

In the spirit of playing devils advocate, I offer the following rejoinder to the views within Tom's memo below.

Brooks Gibson, M.Ed., LPC

- 1) Mavis Hetherington's work indicates there is no correlation between a father's time with a child before divorce and the degree of commitment or time spent after divorce. It is common for fathers to spend more time with children post-divorce due to traditional roles in a marriage and when the marriage ends, roles also must change for both parents. All to the child's benefit.
- 2) The **primary caregiver** appears to mirror the **Approximation Rule**. The principle that you give the parent time post-divorce commensurate with the time they had pre-divorce. This does not follow the best interest standard.
- 3) The new definition still allows for consideration of the historical nature of the parent-child relationship, but more clearly allows for consideration of current and future potential.
- 4) Traditional roles were chosen and agreed upon by parents during their partnership. In contractual terms, once the partnership is dissolved, the terms are no longer binding to either party. Just as a primary bread winner will spend more time directly involved in parenting as a single parent, the primary caregiver will spend more time working and experiencing the limitations of a single parent.

MEMO

TO: DRC Ad Hoc Custody Workgroup

FROM: Tom Alongi

DATE: May 15, 2010

RE: "best interests" criteria – primary caregiver

Dear Workgroup,

As you know, I could not appear at our last meeting because I was out of state on personal leave. I apologize for any disruption my absence may have caused to the agenda.

I understand, from talking to those who attended, that some have earnestly suggested that we eliminate "**primary caregiver**" from the list of "**best interests**" criteria currently itemized in A.R.S. § 25-403(A) in favor of a test that evaluates: "**The historical nature of the relationship between parent and child, the current relationship between parent and child and the potential future relationship of parent and child.**" No matter how well-intentioned, such a step would be a profound mistake.

The "Primary Caregiver" standard is not in keeping with the child's best interests. While it may be an important factor, it may not be in the child's best interests in all cases for the child to remain with the primary caregiver after the parents union dissolves. When the parents union as spouses or partners no longer exists, what is best for the child must be reassessed based on the new, drastically different circumstances.

First, it is difficult to imagine a more relevant (or serious) factor for the court's consideration that identifying who cared for a child in the **past**. Courts across our country have repeatedly recognized this for decades (**past**). Two appellate decisions in particular come to mind, and I have attached them both to this memo.

In **1985**, the Minnesota Supreme Court stated:

Continuity of care with the primary caretaker is not only central and crucial to the best interests of the child, but is perhaps the single predicator of a child's well-being about which there is agreement, and which can be competently evaluated by judges. The other indicia of a child's best interests ... while plainly relevant to

a child's well being and security, are, by contrast, both inherently resistant of evaluation and difficult to apply in any particular case.

1985: Times Change. Changing times have brought significant changes in parental roles, circumstances and the economics of parenting. In 1985 there were a significantly higher number of single income homes with two parents than there are today. Even in homes with two parents and one income, divorce or separation will likely result in both parents having to be employed. The primary caregiver then has to balance work, with the previous caregiving duties, at that point becoming a single parent. The role of a single parent is vastly different than that of a primary caregiver who has a partner earning the entire income for the family.

While tradition and how things existed in the past are certainly relevant to learn from, failing to deviate from the past means we necessarily cannot learn from new research or the mistakes of the past. We have evolved for the better as a society, in significant ways, since the 1980's in how we treat child abuse and DV. No one would suggest the victims would be better off had we not evolved and learned from our mistakes.

Pikula v. Pikula, 374 N.W.2d 705, 712 (Minn. **1985**). Similarly, less than three years ago, the Iowa Supreme Court recognized:

In considering whether to award joint physical care where there are two suitable parents, stability and continuity of caregiving have *traditionally (past)* been primary factors. *In re Marriage of Bevers*, 326 N.W.2d 896, 898 (Iowa **1982**) (noting who during the marriage provided routine care and questioning desirability of the children's nomadic existence for sake of parents); *In re Marriage of Decker*, 666 N.W.2d 175, 178-80 (Iowa Ct.App.2003) (past primary caregiving a factor given heavy **weight** in custody matters); *In re Marriage of Williams*, 589 N.W.2d 759, 762 (Iowa Ct.App.1998) (great emphasis placed on achieving **emotional stability** for children); *Roberts*, 545 N.W.2d at 343 (though not controlling, due consideration to historical primary caregiver); *Coulter*, 502 N.W.2d at 171 (stability "cannot be overemphasized"). **Stability** and **continuity** factors tend to favor a spouse who, prior to divorce, was primarily responsible for physical care. See Iowa Code § 598.41(3)(d).

"Stability" and "continuity" are two very different factors. Continuity does not guarantee Stability. Stability for children, is in line with their best interests. Continuity may not be and can only be determined on a case-by-case basis.

We continue to believe that stability and continuity of caregiving are important factors that must be considered in custody and care decisions. As noted by a leading scholar, "past caretaking patterns likely are a fairly reliable proxy of the intangible qualities such as parental abilities and emotional bonds that are so difficult for courts to ascertain." Bartlett, 35 Willamette L.Rev. at 480. (date?) While no post-divorce physical care arrangement will be identical to predissolution experience, preservation of the greatest amount of stability possible is a desirable goal. In contrast, imposing a new physical care arrangement on children that significantly contrasts from their past experience can be unsettling, cause serious emotional harm, and thus not be in the child's best interest.

As a result, the successful caregiving by one spouse in the past is a strong predictor that future care of the children will be of the same quality. *In re Marriage*

of Walton, 577 N.W.2d 869, 871 (Iowa Ct.App.1998). Conversely, however, long-term, successful, joint care is a significant factor in considering the viability of joint physical care after divorce. *Ellis*, 705 N.W.2d at 103. (date?)

In re Marriage of Hansen, 733 N.W.2d 683, 696-97 (Iowa 2007).

Admittedly, Pikula held that “primary caregiver” status deserved greater emphasis than all other factors – a viewpoint later discarded by the Minnesota legislature when it clarified that no one criterion enjoyed a presumptive edge over the others. But no one – no one – has ever suggested that a family court should ignore who has raised a child for years, and perhaps since birth, whether it was one parent or both.

The primary caregiver will be one factor, which is included in the definition;

“The historical nature of the relationship between parent and child, the current relationship between parent and child and the potential future relationship of parent and child.”

However, while the suggested definition not only includes the “primary caregiver” consideration, it also includes other relevant factors, given the the role and circumstances the child enjoyed with the primary caregiver are now gone, and are not likely to ever be the same.

Picture this analogy: Imagine that two, corporate managers seek promotion to one available, supervisory position in the same company. The best interests and continued financial viability of this company hang in the balance. The two candidates boast virtually indistinguishable skill sets. Both communicate effectively, emphasize teamwork, and inspire the best effort from every person they meet. Both express a desire to remain with the company for years to come, and both seem sincere. Neither has a criminal record, and both passed every drug screening test administered by the human resources division.

There is only one difference. Employee A has worked for the company for six years, and acquired his current position from the entry level. He knows every other employee in the company as if he or she was family, and has participated heavily in the corporation’s marketing and community outreach. His name is virtually synonymous with the company in the eyes of outside contractors, suppliers and competitors alike. Employee B was a lateral hire, and joined the company only two months ago. He shows tremendous promise, but has no proven track record with that company.

The analogy breaks down when all relevant factors are considered. Not that parents are corporate managers of corporations, nor their children employees of corporations. Employees who dislike management decisions and policies may leave and go to work elsewhere, unlike children.

Futher, in the example fails to credit the ability of employee A to achieve all that is credited to them but earned no income for the corporation, only because employee B was working to financially support employee A’s volunteerism. Now both employees must earn an income given the economic changes. The corporation cannot support the previous management structure.

Can we honestly say that we would not even *consider* Employee A’s past stewardship as an explicit, independent factor – particularly if the company posted record profits when the rest of the market ate losses? Of course not. We might conceivably refuse to give it deciding weight,

but we would not even dream of catering to Employee B's self-esteem or other emotional sensibilities by ignoring Employee A's long history with the company. Nor would we completely dilute that factor by mixing it into a debate over "past, present and future relationships." We would want to conduct a specific inquiry into what Employee A had done for the company in the past, and how well he did it. If we did not even try, we would deserve to go bankrupt.

Conversely, if the corporation and the employees agreed to divide roles and tasks between employee A and B, so that A was primarily responsible for making the profits for the Co., while B took care of the social and other tasks, should the employees be evaluated by the same criterion for consideration of future roles that would be vastly different for both?

Our task here is scarcely different. As both *Pikula* and *Hansen* (and a host of other decisions) have easily recognized, stability and past parental performance is tremendously important to children, and we do them a real disservice when we water down our analysis because we care more about pleasing parents than helping children.

Conversely, not all supporters of a new definition, that is more closely related to the best interests of the child than merely the "primary caregiver" standard, are concerned about "pleasing parents", but are just as committed to "helping children."

This law is *not* about making parents happy, and I still think we sometimes forget that.

Second, I would echo a proposition that Judge McNally made two meetings ago, and with which we all seemed to agree at the time. We do not have to re-invent every, single section of the existing custody code – particularly when no evidence exists that it has confused parties, attorneys or judges, unconstitutionally discriminated against one party or the other, and seems to function just fine.

I believe there have been much testimony to the DRC that this is exactly what many feel has occurred.

Some obvious examples include the UCCJEA (A.R.S. §§ 25-1001, et seq.), as well as A.R.S. §§ 25-412, -413 and -415, which pertain to funds and custody by a non-parent. Some sections need work. Relocation, domestic violence, definitions, and the ultimate meaning of "custody" and "parenting time" all come to mind and have already attracted our attention.

But the existing list of "best interests" factors is a good list. True, it is needlessly wordy in places (e.g. "the wishes of the child's parent or parents as to custody," as opposed to "the wishes of the child's parents). It also omits factors that we should definitely *add* (e.g. criminal conduct or incarceration of a parent or other prospective household member), but I have never encountered a case in 20 years of practice where a family court did not want to know who had cared for a child in the past. In fact, it would probably constitute an abuse of discretion – and grounds for appeal – if such a court ever did.

The suggested definition will ensure that the courts continue to consider the history of the Childs caregiver.

Third, the proposed Subsection (7) almost completely overlaps Subsection (3), at least as it pertains to a child's relationships with parents, rendering one of the two duplicative. If it is the intention of this workgroup to add a factor that requires the court to consider which parent(s) appear best able to care for a child in the future, we can easily do that. But it should never come at the expense of a traditional factor that may, as *Pikula* and *Hansen* pointed out above, predict the future health and welfare of a child better than any other.

Lastly, I suspect (but welcome a rejoinder) that dissatisfaction over the "primary caregiver" test is attributable – at least in part – to fathers who believe that this subsection treats them unfairly. I have two responses to such a claim. First, and to repeat yet again, custody laws

are not about fulfilling either parent's personal sense of justice. They strive to recognize what will best promote a child's stability, growth and happiness. **This position falsely assumes that father's happiness must be the only reason for considering the other relevant factors.**

Second, even if parental wants and needs really mattered, the existing law is, in fact, gender-neutral and does not "favor" women over men. **The existing definition favors the "approximation rule" and thus does unfairly discriminate against parents who agreed to participate in role delineation during a partnership, that no longer exists. Further it fails to consider the ability of a parent to be a primary caregiver, or learn to be a primary caregiver, based on the agreement of a past that is no more.**

If we, as private citizens, *choose* to allow a status quo to develop in our families over months or years that frequently leaves children in the primary care of their mothers, then we have no one to blame but ourselves when custody litigation forces the family court to consider that status quo as an explicit factor. Fathers who wish to avoid that consideration need only **meaningfully participate.....**

If the primary caregiver formula was based on "meaningful participation" rather than based merely on "time", then perhaps. Unfortunately, this is not the case.

Further, many in traditional families and traditional roles by choice, would not consider themselves to be "allowing" a status quo to develop, but rather following a model they chose to adopt, as their parents, and their parents, parents, for thousands of years. Shall we impose law on parents during marriage that determines what roles they may choose? If so, then they should be entitled to advance warning of how the law will treat them in case of divorce regarding their custody of children. I suspect that many fathers would no longer opt for traditional roles, but a much different division of duties. Thus requiring mothers to work outside the home at least as much as the fathers. If this is the standard by which they are judged, it only seems fair that they be entitled to "informed consent" prior to forming a partnership.

in their children's lives from the start. I have yet to meet a family court judge who failed to welcome that overture.

In sum, I respectfully disagree with this revision, and I would really like to discuss it at greater length before we consign the "primary caregiver" analysis to our workgroup dumpster!

Sincerely,

COMMUNITY LEGAL SERVICES
Thomas P. Alongi
Senior Staff Attorney