Life, Liberty, and the Pursuit of Parental Equality: Florida’s New Parenting Plan Remains Overshadowed by Lingering Gender Bias

Alexa Welzien∗

Copyright ©2009 by the authors. Nova Law Review is produced by The Berkeley Electronic Press (bepress). https://nsuworks.nova.edu/nlr
Life, Liberty, and the Pursuit of Parental Equality: Florida’s New Parenting Plan Remains Overshadowed by Lingering Gender Bias

Alexa Welzien*

I. Introduction

Both parents love their child, perhaps the problem is that they show that love in very different ways. He works hard every day to support his family.

* Alexa Welzien received a B.A. in Sociology and an Undergraduate Certificate in Women’s Studies from Florida Atlantic University. She is a 2010 J.D. Candidate at Nova Southeastern University, Shepard Broad Law Center. The author wishes to thank her family for their support and encouragement throughout the writing of this article. She would especially like to thank Roberta G. Stanley and Professor Phyllis Coleman for their guidance and contributions. Lastly, she wishes to dedicate this article to her father, James Welzien.
He knows that by doing this, he sacrifices time with his child. He misses out on the daily routines and even some bedtime stories. But in his eyes, he believes that being able to provide opportunities for his child, is taking care of his child. This is the way he shows his love for his child. She stays home every day and takes care of her child. She knows all the child’s favorite things and is involved in every aspect of her child’s life. She helps her child with homework, cooks for her child, and plays with her child. She sacrifices working outside the home so that she can devote herself to being available to her child. This is the way she shows her love for her child.

One day, this arrangement no longer works for this family and the parents decide to get a divorce. This is a clear portrait of so many families. But what happens after the parents dissolve the marriage? Should one parent be entitled to more time and more rights regarding the child simply because they have spent more time with the child? Or should any parent who desires equal time and access to his or her child be automatically given such things? Unfortunately, the way a parent has shown love for his or her child in the past, can effectively determine how much time he or she will get to spend with that child in the future.

This comment provides a critical analysis of the recently enacted Florida Senate Bill 2532.¹ It begins with a brief look at the history and evolution of child custody determinations, with a special emphasis placed on such decisions in Florida. The following section is an introduction of Florida Senate Bill 2532 and a discussion of how it significantly changes and reshapes the statutes governing child custody in Florida.² Next, the comment addresses the practical implications of Florida Senate Bill 2532 and questions whether it preserves a longstanding bias against fathers.³ Following that, the article explores the difficulty involved in modifying child custody arrangements. Finally, this comment proposes a solution to the injustice that seems inherent in child custody disputes: one that promotes parental equality and is truly in the best interests of the child.

It deserves mention that the following analysis is predicated upon the assumption that the parents are competent, capable, and fit parents who desire equal access to their child. Following that assumption, customarily, mothers are more likely to stay home with the child, while fathers typically work outside the home.⁴ The statutory bias that exists in many child custody

---

². Id.
³. See id.
disputes is directed against the parent who works outside the home, and thus the practical effect perpetuates the bias against fathers due to the traditional roles held by men and women. If the mother worked outside the home, the bias would affect her. Consequently, the pursuit of parental equality is often thwarted by the conventional gender norms associated with child rearing.

II. HISTORY OF CHILD CUSTODY DETERMINATIONS

Historically, under Roman law, women “had no legal rights” to their children. Fathers retained exclusive control and custody over children as they were simply regarded as the father’s property. This concept was known as the chattel rule, and continued through early English common law. The courts upheld this notion that fathers had superior rights to their children, and often awarded custody to them. In Busbee v. Weeks, the father gave the care of his three day old daughter to the child’s maternal grandparents after the mother died during childbirth. Despite the fact that the girl, who was then four years old, had been cared for by her grandparents, the Supreme Court of Florida awarded the father custody after he showed that he was able to care for her with the support of his parents, with whom he was living. The Court stated “[a]t common law the father has the paramount right to the custody and control of his legitimate minor children.”

It was not until the early nineteenth century that a custodial preference favoring mothers emerged. This transfer of legal preference was founded upon the idea that mothers were better suited to raise young children than fathers. In Fields v. Fields, the husband’s father was initially awarded

5. See id. at 283.
6. See id.
8. Id.
10. GOULD & MARTINDALE, supra note 7, at 34.
11. Id.
12. 85 So. 653 (Fla. 1920).
13. Id. at 653.
14. Id.
15. Id.
16. Id.
17. EMERY, supra note 9, at 73.
18. Id.
custody of his three minor children. However, noting the young age of the children, on appeal, the Supreme Court of Florida amended the decree and awarded custody to the mother. The Court’s rationale was influenced by a decision rendered by the Supreme Court of Alabama, which held that mothers were more capable to care for infants and children of a tender age. This presumption became known as “the tender years doctrine” and was virtually unchallenged as the standard in child custody decisions until the 1960s. During this time, the tender years presumption was heavily criticized for its bias towards women. As a result, the National Conference of Commissioners created the Uniform Marriage and Divorce Act, which gave birth to the standard which is still applied today, the best interests of the child standard. This new standard was implemented to shift the focus toward the best interests of the child, with no judicial preference given to either parent.

Under Florida law, child custody has been primarily governed by statute. In the determination of child custody and visitation rights, the court would designate one parent as the primary residential parent. This powerful label described “the parent with whom the child maintains his or her primary residence.” The other parent would be labeled as the noncustodial parent. The noncustodial parent’s contact with the child would be referred to as visitation. Throughout the country, “there is a bias in the courts for designating one parent as the ‘primary parent’ regardless of whether the parenting responsibilities are shared.” Many critics have noted that this type of statutory language attaches a negative stigma to the noncustodial parent.

19. 197 So. 530 (Fla. 1940).
20. Id. at 530–31.
21. Id. at 531.
22. Id. (citing Gayle v. Gayle, 125 So. 638, 639 ( Ala. 1930)).
23. GOULD & MARTINDALE, supra note 7, at 34.
24. Id. at 35.
25. Id.
27. GOULD & MARTINDALE, supra note 7, at 34.
30. Id.
who has been assigned a secondary status with a right to merely visit his or her own child. As a result, many states’ legislatures have amended this type of language in an attempt to minimize the negative connotations associated with the terminology of most child custody statutes.

III. Florida Senate Bill 2532: A Plan for Change

Recently, Florida Senate Bill 2532 was enacted into law and will significantly change child custody determinations in Florida. Florida Senate Bill 2532 deletes the outdated terminology and definitions associated with custodial parent, primary residential parent, and noncustodial parent. In an effort to promote shared parental responsibility, those labels have been removed from the statute, and the terms primary residence, custody, and visitation have been replaced with the term “parenting plan.”

“Parenting plan” means a document created to govern the relationship between the parties relating to the decisions that must be made regarding the minor child and shall contain a time-sharing schedule for the parents and child. The issues concerning the minor child may include, but are not limited to, the child’s education, health care, and physical, social, and emotional well-being. In creating the plan, all circumstances between the parties, including the parties’ historic relationship, domestic violence, and other factors must be taken into consideration.

If the parents cannot agree on a parenting plan, the court will create a customized parenting plan to establish the rights and responsibilities of each parent. The parenting plan must consist of a detailed account of each parent’s responsibility of daily activities, a time-sharing schedule which arranges exactly how much time each parent will spend with the child, and a determination of which parent will be responsible for decisions regarding the minor child.
Additionally, the specifically designed parenting plan must be in the best interests of the child. It must be noted that the best interests of the child standard has often been criticized for being overly vague, discretionary, and producing unpredictable outcomes.

A. The Best Interest of Whom?

The best interests of the child standard is subjective and as such, there is no scientific way to determine which type of parenting plan will truly benefit the child. As a result, "different judges employ different ideas about the best child-rearing strategies and/or the most relevant parenting values, yielding a court system in which each judge defines his or her own version" of the best interests of the child standard. In order to assist judges in establishing a proper parenting plan, Florida Senate Bill 2532 introduces several new factors that must be evaluated by the court in order to determine the best interests of the child. Specifically, several new factors to be considered by

43. Id. § 8(2)(b), 2008 Fla. Laws at 445 (amending FLA. STAT. § 61.13(2) (2007)).
44. Id. § 8(3), 2008 Fla. Laws at 446 (amending FLA. STAT. § 61.13(3) (2007)).
45. GOULD & MARTINDALE, supra note 7, at 32; see also EMERY, supra note 9, at 74.
46. See GOULD & MARTINDALE, supra note 7, at 32.
47. Id. at 37.
48. Ch. 2008–61, § 8(3)(a)–(t), 2008 Fla. Laws at 446–48 (amending FLA. STAT. § 61.13(3) (2007)). The complete list of factors that must be evaluated by the court include:

(a) The demonstrated capacity and disposition of each parent to facilitate and encourage a close and continuing parent-child relationship, to honor the time-sharing schedule, and to be reasonable when changes are required. (b) The anticipated division of parental responsibilities after the litigation, including the extent to which parental responsibilities will be delegated to third parties. (c) The demonstrated capacity and disposition of each parent to determine, consider, and act upon the needs of the child as opposed to the needs or desires of the parent. (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity. (e) The geographic viability of the parenting plan, with special attention paid to the needs of school-age children and the amount of time to be spent traveling to effectuate the parenting plan. This factor does not create a presumption for or against relocation of either parent with a child. (f) The moral fitness of the parents. (g) The mental and physical health of the parents. (h) The home, school, and community record of the child. (i) The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference. (j) The demonstrated knowledge, capacity, and disposition of each parent to be informed of the circumstances of the minor child, including, but not limited to, the child's friends, teachers, medical care providers, daily activities, and favorite things. (k) The demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime. (l) The demonstrated capacity of each parent to communicate with and keep the other parent informed of issues and activities regarding the minor child, and the willingness of each parent to adopt a unified front on all major issues when dealing with the child. (m) Evidence of domestic violence, sexual violence, child abuse, child abandonment, or child neglect, regardless of whether a prior or pending action relating to those issues has been brought. (n) Evidence that either parent has knowingly provided false information to the court regarding any prior or pending action regarding domestic violence, sexual violence,
the court are highly presumptuous and could potentially continue a custodial preference for mothers.\textsuperscript{49} According to Florida Senate Bill 2532, one of the new factors the court must consider in determining the best interests of the child is "[t]he demonstrated knowledge, capacity, and disposition of each parent to be informed of the circumstances of the minor child, including, but not limited to, the child's friends, teachers, medical care providers, daily activities, and favorite things."\textsuperscript{50} Another factor the court must now consider is "[t]he demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime."\textsuperscript{51} The court must also consider "[t]he particular parenting tasks customarily performed by each parent and the division of parental responsibilities before the institution of litigation and during the pending litigation."\textsuperscript{52} Are these factors present to ensure that the best interests of the child are met, or have they been included to facilitate the presumed best interests of the parents?\textsuperscript{53} Often in child custody decisions, there is an assumption that whatever arrangement is "best for the parents" must be "best for the child."\textsuperscript{54} This type of thinking neglects what should be the court's primary concern—the needs of the child.

\textsuperscript{49} See id. § 8(3)(j), (k), (o), 2008 Fla. Laws at 447 (amending Fla. Stat. § 61.13(3)(2007)).

\textsuperscript{50} Id. § 8(3)(j), 2008 Fla. Laws at 447 (amending Fla. Stat. § 61.13(3)(2007)).

\textsuperscript{51} Id. § 8(3)(k), 2008 Fla. Laws at 447 (amending Fla. Stat. § 61.13(3)(2007)).


\textsuperscript{53} See id. § 8(3)(j), (k), (o), 2008 Fla. Laws at 447 (amending Fla. Stat. § 61.13(3)(2007)).

\textsuperscript{54} Hartson & Payne, supra note 33, at 3.
IV. A STEP IN THE RIGHT DIRECTION, OR JUST GOOD INTENTIONS?

While it is the public policy of the State of Florida to order shared parental responsibility, this custodial right refers to a shared power to make decisions regarding the child’s welfare. Shared parental responsibility allows the parents to make joint decisions affecting the child’s education, healthcare, and religion. This type of joint legal custody does not encompass joint physical custody. Therefore, in addition to both parents having the legal right to participate in decision making, a time-sharing schedule must be created to establish the physical custody rights and essentially determine how much time each parent will be allowed to spend with his or her child.

A. Favorite Things

Although Florida Senate Bill 2532 specifically denotes that “[t]here is no [statutory] presumption for or against” either parent and that its goal is to encourage both mothers and fathers to experience the joys and responsibilities of parenting, some of the new factors to be considered in determining the best interests of the child indicate otherwise. Specifically, the court must now consider “[t]he demonstrated knowledge, capacity, and disposition of each parent to . . . [know] the child’s friends, teachers, medical care providers, daily activities, and favorite things.” Despite the legislature’s intention to create a more egalitarian parenting relationship by designing a customized parenting plan, this new factor to be evaluated by the court is clearly biased against the parent who spent the least amount of time with the child during the marriage. While this bias is not directly intended to be against fathers, the practical effect is such because customarily, mothers are the pri-

56. Id. § 2(16), 2008 Fla. Laws at 441 (amending Fla. Stat. § 61.046 (2007)).
59. Id. § 2(22), 2008 Fla. Laws at 442 (amending Fla. Stat. § 61.046 (2007)).
60. Id. § 8(2)(c)1, 2008 Fla. Laws at 445–46 (amending Fla. Stat. § 61.13(2) (2007)).
61. See id. § 8(3)(j), (k), (o), 2008 Fla. Laws at 447 (amending Fla. Stat. § 61.13(3) (2007)).
mary caretakers and have more daily contact with the child than fathers.65 Mothers will typically be presenting evidence demonstrating the knowledge that comes with being the primary caretaker. They will be able to recite all of the child’s friends and teachers names, and they will know the child’s favorite color, favorite toys, and favorite foods. Whichever parent is not the primary caretaker, mother or father, is clearly at a severe disadvantage. The parent who has spent less time with the child because of working outside the home will essentially be punished for providing financial stability for the family.

B. The Past Predicts the Future

Another new factor which seems to reinforce the gender bias that permeates child custody disputes is how the court must now consider “[t]he demonstrated capacity and disposition of each parent to provide a consistent routine for the child, such as discipline, and daily schedules for homework, meals, and bedtime.”66 It seems obvious that the primary caretaker who has provided the daily routine and structured the child’s schedules and daily activities will be better able to demonstrate their ability to do so. How could a father’s plea that he will or he can, measure up against a mother’s already accomplished success of providing such things? If actions really do speak louder than words, then how will a father’s words ever compare to a mother’s actions?

One factor introduced by Florida Senate Bill 2532 seems to do no more than preserve the historical division of labor and responsibilities that existed during the marriage.67 The court must consider “[t]he particular parenting tasks customarily performed by each parent and the division of parental responsibilities before the institution of litigation.”68 Maintaining whatever caretaking arrangement existed before the separation will be considered in the determination of the child’s best interests.69 This factor fails to consider the devastating effect of losing the availability of one parent. Essentially, mothers are recognized and rewarded for their past parenting, while fathers are penalized for their inability to match the mothers’ involvement due to having to work outside the home.70 Research shows that parents who took

65. MACCOBY ET AL., supra note 4, at 282.
68. Id.
69. See id.
70. MACCOBY ET AL., supra note 4, at 273.
on less parental responsibility during the marriage have the ability to learn how to evolve into a parenting role with more responsibilities.\textsuperscript{71} Unfortunately, however, when the assessment of one’s parenting skills is based upon past behavior, the parent who had less responsibility will never have an opportunity to become more responsible—even if he or she possesses the ability and desire to do so.

Perhaps even more concerning is the vast discretion given to the court. In addition to the aforementioned factors, the court may also consider “[a]ny other factor that is relevant to the determination of a specific parenting plan, including the time-sharing schedule.”\textsuperscript{72} By what standard is relevance being measured? Effectively, the court can consider any factor it deems important to the welfare of the child.\textsuperscript{73} The broad discretion given to family courts in determining the child’s best interests may explain why gender biases continue to dominate child custody cases.

C. \textit{The Practical Effect}

This type of statutory language promotes excessive litigation and will be burdensome on the courts.\textsuperscript{74} These new factors introduced by Florida Senate Bill 2532 promote competition between the parents and undoubtedly continue to give mothers an advantage and reinforce the bias against fathers.\textsuperscript{75} The specificity of the new factors encourage the parents to present an enormous amount of factual material to demonstrate or prove that they know the child best and therefore must be in the child’s best interest.\textsuperscript{76} Having to present witnesses and provide testimony to persuade the judge that the factors balance in one’s favor can have a devastating effect on a family’s finances.\textsuperscript{77} Unfortunately, most child custody cases resemble warfare rather than a peaceful determination about the child’s needs.\textsuperscript{78} “[M]any separated or divorced parents have widely conflicting perspectives on their own and

\begin{itemize}
  \item \textsuperscript{71} COMM. ON THE FAMILY OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, NEW TRENDS IN CHILD CUSTODY DETERMINATIONS 89 (1980) [hereinafter NEW TRENDS].
  \item \textsuperscript{72} Ch. 2008–61, § 8(3)(i), 2008 Fla. Laws at 448 (amending FLA. STAT. § 61.13(3) (2007)).
  \item \textsuperscript{73} See id.
  \item \textsuperscript{74} See id. § 8(3)(j), (k), (o), 2008 Fla. Laws at 447 (amending FLA. STAT. § 61.13(3) (2007)) .
  \item \textsuperscript{75} See id.
  \item \textsuperscript{76} See id.
  \item \textsuperscript{77} See Interview with Roberta G. Stanley, Board Certified Marital and Family Law Attorney, Brinkley, Morgan, Solomon, Tatum, Stanley, Lunny, Crosby, L.L.P., in Plantation, Fla. (July 31, 2008).
  \item \textsuperscript{78} See NEW TRENDS, supra note 71, at 67.
\end{itemize}
Parents often have different recollections of how much involvement each former spouse had in the child’s life. Motivated by “the high stakes involved in custody” cases, each parent will attempt to portray him or herself in the most favorable light and devalue the other parent’s contribution.

Roberta G. Stanley, Board Certified in Marital and Family Law, and a Fellow and President Elect of the American Academy of Matrimonial Lawyers, stated, “[t]he intentions were great, but practically, I am not sure it is going to have its intended effect” when referring to Florida Senate Bill 2532. While she acknowledged the legislature’s intention to reduce child custody disputes, she remains skeptical of whether Florida Senate Bill 2532 can actually accomplish such a goal. She noted that in cases where the parents are cooperative and amicable, it could result in a parenting plan that has a fair and accommodating time-sharing schedule. On the other hand, “[f]or the cases in which the legislation will actually apply, in cases of high conflict, [Florida Senate Bill 2532] could create even more controversy because the day to day lives of each parent in relation to the child will be brought into court.” Consequently, the legislative intent conflicts with the practical application of the factors. Ms. Stanley also acknowledged that the new factors present a bias against the parent who works outside the home. This could affect either the mother or the father, depending on the division of labor and responsibilities within the household. “The practitioners need to start thinking outside of the box” to prohibit gender biases from pervading the creation of fair and equal time-sharing schedules.

V. WILL THE GENDER PREFERENCES EVER BE ERADICATED FROM CHILD CUSTODY DISPUTES IN FLORIDA COURTS?

Divorce is a reality of the modern world that cannot be ignored. It affects approximately forty percent of America’s children. Fortunately, the

79. EMERY, supra note 9, at 6.
80. See MACCOBY ET AL., supra note 4, at 272.
81. EMERY, supra note 9, at 6.
82. Interview with Roberta G. Stanley, supra note 77.
83. See id.
84. See id.
85. Id.
86. See id.
87. Interview with Roberta G. Stanley, supra note 77.
88. See id.
89. Id.
90. GOULD & MARTINDALE, supra note 7, at 31.
vast majority of child custody arrangements following a divorce are settled outside the courtroom.\textsuperscript{91} Although legal conflict is atypical, it is usually initiated because the father wants equal custodial rights.\textsuperscript{92} Nevertheless, when two competent and capable parents both want primary responsibility for their child, mothers typically receive the primary custodial rights.\textsuperscript{93} It seems that the best interests of the child are tainted by the social presumption that a primary relationship with a fit mother is in the child’s best interest, regardless of whether the father is a capable, fit, and loving parent.\textsuperscript{94} Society is more concerned that fathers financially support their children after a divorce than continue to build and nurture a relationship with those children.\textsuperscript{95} Because a strong maternal preference still exists among the courts, fathers seeking equal custodial rights have a difficult burden to overcome.\textsuperscript{96}

A. Florida Is Determined to Continue the Gender Bias

The custodial preference for mothers is so strong that it exists even in cases where the parents took on the traditional roles of the opposite gender.\textsuperscript{97} This judicial bias is evidenced by \textit{Young v. Hector},\textsuperscript{98} in which the mother was the primary breadwinner and worked outside the home, and the father was the primary caretaker of the two children.\textsuperscript{99} Alice Hector and Robert Young were married and had two daughters.\textsuperscript{100} While living in New Mexico, Hector was working as an attorney in her own practice and Young was an architect and entrepreneur.\textsuperscript{101} The couple had always employed someone to either help care for the two children or help with household chores.\textsuperscript{102} After the birth of their youngest child, the mother found a job working at a successful law firm in Florida and the couple decided to relocate.\textsuperscript{103} Initially, the mother moved to Miami with the children.\textsuperscript{104} The father stayed in New Mexico to complete prior business arrangements and make improvements on

91. \textit{See id.}
92. \textit{See MACCOBY ET AL., supra} note 4, at 272.
93. \textit{See id.} at 283.
94. \textit{See id.} at 282.
95. \textit{See EMERY, supra} note 9, at 75.
96. \textit{See MACCOBY ET AL., supra} note 4, at 283.
97. \textit{See generally Young v. Hector, 740 So. 2d 1153 (Fla. 3d Dist. Ct. App. 1998), rev’d per curiam, aff’d on reh’g en banc, 740 So. 2d 1158 (Fla. 3d Dist. Ct. App. 1999).}
98. \textit{Id.} at 1153.
100. \textit{Id.} at 1154.
101. \textit{Id.}
102. \textit{Young, 740 So. 2d at 1154.}
103. \textit{Id.}
104. \textit{Id.}
their house to improve its resale value. During this time, he regularly visited with the children. After the father had rejoined the family, he traveled to Arkansas to care for his dying brother and to manage his estate. He also had to return to New Mexico to direct a treasure hunt and was away from his wife and children for approximately fourteen months. At this time, the children were being cared for by a nanny while the mother was at work. When the father eventually returned to Florida, he passed the Florida contractor's exam and began looking for employment. Due to his lack of computer skills, Young was unable to find work as an architect. The mother, on the other hand, had accepted a new position as a shareholder in a large firm and was earning a salary of $300,000 a year. While there was no express verbal agreement that the father should stop seeking employment and stay home as the primary caretaker, that became the arrangement for three consecutive years preceding the divorce.

Young was an extremely dedicated father and very involved in his daughters' lives. He “started and led one of the children’s Brownie troop [sic], coached one of the children’s soccer team [sic], regularly volunteered at the children’s school, and [took] the children to doctor and dentist appointments.” Testimony from neighbors, teachers, and friends illustrated that while the father spent more time with the children, both parents were loving and capable parents. During the trial, the guardian ad litem’s report stated that the father was “phenomenal” while interacting with the children and the report described the father as “warmer” towards the children than their mother. Despite the guardian ad litem’s praise of Young’s parenting, the report still recommended that the mother be designated as the primary residential parent. Under Florida law, this meant that the children would

105. Id. at 1159.
106. See id. at 1154.
107. Young, 740 So. 2d at 1160.
108. Id.
109. Id.
110. Id. at 1159.
111. Id. at 1155.
112. Young, 740 So. 2d at 1155.
113. Id. at 1154.
114. Id. at 1160.
115. Id. at 1161.
116. Id. at 1155.
117. Young, 740 So. 2d at 1155.
118. See id. at 1156.
119. Id. at 1155.
120. Id.
live with the mother in her home, and the father would have visitation rights. The guardian ad litem based his recommendation on three factors. He considered the mother’s financial stability, as well as the fact that prior to taking on the primary caretaker role, the father was absent from the children for extended periods of time, and stated that the mother managed anger around the children better than the father. The trial court followed the recommendation and awarded the mother primary residential custody over the two children. The father appealed the judge’s decision claiming that it was predicated upon gender bias.

1. One Step Forward, Two Steps Back in Young v. Hector

Initially, a three-judge panel of Florida’s Third District Court of Appeal agreed with Young and reversed the trial court’s decision to award primary residential custody to the mother. The panel declared that when determining custody in accordance with the best interests of the children, the judge “should attempt to preserve and continue the caretaking roles that the parties had established.” The panel found that the trial judge had abused his discretion by granting primary residential custody to the parent who was not the children’s primary caretaker. Furthermore, the panel found that the factors that were considered by the guardian ad litem were unreasonable. The panel of the court of appeal stated that a parent’s economic stability and finances should not be considered as a “determinative factor” when establishing the allocation of custodial rights. The panel also noted that the father being away from the family for lengthy amounts of time should not have been considered in light of the fact that for the last three years, he had been the primary caretaker in the children’s lives on a daily continuous basis.

122. Young, 740 So. 2d at 1155.
123. Id.
124. Id. at 1156.
125. Id.
126. Id. at 1159.
127. Young, 740 So. 2d at 1158.
128. Id. at 1157.
129. Id. at 1158.
130. See id. at 1157–58.
131. Id. at 1157.
132. See Young, 740 So. 2d at 1157–58.
Just when it seemed that the panel of the court of appeal was becoming aware of the gender bias that exists in many trial courts across the state, the panel granted a rehearing en banc over the matter and withdrew its former opinion, which had reversed the trial judge’s initial decision. Upon reexamining the record, the court en banc concluded that the trial court had sufficient evidence to award primary residential custody to the mother and that the father’s accusation of gender bias was not supported by evidence. The appellate court reiterated the fact that there was no agreement between the parents that the father would remain unemployed to stay home and care for the children. The appellate court grew skeptical of the father’s role as the caretaker because the mother had employed a housekeeper/babysitter who worked in the home five days a week. Ultimately, the appellate court asked the father “why there was a need for a full-time nanny.” In response to the court’s questioning, the father replied, “She cooks. She cleans. I could do a lot of that. . . . [We] can afford the luxury of having help, hired help. I am not the kind of person that sits around and watches soap operas. I try to do meaningful, worthwhile things.” The appellate court reevaluated the factors that were originally considered by the guardian ad litem and found that they were properly balanced by the trial judge when awarding primary residential custody to the mother. The court stated that it was proper for the trial court to consider the fact that the mother had remained continuously employed throughout the children’s lives, as opposed to the father who, although licensed, chose not to pursue a career. Additionally, the appellate court found that it was reasonable for the judge to weigh the fact that the father had been missing from the children’s lives for extended periods of time. The court also expressed that the trial court was correct to place more importance on the parent who had been continuously present throughout the children’s entire life, rather than on the parent who had been most present in the years immediately preceding the divorce. Moreover, the appellate court noted that the guardian ad litem had witnessed the father have an angry outburst in front of the children. The court found this to be

133. Id. at 1158.
134. See id. at 1159.
135. See id. at 1163.
136. Id. at 1160–61.
137. Young, 740 So. 2d at 1161.
138. Id. at 1162.
139. See id. at 1162–63.
140. Id.
141. Id. at 1163.
142. See Young, 740 So. 2d at 1163.
143. Id.
a credible factor that tipped the balance in favor of granting primary residential custody to the mother.\textsuperscript{144} In a concurring opinion, Judge Levy remarked that the record most likely supported a finding of either parent being designated as the primary residential parent, but that it is not the job of the appellate court to "second-guess" the trial court's determination.\textsuperscript{145}

2. A Glimmer of Hope

Not all the judges agreed with the majority. Three members of the bench, including Chief Judge Schwartz, concluded that there was no reasonable or logical explanation, based on the evidence, that supported the designation of the mother as the primary residential parent.\textsuperscript{146} The daughters are well rounded children and well adjusted as a result of the division of caretaking responsibilities established by the parents.\textsuperscript{147} A prior arrangement should not be changed or modified if it has been proven to be successful.\textsuperscript{148} The majority allowed its personal beliefs to influence the determination of the children's best interests.\textsuperscript{149}

In my opinion, there is no question whatever that the result below was dictated by the gender of the competing parties. . . . I believe that this is shown by contemplating a situation in which the genders of the hard working and high earning lawyer and the stay at home architect were reversed, but everything else remained the same. The male attorney's claim for custody would have been virtually laughed out of court, and there is no realistic possibility that the mother architect would have actually "lost her children."\textsuperscript{150}

The majority opinion emphasized the fact that the parents had never agreed that the father would be the stay at home parent and primary caretaker while the mother supported the family.\textsuperscript{151} Nevertheless, despite not having an expressed mutual agreement, the parents clearly acquiesced to such an arrangement by allowing the father to continue to tend to the children's primary care and daily needs.\textsuperscript{152} As to the factors that were considered in de-

\textsuperscript{144} See id.  
\textsuperscript{145} Id. at 1164 (Levy, J. concurring).  
\textsuperscript{146} Id. at 1172 (Schwartz, C.J., dissenting).  
\textsuperscript{147} See Young, 740 So. 2d at 1172.  
\textsuperscript{148} Id.  
\textsuperscript{149} Id. at 1175.  
\textsuperscript{150} Id. at 1177 (Goderich, J., dissenting).  
\textsuperscript{151} Id. at 1177 (Goderich, J., dissenting).  
\textsuperscript{152} Young, 740 So. 2d at 1177.
Pursuing the custodial arrangement, had the roles been reversed, the guardian ad litem would not have even assessed the father’s economic stability as a factor. Also, because the father had legitimate reasons that kept him away from his family, it was improper to consider the fact that he was not a constant presence in the children’s lives.

The record indicates three instances in which the father was away from the family. The first absence occurred when the father remained in New Mexico for three months after the mother and children had already moved to Florida. The father stayed behind to finish prior business deals and to make renovations on their home to raise its resale value. The second instance occurred when the father traveled to Arkansas for approximately three to four weeks so that he could care for his dying brother and help manage his estate. The third absence occurred while the father was away from the family for fourteen months to lead a treasure hunt for gold in New Mexico, a project in which the family had invested money.

The final factor that had been considered was the guardian ad litem’s testimony that the father had an angry outburst in front of the children. This was not relevant as a determinative factor because the father’s anger was regarding their finances and never directly involved the children.

The effect of designating the mother as the primary residential parent is that the children receive their daily primary care from an unrelated employee instead of their father. The appellate court is constrained by the long established gender bias “that a mother will not lose her entitlement to become the primary residential parent unless her unfitness is demonstrated; no matter how actively she is engaged outside of and away from the home, even though the other parent is fit and willing to serve in that capacity.” The gender bias in this situation is unique and perhaps not as obvious to the majority because typically when one parent stays home as the primary caretaker it is the mother. Nevertheless, Young illustrates how gender biases can

153. Id. at 1178.
154. Id. at 1179.
155. Id. at 1178–79.
156. Id. at 1178.
157. Young, 740 So. 2d at 1178 (Goderich, J., dissenting).
158. Id. at 1178–79.
159. Id. at 1179.
160. Id.
161. Id.
162. See Young, 740 So. 2d at 1177 (Nesbitt, J., dissenting).
163. Id.
164. Id. at 1179 (Goderich, J., dissenting).
pervade the courts and influence its decisions. Even in the most exceptional circumstances, the desire to grant women superior custodial rights seems to exist regardless of whether the facts support an opposite finding to be in the best interests of the child.

VI. MODIFICATION OF CHILD CUSTODY: A HEAVY BURDEN TO OVERCOME

The enormous difficulty involved in modifying custody arrangements is one reason it is so important that judicial discretion and gender biases do not influence the initial custody determinations. 

"[W]hen a trial court is asked to modify a final child custody order, the petitioner carries the burden of proof, and that burden is extraordinary." Appellate courts are far more likely to affirm the trial court's decision than to reverse it. Although a consensus exists that the person seeking to modify custody carries a heavy burden, the district courts of appeal have not always agreed upon the test that should be applied.

A. The First District Court of Appeal

In Cooper v. Gress, the parents had decided to share equal physical custody of their two children following the divorce. The parents acknowledged that they were both fit and capable parents who could provide proper care to their children. The parents also agreed that all decisions regarding the children would be made together. This joint custody arrangement was included in the final judgment for the dissolution of marriage. One year later, the father filed a petition to enforce the custody arrangement. The father claimed that the mother was interfering with his visitation rights and making negative comments about him in front of the children. In re-

165. See id.
166. See id.
168. Id.
169. Interview with Roberta G. Stanley, supra note 77.
170. See Wade v. Hirschman (Wade I), 903 So. 2d 928, 930 (Fla. 2005).
172. Id. at 263.
173. Id.
174. Id.
175. Id. at 264.
176. Cooper, 854 So. 2d at 264.
177. Id.
response, the mother filed a petition seeking to modify the custody arrangement and designate herself as the primary residential parent. The mother alleged that she and the father were no longer communicating, that the husband was unable to care for their children at times due to a new illness, and that the children wanted to live with her. The father counterpetitioned to be designated as the primary residential parent, alleging a lack of communication, and the mother’s failure to follow the guidelines of the final judgment by interfering with his visitation rights. The trial judge weighed the factors that are typically used to determine the best interests of the child in an initial custody arrangement and made findings about each parent. The judge found that the parents’ lack of communication had hindered the children’s social skills and prevented them from participating in extracurricular community activities. Although both parents were found to be devoted and committed to their children’s needs, the trial court held that it was in the best interests of the children to award primary residential custody to the mother.

The father appealed the trial court’s decision alleging that it had used the wrong legal standard to determine whether modification of the custody arrangement was appropriate. Florida’s First District Court of Appeal reversed the trial court’s decision and held that the trial judge erred by not holding the mother to the heavy burden of proof that is required in all motions for modification of custody. The appellate court described the law as a two-part test and declared that the party seeking to modify custody “must show both that the circumstances have substantially, materially changed since the original custody determination and that the child’s best interests justify changing custody. Furthermore, the substantial change must be one that was not reasonably contemplated at the time of the original judgment.” The mother’s allegations were insufficient to meet the requirement that a substantial and material change had occurred. The appellate court found that a lack of communication was not enough to satisfy the first part of the test. The court also addressed the mother’s allegations that the father

178. Id.
179. Id.
180. Id.
181. Cooper, 854 So. 2d at 265.
182. Id.
183. Id.
184. Id.
185. Id. at 268.
186. Cooper, 854 So. 2d at 265 (citations omitted).
187. Id.
188. Id. at 266.
was unable to provide care to the children due to an illness. The appellate court noted that this issue was no longer relevant because the father was in remission. Additionally, the appellate court stated that there was no evidence behind the mother’s claim that the children wanted to live with her, and if there was, the children’s preference would not be considered because of their young ages. Therefore, by only assessing whether a modification of custody was in the best interests of the children, the trial judge improperly held the mother to a much lower burden of proof than what is required by law.

B. The Fifth District Court of Appeal

In Wade v. Hirschman (Wade I), the parties had agreed to share physical custody of their child, which was incorporated into the parents’ dissolution decree. Both parents sought to modify the custody arrangement alleging that a substantial change in circumstances had occurred. Also, both parents wanted the designation of primary residential parent. The trial judge found that the mother was extremely uncooperative and refused to uphold the joint custody arrangement. Similar to the trial court in Cooper, the trial court in Wade I also balanced the factors that are used in initial custody decisions to determine the best interests of the child, but granted primary residential custody to the father. The mother appealed to the Fifth District Court of Appeal alleging that the trial judge applied the wrong standard in failing to use the substantial change prong of the two-part test and only considering the best interests of the child. Unlike Cooper, the Fifth District Court of Appeal held that the trial court did not abuse its discretion and declared the two-part test of finding a substantial and material change and a consideration of the best interests of the child inapplicable in cases

189. See id. at 267–68.
190. Id. at 268.
191. Cooper, 854 So. 2d at 268.
192. Id. at 265, 268.
193. 872 So. 2d 952 (Fla. 5th Dist. Ct. App. 2004).
194. Id. at 953.
195. Id.
196. Id.
197. Id.
198. Wade I, 872 So. 2d at 955; see Cooper v. Gress, 854 So. 2d 262, 265 (Fla. 1st Dist. Ct. App. 2003).
199. Wade I, 872 So. 2d at 953.
200. See id. at 953–54.
201. Id. at 955; see Cooper, 854 So. 2d at 268.
where neither parent is the primary residential parent and the physical custody is shared equally.\textsuperscript{202} The appellate court stated that under such circumstances, once it established that joint physical custody is no longer functioning properly, the trial judge can reassess custody as if it were making an initial determination, using only the best interests of the child standard.\textsuperscript{203}

C. \textit{The Supreme Court of Florida: The Final Authority}

A discrepancy existed between the Florida district courts of appeal regarding which test should be applied in determining custody modifications.\textsuperscript{204} The First District Court of Appeal in \textit{Wade I} is in direct conflict with the Fifth District Court of Appeal in \textit{Cooper}.\textsuperscript{205} Thus, in \textit{Wade II}, the Supreme Court of Florida granted review of \textit{Wade I} to determine the test that should be applied by all Florida courts.\textsuperscript{206} The Court concluded that the two-part test used in \textit{Cooper} should be applied in all custody modifications, regardless of whether the parents shared custody or one parent was designated as the primary residential parent.\textsuperscript{207} The Court also noted that while it is not necessary to prove that the child will suffer a detriment if the custody arrangement is not modified, there must be evidentiary proof of a substantial and material change in order to warrant any kind of modification.\textsuperscript{208} According to the Court, dissatisfaction with the arrangement or lack of cooperation in carrying out the custody arrangement is not sufficient to satisfy a substantial change in circumstances.\textsuperscript{209} Nevertheless, this requirement must be satisfied before a trial court can begin to consider the best interests of the child.\textsuperscript{210} The Supreme Court of Florida adopted the test that requires the greater burden of proof.\textsuperscript{211} With such a difficult burden to satisfy, the vast majority of child custody determinations remain unmodified, regardless of whether they meet the child’s or the family’s needs. Therefore, it is imperative that courts are unbiased in the initial custody determinations to ensure that the parenting plan is in the best interests of the child.

\textsuperscript{202} W\textit{ade I}, 872 So. 2d at 954.
\textsuperscript{203} \textit{Id.} at 954–55.
\textsuperscript{204} W\textit{ade v. Hirschman (Wade II)}, 903 So. 2d 928, 930 (Fla. 2005).
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} \textit{Id.} at 932.
\textsuperscript{207} \textit{See id.}
\textsuperscript{208} \textit{Id.} at 934.
\textsuperscript{209} \textit{See Wade II}, 903 So. 2d at 934.
\textsuperscript{210} \textit{See id.} at 935.
\textsuperscript{211} \textit{See id.} at 933.
VII. THE EVOLUTION OF JOINT CUSTODY AND THE EMERGENCE OF EGALITARIAN PARENTING RELATIONSHIPS

The predominant outcome in most child custody cases has been to preserve the mother-child relationship by awarding mothers superior custodial rights and leaving fathers with limited physical custody. However, more recently, society has begun to take notice of the negative consequences associated with restricted access to the father, as well as the valuable aspects that a continuing father-child relationship can have on a child's overall well-being. Research shows that frequent paternal involvement in a child's daily activities has a profound positive impact on the child. A child custody arrangement that facilitates joint and equal physical custody between both parents would support fathers' participation and would encourage fathers to fully embrace a more involved role in their child's life. It is necessary for both parents to experience a broad range of activities with the child to strengthen and nurture the child's bond with each parent. "There is an emerging consensus that the benefits of maintaining contact with both parents exceed any special need for relationships with the mother or the father." Therefore, between two loving and capable parents, a parenting plan that is in the best interests of the child is one in which the child has equal access to both parents.

A. A Glimpse at Parental Equality Following a Divorce

The current goal of Florida Senate Bill 2532 is to design a parenting plan that promotes the best interests of the child. How can any parenting plan that can potentially limit one parent's time with the child be in that child's best interest? As long as both parents desire to maintain a continuing relationship with their child and want physical custody of the child, there should be a legal presumption towards joint physical custody. Parents may have decided that one of them would be responsible for the primary caretaking of the child, while the other worked outside the home to support the family. They most likely chose this arrangement because it was in the best

212. Gould & Martindale, supra note 7, at 164.
213. See id.
214. See id. at 149.
215. Id. at 166.
216. Id. at 163.
218. See id.
interest of their child and not necessarily because they wanted to or because they felt obligated to based on their gender. This division of responsibilities was functional and enabled each other to better care for the child’s needs. The efforts of both parents should be rewarded and the financial support should be given just as much value and consideration as the daily child rearing, regardless of which parent performed each task.

Additionally, establishing a parenting plan that grants joint physical custody would create more predictable outcomes in disputes between parents who want equal access and time with their child. It would encourage more cooperative settlements and would be less burdensome on the courts. It would also eliminate the opportunity for parents to demean each others’ parenting skills and personally attack each other for the sake of the children. A tactic which is unfortunately used all too often in custody disputes and is never in the best interests of the child.

Finally, a presumption of joint physical custody would encourage parental responsibility. Parents will be challenged to rethink their role as caretakers and providers and perhaps develop into more balanced examples for their children. More importantly, the focus would be on the future coparenting relationship. Fathers will no longer be judged and bound by their past parenting roles. Instead, both parents will have the opportunity to truly share all the benefits that come with parenting. Child custody determinations should not be based on past behaviors. Following a divorce, the family unit has been divided and has changed. It is only logical that the parental responsibilities should also change. Because one arrangement worked in a prior setting does not necessarily mean that the same arrangement will continue to work in a completely new setting. Child custody determinations should be aimed at the future best interests of the child. A parenting plan that gives both parents equal access and time with the child would ensure that gender biases and parenting stereotypes could no longer influence child custody decisions or be a factor in determining the best interests of the child. Every loving and capable parent deserves the right to pursue parental equality, free from the longstanding constraints of gender bias.

1. A Moment of Reflection

I feel very passionate about this subject matter because of the enormous impact it has had on my own life. My parents divorced when I was about six years old. I was fortunate enough to have two loving and capable parents. Both my mother and father wanted to remain involved in every aspect of my life and continue to nurture the parent-child bond we shared. My father challenged the societal norms that supported the popular belief that children should remain with their mothers after a divorce. He knew that he had more
to offer his child than financial support. And he knew that there was more to being a parent than sustaining an income. He wanted to go through all the experiences and privileges that come with being a parent. He wanted to experience helping me get ready for school, cooking me dinner, reading me bedtime stories, and all the other simple joys that are the building blocks to a healthy parent-child relationship. He knew that the only way to do this was to share joint physical custody of me with my mother. Together, they developed a plan that allowed me to have continuous contact with both parents throughout each week. I spent every Monday and Thursday with my mother, and every Tuesday and Wednesday with my father. Every weekend would be spent with one of my parents and would rotate each week. This cooperative and equal parenting plan also allowed me to spend every holiday with both of my parents. I would spend the first half of the day with one parent and the remaining half of the day would be spent with the other.

This is just one example of how parenting plans can be designed to allow each parent to spend the same amount of time with their child. I never felt abandoned by one of my parents or experienced intense separation anxiety. I always felt each of my parents’ presence in my daily life. I do not think that my parents structured this plan out of convenience or their own preference. I believe that my parents truly considered my future well being and what was in my best interest. I am very grateful for the fact that my relationship with both of my parents never suffered as a result of their divorce. I feel that I benefitted tremendously from having consistent and continuous access to and availability of both of my parents throughout my life.