Joshua Williams Memorial Essay 1990

Sir Joshua Strange Williams was resident Judge of the Supreme Court in Dunedin from 1875 to 1913, and he left a portion of his estate upon trust for the advancement of legal education. The trustees of his estate, the Council of the Otago District Law Society, have provided an annual prize for the essay written by a student enrolled in law at the University of Otago which in the opinion of the Council makes the most significant contribution to legal knowledge and meets the requirements of sound legal scholarship.

We publish below the winning entry for 1990.

IS THE PRIMARY CARETAKER PRESUMPTION IN CUSTODY CASES FOR US?

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Introduction

Over the last ten years New Zealand family law has undergone major reform and much energy has gone into developing a comprehensive system to deal with the legal needs of families in this society. Our family law grew out of the English legal system, but more and more the courts and the legislature are recognising the specific needs of our own community.[1]

The system is by no means perfect but its emphasis on relative flexibility and informality and its efforts to meet the individual needs of its users and respond to the current social and moral climate seem to be strengths in an area which is intrinsically concerned with values, with changes in moral and social standards and with a multitude of unique situations and possible solutions.

It was with some concern, then, that I became aware of the directions indicated by Georgie Hall in her research report for the Justice Department.[2] The first objective given for this report was ". . . to ascertain which custody and access arrangements are seen to best serve the welfare of the child . . ."[3] and while Hall was unable to find indications of any clearly superior arrangement from the review of the literature, she clearly saw the

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1 The indigenous nature of our family law can be seen in such things as the structure of our family court system and in legislation such as the Children, Young Persons, and Their Families Act 1989.

2 Family Court Custody and Access Research Report 1, *The Welfare of the Child: a Literature Review* (Policy and Research Division, Department of Justice, 1989).

3 Foreword by W P Jeffries, Minister of Justice.

presumption in favour of the primary caretaker in custody decisions as a promising new development that New Zealand should consider closely.

This paper will focus on this development and look critically at its possible application in New Zealand. It will begin with a consideration of Hall's findings in this area and a fuller exploration of its West Virginian basis. It will then turn to the New Zealand situation, considering the implications of an application of such a rule here and how that fits with the current court climate and directions as regards custody disputes.

The Report

As Hall states,[4] her review follows the custody and access debate of the last two decades and she attempts to summarise and draw conclusions from the literature she has located, that literature coming primarily from the United States with a few reports from Australia, Canada, the United Kingdom and New Zealand. She claims that the United States developments have influenced both the family law practice and legislation in New Zealand in recent years[5] and in order to understand custody practice in New Zealand today she advocates a study of recent trends in the United States, focusing particularly on the joint custody debate and on the emergence of the primary caretaker presumption.

However, I would be very reluctant to accept that it is probable or in any way desirable that we should regard our developments in this area as necessarily following the American lead, and perhaps the best lesson to be learnt from the American experience and research is a cautionary one. Hall's own consideration of the joint custody debate and her concern with the validity of father-absent research illustrate the dangers of a somewhat political approach which has seen large swings in favour of an exciting new principle, energy being put into both supporting and countering it by affected groups, disillusionment when difficulties are encountered and then an enthusiastic search for another principle to replace it.

It is with this in mind that I would like to look closely at Hall's findings regarding the primary caretaker presumption, for it is this which she appears to be most enthusiastic about and seems to be steering our thoughts towards.

The Primary Caretaker Presumption

In Chapter 5 of her report, Hall introduces the primary caretaker principle as an emerging United States trend, developed in response to a dissatisfaction with the broad, indeterminate "best interests of the child" standard and the presumption in favour of joint custody that some states had adopted. Its historical source was the 1981 decision of the West Vir-

4 Ibid, 10.

5 Ibid, 18. Perhaps this claim is given too much weight and not enough attention is given to the other influences such as the English legal base and indigenous developments. While these influences may not have been reflected in the literature, their strength must be acknowledged in any consideration of future directions.

ginia Supreme Court of Appeals in *Garska* v *McCoy*.[6] The Court, in a judgment delivered by Neely J, introduced the primary caretaker presumption. If there was a custody dispute involving children up to the age of fourteen, sole custody was to be granted automatically to the parent who was the primary caretaker as determined by lay testimony, unless that parent was shown to be unfit (also determinable by lay testimony). Lay testimony was evidence given by neighbours, friends and teachers but was not to include "expert" opinions of professionals such as psychologists and psychiatrists. The Court believed expert testimony was not helpful in that it reflected the ability of a party to hire expensive assistance rather than providing objective data and the expert would be concerned with acting on behalf of his or her client, not in the interests of fairness or objectivity. It simply prolonged and increased the costs of litigation while the information needed to satisfy the criteria for determining the primary caretaker could easily be ascertained by people with ordinary day-to-day contact with the family.

In the case of a child aged between 6 and 14 years, the judge could also seek to ascertain the child's preference and allow that to rebut the presumption. Children over 14 years were to be allowed to make their own choices.

Neely J set down specific criteria for determining the primary caretaker. Hall reports only the five aspects the judge himself summarised in his extra-judicial comment on the primary caretaker parent rule.[6] The full test, as first reported in *Garska* v *McCoy* is as follows:[7]

> While it is difficult to enumerate all of the factors which will contribute to a conclusion that one or the other parent was the primary caretaker parent, nonetheless there are certain obvious criteria to which a court must initially look. In establishing which natural or adoptive parent is the primary caretaker, the trial court shall determine which parent has taken primary responsibility for, *inter alia,* the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking the child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and (10) teaching elementary skills, i.e. reading, writing and arithmetic.

The Court elaborated the idea of fitness in its later decision in *David M* v *Margaret M,*[8] the judgment again delivered by Neely J:

> To be a fit parent, a person must: (1) feed and clothe the child appropriately; (2) adequately supervise the child and protect him or her from harm; (3) provide habitable housing; (4) avoid extreme discipline, child abuse, and other similar vices; and (5) refrain from immoral behaviour under circumstances that would affect the child. In this last

6 Richard Neely, "The primary caretaker parent rule: child custody and the dynamics of greed" (1984) 3 Yale Law and Policy Review 168.

7 278 SE 2d 357, 363 (1981) (footnote omitted).

8 385 SE 2d 912, 924 (1989) (footnote ommited).

> regard, restrained normal sexual behavior does not make a parent unfit. The law does not attend to traditional concepts of immorality in the abstract, but only to whether the child is a party to, or is influenced by, such behavior. Whether a primary caretaker parent meets these criteria can be determined through non-expert testimony, and the criteria themselves are sufficiently specific that they discourage frivolous disputation.

Hall reports that the main reasons for the adoption of the presumption in West Virginia were to develop a gender-neutral standard, to discourage "sharp practice" in out-of-court bargaining and to avoid the cumbersome, often destructive prolonged litigation associated with the "best interest" standard. These reasons will be explored more fully later, as will the support Hall claims was given to the presumption by an American commentator.[9]

The Primary Caretaker Presumption in West Virginia

This paper now traces the history of the presumption in the Supreme Court of Appeals of West Virginia, exposes in more detail the justifications given for it by Neely J and comments on whether it can be seen to have lived up to its expectations.

The fullest exposition of the presumption can be found in Neely J's judgment in *David M* v *Margaret M*[10] in which the judge writes ". . . to reaffirm and clarify the benefits of the primary caretaker parent rule to assist the family law masters and the circuit courts in reaching the best interests of the child by applying the primary caretaker presumption . . . ."[11]

West Virginia, like New Zealand, is bound by statute[12] to make determinations in custody disputes which are in the best interests of the child and which do not favour one parent on the basis of gender. In *Garska* v *McCoy*[13] the Court construed this requirement as allowing a presumption in favour of the primary caretaker as ". . . we are convinced that the best interests of the children are best served in awarding them to the primary caretaker parent . . . ."[14] At this stage Neely J rationalised the presumption on the grounds that any litigation was injurious to the children and a presumption would reduce the likelihood of courtroom experiences.

In his extra-judicial writing in 1984[15] he supported the choice of the primary caretaker as the basis for the presumption with references to sociological research findings and his own practical experience showing that mothers were generally the caretakers and were closer to their children than fathers. Then in 1989 in *David M* v *Margaret M*[16] Neely J expanded his rationale further with an appeal to psychological theories of attachment

9 David L Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984) 83 Michigan LR 477.
10 Supra n8.
11 Ibid, 915.
12 New Zealand by the Guardianship Act 1968, s23, and West Virginia by the 1980 amendment to the *W Va Code,* 48-2-15.
13 Supra n7.
14 Ibid, 361.
15 Supra n6, 171-172.
16 Supra n8.

and bonding. He again stressed that ". . . the child's welfare is the paramount and controlling factor in all custody matters".[17] So in this, at least, New Zealand legislative requirements and court practice reflect a similar base.

However, the development of the primary caretaker presumption has, it is contended, developed from this base for reasons perhaps appropriate in West Virginia, but not so applicable in the present New Zealand family law climate.

Before *Garska* v *McCoy,* West Virginia had applied a presumption in favour of the mother[18] but this became increasingly challenged as reflecting a constitutionally unacceptable discrimination on gender grounds. In 1980 an amendment to the West Virginia *Code*[19] abolished any gender based presumption and substituted a best interests standard. But the Supreme Court of Appeals still felt that a presumption best served the interests of children, by reducing litigation and countering the bargaining power of the non-caretaking parent. Faced with the dilemma of how to implement any presumption, given the amendment, the Court in *Garska* v *McCoy* arrived at the unique solution of simply replacing the word "maternal" with the phrase "primary caretaker" in its formulation of a presumption,[20] acknowledging that in most cases this would still in reality be the mother anyway.

The theoretical justification for this was the belief that young children form a unique bond with their primary caretaker and that this is ". . . an essential cornerstone to the child's sense of security and healthy emotional development".[21] The Court cites Goldstein, Freud and Solnit's work,[22] inter alia, to support this claim, though it could be urged that they were addressing the psychological parent rather than the primary caretaker despite their reference to a relationship "based on the day-to-day interaction, companionship and shared experiences"[23] of parent and child. There is nothing in the Court's criteria which looks at the *quality* of the relationship with the parent, the basis for Goldstein, Freud and Solnit's preference. Nor does Neely J acknowledge in his application of the presumption that the role can be filled by any adult who acts appropriately towards the child, not just the biological parent. Goldstein, Freud and Solnit's concern with the psychological well-being of the child and with the dire mental and emotional consequences of a break with the psychological parent's care are hardly evidenced by Neely's acceptance that mistakes may be made but they are of minor importance if in general the system is of practical benefit.[24]

17 Ibid, 916.
18 see *J B* v *A B* 242 SE 2d 248 (1978).
19 *W Va Code,* 48-2-15.
20 *Garska* v *McCoy* supra n7, 363.
21 *David M* v *Margaret M* supra n8, 917.
22 J Goldstein, A Freud and A Solnit, *Before the Best Interests of the Child* (1979).
23 J Goldstein, A Freud and A Solnit, *Beyond the Best Interests of the Child* (1973) 18.
24 *David M* v *Margaret M* supra n8, 923.

Neely J also quotes Chambers[25] at length in support of his presumption,[26] but as he acknowledges in his footnote,[27] Chambers' position is not unequivocally in favour of the primary caretaker in that he is concerned at the lack of recognition of the value of the relationship with the secondary caretaker as well. Neely J also makes no reference to Chambers' belief in a clear limitation to such a rule — that it should only apply to children up to the age of five years — because Chambers could find insufficient empirical evidence or theory that supported a view that it would benefit older children's interests.[28] Nor does Neely J mention Chambers' view that perhaps, in the absence of proven alternatives, an open "best interests" standard would still best serve those up to around twelve years old at least;[29] and that an "unfitness" rebuttal is not an appropriate test in that it focuses too strongly on parental moral behaviour and not on the child's relationship with the parent.[30] While Chambers shares with Neely J a concern with the power of court standards as they may affect out-of-court settlements and bargaining power, his concern with the trauma of loss on the primary caretaker as a justification for a custody preference[31] fits uneasily with the law's best interests of the child foundation.

As Fineman and Opie point out in their criticism of Chambers' work[32] it may even be possible to argue that the preference for the primary caretaker for young children is an adult-centred, political or moral rule based on a belief in the subservience of women and a desire to keep them in a homemaking role, rather than a gender-neutral, fair rule in the best interests of the children.

Neely J justifies his preference for a primary caretaker presumption on three main grounds. First, he believes a less certain rule allows one of the parties, usually the father, to take advantage of the situation and use the uncertainty to strengthen his bargaining position and negotiate a settlement involving lower maintenance payments. In *Garska* v *McCoy* Neely J cited Mnookin and Kornhauser's writing[33] to support his stand. These writers saw the courts as providing a framework which helped determine out-of-court settlements (the bulk of agreements) in that they influenced the relative strengths of each party. They maintained that a vague, general standard such as the "best interests of the child" enhanced the position of the economically stronger, less committed, more risk-neutral party who was then able to negotiate advantageously. They claimed that more precise standards aided the weaker party but they recognised the dilemma that these precise standards did not always provide the most appropriate in-

25 Supra n9.
26 See *David M* v *Margaret M* supra n8, 917.
27 Idem.
28 Chambers supra n9, 564.
29 Idem.
30 Ibid, 562.
31 Ibid, 499-503.
32 Martha L Fineman and Anne Opie, "The uses of social science data in legal policymaking: custody determinations at divorce" (1987) Wisconsin Law Review 107, 167-168.
33 Robert H Mnookin and Lewis Kornhauser, "Bargaining in the shadow of the law: the case of divorce" (1979) 88 Yale LJ 950.

court solution. Neely J, however, believes that a primary caretaker presumption is an appropriate standard with regard to its effect both in and out of court, as providing as good a solution as any in court and preventing custody being used as a "bargaining chip" in out-of-court negotiations.

Secondly, he believes the individualised approach involved in determining what is in the best interests of each child is "intrusive, time-consuming and inherently distortive in its effect".[34] He believes the court battle results in the hiring of expensive expert witnesses in whom he clearly has little faith, claiming that they will work only to advance the cause of their employer. No clear picture of the true situation is possible and the system is open to bias, the result is usually a decision in favour of the mother anyway, but in the process, the situation, especially as regards the child, is worsened because of the destructive effects of the conflict and of the procedures involved in gathering evidence for each party's case.

Thirdly, Neely J believes there is still a strong bias against women in society and that a presumption in favour of the primary caretaker (usually the woman) would help preserve some fairness to their position without discriminating against those men who genuinely deserve a decision in their favour.

These, then, are the reasons behind the standards Neely J has set in West Virginia and which he has applied consistently, along with his tests for fitness, his preference for lay testimony and his consideration of older children's own preferences. These ideas have also been developed in other states such as Minnesota and, Neely J claims, considered quite favourably in states such as North Dakota, Ohio, Pennsylvania, California and Florida.[35] Atkinson[36] also reports developments in other states.

Before we consider how these ideas might apply in New Zealand, let us look more closely at the fact situations in which they have been applied at appeal level in West Virginia. In *Garska* v *McCoy*[37] itself the presumption was used to enable an unwed mother of a two-year-old boy to gain custody in order that she could apply to allow her parents to adopt the boy so that their medical insurance could be used to pay for hospitalisation bills. The father, who had not lived with the mother, objected to the adoption moves and countered with a successful custody plea. In the lower court, upon the extraordinary findings of fact that, compared to the mother, the father was better educated, more intelligent, better able to provide financial support and a better social and economic environment, had a better command of English, a better appearance and demeanour and was very highly motivated to have custody, the father was awarded custody.

In reversing the decision, Neely J mentions the "terrifying spectre"[38] of loss to the primary caretakers, their inferior financial position and vulnerability in out-of-court settlements, the need for protection, the destruc-

34 *David M* v *Margaret M* supra n8, 918.
35 Ibid, 925-926.
36 Jeff Atkinson, "Criteria for deciding child custody in the trial and appellate courts" (1984) 18 Family Law Quarterly 1.
37 Supra n7.
38 Ibid, 360.

tive nature of court hearings per se and the need for certainty, and he uses these factors to justify his exposition of the primary caretaker presumption.

However, in considering the facts of the case, although he finds that the mother has clearly been the primary caretaker and this is the ratio of the case, he goes on to mention her ". . . love, affection, concern, tolerance, and the willingness to sacrifice . . ."[39] as factors which outweigh the father's advantages. But are these qualities evidenced conclusively by the criteria he sets out for determining the primary caretaker or is a further assumption being made? Is it assumed that caring physically for a child is intrinsically linked with such love, affection, concern, tolerance and willingness to sacrifice? If so, what evidence is there for such an assumption?

Since 1981, there have been more than twenty applications of the primary caretaker presumption reported in West's South Eastern Reporter and it is on these that I will focus in an attempt to examine the presumption in action. Of these cases, only one was an appeal by a father and that was against a custody order not to the mother but to the grandmother of the child.[40] There was one appeal by grandparents against an order made to the mother, in spite of the grandparents being found to be the primary caretakers. However, parental rights were held to prevail even if they were not in the best interests of the child.[41] All the other cases concerned mothers appealing against orders that had been made either to the father (16 cases), to the grandparents (2 cases) or orders for joint custody (2 cases), and the grounds for appeal were either that the primary caretaker presumption had not been applied or had been applied wrongly on the facts (10 cases) or that the findings of fitness were wrong (10 cases).

It would seem from the cases that, although Neely J's guidelines and criteria are, he aims, clear and specific enough to allow lower courts to come to quick, conclusive decisions, dispensing with the need for prolonged litigation, even by the end of 1989 the process was still not working entirely successfully. The rule may be clear, but the problems in its application indicate that the reasons for it are not being remedied. If the system was to make custody more available to the primary caretaker then why did the majority of reported appeal cases show lower courts still denying her that outcome? If the system was to avoid painful, destructive investigations into the parents' suitability as custodians, why are so many of the cases still being fought on those lines?

A brief description of some of the fact situations will illustrate some of the anomalies of the system.

(1) *Mormanis* v *Mormanis*:[42] The mother appealed successfully after custody was denied her on the grounds that she was unfit as she smoked marijuana in the presence of the children. The appeal turned on the fact that there was no proof that the children were in fact present.

39 Supra n7, 364.
40 *Hatfield* v *Hatfield* 300 SE 2d 104 (1983).
41 *Pitsenberger* v *Nuzum* 303 SE 2d 255 (1983).
42 296 SE 2d 680 (1982).

(2) *Hatfield* v *Hatfield*:[43] The father appealed successfully against a custody order to the maternal grandmother who was found to be the primary caretaker. He was held to have a natural right to custody unless found unfit and so won custody although it was understood that the caregiver would continue to be the grandmother.[44]

(3) *Pitsenberger* v *Nuzum*:[45] The primary caretaker grandparents unsuccessfully appealed against a decision to award custody to the mother who had taken no interest in the child during its first two and a half years. Here it was acknowledged that the decision may not have been in the child's best interests, but unless she was unfit, the natural parent had a right to the custody of the child.

(4) *Gibson* v *Gibson*:[46] The trial judge had been unable to determine who was the primary caretaker and on a best interests standard awarded custody to the father. However, on appeal the mother showed she was the primary caretaker on the evidence of friends and family that although both parents worked, she performed the majority of the child-rearing functions, including most of the cooking, washing and ironing, and taking care of the children; that she sometimes employed a babysitter even while the father was at home; and that when both parents were home she performed the care functions. So the decision was reversed.

(5) *J E I* v *L M I*:[47] The mother appealed a decision giving custody to the father on the grounds that she had been prevented temporarily from being the primary caretaker at the time of the first hearing because of mental illness — a situation beyond her control. The Court recommended that in such situations, temporary custody should be given to the current caretaker but that a full "best interests" hearing would be appropriate later.

(6) *Allen* v *Allen*:[48] The mother appealed against a finding that, although she was indisputably the primary caretaker, she was unfit because of past drug and criminal problems. The Court allowed her appeal, holding that fitness was at the time of the hearing and that she was now reformed. However, Neely J's dissenting judgment is confusing in that it seems to be indicating that the presumption is not necessarily binding. He makes no mention of fitness but states: "Although I strongly favour our primary-caretaker-parent presumption, I do not read that presumption as providing that mothers will invariably get custody. In the case before us the record obviously discloses that the appellee father, as between the two natural parents, is superior . . . ."[49] If these comments are to be taken seriously Neely J seems to be indicating a double standard. When the superiority of the non-caretaking parent is sufficiently marked he is willing to abandon the presumption and revert to an ability of parents test.

43 Supra n40.
44 Refer to discussion on the differences in the meaning of the concept of custody: infra nn73-75 and accompanying text.
45 Supra n41.
46 304 SE 2d 336 (1983).
47 314 SE 2d 67 (1984).
48 320 SE 2d 112 (1984).
49 Ibid, 118.

(7) Several cases[50] have been appeals by the mothers against custody orders made to the fathers on the grounds that the mothers have been unfit – because of sexual misconduct or adultery, including such claims as allowing the child to see the second husband in only a T shirt and underwear,[51] having bisexual or homosexual friends,[52] or three isolated incidents of sexual activity (while the child was asleep or absent) over a period of two years.[53] In all of these cases the appeals were successful because it was agreed that the behaviour complained about did not, according to the appellate Court, have a detrimental effect on the children.

(8) *T S K* v *K B K*:[54] The mother successfully appealed against a decision giving custody to the father on a finding that he had been the primary caretaker over the previous two years. Psychological reports had indicated that the father may have had more physical care but the mother provided more psychological and emotional support, the children would be better off with her, and one child clearly expressed such a preference. The expert reports, though, and their recommendations could not be the basis for the decision on primary caretaker presumption guidelines and so the appeal decision was justified in terms of a finding of equal care, but the deciding factors being the extra emotional support and child's preference.

These cases illustrate many of the problems associated with a system relying on a rule and fixed criteria. Where there are anomalies – such as grandparents being involved – the rule flounders and its principles are lost in its strict application. The rule is to apply to primary caretaking *parents* only and so the theoretical justifications for a preference for the primary caretaker are abandoned when the primary caretaker is not a parent: parental rights are superimposed. It is difficult to understand how the theory can be disregarded with, say, grandparents, if the overall framework is still held to be the best interests of the child.

Even a clear list of criteria does not seem to be immune from a judge's own values and bias, so that in some cases concerns about moral standards and beliefs about the suitability of one arrangement over another, particularly at lower court level, clearly overrode the strict application of the rule anyway.[55] Or else the elements of the case were manipulated so that they could fit within the requirements of the rule.[56]

But the greatest concern is that once the rule is established, the focus becomes the elements of that rule and perspective is lost on the case as a whole. It would seem incongruous that a rule established on the grounds that it is in the best interests of the child can be persisted with in situa-

50 *Stacy* v *Stacy* 332 SE 2d 260 (1985); *Bickler* v *Bickler* 344 SE 2d 630 (1986); *M S P* v *P E P* 358 SE 2d 442 (1987); *Isaacs* v *Isaacs* 358 SE 2d 833 (1987); *Goetz* v *Carpenter* 367 SE 2d 782 (1988); and *David M* v *Margaret M* supra n8.

51 *Goetz* v *Carpenter* 369 SE 2d 782 (1988).

52 *M S P* v *P E P* supra n50.

53 *David M* v *Margaret M* supra n8.

54 371 SE 2d 362 (1988).

55 Eg *Mormanis* v *Mormanis* supra n43; Neely J's dissenting judgment in *Allen* v *Allen* supra n48; *M S P* v *P E P* supra n50; *David M* v *Margaret M* supra n8.

56 Eg *Allen* v *Allen* supra n48; *T S K* v *K B K* supra n54.

tions where the result is acknowledged clearly not to be in those best interests.[57]

A striking feature in reading the West Virginian cases from a New Zealand perspective is the lack of any sense of the children's presence. The focus of all the cases is on the activities of the parents — the caretaking functions (who arranged the babysitter) or the fitness, which is usually challenged in terms of moral behaviour. Far from removing the courtroom character battle, it would seem to have created the possibility of a very one-sided character assassination of the primary caretaker. The requirement is to find the primary caretaker unfit, so in a situation such as that in *Allen* v *Allen*[58] the investigation was into the mother's past drug and criminal problems and only passing mention was made of the fact that the father also may have had drug experience. While no doubt a judge would allow the fitness of the other parent to be considered before awarding custody, the intention of the presumption is to avoid the courtroom weighing of the merits of the two parents and choosing between them on suitability grounds.

And in all of this the individual child seems to be lost in reported cases — often not even identified in terms of age and sex. Rarely are the child's needs mentioned and certainly never in detail, while the parents' qualities still seem to receive detailed attention at least in areas of physical care activities and moral behaviour.

It is difficult to know whether all the objects Neely J had in mind on the introduction of his ideas have been fully realised, although it would appear that there is still some concern at the effect on the child's best interests. Atkinson[59] claims that "While the identity of the primary caretaker is a very important factor in deciding custody, West Virginia's replacement of one wooden rule with another is not serving the best interests of the children". He believes the consideration of a variety of factors is possible and preferable and that by allowing one factor to supersede all others, the child's needs are obscured.

Bruch[60] appears to favour a primary caretaker presumption yet also states that ". . . only if custody law turns away from its current preoccupation with parents' rights . . . will children's needs be well served". It would be my contention that compared to the present New Zealand situation the West Virginian one is indeed much more preoccupied with parents' rights than children's interests.

There may have been a favourable impact on out-of-court settlements, although if the trends reported earlier by Weitzman and Dixon[61] of a rela-

57 Eg *Pitsenberger* v *Nuzum* supra n41; *Gibson* v *Gibson* supra n46.

58 Supra n48.

59 Supra n36.

60 Carol S Bruch, "And how are the children? The effects of ideology and mediation on child custody law and children's well-being in the United States" (1988) 2 International Journal of Law and the Family 106.

61 Lenore J Weitzman and Ruth B Dixon, "Child custody awards: legal standards and empirical patterns for child custody, support and visitation after divorce" (1979) 12 UC Davis LR 471.

tive lack of impact of changes in custody criteria on actual outcomes are applicable, this may well be minimal. The courts still appear to be a forum for bitter battles focusing on parental behaviour and again if the reported cases are representative the appeal cases seem to indicate that the mothers are still at times disadvantaged at court level and so the advantages of certainty must be weakened in terms of out-of-court bargaining power. The prospect of sexual conduct being used successfully at lower court level and the need for appellate court remedying can hardly be reassuring to the economically weaker, risk-averse caretaker.

There are further problems with the presumption in its American setting too, which neither Neely J, other writers, nor Hall in her report address adequately. For instance, the problems occurring when siblings are involved, as when a couple decide that the primary care of the older children will rest with one parent and that of the younger with the other, then by law the court must split these children according to their primary caretakers. The problems such an estrangement and lack of companionship and support this might cause for the children are not addressed at all.

At no time, either, is the child's response to the caretaker considered – the quality of the relationship as opposed to its mechanics. So if there is a dispute, the child who is emotionally and psychologically close to the secondary caretaker again, by law, must remain in the care of the other parent.

There are problems associated too with the ability of older children (six–fourteen years) to rebut the presumption with their own expressed preference. The test to be applied by the judge in deciding whether or not to allow a child to express his or her preference is one of maturity and intelligence[62] but the courts seem to have some difficulty in establishing standards for this test and applying it consistently. The results, too, can be somewhat disturbing in terms of the best interests of the child. For example, in *S H* v *R L H*[63] a fourteen-year-old girl chose to be with her father because he gave her more freedom so that she could continue her sexually active life with older men, although the Court agreed it would be better for her to be with her mother. In *Busch* v *Busch*[64] the problem arose of changes being required as the child changed his mind about his preference: the dangers of manipulation by a child in an antagonistic situation were highlighted. In *Rose* v *Rose*[65] the judge felt the need to give guidelines to assist the Court in determining whether a child's preference was based on "good reason" and required that aspects not only of intelligence and maturity, but also of strength, clarity and sincerity of the preference, motivation in terms of discipline style of the parents, inducement and logic be considered. The Court then went on to give weight to a ten-year-old boy's preference based on the fact that he did not like his mother's new boyfriend and "what went on" after the situation had been explained to him by his father.

62 *Garska* v *McCoy* supra n7, 363.
63 289 SE 2d 186 (1982).
64 304 SE 2d 683 (1983).
65 340 SE 2d 176 (1985).

The fitness standard is also of some concern in that as long as a parent reaches a minimal objective standard, custody will be his or hers, even though the other parent may be significantly superior in terms of the interests of the child. The child's interests will not be considered at all, nor will the abilities of the other parent.

There appears to be a strong element of reward for sacrifice – possession of the child as compensation for devoting time and effort to him or her. But this may not necessarily be in the best interests of the child at all.

The secondary caretaking parent may well be disadvantaged too in that, even if he or she is willing to adjust their lifestyle so as to meet the full caretaking role, this will not even be considered, as only past performance and not future intentions are relevant under the West Virginian guidelines.

In terms, then, of its value as a concept per se and its application in West Virginia – its birthplace, so to speak – the presumption in favour of the primary caretaker in custody disputes seems to raise many questions and present many problems. Does it really serve the best interests of the child? What specific benefits does it have for the child? Or are they mainly for the adults? Or for the court system? Is the need for certainty such that it justifies a rigid rule? Is it not possible to use expert testimony positively? Is the position of women really strengthened by making it easier for them to retain care of young children? Does a primary caretaker have the same value for the child if he or she is not a natural parent? Does a presumption in fact reduce the need for litigation? How much attention should be given to the children's interests anyway? Or to their preferences?

And so the list goes on.

Even greater problems arise when the possibility of adopting such a concept here in New Zealand is contemplated and it is to the New Zealand setting that our attention will now turn. First the applicability of Neely J's rationale for the presumption will be considered along with the important differences between the family law system and concepts here as opposed to those in the United States. The current climate and values reflected in the custody decisions in New Zealand will be examined along with the likely directions these seem to indicate. It is suggested that focusing on the movement within New Zealand may be much more fruitful ultimately than considering literature and practices from other systems which have developed to counter problems specific to their own jurisdictions.

The Primary Caretaker Presumption in New Zealand

The presumption was developed in the United States in response to particular difficulties seen in family law practice there. To begin with, do the same difficulties occur here in New Zealand?

Neely J believed the presumption would help strengthen the weaker party in her bargaining position in out-of-court settlements. He saw a pattern of men threatening long expensive litigation over custody unless the mother agreed to low maintenance payments or alimony, and so a system promising relative certainty of outcome in custody disputes would negate the power of that threat.

However, I would contend that such a situation is not typical of the New

Zealand setting. To begin with, Family Court litigation for a weaker, economically vulnerable party is not expensive because of the availability of legal aid. Because of the counselling and mediation structure too, although a court battle might be intimidating, a fully informed party would be aware that a court solution would only be the outcome if all other measures had failed to bring about agreement.

The maintenance bargaining threat is also of little relevance to many New Zealand parents who may have limited financial resources in that they may well avail themselves of the Domestic Purposes Benefit in which case maintenance responsibilities are negotiated with the Department of Social Welfare and the level will not directly affect the recipient of the benefit. Those who are not reliant on welfare support are probably stronger and less in need of the protection Neely J felt bound to provide. Again the power of such a threat will be further diminished if the proposed changes related to Child Support payments are instigated. These will involve more direct government control and the collection of maintenance payments by the state directly through taxation payments.[66]

Neely J also believed the presumption was necessary to avoid the destructive process of courtroom battles between embittered parents and the detrimental effect on the children. However, I suspect that these battles will occur anyway if the parents are angry and antagonistic enough and, as the West Virginian experience has shown, the focus of the battles will simply be changed from the comparative merits of the parents to attacks on fitness or battles over primary caretaking criteria. The New Zealand experience too seems to be that, despite the best efforts of any system to provide alternatives such as counselling and mediation, there will be parties who will find some way to continue the battle[67] and a device such as a presumption is not likely to be a strong enough deterrent.

Neely J holds that the broad best interests of the child standard is unwieldy and inefficient in determining custody disputes and more specific guidelines are needed, and Hall, in her report, supports this view.[68] However, the picture Neely J paints of the problems involved in determining the best interests seems somewhat different from that in the New Zealand courtrooms. In spite of the standard being child-centred, it would appear that most litigation was very adult-centred, Neely J seeing it as a battle between two parents to determine which parent would be the most suitable parent. His complaints about the competition between highly paid experts to present the most convincing case for the clients would certainly cause concern.

However, the New Zealand system seems to have avoided this problem largely by its emphasis on the child and the provisions available to ensure that such practices do not occur. There is still some room for parties to call their own expert witnesses according to the court's discretion under

66 See now the Child Support Act 1991 – Ed.

67 Eg the prolonged litigation leading to *K* v *K (No 2)* (1988) 5 NZFLR 283 (also reported as *Fraser* v *Kelly* 3 FRNZ 661) and the 15 or more different actions preceding *Wheeler* v *Wheeler* (1988) 5 NZFLR 380; 4 FRNZ 514.

68 Supra n2, 57-60 and 66-69.

section 28 of the Guardianship Act 1968 and parties can examine matters referred to in reports called for by the court under section 28A(7) of the Act. However, in practice, the reports considered by the court are those commissioned by it independently under sections 29 and 29A: the court has shown itself to be very reluctant to allow parties to introduce their own expert reports, expressing concern that the children be protected from excessive examination and that the reports remain as free as possible from the bias resulting from any loyalty to an employing party.[69]

Perhaps the key element in this area is the provision of a counsel for the child if appropriate. The emphasis in all the proceedings is on the child's needs and it would be a detrimental step to allow rules which would take the attention away from the child and, in his or her so-called best interests, allow the court to focus only on the parents' behaviour. So far, because of the focus on the child, rarely do we have the problem of competing expert testimony vying for recognition and if there does appear to be the danger of the type of adversarial battle of which Neely J is critical, the counsel for the child can provide the apparently neutral, non-partisan viewpoint the court requires to aid it in its determination and to serve to protect the child's interests. Through the legislative provisions[70] the court has a large measure of control of the type of expert testimony used in custody disputes and while there do appear to be dangers at times in the over-zealous reliance on such testimony, there have been numerous instances where it has been of considerable assistance to the court[71] and its complete abandonment in an insistence on lay testimony only as part of a presumption package would seem unwise.

The philosophy of the Family Court system and some of the basic concepts involved would appear to be very different from those giving rise to the primary caretaker presumption in the United States. On reading the American cases one is left with the clear notion that the custody of the children has a very strong possessive value for the parents involved.

However, the Family Court judges in New Zealand seem to go to great lengths to minimise this aspect and, as the later discussion regarding their use of orders other than custody orders will illustrate,[72] they are greatly concerned with moving away from any idea that one party may have "won" possession or rights over the child or gained an advantage over the other party. Many cases[73] stress the shared nature of parenting, regardless of who has custody, and this is reflected in the legal notion of guardianship. In New Zealand the non-custodial parent still has full guardianship rights which entail involvement in the major decisions affecting the child. Their legal status as parent is not diminished.[74] However, in the United States

69 Eg *Mueller* v *Mueller* (1987) 2 FRNZ 619.
70 Guardianship Act 1968, ss29 and 29A.
71 Eg *N* v *N* [1980] 2 NZLR 38; *H* v *H* [1977] NZ Rec Law 316.
72 Post p484.
73 Eg *Makiri* v *Roxburgh* (1988) 4 NZFLR 673, 4 FRNZ 78 and *Cable* v *Cable,* Family Court, Wanganui, 10 May 1989 (FP 083/125/87), Judge Inglis QC.
74 See *F* v *T* (1983) 2 NZFLR FLN-188 (2d) in which Judge Inglis gives a full history and description of the difference between guardianship and custody in New Zealand.

and in the system giving rise to the presumption under review, custody of the child to one parent is equivalent to depriving the other parent of those guardianship rights and duties. Custody really is complete control of the child's life and it really is more of a "winning" and "losing" situation for the parents concerned.

While Hall acknowledges this fundamental difference in her report,[75] the full implications are not realised. Much of Neely J's thinking regarding the need to strengthen the mother's position seems to arise from a concern that she is being deprived of a valuable possession or right she has worked hard for. The whole American emphasis on parents' rights is somewhat foreign to the New Zealand setting and the courts have actively resisted allowing it to be developed here, stressing again their commitment to the child's needs over and above the needs of the parents, expressing sympathy for a parent who may suffer because of a decision and even at times acknowledging the unfairness of it, but remaining firm in their commitment to the child's interests as paramount.[76] The court will also override, if necessary, what may be regarded the "parental right" to contest custody, if it believes it would not be in the best interests of the children to allow this.[77]

New Zealand, then, has a very different base to its family law system and its commitment to a non-adversarial atmosphere, its rejection of possession-like values in its regard for children, and its priority concern for the welfare of the children over any parental rights make the adoption of a device emerging from the American experience most inappropriate at this time.

What Are the New Zealand Directions?

In this section I shall examine briefly the main concepts and directions which seem to be emerging from the New Zealand Family Courts in their recent custody decisions, looking at the reported cases up to 1990 and unreported cases over the last six months. I shall also consider whether these trends are compatible with the directions indicated by Hall in her review of the literature.

(i) The concept of guardianship

As indicated earlier in this paper,[78] the courts in New Zealand have shown a strong commitment to shared parenting responsibilities, to as full as possible involvement of both parents in the upbringing of the child and to the protection of each parent's guardianship rights and responsibilities, regardless of the day-to-day care arrangements. They have gone to great lengths to stress that they are not involved in an adversarial battle with "winners" and "losers" and that custody is not a matter of exclusive possession or complete control of the child.[79] More and more they are refus-

75 Supra n2, 19.
76 Eg *R* v *R* (1988) 5 NZFLR 337.
77 Eg *T* v *M* (1988) 5 NZFLR 252, 3 FRNZ 681.
78 Ante p483.

ing to make the custody orders applied for, but are choosing to make orders under section 13 of the Guardianship Act 1968, as resolutions of disputes between guardians, phrasing their decisions in terms of care arrangements, for instance for term time and holiday time,[80] or in detailed directions regarding the care of the child[81] or in terms of access orders only.[82]

This direction is not considered in Hall's report and yet it seems at present to be the clearest trend in the awards made in line with the philosophy of the family law legislation to work towards conciliation and to avoid destructive conflict and bitterness which may affect the child. Tapp, in her review of the current family law developments,[83] recognises this trend in the recent case law and expresses concern that it requires a strained interpretation of section 13 of the Guardianship Act 1968 and may result in unnecessary uncertainty. However, she acknowledges that legislative change could remedy this uncertainty. The only evidence she refers to which shows any trend towards a primary caretaker presumption in New Zealand is Hall's own report.

(ii) Cultural issues

There is a growing awareness that Maori issues in particular need to be addressed in the resolution of custody disputes involving Maori children. Tapp[84] identifies this area as the other major focus of change and concern in family law at present, but it is of interest that Hall gives it so little attention in her report and there are no indications in her conclusions that this is an area deserving more exploration. It is my belief that here, in particular, a solution such as the primary caretaker presumption would be insensitive and inappropriate. The courts – and particularly Judge Inglis QC – have tried to find solutions in the best interests of the children that acknowledge their cultural needs.[85]

This is proving to be a somewhat difficult area, though, because of the conflict between iwi authority in family matters and the court's paternalistic role and the demand from some sections of the Maori community for legal autonomy and for the less child-centred values of Maori culture. Whatever the future direction here, the imposition of a legalistic presumption based on somewhat materialistic considerations would do no more than highlight, not resolve, any difficulties.

79 "Custody and access orders . . . convey quite erroneously some idea of ownership or possession": *Schuler* v *Bevan,* Family Court, Hawera, 10 May 1990 (FPN 021/65/85), per Judge von Dadelszen, p5.

80 Eg *Makiri* v *Roxburgh* supra n73; *R* v *R* (1988) 5 NZFLR 337; *B* v *P* (1988) 5 NZFLR 462.

81 Eg *Christie* v *Christie* (1988) 5 NZFLR 353; *Marshall* v *Marshall,* Family Court, New Plymouth, 4 April 1990 (FP 043 303 89), Judge Inglis QC.

82 Eg *Windfuhr* v *Lewis* [1990] NZFLR 264.

83 P F Tapp, "Family Law" [1990] NZ Recent Law Review 104.

84 Ibid, 104-108.

85 Eg *Rikihana* v *Parsons* (1986) 4 NZFLR 289; *Brooks* v *Brooks* (1987) 2 FRNZ 338; *Makiri* v *Roxburgh* supra n73; *Whittle* v *Fagavao* [1990] NZFLR 305.

(iii) Stability, security and continuity

At first sight, the courts' concern with providing stability and continuity of care as being in the best interests of the child would appear to accord with a primary caretaker presumption. However, this concern is reflected not in a trend towards determining who was the primary caretaker before the separation of the parties (as is the case in West Virginia), but in looking closely at just how the *present* care arrangements are working. The courts are reluctant to make any changes which would put the child at risk. If the present arrangement seems to be working for the child's benefit, the risk involved in changing would not be worth testing.[86] The courts have consistently favoured not meddling with the present care arrangements unless there is very good reason to do so.

Another characteristic of New Zealand custody applications, which seems to differ from the American cases referred to, is that in New Zealand there has been a marked increase in the number of applications made for court assistance a considerable length of time after the actual separation of the parties. For instance, of the reported cases, before 1980 only eight (less than half the total number) involved relationships which had ended more than a year before the court hearing, while the figure increased to thirty-six (almost two-thirds of the total number) between 1980 and 1989, fourteen of these cases involving applications between four and ten years after separation. In such cases, reference to present care arrangements would seem much more relevant than a consideration of the division of caretaking functions while the couple were operating as a family unit.[87]

(iv) Reducing conflict — trying to keep everyone happy

There has been a notable trend in the court reports of a sometimes extraordinary effort on the part of the judges not to upset either of the parties and to reassure them that no one has "lost", each is still a worthy parent, neither is really being favoured over the other.[88] Unfortunately, one possible disadvantage of such an approach, together with the reluctance to grant custody orders mentioned above, is that it avoids confronting directly the task before the court — to resolve a conflict. The result can sometimes be prolonged conflict and a reluctance on the part of the parties to accept as final the outcome of the court proceedings.

In the interests of the child, it might be argued that clearer, more direct resolutions may be preferable in some situations, although I do not believe a presumption is needed to achieve this. There are already signs that some judges are prepared to act decisively to protect the children from ex-

86 Eg *A* v *A* [1978] 1 NZLR 278; *Franklin* v *Franklin* (1988) 4 FRNZ 466; *Makiri* v *Roxburgh* supra n73.

87 In West Virginia it is likely that such cases would be considered in terms of the best interests of the child, if they were regarded as arising from a change of circumstances. If this involves such a high proportion of the cases coming before the courts, then the importance of the presumption would be of questionable practical use anyway.

88 Eg *Emmens* v *Emmens,* High Court, Timaru, 20 April 1990 (AP No 72/89), Tipping J.

posure to destructive legal battles if necessary in their use of devices such as a stay of proceedings.[89]

(v) The emphasis on the child: the welfare of the child is paramount rather than parental attributes or behaviour

Throughout the judgments a consistent pattern can be seen of focusing on the child first of all. The reader knows the child well, usually by name, character, history and apparent needs, unlike the West Virginian judgments when one is often unsure of the very basic details about the children involved. Consistent with the legislation,[90] the courts stress over and over again that their decisions must accord with what is first and foremost in the best interests of the child. This emphasis is reflected in the way the courts have dealt with some of the issues arising in the claims of the parties before them, and while the decisions may well be influenced by many extraneous factors, the judges do seem to make a genuine effort to at least justify them in child-centred terms.

When parental behaviour is considered it is only within the framework of how that will affect the child, rather than in isolated judgmental terms. This approach is revealed in a number of ways:

(a) The most suitable parent

There is an effort to relate the suitability of the parent to the needs of the specific child, rather than to choose a parent on unrelated parenting skills. The focus is usually on the quality of the relationship between the parent and the child and while bonding, primary caretaking functions and aspects such as the need for contact with the psychological parent may well be considered, they are generally considered as one aspect of a whole picture.[91] Many different aspects are considered under this head, even things such as whether one parent will portray the other parent more favourably to the child than the other.[92]

(b) Sexual promiscuity

Decisions will be affected by the sexual or moral behaviour of the parties if it is seen to affect the children's interests,[93] but it is not often the decisive factor.

(c) Sexual orientation

Again it is in terms of the effect on the children that this aspect, at least on the surface, is considered and the degree of risk to which the child may be exposed.[94]

(d) Sexual abuse

The test developed by the courts in regard to sexual abuse is that

89 Eg *T* v *M* (1988) 5 NZFLR 252, 3 FRNZ 681.

90 Guardianship Act 1968, s23.

91 Eg *Keane* v *Keane* (1986) 3 FRNZ 22; *B* v *B* [1978] 1 NZLR 285; *Marshall* v *Marshall* supra n81; *Whittle* v *Fagavao* supra n85.

92 Eg *C* v *C* (1982) 2 NZFLR FLN-14 (2d); *Kemp* v *Kemp,* Family Court, North Shore, 5 June 1990 (FP No 207/89), Judge MacCormick.

93 Eg *A* v *A* (1983) 1 NZFLR FLN-161 (2nd).

94 Eg *G* v *G* (1981) 1 NZFLR FLN 76,

if allegations and evidence result in the court finding that the child is likely to be exposed to an unacceptable risk, it will protect the child accordingly.[95] Again the test is child-centred.

(e) Antagonism between the parties

Particularly if this is reflected in excessive litigation with prolonged and destructive effects on the children, as mentioned earlier, the courts will intervene.[96]

(f) Effects of risk from parental behaviour

In cases where the court believes the risks are extreme, it has shown itself willing to override parental rights and make the child a ward of the court.[97] Parental rights will even be overridden in far less extreme situations, where it is felt that the children's interests would be best served by their being with someone other than the parent, although guardianship rights are more difficult to remove.[98]

These considerations, which are used within the framework of custody disputes, have been selected in order to illustrate that in New Zealand a wide range of aspects are considered in making determinations, whereas in the cases considered in West Virginia the focus was very much on the parental behaviour alone within very strict guidelines.

I contend that the more varied approach is better suited to serving the interests of the children and that it should continue to be the primary guideline in family law dispute resolution. It allows the court to focus on the needs of the particular children and to weigh up the factors most appropriate in each case. There may still be bias and prolonged hearings, and the dangers of a wide discretion cannot be ignored. But it is believed that, given the philosophy and the full machinery of the New Zealand system, hearings are more likely to result in a child-centred, case specific solution most appropriate to the particular circumstances. The result may well be that the primary caretaker retains care of the child in the vast majority of cases, but it is likely that the actual process of focusing on the child in resolving the dispute may be helpful in reducing the opportunities for inter-party antagonism and in promoting cooperation.

No family law system is likely to remove the antagonism inherent in its disputes or to reduce significantly the need for some parties to pursue court action. It is only a small proportion of cases which result in litigation anyway, and it would seem that no imposed presumptions or rulings will deter some parties from exposing their children to the effects of prolonged conflict.[99]

There have been rules of thumb in the past and guidelines such as the mother principle, father principle, siblings principle, conduct of the par-

95 *Molloy* v *Molloy,* Family Court, Nelson, 27 April 1989 (FP 042/129/86), Judge Mahony.
96 Supra n89; *K* v *K* and *Wheeler* v *Wheeler* supra n67.
97 Eg *K* v *K* and *Wheeler* v *Wheeler* supra n67.
98 Eg *F* v *T* (1984) 2 NZFLR FLN-188 (2d); *H* v *O* (1984) 1 FRNZ 525.
99 See cases referred to in n86.

ties and preference of the children.[100] However, none of these has been successful in removing the need for litigation or in providing perfect solutions for difficult situations. It is unlikely that a simple rule of thumb will succeed where mediation, counselling and all the best efforts of the system have failed to bring about an acceptable solution.

As a final illustration, the facts of four of the most recent cases will be examined and the likely outcomes under a presumption in favour of the primary caretaker will be calculated and compared with the actual outcomes of the cases.

"What if?" in the Recent Cases

(i) *Sutcliffe* v *Sutcliffe*[101]

By agreement, the oldest daughter (14) was living with the father and the 13-year-old boy lived with the mother. The dispute was about the 9-year-old son, who had lived with the mother until the beginning of 1990 but was now with the father. The parties attended counselling and a counsel for the child was appointed and reported to the court. Without going into the details of the events leading to the change in arrangements, the Court accepted the recommendations of the child's counsel and the outcomes of the counselling and made orders under section 13 of the Guardianship Act 1968 to allow the boy to remain with his father. Judge Inglis QC said: "It appears to me that Mr Olphert, in his report, has successfully adopted a stance which fully recognises Puna's needs and welfare and which does not suffer from the partisan positions which have been taken up by the parents in what appears from the Court documents."[102]

If, however, the setting had been West Virginia, the procedures would have been quite different. Under the presumption in favour of the primary caretaker, initial custody would have allowed a grant probably in favour of the mother (no specific details are given on caretaking responsibilities) on proof of her role concerning her son. The father might have challenged her fitness and this may well have resulted in a much more acrimonious hearing.

However, in a case such as this where an existing arrangement is being changed, the applying party might have been able to have had a "best interests of the child" hearing but only on proof of a change of circumstances which materially affects the child.[103] The West Virginian experience would indicate that in establishing this threshold requirement many of the cases become forums for accusations against one party by the other regarding

100 See Mark Henaghan, "Child-Custody Adjudication: a study of the standards and procedures used to resolve custody disputes", LLB(Hons) thesis (November 1978) University of Otago.

101 Family Court, New Plymouth, 28 March 1990 (FPN 043/70/90), Judge Inglis QC.

102 Ibid, p2.

103 *Waller* v *Waller* 272 SE 2d 671 (1980).

either moral or sexual standards,[104] or their parenting ability.[105] The focus is on the parents' behaviour again before any consideration can be given to the child's interests.

(ii) *Whittle* v *Fagavao*[106]

This case involved an application by the father of a three and a half year old boy for custody. He had never lived with the mother nor cared for the child, but under the existing West Virginian system he would have been granted custody because of his natural rights as a parent: these rights would have overridden the claim of primary caretaker, who here was a foster parent/friend of the mother who had cared for the child from birth. The main concern of the New Zealand Court was to consider neither parental rights nor caretaking functions, but rather to look to the psychological bonding of the child with the foster parent and the detrimental effects of disturbing this. Judge O'Donovan said: "A decision about custody involves a weighing up of all sorts of factors with a view to arriving, if possible, at a solution which is seen to be that which is best suited to the present and future needs of the child . . . . [A]t the end of the day . . . 'the bottom line is Ricky'."[107]

A West Virginian decision implementing an exclusive custody concept would have resulted in the custodian having full control of all decisions regarding the child, whereas the New Zealand system, while granting custody to one party, allows the natural parents to retain full guardianship rights with, as here, the possibility for continued involvement and perhaps a later change in arrangements.

(iii) *Marshall* v *Marshall*[108]

The need for a secure home base was the main reason given for allowing two boys aged six and three to live with their father while the mother retained the physical care of an eleven-year-old boy.

A similar outcome may have been possible in a primary caretaker structure, but the hearing, rather than focusing on the children's needs, would have taken a very different route. The mother would have been entitled to initial custody on the presumption rule, but then the father could have challenged this on unfitness grounds. The fact that she did not use seat belts in the car and allowed the boys to go boating without life jackets may have been the basis for a claim that she did not protect them adequately from harm. This, however, would also have applied equally to the eldest boy and so a further consideration of his wishes would have been needed to counter such a rebuttal.

There certainly would not have been the necessity for the judge's visit to the boys' home (and his meeting with the family dog!), the long and

104 Eg *Porter* v *Porter* 298 SE 2d 130 (1983).
105 Eg *Thomas* v *Thomas* 327 SE 2d 149 (1985).
106 [1990] NZFLR 305.
107 Ibid, 309.
108 Supra n81.

full consideration of the characteristics of the children and of the parties, the concern with the dynamics of the family relationships and the positive attributes, as well as the limitations of each parent. The hearing may well have been shorter and more decisive, but the question would have to be whether it achieved a more satisfactory long term outcome and left the parties more or less willing to cooperate in the care of the children.

(iv) *Kidd* v *Kidd*[109]

The father was granted custody of two children aged fifteen and ten, although the mother had been the primary caretaker throughout their lives. Again the focus was clearly on the children's interests and their need for a secure home base. A more exclusive control concept was seen as desirable because of the conflicting parenting styles and the effect on the children, Judge Inglis commenting that ". . . it is of particular importance for the children . . . to have the security of knowing which parent is in charge of them and which parent has the principal responsibility for their upbringing and activities".[110]

Much attention was given to parenting styles and abilities and to the mother's conduct in leaving the marriage, but the focus is on the consequences of these aspects for the children, and the hearing tries to avoid turning into merely an adversarial attack on the mother.

Such an attack may have been the result of an unfitness challenge under a primary caretaker presumption system, or the children themselves may have been asked to rebut the presumption with their preferences. However, one cannot help wondering whether this route would not have jeopardised even further any hope of cooperation between the parents over the children and increased the animosity already seen to be placing the children at risk.

Conclusion

These cases have illustrated that it would be possible in most cases to reach similar decisions using a primary caretaker presumption, but the advantages, apart from perhaps shortening proceedings, are difficult to perceive in the New Zealand setting and the directions that such a system would lead in would, in my opinion, be detrimental.

The establishment of a strict rule-based system poses problems where the facts do not fit comfortably with the model, as when the dispute involves parties other than parents. The rationale behind the rule is abrogated by a rigid need to follow the rule and so the welfare of the child is denied.

In a family law system which aims above all at reconciliation and conciliation[111] a procedure encouraging direct challenges by one party to the fitness of the other, rather than a neutral assessment by the court or by a child-centred advocate, would seem of doubtful value.

109 Family Court Hastings, 31 May 1990 (FP 021/128/89), Judge Inglis QC.
110 Ibid, p25.
111 Family Proceedings Act 1980, s8.

A further concern with the presumption structure is with the responsibility it may place on the children in allowing them the power to rebut the presumption with an expression of their preferences. Courts have long recognised the dangers of asking children directly to choose between their parents, the problems involved in terms of feelings of loyalty, the implications of rejection and blame and the possibilities of manipulation and pressure from the parents on the children to make the "right" choice.

There may well be difficulties in a system with a broad, ill-defined base such as the concept of the welfare of the child: it may be open to the influence of the judges' own values; it may leave parents unsure of the likely outcomes of disputes; it may involve the need for reports and full investigations that are time-consuming and painful. However, its flexibility and the comprehensive structure supporting it involving negotiation, mediation, counselling, counsel for the child and the wide powers of the court to direct and gather information on the child's needs are strengths that are worth protecting and might well be under threat if a decision were made to move towards a more certain, rule-based system.

Is this really where we want New Zealand family law to go?

A pre-publication copy of the above article was sent to the Department of Justice. Georgie Hall, author of the report discussed in the article, has conveyed to the Editors this reply.

REPLY TO JUDY FERGUSON

My literature review on custody and access, *The Welfare of the Child,* concluded that there was no evidence to show that any one form of custody (eg joint custody, sole maternal custody, sole paternal custody) was superior to any other with regard to the adjustment of the children. Another conclusion was that, because joint custody could not be presumed to be in the best interests of children, it should not be imposed when one or both parents did not desire it. I also concluded that serious levels of conflict between parents in custody disputes were bad for children and should be minimised wherever possible. With this in mind, I suggested that some kind of positive guideline for deciding custody disputes might prove to be of value in New Zealand. I concluded finally that more information should be sought on the primary caretaker principle, which could be used to develop a set of positive guidelines.

The publication of Judy Ferguson's paper shows that my review has to some extent achieved its main purpose — to generate public discussion and debate on the subject of custody and access. It seems to me, though, that readers could easily get the impression from Ferguson's paper that the greater part of my review was devoted to the primary caretaker principle, and that I was advocating its introduction in New Zealand. In fact, discussion of the primary caretaker principle took up only a small part of my review, which concluded only that it was worthy of consideration. Although the word limit imposed on this reply precludes my addressing a number of issues arising from Ferguson's paper, there are some additional points which I feel it is important to make.

From the first page of Ferguson's paper, readers may infer that I considered the primary caretaker principle to be a type of custody arrangement, and then, despite having compared it with other types of arrangement and finding it not to be superior, continued to favour it. In fact, it is not a type of custody arrangement; it is a guiding principle applied when determining custody arrangements, and can lead to sole maternal, sole paternal, split, non-parental and even joint custody. It would not have been appropriate to compare it with types of custody arrangements and I did not do so.

I concluded in my literature review that there was no evidence to show that imposing joint custody on an unwilling parent promoted conciliation or lessened conflict between the parents. I understand, though, that some New Zealand Family Court Judges are making orders for joint custody under s.13 of the Guardianship Act 1968, and that some of these may be against the wishes of one parent. Ferguson asserts, however, without any supporting evidence, that s.13 orders seems to be "the clearest trend in the awards made in line with the philosophy of the family law legislation to work towards conciliation and to avoid destructive conflict and bitterness". In view of my findings, this assumption would appear to lack justification.

There appears to me to be a rather contradictory element running through Ferguson's paper, relating particularly to the issue of parents' rights. She argues that parents' rights are a prominent issue in US custody disputes, but that they are not, and should not be, in New Zealand. However, on more than one occasion, Ferguson applauds the fact that in this country we appear to be moving away from concepts such as "winning" and "losing" in custody disputes, and at the same time we have a strong commitment to the protection of guardianship rights of each parent. Sensitivity to parents' feelings of loss and protecting their rights can only be described as parents' rights issues.

In addition to saying that West Virginia is much more preoccupied with parents' rights than New Zealand, Ferguson also argues that it has a very different base and philosophy to its family law system. In fact, the standard in most US jurisdictions is "best interests of the child", similar to New Zealand's "welfare of the child".

The US cases Ferguson cites in support of her arguments are all reported appeal cases, yet Ferguson treats them as if they were representative of decisions involving the primary caretaker principle. In fact, cases which go to appeal are, by definition, not representative of all cases. The data she uses, therefore, are inadequate for her purposes. In addition, though, the conclusions that Ferguson draws from her US cases do not appear to be correct. Because of the inadequacy of the data, however, it is not appropriate to discuss these cases any further.

The New Zealand cases that Ferguson described in support of her thesis also present a problem. In three of the four cases, the primary caretaker lost custody. Ferguson rightly points out in her conclusion that similar decisions might have been made using the primary caretaker principle (if, for example, the primary caretaker's fitness had been successfully challenged and/or if the child's preference was to live with the secondary caretaker). This, however, proves nothing. It has never been suggested that the primary caretaker principle will always or inevitably result in the primary caretaker being given custody. If Ferguson wishes to argue that the primary caretaker principle is inappropriate for New Zealand, she needs to present evidence that, in a substantial number of New Zealand cases, final custody is not given to the primary caretaker in circumstances where the application of the primary caretaker principle would have resulted in unnecessary problems for the children involved in these cases. It would be interesting to know on what basis the four cases discussed by Ferguson were selected for analysis and how representative they are of current custody decisions.

Ferguson frequently portrays the primary caretaker principle in an unnecessarily unflattering light. She says, for example, that the child's response to the caretaker is never considered when in fact the preference of children aged 6-14 is taken into account and those over 14 can choose. (Yet Ferguson also worries elsewhere in her paper about the wisdom of allowing children to express their preference.) Ferguson suggests that the primary caretaker principle was introduced in West Virginia as a way of ensuring the continuance of maternal custody, and she appears to take seriously the suggestion that it is a way of keeping women subservient. (This is some-

what unlikely since it can only be imposed in the event of a custody *dispute,* where both parents want custody; custody is not imposed on unwilling mothers! And few, I think, would accept that caring for children is in itself a "subservient" role.) My response to all of these assertions is that, as I understand the situation, the primary caretaker principle is based on the presumption that the *child's best interests* will be served by being in the custody of the primary caretaker.

It seems to me that Ferguson argues at times against a very rigid and culture-specific interpretation of the primary caretaker principle. If the concept were ever to be introduced in New Zealand, there is no reason why it would have to be transplanted without modification. It would, of course, need to be adapted to take account of certain important New Zealand "givens", such as the guardianship rights of non-custodial parents and non-partisan expert testimony.

To conclude, in my literature review I suggested that the primary caretaker principle should be further considered; I did not recommend that it should be immediately adopted. However, it would be regrettable, in my view, if it were to be rejected without adequate evaluation and debate.

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