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Should child custody be based on pre-divorce share of caretaking?

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Judges in divorce cases have an impossible task: Allocating custody by determining what's "in the best interests of the children." Parents themselves agonize over what's best for their kids, and are often troubled, later, by whether they've done the right thing. How can a judge--who might never have met the kids, and who in any case knows almost nothing about them--confidently make a decision in the best interests of a child?

Few people are happy with this situation. So legal scholars have come up with an alternative that they call "the approximation rule." It's been debated in law journals for a decade or so, but got a boost recently when it was embraced by the prestigious American Law Institute, a group of lawyers, judges and scholars interested in putting the law on a firm scholarly and scientific basis.

The approximation rule says that judges should decide custody so that the time each parent spends with children after divorce approximates the amount of time each parent spent taking care of the children before the divorce.

But a study in the journal Child Development Perspectives, from the Society for Research in Child Development, concludes that the rule won't be good for children and will not ease the burden on judges. The study recommends, instead, that courts stick with the current best-interests standard and develop new guidelines to help judges make better custody decisions.

"There's no support for the assumption that the amount of time invested in past caretaking reflects the quality of the bond between the parent and child," the study's author, Richard A. Warshak, told me when I sought him out. Children can spend a lot of time with a disturbed parent, or have a very strong bond with a parent they don't see as often, said Warshak, a psychologist in Dallas and clinical professor at the University of Texas Southwestern Medical Center.

He also argues that the rule is likely to favor mothers--because more fathers than mothers work outside the home, leaving them less time for childcare. Furthermore, he says, the rule doesn't consider the change of circumstances that often follow divorce: Many mothers who spent all day with the kids may suddenly be forced to get a job outside the home. And fathers who were content to delegate childcare responsibilities might now want to take a larger role.

Barbara Ann Atwood, a professor of family law at the University of Arizona's law school and the author of one of several commentaries published with Warshak's paper, expressing views on the approx rule, took a middle road. She thinks the approximation rule is a sensible assumption

even if it hasn't been verified by research.

"It's a useful negotiating starting point," Atwood told me. And "it respects diversity in family styles." Families in which parents have equal roles in child care would be treated differently under the rule than families in which most child care is delegated to one parent. And it furthers the interests of the child in stability-if mother was the one who was usually there, she will still be there.

Atwood agrees that the rule could discriminate against fathers. But she notes that fathers who already assume a bigger role for child care would make out better under this rule. And maybe the rule would encourage more fathers to become more involved with their children, especially if they anticipate a breakup of the marriage. "I have more optimism about gender equality being attained-we are moving towards that," Atwood said.

Maybe so, but the reality, now, is that fathers spend more time out of the house at their jobs than mothers do, and the approximation rule would penalize them for that. By focusing solely on time spent caring for the children, it excludes the economic contributions fathers make to their children.

We all want what's in the best interests of our children. And that becomes especially important in a divorce. It's not at all clear whether the approximation rule gets us closer to that worthy goal.

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