CHILD CUSTODY MODIFICATION UNDER THE UNIFORM MARRIAGE AND DIVORCE ACT: A STATUTE TO END THE TUG-OF-WAR?

Each year approximately one million American children experience the trauma of their parents' divorces.[1] The resulting child custody decisions involve familial complications and difficulties requiring judicial discretion.[2] The amount of discretion trial court judges currently exercise, however, often yields unpredictable and poorly reasoned decisions. Frequently, the trial court judge's decision motivates the losing parent to relitigate.[3] In an effort to ensure greater stability after the initial custody decision and to dissuade further litigation, the drafters of the Uniform Marriage and Divorce Act (UMDA)[4] provided a variety of procedural and substantive limitations on a judge's ability to grant changes in custody.[5]

This Note evaluates the UMDA's custody modification provisions and explores their application by the courts. Part I of the Note reviews the history of initial custody determinations and subsequent modifications under the traditional "substantial change in circumstances" standard. Part II details relevant studies on the effects of divorce and discusses how the UMDA incorporates the results of these studies into its modification provision. Part III analyzes judicial and legislative application of the UMDA provisions, focusing on state courts' adherence to and departure from the UMDA. Part IV critiques the effect of the UMDA custody provisions and provides recommendations for change.

I. BACKGROUND OF CHILD CUSTODY DISPUTES

Child custody battles are like no other matters litigated in our courts. Amidst the emotional and life-changing drama played out before him,

1. U.S. BUREAU OF THE CENSUS, *Statistical Abstract of the United States: 1987*, 80 (107th ed.).

2. The trial court is vested with broad discretionary power to determine what is for the child's welfare and to whom custody should be awarded. 27C C.J.S. *Divorce* § 617 (1986). The court's discretionary power, however, is limited by statutory provisions setting forth legislative policy. *Id.*

3. *Cf.* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 262 (suggesting vague standards make the outcome of the litigation difficult to predict, creating a greater incentive to litigate).

4. UNIF. MARRIAGE AND DIVORCE ACT §§ 101-506, 9A U.L.A. 177-677 (1987). The Uniform Marriage and Divorce Act was amended in 1971 and 1973.

5. *Id.* § 409, 9A U.L.A. 628.

the trial court judge must predict the future and place the child with the parent who will best raise the child to become a responsible adult.[6] Once the judge makes a determination, the parties cannot end the matter merely by paying damages. They must continue to interact for the sake of their child.[7] Because each case presents a new set of circumstances, reference to prior case law offers little guidance.[8] State statutes admonish the judge to consider the child's "best interests"[9] and to modify a decree only if a "substantial change in circumstances" exists.[10] The statutes, however, never define these terms.[11]

A. The Initial Custody Decision[12]

For the past two hundred years, judicial resolution of initial custody decisions has been largely inconsistent.[13] Early nineteenth century courts considered children as their father's "chattel" and granted him custody in the event of divorce.[14] Gradually, courts shifted to a maternal

6. Mnookin, *supra* note 3, at 254. "Applying the best-interests standard requires an individualized prediction: with whom will this child be better off in years to come? Proof of what happened in the past is relevant only insofar as it enables the court to decide what is likely to happen in the future." *Id.*

7. *Id.* at 253. "Most disputes resolved by adjudication do not require predictions involving appraisals of future relationships where the 'loser's' future behavior can be an important ingredient." *Id.*

8. *Id.*

9. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-322 (1988) ("The court shall determine custody, either originally or upon petition for modification, in accordance with the best interests of the child."); IDAHO CODE § 32-717 (1983) ("In an action for divorce the court may, before and after judgment, give such direction for the custody, care and education of the children of the marriage as may seem necessary or proper in the best interests of the children."); IND. CODE ANN. § 31-1-11.5-21 (Burns 1987) ("The court shall determine custody and enter a custody order in accordance with the best interests of the child.").

10. *See, e.g.*, ALASKA STAT. § 25.20.110 (1983) (modification permitted if court determines a change in circumstances requires the modification and the modification is in the best interests of the child); MO. REV. STAT. § 452.410 (1986) ("Court shall not modify unless it finds that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child.").

11. Even the UMDA's "best interests" provision, which lists factors for the judge's consideration, "offer[s] judges only a long list of criteria, without explaining a criterion's intended effect or weight." Schneider, *Legislatures and Legal Change: The Reform of Divorce Law* (Book Review), 86 MICH. L. REV. 1121, 1127 (1988).

12. While this Note will concentrate on modification decisions, an understanding of the actual custody decision adds perspective to the developments in custody modifications.

13. Mnookin, *supra* note 3, at 233.

14. *Ex Parte* Devine, 398 So. 2d 686, 688 (Ala. 1981). At common law the husband was responsible for the care, maintenance, education and religious training of his children. He was thus entitled to the benefits of his children's services and association. The wife, whose legal identity

presumption,[15] assuming that the mother is the more nurturing parent and that children of tender years need their mother's care.[16] Additionally, when divorce laws mandated that one party be "at fault" for the marital breakup, courts routinely awarded custody to the innocent party.[17]

"No-fault" divorce statutes[18] and the abolition of the maternal preference doctrine[19] left courts without presumptive custody rules favoring either parent.[20] The focus thus shifted to the child, and the "best inter-

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merged with her husband's upon marriage, had no rights regarding the care and custody of her minor children. *Id.* at 688-89 (citing 1 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 453 (Tucker ed. 1803)).

15. *Id.* at 689. A preference for awarding custody to the mother of children under seven years old developed in England in the nineteenth century. By 1839, the presumption, known as the "tender years" doctrine, became a part of England's statutory law. *Id. See* Justice Talfound's Act, 1839, 2 & 3 Vic., ch. 54. The doctrine originated in the United States in Helms v. Franciscus, 3 Md. Ch. R. (2 Bland) 519, 544 (1830).

16. The court in Helms v. Franciscus, 3 Md. Ch. R. (2 Bland) 519 (1830) explained the basis for the tender years presumption:

> Yet even a court of common law will not go so far as to hold nature in contempt, and snatch helpless, pulling infancy from the bosom of an affectionate mother, and place it in the coarse hands of the father. The mother is the softest and safest nurse of infancy, and with her it will be left in opposition to this general right of the father.

Id. at 536. The maternal preference, however, was inapplicable when clear and convincing evidence demonstrated that the mother was "unfit." Mnookin, *supra* note 3, at 235.

17. *Id.* at 234.

18. Every state had enacted "no-fault" divorce statutes by 1985, though some states also retained fault grounds. Schneider, *supra* note 11, at 1124.

19. Many courts consider the maternal preference doctrine to be gender discriminatory. The Supreme Court of Alabama, for example, held that "the tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex." *Ex Parte* Devine, 398 So. 2d 686, 695 (Ala. 1981). *See also* King v. Vancil, 34 Ill. App. 3d 831, 836, 341 N.E.2d 65, 69 (1975) (maternal preference violative of the Illinois Constitution equal protection clause); State *ex rel.* Watts v. Watts, 77 Misc. 2d 178, 183, 350 N.Y.S.2d 285, 291 (N.Y. Fam. Ct. 1973) (no "compelling state interest" exists to justify different treatment based on parent's sex).

Some states have abolished maternal preference by statute. The following language is typical: "The court in determining custody shall not prefer a parent as custodian because of that parent's sex." ARIZ. REV. STAT. ANN. § 25-332 (Supp. 1988). *See also* ARK. STAT. ANN. § 9-13-101 (1987); CAL. CIV. CODE § 4600 (West 1983); NEB. REV. STAT. § 42-364(2) (1988); OR. REV. STAT. § 107.105(1)(a) (1984).

The official comment to the UMDA suggests retaining the maternal preference because, when all things are equal, it "is simply a shorthand method of expressing the best interests of children . . . ." UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561, Commissioner's Note (1987).

20. Joint custody exists where both parents share legal and often physical custody of the child. The concept of joint custody developed after the abolishment of the maternal preference, when fathers began asserting parental rights. Proponents of joint custody believe it furthers the child's best interests by encouraging both parents to remain actively involved in the child's life. A growing number of states have enacted some form of joint custody legislation. Some states adopted a legal

ests of the child" standard emerged.[21] This standard, while noble in its intentions, gives judges little direction in making custody decisions.[22]

presumption in favor of joint custody. *See generally* Scott and Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455 (1984). A major concern regarding court-ordered joint custody is the effect interparental conflict may have on the child. One commentator suggests that joint custody works best if both parents are psychologically stable and participated in the child's care during the marriage. Wallerstein, *The Child in the Divorcing Family*, 19 JUDGE'S J. 16, 42 (1980).

21. Mnookin, *supra* note 3, at 236.

22. Statutes, at best, list factors for judges to consider when deciding what is in the child's "best interests." The Uniform Marriage and Divorce Act enumerates the following relevant, but not exclusive, factors:

(1) the wishes of the child's parent or parents as to his custody;
(2) the wishes of the child as to his custodian;
(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
(4) the child's adjustment to his home, school, and community; and
(5) the mental and physical health of all individuals involved.

UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

Some states generally follow the UMDA, but consider additional factors, such as: 1) which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent (*see* ARIZ REV. STAT. ANN. § 25-332 (Supp. 1988)); 2) the need to promote continuity and stability in the child's life (*see* IDAHO CODE § 32-717 (1983)); and 3) the age and sex of the child (*see* IND. CODE ANN. § 31-1-11.5-21 (Burns 1987)).

Courts are constitutionally forbidden from considering certain factors in making custody decisions. In Palmore v. Sidoti, 466 U.S. 429, 433 (1984), the Supreme Court held that a court's consideration of race as a factor in a custody decision violated the equal protection clause of the fourteenth amendment. In *Palmore*, the trial court granted a custody change from mother to father following the white custodial mother's cohabitation and subsequent marriage to a black man. *Id.* at 429. The trial court concluded that the modification would serve the child's best interests because, if left with the mother and her black husband, the child would inevitably suffer from social stigmatization upon reaching school age. *Id.* The Supreme Court reversed, explaining that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 433. For a detailed discussion of the *Palmore* decision, see Silverberg and Jonas, Palmore v. Sidoti: *Equal Protection and Child Custody Determinations*, 18 FAM. L.Q. 335 (1984).

Custody decisions based on a parent's religion interfere with the parent's first amendment rights. Thus, courts may only consider the parent's religious practices if the practices are harmful to the child. Some courts, however, have held that the allegations of harm must be demonstrated in detail. Most courts require a demonstration of "substantial probability" of harm rather than a showing of actual harm. For example, a nonassociation with nonbelievers constitutes a harmful religious practice permitting a denial of custody. If the strength of the nonassociation interferes with the child's relationship with the nonbeliever parent, courts may refuse to award custody to the religious parent. Atkinson, *Trends in Child Custody Law: Factors Used in Deciding Custody*, 11 LOY. Q. PUB. ISSUES & L. 39, 43 (1987).

Some states expressly prohibit courts from considering sex as a factor in the custody decision. The use of sex as a factor may violate a state constitution's equal protection clause; moreover, the Alabama Supreme Court held that sexually discriminatory custody decisions violate the equal protection clause of the United States Constitution. *Ex Parte* Devine, 398 So. 2d 686, 695 (Ala. 1981). *See supra* note 19.

Given the differing circumstances involved in each custody decision, precedent proves of little value in determining what constitutes the child's "best interests." Commentators have criticized the tremendous amount of judicial discretion available under the "best interests" standard; the few suggestions for change, however, have not been widely implemented.[23]

23. The "primary caretaker" presumption represents one alternative to the "best interests" standard. Under the "primary caretaker" presumption, the parent who previously provided the child's daily needs, such as feeding, bathing and putting to bed, receives custody. The "primary caretaker" presumption is touted as gender neutral, easily applied and predictable. Hence, it engenders less custody litigation than the "best interests" standard. *See* Fineman, *Dominant Discourse, Professional Language and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 770-74 (1988). At least two states' courts have adopted the "primary caretaker" standard. *See* Pikula v. Pikula, 374 N.W.2d 705 (Minn. 1985); Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981). The *Garska* court explained that the primary caretaker presumption prevents the occurrence of the "Solomon Syndrome." 278 S.E.2d at 3. The "Solomon Syndrome" represents the nonprimary caretaker's threat of custody litigation as a weapon to affect the divorce proceedings. Because the outcome of custody litigation is uncertain, the primary caretaker may accept lesser settlements to prevent any chance of custody litigation. A presumption favoring the primary caretaker removes this threat and permits unhindered settlement negotiations. The "primary caretaker" concept has been criticized, however, as simply a return to maternal preference. *See* McCant, *The Cultural Contradiction of Fathers as Nonparents*, 21 FAM. L.Q. 127, 133 (1987). Additionally, a study of custodial fathers indicates that their adjustment from the secondary caretaker to the primary caretaker role is not inadequate. *See* Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 511-13 (1984).

Goldstein, Freud and Solnit recommend custody decisions based on the "least detrimental alternative" standard. The "least detrimental alternative" means:

> [T]hat child placement and procedure for child placement which maximizes, in accordance with the child's sense of time, . . . the child's opportunity for being wanted . . . and for maintaining on a continuous, unconditional, and permanent basis a relationship with at least one adult who is or will become the child's psychological parent.

J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 53 (1973) [hereinafter GOLDSTEIN, FREUD & SOLNIT]. The "least detrimental alternative" standard focuses exclusively on the child. Thus, a court will afford no preference to the natural parents if the child has developed a psychological bond with another adult. The "least detrimental alternative" standard has been criticized as an oversimplification of the complex issues in child placement disputes. *See* Dembitz, *Beyond Any Discipline's Competence*, 83 YALE L.J. 1304 (1974).

One commentator recommends that the couple reach an agreement through custody counseling because "agreements usually stand on firmer ground than ordinary settlements, and returns to court for visitation and other problems are much rarer." Bodenheimer, *The Rights of Children and the Crisis In Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 495, 507 (1974-75).

Finally, one commentator facetiously recommends resolution of custody disputes through a state-administered coin-flip. The coin-flip idea "acknowledges both our ignorance and the presumed equality of the natural parents." Mnookin, *supra* note 3, at 289.

B. Traditional Custody Modification: The "Substantial Change" Standard

The judge's initial custody determination does not necessarily resolve the custody issue. Custody orders, interlocutory in nature, are always subject to review.[24] The trial court maintains continuing jurisdiction to modify custody, and the appellate court will only overturn a trial judge's decision for abuse of discretion.[25]

In most states, the modification standard imposed by statute or case law requires a "substantial change in circumstances" since the initial custody decision.[26] Courts and legislatures mandate a "substantial change" rather than "any change" to prevent harassment suits and decrease relitigation in general.[27] The stable custody arrangement this standard purports to promote, however, is often a fiction. A trial judge's determination of what constitutes a "substantial change" is subjective. Trial judges have considered such factors as the noncustodian's remarriage,[28] improvement in the noncustodian's financial condition,[29] the

24. *E.g.*, Immerman v. Immerman, 176 Cal. App. 2d 122, 1 Cal. Rptr. 298 (1960); Frye v. Frye, 205 So. 2d 310 (Fla. Dist. Ct. App. 1967); Ponder v. Ponder, 198 Ga. 781, 32 S.E.2d 801 (1945); State *ex. rel.* Werthman v. Superior Court, 448 N.E.2d 680 (Ind. 1983).

25. *E.g.*, Kennedy v. Kennedy, 517 So. 2d 621 (Ala. Civ. App. 1987); Pridgeon v. Superior Court, 134 Ariz. 177, 655 P.2d 1 (1982); Gazaway v. Brackett, 241 Ga. 127, 244 S.E.2d 238 (1978); D. H. v. J. H., 418 N.E.2d 286 (Ind. App. 1981). The underlying rationale for the "abuse of discretion" standard is that the trial court has a better opportunity to observe the parents, assess the credibility of their testimony, and weigh intangibles of sincerity and character. Minton v. Minton, 639 S.W.2d 640, 643 (Mo. Ct. App. 1982).

26. "The party seeking to modify the decree bears the burden of demonstrating both that a substantial change in circumstances has occurred and that a modification will be in the child's best interests." Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 761 (1985).

27. *E.g.*, Newsome v. Newsome, 42 N.C. App. 416, 256 S.E.2d 849 (1979).

28. *See, e.g.*, McCullough v. McCullough, 159 Mont. 419, 498 P.2d 1189 (1972) (evidence that mother remarried and quit her job, allowing her ample time to give minor child attention he needed, supported order modifying custody to mother); Perreault v. Cook, 114 N.H. 440, 332 A.2d 610 (1974) (modification from father to mother because of father's divorce from his second wife and mother's apparently stable second marriage); Gehring v. Gehring, 582 S.W.2d 901 (Tex. Civ. App. 1979) (modification from mother to father, with no statement of material change other than father had remarried, established a home, and had a good income); Turner v. Turner, 348 S.E.2d 21 (Va. 1986).

In *Turner*, the court awarded the father custody in June 1984. The mother's request for modification was denied in January 1985, but granted in October 1985. The court explained that both the mother's remarriage and the child's expressed preference for living with the mother constituted a change in circumstances. 348 S.E.2d at 23. Although there was no finding that the father was an unfit parent, the court granted the modification, finding it to be in the "best interests" of the child. *Id.* at 24. The court stated that "[a] remarriage of the noncustodial parent . . . could be a negative as

child's increased age,[30] the child's declined performance in school,[31] and the custodial parent's desire to move out of the jurisdiction.[32] These factors continue to be subject to a "substantial change," and may instigate another custody modification at some later date.[33]

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well as a positive factor in determining the best interests of a child. *Id. But see* Webster v. Webster, 500 So. 2d 1106 (Ala. Civ. App. 1986) (mother seeking change in custody must demonstrate more than remarriage and improved financial position).

29. *See, e.g.*, Caywood v. Harris, 646 S.W.2d 144 (Mo. Ct. App. 1983) (one fact relevant to change of custody from mother to father was mother's living in a trailer home versus father's living in a three-bedroom home); Keel v. Keel, 225 Va. 606, 303 S.E.2d 917 (1983) (change of circumstances not limited to negative events at home of custodial parent, but may also include positive changes in circumstances of noncustodial parent, such as remarriage, creation of stable home environment, or increased ability to provide emotional and financial support); Wood v. Wood, 7 Wash. App. 252, 498 P.2d 913 (1972) (improvement in noncustodial mother's finances one factor in modifying custody from father to mother).

30. *See* McBride v. McBride, 579 S.W.2d 388, 390 (Mo. Ct. App. 1979) ("specifically, the increased age of a child since the previous custody order can, by itself, constitute a 'changed circumstance' which a court may properly consider in modifying the prior custody order"); Blair v. Blair, 505 S.W.2d 444 (Mo. Ct. App. 1974); King v. King, 114 R.I. 329, 333 A.2d 135 (1975).

In *King*, the initial divorce decree awarded custody of the eight-year old son to his mother. 114 R.I at 330, 333 A.2d at 136. Four years later, the father motioned for a modification based on the boy's increased age. The court held that "a substantial increase in the age of a child during some critical period in his life, standing alone, constitutes a change of circumstance sufficient to warrant the trial court in reopening the prior order awarding custody." *Id.* at 331, 333 A.2d at 137. The court granted the modification, believing that, at twelve, the boy had reached a critical period in his development and that he would be better off with his father, with whom he could hunt, fish and hike. *Id.*

31. *See, e.g.*, Morrison v. Morrison, 676 S.W.2d 279 (Mo. Ct. App. 1984) (deterioration of son's behavior and performance at school while living with father is factor warranting custody modification to mother); Minton v. Minton, 639 S.W.2d 640 (Mo. Ct. App. 1982) (two-year decline in junior high school scholastic performance constitutes a substantial change warranting modification from mother to father); Penn v. Abell, 173 S.W.2d 483 (Tex. Ct. App. 1943) (one child's failure to make passing grades in school while in mother's custody is proper element for consideration).

32. *See, e.g.*, Brandon v. Faulk, 326 So. 2d 76 (Fla. Dist. Ct. App. 1976) (custody transferred to paternal grandparents); *In re* Nodot, 6 Fam. L. Rep. (BNA) 2335 (Ill. App. Ct. 1980) (transfer of custody upon finding that custodial parent would move even if removal petition were denied); Fritschler v. Fritschler, 60 Wis. 2d 283, 208 N.W.2d 336 (1976) (custody transferred to father when mother moved with children after removal petition denied).

Courts have applied different standards to determine whether the custodial parent's move is warranted. Some courts grant the custodial parent's motion to remove the child from the jurisdiction unless the noncustodial parent establishes that the move would not be in the child's best interests. *See, e.g.*, Auge v. Auge, 334 N.W.2d 393 (Minn. 1983). Other courts require the custodial parent to demonstrate that the move is legitimate and consistent with the best interests of the child. *See, e.g.*, *In re* Marriage of Brady, 115 Ill. App. 3d 521, 450 N.E.2d 985 (1983). Finally, New York courts require that the custodial parent make a compelling showing of exceptional circumstances warranting the move. *See* Courten v. Courten, 92 A.D.2d 579, 459 N.Y.S.2d 464 (1983).

33. For example, the breakup of the new custodial parent's second marriage, the new custodial parent's employment demotion, the child's increasing age, the child's continued decline in academic performance, or the new custodial parent's desire to move, all motivate toward relitigation.

The consideration of such a variety of factors exemplifies the trial judge's extreme discretion in the modification decision. The vagueness of the "substantial change" standard often results in modifications based on irrelevant,[34] predictable,[35] or even improved[36] changes in the prior custodian's circumstances. Additionally, because the trial court judge often fails to make specific findings of fact, the decision may be based on unexplained prejudices,[37] which appellate review cannot correct.[38] Judicial discretion and the vague "substantial change" standard make the outcome of a particular case indeterminable,[39] thus promoting, rather than deterring, relitigation. The constant possibility of relitigation may have a

34. *See supra* notes 28-29 and accompanying text. Improvement in the noncustodial parent's circumstances is irrelevant because it does not alter the custodial parent's fitness and may not directly affect the child. Comment, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings*, 35 UCLA L. REV. 677, 681 (1988). The parents' comparative financial status is particularly irrelevant given the court's redistribution power through child support payments. "If in fact the custodial parent's income is insufficient to provide proper care for the child, the remedy is to award child support, not to take away custody." Burchard v. Garay, 42 Cal. 3d 531, 539, 724 P.2d 486, 492 (1986).

Rather than forming a new, stable family unit, the noncustodian's remarriage may cause emotional and adjustment problems for the child. *See infra* notes 59-60 and accompanying text.

35. *See supra* notes 30-31 and accompanying text. The child's declining performance in school is predictable during the post-divorce adjustment period. *See infra* note 58 and accompanying text. Similarly, an increase in the child's age after the initial custody decision is undoubtedly predictable.

36. *See supra* note 32 and accompanying text. The custodial parent's relocation to secure better employment or to be closer to his or her immediate family would likely improve the custodial parent's well-being and, indirectly, the child's well-being. One researcher has concluded that:

> [o]f all factors related to the child's way of coping with the loss [of a parent due to divorce or death], the role of the home parent seem[s] most central. Some years after the divorce or death, the well-being of the child appear[s] closely related to the well-being of the [home] parent.

L. TESSMAN, CHILDREN OF PARTING PARENTS 516 (1978).

Wallerstein and Kelly confirm this conclusion, stating that children of all ages "were in trouble" when stress on the custodial parent, such as "loneliness and discouragement," affects the parent-child relationship. J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP 114, 224-25 (1980). *See generally* Note, *The Judicial Role in Post-Divorce Child Relocation Controversies*, 35 STAN. L. REV. 949 (1983) (arguing that judicial discretion should be replaced by a rule allowing the custodial parent to move whenever the parent desires, absent a privately negotiated restriction).

37. Mnookin, *supra* note 3, at 263. "The use of an indeterminate standard means that state officials may decide on the basis of unarticulated (perhaps even unconscious) predictions and preferences that could be questioned if expressed." *Id.*

See Wexler, *supra* note 26, at 762. "Not surprisingly, decisions made [under the 'substantial change' standard] are less a product of reasoned application of precedent than of the personality, temperament, background, interests, and biases of the trial judge or the community that elected him." *Id.*

38. Mnookin, *supra* note 3, at 253-54.

39. *Id.* at 263.

detrimental effect on the custodial parent-child relationship.[40] Relitigation causes emotional and financial strain on all parties.[41] Modification under this standard, therefore, may not promote the child's "best interests," and, in fact, often promotes the contrary.

II. PSYCHOLOGICAL STUDIES AND UMDA INCORPORATION

Given the lack of judicial agreement concerning what constitutes the child's "best interests" or a "substantial change in circumstances," psychological studies may assist judges in making custody decisions.[42] While studies on the effects of divorce have some deficiencies,[43] the similarity of results suggests that these studies contain valid and valuable information. The UMDA child custody provisions incorporate much of this information.

Experts agree that stability is paramount to a child's development.[44] Changes in environment disrupt a child's sense of security and ability to

40. The continuing ability to change the custodial disposition has "serious and detrimental effects on the custodian, who must remain ever alert to defend against such legal onslaughts." Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 63 (1969). Because the custodian must anticipate a court's reaction to her parenting, she may lose spontaneity with the child. *Id.*

41. *Id* at 64. The financial strain on the custodial mother may be particularly acute. Studies show that women with child custody often experience severe economic decline following divorce. A recent study of California families found that custodial women experienced an average 73% decline in their standard of living for the year following divorce, while men experienced an average 42% rise. L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 339 (1985). Moreover, the litigation costs from modification challenges effectively reduce the standard of living for custodial women.

42. PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 5 (L. Weithorn ed. 1987).

43. Study deficiencies include: 1) exclusive focus on maternal custody arrangements or families of similar demographic characteristics, 2) nonrandom sampling, and 3) nonlongitudinal studies.

Even two of the most respected studies contain deficiencies. A two-year longitudinal study conducted by Hetherton, Cox and Cox analyzed the effect of divorce on 48 white, middle-class divorced families with preschool-aged children and on a matched sample of intact families. Because all families in the group were demographically similar, the results may not be transferable to other demographic groups. *See* Wexler, *supra* note 26, at 785-86.

Another longitudinal study conducted by Wallerstein and Kelly analyzed only divorced families who sought assistance. This study lacked a control group with which Wallerstein and Kelly could compare their results. *See id.*

44. Goldstein, Freud and Solnit explain that continuity of relationships, surroundings, and environment are essential to a child's normal development. The consequences of stability disruptions, however, differ with respect to the child's age. For infants and toddlers, instability in relationships and environment causes anxiety and increasingly shallow emotional attachments. For young children, disruption of continuity affects recently acquired skills, causing breakdowns in toilet training and verbal communication abilities. For school-aged children, instability in relationships may cause resistance to authority resulting in dissocial, delinquent and even criminal behavior. Children who

achieve his own identity.[45] Instability naturally results from any divorce, but courts can lessen the disruption by ensuring the finality of the initial custody decree. The UMDA modification provision promotes stability in the child's environment by limiting the situations in which a court can grant a custody change. Section 409(b) bars modification unless a "change has occurred in the circumstances of the child or his custodian"[46] and the modification is "necessary" to promote the child's best interests.[47] The UMDA additionally requires one of three specific criteria for a change in custody: 1) the custodian agrees to the modification; 2) the child's integration into the noncustodian parent's life is consensual; or 3) "the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him."[48]

Section 409(b) promotes stability in several ways. It limits the court's discretion in determining a change of circumstances, requiring that the "change" involve either the child or the custodial parent. The statute does not recognize a change in the noncustodial parent's circumstances as a basis for modification. Limiting the number of parties whose circumstances affect the decision reduces the frequency of modification.

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experience stability disruptions may raise their own children similarly; the result is a harmful and continuing cycle. GOLDSTEIN, FREUD & SOLNIT, *supra* note 23, at 31-34.

Bodenheimer asserts that courts have operated under the false assumption "that children, being young and malleable, can adapt to shifts in their environment more readily than adults." Bodenheimer, *supra* note 23, at 498. In reality, "children, like delicate plants, should not be uprooted from their surroundings if at all avoidable." *Id. See also* Mnookin, *supra* note 3, at 264-65; Watson, *supra* note 40, at 64.

45. Watson, *supra* note 40, at 64. "When a child is kept suspended, never quite knowing what will happen next, he must likewise suspend the shaping of his personality." *Id.*

46. UMDA section 409(b) provides:

> [T]he court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of entry of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interest of the child. In applying these standards the court shall retain the custodian appointed pursuant to the prior decree unless:
>
> (1) the custodian agrees to the modification;
>
> (2) the child has been integrated into the family of the petitioner with consent of the custodian; or
>
> (3) the child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him.

UNIF. MARRIAGE AND DIVORCE ACT § 409(b), 9A U.L.A. 628 (1987).

47. *Id.*

48. *Id.*

Additionally, the modification must be in the "best interests of the child." UMDA section 402 lists the specific factors to consider when determining the child's "best interests"[49] and enjoins the court from considering custodial conduct that does not affect the relationship with the child.[50] For example, a custodial parent's sexual behavior of which the child is unaware would not justify modification.[51]

Finally, section 409(b) assumes that a modification is not in the child's "best interests" unless one of three situations exists.[52] With some exceptions, this prohibition creates a presumption against modifications. Also, the third exception—when the child's present environment seriously endangers his physical, mental, moral or emotional health—requires the court to balance the harm of a change in environment against the advantages of such a change. As the official comment explains, the balancing test ensures that the court will not modify custody simply because the noncustodial parent can provide a better environment at the present time.[53]

Section 409(c) of the UMDA further promotes stability by mandating the assessment of attorney's fees against the noncustodial parent for harassment litigation.[54] The assessment of attorney's fees deters a noncustodial parent from using the modification hearing as a tool for punishing the former spouse.[55]

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49. *See supra* note 22.

50 "The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child." UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 561 (1987).

51. The official comment to § 402 explains that "unless a contestant is able to prove that the parent's behavior in fact affects his relationship to the child (a standard which could seldom be met if the parent's behavior has been circumspect or unknown to the child), evidence of such behavior is irrelevant." UNIF. MARRIAGE AND DIVORCE ACT § 409, 9A U.L.A. 628, Commissioner's Note (1987). The purpose of the provision is to discourage the parties from spying on each other in order to discover misconduct for use in a custody contest.

52. *See supra* note 46.

53. "Any change in the child's environment may have an adverse effect, even if the noncustodial parent would better serve the child's interest." UNIF. MARRIAGE AND DIVORCE ACT § 409, 9A U.L.A. 628, Commissioner's Note (1987).

54. UNIF. MARRIAGE AND DIVORCE ACT § 409(c), 9A U.L.A. 628, (1987). "Attorney's fees and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment." *Id.*

55. Fathers who seek custody usually fall into two categories. Some fathers, who had been actively involved with their children during the marriage, sought custody to maintain their relationships with their children. Other fathers, who had not been actively involved, waited at least two years before seeking custody out of anger toward the former spouse or belief that the former spouse was a poor mother. PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 125 (L. Weithorn ed. 1987).

Studies also indicate that divorce is not a single event, but rather a process that extends over time.[56] Following the marital breakup, both parents undergo an adjustment period during which they become preoccupied with changes occurring in their respective lives, such as new love relationships, new jobs, and new homes. This preoccupation may result in diminished care for the child. Additionally, the parents' anger and depression over the divorce may reduce the emotional support they can provide for their child.[57] During this adjustment period, children of divorced parents tend to display more aggressive behavior, lower frustration tolerance and greater difficulty in following rules.[58]

During the adjustment stage, which may last from two to five years, either parent is likely to remarry. An estimated eighty percent of divorced men and seventy-five percent of divorced women remarry, usually within five years of the divorce.[59] A parent's remarriage may create additional difficulties for the child's adjustment, particularly in coping with the stepparent relationship.[60]

UMDA section 409(a) recognizes the need for an adjustment time following divorce. The section provides a two-year "cooling off" period in which neither parent may seek custody modification.[61] Any "changes"

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56. Wexler, *supra* note 26, at 785.

57. Wallerstein, *The Child in the Divorcing Family*, 19 JUDGE'S J. 16, 19 (1980). Additionally, the parents' failure to explain to their child the reason for the divorce may increase the child's feelings of abandonment. *Id.*

58. PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 112 (L. Weithorn ed. 1987).

59. Wexler, *supra* note 26, at 792.

60. *Id.* at 795. Stepparent-stepchild relationships generally cause more problems for older children and children in families of lower socioeconomic status. Girls whose custodial mothers remarry undergo particularly difficult adjustments. One scholar points out that courts' reliance on remarriage as a ground for modification is ironic because of the mistaken assumption that the new spouse necessarily can replace the lost parent and create a stable, nuclear family. *Id.* Another author suggests this assumption "comes dangerously close to implying mothers are fungible." Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 241 (1982).

61. No motion to modify a custody decree may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health.

UNIF. MARRIAGE AND DIVORCE ACT § 409(a), 9A U.L.A. 628, (1987).

The original draft of § 409 provided that *no* petition to modify could be filed until one year after the issuance of the initial decree. One commentator noted that "[t]he thrust of the draft is that no independent person will be able to modify that decree within a year, but if circumstances arise that require immediate measures to be taken for the protection of the child, the Juvenile Court presumably would be available." H. Kay, Remarks at the Proceedings of the National Conference of Commissioners on Uniform State Laws (Aug. 1-6, 1970).

in circumstances during the two-year period following the initial decree may reflect merely post-divorce adjustment; a court's examination of the parties during this period would thereby constitute an examination under abnormal circumstances.[62] Additionally, the two-year waiting period applies after each motion to modify, whether successful or not. This discourages the noncustodial parent from jeopardizing the custodial parent-child relationship with constant threats of relitigation.[63]

The official comment to the UMDA suggests that the juvenile court can handle any emergency situation posing an immediate threat to the child.[64] The modification provision also provides a "safety valve" which the noncustodial parent can employ during each two-year period. If the noncustodial parent provides the court with affidavits suggesting "a reason to believe the child's present environment may endanger seriously his physical, mental, moral, or emotional health," the court will grant an immediate hearing.[65]

III. THE UNIFORM MARRIAGE AND DIVORCE ACT: LEGISLATIVE AND JUDICIAL RESISTANCE TO CHANGE

A. Enactment of the UMDA

In 1892, the National Conference of Commissioners on Uniform State Laws assembled to draft uniform laws for commercial paper and marriage and divorce.[66] While the Commissioners promulgated various uniform laws relating to commercial paper as early as 1896,[67] they could not reach agreement on the first draft of the Uniform Marriage and Divorce Act until 1970.[68] Existing fault-based divorce laws, widely thought to add hostility to divorce proceedings and to promote disrespect for the

62. *See supra* notes 57-58 and accompanying text.

63. *See supra* note 40 and accompanying text.

64. UNIF. MARRIAGE AND DIVORCE ACT § 409, 9A U.L.A. 628, Commissioner's Note (1987).

65. *Id.* § 409, 9A U.L.A. 628. The official comment describes the moving party's initial showing by affidavits as an "onerous burden." *Id.* § 409, 9A U.L.A. 628, Commissioner's Note (1973). *But see* Ladden, *Irrationally Held Truths: A Mildly Iconoclastic Look at the Illinois Marriage and Dissolution of Marriage Act*, 70 ILL. BAR J. 628, 630 (1982) ("An attorney who cannot prepare an affidavit that would get his client before a trial judge has obvious shortcomings."); Wexler, *supra* note 26, at 775 (judges will normally grant the motion for a hearing because they are unwilling to decide child custody issues on the basis of papers filed).

66. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A., Prefatory Note (1987).

67. U.C.C., General Comment of National Conference of Commissioners on Uniform State Laws and the American Law Institute (1978). The National Conference of Commissioners on Uniform State Laws promulgated the Uniform Negotiable Instruments Law in 1896.

68. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 148, Prefatory Note (1987).

law,[69] finally provided the impetus needed to ratify the Act.[70] State legislatures readily accepted the concept of no-fault divorce based on "irretrievable breakdown," and by 1985 every state had enacted no-fault divorce laws similar to the UMDA.[71]

Legislative recognition of the need to change existing child custody laws, however, has occurred more slowly.[72] Only a few states have adopted statutes similar to the UMDA in terms of the initial custody decision.[73] Likewise, only a handful of legislatures have enacted variations of the UMDA's modification standards,[74] which were designed

69. Liberal divorce statutes, like Nevada's, undercut the restrictive statutes, like New York's, which permitted divorce only on grounds of adultery. Perjury was common, therefore, in both establishing grounds for divorce in conservative divorce-law states and showing domicile necessary to obtain a decree in liberal divorce-law states. Schneider, *supra* note 11, at 1128.

70. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 148, Prefatory Note (1987).

71. *See supra* note 18.

72. One author suggests that, unlike the decades of debate over the fault-based system of divorce, the lack of widespread debate regarding necessary changes in child custody laws made uniform changes less acceptable to state legislatures and, when enacted, more vulnerable to subsequent change. *See* Schneider, *supra* note 11, at 1128.

The contrast between the states' hesitancy to adopt the UMDA child custody provision and their readiness to adopt the Uniform Child Custody Jurisdiction Act (UCCJA) is obvious: while only a few states have adopted the UMDA, 49 states have adopted the UCCJA. J. AREEN, CASES AND MATERIALS ON FAMILY LAW 559 (2d ed. 1985). State legislatures apparently perceived a greater need for uniformity in child custody jurisdiction laws than in child custody adjudication laws.

The National Conference of Commissioners on Uniform State Laws drafted the UCCJA in 1968 to deal with the parental kidnapping problem. Because the Full Faith and Credit standard did not apply to child custody decrees, a parent who lost custody in one state could kidnap the child and obtain a modification order in another state. The UCCJA sets forth standards that a state court must meet in order to assume jurisdiction over a child custody matter. A complete treatment of the UCCJA is beyond the scope of this Note. For an in-depth discussion of the UCCJA, see Moran, *The Uniform Child Custody Jurisdiction Act: An Analysis of Its History, A Prediction of Its Future*, 84 W. VA. L. REV. 135 (1981).

73. The following state statutes contain versions of the UMDA "best interests" provision governing initial custody decisions, § 402: COLO. REV. STAT. § 14-10-124 (1987); DEL. CODE ANN. tit. 13, § 772 (1981); KY. REV. STAT. ANN. § 403.270 (Michie 1984); MINN. STAT. ANN. § 518.17 (West Supp. 1989); MONT. CODE ANN. § 40-4-212 (1986); OHIO REV. CODE ANN. § 3109.04(C) (Anderson Supp. 1987) (the Montana and Ohio statutes exclude the prohibition against a court's considering conduct of the custodian that does not affect his relationship with the child).

74. The following state statutes contain versions of the UMDA modification provision, § 409: COLO. REV. STAT. § 14-10-131 (1987); DEL. CODE ANN. tit. 13, § 729 (1981); KY. REV. STAT. ANN. § 403.340 (Michie/Bobbs-Merrill 1984); MINN. STAT. ANN. § 518.18 (West Supp. 1989); MONT. CODE ANN. § 40-4-219 (1986); OHIO REV. CODE ANN. § 3109.04(B)(1) (Anderson Supp. 1987); WASH. REV. CODE ANN. § 26.09.260 (Supp. 1989).

One possible reason why more state legislatures have not passed the UMDA child custody provisions is that the "best interests" test for initial custody decisions represents no significant change from existing law, while the modification standards are significantly stricter than the "substantial change" test. Legislators may believe that, because there is no guarantee that the initial custody

to deemphasize fault notions[75] and promote stability[76] in custody arrangements.

B. Legislative Resistance to Change

Of the few state statutory provisions similar to the UMDA child custody modification provision, only Kentucky's replicates the UMDA version.[77] The other statutes liberalize the UMDA version through either alteration or omission of particular sections. For example, the Montana, Ohio and Washington statutes omit the two-year "cooling off" period.[78] Absent the two-year "cooling off" period, the noncustodial parent may petition for a modification at any time. This allows the court to modify the initial decree during the adjustment period, when "changes" in behavior may reflect merely post-divorce adjustment.[79]

The Colorado, Delaware and Minnesota statutes omit the word "seriously" from the UMDA jurisdictional provision, section 409(b).[80] These statutes permit modification based upon evidence that the present custody situtation "endangers" the child's physical or emotional health. Washington's statute requires that the present environment be merely

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decision under the "best interests" standard is the "correct" decision, strict modification standards may run counter to the child's future "best interests." As a Virginia court stated:

> It is indeed rare when a court can be positive, at the time, that its award will prove to be for the best interest of the child, which is the paramount question. The uncertainty involved is the reason for [the Virginia modification provision], which empowers the court to alter or change the custody of children, viewed in the light of subsequent events.

Turner v. Turner, 348 S.E.2d 21 (Va. App. 1986).

Alternatively, one scholar suggests that, because the initial custody decision continues to favor the mother, male-dominated legislatures are reluctant to pass a strict modification statute which could effectively remove the possibility of paternal custody. Interview with Susan Appleton, Professor of Law at Washington University School of Law, in St. Louis (Jan. 1989). Recent custody awards statistics evidence the judicial preference for material custody. In 1981, courts awarded mothers initial custody 92% of the time; courts awarded fathers initial custody less than 5% of the time. Awards to grandparents, stepparents, relatives, and nonrelatives constituted the remaining 3% of awards. McCant, *The Cultural Contradiction of Fathers as Nonparents*, 21 FAM. L.Q. 127, 133 (1987).

75. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. 148, Prefatory Note (1987).

76. UNIF. MARRIAGE AND DIVORCE ACT § 409, 9A U.L.A. 561, Commissioner's Note (1987).

77. KY. REV. STAT. ANN. § 403.340 (Michie/Bobbs-Merrill 1984) (enacted in 1972).

78. MONT. CODE ANN. § 40-4-219 (1986) (enacted in 1975, amended in 1983); OHIO REV. CODE ANN. § 3109.04(B)(1) (Anderson Supp. 1987); WASH. REV. CODE ANN. § 26.09.260 (Supp. 1989).

79. *See supra* notes 56-60 and accompanying text.

80. COLO. REV. STAT. § 14-10-131 (1987); DEL. CODE ANN. tit. 13, § 729 (1981); MINN. STAT. ANN. § 518.18 (Supp. 1989).

"detrimental to," rather than "endanger," the child's health.[81] More situations are "detrimental to" or "endanger" the child's health than "endanger seriously" the child's health. The legislatures' less restrictive language, therefore, increases a court's discretion in determining which situations warrant modification. This greater degree of judicial discretion contradicts the UMDA's purpose of promoting stability in the custodial arrangement.[82]

The Colorado, Delaware, Minnesota, and Ohio statutes[83] also reduce the stability of the custodial arrangement by omitting the UMDA section that awards attorney's fees for harassment litigation.[84] Without the deterrence this section provides, the noncustodial parent may use the modification hearing to punish his former spouse,[85] an act which effectively punishes the child.[86]

Illinois enacted a version of the UMDA provision in 1977,[87] but amended the statute in 1982[88] by eliminating the three prerequisites to modification.[89] The amended statute allows modification if a petitioner proves by clear and convincing evidence that a change has occurred and that modification is necessary to serve the "best interests" of the child.[90] Aside from dictating a stricter burdern of proof, Illinois' amended version essentially reinstates the traditional "substantial change" standard,[91] as well as the judicial discretion that accompanies this standard.[92]

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81. WASH. REV. CODE ANN. § 26.09.260 (Supp. 1989).

82. *See supra* notes 46-53 and accompanying text.

83. COLO. REV. STAT. § 14-10-131 (1987); DEL. CODE ANN. tit. 13, § 729 (1981); MINN. STAT. ANN. § 518.19 (Supp. 1989); OHIO REV. CODE ANN. § 3109.04(B)(1) (Anderson supp. 1987).

84. *See supra* note 54 and accompanying text.

85. *See supra* note 55 and accompanying text.

86. There is considerable evidence that continued conflict between parents after a divorce hinders the positive adjustment of children. Relitigation of custody:

> signifies to the child just what it signifies to anyone else—that the parents are in overt conflict with one another and that this conflict is sufficiently strong to bring them to the courts. Therefore, the fact of the litigation itself means that interparental hostility exists, together with its concomitant adverse effects on the children.

Wexler, *supra* note 26, at 791.

87. ILL. ANN. STAT. ch. 40, para. 610 (Smith-Hurd 1980).

88. ILL. ANN. STAT. ch. 40, para. 610 (Smith-Hurd Supp. 1988).

89. *See supra* note 48 and accompanying text.

90. ILL. ANN. STAT. ch. 40, para. 610 (Smith-Hurd Supp. 1988).

91. Wexler, *supra* note 26, at 776.

92. *See supra* notes 26-39 and accompanying text.

C. *Judicial Resistance to Change*

In those states retaining some version of the UMDA custody modification provision, judicial resistance to change presents an additional problem.[93] Both liberal judicial interpretation and judicial failure to comply with the statute's modification requirements thwart the UMDA's intended reform. The resistance to change is manifest in three ways. First, courts frequently interpret "endanger" to mean "potential for future danger."[94] Second, judges frequently focus on custodial conduct that does not affect the parent's relationship with the child.[95] Finally, courts often disregard the balancing test imposed by the UMDA's modification standards.[96] As a result, the courts in these states exercise a great amount of discretion—discretion the legislatures specifically intended to eliminate.[97]

1. Present Environmental Endangerment

UMDA-based custody statutes prohibit modification unless either the custodial parent consents or the present environment endangers the child's health.[98] Courts have expanded the meaning of the latter requirement to encompass "potential for future harm."[99] This interpretation

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93. One commentator suggests that judicial resistance to change is particularly prevalent in the family law area because of courts' reluctance to surrender their traditionally broad discretionary powers. *See* Schneider, *supra* note 11, at 1127. Authors Foote, Levy, and Sander state the reality of custody litigation as:

> [L]ikely that judges' attitudes vary more in accordance with their personal philosophies than with the latest pronouncements of the legislatures . . . and practicing lawyers try, when possible, to appear before a judge whose views are not unsympathetic to the weaknesses of his client's case

C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 859 (3rd ed. 1985).

94. *See infra* notes 99-118 and accompanying text.

95. *See infra* notes 119-32 and accompanying text.

96. *See infra* notes 133-43 and accompanying text.

97. *See supra* notes 44-53 and accompanying text.

98. *See supra* note 48 and accompanying text.

99. *See, e.g.*, Jarrett v. Jarrett, 78 Ill. 2d 337, 344, 400 N.E.2d 421, 425 (1980) ("To wait until later years to determine whether [custodial mother] had inculcated her moral values in the children would be to await a demonstration that the very harm which the statute seeks to avoid had occurred."); *In re* Marriage of Padiak, 101 Ill. App. 3d 306, 427 N.E.2d 1372 (1981) (subsection contemplates both potential harm and present harm as result of child's current environment); Krug v. Krug, 647 S.W.2d 790 (Ky. 1983) (judge not required to wait until children have already been harmed before considering the conduct causing the harm); *In re* Custody of Dumont, 700 P.2d 167, 170 (Mont. 1985) ("potential for or probability of serious harm is sufficient"); *In re* Marriage of Frasier, 22 Wash. App. 445, 655 P.2d 718 (1982) (living environment can be found detrimental at time of trial without proof that environment caused damage or impairment). *But see* Meiner v. Connelly, 378 N.W.2d 812 (Minn. Ct. App. 1985) (modification based on the statutory ground that a

requires the judge to predict the future.

In some cases, this additional judicial discretion is necessary. *In re Marriage of Sarsfield*,[100] a Montana case, involved a noncustodial father's motion to modify custody based on the custodial mother's association with M.M., an alleged child molester. M.M.'s former wife testified that M.M. admitted to having sexually molested their daughter.[101] No charges were filed against M.M., but authorities removed the daughter from her parents' home. She subsequently underwent treatment for emotional problems connected with the abuse.[102] The noncustodial father presented no evidence that M.M. had physically molested the Sarsfield children.[103] The court, however, recognized the special problem of proof in child abuse cases and awarded the Sarsfield father custody. The court explained that "where substantial, credible evidence of *potential* danger is presented" by a noncustodial parent, a trial court may assume jurisdiction over modification petitions.[104]

Where the potential danger proves less immediate and severe, the likelihood of abuse of discretion arises. In *S. v. S.*,[105] the noncustodial father requested a modification of custody of his infant daughter because the custodial mother was engaged in a lesbian relationship.[106] The request for modification occurred only ten months after the initial decree.[107] The lower court denied the motion for modification, but the appellate court reversed.[108] Applying the two-year adjustment period standard for modifications,[109] the appellate court interpreted the words "may endanger" to mean a potential for future danger rather than an injury that has already occurred or is presently occurring.[110] Although the court found that the mother did not conduct her relationship in the presence of her

child's present environment endangers his physical or emotional health requires showing of actual endangerment).

100. 671 P.2d 595 (Mont. 1983).

101. *Id.* at 600.

102. *Id.*

103. *Id.* at 601.

104. *Id.* at 602 (emphasis added).

105. 608 S.W.2d 64 (Ky. Ct. App. 1980).

106. *Id.* at 65.

107. *Id.*

108. *Id.* at 65-66.

109. *See supra* note 61 and accompanying text.

110. 608 S.W.2d 64, 65 (Ky. Ct. App. 1980).

child,[111] it predicted that, because of the social stigma attached to homosexuality, the child would eventually be subject to "teasing, possible embarrassment and internal conflicts."[112] The court understood this situation to potentially endanger the child's future emotional health, and granted custody to the father.[113]

In *S. v. S.*, the mother's relationship posed no immediate threat to her infant daughter's emotional development.[114] The court, however, based the modification on its prediction of the future, when the child would have to endure teasing and embarrassment. Additionally, the mother's relationship did not constitute a serious threat to her daughter, unlike the mother's relationship in the *Sarsfield* case.[115] The majority view in the psychology profession indicates that children living with homosexual parents are no more likely to experience sexual dysfunction or become homosexuals than children living with heterosexual parents.[116] While fears of this sort were not the sole motivation for the decision in *S. v. S.*, the court did little to conceal its homophobia, calling the mother's conduct a "deviate [sic] practice"[117] and "speculating" that the daughter "may have difficulties in achieving a fulfilling heterosexual identity of her own in the future."[118] As *S. v. S.* indicates, the increased judicial discretion involved in predicting future harm opens the door for decisions based on personal bias, rather than immediate and serious harm to the child.

2. *Effect on the Child*

The UMDA statutes require that the modification prove "necessary to

111. The court explained that "[t]he wife denies any overt lesbian relationship in the presence of the child and there is no proof to the contrary." *Id.* at 65.

112. *Id.* at 66.

113. *Id.* The court's reasoning is strikingly similar to the trial court's reasoning in Palmore v. Sidoti, 466 U.S. 429, 429 (1984). *See supra* note 22. In *Palmore*, the Supreme Court disallowed modification based on the child's future stigmatic injury from the custodial parent's interracial marriage. The Supreme Court, however, has never addressed modification based on stigmatic injury from a custodial parent's homosexual relationship.

114. The child was an infant and the mother did not conduct her relationship in the child's presence.

115. *See supra* notes 100-04 and accompanying text. One scholar points out: "While there is no consensus about what is best for a child, there is much consensus about what is very bad (e.g., physical abuse)." Mnookin, *supra* note 3, at 261.

116. Atkinson, *Trends in Child Custody Law: Factors Used in Deciding Custody*, 11 LOY. Q. PUB. ISSUES & L. 39, 42 (1987).

117. 608 S.W.2d 64, 65 (Ky. Ct. App. 1980).

118. *Id.* at 66.

serve the best interests of the child."[119] In applying this standard, courts often overlook the mandate of the "best interests" provision, which prevents a judge from considering conduct of the custodian that does not affect the parent's relationship with the child.[120] For example, the custodial parent's sexual conduct, even absent proof of a negative effect on the child, has been a factor in many modification decisions.[121]

In *De Franco v. De Franco*,[122] the Illinois Appellate Court granted the noncustodial father's modification motion based on the custodial mother's affair. The mother's partner, separated from his own wife, was attempting to obtain a divorce.[123] Without interviewing the children or

119. *See supra* note 47 and accompanying text.

120. *See supra* notes 49-51 and accompanying text.

121. *See, e.g.*, Jarrett v. Jarrett, 78 Ill. 2d 337, 400 N.E.2d 421 (1980) (change in custody predicated upon the open and continuing cohabitation of the custodial parent with a member of the opposite sex appropriate despite showing that children were healthy, well adjusted, and well cared for); Powell v. Powell, 665 S.W.2d 312 (Ky. 1984) (trial court correctly considered mother's sexual misconduct in making custody modification determination despite lack of evidence that such conduct was viewed by or affected child). *But see* Whaley v. Whaley, 61 Ohio App. 2d 111, 399 N.E.2d 1270 (1978) (custodial parent's immoral conduct must be shown to have a direct or probable adverse impact on child's welfare to justify a change of custody); Schuster v. Schuster, 90 Wash. 2d 626, 585 P.2d 130 (1978).

In *Schuster*, the lower court denied modification on the basis of the custodial mother's lesbian relationship. The Washington Supreme Court found no change in the circumstances of the child or custodian since the initial decree. Although the initial decree prohibited the mother from living with another woman, the court refused to change custody based on the mother's violation of the decree. The court explained that "[t]he custody of a child is not to be used as a reward or punishment for the conduct of the parents. The court shall not consider conduct of a proposed guardian that does not affect the welfare of the child." *Id.* at 630, 585 P.2d at 133.

Courts have approached custody disputes involving parental nonmarital sexual conduct in four ways: 1) conclusive disqualification, 2) presumptive unfitness, 3) presumptive adverse impact, and 4) direct adverse impact. The first three approaches rest on the premise that the sexually active parent necessarily or probably lacks the ability to be a good parent. These approaches apparently aim to punish the parent, rather than to further the best interests of the child. Under the fourth approach, however, the court need not determine morality. In addition, under the first three approaches, a court may presume a harmful effect on the child from the parent's sexual activity. Conversely, a court using the direct adverse impact approach may not infer such an effect. Thus, the fourth approach mandates that the court refrain from acting until an injury has been sustained. In light of the harm to a child that necessarily follows a custody change, awaiting actual injury before custody modification appears less rigid. *See generally* Whaley v. Whaley, 64 Ohio App. 2d 111, 399 N.E.2d 1270 (1978) (interpreting Ohio's version of UMDA modification provision under the direct adverse impact approach); Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CIN. L. REV. 647 (1977).

122. 67 Ill. App. 3d 760, 384 N.E.2d 997 (1979). *De Franco* was decided under the Illinois version of the UMDA, prior to the 1982 amendment. *See supra* notes 87-92 and accompanying text.

123. 67 Ill. App. 3d at 763, 384 N.E.2d at 1000.

requiring any psychological examinations,[124] the court concluded that "[t]he tie between an adulterous relationship and its effect on minor children does not lend itself to precise, empirical proof"[125] and that "[t]he effects may well be subjective ones that will raise their ugly heads and make their presence known at some future time."[126]

The *De Franco* court distinguished an earlier case, *Jarrett v. Jarrett*.[127] In *Jarrett*, the trial court had issued a modification order granting custody to the father when the custodial mother's boyfriend moved in with her, but the appellate court reversed.[128] The *Jarrett* appellate court held that the mother's relationship with her boyfriend was irrelevant because there was no indication of a negative effect on the minor children.[129] The *De Franco* court distinguished *Jarrett* on the grounds that fornication constitutes only a class B misdemeanor, while adultery constitutes a class A misdemeanor.[130] It is unlikely that the De Franco children, at ages five and two, were aware of this distinction.

Consideration of parental conduct that does not affect the child, like prediction of future harm, allows custody decisions to reflect nothing more than the judge's personal bias.[131] Because modifications disrupt stability and invade family privacy,[132] a custody modification should re-

124. *Id.* at 771, 384 N.E.2d at 1005.

125. *Id.* at 767, 384 N.E.2d at 1003.

126. *Id.* at 768, 384 N.E.2d at 1003.

127. 64 Ill. App. 3d 932, 382 N.E.2d 12 (1978), *rev'd*, 78 Ill. 2d 337, 400 N.E.2d 421 (1980).

128. *Id.* at 937, 382 N.E.2d at 17. The Illinois Supreme Court later reversed the appellate court's holding after *De Franco* was decided.

129. The court reasoned that "[b]y statutory mandate, it is not our function to approve or disapprove [the custodial mother's] conduct, but only to determine its effect upon the children." *Id.* at 936, 382 N.E.2d at 16.

130. De Franco v. De Franco, 67 Ill. App. 3d 760, 766, 384 N.E.2d 997, 1002 (1979). Under an alternative rationale, that custodial parents who engage in criminal conduct are unlikely to proscribe future illegal activities of their children, both *De Franco* and *Jarrett* would have resulted in modification. *See* Jarrett v. Jarrett, 64 Ill. App. 3d 932, 939, 382 N.E.2d 12, 18 (McNamara, J., dissenting). This rationale, however, involves the court once again in the business of predicting the future.

131. The *De Franco* court manifested its bias in resolving the custodial mother's request that the court consider "her remorse over a 'bad decision' and the fact that [her lover was] no longer living with her." 67 Ill. App. 3d at 770, 384 N.E.2d at 1004. The court remained unconvinced that Mrs. De Franco intended to "abandon her ways," stating: "[p]etitioner alleges remorse, yet we are far from convinced as to her future conduct." *Id.*

132. The Supreme Court has recognized a fundamental right of family privacy that protects the raising and educating of children from state interference. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). The state as *parens patriae*, however, may restrict the parents' control in matters affecting the child's welfare, for example, school attendance and child labor. Prince v. Massachusetts, 321 U.S. 158 (1943). The tension between the family's privacy interest and the state's interest in protect-

quire stringent proof of immediate harm and evidence of a current effect on the child.

3. *Balancing Test*

In addition to requiring proof that the present environment endangers the child's health, the UMDA statutes compel courts to balance the harm of a change in environment against the advantages of such a change.[133] Essentially, the test strengthens the presumption favoring the present custodial arrangement.[134] Unfortunately, in many UMDA state cases the records are "one-sided and narrow in scope,"[135] concentrating on the parenting problems of the custodial parent rather than evaluating the capabilities or deficiencies of the noncustodial parent.[136] In *S. v. S.*,[137] for example, the only reference to the father's qualifications for custody was the court psychologist's opinion that both parents were reasonably well adjusted.[138] Furthermore, the psychologist stated that the father's second wife "was the most stable person in this situation."[139] In

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ing the child's welfare pervades custody modification proceedings. One suggestion for balancing these interests is a rebuttable presumption against modification, permitting modification only upon a showing of present neglect or harm to the child. *See* Comment, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Modification Proceedings*, 35 UCLA L. REV. 677 (1988).

133. *See supra* notes 48, 53 and accompanying text.

134. The [balancing test] is especially important because it compels attention to the real issue in modification cases. Any change in the child's environment may have an adverse effect, even if the non-custodial parent would better serve the child's interest. [The balancing test] focuses the issue clearly and demands the presentation by evidence relevant to the resolution of that issue.

UNIF. MARRIAGE AND DIVORCE ACT § 409, 9A U.L.A. 628, Commissioner's Note (1987).

135. Young v. Young, 370 N.W.2d 57, 64 (Minn. Ct. App. 1985).

136. *See, e.g., In re* R.L.S. v. Barkhoff, 674 P.2d 1082 (Mont. 1983). In *Barkhoff*, the district court failed to enumerate specifically the facts that satisfied the balancing test. *Id.* at 1087. The Montana Supreme Court upheld the modification, looking "through the form to the substance of the trial court's findings." *Id.* The court made detailed factual findings regarding the custodial mother's numerous jobs, sloven housekeeping habits and abuse of drugs and alcohol. *Id.* at 1087-88. The court never mentioned the father's parenting capabilities. *But see* Chapman v. Chapman, 352 N.W.2d 427 (Minn. 1984) (trial court erred in modifying decree where it failed to weigh explicitly the advantages of the change against the harm likely to result from the change); State *ex rel.* Gunderson v. Preiss, 336 N.W.2d 546 (Minn. 1983) (statute should be construed to require a weighing of the harm the child would suffer from a change of environment against the advantage to be derived from the change).

137. 608 S.W.2d 64 (Ky. Ct. App. 1980). *See supra* notes 105-13 and accompanying text.

138. 608 S.W.2d at 66.

139. *Id.*

De Franco,[140] the court examined the noncustodial father's status in one paragraph,[141] emphasizing his second wife's ability to remain at home during the day and care for the children.[142] Neither court explicitly balanced the advantage of a stable or nonworking stepparent[143] against the harm resulting from a change in environment.

IV. CRITIQUE AND RECOMMENDATION

The results under the UMDA custody modification provision exemplify "[t]he gap between the law on the books and the law in action."[144] Judges seem unwilling to follow the UMDA's mandate, perhaps because of their reluctance to surrender broad discretionary powers. Additionally, ambiguity in any statute's wording permits expanded readings of the language. These problems suggest the need for substantive and procedural changes that will ensure precise application of UMDA state statutes.

A. Substantive Changes

The following recommended substantive changes will enhance the UMDA's primary goals of de-emphasizing fault notions[145] and promoting stability[146] in custody arrangements.

First, to provide post divorce adjustment time for the custodial parent and child,[147] the statute should prohibit *all* motions for modification within two years of the initial custody decree. The "safety valve"[148] in the present statute is too easily triggered, given the vague "may endanger" standard[149] and judges' reluctance to deny modification hearings based on affidavits.[150] The juvenile court can consider motions which

140. 67 Ill. App. 3d 760, 384 N.E. 2d 997 (1979). *See supra* notes 122-31 and accompanying text.

141. 67 Ill. App. 3d at 764, 384 N.E.2d at 1001. The court considered the father's occupation, marital status, and current and prospective homes. An examination of the father's parenting capabilities was noticeably absent.

142. *Id.*

143. The benefit resulting from the stepparent's presence is dubious. *See supra* notes 59-60 and accompanying text.

144. Schneider, *supra* note 11, at 1122.

145. *See supra* note 75 and accompanying text.

146. *See supra* note 76 and accompanying text.

147. *See supra* notes 56-63 and accompanying text.

148. *See supra* note 65 and accompanying text.

149. *See id.*

150. *See supra* note 65.

require immediate action during this two-year period.[151]

Second, modifications after two years without the consent of the custodial parent should be based only on present or immediate and severe endangerment to the child's physical health. The vague terms of "mental, moral, and emotional health"[152] should be eliminated from the statute. These terms present evidentiary problems and allow modifications based on judges' subjective opinions regarding proper child-rearing environments.

Third, the proposed modification section should prohibit explicitly consideration of the custodial parent's conduct that does not affect the relationship with the child.[153] Although section 409(b) incorporates this prohibition by reference to section 402,[154] explicit restatement may promote greater judicial compliance.

Finally, the statute should take further steps to prevent harassment litigation.[155] Not only should the statute assess attorney's fees, but it should prohibit any future modification sought by a noncustodial parent who instigates vexatious litigation.

B. Procedural Changes

The success of a strict modification statute depends on the trial court judge's adherence to its terms. To promote judicial compliance, the statute should include a procedural section requiring the trial court judge to state findings of fact with respect to the following:

1) how the present environment seriously endangers the child;
2) the effect of the custodial parent's conduct on his or her relationship with the child; and
3) the capabilities and deficiencies of the noncustodial parent, including whether the benefit of living with the noncustodial parent outweighs the likely harm of a change in environment.

Requiring the judge to address explicitly the above issues compels adherence to the statute and deters reliance on personal bias. Additionally, a record that contains these findings of fact expedites effective appellate review.

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151. *See supra* note 61.
152. *See supra* notes 46, 48 and accompanying text.
153. *See supra* notes 50-51 and accompanying text.
154. *See supra* notes 49-50 and accompanying text.
155. *See supra* notes 54-55 and accompanying text.

V. CONCLUSION

The UMDA custody modification provision represents a vast improvement over the traditional "substantial change" standard. Each section of the UMDA provision promotes stability for children of divorce. Legislatures should be encouraged to enact the uniform statute in its entirety.

Despite the strides of the UMDA, however, further refinements are needed to enhance the statute's effectiveness. The substantive and procedural changes recommended in this Note help achieve the UMDA's objectives by clarifying the statute's language and promoting judicial compliance with the statute.

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