

Brogan Gerhart

01/30/2018

Shared Custody to Combat Gender Bias's Harmful Influence on Child Placement After Divorce

When I was six years old, I was faced with an impossible situation. My parents had decided they had not loved each other anymore, but that they still wanted to love my one-year-old sister and me. I should have seen it coming. Even though I was young, I always wondered why my mom would volunteer to be deployed, why she preferred a war zone over our nice little home on the army base in Killeen, Texas. My dad had recently retired from the army to pursue a career in art, a career much less stable than that of my mother. Even though he had been the one to raise me while my mom was overseas, which was the majority of my childhood, she was perceived to be the better parent in the law's eyes. After all, she was my mother. Mothers are supposed to be the caregivers. Even though she would rush off to battle before rushing home to tuck me in at night, she was still given the title as the better parent. Although her financial situation was more stable than my father's, his was not terrible. It was more than a father needed to raise two children, and the argument soon shifted from a matter finance to a battle of the sexes. Or rather, of the stereotypes. For the next few years, I watched my dad work harder than anyone to eventually be granted custody of one of his children, all while still making me breakfast every morning before school and reading me a bedtime story every night before going to sleep. He was more than just a great father, he was an amazing parent in all aspects of parenting, contrary to what the judge who worked our case initially thought because of his gender.

Divorce is a horrible thing. It is something that tears more than just two people apart, but entire families. Marriage can end without parenthood suffering because of it, but I believe it is society's slanted views and expectations for mothers and fathers, in the role that they play and the amount of impact they are able to create in their child's life, that causes rifts in U.S. family courts across the country. When my parents divorced, some people may say that my father adopted a motherly role towards me, as he was the one to cook all the meals and clean the house and drive me to and from all of the places I needed to go, but that is what I think society believes. I see what my father did for me as not taking over my mother's role, but fulfilling his own role as my parent where he had always fulfilled it – where it was needed. Nina argues on *Everyday Feminism* that society tends to assign gender roles in marriage to each sex (e.g., the mother takes care of the children, the father takes care of the moneymaking). These perceived gender roles within marriage are factors that have contributed to the development of what determines child placement in contemporary family courts.

Legal measures addressing the issue of gender bias in the U.S. has continued to develop into modern day. Reform movements and the rise of feminism in the 1970s established the gender rights we know today in the United States. Legislation that followed due to this reform reflected these rights in courts, according to Bergeron, a producer for *CNN's* Special Projects. Prior to the tender years doctrine, which granted mothers priority in maintaining the custody of younger, more impressionable children, dependents were usually considered a father's natural right (Jacobs 10). As reform prompted gender equality, the legislation shifted from the tender years doctrine to "the best interest of the child." The focus itself of the deciding factor of custody was no longer about which gender had more right to parent, but about which parent was better fit

to give their child or children the best possible life moving forward. This is where we stand today. In theory, the focus is now where it should be: on the child.

This is why I believe it is important to address the implications of gender bias that still exist today, and how gender stereotypes can have an effect on determining the outcome of a custody decision and fulfilling the best interest of the child. If a child is declared a dependent of one parent solely due to the stereotypical view of that parent's gender, his or her best interest runs the risk of not being satisfied. The problem with the child's best interest, an idea expressed in an article written by Kruk, is that "a clear and precise understanding of the 'best interest' concept remains elusive, to the point that it is subject to competing interpretations." Although legislation made to combat gender bias are already in place, I believe gender bias in custody courts continues to play a large role in child placement after divorce and acts as an unfair influencer in determining the best interest of the child. A new system of gender neutral indicators of parental fitness should be enforced and a push for shared custody should be enacted. The ultimate goal in custody decisions should be to do what is best for a child's long-term development.

In this paper, I will first provide evidence that proves that gender bias in custody courts plays a large role in child placement after divorce and acts as an unfair influencer in determining the best interest of the child. To do this, I will address four key points: longstanding gender stereotypes within marriage and parenting, difficulties faced by members of the LGBTQ community in custody courts, current factors used to determine parental fitness and "the best interest of the child." After explaining the importance of these issues, I will discuss views opposing my claims and defend them in response to these oppositions. To conclude, I will propose three new ways to calculate parental fitness that will help curb the influence of gender

bias: encouraging shared custody, implementing single-blind evaluations of each parent where the judge is given information on each person without knowing their gender or sexual orientation, and having each member of the direct family involved in the custody battle undergo psychological evaluations so factors beyond financial stability can be taken into account.

To begin proving that gender bias in custody courts plays a large role in child placement after divorce and acts as an unfair influencer in determining the best interest of the child, I will first discuss the longstanding gender stereotypes within marriage and parenting. For the sake of simplicity, I will only be discussing the stereotypes associated with traditional, heterosexual mother-father relationships here. “Men, more than women, are culture-made,” McNeely says, expressing her thoughts on the initial construction of gender norms within families, suggesting that the male is traditionally viewed as the financial provider, and less of a caregiver than the mother. Therefore, the interest that a father has in winning custody, even if that interest is equal to that of the mother’s, may be viewed as higher because it is thought of to be less common to see this type of father-to-child relationship. With that being said, sex-based discrimination also has the chance to be pitted against fathers, as mothers’ care for their children is seemingly viewed as implied (McNeely 9). As a society, McNeely implies that whereas it is seen as a mother’s job to love her children, for a father, it is simply something that makes him a really good one.

This leads me to the difficulties faced by members of the LGBTQ community in custody courts. I think it is important to include this to emphasize the effect that perceived ability to parent based on gender and sexual orientation have on custody decisions. Bagnall, Gallagher and Goldstein highlight the unique plight of the LGBTQ community in relation to custody cases. They explain how stereotypes about sexual orientation can make for baseless decisions by judges

regarding best interest and how the assumption that an individual's homosexuality is often presumed as harmful to a child is a common ground for final rulings. This sexuality-discrimination relates directly to gender bias in family courts because I think it is still an unfair influencer in determining child placement after divorce and that it is important to recognize. Just like with determining custody with heterosexual parents, LGBTQ parents face judgement based on gender role bias rather than the facts of their actual ability to parent. According to research done on gay parenting by Drexel University, it has been shown that children raised by gay or lesbian parents are just as well-adjusted as their peers. Although it has also been shown that a child can be affected by a parent's shift in sexuality (Fairley), it should not be judged as harmful having an LGBTQ parent pointblank by judges when determining the placement of a child.

I will now talk about the current factors used to determine parental fitness. Although there are many things taken into account when deciding custody, the main factors taken into account, according to Dutton, are the child's preference, the quality of the child's relationship between his or her parents, the mental and physical health of the parents, the wishes of the parents and the work obligations of both parent. Some other things that are taken into consideration are the child's age, past instances of neglect, abuse, or violence by either or both parents and the number of children involved in the custody case. Although these are all good factors to take into account, I believe a lot of them are vulnerable to interpretation influenced by gender bias. For example, the determination of mental and physical health of the parents is left up to the judge evaluating each parent. Mental and physical health meaning any disabilities faced by the parent are taken into account when deciding custody. Because mental and physical strength and ability is key to meeting the needs of a child, in my opinion, a man might be

perceived as more capable of overcoming physical handicaps than a woman due to gender stereotypes. I believe the majority of the other factors are also open to such bias interpretations.

This leads me to the main point that helps prove the large role gender bias plays in child placement after divorce, and what I believe is unfairly influenced by the presence of gender bias in family courts: “the best interest of the child.” Because the best interest of the child is more of a vague guideline for deciding custody and not a legal or scientific standard, Charlow states it is subject “to abuse both by judges who administer it and parents who use it to further their own interests.” According to the *Swanson Law Center*, parents have many concerns when it comes to determining who gets what in a divorce. Children usually tend to be treated somewhat like objects in the sense that custody becomes more about the parents and what they want versus what would be better for the child themselves. I agree with Charlow, who believes striving for the child’s best interest is good in theory, but difficult in practice as there are many personal preferences of outside parties that can distract from the main focus of custody outcome.

The large role that gender bias plays in child placement after divorce and its unfair influence in determining the best interest of the child is important because if the ultimate placement of a child is based off bias decisions regarding the gender or sexuality of the parents by judges, I do not believe the end goal of the “best interest” has been met. As long as gender bias is able to play a role in influencing custody decisions, I think the outcome will remain being not as much about the long-term health and development of the child as it should be. Cadwell believes that while more time is spent working towards the outcome: where custody is granted, not enough concern is being given to the process: how the court evaluates the parties and each one’s ability to care for the child. Most children report painful feelings about their parents’ divorce according to Lee and Bax. I think this is due to a lack of focus on the court’s evaluation

of each parent to provide the best long-term care for the child and too much on the desired outcome of the parents alone. Because there is such a large focus on the capability of each parent based on their perceived child-rearing capabilities, I believe that child behavior after placement is important to note, as it suggests there is not enough focus on meeting his or her specific needs and long-term wishes in the custody process.

Some can argue that gender bias does not in fact exist or play a role in custody courts today, or that it has improved to the point of either parent not having a notable disadvantage in attaining custody. Belkin, a journalist for The New York Times, argues that percentages of fathers with primary custody is increasing, and that the effect of gender bias in courts will likely lose its impact. Although this line of argument does emphasize the improvement seen in family court legislation and practice, the implication of the best interest of the child and the general reform to law in relatively recent years (e.g., due process and equal protection clauses), it defends itself by using the increase in fathers attaining custody as a sign of gender bias leaving courts. This is where the weakness in Belkin's argument lies because gender bias is not being removed from custody courts just because more fathers are being granted primary custody, it is simply being redefined. Pizarra, in an article for The Huffington Post, says that "while there are inherent animal instincts hardwired into our species when dealing with infants, parenting is a learned behavior." I believe that society defines mother and father's roles as parents and due to the recent shift in female independence, mother's increased involvement in the workplace has allowed for fathers to be seen as more capable caregivers. I think this shift has allowed for a more positive gender bias, yes, which accounts for the increase in primary custody granted to fathers, but a persisting presence of gender bias in family courts all the same.

To combat the issues attached to the influence of gender bias in custody courts, I would like to propose three new ways to calculate parental fitness that will help curb the influence of gender bias. The first strategy I will talk about is encouraging shared custody. Parents in general, regardless of their sexual orientation, do what they think they need to do to make their children's lives better, but sometimes make mistakes when deciding how to go about doing that. Oftentimes spouses will exorcise their ex-partners from portions of their children's lives in order to isolate them from potentially adverse or contradicting environments. Although parents do this to protect their child, researchers have found that unless there was a case of severe conflict or abuse within the marriage, according to Allison and Furstenberg, it is in the best interest of the child to maintain a healthy relationship with both of his or her parents. If ties with one parent are cut completely, a child could struggle with the psychological loss of both a parent and financial support (Buchanan and Jahromi 1). Even in the cases of LGBTQ parents collected by Joos and Broad, it is shown that having that additional interaction with both parents, regardless of their gender or sexual orientation, does contribute to the child's overall well-being and sense of identity. I think it is important that a child has the opportunity to grow and learn from both of their parents for this reason. Regardless of sexual orientation or how well a specific parent based on their gender is perceived to be, a child is in a better position to develop if they are able to stay connected to some extent with both individuals. Although shared custody cannot be required, I believe it should be heavily encouraged in the best interest of the child and its benefits highlighted before parents make their final decision.

The second method I will propose, is the implementation of single-blind evaluations of each parent where the judge is given information on each person without knowing their gender or sexual orientation. I believe this will allow for non-discriminatory analyses on each parent

based on factors outside of gender like income, personal history, and stability. Earlier in this paper, I talked about the different factors taken into account when determining custody. Factors like the child's preference, the wishes of the parents, the work obligations of both parent, etc. This method allows for all of those factors, which are also listed on the *U.S. Department of Health & Human Services'* website under "Child Welfare," to be considered without the subconscious influence of a parent's gender. Because the ultimate goal of child placement is deciding what will ultimately be in the best interest of the child, these evaluations will use factual information free of gender role bias that will act as a more accurate tool for determining this.

The third and final solution I have for curbing the influence of gender bias in custody cases is having each member of the direct family involved in the custody battle undergo psychological evaluations so factors beyond financial stability can be taken into account. This helps evaluate factors outside of gender and things like income. It tests a different kind of fitness to parent outside of a single judge's analysis that I think is important to take into mind when custody is to be determined. *Heimerl & Lammers Law Firm* states that most parents overlook that effect that divorce has on children. I think that the first concern of parents in family courts is not to truly think about if they are best-suited or fully capable to raise their children, they are just trying to prove that they are. That is why I think that job should be left up to a professional able to provide accurate psychological evaluations of all parties vying for custody and the child/children if they are of appropriate age.

My solutions do not put an end to gender bias. That is something that can never be fully removed from U.S. courts. However, it does provide a way for the child to achieve a level of long-term care most beneficial to his or her needs and takes into account multiple factors outside

of gender that can be taken into the final evaluation when deciding where a child should be placed in the end.

In conclusion, in this paper, I first provided evidence that proved that gender bias in custody courts plays a large role in child placement after divorce and acts as an unfair influencer in determining the best interest of the child. To do this, I addressed four key points: longstanding gender stereotypes within marriage and parenting, difficulties faced by members of the LGBTQ community in custody courts, current factors used to determine parental fitness and “the best interest of the child.” After explaining the importance of these issues, I discussed views opposing my claims and defended them in response to these oppositions. To wrap up my argument, I proposed three new ways to calculate parental fitness that will help curb the influence of gender bias: encouraging shared custody, implementing single-blind evaluations of each parent where the judge is given information on each person without knowing their gender or sexual orientation, and having each member of the direct family involved in the custody battle undergo psychological evaluations so factors beyond financial stability can be taken into account.

I believe that the ultimate goal in custody decisions should be to do what is best for a child’s long-term development. Because healthy relationships between parents and parent-to-child relationships should be maintained after divorce, I believe my proposed solutions will allow these healthy relationships to form and the best interest of the child to be met. I almost did not live with the man who raised me and the man I am proud today to call my dad. Although society’s perception of gender roles within marriage and parenting are changing, it’s important that legislation in family courts continues to change with it, so children are able to live in the best environment possible coming out of a divorced household. A lot of people tend to label separated families as “broken” families, but I believe that they do not have to be. Divorce can have a lot of

negative effects on the children caught in the crossfire of their parent's custody battle, but with the continual effort to judge accurate parental fitness in custody courts, I foresee improvement in the placement of children that will truly be in their long-term and best interest.