Battle of the Sexes: A History of Social Change and a Solution for Maintaining a Child’s Best Interest in Light of the #MeToo Movement

Jackie Calvert
J.D. 2020, St. Mary’s School of Law, jackiecalvert63@gmail.com

Follow this and additional works at: https://www.repository.law.indiana.edu/ijlse

Part of the Development Studies Commons, Family Law Commons, Feminist, Gender, and Sexuality Studies Commons, Law and Gender Commons, Legal Theory Commons, Public Policy Commons, Social Policy Commons, and the State and Local Government Law Commons

Publication Citation

This Comment is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Journal of Law and Social Equality by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
COMMENT

Battle of the Sexes: A History of Social Change and a Solution for Maintaining a Child’s Best Interest in Light of the #MeToo Movement

Jackie Calvert*

“There can be no keener revelation of a society’s soul than the way in which it treats its children.”1

INTRODUCTION

Let’s set the scene. Two people meet and fall in love. They get married and have a couple of kids—happily ever after has arrived, and everything is wonderful. Unfortunately for forty to fifty percent2 of the United States, the happily ever after they envisioned ends in divorce. Divorce is only the beginning of their issues with the court.3 When parents cannot agree on child custody, the state generally defers to family autonomy; however, in approximately ten to twenty percent of divorce cases involving children, the parents cannot agree.4 These numbers also do not represent the number of unwed parental custody issues that arise.5 Where custody is an issue, the court is posed with deciding what is truly in the best interest of the

* St. Mary’s School of Law J.D. Candidate 2020. I would like to thank Professor Afton Cavanaugh for his guidance and mentoring throughout my law school experience. You have made me a better writer and law student. You have inspired and motivated me to be better and to push through to the finish line. Thank you to Byron E. Barnett for giving me a chance as a legal intern and inspiring this piece. I have learned so much from you and I know you will make me a better attorney and advocate. I would also like to thank Austin Reyna—your love and support throughout the long days and nights editing and writing is invaluable to this piece. Thank you for being there for me no matter what comes our way. A big thank you to the staff writers and editorial board on the Indiana Journal of Law and Social Equality. Your constructive criticism and edits have vastly improved this piece and made it what it is. Finally, thank you to my parents, Bianca and Brett Calvert. Both of you have always pushed me to chase my dreams and be myself. Thank you for doing that; I never would have realized what I can do without you.


5 See id.; see also Claire Huntington, What Unmarried Fathers Have to Worry About, N.Y. TIMES (July 8, 2015, 2:34 PM) https://www.nytimes.com/roomfordebate/2014/06/13/fathers-rights-and-womens-equality/what-unmarried-fathers-have-to-worry-about (exploring the social inequities unmarried father face during custody disagreements).
child. The best interest of the child is based on a variety of subjective factors that emphasize not only society’s expectations for gender roles but also social change movements. Throughout the last forty years, social change movements have changed the presumptions placed on mothers and fathers in custody disagreements.

Starting in 1973, one of the first seismic shifts occurred in the world of family law. The State of New York brought an action for custody on behalf of Susan Watts to determine custody of three infant children. Daniel Watts sought custody of the infant children. All precedent favored Susan Watts for sole custody based on the tender years doctrine—also known as the idea that the best interest of the child is best served if mothers maintained primary custody. The presumption aggravated the stereotype of strictly fathers working outside the home and mothers as homemakers. The tender years presumption faded steadily in the wake of the feminist movement, and the law became “sex-neutral”—the tender years presumption was abolished and is now described as “stereotypical and anachronistic.”

In Watts, the Court concluded that the tender years presumption was an unconstitutional discrimination against fathers seeking custody. Further, testimony and medical reports concluded the best interests of the child would be fulfilled if they lived with Mr. Watts. Following the Watts decision, the tender years presumption met its rebuttal by numerous courts in the mid-1970s. Beyond the Watts case, the shift in fathers as primary caregivers is few and far between—however, not unheard of—and social change movements have affected custody

---

6 See WIESBERG, supra note 4, at 694–96.
7 See id. at 690–94 (explaining the tender years doctrine, primary caregiver presumption, and feminist movement in terms of social change movements).
8 Id. at 692.
9 See generally State ex rel. Watts v. Watts, 350 N.Y.S.2d 285, 286 (N.Y. Fam. Ct. 1973) (quoting The Right of Children in Modern Family Law) (“Although in theory, a father has an equal right with the mother to the custody of his children, in well over 90% of the cases adjudicated, the mother is awarded custody.”); see also Dinner, supra, note 3 at 115 (discussing developments in constitutional law reforming equality in family law).
10 See Watts, 350 N.Y.S.2d at 285.
11 See id.
12 Id. at 287.
13 See Caban v. Mohammed, 441 U.S. 380, 389 (1979) (holding that the distinction between unmarried mothers and unmarried fathers was unconstitutional and that “maternal and paternal roles are not invariably different in importance”).
14 See Stanley v. Illinois, 405 U.S. 645, 658 (1972) (“[D]enying [a hearing on parental fitness before children are removed from custody] to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.”).
15 See, e.g., Watts, 350 N.Y.S.2d at 286 (stating the “best interests of the child standard” requires the burden on fathers for custody should not be greater than a mother’s).
16 Id. at 291.
17 Id. at 288; see also Dinner, supra note 3 at 116 (stating Watts influenced subsequent court decisions around the country).
decisions by abolishing custody arrangements like the tender years presumption. The most prevalent social movement in recent years, and another possible seismic shift in the world of family law, is the Me Too Movement—also known as #MeToo.

Founded in 2006, the #MeToo Movement addresses sexual violence and aims to build a community of advocates as the forefront to solutions against sexual harassment and violence in relationships, in the workplace, and beyond. The Movement also aims to destigmatize the idea of surviving sexual violence and to broaden the spectrum of survivors. At the core of the #MeToo Movement is the central idea that “[w]e want perpetrators to be held accountable and we want strategies implemented to sustain long term, systemic change.” The viral #MeToo hashtag ignited a national conversation and thrust the movement into everyday conversation and media spotlight. The Movement gained traction in October 2017 and continues to press forward despite some backlash from corporations, writers, pundits, and questionable behavior from female celebrities. For example, an opinion published in The New York Times highlighted how the Movement returned women to the Victorian era—perceiving them as frail housewives without agency. The conversation grew from perpetrator accountability to deciphering the difference between inappropriate conduct and harassment.

Most of the media focuses on #MeToo as changing employer and employee relationships in the workplace or as dating and brief sexual encounters. Long-term effects of #MeToo signal a warrior cry for all women and men affected by domestic violence and sexual abuse—whether in private relationships or used as a bargaining chip in the workplace. This warrior cry reverberates not only throughout workplaces, but court rooms and domestic life, such as in cases where a

---

18 See JOCelyn ELISE CROWLEY, DEFIANT DADS: FATHERS’ RIGHTS ACTIVISTS IN AMERICA 28 (2008) (discussing men and custody issues post-divorce). See generally Dinner, supra note 3 (analyzing the men’s rights movement and how middle-class white men responded to divorce and divorce law reform).


20 Id.

21 Id.


26 Id. (addressing Hollywood’s acknowledgement of sexual harassment at the Golden Globes).


parent is accused of domestic violence that could then affect his or her custody and future relationship with the child.29

This Comment seeks to determine how courts can keep children’s interests at the forefront of child custody decisions regardless of shifting societal attitudes like the #MeToo Movement. This Comment does not seek to determine if the father’s rights movement for men or the #MeToo Movement’s benefits for women are better or worse for a child. Rather, this Comment is an exploration on these social change movements and how these movements have changed, and will continue to shape family law issues. Part I highlights the different standards in child custody laws, and their connection with social change movements, throughout the twentieth century.30 Part II details the current standard—the best interest of the child—and its criticisms despite its prevailing popularity in court rooms.31

Part III recalls the history and phenomenon of the #MeToo Movement’s mainstream recognition in October 2017—starting with The New York Times’ breaking story of Harvey Weinstein’s sexual harassment allegations—and the backlash the Movement faced shortly after its uprising.32 Part III also recaps how the Movement impacted family violence reports and the role of family violence as a “best interest factor.”33 Additionally, Part III explores how the Movement’s backlash shows a future struggle for the courts: what constitutes abuse? Part IV proposes an alternative standard as a solution to best interest of the child issues. Additionally, Part IV explores the judge’s role in custody decisions and the limitations of the court’s resources. Part IV also shows how child advocates can ensure that putting the needs of the child first is not overshadowed by societal shifts, such as the #MeToo Movement, in favor of fathers or mothers.

30 See Stanley v. Illinois, 405 U.S. 645 (1972) (providing one of the first father’s rights custody cases).
31 See Colo. Rev. Stat. § 14-10-124(b)(3) (2014) (“In determining parenting time or decision making responsibilities, the court shall not presume that any persons is better able to serve the best interests of the child because of that person’s sex.”); Del. Code Ann. tit. 13, § 722(b) (2018) (stating the court shall not presume that a parent because of his or her sex is better qualified as a parent); Vt. Stat. Ann. tit. 15, § 665(c) (2017) (“The court shall not apply a preference for one parent over the other because of the sex of the parent.”); State ex rel. Watts v. Watts, 350 N.Y.S.2d 285, 290 (N.Y. Fam. Ct. 1973) (“Application of the tender years presumption would deprive the father of his right to equal protection under the Fourteenth Amendment to the United States Constitution.”).
32 Kantor & Twohey, supra note 24.
I. SOCIAL MOVEMENTS’ HISTORICAL IMPACT ON CHILD CUSTODY DECISIONS

Prior to 1972, fathers’ rights were non-existent. This applied especially to unwed couples. Child custody battles from colonial America to the Industrial Revolution led to the development of the tender years doctrine. The presumption and stereotypes of mothers as better caregivers gained heavy influence from England’s Talfourd Act of 1839. The Act promulgated the presumption that courts should award custody of children under age seven to the mother.

Parallel to this idea was a father’s overall role as leader of the family. As time went on and society changed, fathers were called away from home much more often which resulted in mothers being viewed as the primary caregiver. Although the tender years doctrine began as a temporary guideline for child custody, many states overlooked the best interest of the child just to avoid separation from the mother. The tender years doctrine was normalized after a few decades and eventually became the standard for awarding custody to the mother on a permanent basis, no matter the child’s age.

From the 1920s up until the beginning of the 1970s, the pressures on men to provide for their families over physically being present for their family grew. Men became more focused on their own ambition professionally because society permitted the idea that if men became failures in the working world they were failures in life. Parallel to this idea was the misconception that if women did not prioritize families over all else, her failures would shine through society’s reflective

---

35 Twenty years ago, the American legal system had a particular and long-established way of thinking about unwed fathers. Unwed fathers ran from paternity suits; unwed fathers were almost by definition ill-suited parents; unwed fathers had no parental rights that permitted them to block adoption or override the wishes of the women who had borne their children.
37 Custody of Infants Act 1839, 2 & 3 Vict. c. 54 (Eng.).
38 Id.; see also Gary Stollack, CHILD CUSTODY DISPUTES 131 (1985) (commenting on Justice Talfourd’s influence on American influence).
40 Id. at 17 (describing the increase in women’s roles as mothers during America’s urbanization); see also David Blankenhorn, Fatherless America: Confronting Our Most Urgent Social Problem (1995).
42 See, e.g., Warshak, supra note 36, at 29.
43 See Blankenhorn, supra note 40, at 15–16.
44 See id. at 15; Black, supra note 39, at 16, 17; see generally Ralph LaRossa, The Historical Study of Fatherhood: Theoretical and Methodological Considerations, in Fatherhood in Late Modernity 37-58 (Sabine Hess ed., 2012).
mirror of stereotypes.45 Even more troubling, children could be considered “wards of the State” upon their mother’s death.46

The Supreme Court decided *Stanley v. Illinois* in 1972.47 Joan and Peter Stanley were an unmarried couple with three children; when Joan died, the children were declared wards of the State and placed with court-appointed guardians per Illinois law.48 Peter Stanley fought for his children, arguing he was not an unfit parent and seeking relief under the Fourteenth Amendment’s Equal Protection Clause.49

The Court stated Stanley was treated as a “stranger” to his children, and although he could proceed with adoption, Illinois law did not grant him priority.50 His unwed father status created a burden for him to prove not only that he was a suitable parent, but that he was the *most* suitable parent.51 With this reasoning, the Court concluded that Stanley was entitled to a hearing on his fitness as a parent before his children became wards of the state. The denial of such a hearing, but extension to all other parents challenging custody, violated his equal protection rights.52

*Devine v. Devine* represented another example of the tender years presumption’s effect on the court system, both procedurally and substantively.53 In 1981, Alabama law abided by the tender years doctrine, and the state awarded the children to the mother. Even though both were equally fit parents,54 as a procedural matter, the presumption imposed an evidentiary burden on the father to prove the maternal unfitness.55

The decisions in *Stanley* and *Devine* presented the first shift in the structure of family law which continued into the 1990s.56 After the tender years doctrine was eliminated from the court system, the primary care presumption was suggested as an alternative.57 Under this presumption, the best interests of the child are served by placing the child with the parent primarily responsible for the child’s care.58

47 *Id.* at 645.
48 *Id.* at 646.
49 *Id.*
50 *Id.* at 648.
51 *Id.* (emphasis added).
52 *Id.* at 658.
54 See *id.* at 687.
55 *Id.* at 691.
56 See Weisberg & Appleton, supra note 4, at 692–93, n.1.
57 See *id.* at 693; see also Martha Albertson Fineman, The Illusion of Equality: The Rhetoric and Reality of Divorce Reform 180, 181 (1991); J. Herbie DiFonzo, From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy, 52 Fam. Ct. Rev. 214, 215 (2014) (asserting that “states continue to weigh the primary caretaker’s role in child rearing as a factor”).
58 *Id.*
Primary caretaker status is a factor today in determining best interest of the child. In some states, one way to rebut this presumption is to prove the primary caregiver as unfit. This presumption received praise at the time because it limited the pitfalls of best interest of the child decision-making by providing day to day predictability with an already established primary caregiver. The standard also fostered continuity because the parent whom the child spends the most time with will continue to spend time with that child. Although praised, the standard was criticized as anti-feminist because it reinforced the stereotype that mothers have a stronger bond to their children and therefore must never be separated from them. Again, this reinforces stereotypes of mothers as non-working and fathers as prioritizing career over family.

Both of these shifts in custody laws and legislation were the result of social change movements, such as feminism and fathers' rights movements. Liberal and feminist groups applauded the abolishment of the tender years doctrine—which

59 Id.
60 See Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981) (“In those custody disputes where the facts demonstrate that child care and custody were shared in an entirely equal way, then indeed no presumption arises and the court must proceed to inquire further into relative degrees of parental competence.”). But see In re Marriage of Van Dyke, 618 P.2d 465, 467 (Or. Ct. App. 1980) (concluding both parents are fit to have custody of the child, but the primary caretaker position is dominant in assessing custody).
61 See J.B. v. A.B. 242 S.E.2d 248, 254 (W. Va. 1978) (“Recognizing the imperfections of our own materials we can justify our presumption only on the grounds that the presumption will achieve greater justice over a wider spectrum of cases than the alternative of endless hearings about issues which cannot, in any meaningful sense, be satisfactorily resolved in the adversary system.”).
62 If nothing else, the presumption provides a definite standard and a predictable result which is not conceivably related to the trial court’s knowledge of the families involved, a serious problem whenever we are dealing with men, no matter how honest, in a rural setting where courts and litigants are frequently well known to one another. Id. at 254–55.
63 [T]he specific biological situation of the continuing relationship of the child to the biological mother and its need for care by human beings are being hopelessly confused in the . . . insistence that the child and mother or mother surrogate must never be separated; that all separation even for a few days is ultimately damaging and that if long enough it does irreversible damage. This is a mere and subtle form of anti-feminism which men—under the guise of exalting the importance of maternity—are tying women more tightly to their children than has been thought necessary since the invention of bottle feeding and baby carriages.

64 See Gulyas v. Gulyas, 254 N.W.2d 818, 823 (Mich. Ct. App. 1977) (“[I]t should be noted that the best interests of the child, as statutorily defined, should not be used as a screen with which to hide outmoded notions of a woman’s rule being near hearth and home.”).
some say reinforced gender stereotypes. Liberals envision formal equality, where the family is viewed as a partnership of individuals rather than male dominated.

However, there are two major critiques to this view. First, feminists claim the changes in family law are not beneficial to women. Divorces generally cause a decline for women’s incomes and an improvement in men’s incomes. Over time, men consistently fared better post-divorce for various reasons, and equality was merely illusion—a thin veil of rhetoric. Second, major feminists suggested family law became dominated by selfish individualism and “waning of belonging,” which could be seen as a detriment to human relationships and irresponsibility to offspring—ignoring the best interest of the child.

II. CURRENT STANDARDS IN CHILD CUSTODY LAWS

Today, the foremost concern in custody disputes is protecting and guaranteeing the best interests of the child. Criticism of the best interest standard takes many forms. For example, a judge’s bout of power and bias can be viewed as “judicial patriarchy,” based on a judge’s “personal values, moral codes, and biases,” instead of psychological research.

When the best interest standard gained steam in 1975, many saw it as a major, and not necessarily good, move from rules to biased principles. Harvard Law Professor, Robert H. Mnookin, first challenged the best interest standard stating, “[A]djudication by a more determinate rule would confront the fundamental problems posed by an indeterminate principle.” The concept of the best interest standard relies on indeterminate factors; however, there is no consensus on what is necessarily the best interest of a child. The court often chooses between parents

---

67 See id. at 22–23 (stating liberals envision a partnership of individuals, and recent changes throughout family law are desirable “because they enhance equality for women and individual freedom for everyone.”).
68 See id. at 23.
69 See id.; see also, e.g., CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 93–102 (1987) (declaring abortion does not necessarily give women more freedom in their choices).
71 See PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY 77–81 (2d ed. 2011) (asserting “when fathers fought for custody, they won custody”); see also FINEMAN, supra note 57, at 36–38 (examining economic inequality and struggles for women post-divorce).
72 See id. at 24.
73 See WEISBERG & APPLETON, supra note 4, at 694.
74 See id. at 694–95.
76 See WEISBERG & APPLETON, supra note 56, at 695.
77 Id.
78 Id.
who each offer advantages and disadvantages, but the court is also faced with the
totality of the significant factors in a child’s best interest. The court should not be
unduly influenced by what may appear to be a minor factor in a particular case.

This indeterminate standard makes custody disputes and their outcomes
unpredictable and encourages more litigation regarding the issue—specifically in
instances where a parent’s ability to meet a child’s best interest is vehemently
questioned. There is an even greater risk to the best interest standard;
indeterminate standards can violate the fundamental precept that these cases
should be decided alike. An indeterminate standard such as the best interest
standard means that state officials decide on the basis of “unarticulated (perhaps
even unconscious) predictions and preferences that could be questioned if
expressed.” Indeterminate standards are an unfortunate result of the inability to
predict human behavior because societal values change frequently and lack a
general consensus.

The main idea of the best interest standard is applying various factors to
diverse situations—and the same factors will not apply to every family. Supporters of the best interest standard argue discretion is favorable because not
every family is the same. Bright-line rules and unevenly weighted standards may
not reflect a child’s best interest, depending on the family situation. Applying a
broad set of varying factors helps judges evaluate each family’s unique situation.

Feminists have challenged the equality of the best interest standard. They
proclaim it is a myth that women always win custody with a best interest
standard. One study showed that men who fight for their children win custody
seventy percent of the time. A select group of feminists insist fighting fathers win
custody not because mothers are unfit but because women are held to a much
higher standard in a custody situation. Judges assume that a father fighting for
his child deserves a reward and that something might be wrong with the mother.

79 Id.
80 Id.
81 Id.
82 Id.
83 Id.
84 See, e.g., Bartosz v. Jones, 197 P.3d 310, 319 (Idaho 2008) (concluding an overemphasis of one factor is an
abuse of discretion).
85 See In re Marriage of Hansen, 733 N.W.2d 683, 697 (Iowa 2006) (comparing and contrasting best interest
standard with the approximation standard).
86 See MINN. STAT. ANN. § 518.17(b)(1) (2015) (stating the court must evaluate each factor when determining
best interest).
87 See CHESLER, supra note 71, at xi (arguing against current custody standards); FINEMAN, supra note 57, at
87 (exploring in depth the consequences of no fault divorces including the “best interest” standard).
88 See CHESLER, supra note 71, at 78–80 (purporting mothers could lose custody due to the best interest
standard).
89 See id. at xii.
90 Id. at xi.
91 Id. at xi.
Despite prevalent criticism, the best interest standard withstands society’s changing interests and values. Various fathers’ rights groups advocate for joint custody and eliminating gender bias from family law and legislation. Psychologists debate over why children’s best interests are primarily their psychological interests, as opposed to their medical or economic interests. Further, society’s persistent focus is on the psychological factors in determining custody, yet there is little scientific evidence to support how these factors are weighted and evaluated.

Praise of the best interest standard as neutral is criticized for continuing gender-based stereotypes because custody determinations are still rooted in gender roles of mothers and fathers. This criticism is furthered by the idea that little difference between the best interest standard and the tender years presumption exists because the expectations of fathers are fairly low and mothers are almost seen as mythical creatures in what is expected of them as a parent. In fact, while much of today’s discussion and society’s interests rely on female gender stereotypes and sex-based discrimination, it seems society is not interested in the slow disintegration of the fatherhood role. This begs the question: what is a father’s role today? Is it as breadwinner and head of the household, or is the question far more drastic? In an ever-changing society with a growing list of social change movements every few decades, are we currently in a period where the fatherhood role is unnecessary to the best interest of the child standard?

A further constitutional argument is the best interest standard interferes with a parent’s constitutional right to raise their children. The right to parent is protected by the Due Process Clause of the Fifth and Fourteenth Amendments, although debate persists on whether it is a fundamental right. In Linder v. Linder, the court stated, “[t]he parental rights protected by the Fourteenth Amendment do not spring from a bare biological connection to a child, but rather must be born of a relationship to a child demonstrated over time.” The court in Linder also used the

95 See id. at 7 (criticizing the lack of scientific evidence used to determine psychological best interest factors).
97 See Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916) (“Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than a father's.”); see also RICHARD A. WARSHAK, THE CUSTODY REVOLUTION: THE FATHER FACTOR AND THE MOTHERHOOD MYSTIQUE 31 (1992).
98 WARSHAK, supra note 97, at 31.
99 U.S. CONST. amend. XIV; see Linder v. Linder, 72 S.W.3d 841, 854 (Ark. 2002) (citing Troxel v. Granville, 530 U.S. 57, 91–93 (2000) (Scalia, J., dissenting)) (“[I]t is the state legislatures that have the power to enact family-law legislation, and he questioned the validity of any substantive due process right to parent a child.”).
100 Linder, 72 S.W.3d at 852 (citing Michael H. v. Gerald D., 491 U.S. 110 (1989)).
Supreme Court analysis in *Troxel v. Granville* to determine that “impingement on a parent's fundamental liberty right to raise children requires heightened review and that one ‘special factor’ that might warrant state interference was if the parent were declared unfit.”

Therefore, the right to parent does not mean parents can neglect, abuse, or endanger their children. Justice Kennedy dissented and agreed that parents have a Fourteenth Amendment right to parent their children without undue state interference, but that the best interest test was effective because of modern family law’s changing structures.

Determinative factors for unfit parents include neglect and physical abuse. The Texas Family Code describes a few limitations on removal of children excluding neglect and abuse. A few of these limitations prevent Child Protective Services (CPS) from removing a child based on evidence that a parent homeschooled the child or is economically disadvantaged. Although removal is one step of many in the CPS process, termination and the best interest standard pose the most interesting cases.

For example, in August 2017, the Court of Appeals of Texas upheld the termination of a mother’s rights for endangering her two young children, Lisa and Arlene, by her rampant drug usage and incarceration. The father of the children voluntarily relinquished his rights prior to termination, but the mother contested. Her CPS history traced back to a case opened in 2013 after reports of physical abuse and neglectful supervision of both children, subsequently closed when the mother completed a drug treatment program. Then, a series of 2015 reports about neglect led to a new CPS investigation and the initiation of court proceedings to terminate parental rights.

Before the trial began, the court ordered the mother to comply with a detailed Family Service Plan requiring that she:

---

101 See id. (citing *Troxel*, 530 U.S. at 68 (O'Connor, J., plurality)).
102 See *Troxel*, 530 U.S. at 68 (concluding that courts must accord some special weight to the parent’s determination).
103 *Id.* at 73.
105 See *TEX. FAM. CODE ANN.* § 262.116(a) (West 2017) (describing limitations on removing children).
106 See id. § 262.116(a)(1)–(2). Furthermore:

The Department of Family and Protective Services may not take possession of a child . . . based on evidence that the parent . . . has been charged with a nonviolent misdemeanor offense . . . ; provided or administered low-THC cannabis to a child for whom the low-THC cannabis was prescribed . . . ; or declined immunization of a child for reasons of conscience, including a religious belief.

*Id.* at (a)(3)–(5).
107 In Interest of A.A.Z., No. 14-17-00276-CV, 2017 WL 3612259, at *11 (Tex. App. Aug. 22, 2017) (“Mother's history of drug abuse and its attendant unstable lifestyle, plus her continuing narcotics use while this case was pending, not only support the trial court’s endangerment finding, it also supports the best-interest determination.”).
108 *Id.* at *3.
109 *Id.* at *2–3.
• maintain safe and stable housing and pay all necessary bills in order to maintain utilities;
• actively participate in a six to eight week parenting class;
• complete a substance abuse assessment and follow all recommendations;
• complete a psychosocial assessment and follow all recommendations;
• participate in individual counseling and follow all recommendations to address her past which has impacted her current involvement with the agency;
• participate in random drug testing; and
• attend all court hearings, CPS meetings, visitations, and assessments pertaining to the case.110

The main goal of CPS is reunification and these service plans, extensive as they may be, are designed to facilitate that end.111 Parents are expected to work with their caseworker to complete these services.112

At trial, Marilyn Scott, the caseworker for Lisa and Arlene, testified that the mother actually participated in many of her services and her family plan. However, Scott also testified that the mother tested positive for methamphetamines and amphetamines and violated the terms of her probation despite visiting with her children and bonding with them.113 The trial court concluded the mother had committed endangering acts specifically enumerated in the Texas Family Code that warrant termination of parental rights when combined with a finding on the child’s best interests.114 The mother testified her forty-hour work week prevented her from completing all of her services and requested more time at her transitional facility in

110 Id. at *4.
112 Id.
114 [T]ermination of parental rights is warranted if the fact finder finds by clear and convincing evidence, in addition to the best-interest finding, that the parent has:
(D) knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child;
(E) engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child; [or]
(O) failed to comply with the provisions of a court order that specifically established the actions necessary for the parent to obtain the return of the child who has been in the permanent or temporary managing conservatorship of the Department of Family and Protective Services for not less than nine months as a result of the child's removal from the parent under Chapter 262 for the abuse or neglect of the child[.]

Id. at *8 (quoting TEX. FAM. CODE ANN. §§ 161.001(b) (D)-(E), (O)).
lieu of termination. This request was denied and the trial court terminated the mother’s rights.

In reviewing that decision, the Court of Appeals of Texas noted that “[i]nvoluntary termination of parental rights is a serious matter implicating fundamental constitutional rights,” and although the issue is of deeply concerning “constitutional magnitude,” parents’ rights are not absolute. Texas requires clear and convincing evidence to support a termination order. Examining the best interest factors, the court acknowledged a “strong presumption exists that the best interest of the children is served by keeping the children with their natural parents,” but the safety of the child’s placement is also in a child’s best interest. The court’s analysis determined Lisa and Arlene actually feared returning to their mother. Further, the mother’s periodic incarceration halted the physical and emotional needs of the children because the children were repeatedly left unsupervised at home and Arlene was behind her age level academically. Both children suffered from severe medical issues including Lisa’s decaying teeth and the inability to speak more than four words.

The above case is an example of the court’s factors and process for determining the best interest of the child. In Texas, the statute states the “[P]rompt and permanent placement of the child in a safe environment is presumed to be the child’s best interest.” Some factors determining best interest include the child’s age, frequency of out of home placements, history of substance abuse by the child’s family, and parenting skills of the child’s placement. However, some of the factors listed are questionably related to the financial ability of the parents such as “the willingness and ability of the child’s family to effect positive environmental and personal changes within a reasonable period of time.” Clearly certain factors like decaying teeth and a lack of growth are imperative to determining not only the best

---

115 Mother had taken multiple drug tests since October of 2016, and tested negative on each of them. Mother had completed all of the “classes and everything that CPS has asked” her to do. Mother thought she would be able to leave Well Springs within a few weeks at which point she would rent a two-bedroom apartment. Mother testified that she had enough money to pay a deposit and the first month’s rent. Mother visited with the children throughout the case, attending every visit on time.


117 Id.

118 Id. (citing TEX. FAM. CODE ANN. § 161.001). Clear and convincing evidence is defined as: “the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.” TEX. FAM. CODE ANN. § 101.007 (West 2017).


120 Id.

121 Id. at *11.

122 Id.

123 TEX. FAM. CODE ANN. § 263.307(a) (West 2017).

124 Id. (emphasis added).

125 Id. § 263.307(b) (West 2017).

126 Id.
interest of a child, but the factors are also indicative of a parent’s financial ability to remedy these issues prior to termination of parental rights.127

III. THE RISE OF #METOO AND ITS LINK TO THE BEST INTEREST STANDARD

Domestic violence, the feminist movement, and society’s persistent view of women as the “weaker” sex—and in turn safeguarding from the inevitable backlash—factored into the 2017 #MeToo Movement surge.128 Domestic violence is consistently used as a best interest factor, and its presence is crucial in family court.129 In 2017, after the #MeToo Movement broke out, Texas saw a rise in domestic violence reports.130 For example, local police in Houston reported they received more than 24,000 domestic violence cases before the end of the year—a forty-five percent increase since 2013.131

The increase in domestic violence reports is alarming, but this is not the first time the media, or even Congress, focused attention to the issue.132 The Congressional Research Service (CRS) issued a report on family violence, which focused on the federal response to domestic violence under the Family Violence Prevention and Services Act (FVPSA).133 At that point, a survey conducted by the Centers for Disease Control and Prevention (CDC) found that 4.8 million women and 5.5 million men (4.0% of all women and 4.8% of all men) experienced physical violence by their intimate partners in 2011.134 A larger percentage of both men and women reported emotional abuse.135

Congress passed FVPSA in 1984, when domestic violence issues emerged from the darkness of fear.136 The 1970s sparked former battered women and professionals to open shelters and support abused women and their children.137 Their efforts helped the FVPSA become the first federal law to address domestic

---

127 See id.
129 See TEX. FAM. CODE ANN. § 263.307(b)(7) (West 2017) (listing a history of abusive or assaultive conduct by a child’s family or others); see also LA. CIV. CODE ANN. art. 134 (A) (8) (2018) (stating history of substance abuse, violence, or criminal activity as a best interest factor); DEL. CODE. ANN. tit. 13, § 722(a) (7) (2019) (enforcing domestic violence as a best interest factor).
131 Id.
133 Id.
134 Id.
135 See id. at 6.
136 See id. at 8.
137 Id. at 7.
violence with a primary focus on providing shelter and services to survivors. Additionally, the program provides support for victims of dating and teen violence. Congress funds the following FVPSA services: (1) a national domestic violence hotline for those in crisis that responds to nearly 2.7 million calls annually; (2) provides direct services to domestic violence victims, their families, and children caught in the crosshairs of domestic violence; (3) FVPSA funds preventative measures with Domestic Violence Prevention Enhancement and Leadership through Allies (DELTA). Funding for the total program amounted to $165 million in 2015.

FVPSA 2017 cites various risk factors focusing mainly on social conditions and women’s lack of social equality. “Certain risk variables are often associated—but not necessarily the causes—of domestic violence. Such factors include a pattern of problem drinking, poverty and economic conditions, and early parenthood. For example, substance abuse often precedes incidents of domestic violence.”

Although progress for domestic violence statistics exists on the surface, many feminists—and other opponents of patriarchal law—strongly disagree. According to one study, battered women are rarely offered relief and judges do not relate wife battering to child abuse. The same goes for battered husbands who learn their claims will not be taken seriously. Few women have an opportunity to explain to judges their fears about violence when asking for a protective order. In sum, feminists actually view contemporary judges as biased against mothers in custody disputes. Judges favor paternal custody when mothers are allegedly mentally ill, accused of a crime, or determined inadequate or unfit based on best interest of the child standards. Factors such as money, a career-driven woman, adultery, living with a man out of wedlock, or an illegitimate child are factors feminists see as harming women more so than men in a custody dispute.
Domestic violence has a long history with family law, but #MeToo’s influence may impact how courts view families and violence in custody cases. The #MeToo Movement gained momentum on October 5, 2017, when the New York Times published a report on prominent film executive Harvey Weinstein’s payoffs to his sexual harassment accusers. The accusations emerged from big name celebrities, and most prominently, Ashley Judd, who was the first to go on record about Hollywood’s “open secret.” Back when Judd’s career was at an all-time high, Harvey Weinstein invited her to his hotel room. Weinstein then attempted to coerce Judd into bed when she promptly left. However, Judd could have easily stayed silent and repressed—instead she spread the word amongst females in Hollywood. As the days and weeks rolled on, more A-list celebrities like Gwyneth Paltrow and Angelina Jolie came forward saying they also experienced sexual harassment from Harvey Weinstein. However, their stories were only the beginning of the Me Too movement’s recognition . . . not only in Hollywood, but workplaces, court rooms, and universities.

The silence on sexual harassment broke on a quiet Sunday on October 15, 2017, when television star Alyssa Milano shifted the Movement’s popularity with the following tweet:

If you’ve been sexually harassed or assaulted write “me too [as a reply to this tweet]. “Me too. Suggested by a friend: ‘If all the women who have been sexually harassed or assaulted wrote “Me too.” as a status, we might give people a sense of the magnitude of the problem.'

Since Milano’s tweet, millions of women, and men, have said “me too” to experiencing some form of sexual harassment or assault in their lifetime. Unfortunately, for any movement or request for social change, there is some sort of adverse reaction, even backlash. Suddenly, this movement that felt so

152 See supra text accompanying notes 27–29.
153 See Kantor & Twohey, supra note 24.
154 Id.
156 Id.
157 Id.
158 Kantor & Twohey, supra note 24.
empowering at the time, received vehement backlash from the same group of would-be ‘social justice warriors’ who brought the Movement into the limelight: celebrities.\textsuperscript{163}

Many of the celebrities who disparaged and criticized the accused found themselves at the wrong end of the Movement’s wrath.\textsuperscript{164} For example, Aziz Ansari, a comedian and actor, received criticism from women and fans for what some would describe as one bad date when allegations arose of sexual misconduct from a \textit{Babe} magazine interview with Grace in 2017.\textsuperscript{165} Grace went on a date with Ansari and claimed he could not read social cues as they began kissing and engaging in sexual activities.\textsuperscript{166} She left her date feeling uncomfortable and stated, “I was debating if this was an awkward sexual experience or sexual assault. And that’s why I confronted so many of my friends and listened to what they had to say, because I wanted validation that it was actually bad.”\textsuperscript{167}

Grace’s story received a mixture of sympathy, but also a major question now hung in the air in the wake of the Movement: what constitutes sexual assault and abuse, and should the legal definition of sexual assault and abuse change?\textsuperscript{168} One New York Times critic remarked that the article published in \textit{Babe} magazine was “the worst thing that has happened to the #MeToo Movement.”\textsuperscript{169} She also noted how the article transformed the #MeToo Movement for women’s empowerment into a mark of female helplessness.\textsuperscript{170} However, many women came to Grace’s support, including popular late night talk show host Samantha Bee who said the article did not equate Grace’s experience with rape or even sexual harassment.\textsuperscript{171}

Another notable example of backlash emerges ironically from one of the early #MeToo advocates.\textsuperscript{172} In August 2018, Asia Argento, one of the first actresses to publicly discredit Harvey Weinstein was accused of paying off actor Jimmy Bennett—who was seventeen at the time she engaged in a sexual relationship with

\begin{footnotes}
\item[164] See 252 Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017, VOX, https://www.vox.com/a/sexual-harassment-assault-allegations-list (last updated Jan. 9, 2019).
\item[166] See id.
\item[167] Id.
\item[170] Id.
\item[172] See Severson, \textit{supra} note 163.
\end{footnotes}
him.\textsuperscript{173} The news broke from the same source that reported the Weinstein accusations—The New York Times.\textsuperscript{174}

It is no surprise that the media’s wave of support and criticism for the Movement parallels past reactions for social movements.\textsuperscript{175} As discussed in Part I, social change movements have a role in the progression of custody laws throughout the country’s history.\textsuperscript{176} Starting even in 1972, when unwed fathers did not have rights to their children, the feminist movement helped break stereotypes that women were merely homemakers and mothers.\textsuperscript{177} Women were consistently magnified and romanticized as caregivers and nurturers.\textsuperscript{178} The feminist movement was a step towards equality for custody seekers.

However, with the wave of support and criticism provided by the media this also begs the following questions: what constitutes abuse? Does the definition of abuse demand change to punish a wider range of people and hold various unsavory acts accountable? According to The National Domestic Violence Hotline, domestic violence includes the following:

Behaviors that physically harm, arouse fear, prevent a partner from doing what they wish or force them to behave in ways they do not want. It includes the use of physical and sexual violence, threats and intimidation, emotional abuse and economic deprivation. Many of these different forms of domestic violence/abuse can be occurring at any one time within the same intimate relationship.\textsuperscript{179}

Additionally, the Hotline provides six different categories for partner abuse on its website: (1) Physical Abuse, (2) Emotional Abuse, (3) Sexual Abuse and Coercion, (4) Reproductive Coercion, (5) Financial Abuse, and (6) Digital Abuse.\textsuperscript{180} While the National Domestic Violence Hotline focuses on domestic violence, the media frames #MeToo as an outcry to workplace harassment and sexual harassment or assault with acquaintances.\textsuperscript{181} However, the mantra of the Movement does not limit it to only the workplace.\textsuperscript{182} The Movement’s flagship website is vague, but signifies its
initial founding was to help sexual violence survivors of color from low-income communities. Now, the Movement includes “young people, queer, trans, disabled, black women, and girls, and all communities of color,” intending to “hold all perpetrators accountable and to implement long term and systemic change.” While the who is clearly represented, the situations themselves are not clearly explained because the Movement’s goal is to “interrupt sexual violence.”

The vague mantra and broadened inclusion of the #MeToo Movement’s focus provides a new level of bravery and possible changes to the definition of abuse—at least in the context of the corporate workplace. The Equal Employment Opportunity Commission recently saw a fifty percent increase in suits challenging sexual harassment, a twelve percent increase from 2017, further finding reasonable cause to believe discrimination occurred in nearly twenty percent more charges in 2018 than 2017.

Additionally, the National Women’s Law Center provides resources for lasting change with #MeToo. Their mission statement emphasizes “strengthening the laws and policies that prohibit sexual harassment in schools and in the workplace to raising awareness and changing the culture that fosters sexual violence.” NWLC’s resources include a legal network for gender equity and a link to tell Congress to help end workplace sexual harassment by protecting more workers and strengthening a victims’ ability to obtain justice. #MeToo’s immediate legal focus is on what is most perpetuated in the media regarding its influence: workplace harassment.

Although there is an increase in sexual harassment claims, the Movement caused a reexamination in fathers’ rights issues. For example, Rich Allison has been a plaintiff in thirteen lawsuits—most of which challenge California’s Unruh Civil Rights Act. The Act is named after Jesse Unruh—one of the most powerful

183 Id.
184 Id.
185 Id.
186 Bachman, supra note 181.
187 Id.
189 Id.
190 Id.
193 Id.; see Unruh Civil Rights Act, CAL. CIV. CODE § 51(b) (Deering 2016) (“All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary
politicians in the 1960s—and outlaws discrimination against all people by any type of business or establishment in the state regardless of a person’s sex, race, and other characteristics.\(^{194}\) Rich Allison has filed three lawsuits since September 2017 regarding the Financial Services Information Sharing and Analysis Center’s (“FSISAC”) “Diversity Scholarship,” awarding female recipients $5,000 each in the cybersecurity industry.\(^{195}\) Mr. Allison’s critics have dubbed him an “ambulance chaser”—specifically heavy metal band Five Finger Death Punch’s “Chicks for Free” concert.\(^ {196}\)

While the CEO of FSISAC states the men’s rights activists show “a gross misunderstanding of the nature of our sexist society and of what is specifically going on in the state of California,” these lawsuits also shows “potential legal holes in the current feminist strategy.”\(^{197}\) These legal holes are raised by the National Coalition for Men.\(^{198}\) The organization is California based and began in 1977—the same time as the custody revolution abolishing the tender years doctrine.\(^{199}\) Mr. Allison was intrigued by the NCFM because he found “popular culture can diminish the importance of men in families and society.”\(^{200}\) The interesting aspect of NCFM is their flagship page stating, “NCFM’s general membership includes men and women from all walks of life – truck drivers, accountants, cabinet makers, homemakers, attorneys, politicians, farmers, media personalities, actors, doctors, psychologists, airline pilots, construction workers, engineers, computer technicians, and more.”\(^{201}\) The inclusion of women in their description gives their organization an all-encompassing feel, however their message is clear: what about men?\(^{202}\) Their transition from Free Men, which seems more like a fathers’ rights and advocacy group, to NCFM occurred over a span of several years.\(^{203}\) The following cryptic and unsavory message appears describing the reasoning for the Twin Cities Chapter:

> “Each member had their own reasons for wanting to form a local chapter. Some had endured terrible ordeals in family court. Some had seen women get away with doing things to men, for which men would be severely punished for doing to women. Some were disgusted with the media’s and the government’s fixation on the problems of

\(^{194}\) CAL. CIV. CODE § 51(b); see University of Southern California, About the Jesse M. Unruh Institute of Politics, USC DORNSIFE CENTER FOR THE POLITICAL FUTURE, https://dornsife.usc.edu/unruh/about-jesse-unruh/ (last visited Dec. 26, 2018).

\(^{195}\) Rosman, supra note 192.

\(^{196}\) Id.

\(^{197}\) Id.


\(^{199}\) Id.

\(^{200}\) Rosman, supra note 192.

\(^{201}\) NAT’L COALITION FOR MEN, supra note 198.

\(^{202}\) See id.

\(^{203}\) Id.
women, real or imagined, while the problems of men were ignored, denied, or celebrated. Some were tired of rights issues referring only to women, and responsibility issues referring only to men. Some were fed up with being blamed for everything bad, being demonized and vilified—after one million men had died in wars to create and preserve the United States.”

The last part of the sentence ties vilification of men to men as the “founding fathers” of the United States and therefore that makes them worthy of safeguarding. The organization insists it is “nonpartisan, inclusive, . . . [and] dedicated only to freeing men and boys from sex discrimination.” They also emphasize that “all are welcome if committed to equal, fair and just treatment.”

IV. RESPECTING THE #METOO MOVEMENT’S IMPACT ON SOCIETY WHILE KEEPING CHILDREN AT THE FOREFRONT OF LEGISLATIVE UPDATES

Despite positivity, celebrity endorsement, and ample opportunity, social change movements lag with the courts. An example of the lag with the courts and social change includes the prevalence of domestic violence in the post-feminist movement. A recent exploration into the rise in domestic violence cases after #MeToo affirms the unfortunate reality that the law remains behind with social movements, and reform within family law is necessary to match progress. For example, in early November 2018, New York State Attorney General Eric Schneiderman resigned as a result of accusations that he beat and demeaned multiple ex-girlfriends. One of his accusers stated he called her his “brown slave” and “property,” and “threatened to kill her if she left him.” However, he would not face any criminal charges for his actions.

This is just one example showing that although #MeToo’s impact is magnified in the media, or at The Oscars, or the increase in domestic violence reports, the legal world is not completely caught up. As Part III explored, laws and resources around domestic violence and sexual harassment that emerged in the 1980s represented progress, but the consequences surrounding abuse and manipulation

---

204 Id.
205 See id.
206 Id.
207 Id.
211 Id.
212 Id.
213 Id.
lacked enforcement.\textsuperscript{214} For example, without a significant injury—and sometimes without intent—felony assault is dismissed in certain jurisdictions.\textsuperscript{215} This begs the question: Will #MeToo’s lag in courtrooms gain steam in family law cases? Despite criticism, the best interest standard still rules courtrooms and real change is missing, but there are suggestions to reform it.\textsuperscript{216} For example, the American Law Institute’s approximation standard suggests allocating custody between parents on the basis of past caretaking.\textsuperscript{217} The argument for the approximation standard asserts it “offers a relatively verifiable proxy for best interests that narrows judicial discretion and obviates the need for psychological evidence.”\textsuperscript{218} An additional benefit of the approximation standard is prioritizing mediation before trial.\textsuperscript{219} This ensures parents are the best equipped individuals to sort out any issues with caretaking and planning—more so than judges.\textsuperscript{220} I propose a solution for not only the best interest standard but consequences for judges who fail to perform their tasks in family court in a timely and satisfactory manner. As for a new custody standard, I also propose a combination of the approximation plan and the “reasonable person” standard used in other areas of law.\textsuperscript{221} While the best interest standard in theory puts the child first, the reality is most of the factors for best interest of the child pertain to the parents.\textsuperscript{222} Children need to be on par with parents in custody proceedings because they are most affected by the outcome, and this can be resolved by assessing the parental fitness of both mother and father and not giving in to societal pressures.

Fathers have proven themselves as active caregivers in childcare in recent years for a few reasons.\textsuperscript{223} First, women have increased their work outside of the

\textsuperscript{214} See supra Part III (exploring the various resources for abused women).

\textsuperscript{215} See ALASKA STAT. § 11.41.200(a) (“A person commits the crime of assault in the first degree if . . . with intent to cause serious physical injury to another, that person causes serious injury to any person.”); D.C. CODE § 22-404(a) (2) (2013) (“Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another . . . ”); TEX. PENAL CODE ANN. § 22.02(a) (West 2013) (requiring serious bodily injury or the use of a firearm in the commission of the assault to trigger § 22.02).


\textsuperscript{217} PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 (AM. LAW INST. 2019); See generally Elizabeth S. Scott, Pluralism, Parental Preference, and Child Custody, 80 CALIF. L. REV. 615 (1992) (proposing the approximation standard for the first time).

\textsuperscript{218} Scott & Emery, supra note 216, at 71.

\textsuperscript{219} Id. at 106.

\textsuperscript{220} See id. at 71–72.

\textsuperscript{221} See Scott, supra note 217.

\textsuperscript{222} See id. at 616.

home, and fathers have embraced caring for their children. The approximation standard could work in either instance of a career minded father or mother and depends on who appropriated their time the most with the child. Whichever parent was responsible for meals, school pick-ups, etc. should be allocated more time based on the child’s previous experience with each parent and what worked effectively and smoothly for the family in the past.

Second, several suggestions include that men could “self-select” themselves into fatherhood because parenthood is now a voluntary choice given the rise of contraception. Desire to participate in child rearing and childcare could also be a part of the standard for determining what is best for the child. Many mothers and fathers are still unexpectedly thrust into parenthood despite contraception, but if a judge discerns that one parent, or both, has a desire and willingness to still parent and fight, then that should also factor into a custody arrangement.

However, many fathers’ rights groups feel that despite society’s changing views and growth, current custody arrangements, specifically joint custody, cause contact with the noncustodial parent and child to diminish rapidly—especially if both parents continually disagree over what is best for the child. This loss of contact is most prevalent with lower income families, and scholars have uneven findings on the various custody arrangements that work and do not work. The most important aspect of the scholarly study is how these arrangements affect the child’s well-being. Various research and studies lack a definitive answer for what truly constitutes best practices; however, research has provided insight into child development. For example, past research shows that children of parents with

---

224 See Crowley, supra note 18, at 147–48.
225 See Scott, supra note 217, at 630 (defining the approximation standard and asserting “a custody arrangement based on past roles is less likely to be disruptive to the child”).
226 Critics of this may see similarities with the primary caregiver presumption. See, e.g., Paul L. Smith, Note, The Primary Caretaker Presumption: Have We Been Presuming too Much?, 75 IND. L. J. 731 (2000); cf. Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981) (“[I]n any custody dispute involving children of tender years it is incumbent upon the *69 circuit court to determine as a threshold question which parent was the primary caretaker parent before the domestic strife giving rise to the proceeding began.”).
227 See Crowley, supra note 18, at 147.
230 See Crowley, supra note 18, at 150.
231 Id. at 153.
232 Id.; Johnston, supra note 228, at 420.
emotional issues or anxiety will likely experience emotional distress themselves.\textsuperscript{233} This is something to keep in mind when looking at a new standard of care for a child: how does the child react when left with a parent who is perhaps experiencing their own emotional struggles?

As previously discussed, the best interest standard decides custody through subjective factors. Although the approximation standard offers an alternative, the reasonable person standard, frequently cited in other areas of law, adds to the solution because it offers an objective and fair measure for custody.\textsuperscript{234} The reasonable person standard is defined as, “a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests. The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions.”\textsuperscript{235} Judges could use the “reasonable parent” standard and base custody decisions on what a reasonable parent expects or how a reasonable person would act given their role as a parent. Parental economic advantages and disadvantages could also facilitate in a judge’s decision-making process. The approximation standard combined with the “reasonable person” standard creates a fair and long-term solution for custody solutions.

Although redefining standards is important, the way a judge makes these decisions is also imperative to the custody decision making process. Currently, the American Bar Association recommends judges should minimize the hostility between combative parents in order to maintain the best interest of the child.\textsuperscript{236} High conflict divorce can obviously have negative effects on a child,\textsuperscript{237} but divorce in the wake of sexual abuse between spouses or former partners can make a court room situation more combative.\textsuperscript{238} The American Bar Association suggests “[t]he manner in which you approach cases affects how the parties view the judicial system and how they participate in their cases.”\textsuperscript{239} If a judge is empathetic to a father fighting for custody rights because he is the “outlier” and a rare find in custody cases, how is this decision fair to a mother with a lower income, but the same or better parenting ability to create a good life for the children? On the flip side, if a judge is empathetic to a woman stating her partner cheated on her, yet this does not affect the child in any way, is it fair to limit the father’s care for his

\textsuperscript{233} Johnston, supra note 228, at 420.

\textsuperscript{234} See Restatement (Second) of Torts § 283(b) (AM. LAW INST. 1965) (defining reasonable person standard in tort law); see also Restatement of the Law, Children and the Law § 14.20(b)(1) (AM. LAW INST., Tentative Draft No. 1, 2018) (describing a reasonable person standard for a juvenile); Restatement (Third) of Torts: Prods. Liab. § 8(b) (AM. LAW INST. 1998) (using the reasonable person standard to define buyers and product liability).

\textsuperscript{235} Reasonable Person, BLACK'S LAW DICTIONARY (10th ed. 2014).

\textsuperscript{236} AM. BAR ASS’N, CTR. ON CHILDREN & THE LAW, A JUDGE’S GUIDE: MAKING CHILD-CENTERED DECISIONS IN CUSTODY CASES 3 (Diane Boyd Rauber ed., 2001) [hereinafter JUDGE’S GUIDE].

\textsuperscript{237} Id.

\textsuperscript{238} See Echo A. Rivera, Cris M. Sullivan & April M. Zeoli, Secondary Victimization of Abused Mothers by Family Court Mediators, 7 FEMINIST CRIMINOLOGY 234 (2012) (providing a study on victims in family court).

\textsuperscript{239} JUDGE’S GUIDE, supra note 236, at 3.
child based on this? Situations and personal beliefs of judges could limit fair decision making despite the “ABA Standards Relating to Trial Courts provid[ing] that judges have the ‘affirmative responsibility’ to ensure their decisions are just and based on the facts.”

In determining the best interests of the child, judges must keep in mind the developmental effects their decision may have on the child’s well-being. Resources that can assist judges with determining best interest standards include: neutral evaluators, mental health professionals, mediators, guardians ad litem, and domestic violence and child abuse experts; in certain jurisdictions, a judge can gather information from a network of professionals as well. Additionally, the ABA suggests requiring family law attorneys to attend trainings related to child development, family functioning, and domestic violence; further suggesting additional training for ad litem attorneys and requiring parents to attend research- and parent-based education seminars. These suggestions are ideal for a jurisdiction filled with resources and unbiased judges. The ABA recognizes resources as an issue and half-heartedly devotes one whole paragraph in their Judge’s Guide to Judicial Caseloads: “If you are to allocate sufficient, uninterrupted time to hear child custody cases, you must have reasonable caseloads. In addition, you must have sufficient time to prepare for cases, issue opinions, perform administrative responsibilities, and undertake professional and community activities.”

The ABA’s take is not only half-hearted, but idyllic, because it provides no solution to unreasonable caseloads. The only suggestion from the ABA is that judges and court administrators consider the implementation of case management tracking systems to help “court staff contact parties and remind them of various deadlines.” But how will this assist with a full docket?

Docket control is assumed to be resolved by pre-trial scheduling orders, such as scheduled mediations and firm trial dates. Despite the solution of docket control, this makes the final judge’s decision all the more alarming if the judge’s time is limited with the case because of the case’s extension and the judge’s discretion to extend the case. The ABA’s Model Code of Judicial Conduct does not have anything directly stating, or punishing, judges need to allocate sufficient—and uninterrupted—time to child custody cases as suggested by the guidelines.

---

240 Id. (quoting AM. BAR ASS’N, COMMITTEE ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO TRIAL COURTS § 2.71 (1992)).
241 See JUDGE’S GUIDE, supra note 236, at 30.
242 Id. at 31.
243 Id.
244 Id. at 20.
245 Id. at 17.
246 Id. at 17–18.
247 Id. at 18.
248 See generally id.
The closest law provided in the Model Code of Judicial Conduct is Rule 2.1: “The duties of judicial office, as prescribed by law, shall take precedence over all of a judge’s personal and extrajudicial activities.”249 Additionally, the ABA suggests, “a judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.”250 While the ABA provides guidelines for bias,251 there is no concrete solution to judicial caseloads that is specific to family law. The ABA states courts have undergone systematic reforms since the best interest standard was implemented,252 yet the criticism and prevalent disdain for the best interest standard lives on.

The main concern with #MeToo—and its impact on family law—is that despite its progress, the Movement could blur the line between what is truly best for the child versus what is best for the parent.253 The best interest standard already favors wealthier families, and the question of what is truly best for the child is lost in factors parents cannot control.254 Some factors prove to only affect economically disadvantaged parents;255 things like dirty clothes or inadequate sleeping arrangements could point to a class issue.256 Judges need to ensure they evaluate economically disadvantaged families objectively while prioritizing a child’s safety and well-being over factors parents cannot control. Appellate Judge Richard Posner posed the reality that judges are insulated from external criticism:

Objective evaluation of appellate judges, which would enable searing criticisms that might shame the judges into behaving themselves, is terribly difficult, in part because of their ability to hide behind their law clerks and in part because the criteria of a good judge are contested and evaluation is frequently contaminated by the politics of the evaluator.257

Judge Posner also suggests that a judge’s actual purpose is to evaluate the case rather than the parties.258 This is something that can become lost in the message

---

250 Model Code of Judicial Conduct R. 2.4(B) (AM. BAR ASS’N 2011).
255 See, e.g., Dempsey v. Dempsey, 296 N.W.2d 813, 814 (Mich. 1980) (per curiam) (warning against trial courts’ “giving excessive weight to the economic circumstances of the parties in deciding the custody issue”).
256 See Doe v. G.B. 270 A.2d 27, 33 (1976) (stating instances of poverty are not enough to claim abuse or neglect).
258 Id. at 1057.
when a judge is faced with something as subjective as the best interest standard that determines what is best for the child based on the party and not the case.

These subjective standards can be avoided with the approximation standard. The approximation standard allows a judge to take out subjective best interest factors that use psychology and look at the amount of time a child spends with each parent and how that time is utilized. In fact, the approximation standard strives to keep siblings together and “to avoid an allocation of custodial responsibility that would be extremely impractical or that would interfere substantially with the child's need for stability in light of economic, physical, or other circumstances . . . .” The standard examines time spent with the child and stability of placement for the child’s interests rather than the placement itself.

A new standard would require not only time, but a revision of individual state statutes, and support from higher courts. Parents fighting for their children also need information from their attorneys—appointed or retained. That would require continuing education for seasoned attorneys and, even better, a class in law school for students interested in practicing family law.

CONCLUSION

Social change movements influenced custody reforms in the past, and it is very likely #MeToo will soon follow suit. While progress and change are ideal when it comes to children, their needs deserve the forefront role of any law that directly affects their future. Although the wave of #MeToo includes a mixture of progress and change for women, there are legal holes and questions for the Movement regarding what constitutes abuse, and whether the laws concerning assault or emotional abuse need reform to match the times. Currently, #MeToo has caused the most change in the workplace, but just as the feminist movement radically changed custody laws—from the tender years doctrine to the best interest standard—#MeToo could produce the same result.

259 Scott & Emery, supra note 216, at 71.
261 Id. § 2.08(1)(f).