The State of Child Custody in Minnesota: Why Minnesota Should Enact the Parenting Plan Legislation

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I. INTRODUCTION

When both parents want custody of their children following a divorce, considerable time, energy and money are drained by the custody battle because so much is at stake. The adversarial process polarizes the parties. While Dad may be willing to let Mom have physical placement of the children, Dad refuses to allow Mom to move the children without his consent. While Mom may be willing to let Dad have half-time parenting responsibilities, Mom cannot afford to give up the guideline child support accompanying the sole custody designation. False custody battles arise as Mom and Dad fight for the whole pie in order to get the one piece most important to them. A win/lose, fight-till-the-end battle ensues, tearing families apart in the process. The current court system for resolving custody disputes is a far reach from the “best interests of the child.”

1. See Janet Weinstein, And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System, 52 U. MIAMI L. REV. 79, 83 (1997). Weinstein states that “disputes involving the custody of children . . . tend to be among the most bitterly fought legal battles.” Id. Weinstein concluded that “proceedings which pit children against parents, or place children in the middle of a battle between parents, are antithetical to the best interests of those children.” Id. at 85. See also IRA MARK ELLMAN, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 4 (Tentative Draft No. 3, Part I, Mar. 20, 1998) (stating that current law treats custody decisions as “fixed event[s] at which the court . . . decides who has a ‘right’ to the child”). The Tentative Draft was the American Law Institute’s (“ALI”) first project on family law and was approved at the American Law Institute’s Seventy-fifth Annual Meeting in May 1998. See The ALI Reporter (last modified Jan. 27, 1999) <http://www.ali.org/ali/reporter.htm>. The Tentative Draft will next be prepared as a Proposed Final Draft. See id.

2. See MINN. STAT. § 518.551, subd. 5(b) (1998). The statute lists guidelines for payment of child support based upon a percentage (from 16–50%) of the obligor’s net monthly income and the number of children. See id. A parent with sole custody is entitled to receive child support from the non-custodial parent in the guideline amount. See id. § 518.551, subd. 5.

3. Interview with Andy Dawkins, Dist. 65A Rep., Minn. House of Representatives, St. Paul, Minn. (Sept. 3, 1998). Dawkins described the “false custody battle” scenario as one that typically occurs in contested, litigated divorces. See also ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 52 (1992). Divorce bargaining is considered a zero-sum game, which necessarily becomes competitive because any benefit to one spouse must come at the other’s expense. See id. at 53. Maccoby and Mnookin believe that rather than resorting to competitiveness, parents can achieve “win-win” outcomes by making the pie larger so that both parents share in the gains and receive larger slices. See id.

4. See id. In addition, lawyers are obligated by the Code of Professional Responsibility to advocate zealously for their clients. See MINN. RULES OF PROFESSIONAL CONDUCT 3.2 (1998) (stating that a lawyer must make reasonable efforts to expedite litigation consistent with the interests of his or her client).

5. See Weinstein, supra note 1, at 82. Weinstein observed, “For many reasons, the adversarial system . . . may be contrary to a determination of the best interests of the child.” Id.
A bill introduced in the Minnesota House of Representatives on January 26, 1998 proposed creating the rebuttable presumption that divorcing parents have equal rights and responsibilities in raising their children. Rather than placing the burden on the court to decide which parent will have custody and which parent will merely be allowed visitation, the bill recommends that divorcing parents cooperate in drafting parenting plans to detail the division of daily duties and responsibilities for taking care of the children. The use of parenting plans would encourage the ongoing and continued involvement of both parents in the children's lives after a divorce.

Part II of this article will trace the development of child custody law, from the historical perspective of the English common law to the "tender years" doctrine, the "best interests of the child," and the "primary caretaker" standards. Part III discusses the current statistics and types of custody and explains the benefits of joint custody, or shared parenting. Part IV explains the concept of the parenting plan and discusses the legislation and its status in the Minnesota legislature. The article concludes with an examination of the different factions opposing the legislation and addresses the arguments, attempting to persuade the opposition that the parenting plan legislation should become the law in Minnesota.

6. See H.F. 2784, 80th Legis. Sess. (Minn. 1998); see also House Bill Status Document Display, Bill Name: HF2784 (visited Oct. 16, 1999) <http://www.revisor.leg.state.mn.us/cgi-bin/getstatus.pl>. H.F. 2784 is referred to in this article as the "parenting plan legislation" or the "parenting plan bill."

7. See id.

8. See ELLMAN, supra note 1, § 2.06. The ALI strongly favors using parenting plans in custodial decision making rather than following pre-established statutory rules. See id. See also MARY R. CATHCART & ROBERT E. ROBLES, PARENTING OUR CHILDREN: IN THE BEST INTEREST OF THE NATION 21 (Report of the U.S. Commission on Child and Family Welfare 1996) (emphasizing that parents who move away from adversarial court processes and toward reaching their own agreements about their children's care will have a better future relationship with their children).

9. See MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS 61 (1994) (discussing the tendency of courts in the nineteenth century to award infants to their mothers, a trend which became known as the "Tender Years Doctrine"); see also State ex rel. McDonough v. O'Malley, 78 Minn. 163, 164, 80 N.W. 1133, 1134 (1899) ("[T]he interests of the children, in view of their tender years, [would] be best served by leaving them... in the care and control of their mother.") (emphasis added). 10. See MINN. STAT. § 518.17, subd. 1 (1998) (listing the 13 relevant factors that courts must consider in determining the best interests of the child).

11. See Pikula v. Pikula, 374 N.W.2d 705, 713 (Minn. 1985) (adopting the rule that custody should be awarded to the parent who has been the primary caretaker of the children in the past, unless that parent is unfit).

12. See discussion infra Part II.

13. See discussion infra Part III.

14. See discussion infra Part IV.

15. See discussion infra Part V.
summary, the article will argue that the parenting plan legislation is the next progressive step in the evolution of custody law in Minnesota and should become the law. The parenting plan concept will encourage parents to put aside old hostilities and cooperate for the best interests of their children.

II. DEVELOPMENT OF CHILD CUSTODY LAW

A. Historical Perspective

English common law traditionally regarded children as the father's property. The father had a duty to provide for the children's protection, maintenance and education, and in return "he was entitled to their custody, including their services and earnings." In cases of divorce, mothers were not even granted visitation rights, because wives were also considered to be the property of the husband.

Custody laws in the United States have evolved considerably from the property concepts of the English common law. At the beginning of the nineteenth century, men still had complete control over the family based on the agricultural-based economy. The family was the primary economic unit, the principal form of wealth was property, and men had absolute rights over their wives and children. When parents separated and disagreed about living arrangements for the children, only the father's interest was entitled to legal protection.

The social and economic upheavals of the nineteenth century changed family dynamics in the United States. What had been a rural society was changed by industrialization into an urban society, separating
home from work, and property ownership was no longer as important in determining family wealth. Fathers worked in factories and shops, and mothers stayed at home to care for the children. Fathers began to lose control over their families’ daily activities and the lives of their children.

New laws emerged with the women’s rights movement of the early twentieth century, granting women political power and the right to own (rather than be) property. Courts began to recognize that mothers had equal rights in their children. Courts increasingly recognized the importance of maternal care and decreased their preference for paternal custody, so that mothers became the favored parent in custody disputes.

The concern with child development grew throughout the nineteenth century and society began to recognize that children had rights independent of their parents. Judges began to regard the child’s needs as the most important consideration in awarding custody. The “best interests of the child” test emerged as a general approach to custody decisions. The beginning of the best interests test was credited to the 1881 Kansas case of *Chapsky v. Wood*, where custody of a five-year-old girl was awarded to the grandmother who raised her, rather than to the child’s father. The best interests standard became the cornerstone of most state custody statutes. Later case law and statutes included specific best interest factors for courts to consider in granting custody.

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25. See Erickson & Babcock, *supra* note 20, at 34.
27. See Erickson & Babcock, *supra* note 20, at 34.
31. See *id.* at 13-12.
32. See *id.*
33. See *id.*
34. 26 Kan. 650 (1881).
35. See *id.* at 652 (holding that a parent’s right to custody of a child will not be enforced where it would destroy the happiness and well-being of the child).
By the end of the nineteenth century, courts in most jurisdictions adopted a new parental preference based on the best interests of the child—i.e., the presumption that young children should be placed with their mothers. Under this presumption, commonly called the “tender years doctrine,” all custody disputes began with the presumption that maternal custody was best for the child. If the father failed to meet his burden of disproving the presumption, the mother was awarded custody. The presumption in favor of maternal custody included both a policy presumption against separating a child from the primary caregiving parent and a factual presumption that the primary caregiving parent was the mother. Where both parents were considered fit and the mother had been the primary caregiver, the maternal presumption placed custody of the child with the mother because she had the primary responsibility for caregiving before the divorce. The tender years doctrine provided a standard for courts to follow and decreased the need for trial court discretion.

With the equal rights movement and no-fault divorce laws of the 1960s, the tender years doctrine began to be seen as unfair, and the maternal presumption was challenged as violating due process and equal protection under the Fourteenth Amendment of the United States Constitution. Most states abolished the tender years doctrine by 1970 and determined that custody decisions should not favor either parent.

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39. See Klaff, supra note 22, at 335. See also Larson v. Larson, 176 Minn. 490, 492, 223 N.W. 789, 790 (1929) (holding that a child of tender years should have the care of the mother, and its custody will not be taken from her).

40. See Klaff, supra note 22, at 342.

41. See id.

42. See id. at 343.

43. See id.

44. See Crippen, supra note 38, at 433.


46. See id. at 1377 n.21 (citing Jeff Atkinson, Criteria for Deciding Child Custody in the Trial and Appellate Courts, 18 FAM. L.Q. 1, 13-14 (1984)). See also U.S. CONST. amend. XIV § 1 (Due Process and Equal Protection Clauses).

47. See Crippen, supra note 38, at 433-34; see also Watts v. Watts, 350 N.Y.S.2d 285, 291 (N.Y. Fam. Ct. 1973) (holding that a presumptive preference in favor of maternal custody violated the father’s right to equal protection under the Four-
Uniform Marriage and Divorce Act\(^48\) prescribed best interest factors in 1979.\(^49\) The five best interest factors listed in the Uniform Act are: (1) the wishes of the child’s parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest; (4) the child’s adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved.\(^50\)

The best interests test was criticized for being unpredictable and encouraging litigation, as each parent hired experts to testify as to each other’s faults.\(^51\) The test also set an unreachable goal for the law by asking judges to make an impossible prediction about which future situation was best for the child.\(^52\)

While many state statutes directed that the best interest factors be given equal weight, courts gave the most attention to the child’s need for stability and continuity of relationships and environment.\(^53\) This recognized need for “stability” and “continuity” was attributed to Joseph Goldstein’s influential 1973 book *Beyond the Best Interests of the Child*.\(^54\) The authors stressed that continuity of the child’s relationships was essential for the child’s healthy development, and they advocated the appointment of one custodial parent with sole decision making power over the other parent’s contact with the child.\(^55\) Goldstein believed that when parents are at odds with each other during the divorce process, the child is best protected through continuity of the relationship with one parent.\(^56\) The view that one parent should maintain sole control over the child following


\(49.\) See id.

\(50.\) See id. These five factors are the same as factor numbers 1, 2, 5, 6 and 9 in Minn. Stat. § 518.17 (1998). See discussion infra Part II(B).

\(51.\) See Ellman, supra note 1, at 2.

\(52.\) See id.

\(53.\) See Folberg, supra note 24, at 4.

\(54.\) See Joseph Goldstein et al., Beyond the Best Interests of the Child 32 (1979).

\(55.\) See id. at 31-32, 38.

\(56.\) See Joseph Goldstein, In Whose Best Interest? in Joint Custody and Shared Parenting, 16, 22 (Jay Folberg ed., 1991). Goldstein explained in the 1991 article that his 1973 book *Beyond the Best Interests of the Child* took the controversial position that parents should be entitled to raise their children free of state intervention, and if the state must intrude, the goal of intervention should be to protect the child as quickly as possible. See id. at 18.
divorce discouraged the growth of alternative forms of custody.  

The equal rights movement again influenced family structure and custody decisions in the 1970s and 1980s when women began to pursue professional goals outside the home and fathers participated more fully in the daily care of children. As both parents were actively involved in child-rearing, courts became forced to make custody decisions between two fit parents who each contributed to the continuity and stability of the children.

Today's legal challenge is to facilitate the resolution of disputes between parents who each want a future role in the lives of their children, while minimizing the harm to the children caught in the middle of their conflict.

B. Child Custody Law in Minnesota

The "best interests of the child" standard was introduced in Minnesota with the 1895 case of Flint v. Flint. The statute effective at the time of Flint gave absolute custodial rights to the father, however, Justice William Mitchell declared that the father's absolute right to custody was not beyond the control of the courts. Justice Mitchell stated that "the cardinal principle in such matters is to regard the benefit of the infant paramount to the claims of either parent... the primary object of all courts, at least in America, is to secure the welfare of the child."

The tender years doctrine was upheld during the early twentieth century and Minnesota courts followed the presumption that young children

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57. See Folberg, supra note 24, at 4.
58. See id. at 4-5.
59. See id.
60. See ELLMAN, supra note 1, at 1-7. The conflicts inherent in trying to meet the needs of both parents and children include: (1) predictability vs. individualized decision making (achieving both predictable and individual results in diverse circumstances); (2) finality vs. flexibility (creating both final results and the flexibility to allow for future changes); (3) judicial supervision vs. private ordering (reaching a compromise between the interests of the parents and the best interests of the child); (4) biological vs. de facto parenthood (the rights of adults other than biological parents who care for children, i.e. grandparents); and (5) protection vs. privacy (the state's interest in protecting individuals versus the freedom of families to have their privacy undisturbed). See id.
61. 63 Minn. 187, 65 N.W. 272 (1895).
62. See id. at 189, 65 N.W. at 273.
63. Id. See also State ex rel. Waldron v. Bienek, 155 Minn. 313, 315, 193 N.W. 452, 452 (1923) (holding that the welfare of the child is the all-important consideration in the custody designation); State ex rel. Anderson v. Anderson, 89 Minn. 198, 200-01, 94 N.W. 681, 682 (1903) (stating that the father's absolute right to the care and custody of his children may be denied if the best interests of the child require it).
belonged with their mothers. In *Larson v. Larson*, the Blue Earth County District Court awarded divided custody of a six year old child to the mother residing in Pennsylvania and the father residing in Minnesota; the child was to reside with the father every summer and on alternating holidays and weekends. The Minnesota Supreme Court reversed, granting custody to the mother even though it would result in the child living out of state, hundreds of miles from the father. The court upheld the rule that "[w]here the mother is a fit person to have the custody of the child and is able to properly care for it, . . . a child of tender years should have the care of the mother, and . . . its custody will not be taken from her."

By the 1960s, Minnesota's courts and legislature moved away from the maternal presumption to a gender-neutral best interests of the child standard. In 1969, the Minnesota Legislature added three provisions to the existing child custody statute to make it more gender neutral. The new statute: (1) codified the best interests of the child standard; (2) di-

64. 176 Minn. 490, 223 N.W. 789 (1929).
65. See id.
66. See id. at 492, 223 N.W. at 789 (holding that part time or divided custody of a child six years of age is not desirable).
67. See id. The court stated that "shunting . . . the child back and forth between two different homes and two different home influences . . . is too likely to cause disturbance and contention between the child and one or both of its custodians." Id.
68. Id. at 492, 223 N.W. at 790. See also *State ex rel. Pappenfus v. Kourtz*, 173 Minn. 177, 182-83, 216 N.W. 937, 940 (1927) (reversing award of custody of seven year old child to father and granting custody to mother even though child had been residing with mother's parents and not with mother); *Spratt v. Spratt*, 151 Minn. 458, 464, 187 N.W. 227, 229 (1922) (stating there is "no satisfactory substitute" for a mother's care); *Volkman v. Volkman*, 151 Minn. 78, 80, 185 N.W. 964, 965 (1921) (denying father's request for custody of five and six year old children because "children who are so young are best off if left in the care of their mother"); *Eberhart v. Eberhart*, 149 Minn. 192, 194, 183 N.W. 140, 141 (1921) (holding that where both parties are good parents, the mother's care is the most indispensable to a five year old boy); *State ex rel. Galson v. Galson*, 132 Minn. 467, 468, 156 N.W. 1, 1 (1916) (finding that the care and custody of the child should be awarded to the mother unless she is an unfit person).
69. See *Fish v. Fish*, 280 Minn. 316, 321, 159 N.W.2d 271, 274 (Minn. 1968) (stating that the principle that the custody of young children is ordinarily best vested in the mother is "distinctly subordinate" to the principle that the overriding consideration in custody proceedings is the child's welfare); *Gumphrey v. Gumphrey*, 262 Minn. 515, 518, 115 N.W.2d 353, 356 (1962) (emphasizing that it is well established in Minnesota that the welfare and best interests of the child are paramount in custody decisions).
70. See 1969 Minn. Laws, ch. 1030 (current version at MINN. STAT. § 518.17 (1998)). Prior to the 1969 amendment, the statute provided that "the court may make such further order as it deems just and proper concerning the care, custody, and maintenance of the minor children . . . and may determine with which of the parents they . . . shall remain, having due regard to the age and sex of such children." Id.
rected the courts to consider the child's relationship with each of the parents; and (3) prohibited custody decisions based on gender.\textsuperscript{71} The revised legislation, however, had little effect on the subsequent court decisions.\textsuperscript{72} Less than one week after the new law became effective, the Minnesota Supreme Court issued its opinion in Hansen v. Hansen,\textsuperscript{73} applying the rule that custody of young children should be awarded to their mother unless it would be detrimental to the child's welfare.\textsuperscript{74} The court also applied the maternal presumption two months later in Hanson v. Hanson,\textsuperscript{75} granting the father custody only after the father showed that the mother lacked the love, affection and concern for the children needed to support the maternal presumption.\textsuperscript{76} While appellate courts generally deferred to the trial court in custody cases,\textsuperscript{77} they required that the record clearly show all of the factors were considered.\textsuperscript{78} The court continued to use its own discretion in evaluating the best interest factors,\textsuperscript{79} considering that the new legislation was only a reflection of its prior decisions.\textsuperscript{80}

Minnesota appellate courts began to seek more specific guidance for their child custody decision making,\textsuperscript{81} giving rise in the 1980s to the primary caretaker rule. The primary caretaker preference first emerged in the case of Berndt v. Berndt,\textsuperscript{82} and a parent's role as the child's primary caretaker became the factor most relevant to the best interests of the child.\textsuperscript{83} The primary caretaker is considered to be the parent with the prior history of responsibility for the day-to-day care of the child, and thus

\begin{thebibliography}{99}
\bibitem{note71} See id.
\bibitem{note72} See Ahl, \textit{supra} note 45, at 1350 & n.25.
\bibitem{note73} 284 Minn. 1, 169 N.W.2d 12 (1969).
\bibitem{note74} See id. at 5, 169 N.W.2d at 15.
\bibitem{note75} 284 Minn. 321, 170 N.W.2d 213 (1969).
\bibitem{note76} See id. at 329, 170 N.W.2d at 218; see also Ahl, \textit{supra} note 45, at 1350 n.25.
\bibitem{note77} See Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn. 1988) ("Appellate review of custody determinations is limited to whether the trial court abused its discretion by making findings unsupported by the evidence or by improperly applying the law.").
\bibitem{note78} See Ahl, \textit{supra} note 45, at 1354 n.41. Ahl notes that appellate courts are highly deferential to the trial court's custody decisions and do not require specific findings for each of the best interest factors. See id. (citing Rosenfeld v. Rosenfeld, 311 Minn. 76, 82, 249 N.W.2d 168, 171 (1976)).
\bibitem{note79} See Ahl, \textit{supra} note 45, at 1350.
\bibitem{note80} See Reiland v. Reiland, 290 Minn. 497, 500, 185 N.W.2d 879, 881 (1971) (citing the 1969 amendment to Minnesota Statutes section 518.17 requiring that sex of the parent not be used as the sole basis for determining custody, and stating that the amendment "does no more than express views contained in prior decisions of this court").
\bibitem{note81} See Crippen, \textit{supra} note 38, at 434.
\bibitem{note82} 292 N.W.2d 1, 2 (Minn. 1980) (determining that either parent would be a suitable custodian for the child, but awarding custody to the mother because she had been the primary parent since the child's birth).
\bibitem{note83} See Ahl, \textit{supra} note 45, at 1355.
\end{thebibliography}
the parent who will provide the most stability for the child following a divorce. The *Berndt* court awarded custody of a three year old child to the mother, recognizing that although both parents would have been suitable custodians, the mother's role as the primary parent since the child's birth created an intimate relationship between parent and child which "should not be disrupted without strong reasons."

Minnesota adopted a presumptive rule in favor of the primary caretaker preference with the supreme court's 1985 decision in *Pikula v. Pikula*. The *Pikula* court acknowledged the best interest factors, but reasoned that because four of the nine factors centered on the continuity of care and environment for the child, such continuity is best provided by maintaining the child's relationship with the primary caretaker. The court followed the reasoning of West Virginia, Ohio and Oregon courts in adopting the rule that "when both parents seek custody of a child too young to express a preference, and one parent has been the primary caretaker of the child, custody should be awarded to the primary caretaker absent a showing that that parent is unfit to be the custodian." The court refused to recognize any similarity between the tender years doctrine and the primary caretaker rule, asserting that the primary parent preference was in fact gender neutral. The court believed the new rule would encourage co-parenting and provide clarity in custody decisions, thereby reducing litigation and associated costs.

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84. See *Pikula v. Pikula*, 374 N.W.2d 705, 711 (Minn. 1985); see also *Sefkow v. Sefkow*, 427 N.W.2d 203, 211 (Minn. 1988) (reasoning that stability is paramount to the security, happiness and adaptation of a young child and that the relationship between the child and the primary parent provides that stability).
85. *Berndt*, 292 N.W.2d at 2.
86. *Pikula*, 374 N.W.2d at 712.
87. See *id.* at 711 (citing JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 31-35 (1979)).
88. See *id.*
89. See *Garska v. McCoy*, 278 S.E.2d 357, 361 (W. Va. 1981) (holding that the best interests of the child are best served by awarding custody of the child to the primary caretaker parent). The *Garska* court justified the primary caretaker preference in part on the "Solomon syndrome": "the fact that the parent most attached to the child will be most willing to accept an inferior bargain, and thereby deserves the compensation of the custody presumption." *Id.*
90. See *In re Maxwell*, 456 N.E.2d 1218, 1222 (Ohio Ct. App. 1982) (affirming award of custody to the mother because she provided the primary care for the child during the marriage, although it was determined that both parents were equally fit).
91. See *VanDyke v. VanDyke*, 618 P.2d 465, 467 (Or. Ct. App. 1980) (reversing trial court's award of custody to the father because mother had been the primary caretaker).
92. *Pikula*, 374 N.W.2d at 712.
93. See *id.* at 711-12 n.2.
94. See *id.* at 712-13.
The *Pikula* case listed factors to aid courts in determining which parent was the primary caretaker. The *Pikula* factors list the daily tasks that are typically performed by the parent with the “primary” caretaking responsibility: (1) preparation and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) arranging for medical care; (5) arranging for social interaction with friends after school; (6) arranging babysitting and day-care; (7) putting child to bed at night, attending to child in the middle of the night and waking child in the morning; (8) disciplining, teaching general manners and toilet training; (9) educating, including religious, cultural and social; and (10) teaching elementary skills such as reading, writing and arithmetic.

The court’s purpose in establishing the primary caretaker rule was to “remove the issue of custody from the arena of dispute over such matters, and prevent the custody determination from being used in an abusive way.”

The primary caretaker rule, however, was not effective in simplifying custody decisions. Rather than “remov[ing] the issue of custody from the arena of dispute” as the court hoped, the preference “caused an explosion of litigation in Minnesota.” In 1984, before the *Pikula* decision, the Minnesota Court of Appeals decided nine custody cases, and from 1986 through 1988 the court decided an average of thirty cases per year. An increase in divorce litigation in the trial courts since 1984 was also reported. Because the primary caretaker preference could be reversed by a showing of unfitness, placing the focus on past parenting behavior caused bitter disputes over which parent did the most caretaking.

Commentators have observed that the *Pikula* case “spawned an incredible amount of litigation concerning who changed more diapers, the unfitness of parents and the threshold age at which a child is old enough to express a preference.” In the case of *Novotny v. Novotny*, the parties attacked each other’s character, the father calling his former wife an “immature,

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95. See id. at 713.
96. See id.
97. Id.
98. See Crippen, supra note 38, at 452.
99. *Pikula*, 374 N.W.2d at 713.
100. See Crippen, supra note 38, at 452.
101. See id. at 453.
102. See id. Crippen acknowledged that there is no formal system of record-keeping in Minnesota, and his statistics were based on a Westlaw search of custody cases in the Minnesota Court of Appeals during 1986-1988. See id. at 453 n.103.
103. See id. at 454.
104. See id. at 462 (discussing the evaluation of the character of the caregiver as well as the quality and quantity of care).
self-centered hedonist," \textsuperscript{107} and the mother complaining that the father "[drank] too much and [was] foul-mouthed and slovenly." \textsuperscript{108}

One of the justifications for the \textit{Pikula} rule was that appellate review would be more effective with a defined standard to follow. \textsuperscript{109} However, the subjectiveness of the factors resulted in more, rather than less, trial court discretion and caused inconsistent results. \textsuperscript{110} Because the \textit{Pikula} rule is a rebuttable presumption that can be overcome by showing that the primary parent is unfit, \textsuperscript{111} trial court judges must still make custody decisions based on their own concepts of parental fitness. \textsuperscript{112} Minnesota's narrow standard of appellate review provided little guidance to the trial courts in defining the caretaker preference. \textsuperscript{113} Opponents of the primary caretaker preference also believed that focusing on past parental conduct was actually a renewal of the tender years doctrine and another maternal preference biased against fathers. \textsuperscript{114} The opposition eventually led to a legislative rejection of the preference. \textsuperscript{115} The legislature amended Minnesota Statutes section 518.17 in 1989 to add two best interest factors considering "the child's primary caretaker" and "the intimacy of the relationship between each parent and the child" and stating that "the court may not use one factor to the exclusion of all others." \textsuperscript{116} In 1990, the legislature restated the prohibition against using one factor exclusively and declared that "the primary caretaker factor may not be used as a presumption in determining the best interests of the child." \textsuperscript{117}

Following the legislative amendments, the primary caretaker preference has been largely rejected by Minnesota courts. \textsuperscript{118} The best interest

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\textsuperscript{107} Id. at 258.
\textsuperscript{108} Id.
\textsuperscript{109} See \textit{Pikula}, 374 N.W.2d at 713 ("[W]e have repeatedly stressed the need for effective appellate review of family court decisions in our cases . . . ."); see also \textit{Ahl}, supra note 45, at 1373.
\textsuperscript{110} See \textit{Crippen}, supra note 38, at 486.
\textsuperscript{111} See \textit{Pikula}, 374 N.W.2d at 712 ("[A] showing that [the primary caretaker] parent is unfit to be the custodian will defeat a custody award to that parent.").
\textsuperscript{112} See \textit{Ahl}, supra note 45, at 1375.
\textsuperscript{113} See \textit{Crippen}, supra note 38, at 480.
\textsuperscript{114} See id. at 486.
\textsuperscript{115} See id. at 487.
\textsuperscript{116} 1989 Minn. Laws ch. 248, § 2.
\textsuperscript{117} 1990 Minn. Laws ch. 574, § 13 (codified at \textit{MINN. STAT.}, § 518.17 (1998)).
\textsuperscript{118} See \textit{Maxfield} v. \textit{Maxfield}, 452 N.W.2d 219, 224 (Minn. 1990) (Yetka, J. dissenting). Despite the new legislation, the court temporarily returned to the \textit{Pikula} presumption in \textit{Maxfield}, acknowledging that the primary caretaker status was still one of the relevant best interest factors. See id. A strong dissent by three justices, however, denounced the \textit{Pikula} presumption as an attempt "to get the tender-years doctrine in through the back door so that, once again, it will be the mother who is invariably granted custody of the children unless she is found to be unfit." Id. at 225. More recent Minnesota cases have rejected the primary caretaker preference. See \textit{Hayward} v. \textit{Beagle}, No. CO-97-1545, 1998 WL 51588, at *1 (Minn. Ct. App. Feb.
factors that Minnesota courts must currently consider are: (1) the wishes of the child's parent or parents regarding custody; (2) the reasonable preference of the child (if the child is old enough to express a preference); (3) the child's primary caretaker; (4) the closeness of the relationship between parent and child; (5) the relationship of the child with parents, siblings, and other persons who may affect the child's best interests; (6) the child's adjustment to home, school, and community; (7) the length of time the child has lived in a stable environment and the desirability of maintaining continuity; (8) the permanence of the existing or proposed custodial home as a family unit; (9) the mental and physical health of the individuals involved; (10) the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue raising the child in the child's culture and religion; (11) the child's cultural background; (12) the effect on the child of the actions of an abusive parent; and (13) the likelihood that each parent will encourage and permit frequent and ongoing contact with the other parent.¹¹⁹

Minnesota courts must also consider four additional factors where joint custody is sought: (a) the ability of parents to cooperate in the rearing of their children; (b) methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods; (c) whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing; and (d) whether domestic abuse has occurred between the parties.¹²⁰

The current standard for determining custody is the best interests of the child, with no one factor being preferred to the exclusion of all others.¹²¹

¹⁰, 1998) (stating that although the primary caretaker determination is one of the best interests factors, the legislature removed its presumptive preference in 1989); Anderson-Slama v. Slama, No. C9-98-422, 1998 WL 550771, at *1 (Minn. Ct. App. Sept. 1, 1998) (holding that courts may not use the primary caretaker factor as a proxy for the best interests of the child); Schumm v. Schumm, 510 N.W.2d 13, 14 (Minn. Ct. App. 1993) (recognizing that although the primary caretaker factor is significant, it may not be used as a presumption in determining a child's best interests). ¹¹⁹. See MINN. STAT. § 518.17, subd. 1 (1998).
¹²⁰. See MINN. STAT. § 518.17, subd. 2 (1998).
¹²¹. See Anderson-Slama, 1998 WL 550771, at *1; see also MINN. STAT. § 518.17, subd. 1(a) (1998).
III. THE BENEFITS OF SHARED PARENTING

A. Where We Are: The Statistics

Approximately one million children each year in the United States will experience the divorce of their parents. Currently, more than one-fourth of all children in this country live in a home with only one parent. Over half of all children will live in a home with only one parent sometime during their childhood. The percentage of children living with one parent almost doubled from 1970 to 1993.

Children in single parent families are more likely to be poor than children in two-parent families. Gender-preference rules such as the tender years doctrine and the primary caretaker preference have resulted in few fathers retaining custody of their children, and non-custodial parents often greatly decrease their involvement in their children's lives. Many fathers become less involved with their children after divorce. The non-custodial parent is typically awarded visitation rights on weekends or one day during the week. Because visitation means contact between two antagonistic parties, the friction and difficulty of the encounters may cause fathers to give up trying. They may become apathetic.

122. See Cathcart & Robles, supra note 8, at 12 (reflecting 1990 statistics). The divorce rate decreased slightly from 1980 to 1990, which may either represent a declining trend or a decrease in the marriage rate over the decade. See id. 123. See id. at 11. 124. See id. 125. See id. at 11-12 (changing from 14.7% in 1970 to 28% in 1993). 126. See id. at 15. The poverty of single-parent families is largely caused by the failure of non-custodial parents to pay child support. See id. Children who have contact with the noncustodial parent are more likely to receive child support. See id. 127. See discussion supra Part II; see also Don R. Ash, Bridge Over Troubled Water: Changing the Custody Law in Tennessee, 27 U. MEM. L. REV. 769, 779 (1997) (describing the doctrine's history in Tennessee); Stephanie B. Goldberg, Make Room For Daddy, A.B.A. J., Feb. 1997, at 48 (discussing the father's rights movement). 128. See Ash, supra note 127, at 775. 129. See Jo-Ellen Paradise, Note, The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?, 72 ST. JOHNS'S L. REV. 517, 543 (1998). 130. See id. at 542-43. 131. See id. at 543-45. Paradise cites the inherent difficulties for fathers in a non-custodial role. See id. The conventional family structure that allows a father significant participation in his children's daily lives is lost, and the father's role is reduced to an occasional visitor of his children. See id. at 544. The decreased time spent with the children puts pressure on the father to make the time enjoyable rather than spending it on household chores or homework. See id. at 545. Fathers become "Disneyland Dads" and the relationship loses a sense of normalcy and realism. See id.
and feel that the system is biased against them. The resulting loss of contact with their fathers has a profound effect on children, causing feelings of rejection and grief that linger for years. In addition to the loss of emotional support, children who have no contact with the non-custodial parent are less likely to receive child support. Of fathers without joint custody or visitation, only fifty-six percent nationwide paid all or some of their child support in 1991.

Mothers who are raising children alone often have inadequate financial and emotional support. Even when employed full time, single parent mothers struggle financially and can become overburdened with their responsibilities. Conversely, mothers who place too much emphasis on their careers can be punished for their success by losing custody of their children. In the Florida case of Young v. Hector, an appellate panel of judges granted custody of the children to the father, an often unemployed architect who was actively involved in the lives of the children, while the mother provided the economic support as a trial attorney who routinely worked ten or eleven hours per day. After the court panel initially awarded custody to the father, the appellate court, sitting en banc, awarded custody to the mother. One parent alone cannot meet all the emotional and financial needs of the children, and children of divorced parents require the support of both parents to thrive.

The parental conflict of a divorce, particularly when a custody dispute is involved, can cause the most significant damage to children.

132. See Cathcart & Robles, supra note 8, at 15.
133. See id. See also Richard A. Warshak, Gender Bias in Child Custody Decisions, 34 Fam. & Conciliation Cts. Rev. 396, 407 (1996) ("[C]hildren in conventional mother-custody homes will tell you... that the worst thing about their parents' divorce is the loss of regular contact with their fathers.").
134. See Cathcart & Robles, supra note 8, at 15.
135. See id.
136. See id.
137. See id. at 16.
140. See Ball, supra note 138, at 116.
141. See Young, 1999 WL 492591, at *1.
142. See Cathcart & Robles, supra note 8, at 16.
143. See Ash, supra note 127, at 773-74. A 1991 study showed continued parental conflict was associated with problems in children such as juvenile depression, conduct disorders, sleeping disturbances, and difficulty with communication skills. See id. (citing Janet R. Johnson et al., Ongoing Postdivorce Conflict and Child Disturbance, 15 J. Abnormal Psychol. 493, 502 (1987)).
The authors of a 1991 study found that:

[C]hildren who are the objects of custody disputes face a profoundly painful experience. They live in limbo while lengthy legal battles are waged, and they are faced with complicated conflicts and stresses. Their loyalties are tested. The accuracy of their perceptions is questioned. They may be used as agents to carry messages between parents who will not communicate directly, or to elicit information about one parent for the other. They may be used as witnesses, to substantiate a parent's viewpoint. Children are routinely used as currency in emotional transactions in which their availability to a parent (and that parent's availability to them) is made contingent upon timely receipt of child support.\[144\]

The authors of the study concluded that parents involved in custody litigation must be made aware of the impact of their conflict on their children's lives.\[145\] The U.S. Commission on Child and Family Welfare ("Commission"), in its 1996 report to the President and Congress recommended "[m]oving away from traditional, adversarial court processes" as a solution to resolving the hostility of custody disputes.\[146\] The Commission urged a reshaping of the court processes for resolving custody and visitation arrangements.\[147\] While the current system resolves the legal conflict between the parents, the acrimony lingers.\[148\] The Commission stressed the need to help parents reduce conflict with each other to foster im-

\[144\] Ash, supra note 127, at 774 (citing Richard A. Wolman & Keith Taylor, Psychological Effects of Custody Disputes on Children, 9 BEHAV. SCI. & L. 399, 408 (1991)).
\[145\] See Ash, supra note 127, at 774.
\[146\] CATHCART & ROBLES, supra note 8, at 21.
\[147\] See id.
\[148\] See id. at 18. See also Ronald L. Solove, Confessions of a Judicial Activist, 54 OHIO ST. L.J. 797, 806 (1993). Solove, a domestic relations court judge in Franklin County, Ohio, describes the experience of litigants who have appeared before him in domestic relations court:

The problems that they bring before the courts involve the very core of their emotional being. . . . They want to see the judges and tell their stories. Cases often get continued, and the litigants feel they are being shunted aside. Once their case is resolved . . . sometimes after an arduous, emotionally rending, and expensive trial, they remain unsatisfied because the resolution of their legal dispute does little to resolve the hurt, anger, and emotional anguish they have experienced. . . . They face a future of possible disputes over custody, support, and visitation. Almost universally, they believe it will never end.

Id.
proved relationships between parents and their children. \(^{149}\)

B. Where We Can Go: Joint Custody/Shared Parenting

In the adversarial system, disagreements over the custody of children are left in the hands of judges. \(^{150}\) The court's custody award determines the legal responsibility for, and the living arrangements of, children after divorce. \(^{151}\) This places a tremendous responsibility on the court.

The custody arrangements awarded by courts following a divorce are seldom precise. \(^{152}\) The variety of custody arrangements that courts may award include sole custody, \(^{153}\) split custody, \(^{154}\) divided custody, \(^{155}\) joint legal custody, \(^{156}\) and joint physical custody. \(^{157}\) There is a lack of standard definitions and parents may become confused between the common meaning and the legal meanings of the words used in the court's order. \(^{158}\)

I. Sole Custody

The most frequently ordered custodial arrangement is sole custody, \(^{159}\) an award of physical and legal custody to one parent with visitation rights to the other parent. The custodial parent has ultimate control and legal responsibility over all decisions affecting the care, upbringing and

\(^{149}\) See Cathcart & Robles, supra note 8, at 21.

\(^{150}\) See Minn. Stat. § 518.17, subd. 3 (1998); see also discussion supra note 119 and accompanying text (listing best interest factors judges must consider when making a custody decision).

\(^{151}\) See Cathcart & Robles, supra note 8, at 17.

\(^{152}\) See Ash, supra note 127, at 769-72. Judge Ash, a circuit court judge in the 16th Judicial District in Tennessee, described the typical custody case in his courtroom. See id. After listening to days of testimony and closing arguments, he had to make a decision that would change the lives of two children forever. See id. at 772. After announcing his decision, the judge entered his chambers and collapsed into his chair, his stomach aching and a "feeling of frustration flood[ing] over [him]." Id. Rather than encouraging parents to try everything they can to hurt each other and even the score, the judge strongly believes the system must change. See id. He concluded that "our society must promote the parent-child relationship after divorce rather than set the stage for litigation and heartache for years to come." Id.


\(^{154}\) See discussion infra Part III.B.1 and accompanying notes.

\(^{155}\) See discussion infra Part III.B.2 and accompanying notes.

\(^{156}\) See discussion infra Part III.B.2 and accompanying notes.

\(^{157}\) See discussion infra Part III.B.3 and accompanying notes.

\(^{158}\) See id. See also Folberg, supra note 24, at 5-7 (providing definitions and parameters of each type of custody arrangement). For purposes of this article, "joint custody" is also referred to as "shared parenting." Joint custody and shared parenting include the concepts of joint legal custody and the sharing of residences.

\(^{159}\) See Folberg & McKnight, supra note 16, § 13.04, at 13-15.

\(^{160}\) See id.
education of the children. The noncustodial parent is awarded the right to visit the children for specific or flexible periods of time, but has no legal rights regarding decision making. Mothers are awarded sole custody much more frequently than fathers.

2. Split and Divided Custody

Split custody applies where there is more than one child. This arrangement awards one or more children to one parent and the remaining children to the other parent. The policy of the law generally is to keep siblings together, and split custody is not favored by the courts absent compelling reasons. Divided custody allows each parent to have the child or children for a part of the year. The custody may be divided by half-week, week, month, school year or calendar year, or another arrangement meeting the needs of the children and the parents. The parent with custody of the child has complete legal and physical control over the child during the custodial period and visitation rights during the non-custodial periods. The criticism of divided custody is that shifting between homes causes instability and confusion for children who must follow two sets of rules.

161. See Folberg, supra note 24, at 6-7.
163. See Paradise, supra note 128, at 538 (stating that mothers are the most common recipients of sole custody); see also MacPhee & Mookin, supra note 3, at 103 (stating that the majority of mothers still want sole physical custody and they are usually awarded it).
164. See Folberg & McKnight, supra note 16, § 13.04, at 13-17.
165. See id.
166. See Folberg, supra note 24, at 6. Minnesota upholds the rule that split custody is not favored, but will allow split custody if in the best interests of the children. See Maxfield v. Maxfield, 452 N.W.2d 219, 223 (Minn. 1990) (acknowledging that split custody is not favored but recognizing the need to decide each case individually); Doren v. Doren, 431 N.W.2d 553, 561 (Minn. Ct. App. 1988) (stating that split custody is not favored but will be allowed where other factors outweigh the need for siblings to reside together); Sefkow v. Sefkow, 427 N.W.2d 203, 215 (Minn. 1988) (finding that while split custody not favored as a general rule, split custody is allowed where it outweighs the need for the children to remain together).
167. See Folberg, supra note 24, at 6.
168. See id.
169. See Folberg & McKnight, supra note 16, § 13.04, at 13-16.
170. See id.
171. See id.; see also Peterson v. Peterson, 393 N.W.2d 503, 506 (Minn. Ct. App. 1986). The court in Peterson cited Kaehler v. Kaehler, which enunciated the court’s policy on divided custody:

We are of the opinion that the divided custody of a child of ... tender years is not desirable. Regularity in the daily routine of providing the...
3. Joint Legal and Joint Physical Custody

The definition of joint custody varies from jurisdiction to jurisdiction. Joint custody is also referred to as shared parenting, joint parenting, co-custody or co-parenting. Generally, joint custody means that both parents have equal legal rights and responsibilities regarding the children and that the children spend time at each parental home on a scheduled basis. Joint custody includes situations where the children spend time with both parents, and the division of time between homes need not be equal. The children may spend Monday morning through Friday night with one parent and spend the weekend with the other parent, or any other division of time that meets the needs of the family. In the joint custody arrangement, both parents contribute to decisions regarding the children's education, religion, medical care, and general welfare, while the parent who has the child at any given time makes day-to-day decisions regarding discipline, clothing, diet, activities, social activities and emergency care.

Minnesota distinguishes between joint legal and joint physical custody. Legal custody specifies who has legal responsibility for making decisions about the child's life, including education, health care and religious upbringing, and physical custody refers to the physical residence

child with food, sleep, and general care, as well as stability in the human factors affecting the child's emotional life and development, is essential, and it is difficult to attain this regularity and stability where a young child is shunted back and forth between two homes.

219 Minn. 536, 539, 18 N.W.2d 312, 314 (1945).
172. See Folberg, supra note 24, at 6-7.
174. See id. at 13-17, 13-18.
175. See CATHCART & ROBLES, supra note 8, at 17.
176. See Folberg & McKnight, supra note 16, § 13.04, at 13-18; see also MINN. STAT. § 518.003 (1998) (defining joint physical custody to mean "that the routine daily care and control and the residence of the child is structured between the parties").
178. See Folberg, supra note 24, at 7.
179. See MINN. STAT. § 518.003, subds. 3(b) & (d) (1998).

"Joint legal custody" means that both parents have equal rights and responsibilities, including the right to participate in major decisions determining the child's upbringing, including education, health care, and religious training. . . . "Joint physical custody" means that the routine daily care and control and the residence of the child is structured between the parties.

Id.
180. See MINN. STAT. § 518.003, subd. 3(a) (1998).
and routine daily care and control of the child. Joint legal custody is presumed to be in the children's best interests in Minnesota, although joint physical custody is generally not favored.

Joint custody, or shared parenting, is the attempt by parents to maintain an active and ongoing relationship with their children following divorce, despite the complications of separate households and different schedules. For shared parenting to be effective, the parents must be able to cooperate and should live reasonably close to each other and to the children's schools. The advantage of a shared parenting arrangement is that decision making most closely resembles that of an intact family. Because both parents continue to participate in the daily care of the children, the parents and children are less likely to experience the intense feelings of loss and insecurity found with sole custody. Shared parenting also allows parents more flexibility in scheduling their work and personal lives.

Judge Gerald Hardcastle, a family division judge in Clark County, Nevada, wrote of the concern family court judges have for the recent trend toward shared parenting arrangements. Judge Hardcastle cited a California study in which nearly seventy percent of the state's judges rated joint custody arrangements as producing "mixed or worst results." The factors cited were "poor parental cooperation, instability created by shifting the child [between homes], distance between the parental homes, and acrimony and revenge between the parents." Judge Hardcastle reasoned that since the most basic requirement of shared parenting is cooperation between the parents, and judges typically see divorcing couples in the midst of contested custody litigation when they are fighting over everything, the wisdom of awarding joint custody seems questionable. Judges see little reason to believe that joint custody ordered by the court will reduce hostility between parents, when the future only brings new

181. See id. § 518.003, subd. 3(d).
182. See MINN. STAT. § 518.17, subd. 2(d) ("The court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child."). See also Preston v. Preston, No. C3-98-285, 1998 WL 436906, at *2 (Minn. Ct. App. July 29, 1998) ("[J]oint legal custody is generally presumed to be in the children's best interests . . . .")
183. See CATHCART & ROBLES, supra note 8, at 17.
185. See id.
186. See id.
188. See id. at 201 (citing Thomas J. Reidy et al., Child Custody Decisions: A Survey of Judges, 23 FAM. L.Q. 75, 80 (1989)).
189. See id.
190. See at 214.
191. See id.
challenges with the addition of stepparents, stepchildren, half-siblings and other family changes. 192 While joint custody benefits the rights of parents to have continuous access to the child, it does not serve the child’s best interests when the parents are in conflict. 193 Judge Hardcastle acknowledged the importance of maintaining contact between the child and both parents, but urged caution in awarding joint custody such that the child is protected from the parents’ conflict. 194

Divorcing parents can avoid reaching the level of hostility and conflict created by the adversarial litigation process, and achieve a mutually satisfactory resolution through mediation. 195 A skilled and neutral mediator can work with parents in a safe, structured environment to help parents articulate their positions and resolve their own differences. 196 Even parents who are initially reluctant to try mediation approve of the process, and seventy to ninety percent of those who use mandated or voluntary mediation are able to reach agreement. 197 Parents feel more control and a greater sense of empowerment when decisions are reached through mediation. 198 Participants have an increased satisfaction with the outcome reached through mediation of custody disputes. 199 Conversely, parents who reached courtroom settlements found the legal system to be impersonal, intimidating and intrusive. 200 Mediation can also help parents develop conflict resolution skills that will assist them in their ongoing relationships with each other and develop a process for making decisions about the future needs of the children.

The conflict of a custody battle affects children deeply. 201 As parents become increasingly stressed by the demands of a prolonged court battle,
children's needs are inadvertently neglected. The child's sense of certainty and stability erodes when placed in the middle of the parents' war. The child's functioning in all areas may be affected and the child may lose the ability to form satisfying relationships as an adult. Financial resources that could be used for the children's needs are drained on litigation fees. By avoiding the adversarial system and engaging in a problem solving process focused on finding solutions for the future, divorcing parents can turn their attention to their children rather than battling each other. The mediation process can help divorcing parents enter their future as co-parents with an optimistic outlook, as they maintain their parenting roles through continuing and ongoing contact with their children. Parents will move on to new lives separately, and their children will be happier and healthier with the resulting security of both parents' emotional and financial support.

IV. THE PARENTING PLAN

A. What Is It?

A parenting plan is a written agreement that divorcing, separating and unmarried parents develop containing details of decision making, parenting time, and residential arrangements for the children. The plan is more specific and detailed than parenting arrangements written by courts, and ambiguity is minimized because parents consult with each other to work through the details. If the children alternate homes frequently, considerable detail in the plan will be needed, but if one parent does not have extended residential periods of time with the child, the plan can be fairly simple. A sample parenting plan used by the state of Washington contains sections for "residential schedule," "decision making," "dispute resolution," and "other provisions." In developing a

203. See id. at 124.
204. See id. at 124-25.
205. See id. at 124.
206. See CATHCART & ROBLES, supra note 8, at 36.
207. See id.
208. See id.
209. See id. at 173. The "residential schedule" section includes provisions setting forth where the children will reside each day of the year, including the preschool schedule, school schedule, schedule for winter and spring vacation, summer schedule, vacation with parents, schedule for holidays, and schedule for special occasions. See id. at 173-75. Other categories in this section of the plan are priorities under the residential schedule, restrictions, transportation arrangements, and designation of custodian. See id. at 176.
210. See id. at 177. The "decision making" section states that each parent will make day to day decisions regarding the children while the child is residing with that parent. See id. The section also designates which parent will make major de-
parenting plan, the individual needs of the family are considered and negotiated between the parents with the assistance of lawyers or through mediation, and the plan is then submitted to the court for approval.\textsuperscript{213} The Commission supports the use of parenting plans based on their success in a growing number of states.\textsuperscript{214} The Commission believes the parenting plan is the best way to minimize conflict between parents and minimize the need for court involvement in parenting disputes.\textsuperscript{215} The Commission recommends that courts provide guidance for developing the plan by identifying issues the plan should address and making preprinted forms available, but urges courts to give deference to the agreements parents reach.\textsuperscript{216} The states must decide whether child support issues will be covered in the plan and must specify the process for court approval and amendment of the plan.

A bill was introduced to the legislature in January 1998 to encourage divorcing parents in Minnesota to develop parenting plans ("Bill").\textsuperscript{218} The

\begin{enumerate}
\item \textsuperscript{211}See id. at 178. The "dispute resolution" section designates who will decide disputes between the parents in the areas of counseling, mediation, and arbitration, how the cost will be allocated between the parties, and how the process will be commenced. See id.
\item \textsuperscript{212}See id. at 179. The "other provisions" section states either that there are no other provisions, or lists the other provisions the parents have agreed to include in the parenting plan. See id.
\item \textsuperscript{213}See ELLMAN, supra note 1, at 8-10. The ALI recommends parents file a joint agreement with the court after negotiating terms regarding custodial responsibility (including a schedule for each parent's access to the child and a procedure for resolving future disputes) and decision making responsibility (including decisions regarding the child's health, education, religion, and any other anticipated issues). See id. Where domestic abuse is present, the ALI stresses that courts must take an active role in reviewing the fairness of the parenting plan and assisting domestic abuse victims in finding safe shelter and counseling. See id.
\item \textsuperscript{214}See CATHCART & ROBLES, supra note 8, at 36. Fifteen states (Arizona, California, Colorado, Illinois, Kansas, Massachusetts, Mississippi, Missouri, Montana, New Jersey, Oklahoma, Oregon, Pennsylvania, Texas, and Washington) currently require or give courts authority to require the use of a parenting plan in a variety of circumstances. See id. In 10 of the 15 states (Arizona, Colorado, Illinois, Kansas, Massachusetts, Missouri, Montana, Oklahoma, Oregon, and Texas), parenting plans are required only in joint custody cases. See id. Of the remaining five states (California, Mississippi, New Jersey, Pennsylvania, and Washington), only Washington requires parenting plans in all cases. See id. New Jersey requires parents to develop a parenting plan when they cannot agree on other parenting arrangements. See id. at n.31. California, Mississippi and Pennsylvania authorize courts to require parenting plans in all cases or a subset of cases. See id at 36.
\item \textsuperscript{215}See id.
\item \textsuperscript{216}See id. at 37.
\item \textsuperscript{217}See id. at 36.
\item \textsuperscript{218}See H.F. 2784, 80th Legis. Sess. (Minn. 1998). The Bill's chief author is Representative Andy Dawkins, Minn. Dist. 65A. Rep. See id.
\end{enumerate}
Bill contains a rebuttable presumption that both parents have equal rights and responsibilities regarding the upbringing of their children. Importantly, the Bill declared it the public policy of the state of Minnesota to encourage parents to reach their own agreement concerning the upbringing of their children, consistent with the best interests of the child, and to develop procedures to assist parents to do so with minimal court involvement. The Parenting Plan Alternative was included in the Bill as a “pilot project” that would take effect in a judicial district only upon its adoption by a majority of the judges of that district and the subsequent approval of the Minnesota Supreme Court.

The Bill contains several important improvements to the existing law, including: (1) flexible provisions for parenting time and parenting responsibilities; (2) a provision to utilize expense-sharing rather than paying child support; (3) a changed standard for moving the child; and (4) provisions for dealing with future changes.

1. Parenting Time

The Bill allows parents the option to develop a parenting plan that will determine parenting obligations, parental decision making authority, and a parenting schedule detailing physical custody and residence.

219. See id. art. 3, § 2.
220. See id. art. 2, § 2.
221. See id. art. 3, § 1.
222. See MINN. STAT. § 518 (1998) (the Marriage Dissolution chapter). H.F. 2784 modifies several sections of the Marriage Dissolution chapter; specifically, the Optional Parenting Plan section of the Bill modifies section 518.13, subd. 5. See H.F. 2784, art. 2, § 1.
223. See H.F. 2784, art. 3.
224. See id. art. 3, § 22.
225. See id. art. 3, § 15, subd. 4.
226. See id.
227. See id. art. 3, § 2. “Parenting obligations” is defined as the duties of each parent or acting parent concerning the child’s upbringing, including daily care, education, health care, religious training, and other parental duties. See id.
228. See id. “Parental decision making” means designation in a parenting plan of mutual, primary, limited, or no responsibility for decisions regarding: (1) education, healthcare and religious training; (2) the child’s daily care, schoolwork, activities, participation in religious activities and extra-curricular activities; (3) consistent discipline and behavioral consequences; (4) the child’s changing developmental needs; (5) the special needs of a child; (6) professional resources for the child; (7) the time, place or manner of communication between the parents; (8) the child’s relationship with grandparents and other significant persons; (9) deviations from the regular parenting schedule; (10) future resolution of parental conflicts; and (11) any other issues pertaining to the child. See id. The issues in clauses (1) to (3) must be included in the plan, and the issues in clauses (4) to (11) may be included in the plan. See id.
Parents may develop a parenting plan instead of establishing a sole custody or joint custody designation. The parenting plan details may be worked out between the parents and then submitted to the court for approval. Parties who presently have a custody and visitation order may agree on a parenting plan to replace those orders. If the proceeding becomes contested or if either parent requests, the court may recommend the services of a professional parenting plan evaluator. The professional parenting plan evaluator may interview a child of suitable age and maturity to learn the child’s views, preferences and concerns about the parenting plan. The parenting plan evaluator must recommend a parenting plan that allows both parents continued involvement in the life of the child, unless it would be contrary to the best interests of the child.

2. Expense Sharing

The Bill maintains the child support guidelines of Minnesota Statutes section 518.551, and the use of a parenting plan in itself is not considered grounds for deviating from the guidelines. Instead of the “non-custodial” parent paying child support directly to the “custodial” parent, the Bill offers parents the option of expense sharing if the parents agree and the court finds the agreement in the child’s best interests. Under the expense sharing provision, parents may agree to spend the guideline child support directly on the children or deposit money into a checking account for children’s costs and expenses. Allowing the child support payor (typically the father) to spend child support dollars directly on the children may give the father a greater feeling of control over how the money is spent, which may result in the father’s increased involvement with the children. Parents who are able to cooperate may try the expense sharing option, but if the expense sharing arrangement is not suc-

229. See id. “Parenting schedule” means the parenting plan provisions regarding the time the child spends with each parent, transportation arrangements, and provisions for exchanging the child between parents. See id.
230. See id.
231. See id. art. 2, § 2, subd. 3.
232. See id. art. 2, § 2, subd. 4.
233. See id. art. 3, § 11.
234. See id.
235. See id.
236. See MINN. STAT. § 518.551, subd. 5(b) (1998).
237. See H.F. 2784, art. 3, § 22, subd. 1.
238. See id.
239. See id.
240. See Goldberg, supra note 127, at 52 (proposing that men who are emotionally involved with their children are more inclined to be financially involved).
cessful, a parent may move to terminate the arrangement. If the court finds the expense sharing arrangement is unenforceable or there are unmet obligations under the arrangement, the court shall discontinue the expense-sharing agreement and modify the support order as needed.

3. Moving a Child

The current statute allows a custodial parent to move a child out of state unless the non-custodial parent can prove the move endangers the child. The Bill changes the law so that when a parenting plan is in place, neither parent may move the residence of the children unless the other parent consents. If one parent disputes the move, it must be approved by the court. The court will consider several factors in deciding whether or not to allow the move, including: (1) the potential quality of life for the parent and child after the move; (2) the motivation of the parent requesting the move; (3) the ability of both parents to maintain the parenting schedule after the move; (4) whether domestic violence exists between the parents; and (5) whether the child's relationship with extended family members will be disturbed after the move.

241. See H.F. 2784, art. 3, § 22.
242. See id.
243. See MINN. STAT. § 518.18(e) (1998); see also Auge v. Auge, 334 N.W.2d 393, 397 (Minn. 1983) (holding that a custodial parent is presumptively entitled to remove a child to another state subject to the noncustodial parent's ability to establish that removal is not in the best interests of the child); Wilson v. Wilson, No. C6-97-562, 1997 WL 559735, at *1 (Minn. Ct. App. Sept. 9, 1997) (granting custodial mother's motion to move child out of state where father failed to prove endangerment to the child, even though father had physical placement of the child nearly fifty percent of the time). The presumption allowing the move applies even where the parties share legal custody of the child. See id. To defeat the presumption, the party opposing removal must offer evidence to establish that the removal is not in the best interest of the child and would endanger the child's health and well-being, or that the removal is intended to interfere with visitation. See id. Judge Crippen wrote a scathing dissent in Wilson, stating:

Because our application of the law in this case disregards a child's relationship with a parent who has shared greatly in his care, it is in direct conflict with the developing scheme of law on child custody placements in Minnesota... Here, once again, an inappropriate application of law to a family's individual circumstances produces the worst of both worlds for the child.

Id. at *6, *8.
244. See H.F. 2784, art. 3, § 15, subd. 4.
245. See id.
246. See id.
4. Dispute Resolution

Recognizing that circumstances in the lives of families are likely to change, the authors of the Bill have included a method for resolving future disputes. Disagreements regarding parenting time, division of expenses, or other details of the parenting schedule may be settled by a court-appointed family dispute mediator, upon the request of either party or upon the court's own motion. The family dispute mediator will resolve parenting schedule disputes by clarifying the plan and making adjustments in the plan if necessary. The family dispute mediator may be appointed to resolve a one-time scheduling dispute or to provide ongoing dispute resolution services regarding the parenting schedule.

5. Domestic Violence Protections

If domestic abuse or neglect is suspected, the court will appoint a guardian ad litem to represent the interests of the child and advise the court regarding the details of the parenting plan. Protection against domestic abuse is also built into the best interest factors. The four factors presently evaluated only where joint custody is requested have been added in the Bill to the thirteen current statutory best interest factors. The proposed additional factors concern the ability of the parents to cooperate, the methods for resolving disputes, whether it would be detrimental to the child for one parent to have more decision making authority than the other, and whether domestic abuse has occurred between the parents. Therefore, in any determinations regarding the best interests

247. See id. art. 3, § 16.
248. See id. A "family dispute mediator" is a neutral person authorized to use a mediation or arbitration process to resolve parenting schedule disputes. See id. subd. 3(c).
249. See id. subd. 4.
250. See id. The family dispute mediator will facilitate negotiations between the parties to promote settlement. See id. If a dispute cannot be resolved, the family dispute mediator will make a decision regarding the dispute. See id.
251. See id.
252. See id. art. 3, § 9.
254. See MINN. STAT. § 518.17, subd. 2 (1998).
255. See id.; see also H.F. 2784, art. 3, § 13.
256. See H.F. 2784, art. 3, § 15. In addition to adding four best interest factors, the previously-existing factors were changed to eliminate the words "custody" and "primary caretaker" and substitute the words "parenting obligations," "parenting schedules" and "parental caregiving." See id. The U.S. Commission on Child and Family Welfare, in its 1996 Report to the President, recommended that courts and legislatures replace the terms "custody" and "visititation" with neutral terms that more accurately describe parenting responsibilities and are less likely to foster conflict. See CATHCART & ROBLES, supra note 8, at 51. The Commission suggested the use of the terms "parenting time" instead of "visititation," and "residential ar-
of the child, whether domestic abuse has occurred between the parties becomes one of the statutory factors that must be considered and weighed equally. 257

B. The Bill's Current Status

Minnesota's legislators considered the proposed changes of H.F. 2784 quite controversial. 258 The Senate companion bill (S.F. 2276) had its first reading in the House and was not identical to H.F. 2784, 259 so a conference committee was appointed to review the differences. 260 The Senate heard the parenting plan language for the first time in the committee and, because the Senate version did not contain the parenting plan article, 261 considered the differences between the Senate and House versions too great to be resolved during the 80th Session. 262 The committee recommended that the parenting plan provisions be deleted from H.F. 2784, 263 and the Senate version of the Bill was passed at the end of the session without the parenting plan language. 264 The conference committee recommended the appointment of a task force to review the issue of parenting plans following the end of the legislative session.

Representative Andy Dawkins, the chief author of the Bill, described the most important concept of the parenting plan legislation as the “destranding” of the issues. 266 Dawkins explained that in any custody proceeding there are four major issues to be resolved: (1) where the children will live; (2) how much support will be paid; (3) who will have decision making authority; and (4) where the children will live if one parent moves. 267 Under the current law, the parent appointed primary custodian by the court has the power and authority to decide all of those major issues. 268 The children live primarily with that parent, support is paid to that parent, that parent has the ultimate decision making authority, and

rangements” instead of “custody.” See id.
258. Interview with Andy Dawkins, supra note 3. Dawkins explained that there was considerable debate and concern over the idea of the parenting plan in legislative hearings and committee meetings. Id.
260. See id.
261. See S.F. 2276, 80th Legis. Sess. (Minn. 1998).
262. See id.; Interview with Andy Dawkins, supra note 3.
264. See id.
265. See 1998 Minn. Laws, ch. 367, art. 1, § 17 (requesting that the supreme court establish a parental cooperation task force).
266. Interview with Andy Dawkins, supra note 3.
267. Id.
268. See MINN. STAT. § 518.003(a) (1998).
that parent can move the children out of state unless the non-custodial parent can prove that the move would be harmful.\footnote{See Minn. Stat. § 518.18(d) & (e) (1998).}

As Dawkins explained, the new law keeps the best interest factors intact but the four issues regarding the care of the children are "destranded" and decided separately.\footnote{Interview with Andy Dawkins, supra note 3.} In deciding where the child will live there is a presumption that both parents will continue to be involved in the children's lives, with a sharing of physical placement that takes into account the past arrangements and the future needs of the family. Child support, the second issue, will continue to be based upon the statutory guidelines, but also upon who has incurred expenses in the past, who will incur expenses in the future, and who has the best ability to pay.\footnote{Id.} Parents who directly pay expenses of the children may deviate from the statutory guidelines. \footnote{See H.F. 2784, 80th Legis. Sess., art. 1, § 8 (Minn. 1998).} Third, decision making authority will be shared pursuant to agreed upon terms in the parenting plan.\footnote{See id. art. 3, § 14.} Fourth, a process is built into the parenting plan for decisions regarding any future moves by either parent.\footnote{See id. art. 3, § 15.} By separating out, or "destranding," the major issues through the formation of a plan developed with the input of both parents, each parent can insure that the piece most important to them is in place.\footnote{Interview with Andy Dawkins, supra note 3.} The ability of parents to develop a parenting plan through mediation and prior to court involvement may eliminate false custody battles, and thus greatly enhance the opportunity for future cooperation between parents.

The legislature concluded that further study was needed on the parenting plan issue, and the supreme court ordered the appointment of the Parental Cooperation Task Force ("Task Force") on August 10, 1998.\footnote{See Order Establishing Parental Cooperation Task Force, No. C8-98-1335 (Aug. 10, 1998) reprinted in Minn. Law., Aug. 21, 1998.} The goals of the Task Force are to research, evaluate and make recommendations regarding: (1) ways to reduce conflict between separating parents; (2) the use of parenting plans; (3) the programs and experiences in other states that have implemented parenting plans; and (4) the fiscal impact of parenting plans on parties and the judicial system.\footnote{See id.}

The Task Force met in September, October and November 1998 and will continue to meet on a monthly basis.\footnote{See Memorandum from Tori Jo Wible, Staff Attorney to Representative Steve Smith, Chair House Civil Law Committee, Representative Phil Carruthers, Lead DFL, Civil Law Committee, Senator Jane Ranum, Chair, Senate Judiciary Committee, Senator Thomas Neuville, Ranking Minority, Judiciary Committee, for information on the Task Force's meetings and activities.} The Task Force issued an in-
terim Progress Report to the Minnesota Legislature on January 12, 1999. Subcommittees were formed to further research the issues of parenting plans, fiscal review and other conflict reduction. The subcommittees developed work plans and began to gather information and define the scope of their inquiries. The committees made preliminary recommendations that included additional education for all participants in the legal system regarding child development issues and a potential pilot project or elective test area for parenting plans. The Task Force also proposed future plans to bring in state and national experts on the issues of conflict resolution between parents and parenting plans. The Task Force will also conduct an empirical research project examining dissolution files in an urban, suburban, medium outstate and small outstate county to document the types of disputes currently brought before the court.


C. What is the Opposition?

Judges, family law lawyers and victims of domestic violence testified at legislative hearings opposing the Bill and the use of parenting plans. Their concerns about the proposed legislation included loss of child support collection, the inability of the Bill to solve the problems of conflicting parents, and the danger to battered women of increased contact with abusive spouses.

1. Judges

Judge William Howard testified that family court judges have "very serious concerns" about the Bill and argued that the Bill would increase
litigation rather than simplifying the divorce process. He spoke vehemently about the need for clear and simple rules for collection of child support and about his fears that the state would lose thousands of dollars in revenue without simple child support percentage guidelines. Judge Howard further articulated the difficulty family court judges have in carving out workable solutions for unique cases where there are no hard and fast rules. Finally, he stressed to the legislators the need to appoint a task force to study the issue of parenting plans and initiate a pilot project before the Bill becomes law.

2. Family Law Attorneys

Attorney Suzanne Born of the Minnesota State Bar Association testified in opposition to the Bill. Ms. Born stated that the Bar Association’s Family Law Section was “unanimously against” the Bill, because the proposed legislation would not solve the problems divorcing parents face. Ms. Born testified that the Bill would create more ammunition for high conflict families rather than less, since parents who are able to cooperate already have the option of doing so, but parents who lack the commitment to compromise will have little chance of resolving their conflicts. Ms. Born also stated the Family Law Section’s belief that the provision allowing judicial districts to voluntarily elect the parenting plan option creates a constitutional issue because different law will be applicable in different districts of the state. Ms. Born concluded by urging the legislators to delete the parenting plan section of the Bill.

Attorney Bruce Kennedy also testified in opposition to the Bill on behalf of the Minnesota State Bar Association Family Law Section. Kennedy stated that “[w]hen people have conflict over their children, they have serious disputes that are real,” and “[w]hen you dig into these people’s complaints, you find that they are more broad than the termi-

the chief judge at family court in Hennepin County for three years. See id.

288. See id.
289. See id.
290. See id.
291. See id.
292. Audio tape of Civil and Family Law Division meeting (Feb. 11, 1998) (available in Minnesota Legislative Law Library Tape Room, Minnesota State Office Building, St. Paul, Minn.). Ms. Born is the Chair of the Legislative Committee of the State Bar Association’s Family Law Section.
293. See id.
294. See id.
295. See id.
296. See id.
298. Id.
nology of parenting."

Kennedy seemed to focus on the idea that the terminology changes alone (i.e. from “custody” and “visitation” to “parenting obligations” and “parenting schedule”) would not make a difference in resolving the conflicts of divorcing parents.

3. Domestic Violence Victims

Victims of domestic violence believe the use of mediation and parenting plans will allow abusive spouses increased contact with their former spouses and more opportunities for abuse. Anna Sochockey, an independent consultant for family violence providers, argued against the mandatory mediation concept implicit in the Bill. Ms. Sochockey stated that victims of domestic violence do not participate voluntarily in mediation and tend not to seek protection from authorities for fear of reprisal from their abusive partners. She testified that abusive spouses are typically abusive to both their partners and their children, and that the non-abusive parent should have a right to sole custody. Ms. Sochockey also stated that the Bill should include a provision allowing abused spouses the opportunity to escape violence in an emergency situation, by physically moving their children for an interim period of sixty or ninety days without court permission.

D. Why We Need It – Countering the Opposition

All those whose lives are touched by child custody disputes agree that the most vital consideration is protecting the best interests of the child. While the opponents disagree that the child’s best interests are met by the Bill, the opposition appears unfounded when examined closely. The parenting plan legislation proposes a positive change in the law that will encourage parents to reduce conflict and increase cooperation at a crucial point in their children’s lives.

299. Id.
300. See H.F. 2784, art. 2, § 2.
301. Interview with Marilyn S. McKnight, supra note 199. McKnight said that battered women’s groups oppose mediation because it increases the opportunities for batterers to get near their spouses and further abuse them. Id.
302. Audio tape of Civil and Family Law Division meeting, supra note 291.
303. Id.
304. Id.
305. Id.
306. See discussion supra Part IV.C.
1. Judges' Concerns

The state's family court judges fear the parenting plan legislation will increase litigation and decrease child support collection.\(^{307}\) The Bill is actually designed to encourage the resolution of parenting issues through mediation and not litigation.\(^{308}\) The adversarial process of litigation is a win-lose competition, with each party attempting to prove to the court why he or she should be the winner.\(^{309}\) Rather than deciding the best interests of the child, the custody dispute becomes a contest between the rights of the two parents.\(^{310}\) Judge Ronald Solove, a domestic relations court judge in Franklin County, Ohio was dismayed with the destruction of families caused by the adversarial nature of divorce proceedings and has become an outspoken proponent of mediation and arbitration.\(^{311}\) Judge Solove stated that "[a] few short months on the bench convinced me that the adversarial atmosphere of the courtroom was absolutely the wrong place to make determinations about the welfare of the children of divorce."\(^{312}\)

Not only is a custody battle emotionally destructive and draining for parents and children, fighting in the courts will also deplete the family's resources by the accumulation of attorney fees, with no beneficial outcome for the child or the parents.\(^{313}\) The litigation process may cause the parties to become so angry with each other that they make life difficult for each other by refusing to pay child support or refusing to let the non-residential parent visit the child.\(^{314}\)

Rather than increasing litigation as judges fear, the very concept of the parenting plan is to discourage litigation and promote mediation. Given the parenting plan option, more parents will likely choose to work out the complicated details of their children's lives themselves. If difficulties arise in implementing the plan, parents can return to mediation rather than the court system. With the increased use of mediation in developing the parenting plan and in resolving post-dissolution disputes, judges will be faced with less crowded calendars and fewer agonizing custody decisions.

Professor Robert Oliphant of William Mitchell College of Law testi-
fied in favor of the Bill. Professor Oliphant, however, observed that the legislators were strongly persuaded by Judge Howard’s arguments that the state would lose money with the expense sharing provisions of the Bill and without automatic payment of child support.

Although the Bill provides for the option of expense sharing, the Bill leaves the traditional child support mechanism in place and should not result in a significant loss of revenue for the state. Since child support is simply a transfer of money from one parent to the other parent to meet the economic needs of the children, if both parents spend the money directly on the children, the need for the transfer is erased. If parents attempt the expense sharing option but encounter disputes over the amount of money being spent or other aspects of the arrangement, they have the option of resolving disputes with the aid of a family dispute mediator. As a final resort, expense sharing can be eliminated and payment of guideline child support restored. While women may fear the proposed legislation will result in reduced child support income and the loss of independence to make decisions about their children, the expense sharing provisions in the Bill are only an option that may be implemented if there is cooperation between the parties. Otherwise, the statutory child support guidelines remain the backbone of the child support determination.

2. Attorneys’ Concerns

A representative of the State Bar Association Family Law Section testified that attorneys in the state oppose the legislation because it would not solve the problems of divorcing parents. The Family Law Section’s opposition may be rooted in the self-interest of its members. If parents are able to draft parenting plans with minimal legal assistance, family lawyers may have fewer clients, less litigation and lower billable hours. Representative Dawkins’ impression of the lawyers’ opposition was that they feared the loss of income as more divorcing parents turn to mediation rather than litigation to resolve custody disputes.

316. Id.
318. See id. art. 3, § 16.
319. See id. § 22, subd. 2.
320. See id. § 22, subd. 1.
321. Audio tape of Civil and Family Law Division meeting, supra note 302 (testimony of Suzanne Born).
322. Interview with Andy Dawkins, supra note 3. See also Solove, supra note 148, at 801. Judge Solove described an encounter he had with a family law lawyer who opposed the program Judge Solove was developing for mediation of custody disputes in Franklin County, Ohio. See id. The lawyer approached Judge Solove in
A parenting plan bill proposed in the 1997 Missouri legislative session faced similar opposition from the Family Law Section of the state’s bar association. The state’s family law attorneys opposed the immediate use of a parenting plan, suggesting that the parties needed time to adjust to the divorce circumstances and let the initial emotions diminish. The lawyers argued that waiting until later in the process, after the parties had some experience with time sharing and an opportunity to mediate, would more likely lead to compromise. The legislators favored the immediate parenting plan, to focus parents on dealing with issues relating to the children and to reduce conflict caused by unclear orders by including specific parenting time arrangements. The Missouri Family Law Section was eventually convinced by the arguments of the legislators, and Missouri passed a bill in the summer of 1998 requiring all divorcing parents to develop an immediate parenting plan.

Instead of opposing the change, lawyers should promote the early use of parenting plans to their clients and help families get through the divorce process more quickly and less painfully. With less litigation, family law lawyers could accommodate a greater number of divorce and custody cases of less complexity. Less custody litigation may also improve the job satisfaction and decrease the stress of family law lawyers.

Stephen K. Erickson, an attorney and divorce mediator, described the inherent problems with the adversarial system of making custody decisions. Erickson explained:

The legal adversarial system asks, ‘Who will be awarded custody of the minor children?’ . . . In many ways, this question is much like the law school professor’s example of an inappropriate leading question [such as] ‘[w]hen did you stop beating your wife?’ Just as the wife-beating question assumes an answer by the way it is asked, the usual custody question assumes that it is necessary to determine two levels of ‘ownership’ of the minor

his chambers, telling him the mediation idea was bad, that a lot of lawyers did not like it, and that the judge should forget about trying to change the way things were done. See id.

324. See id.
325. See id.
326. See id.
327. See id. The bill passed on May 14, 1998 and became effective August 28, 1998. See id. at 328.
328. See Stephen K. Erickson, The Legal Dimension of Divorce Mediation, in DIVORCE MEDIATION 105, 105 (Jay Folberg et. al eds. 1988). Erickson is the founder and co-director of Erickson Mediation Institute, Minneapolis, Minnesota, with his wife, Marilyn S. McKnight. See id.
329. See id. at 108.
children. This is absurd, because the question of ownership need not even be asked; the focus should be establishing the parenting obligations that must be practiced in the future by the spouses.330

Rather than tearing families apart by promoting the destructive process of a prolonged court battle, lawyers can engage in the positive task of helping families rebuild. By supporting the parenting plan legislation, family law attorneys can help bring their clients together to resolve the future needs of their children cooperatively.

3. Domestic Violence Victims’ Concerns

Victims of domestic violence (most frequently women)331 seek divorce to escape an abusive spouse and start a new life for themselves and their children without fear. Battered women’s groups oppose the parenting plan legislation because drafting parenting plans and engaging in mediation will increase opportunities for contact with the abusive spouse.332 During the divorce process when the woman actively seeks to leave the relationship, the abuse may increase.333 The abuser may use the negotiation process as a way of intimidating his spouse, placing her at a disadvantage in the divorce proceedings.334 The unequal bargaining power of the parties may result in the more powerful party (the abuser) attempting to coerce a settlement from the less powerful party.335 A battered woman may accept economic concessions in order to retain custody of the children, resulting in poverty that could later be considered grounds for returning custody to her more affluent spouse.336

Because there are unique difficulties in situations of domestic violence, the Bill provides additional protections for these families.337 First, while parental involvement in drafting parenting plans is encouraged, the

330. Id.
331. See Lois Schwaeber, Domestic Violence: The Special Challenge in Custody and Visitation Dispute Resolution, 10 Divorce Litig. 141, at 1 (Aug. 1998) (reporting National Institute of Justice statistics that 95% of domestic violence victims are female and 95% of perpetrators of spousal abuse are male).
332. See discussion supra Part IV.C.
333. See Linda R. Keenan, Domestic Violence and Custody Litigation: The Need for Statutory Reform, 13 Hofstra L. Rev. 407, 422 (1985). Physical assaults increase and batterers are more likely to kidnap the children during the initial separation, leaving the woman and children at more risk during unsupervised visitation periods and transfers of the children. See id.
334. See Cathcart & Robles, supra note 8, at 39.
335. See id.; see also Keenan, supra note 333, at 413.
336. See Keenan, supra note 333, at 423.
337. See H.F. 2784, 80th Legis. Sess. (Minn. 1998).
use of self-drafted plans is optional and not mandatory under the Bill. 338 The parties can choose to let the court decide parenting arrangements. In court-drafted parenting plans, the court will restrict an abusive parent’s participation in the parenting schedule. 339 If the court suspects that the child has been a victim of abuse or neglect, the court will appoint a guardian ad litem to represent the interests of the child. 340 The guardian ad litem will conduct an independent investigation, observe the child in the home setting, 341 and prepare a written report to the court with recommendations for the future relationship between the child and both parents. 342 Whether domestic abuse has been present in the home is one of the new factors the guardian ad litem must weigh in considering the best interests of the child and in making a recommendation to the court. 343

To further protect the rights of domestic violence victims, the legislation could be amended to provide that evidence of domestic violence is evidence of detriment to the child; and to add a rebuttable presumption against awarding any parenting time to a perpetrator of domestic violence. 344

While the use of mediation in domestic abuse situations is controversial, 345 experimental mediation programs in these situations have produced high levels of satisfaction and acceptable results. 346 The experimental programs found that for the mediation to be effective there must be an agreement to stop the violence and a prerequisite that ending the violence must not be used as a bargaining concession. 347 Marilyn McKnight of Erickson Mediation Institute believes that families can benefit from mediation even when domestic violence is present. 348 Through her experience as a divorce mediator, Ms. McKnight has found that all parents can learn to communicate with each other through the assistance of a neutral third party, and can be taught the skills required to work together as parents of their children, rather than repeating past behaviors. 349

338. See id. art. 2, § 2.
339. See id. art. 3, § 15, subd. 1.
340. See id. § 9, subd. 2.
341. See id. subd. 3.
342. See id.
343. See id.; see also art. 3, § 13 (citing factors to be considered in best interests of child).
344. See Schwaeber, supra note 331, at 4, 11, 12.
347. See id.
348. Interview with Marilyn McKnight, Co-Director of Erickson Mediation, in Minneapolis, Minn. (Aug. 12, 1998).
349. Id.
Mediation presents a more rational and workable solution for resolving custody disputes. Most parents are not satisfied with decisions forced upon them by judges. Parents tend to see themselves as winners or losers and may carry that attitude for many years after. In accomplishing a solution that both parties have contributed to, the parents feel like full partners in decisions regarding their children, with an accompanying sense of empowerment and satisfaction with the final outcome. Even in families where domestic violence is present, mediation may positively contribute to a cooperative spirit between the parents that will progress into their future contacts with each other regarding the children.

The parenting plan legislation proposes new methods for allowing both parents to have equal rights and responsibilities in raising their children after a divorce. Shared parenting allows women to shed the weight of sole responsibility for their children and gives fathers the satisfaction of continued involvement with their children. Parents are not prohibited from following the traditional methods if the new methods fail. However, the parenting plan legislation makes it the policy of the state of Minnesota to encourage parents to work together to resolve the future needs of their children following divorce, and it provides new options for parents to do so. If parents can put aside past differences and adopt a cooperative spirit in raising their children, the entire family and the rest of society stands to gain.

E. What Have Other States Done?

Washington, Montana and Missouri are the only states that currently require the use of a parenting plan in all cases. The Washington legislation has been in effect since 1987. The Montana legislation passed in the 1997 session after being a two year study by the Montana Domestic Relations Study Commission. Missouri's parenting plan statute was signed by the governor on July 13, 1998 after a three year battle in the legislature and became effective August 28, 1998. The Kentucky legislature con-

350. See Cathcart & Robles, supra note 8, at 38.
351. See id.
352. See id. at 39.
353. See id.
357. See P. Mars Scott, A Successful Effort to Revamp Montana Domestic Relations Law, 22 Mont. Law. 17, 17 (July/Aug. 1997).
358. See Plax, supra note 323, at 328.
considered a parenting plan bill in the 1998 session, and a task force was appointed to further research the issue, with a report due on July 1, 1999. Seven other states currently require a written parenting plan before the court may order joint physical custody.

The 1987 Washington State Parenting Act ("Washington Act") was considered controversial for its time. The Washington Act included a parenting plan provision designed to accommodate differing family situations and allocate parental responsibility according to each family's needs. Jane W. Ellis, an Assistant Professor of Law at University of Washington Law School, conducted a study of the Washington Act one year after it was passed. Ellis examined 300 King County, Washington dissolution cases with permanent parenting plans and conducted interviews of thirty family law attorneys. The results of the study were mixed.

All of the lawyers interviewed agreed that the dissolution process is marked by a hostile and unpleasant atmosphere. Ten of the attorneys interviewed felt the Washington Act did not help parents who were hostile and angry to think about the best interests of their children. Fourteen of the lawyers interviewed, however, saw the positive effects of the parenting plan. These lawyers felt the preparation of the plan early in the process helped their clients focus on the details of raising their children rather than their anger toward each other.

While the Washington study represents only a small number of family lawyers in one state only a year after the parenting plan bill became law,

360. See id.
361. Those states are Alabama, Arizona, Illinois, Massachusetts, Missouri, New Mexico, Ohio, and Oklahoma. See ALA. CODE § 30-3-153 (Supp. 1997); ARIZ. REV. STAT. ANN. § 25-403(I) (West Supp. 1998); ILL. COMP. STAT. ch. 750, para. 5/602.1(b) (West Supp. 1996); MASS. GEN. LAWS ch. 208, § 31 (West 1994); MO. REV. STAT. § 452.375, subd. 8 (Supp. 1996); N.M. STAT. ANN. § 40-4-9.1(F) (Michie 1994); OHIO REV. CODE ANN. § 3109.04(G) (Banks-Baldwin 1994); OKLA. STAT. tit. 43, § 109(c) (West 1990).
363. See Ellis, supra note 356, at 81-82. The Washington statute requires all parents to complete a parenting plan at divorce, but limits the components of shared parenting where specified parental behaviors (i.e. physical, sexual or emotional abuse) are found. See WASH. REV. CODE ANN. §§ 26.09.181, 26.09.191 (West Supp. 1996).
364. See Ellis, supra note 356, at 114.
365. See id. at 114-16.
366. See id. at 115-16.
367. See id. at 136-37.
368. See id. at 157.
369. See id. at 137-38.
370. See id. at 138.
the experience of these few lawyers does provide insight. Attorneys can contribute to the success of the parenting plan by promoting its use and encouraging clients to develop a parenting plan early in the process. The efforts of lawyers to reduce the level of hostility and conflict between their clients and put the focus back on the children may result in earlier and more amicable solutions.

V. CONCLUSION

The parenting plan legislation should become the law in Minnesota. Adopting the legislation will lead to less conflict between parents in resolving child custody disputes. Rather than relying on the traditional adversarial system, the new statute would encourage parents to negotiate and mediate a plan for future care of their children outside of the court system. The new law would help parents proceed with the task of parenting their children despite remaining hostility toward each other. By changing the process through which custody disputes are resolved, parents will require less contact with the court system. Lawyers will be engaged in bringing parties together rather than accelerating the battle, and judges will have fewer gut-wrenching custody decisions to make.371 Adopting the parenting plan legislation in Minnesota will make it more possible to protect the best interests of children whose lives are uprooted by the difficult process of divorce.

371. See Weinstein, supra note 1, at 143. Weinstein recommends an overhaul of the entire system, with a “new design,” that “include[s] a range of procedures, from family counseling, mediation, and family group conferences, to a more coercive, involuntary process where protecting the child is the primary goal.” Id. Rather than being the decision makers, the judges and lawyers “should be . . . in the background and be supportive of the important healing work in which the family is engaged.” Id.