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All Things Considered: Child Custody After A Same-Sex Dissolution of Marriage

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ALL THINGS CONSIDERED: CHILD CUSTODY AFTER A SAME SEX
DIVORCE

by

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A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in Legal Studies
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ABSTRACT

Following the decision rendered in Obergefell v. Hodges, there have been unabating talk as to how courts may rule on disputed matters involving same-sex marriages. One specific aspect this thesis intends to focus on is what to expect from custody rulings following dissolutions of same-sex marriages. The purpose of this thesis is to interpret just how courts may rule regarding child custody in same-sex divorces, based on the concept of stare decisis. Given the fresh face of marriage equality in America, there is a lack of research done in the area. This thesis will serve as a substructure and reference for other studies of its kind.

Through a focus on defining factors in same-sex relationships as well as factors often identified in heterosexual relationships, this thesis will be able to compare the two to determine what appropriate outcomes courts may result to in cases of child custody following same-sex dissolutions of marriage. This thesis will compile heterosexual cases involving more role-based relationships such as the caregiver and provider as well as collect cases that reflect the egalitarian lifestyle we know to be present in same-sex couples to get a general idea of how courts may rule when both parents are at an equal standing.

DEDICATION

For my loved ones, who stuck beside and believed in the four-year-old girl who made promises of studying law.

For my mentors/professors who pushed me during my legal studies journey.

For the University of Central Florida who granted me many invaluable opportunities to expand my mind and endeavors.

Acknowledgments

I am genuinely euphoric to be able to acknowledge those who helped me along my trek. Firstly, I would like to thank my fiancé Bernard for his support and patience throughout this entire process. I would also like to thank my mother who believed in the little girl who wanted to dance in the sun and had hopes of becoming a singing, track-star attorney. Last, but not least, I'd like to thank my coach Jeanette Bolden for believing in my abilities and giving me the opportunity to attend school at the University of Central Florida. Your contributions to my life were truly instrumental and will linger on for the rest of my days.

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INTRODUCTION

Court rulings surrounding child custody in America are among the most widely discussed legal topics. In dissolutions of marriage, which parent obtains preeminent legal and physical custody or how time will be apportioned between parents are tasks the Court is assigned. Out of the plethora of cases that are put in front of our judicial system, those involving child custody or similar subject matter are most sensitive. Following decades of alterations to the fabric of child custody laws in America, much of the debate still revolves around what factors are primarily considered when granting child custody. For the most part, precedent, or past rulings, can grant us this explanation. However, with the new landmark case, Obergefell v. Hodges once again reaffirming marriage as a fundamental right the question lingers, how will factors that are often identified in same-sex marriages compare to the precedent established in heterosexual cases? See Obergefell v. Hodges 135 S. Ct. 2584 (2015). This thesis will attempt to gain a firmer grasp of understanding of this concept. The comparison between factors identified in same-sex couples and those identified in heterosexual case precedent that determines child custody will be utilized to predict outcomes surrounding same-sex couple's child custody decisions upon dissolution of marriage.

To understand where America is today, concerning child custody laws, it is important to understand that America, as the progeny of England, initially followed the English's common law system, this includes those laws associated with child custody. At that time, when America was still in its tender stages and under the umbrella of the English empire, fathers were granted custody of children following a divorce. Children were widely considered the property of their

fathers, as were wives. As times began to evolve, America taking the reins of its destiny, the revolution began to take shape and men took on new work in factories, leaving women home to care for the children. Disenfranchised and often marginalized, women took on caregiving as their primary position in the eighteenth, nineteenth, and early twentieth centuries. The ideology surrounding the assignment of roles based on gender derived from this period. Under what is called the Tender Years Doctrine, the award of child custody following a dissolution of marriage was then given to mothers as they were assumed to be the "caregiver" to the child, and the father the "provider" of the two. "Tender years" were considered to be between birth and twelve years of age. However, the wife almost always maintained primary custody following the age of twelve. (Luppino, Esq. & Miller Esq. p.156)

Though it is not the defining characteristic it used to be, being a caregiver is still a valid preference a court assigns if certain criteria are met. Identifying characteristics of the primary caregiver include the following: bathing the child; cooking the child's meals; healthcare decisions; teaching, reading to, and assisting the child with schoolwork; and joining in recreational activities. (Who Gets Custody, 2019) This is one of a plethora of factors considered when child custody is determined by a court of law. Today, Mom is still synonymous with the warm, loving individual who performs the tasks necessary to hold the home together. Though not entirely accurate today, it is still ingrained in our culture.

Today, we no longer operate under the Tender Years Doctrine, but rather what is in the child's "best interest." The masculine and feminine roles that were once assumed are now inaccurate to an extent. In our current and progressive society, women are no longer as limited as they were in previous decades. Women are more in the workforce now than ever, and roles

within a family can no longer be assumed based on gender. Additionally, it was realized that a child's well-being could no longer be assumed by assuming gender roles and automatically awarding the mother with custody of the child. Per *Family Law and Practice the Fourth Edition*, "best interest of the child" is the "standard that opened the contest for custody not only to fathers but also to other potential caregivers when the child's wellbeing or interests could be served by such a custody determination." (Luppino, Esq. & Miller Esq. p.157) This concept relaxes the standard of who can gain custody of a child, and in same-sex relationships where the relationship with a child may not be biological or adoptive, it offers some hope towards gaining custody. According to the United States Department of Health and Human Services maintaining the integrity of the family, the safety and protection of the child, and assurance of care are frequently referenced goals of child custody decisions nationwide. Factors considered include emotional ties and relationships between children, the parent's capacity as a provider, and mental and physical health needs of the child. (Determining the Best Interests of the Child, 2016, p.2) Most of these factors mirror the concept of a caregiver. In this thesis, these factors will be identified in precedent and compared to traits studies have identified in same-sex marriages.

In earlier times, in heterosexual couples, the females were considered to have a stronghold of the majority of the factors discussed when considering the current best interest of the child standard. Today, it is not an anomaly for the male to perform such tasks. According to a recent study done by the American Psychological Association, most Americans still believe that sex should determine the division of household labor. The study also revealed that most Americans believe that in same-sex relationships masculinity and femininity should determine who does what. (Americans Think Sex Should Determine Chores for Straight Couples,

Masculinity and Femininity For Same-Sex Couples, 2016) However, according to Gay Unions Shed Light on Gender in Marriage, an article written by Tara Parker-Pope, a more egalitarian approach to household tasks and family life is taken in same-sex marriages. For the most part, same-sex couples practice a great deal of equality. Upon dissolution of a marriage between a homosexual couple, this factor will be of great importance when considering who gets the child. The concept of the psychological parent will most likely come into play. A psychological parent is used to determine who is the custodial parent, or parent the child primarily lives with when both parents are equally fit. Parents who have spent more meaningful time with the child or had the child since birth get special consideration. (Luppino, Esq. & Miller Esq. p.156)

To bear fruit in this research, the author will utilize the common law concept of stare decisis. Stare Decisis means to stand by decided cases, to uphold precedents. It is a concept that the sustainability of our legal system is based upon and assures the predictability of rulings to come if followed properly. See *Kimble v. Marvel Entertainment, LLC*, 576 U.S. (2015). Using this concept will allow us to predict the outcome of same-sex dissolution of marriage child custody decisions through observing previous cases with related factors. The author will then divide cases into their subsections based on important, identifying factors, and take into consideration the outcome resulting from certain factors.

One of the subsections that will be taken into consideration are cases where only one individual in the marriage is employed. This will provide insight as to how courts rule in cases where one parent is the provider. Noting how the court ruled whether in favor or against these individuals will be noted. A similar methodology will be used in cases where one parent may have been the caregiver. These cases will be taken into consideration for parallel reasons.

Cases, where both spouses are employed, will also be taken into consideration and will be their subsection for the same purpose previously described. The author will then review the cases being sure to take notice of the rulings regarding the awarding of child custody the author will summarize these accounts. Following these observations, the author will identify trends associated with the child custody rulings and, based on stare decisis, will determine how courts should rule regarding same-sex couples whose cases possess the same factors. This will allow for a more accurate depiction surrounding same-sex marriage child custody debates and how U.S. courts will rule.

Following the decision reared in Obergefell v. Hodges, many cogitate as to whether other aspects of the American legal system will be altered as a result of such a groundbreaking ruling. (See Obergefell, 135 S. Ct. 2584) There has yet to be a study on this topic as the right to marry has just been granted in 2015. The goal of this thesis is to objectively state how courts should rule in same-sex divorce child custody cases based on the predictability of American law through the concept of stare decisis. It is important that citizens hold courts to this standard as in the past they have sometimes ignored precedent until they deemed ready to accept contemporary lifestyles such as same-sex marriage.

No attempt will be made to weigh in on the issue of child custody in same-sex marriage dissolutions or bring in opinions reflecting societies temperamental social climate. Understanding the history along with the current state of child custody in America allows us to understand where it is going. Being that law has the capability of evolving from children being considered the property of their fathers until reaching majority age, to having their opinions on who they wish to live with being considered in a court of law, is an important facet to remember

as new strides are taken in the area of family law. The progressive nature of the United States is one that distinguishes it from others and as alterations are made to the law it is important to understand where we all stand and utilize the predictable nature of law, as guaranteed by stare decisis. Child custody should not be an issue that is shrouded by uncertainty.

CHILD CUSTODY

History of Child Custody in America

Today, the United States is far removed from many of the concepts it was based upon at its conception, this includes the nation's ideas and practices surrounding child custody. Today, minors have some say as to whom they live with. Earlier, in America's colonial stage, children were considered the property of their fathers. Children would automatically be given to their fathers following divorce. The concept of child custody was much more cut and dry. No one individual had a say in where the child would go besides the sovereign law. In the late nineteenth century, however, a landmark legal principle began to change the course of child custody.

Used frequently in the twentieth century, the Tender Years Doctrine employed the idea that the mother is the primary caregiver to the child, and the nurturing nature of a mother is essential to children up to twelve years of age. Per *Grove v. Grove* when there is no misconduct by the mother present, it is "customary" to award child custody to the mother, during the child's tender years. See *Grove v. Grove*, 21 N.J. Super. 447 (App. Div. 1952). The mother was given primary custody over children following a dissolution of marriage, but it was expected that custody would be shared once children were beyond the age of twelve. The latter was an anomaly of sorts, as it was very rare for courts to revisit such decisions following the ending of dissolutions of marriage.

In the twentieth century, there was a gradual shift from the Tender Years Doctrine to legislation focused more on traits in a parent that may be in the child's best interest. Many states adopted the idea that "neither the father nor the mother has the greater right to the custody of

their child and that, in a contest between them, the happiness and welfare of the child is the determining factor.” See *Turney v. Nooney* 69 A.2d 342 5 N.J. Super. 392 (1949).

One preference that courts have developed regarding awarding child custody based on the child’s best interest is the primary caretaker preference. This preference is set to award custody to individuals who perform basic care for the child(ren). The idea of one sole caretaker is still a lingering idea from the days in which we operated under the Tender Years Doctrine. For the most part, the idea of the primary caretaker preference still greatly favors women. Some identifying criteria of the primary caretaker, per *Garska v. McCoy*, are

“(1) preparing and planning of meals; (2) bathing, grooming, and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i. e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i. e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i. e. teaching general manners and toilet training; (9) educating, i. e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i. e., reading, writing and arithmetic.” See *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981)

Today, depending on jurisdiction, we still operate on the concept of the child’s best interest. This concept opens custody up to individuals outside of the biological parents. Grandparents, aunts and uncles, even spouses who have a non- biological connection to the child can have a claim regarding child custody. The child may also have a substantial say in what parent they want to stay with or whom they'd prefer to be their guardian, if the child is of age. A

child's preference carries significant weight in determining where a child should go. It is the court's ultimate responsibility to act in a manner that is set to secure the stability and wellbeing of a child, so constant shifts with the times in regards to child custody are necessary.

Reasoning and Intent Surrounding Court Decisions

When ruling on child custody cases, a court intends to place the child where it is in their best interest. Placement can be crucial to a child's future. A court can fulfill such intentions by identifying set criteria that make an option best for a child, securing a healthier future.

Some factors that courts look in determining what is in the child's best interest is the individual's role in the child's life. If the individual is the primary caretaker (details on identifying this individual are described in a previous section), if the individual is the child's biological parent, if the individual has connected with the child on a deeper level, or if the individual provides for the child can be deciding factors. Courts also justify their reasoning behind the individual's ability to take care of the child. If the child has special needs, it would seem more plausible to grant him or her to an individual who is equipped to deal with such matters, barring any serious issues with that individual. Courts may also look at an individual's ability to afford to care for a child on a financial level. Whether the individual is unemployed or underemployed plays a huge role. Also, courts may pay attention to criminal history and lifestyle to assure the wellbeing of the child.

Courts also attempt to pursue the less evasive measures to secure whatever option is in the child's best interest. It is no secret that divorces, and child custody proceedings are amongst the most trying happenings one can go through, so courts shoot for causing the least damage while coming out with the best result. They may think that the best way to accomplish this is by keeping a child immersed in family culture, so they may rule to grant child custody to grandparents.

Today, the amount of child custody variations is more vast than ever before, and a courts intentions and reasoning behind those decisions are just as abundant. Ultimately though, the central intention and reasoning are set in stone. To furnish a decision that is within the best interest of the child by using well-defined criteria for this requirement are the anchors of any decision.

RELATIONSHIP FACTORS OF SAME-SEX COUPLES

What Recent Research Says about how Same-Sex Couples May or May Not Divide Childcare Depending on Certain Factors

There are three major theories concerning the division of labor in both heterosexual and homosexual households. The first, relative resource theory, attributes the division of labor in a home to the difference in resources within a couple (Blood & Wolfe, 1960). These resources include individual income, education, or occupational prestige. The second of the division of labor theories is the time constraint theory, where partners have limited time spent on household tasks due to a constraint such as work. The life-course theory is the third of the major theories. This theory examines associations among factors or variables such as age, family structure, living arrangements, and life transitions in the context of cultural and historical environments (Elder, 1998). “Research has evaluated the association between these variables and the division of labor in both heterosexual and families headed by same-sex couples” (American Psychological Association, 2015).

In a court of law, there are a plethora of indicators courts consider when determining the child’s “best interest.” As previously discussed, individuals who care for the child and home have received special considerations in past cases, and have been regarded as the primary caregiver gaining them leverage over the spouse who provides for the family. This has long been the case for heterosexual couples for generations. The women usually tend to work inside of the home ranging from preparing meals to childcare, and the men opt for more outdoors work. From

past studies, we have been made aware that homosexual couples tend to practice more equality, than heterosexual couples, when assigning household tasks, such as childcare.

Factors that may play a role in how a couple behaves regarding the division of unpaid household labor, more specifically childcare, include being the biological or non-biological parent. This factor ties into the recently discussed life course theory. Mignon Moore, author of *Gendered Power Relation Among Women*, found in her study of black lesbian households that regardless of income, biological mothers do more household chores than non-biological mothers (Moore, 2008). Similarly, in a study titled “Division of Labor among Lesbian and Heterosexual Parents: Associations with Children's Adjustment,” it was determined that although lesbian couples maintain equality in their division of labor the biological mother performs more childcare tasks and works fewer hours in the labor force (Chan, 1998). These are illustrations that childcare in same-sex relationships, like heterosexual relationships, can be divided and a primary caregiver is present in same-sex relationships as in heterosexual relationships. As it pertains to gay fathers, they typically similarly divide labor depending on who is the biological and non-biological parent of the child (American Psychological Association, 2015).

Another additional factor that plays into the division of labor concerning child-care in a same-sex household is education. As aforementioned, discrepancies regarding the level of education received by a partner ties into the relative resource theory. According to a study titled “Division of labor among lesbian and heterosexual parenting couples: Correlates of specialized versus shared patterns,” they found that when one parent was more educated than the other, the partner who was less educated performed more childcare (Patterson, 2004). As it pertains to the time constraint theory in a same-sex relationship, research is consistent that the partner that

spends more time performing paid labor, contributes fewer hours in childcare than does the other partner (Goldberg, 2012).

Comparing Factors Considered in Average Hetero and Homosexual Relationships as it Pertains to Child Care

For centuries, women have been tasked with “maintaining the home” whereas men have been depicted as the “breadwinner” or “provider.” Today, in the average American, heterosexual home the story has not deviated much from the not so distant past regarding the equitable division of household tasks. However, women have entered the workforce more than ever and roles, although still separate and reflective of the past, have a bit more fluidity in this more progressive society.

Homosexual couples, however, still practice a very egalitarian approach to housework. Tasks are divided more evenly, but hence they are still divided, and as discussed in an earlier section may be divided based on whether a partner is a biological parent, if one partner is more educated than the other, or the hours a partner works in paid labor. In comparison to heterosexual couples, however, the task of childcare is mostly assigned to the female, and the different factors considered in determining who performs more childcare tasks in a homosexual relationship do not often apply in heterosexual couples.

In a recent study done by Claire M. Kamp Dush, Jill E. Yavorsky, and Sarah J. Schoppe-Sullivan, it was determined that even in heterosexual relationships where both partners were dual-earners, men spent much more time on leisure than women and women focused more on housework and childcare. According to the study, “On nonwork days, fathers engaged in leisure 47% and 35% of the time during which mothers performed childcare and routine housework, respectively. Mothers engaged in leisure only about 16% to 19% of the time that fathers

performed childcare and routine housework.” (Dush, Yavorsky and Sullivan, 2018). This study is one of many demonstrations of the lack of factors outside of gender included in determining who performs childcare tasks.

METHODOLOGY

To accurately predict the outcome of a same-sex child custody proceeding, precedent cases, that fit the previously identified characteristics of a same-sex relationship, were collected. These cases demonstrated factors such as an identifiable primary caregiver based on being the biological or non-biological parent, one partner being more educated than the other, etc. Additionally, some cases that demonstrated a more shared approach to unpaid labor were compiled for a separate result set.

Throughout this study, the legal research tool LexisNexis was used to find cases. The phrases “divorce /p primary caregiver” “, child /s care! /s marriage /p divorce,” and “share! /s marr! /p employ!” were habitually used to render satisfactory search results. The first search simply asks the search engine to find cases with the word divorce and primary caregiver in the same paragraph. The second of the searches ask for cases that contain the word child in the same sentence as a word that begins with “care”, in the same sentence as the word marriage, and in the same paragraph as the word divorce. The third search example is asking the search engine for cases that include words that start with “share,” in the same sentence as words that start with “marr,” in the same paragraph as words that begin with “employ.” The research was in no way limited to these three search phrases as a variety of combinations were used to render different results. (These are simply examples of the method I used when searching for precedent.)

Following the search for cases, the author combed through the cases in search of factors that same-sex couples may identify with and compiled them to furnish a general prediction for a same-sex child custody ruling, such as those previously discussed. These cases were broken down in a chart which can be found in Appendix B. The ruling from each case was considered,

and a special note was taken as to whether the primary caregiver of the child was awarded custody. The results of the majority of the cases reflect the prediction.

ANALYZING CASE OUTCOMES

Primary Caregiver

A total of fourteen cases were reviewed in the course of this study, below are four cases that reflect the dynamics demonstrated in those cases as it pertains to having a primary caregiver. The fully analyzed versions of these cases can be found just below their descriptions. These cases provide an accurate demonstration on how courts rule if a parent identifies as a primary caregiver and make mention of if the parent is biological, has time constraints that may be work-related, and if they may or may not be more educated than the other spouse.

In the first case *Porter v. Porter* the plaintiff, Audrey Porter, filed an appeal due to a previous ruling granting custody to her ex-husband Thomas Porter. Throughout the marriage, the plaintiff was the primary caregiver to their three children, the defendant served in the military as a captain and spent less time with the children as a result of it. Both parents were biological. Following the divorce, the plaintiff served as a waitress and sold homes which were unappealing to the court, and ultimately the court decided to deny the plaintiff's appeal. *See Porter v. Porter*, 274 N.W.2d 235 (N.D. 1979)

Porter v. Porter, 274 N.W.2d 235 (N.D. 1979).

Facts: Plaintiff Audrey Porter [Plaintiff] is filing an appeal of the First Judicial District Court, Grand Forks ruling awarding custody of their three children to her now ex-husband Thomas D. Porter [Defendant] and granting her only \$150 per month in alimony. Also, under appeal was the court's denial of Plaintiff's motion for a new trial, motion to alter and amend the judgment, and motion for attorney's fees and costs on appeal. The couple was married on October 26, 1971, and

a complaint was filed on February 9, 1977, alleging irreconcilable differences. Defendant serves in the United States Airforce as a captain. Plaintiff was unemployed and served as a waitress and selling homes following the divorce. Throughout the marriage, the Plaintiff spent most of her time caring for the children and the marital home.

Issues: Are the findings of the trial court awarding the custody of the children to Defendant and limiting alimony payments to Plaintiff "clearly erroneous"?

Rule: "A finding of fact is clearly erroneous when, although there is some evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made. *Kostelecky v. Kostelecky*, supra; *Rambel v. Rambel*, 248 N.W.2d 856 (N.D.1977); *In re Estate of Elmer*, 210 N.W.2d 815 (N.D.1973)." *Haugeberg v. Haugeberg*, 258 N.W.2d 657, 659 (N.D.1977).

Application: Through applying the rule of law surrounding the definition of clearly erroneous to the facts. The court was able to deduce whether the district court erred in their ruling. Plaintiff asserts and challenges that the trial courts conclusion that she intends to continue with her present employment with Cooper Craft (a home-selling plan) and would be unable to support three children was clearly erroneous. The Court agreed with her in that the district court referring to the home-selling plan as Copper Craft was an error on the part of the district court because the proper name for the company Plaintiff sold with was Beeline. However, the concept of home selling which was the district courts main point was the same no matter what specific company Plaintiff sold with.

Conclusion: The Court ruled to affirm the lower courts decision to deny the plaintiffs motion for a new trial, a petition to alter and amend the judgment, and application for attorney's fees and costs for the appeal.

In the second sample case, *Pikula v. Pikula*, the custody of two minor children was initially awarded to Dana Pikula instead of his ex-wife Kelly Jo Pikula. This was done primarily because the trial court wanted the children to stay immersed in the Pikula family as they were very close-knit. During their marriage, Dana worked for the family trucking company and Kelly Jo was the primary caretaker of the children. Kelly Jo eventually appealed the decision to award custody of the children to their father and was granted custody. Dana did try to appeal that decision but was denied. See *Pikula v. Pikula*, 374 NW 2d 705 (Minn. S.C. 1985).

Pikula v. Pikula, 374 NW 2d 705 (Minn. S.C. 1985)

Facts: Custody of two minor children was awarded to Dana Pikula [Petitioner]. Kelly Jo Pikula [Defendant], appealed the decision causing the Court of Appeals to reverse the trial courts ruling concluding that “the evidence, considered in light of the statutory factors outlined in Minn.Stat. § 518.17, subd. 1 (1984), was insufficient to support the award of custody.” The Court of Appeals remanded the decision so the trial court can put the judgment in favor of the mother. Petitioner appealed the ruling. Petitioner was employed through the family business as a trucker. Defendant took care of the children and performed household tasks.

Issue: Did the Court of Appeals exceed its power of review in determining the issue before it?

Should the trial court’s findings be sustained?

Rule: 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. *Weatherly v. Weatherly*, 330 N.W.2d 890 (Minn.1983); *Berndt v. Berndt*, 292 N.W.2d 1 (Minn. 1980).

The trial court's findings must be sustained unless they are clearly erroneous. *Weatherly, supra; Berndt, supra*.

Application: Through a review of the case facts as compared to the rule associated with the issue, the court found that the Court of Appeals did overstep their boundaries as it pertains to their limitation to determine only if the trial court erred in making findings unsupported by the evidence or improperly applying the law. The Court of appeals ruled more on whether or not the trial court ruled properly on who was granted custody of the children. However, this discrepancy does not warrant a reversal.

Upon review, the Court recognized that the findings of the trial courts were not clearly erroneous. The evidence to support their assertions were valid.

Conclusion: The Supreme Court of Minnesota affirmed the Court of Appeals ruling reversing the trial courts decision and remanded the proceedings and follow the rule set identified in their decision. The Court asserted that "If either parent was the primary caretaker, custody should be awarded to that parent absent a strong showing of unfitness."

In the proceeding *In re Marriage of Hansen*. The court was tasked with reviewing the custody award of the Hansen's two biological children. The ex-husband Lyle Hansen was the provider of the two parents, Delores was the primary caregiver of the two. Lyle often missed his children's "childhood events" due to time constraints related to work. Initially, custody was awarded jointly, however courts found that it was not in the children's "best interest and awarded full custody to the mother/primary caregiver. See *In re Marriage of Hansen*, 733 NW 2d 683 (2007)

In re Marriage of Hansen, 733 NW 2d 683 (2007)

Facts: Lyle [Lyle] and Delores Hansen [Delores] were married on September 4, 1987. Two children were born of the marriage. Lyle was the provider of the two, and Delores was the [primary caregiver] of the two. "Delores attended parent-teacher conferences regularly, while Lyle did not. The vast majority of the time, it was Delores who helped the children with their homework. Lyle admits that she was better at it, particularly math. During the marriage, Lyle missed important childhood events because of social activities or work-related assignments." The district court granted joint legal and physical custody of the children. The court divided the property in the marital estate, ordered Lyle to pay alimony, and ordered medical and child support. Delores did appeal. The Court of Appeals granted physical custody of the children to the Delores and adjusted the amount she'd receive in child and medical support, as well as alimony. Lyle sought review.

Issue: Did the appellate court err in awarding physical custody to Delores, along with the adjustment in medical and child support, and alimony?

Rule: Although a child's best interests will be served by associating with both parents, "an attempt to provide equal physical care may be harmfully disruptive in depriving a child of a necessary sense of stability." *In re Marriage of Muell*, 408 N.W.2d 774, 776 (Iowa Ct.App.1987).

Application: Given that the trial court awarded custody jointly, the Court viewed this as being potentially damaging to the children and their stability.

Conclusion: The Court affirms the decisions of the court of appeals.

In the case of *Beck v. Beck* Arthur and Susan Beck received joint custody of their two adopted daughters. Susan primarily cared for the girls. After appealing, Susan was granted full custody of the girls, however after further review, this decision was reversed. The court cited "best interest in their decision" *See Beck v. Beck*, 432 A. 2d 63 (N.J.SC, 1981) This case demonstrates a key element that may play a factor into how a court may rule in a same-sex marriage divorce child custody proceeding as same-sex couples tend to adopt.

Beck v. Beck, 432 A. 2d 63 (N.J.SC, 1981)

Facts: The parties were granted joint custody of their two children following a divorce. The defendant appealed and the appellate court ruled in her favor granting custody of the minor children. The Supreme Court of New Jersey granted certification to review the decision.

Issue: Are the courts authorized to issue the joint custody of children?

Rule: [T]he court may make such order * * * as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the case shall render fit, reasonable and just * * *. [N.J.S.A. 2A:34-23.]

Application: Through the application of the rule used to determine whether or not the court acted lawfully, the court found that

Conclusion: The appellate court's ruling was reversed.

Egalitarian

Below are cases that include marriages that reflect a more shared approach to childcare in heterosexual families. These serve as examples of how courts may rule if a same-sex couple presents as egalitarian.

In the first of two examples of this sort of case, *Pusey v. Pusey*, Kathleen Pusey is appealing the custody award of their eldest son to ex-husband Robert Pusey. Initially, the ruling was for joint custody, awarding a child to each spouse. Both Kathleen and Robert ran a corporation and spent equal amounts of time with their children, who are both biological. In the end, joint custody was upheld. *See Pusey v. Pusey*, 728 P. 2d 117 (Utah S.C., 1986)

Pusey v. Pusey, 728 P. 2d 117 (Utah S.C., 1986)

Facts: Robert Pusey [Defendant] appeals in part to the decision awarding Kathleen Pusey [Plaintiff] half the value of assets of a corporation formed during their marriage and attorney's fees. Plaintiff appeals the custody award of their eldest son to the defendant. Both parties ran a business together and spent equal time with the children.

Issue: Did the trial court err in their decision to separate custody? Did the trial court err in their attempt to divide the assets of the corporation and award attorney's fees?

Rule: "Proof [should be made] by the prevailing spouse that real property had been purchased with premarital assets, and those assets were awarded to the owner spouse before dividing the marital estate."

Regarding the awarding of attorney's fees, an award "must be based on the need of the party and the reasonableness of the fee awarded a matter largely left to the discretion of the trial court." *Walther v. Walther*, 709 P.2d 387, 388 (Utah 1985) (citing *Beals v. Beals*, 682 P.2d 862 (Utah 1984), and *Kerr v. Kerr*, 610 P.2d 1380 (Utah 1980)).

In regards to the split in custody awards, the rule that pertains to this issue is "all other things being equal"

Conclusion: The judgment of the lower court is affirmed.

In the second case, *Kennedy v. Kennedy* Duane Kennedy and Carole Lindstrom both provided for the family and contributed greatly in their children's lives. Carole was an anthropologist and employed as such for a great deal of the marriage. Duane was a practicing attorney. All four of the children were biological, and there was no discrepancy between hours worked between the spouses or education. See *Kennedy v. Kennedy*, 403 NW 2d 892 (Minn., 1987).

Kennedy v. Kennedy, 403 NW 2d 892 (Minn., 1987)

The parties were married in the year 1970 and conceived 4 children throughout the relationship. Duane Kennedy [Respondent] worked as an attorney Carole Lindstrom (or Carole Kennedy) [Appellant] was an anthropologist and employed until 1977. Since then, she performed at home jobs such as typing for a court reporter for two and a half years and was employed as a secretary

for six months. The trial court split custody of the children. In 1985 the trial courts decision was reviewed.

Issue: Does the evidence support the trial court's findings?

Rule: [W]hen 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. *Pikula*, 374 N.W.2d at 712.

Application: Through applying the primary caretaker rule to the facts reviewed by the trial court. The Court of Appeals acknowledges that the rule was not applied as there is no distinct primary caretaker and both parties were equal in the tasks they took on.

Conclusion: Affirmed as modified.

Results/Discussion

In the listed cases, which demonstrated a division of household tasks, specifically childcare tasks, what the court deems is in the “child’s best interest is prevalent. *Please view Appendix B for more of a demonstration. The primary caregiver still receives special consideration when determining the best interest of the child, and a plethora of cases reviewed in the course of the study that reflected this. Also, we notice that the preference is no longer just female, but there is still an overwhelming amount of cases where the female is considered the primary caregiver. However, as demonstrated in Porter v. Porter the primary caregiver preference is hindered if other aspects of the child’s well being are challenged.

Given the division of childcare in same-sex couples, the conclusion is reflective of what might occur if a partner in a same-sex couple presents as the primary caregiver. They may be perceived as the option that is within the best interest of the child if they identify as the primary caregiver by having minimal to no time constraints, a decent level of education, and is the biological parent of the child/children. Alternatively, cases were studied that reflected couples that practice a more egalitarian approach to childcare, and often both parents were awarded equal custody over their children, barring any additional complications with their parental profile.

Some of the limitations of the research include a lack of studies involving gay couples and an absence of cases involving the same-sex dissolution of marriages. Being that same-sex marriage was legalized in 2015 there is a small sample size of same-sex marriage cases. As times progress, there is sure to be more content in these areas, and it will allow for more precise studies.

Appendix A

Children were their father's property

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graph TD; A[Children were their father's property] --> B[Tender Years Doctrine]; B --> C[Best Interest of the Child];
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Tender Years Doctrine

- Seitz v. Seitz, 1 N.J. Super. 234 (App. Div. 1949)
-Grove v. Grove, 21 N.J. Super. 447 (App. Div. 1952)"In the absence of misconduct by the mother, it is customary to award to her the custody of a child of tender years."

Best Interest of the Child

-Clemens v. Clemens, supra, 20 N.J. Super
-Turney v. Nooney, 5 N.J. Super. 392, 397 (App. Div. 1949)
"neither the father nor the mother has the greater right to the custody of their child and that, in a contest between them, the happiness and welfare of the child is the determining factor" -

Case Name	What is the relationship between parents and child/children?	Is there an identifiable caregiver?	What did the court primarily use to justify why they ruled the way they ruled?	Did any of the parents have time constraints?	Was there a discrepancy in the parent's education?	Who was the custody awarded to?
Porter v. Porter	Biological Parents	Identifiable Primary Caregiver	Court cited best interest	The non-primary caregiver had time constraints	n/a	Custody awarded to the provider of the family
Pusey v. Pusey	Biological Parents	No Identifiable Primary Caregiver	Court cited best interest	Both parties had time constraints	n/a	Joint custody
Kennedy v. Kennedy	Biological Parents	No Identifiable Primary Caregiver	Court cited best interest	n/a	Both were very well educated	Joint custody
In Re Marriage of Hansen	Biological Parents	Identifiable Primary Caregiver	Court cited best interest	The non-primary caregiver had a time constraint	n/a	Custody awarded to the primary caregiver
Pikula v. Pikula	Biological Parents	Identifiable Primary Caregiver	Court cited best interest	The non-primary caregiver had a time constraint	n/a	Custody awarded to the primary caregiver
Gaskill v. Gaskill	Biological Parents	Identifiable Primary Caregiver	Court cited best interest	The non-primary caregiver had time constraints	n/a	Custody not awarded to the primary caregiver
Nickerson v. Nickerson	Biological Parents	Identifiable Primary Caregiver	Court cited	The non-primary parent had	n/a	Custody awarded to the

			best interest	a time constraint		primary caregiver
Beck v. Beck	Adoptive Parents	Identifiable Primary Caregiver	Court cited best interest	The non-primary caregiver had time constraints	n/a both were well educated	Joint Custody
Larson v. Larson	Biological Parents	Identifiable Primary Care Giver	Court Cited best interest	The non-primary caregiver had time constraints	The non-primary caregiver was more educated	Custody awarded to the primary caregiver
Reavis v. Reavis	Biological Parents	Identifiable Primary Caregiver	Court Cited best interest	The non-primary caregiver had time constraints	The spouses were both well educated	Custody awarded to the primary caregiver
Evans v. Evans	One biological one adoptive parent for one child; both biological for the other child	Identifiable Primary Caregiver	Court cited best interest	n/a	n/a	Custody awarded to the non-primary caregiver
Watson v. Watson	Biological Parents	Identifiable primary caregiver	Cited best interest	n/a	n/a	Custody awarded to the primary caregiver
In Re Hampers	Biological Parents	Identifiable Primary Caregiver	Cited best interest	The non-primary caregiver had time constraints	Both were well educated	Custody awarded to the primary caregiver
Begins v. Begins	Biological parents	Identifiable primary caregiver	Cited best interest	The non-primary caregiver had time constraints	n/a	Custody awarded to the primary caregiver

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