shall be limited if it is found that the parent resides with a person who has engaged in any of the following conduct: (i) Physical, sexual or a pattern of emotional abuse of a child; or (ii) a history of acts of domestic violence as defined in § 36-3-601(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm. This subsection (2)(b) shall not apply when (c) of this subsection applies.

(c) If a parent has been convicted as an adult of a sexual offense under §§ 39-15-302; 39-17-1001 to 1007; or 39-13-501

to 511, or has been found to be a sexual predator under §§ 39-13-701 to 709, the court shall restrain the parent from contact with a child that would otherwise be allowed under this chapter. If a parent resides with an adult who has been convicted, or with a juvenile who has been adjudicated, guilty of a sexual offense under §§ 39-15-302; 39-17-1001 to 1007; or 39-13-501 to 511, or who has been found to be a sexual predator under §§ 39-13-701 to 709, the court shall restrain that parent from contact with the child unless the contact occurs outside the adult or juvenile's presence.

(3) A parent's involvement or conduct may have an adverse effect on the child's best interest, and the court may preclude or limit any provisions of the parenting plan, if any of the following factors exist:

(a) A parent's neglect or substantial nonperformance of parenting functions;

(b) A long-term emotional or physical impairment which interferes with the parent's performance of parenting functions as defined in § 36-6-102;

(c) A long-term impairment resulting from drug, alcohol, or other substance abuse that interferes with the performance of parenting functions;

(d) The absence or substantial impairment of emotional ties between the parent and the child;

(e) The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development;

(f) A parent has withheld from the other parent access to the child for a protracted period without good cause; or

(g) Such other factors or conduct as the court expressly finds adverse to the best interests of the child.

(4) In entering a permanent parenting plan, the court shall not draw any presumptions from the provisions of the temporary parenting plan.

(5) In determining whether any of the conduct described in this section has occurred, the court shall apply the civil rules of evidence, and procedure.

36-6-109. Modification of parenting plan due to move of one parent

(1) Notice to other parent

(a) If the court grants periods of physical placement to more than one parent, it shall order the parent with whom the child is scheduled to reside the majority of the time to provide not less than 60 days written notice to the other parent, with a copy to the court, of his or her intent to: (i) Establish his or her legal residence outside the state and remove the child from this state for a period of time exceeding 90 consecutive days. (ii) Establish his or her legal residence and remove the child, within this state, at a distance of 150 miles or more from the other parent.

(b) The parent shall send the notice under (1)(a) of this section by certified mail. The notice shall state the parent's proposed action and that the other parent may object within the time specified in subsection (2).

(2) Objection to move; mediation

Within 15 days after receiving the notice under (1)(a), the other parent may send to the parent proposing the move, with a copy to the court, a written notice of objection to the proposed action. The court shall promptly refer the parents for mediation or other family court counseling services pursuant to dispute resolution specifications of the parenting plan and may appoint a guardian ad litem. Unless the parents agree to extend the time period, if mediation or counseling services do not solve the dispute within 30 days after referral, the matter shall proceed under subsections (3) to (5).

(3) Standards for modification if move contested

(a) Except as provided under (3)(b), if the parent proposing the move is the parent with whom the child is scheduled to reside the majority of the time, the parent objecting to the move may file a petition to amend the parenting plan. The court may amend the residential provisions of the parenting plan if the court finds by clear and convincing evidence that the move will result in a material change in circumstances and that modification is in the best interest of the child. (i) The Court is to consider what is in the best interest of the child.

(ii) Under this paragraph, the burden of proof is on the parent objecting to the move.

(b) If the parents have joint decision-making authority under § 36-6-106(4) and have substantially equal periods of physical placement with the child, either parent may file a petition to modify the residential provisions of the parenting plan. The court may modify the parenting plan if the modification is in the best interests of the child and circumstances make it impractical for the parties to continue to have substantially equal periods of physical placement. (i) Under this paragraph, the burden of proof is on the parent filing the motion to amend the parenting plan, and must be proven by clear and convincing evidence.

(4) Guardian ad litem; prompt hearing:

After a petition to amend the parenting plan is filed under sub. (3), the court may appoint a guardian ad litem and shall hold a hearing as soon as possible.

(5) Factors in court's determination:

In making its determination under sub. (3), the court shall consider all of the following factors:

(a) Whether the purpose of the proposed action is reasonable.

(b) The nature and extent of the child's relationship with the other parent and the disruption to that relationship which the proposed action may cause.

(c) The availability of alternative arrangements to foster and continue the child's relationship with and access to the other parent.

36-6-110. Medical records

(1) A copy of a child's medical records shall be furnished by the treating physician or treating hospital upon a written request by either parent.

(2) Such request must contain the current address of the requesting party.

(3) Upon receiving such a request, the treating physician or hospital shall send a copy of the medical records to the requesting party unless furnished with a court order closing the

records.

(4) All expenses for records shall be paid by the requesting party.

(5) Any judge having jurisdiction over the custody of such a child may close the medical records of a child to the requesting parent upon a showing that the best interests of the child will be harmed if the records are released.

36-6-111. Report cards available to parents; Schools and school districts; day care; change in parenting plan

(1) The parent not residing with the child may request in writing that a copy of the child's report card be furnished directly to such parent, and such request shall be accompanied by the parents' current mailing address and the local education agency shall send a copy of the report card to such address.

(2) Any judge having jurisdiction over the parenting plan of such a child may upon a showing of good cause deny any information concerning the residence of the child to the noncustodial or nonresident parent.

(3) No school official shall recognize a change in the parenting plan of a child at such official's school or day care unless:

(a) The person seeking the change of the parenting plan presents the school official with a certified copy of a valid court order from a Tennessee court changing the parenting plan; and

(b) The person seeking the change of the parenting plan gives the school official reasonable advance notice of such person's intent to take possession of such child at such official's school or day care center.

36-6-112. Designation of custody for the purpose of other state and federal statutes

Solely for the purposes of all other state and federal statutes which require a designation or determination of custody, a parenting plan shall designate the parent with whom the child is scheduled to reside a majority of the time as the custodian of the child. However, this designation shall not affect either

parent's rights and responsibilities under the parenting plan. In the absence of such a designation, the parent with whom the child is scheduled to reside a majority of the time shall be deemed to be the custodian for the purposes of such federal and state statutes.

36-6-303. Stepparents and Grandparent Visitation

(1) In a suit for annulment, divorce or separate maintenance where one (1) party is a stepparent to a minor child born to the other party, such stepparent may be granted reasonable visitation rights to such child during its minority by the court of competent jurisdiction upon a finding, by clear and convincing evidence, that such visitation rights would be in the best interests of the minor child and that such stepparent is actually providing or contributing towards the support of such child.

(2) Such decree shall remain within the control of the court and be subject to such changes or modification as the exigencies of the case require.

(3)(a) Standing to Petition for Grandparent Visitation Rights: Grandparent of a minor child may petition the court for reasonable visitation rights if a sufficient relationship exists between the grandparent and the child.

(b) Sufficient Relationship Defined:

A grandparent shall be deemed to have a sufficient existing relationship with a grandchild if: (i) the child has resided with the grandparent for at least six consecutive months during the past two years and the child's parent(s) were not living in the same household; or (ii) the child and his or her parents have resided with the grandparents for a period of at least one year ending within the year preceding the filing of the petition for visitation rights; or (iii) the grandparent has been a full-time caretaker of the child for a period of at least six consecutive months in the last two years; or (iv) the grandparent has had frequent visitation, including frequent overnight visitation, with the child who is the subject of the suit for a period of at least one year. Frequent visitation shall mean at least an average of one visit every week and one overnight visit every two weeks.

(c) Procedures for Filing Petitions: The following proce-

dures apply to petitions for rights of visitation: (i) the grandparent must file with the petition for rights of visitation an affidavit alleging a sufficient existing relationship under subsection (b) of this section. When the petition and accompanying affidavit are filed with the court, the grandparent shall serve a copy of both on the parent(s) with custody of the child or legal guardian(s) of the child; (ii) the parent(s) or legal guardian of this child may file an affidavit in response to the grandparent's petition and accompanying affidavit. When the affidavit in response is filed with the court, the parent(s) or legal guardian(s) shall deliver a copy to the grandparent; (iii) the court shall determine on the basis of the petition and the affidavit whether it is more likely or not that a sufficient existing relationship under subsection (2) exists; (iv) if the court's decision under paragraph (iii) is in the affirmative, the court shall hold a hearing on the grandparent's petition for reasonable rights of visitation.

(d) Decision: (i) In a hearing concerning a petition by a grandparent for reasonable rights of visitation under subsection (c)(iv), the court shall make the following findings of fact by clear and convincing evidence: (1) the grandparent has a sufficient existing relationship as defined in subsection (c); and (2) the visitation is in the best interests of the child. (ii) In determining the best interests of the child, the court shall consider the following factors: (1) the length and quality of the prior relationship between the grandparent and the child; (2) the existing emotional ties of the child to the grandparent; (3) the preference of the child if the child is determined to be of sufficient maturity to express a preference; (4) the effect of hostility between the grandparent and parent on the child and the willingness of the grandparent to encourage a close relationship between the child and the parent(s) or guardian(s) of the child; (5) the good faith of the grandparent in filing the petition; (6) if the parents are divorced, the time sharing arrangements that exist between the parents with regard to the child.

IX. APPENDIX B

Mediation Services provided by:

(Name) _____

(Address)_____

_____

(Phone) _____

_____ COURT OF TENNESSEE

COUNTY OF _____

In Re:	)	
	)	**Case #** _____
Petitioner:_____	)	
	)	PARENTING PLAN
and	)	[ ]Proposed **(PPP)**
	)	[ ]Temporary **(PPT)**
Respondent:_____	)	[ ]Final Order **(PP)**
	)	

This parenting plan is:

[ ] the final parenting plan signed by the court pursuant to a decree of dissolution entered on _____.

[ ] the final parenting plan signed by the court pursuant to a decree of dissolution entered on _____.

[ ] temporary parenting plan signed by the court.

[ ] proposed by _____.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I. GENERAL INFORMATION

This parenting plan applies to the following children:

Name	Birthdate
_____	_____
_____	_____
_____	_____

II. BASIS FOR RESTRICTIONS

2.1 PARENTAL CONDUCT (TENN. CODE ANN. § 36-6-108(1), & (2)).

[ ] Does not apply.

[ ] The [ ] father's [ ] mother's residential time with the children shall be limited or restrained completely, and mutual decision-making and designation of a dispute resolution process other than court action shall not be required, because [ ] this parent [ ] a person residing with this parent has engaged in the conduct which follows.

[ ] Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions (this applies only to parents, not to a person who resides with a parent).

[ ] Physical, sexual or a pattern of emotional abuse of a child.

[ ] A history of acts of domestic violence as defined in TENN. CODE. ANN. § 36-3-601(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

2.2 OTHER FACTORS (TENN. CODE ANN. § 36-6-108(3)).

[ ] Does not apply.

[ ] The [ ] mother's [ ] father's involvement or conduct may have an adverse effect on the child's best interests because of the existence of the factors which follow.

[ ] Neglect or substantial nonperformance of parenting functions.

[ ] A long-term emotional or physical impairment which interferes with the performance of parenting functions as defined in TENN. CODE. ANN. § 36-6-102.

[ ] The absence or substantial impairment of emotional ties between the parent and child.

[ ] The abusive use of conflict by the parent which creates the danger of serious damage to the child's psychological development.

[ ] A parent has withheld from the other parent access to the child for a protracted period without good cause.

[ ] Other:_____

III. RESIDENTIAL SCHEDULE

These provisions set forth where the child(ren) shall reside each day of the year and what contact the child(ren) shall have with each parent.

3.1 PRE-SCHOOL SCHEDULE.

[ ] There are no children of preschool age.

[ ] Prior to enrollment in school, the child(ren) shall reside with the [ ] mother [ ] father, except for the following days and times when the child(ren) will reside with or be with the other parent:
from:_____ to _____
(Day/Time) (Day/Time)

[ ] every week [ ] every other week [ ] the first and third week of the month.

[ ] the second and fourth week of the month [ ] other:
from:_____ to _____
(Day/Time) (Day/Time)

3.2 SCHOOL SCHEDULE.

Upon enrollment in school, the child(ren) shall reside with the [ ] mother [ ] father, except for the following days and times when the child(ren) will reside with or be with the other parent: from:_____ to _____
(Day/Time) (Day/Time)

[ ] every week [ ] every other week [ ] the first and third week of the month.

[ ] the second and fourth week of the month [ ]other:
from:_____ to _____
(Day/Time) (Day/Time)

[ ] The school schedule will start when each child begins [ ] kindergarten [ ] first grade [ ] other: _____

3.3 SCHEDULE FOR WINTER VACATION.

The child(ren) shall reside with the [ ] mother [ ] father during winter vacation, except for the following days and times when the child(ren) will reside with or be with the other parent: _____

3.4 SCHEDULE FOR SPRING VACATION.

The child(ren) shall reside with the [ ] mother [ ] father during spring vacation, except for the following days and times when the child(ren) will reside with or be with the other parent: _____

3.5 SUMMER SCHEDULE.

Upon completion of the school year, the child(ren) shall reside with the [ ] mother [ ] father, except for the following days and times when the child(ren) will reside with or be with the other parent:

[ ] Same as school year schedule.

[ ] Other: _____

3.6 VACATION WITH PARENTS.

[ ] Does not apply.

[ ] The schedule for vacation with parents is as follows:

_____

_____

3.7 SCHEDULE FOR HOLIDAYS.

The residential schedule for the child(ren) for the holidays listed below is as follows:

	With Mother (Specify Year Odd/Even/Every)	With Father (Specify Year Odd/Even/Every)
New Year's Day	_____	_____
Martin Luther King Day	_____	_____
President's Day	_____	_____
Memorial Day	_____	_____
July 4th	_____	_____
Labor Day	_____	_____
Veteran's Day	_____	_____
Thanksgiving Day	_____	_____
Christmas Eve	_____	_____
Christmas Day	_____	_____
_____	_____	_____

[ ] For purposes of this parenting plan, a holiday shall begin and end as follows (set forth times):

_____

[ ] Holidays which fall on a Friday or a Monday shall include Saturday and Sunday.

[ ] Other: _____

3.8 SCHEDULE FOR SPECIAL OCCASIONS.

The residential schedule for the child(ren) for the following special occasions (i.e., birthdays) is as follows:

	With Mother (Specify Year Odd/Even/Every)	With Father (Specify Year Odd/Even/Every)
Mother's Day	_____	_____

Father's Day	_____	_____
Mother's Birthday	_____	_____
Father's Birthday	_____	_____
Child's Birthday	_____	_____
_____	_____	_____
_____	_____	_____

[ ] Other: _____

3.9 PRIORITIES UNDER THE RESIDENTIAL SCHEDULE

[ ] Does not apply.

[ ] For purposes of this parenting plan the following days shall have priority: _____

[ ] Parent's vacations have priority over holidays. Holidays have priority over other special occasions. Special occasions have priority over school vacations.

[ ] Other: _____

3.10 RESTRICTIONS.

[ ] Does not apply because there are no limiting factors in paragraphs 2.1 or 2.2.

[ ] The [ ] father's [ ] mother's residential time with the children shall be limited because there are limiting factors in paragraphs 2.1 and 2.2. The following restrictions shall apply when the children spend time with this parent: _____

_____

[ ] There are limiting factors in paragraph 2.2, but there are no restrictions on the [ ] father's [ ] mother's residential time with the children for the following reasons: _____

3.11 TRANSPORTATION ARRANGEMENTS.

Transportation arrangements for the child(ren), other than costs, between parents shall be as follows: _____

_____

_____

3.12 DESIGNATION OF CUSTODIAN.

The children named in this parenting plan are scheduled to reside the majority of the time with the [ ] mother [ ] father. This parent is designated the custodian of the child(ren) solely for purposes of all other state and federal statutes which require a designation or determination of custody. This designation shall not affect either parent's rights and responsibilities under this parenting plan.

3.13 OTHER:_____

_____

IV. DECISION-MAKING

4.1 DAY TO DAY DECISIONS.

Each parent shall make decisions regarding the day-to-day care and control of each child while the child is residing with that parent. Regardless of the allocation of decision-making in this parenting plan, either parent may make emergency decisions affecting the health or safety of the child(ren).

4.2 MAJOR DECISIONS.

Major decisions regarding each child shall be made as follows:

Education decisions	[ ] mother	[ ] father	[ ] joint
Non-emergency health care	[ ] mother	[ ] father	[ ] joint
Religious upbringing	[ ] mother	[ ] father	[ ] joint
_____	[ ] mother	[ ] father	[ ] joint
_____	[ ] mother	[ ] father	[ ] joint
_____	[ ] mother	[ ] father	[ ] joint
_____	[ ] mother	[ ] father	[ ] joint
_____	[ ] mother	[ ] father	[ ] joint
_____	[ ] mother	[ ] father	[ ] joint

4.3 RESTRICTIONS IN DECISION-MAKING.

[ ] Does not apply because there are no limiting factors in paragraphs 2.1 and 2.2 above.

[ ] Sole decision-making shall be ordered to the [ ] mother [ ] father for the following reasons: _____

_____

[ ] A limitation on the other parent's decision-making authority is mandated by TENN. CODE. ANN. § 36-6-108 (*See* paragraph 2.1).

[ ] Both parents are opposed to mutual decision-making.

[ ] One parent is opposed to mutual decision-making, and such opposition is reasonably based on the following criteria:

(a) The existence of a limitation under TENN. CODE. ANN. § 36-6-108;

(b) The history of participation of each parent in decision-making in each of the areas in TENN. CODE. ANN. § 36-6-106;

(c) Whether the parents have demonstrated ability and desire to cooperate with one another in decision-

making in each of the areas in TENN. CODE. ANN. § 36-6-106; and

(d) The parents' geographic proximity to one another, to the extent that it affects their ability to make timely mutual decisions.

[ ] There are limiting factors in paragraph 2.2, but there are no restrictions on mutual decision-making for the following reasons: _____

_____

V. DISPUTE RESOLUTION

[ ] Disputes between the parties, other than child support disputes, shall be submitted to:

[ ] Counseling by _____, or

[ ] Mediation by _____, or

[ ] Arbitration by _____.

The cost of this process shall be allocated between the parties as follows:

[ ] _____% mother _____% father.

[ ] based on each party's proportional share of income from the child support guidelines.

[ ] as determined in the dispute resolution process.

The counseling, mediation or arbitration process shall be commenced by notifying the other party by [ ] written request [ ] certified mail [ ] other: _____

In the dispute resolution process:

(a) Preference shall be given to carrying out this Parenting Plan.

(b) Unless an emergency exists, the parents shall use the designated process to resolve disputes relating to the implementation of the plan, except those related to financial support.

(c) A written record shall be prepared of any agreement reached in counseling or mediation and of each arbitration award and shall be provided to each party.

(d) If the court finds that a parent has used or frustrated the dispute resolution process without good reason, the court shall award attorneys' fees and financial sanctions to the other parent.

(e) The parties have the right of review from the dispute resolution process to the Chancery Court.

[ ] No dispute resolution process, except court action, shall be ordered, because [ ] a limiting factor under TENN. CODE. ANN. § 36-6-108 applies or [ ] one parent is unable to afford the cost of the proposed dispute resolution process.

VI. STANDARD PARENTING ORDERS

Each parent shall always keep the other informed of his/her actual address of residence, mailing address if different, home and work telephone numbers and any change within twenty-four hours of such change occurring.

Should either parent require child care for twenty-four hours or longer when the child is in his/her care, the other parent shall have first option to provide such care.

Neither parent shall say or do anything in the presence or

hearing of the child/children that would in any way diminish the child/childrens' love or affection for the other parent, and shall not allow others to do so.

All marital, child sharing, court related and financial communications between the parents shall occur at a time when the child/children is/are not present or within hearing range. Communication regarding these issues shall not occur at times of exchanges of the child/children or during telephone visits with the child/children.

Each parent shall inform the other as soon as possible of all school, sporting and other special activity notices and cooperate in the child/childrens' consistent attendance at such events. Neither parent shall schedule activities during the other parent's scheduled parenting time without the other parent's prior agreement.

At least twenty-four hours notice of schedule change shall be given to the other parent. The parent requesting the change shall be responsible for any additional child care that results from the change.

Neither parent shall move the residence of the children out of _____ county without giving the other party sixty (60) days written notice and obtaining the written permission of the other parent or order of the Court.

Either parent may petition for a return to Family Court Services, paying appropriate fees, for mediation on any further parenting issues.

VII. OTHER PROVISIONS

[ ] There are no other provisions.

[ ] There are the following other provisions: _____

VIII. DECLARATION FOR PROPOSED PARENTING PLAN

[ ] Does not apply.

[ ] (Only sign if this is a proposed parenting plan.) I declare under penalty of perjury under the laws of the State of Tennessee that this plan has been proposed in good faith and that the statements in Part II of this Plan are true and correct.

Mother	Date and Place of Signature
Father	Date and Place of Signature

IX. ORDER BY THE COURT

It is ordered, adjudged and decreed that the parenting plan set forth above is adopted and approved as an order of this court.

WARNING: Violation of residential provisions of this order with actual knowledge of its terms is punishable by contempt of court and may be a criminal offense under TENN. CODE. ANN. § 39-13-306. Violation of this order may subject a violator to arrest.

When mutual decision-making is designated but cannot be achieved, the parties shall make a good faith effort to resolve the issue through the dispute resolution process.

If a parent fails to comply with a provision of this plan, the other parent's obligations under this plan are not affected.

Dated: _____ _____
Judge/Commissioner

Presented by:

_____ _____
Signature Signature

_____ _____
Print or Type Name Print or Type Name