

1992

Best Interests of the Child: Considering the Effects of Passive Smoking When Making a Custody Adjudication

Wanda Uhlich

[How does access to this work benefit you? Let us know!](#)

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Uhlich, Wanda (1992) "Best Interests of the Child: Considering the Effects of Passive Smoking When Making a Custody Adjudication," *North Dakota Law Review*. Vol. 68: No. 3, Article 6.

Available at: <https://commons.und.edu/ndlr/vol68/iss3/6>

This Note is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.common@library.und.edu.

BEST INTERESTS OF THE CHILD: CONSIDERING THE EFFECTS OF PASSIVE SMOKING WHEN MAKING A CUSTODY ADJUDICATION

I. INTRODUCTION

The best interests of the child is the legal standard used to determine child custody decisions in North Dakota.¹ This standard has been codified in North Dakota, with twelve factors courts evaluate and weigh, where applicable, in making custody adjudications.² The purpose of this Note is to explore the concept of custody awards based on the best interests of the child in light of recent evidence of the harmful effects passive smoking has on children.³ Years of living with a smoker leads to a decline in a child's

1. N.D. CENT. CODE § 14-09-06.1 (1991). This section provides:

An order for custody of an unmarried minor child entered pursuant to this chapter must award the custody of the child to a person, agency, organization, or institution as will, in the opinion of the judge, promote the best interests and welfare of the child. Between the mother and father, whether natural or adoptive, there is no presumption as to who will better promote the best interests and welfare of the child.

Id.

2. N.D. CENT. CODE § 14-09-06.2 (1991). These factors include:

- a. The love, affection, and other emotional ties existing between the parents and child.
- b. The capacity and disposition of the parents to give the child love, affection, and guidance and to continue the education of the child.
- c. The disposition of the parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
- d. The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.
- e. The permanence, as a family unit, of the existing or proposed custodial home.
- f. The moral fitness of the parents.
- g. The mental and physical health of the parents.
- h. The home, school, and community record of the child.
- i. The reasonable preference of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
- j. The existence of domestic violence. If the court finds that domestic violence has occurred, the court shall cite specific findings of fact to show that the custody or visitation arrangement best protects the child and the parent or other family or household member who is the victim of domestic violence from any further harm. As used in this subdivision, "domestic violence" means domestic violence as defined in section 14-07.1-01.
- k. The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, or assault, on other persons.
- l. Any other factors considered by the court to be relevant to a particular child custody dispute.

Id.

3. See, e.g., PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL (1986) [hereinafter INVOLUNTARY SMOKING]. Children who live with smokers

health,⁴ a fact which should be recognized by a court making a custody decision.

It has been proven that children of smoking parents have an increased frequency of respiratory illnesses such as wheezing, frank asthma, bronchitis, and pneumonia.⁵ Children of smoking parents may also have an increased risk of lung cancer.⁶ Because children suffer serious health consequences as a result of passive smoking,⁷ scrutinizing parental nicotine addiction⁸ makes sense

have more instances of bronchitis, tracheitis, laryngitis, cough, phlegm, and middle ear disease than do children of nonsmokers. *Id.* at 107.

4. *Health Impact, Costs of Smoking: Hearing Before the Senate Committee on Finance*, 101st Cong., 2d Sess. 64 (1990). Dr. Jonathan Klein appeared on behalf of the American Academy of Pediatrics to encourage Congress to require tobacco industry advertisements informing the public of the dangers of tobacco and to increase the federal tax on all tobacco products. *Id.* at 65. In his speech on the dangers of tobacco use, Dr. Klein made special mention of the harm wrought on the health of children who, "[b]ecause of their dependence upon adults . . . have inescapable risks of smoke inhalation." *Id.* at 64. The incidence of respiratory illnesses increases with the amount of cigarette smoke exposure. *Id.* This not only results in more hospitalizations, but also higher death rates in young, passively smoking children. *Id.*

5. Jonathan E. Fielding, *Smoking: Health Effects and Control*, 313 NEW ENG. J. MED. 491, 495 (1985). Not only childhood respiratory illness, but adult respiratory illness is related to exposure to parental smoking. *Id.* See also Official American Thoracic Society Statement, *Cigarette Smoking and Health*, 132 AM. REV. RESPIRATORY DISEASES 1133, 1135 (1985) (stating that smoking parents subject their children to tobacco combustion by-products, triggering respiratory tract infections).

6. Dwight T. Janerich et al., *Lung Cancer and Exposure to Tobacco Smoke in the Household*, 323 NEW ENG. J. MED. 632, 636 (1990). Evidence is accumulating that cigarette smoke inhaled by nonsmokers might eventually cause cancer. *Id.* at 635. Each increment of five smoker-years (exposure to environmental tobacco smoke determined by multiplying the number of years the subject lived in a residence by the number of smokers in that residence) during childhood and adolescence was found to increase the risk of lung cancer by 6.5%. *Id.* at 633. Subsequent five-year blocks of smoker-years of exposure during adulthood were estimated to have little effect on risk, leading to the assumption that the damage is done in childhood. *Id.* at 633-34. But see Thomas J. Borelli, *Passive Smoking: Statistical Bias?*, 29 J. TOXICOLOGY/CLINICAL TOXICOLOGY 293 (1991). Mr. Borelli, an employee of the Philip Morris Company, asserts that the Janerich study is scientifically unconfirmed and that as of yet the risk of lung cancer from exposure to environmental tobacco smoke in childhood is unsubstantiated. *Id.* at 294.

7. Cheryl L. Perry & Gregory L. Silvas, *Smoking Prevention: Behavioral Prescriptions for the Pediatrician*, 79 PEDIATRICS 790 (1987). The authors concluded that childhood hospitalization for pneumonia and bronchitis was increased by 13% when the mother smoked 1 to 10 cigarettes per day, by 69% when the mother smoked 11 to 21 cigarettes a day, and by 230% when the mother smoked more than 21 cigarettes a day. *Id.* at 791.

See also Judy Makin et al., *A Comparison of Active and Passive Smoking During Pregnancy: Long-Term Effects*, 13 NEUROTOXICOLOGY AND TERATOLOGY 5 (1991). A Canadian study found that children age six to nine whose pregnant mothers were exposed to environmental tobacco smoke appear to be behind academically and behaviorally. *Id.* The scores do not indicate major learning deficiencies but rather very subtle effects. *Id.* at 10, 11. Many of the mothers in the study claim they were exposed to cigarette smoke outside the home. *Id.* at 11. Thus, not only does passive smoking have a deleterious effect on children's physical health, but this new research shows that it can also have long-term behavioral effects on those exposed while yet unborn. *Id.*

8. JACK E. HENNINGFIELD, NICOTINE: AN OLD-FASHIONED ADDICTION 34 (Miriam Cohen ed., *Encyclopedia of Psychoactive Drugs* 1985). Nicotine is not as dangerous to health as the other constituents of cigarettes, but smokers inhale the other substances in their quest to acquire nicotine. *Id.* at 35, 37. It is a naturally-occurring drug in the leaves of *nicotiana tabacum*, also known as tobacco. *Id.* at 31. Cf. ANN HARALAMBIE, HANDLING CHILD CUSTODY CASES 32 (1983). Drug or alcohol abuse, particularly in the presence of

when the court's goal is finding what is *best* for the child. Therefore, they should be protected from exposure to secondhand or environmental tobacco smoke⁹ whenever possible, including in the home.¹⁰ Estimates vary, but roughly seventy percent of all children in the United States live in homes with at least one smoker.¹¹ A 1990 report from the Surgeon General estimated the number of smokers in the United States to be over fifty million,¹² and roughly twenty percent of the citizens of North Dakota are smokers.¹³

Although nearly all states have laws that restrict smoking in public areas,¹⁴ courts are neither willing nor able to invade the homes of intact families and order a smoking parent to stop smoking in the presence of his or her children. However, once there is a divorce, the state has a voice in deciding which parent should have custody.¹⁵ This could mean that a divorced smoking parent may not have the freedom to smoke in a home in which a child resides without the risk of losing custody of that child.

children, is a factor in denying custody to a substance-abusing parent. *Id.* at 32-33. Ms. Haralambie is referring to the emotional effects on the child or the parent's ability to provide for the child's physical needs. Where the drug is nicotine, the child is not harmed emotionally nor would parental smoking interfere with the parent's ability to raise the child, but the child's health is nevertheless affected.

9. INVOLUNTARY SMOKING, *supra* note 3, at 7. Mainstream smoke is the smoke formed during a puff and drawn through the cigarette butt into the smoker's lungs. *Id.* Sidestream smoke issues directly from the burning tip of the cigarette. *Id.* Nonsmokers in the presence of smokers are exposed to the combination of mainstream and sidestream smoke, often referred to as environmental tobacco smoke. *Id.*

10. See Dwight T. Janerich et al., *Lung Cancer and Exposure to Tobacco Smoke in the Household*, 323 NEW ENG. J. MED. 632 (1990). This study suggests that lung cancer among nonsmokers can be traced to passive smoking in the childhood home. *Id.* at 635-36.

11. Jonathan E. Fielding & Kenneth J. Phenow, *Health Effects of Involuntary Smoking*, 319 NEW ENG. J. MED. 1452, 1452 (1988). Children are not alone in their suffering: roughly 63% of adult smokers and nonsmokers participating in one particular study reported exposure to secondhand smoke. *Id.* In considering the relationship between passive smoking and lung cancer, the authors conclude that ETS should be considered a public health problem. *Id.* at 1458.

12. PUBLIC HEALTH SERVICE, U.S. DEP'T HEALTH AND HUMAN SERVICES, THE HEALTH BENEFITS OF SMOKING CESSATION: A REPORT OF THE SURGEON GENERAL 8 (1990) [hereinafter SMOKING CESSATION].

13. NORTH DAKOTA STATE DEP'T OF HEALTH AND CONSOL. LAB., BEHAVIORAL HEALTH RISKS OF NORTH DAKOTANS 1989 2 (1990). According to a 1989 survey, approximately 98,532 North Dakota citizens smoke. *Id.* at 3. By marital status, the highest percentage of smokers were divorced. *Id.* at 8. By age groups, smoking prevalence was highest among the 25-34 and 45-54 year olds. *Id.*

14. *State Laws on Smoking*, USA TODAY, June 26, 1990, at 9A. Alabama, Missouri, North Carolina, Tennessee, and Wyoming are the only states that do not have statewide laws limiting smoking. *Id.* at col. 6. Smoking is most often restricted in schools, hospitals, government buildings, elevators, and public transportation facilities. *Id.* See also N.D. CENT. CODE § 23-12-10 (1991) (which provides in part that "[e]very place of public assembly is an area where smoking is not permitted outside of designated smoking areas").

15. BENJAMIN M. SCHUTZ ET AL., SOLOMON'S SWORD 4 (1989). There is no uniform federal law on custody determinations. *Id.* at 6. Thus, because domestic matters are reserved to the states, there are numerous approaches to each custody adjudication. *Id.*

Approximately one-half of all civil cases heard in the major state courts concern domestic matters.¹⁶ If current divorce trends continue,¹⁷ domestic issues will make up an even larger percentage of the caseload. North Dakota is not immune to this trend: In 1989 there were 4,847 marriages and 2,229 divorces in the state.¹⁸ When one views smoking statistics together with divorce statistics, considering parental smoking in custody decisions is applicable to the thousands of children in North Dakota and the millions of children throughout the country caught in the late-twentieth century avalanche of divorce.

This Note will briefly trace the history of the "best interests" standard and will explore the various interpretations of the factors used to determine "best interests." The Note will maintain that parental smoking is a factor to consider in all custody awards and, indeed, *should* be considered in states with custody guidelines that specifically list the physical health of the individuals involved, especially the child, as a factor to be considered.¹⁹

16. RICHARD NEELY, *THE DIVORCE DECISION* 1 (1986).

17. *N.D.: Fewer Marriages, More Divorces*, GRAND FORKS HERALD, Jan. 8, 1992, at 7A. The Census Data Center at North Dakota State University reports that between 1970 and 1990 the divorce rate in the state has jumped from 7,342 divorced people to 29,473. *Id.* According to director Richard Rathge, these figures reflect national statistics. *Id.*

18. NORTH DAKOTA STATE DEP'T OF HEALTH AND CONSOL. LAB., 1989 NORTH DAKOTA VITAL STATISTICS REPORT (1991).

19. In 1991, 22 states listed the physical health of the parties involved as a consideration. ALASKA STAT. § 25.24.150 (c)(1) (1991) ("physical, emotional, mental, religious, and social needs of the child"); ARIZ. REV. STAT. ANN. § 25-332(A)(5) (1991) ("mental and physical health of all individuals involved"); CAL. CIV. CODE § 4608(a) (West Supp. 1992) ("health, safety, and welfare of the child"); COLO. REV. STAT. ANN. § 14-10-124(1.5)(e) (1987) ("mental and physical health of all individuals involved"); DEL. CODE ANN. tit. 13 § 722 (a)(5) (1981 & Supp. 1990) ("mental and physical health of all individuals involved"); D.C. CODE ANN. § 16-911(a)(5)(5) (1989) ("mental and physical health of all individuals involved"); HAW. REV. STAT. § 571-46(5) (1985 & Supp. 1991) ("what is for the best physical, mental, moral, and spiritual well-being of the child"); IDAHO CODE § 32-717(5) (1983) ("mental and physical health and integrity of all individuals involved"); ILL. ANN. STAT. ch. 40, para. 602(6) (Smith-Hurd 1980 & Supp. 1992) ("mental and physical health of all individuals involved"); IND. CODE ANN. § 31-1-11.5-21(a)(6) (Burns 1987) ("mental and physical health of all individuals involved"); KY. REV. STAT. ANN. § 403.270(1)(e) (Michie/Bobbs-Merril 1984) ("mental and physical health of all individuals involved"); LA. CIV. CODE ANN. art. 131(C)(2)(g) (West Supp. 1992) ("mental and physical health of the parties involved"); ME. REV. STAT. ANN. tit. 19, § 752(5)(L) (West Supp. 1991) ("factors having a reasonable bearing on the physical and psychological well-being of the child"); MICH. COMP. LAWS ANN. § 722.2(3)(g) (West Supp. 1992) ("mental and physical health of the parties involved"); MINN. STAT. ANN. § 518.17(9) (West 1990 & Supp. 1992) ("mental and physical health of all individuals involved"); MO. ANN. STAT. § 452.375(2)(5) (Vernon 1986 & Supp. 1992) ("mental and physical health of all individuals involved"); MONT. CODE ANN. § 40-4-212(1)(e) (1991) ("mental and physical health of all individuals involved"); NEB. REV. STAT. § 42-364(1)(c) (1988) ("general health, welfare, and social behavior of the children"); N.M. STAT. ANN. § 40-4-9(A)(5) (Michie 1989) ("mental and physical health of all individuals involved"); OHIO REV. CODE ANN. § 3109.04(F)(1)(e) (Anderson 1989 & Supp. 1991) ("mental and physical health of all persons involved in the situation"); VA. CODE ANN. § 20-107.2(1)(a) (Michie 1990 & Supp. 1991) ("age and physical and mental condition of the child or children"); WIS. STAT. ANN. § 767.24(2)(d) (West 1981 & Supp. 1990) ("mental and physical health of the parties").

This Note will look at how courts in other states have applied the best interest criteria concerning the health of children and how these factors support the premise that parental smoking must necessarily be considered.²⁰ Finally, the Note recommends how the "other relevant factors" aspect of the best interests criteria may be construed in the future as related to involuntary smoking. A parent's smoking addiction²¹ is a legitimate concern because it is detrimental to the welfare of the child.

The premise of this Note does not apply when both parents smoke. Obviously, if both smoke, the argument that "if all else is equal the smoker is less fit" does not apply. Also, this Note is limited to the concept of considering parental smoking in a custody dispute. The related issue of whether a parent who smokes in the airspace of his or her children is committing child abuse²² is beyond its scope.

II. HISTORICAL DEVELOPMENT OF THE BEST INTERESTS STANDARD

A. HISTORY OF THE BEST INTERESTS STANDARD

1. *Early Presumptions in Child Custody Adjudications*

Perhaps the earliest recorded child custody contest is noted in the Bible.²³ Since then, few custody battles have been settled with such speed or consensus that the "right" parent won the contest. At English common law, fathers had nearly unbounded rights to

20. See *In re Parental Rights of M.L.M., L.F.M., & B.D.M.*, 682 P.2d 982 (Wyo. 1984). In an action by the state to terminate the parental rights of a mother who grossly neglected her children and whose home was health-threateningly filthy, the court, in terminating those rights, balanced the rights of the parents and the rights of the children. *Id.* at 990. The court stated, "We recognize the fundamental right of parents to care for, educate, and associate with their children. A child has a fundamental right to live in an environment free from filth, health hazards and danger." *Id.* Though an act so drastic as terminating parental rights is not the suggestion of this Note, the court's position could be cited in a custody dispute between a smoker and a nonsmoker, given the current information on the dangers of passive smoking.

21. See PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION, A REPORT OF THE SURGEON GENERAL (1988) [hereinafter NICOTINE ADDICTION]. Once one is a "smoker," he or she is often not smoking for pleasure, but rather is compulsively using tobacco. *Id.* at 149. The strength of the addiction is illustrated by the patient who has lost his larynx to cancer but continues to smoke through a trach hole. *Id.* at 150.

22. David Reuben, *Mind If I Give You Cancer?*, READER'S DIGEST, May 1991, at 119. Dr. William G. Cahan, a lung cancer specialist at the Memorial Sloan-Kettering Cancer Center, does not mince words: "Parents who smoke in the presence of their children are committing child abuse." *Id.* at 121.

23. 1 Kings 3:23-27. In a dispute between two women over who was the mother of a child, King Solomon's famous solution was to order the baby cut in half and given equally to each of the women. *Id.* When one woman cried out to spare the child, she was determined to be the mother. *Id.*

custody of their children.²⁴ Therefore, the custody issue arose only if the father's unfitness or moral degradation sufficiently impacted the child's daily living.²⁵ Absent that degree of paternal unfitness, the mother had no right to custody.²⁶

With the advent of the Industrial Revolution and the necessity of men working outside the home developed the belief that children of tender years belonged with their mothers.²⁷ Thus, by the latter half of the nineteenth century, courts began recognizing a mother's right to custody as equal or superior to that of the father.²⁸ Until the past decade or two, the increasing use of what was dubbed the "Tender Years Doctrine" usually led courts to find that the "best interests of the child" required the child to reside with the mother.²⁹ Today, the Tender Years Doctrine has been discarded in most American jurisdictions. In those states that have done so, there is no presumption that a mother is more capable of raising a child than a father.³⁰ In states that have not rejected the doctrine, it serves only as a tiebreaking function when all else is equal.³¹ Currently, the main focus in every custody decision is the

24. 1 WILLIAM BLACKSTONE, COMMENTARIES *453. Fathers had legal power over their children until they were 21 years old. *Id.* If the father died before his children reached 21, the "empire of the father" continued because his will could appoint a guardian. *Id.*

25. Paul Sayre, *Awarding Custody of Children*, in SELECTED ESSAYS IN FAMILY LAW 588, 592 (J. Rex Dibble et al., eds., 1950). Custody remained with the father unless there was danger of the child becoming a delinquent or a ward of the court. *Id.*

26. 1 WILLIAM BLACKSTONE, COMMENTARIES *453. A mother had no legal rights over her children; she was entitled only to their respect. *Id.*

27. JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 4.03 (1986). The Tender Years Doctrine, also known as maternal preference, is a belief that mothers are more qualified to care for small children than fathers are. *Id.* § 4.03, at 221. The supporters of the Tender Years Doctrine claimed that it is instinctive for a mother to "bear and rear her young." *Id.* § 4.03, at 223.

28. *Id.* As the Tender Years Doctrine gained strength, mothers were given custody in almost all contested cases because a father's parenting capabilities were generally irrelevant. *Id.* at 223.

29. Linda Henry Elrod, *Child Custody and Visitation*, in 2 FAMILY LAW AND PRACTICE § 32.01(2) (Arnold H. Rutkin ed., 1991 & Supp. 1991). The belief that a child was best left in the care of the mother was the result of an idealistic view of mother love and maternal instincts. *Id.* § 32.01(2)(b)(ii).

30. See N.D. CENT. CODE § 14-09-06.1 (1991), which provides, in pertinent part, that "[b]etween the mother and father, whether natural or adoptive, there is no presumption as to who will better promote the best interests and welfare of the child." See also LeAnn Larson LeFave, *Origins and Evolutions of the Best Interests of the Child Standard*, 34 S.D. L. REV. 459 (1989). Most jurisdictions do not now afford extra consideration to the Tender Years Doctrine in their decisions, but rather look at a variety of factors in making a custody determination. *Id.* at 469.

31. Nancy Nevius, *Custody Disputes Between Parents*, in 2 CHILD CUSTODY AND VISITATION LAW AND PRACTICE § 10.03, at 10-23. (John P. McCahey ed., 1991). The Tender Years Doctrine would apply only when all else is equal. *Id.* at 10-24. However, even if the mother is favored for custody of a very young child, the court may not find the other factors to be "equal" and may grant custody to the father without deeming the mother unfit. *Id.*

best interests of the child.³²

2. *Modern Interpretation of the Best Interests Standard*

When the National Conference of Commissioners on Uniform State Laws was created in 1892, commercial paper and marriage and divorce were two areas suggested as ripe for promulgation into uniform law.³³ Commercial paper transactions were soon governed by uniform law, but it took seventy-eight years³⁴ before the conference produced the Uniform Marriage and Divorce Act (UMDA).³⁵ The major goal of the drafters of the UMDA was to reform the entire legal structure of marriage and divorce.³⁶ One purpose of the UMDA was to lessen the potential harm divorce causes spouses and the children.³⁷ The custody provision of the UMDA, which proposes five factors to be considered in a custody adjudication,³⁸ emphasizes the interests of children over the desires of the parents and discourages continuing litigation involving children.³⁹

32. 4 CHRISTOPHER L. BLAKESLEY, *CONTEMPORARY FAMILY LAW* § 39.06, at 32 (1988). The modern view is that in a custody dispute between father and mother, neither parent has a superior right to custody, since both are the natural guardians. See N.D. CENT. CODE § 14-09-06 (1991). See also JEFF ATKINSON, *MODERN CHILD CUSTODY PRACTICE* § 4.12, at 238 (1986). In the case of young children, some states consider who has been the child's primary caretaker in determining who should get custody, regardless of the sex of the parent. *Id.* The primary caretaker consideration is beneficial for three reasons: the every-day contact between the caretaker and the child creates a close relationship, the caretaker is more experienced in caring for the child, and the previously-demonstrated care is likely to continue. *Id.* § 4.12, at 239.

33. UNIF. MARRIAGE AND DIVORCE ACT, prefatory note, 9A U.L.A. 147 (West 1987).

34. *Id.* In those 78 years, about 12 statutes covering different aspects of marriage or divorce were agreed upon by the Conference of Commissioners, but not one of them was significantly accepted by the states. *Id.*

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

36. UNIF. MARRIAGE AND DIVORCE ACT, prefatory note, 9A U.L.A. 148 (West 1987). The old idea of a divorce based on fault was seen as both hindering the dissolution and adding to the unpleasantness of the proceedings. *Id.*

37. See UNIF. MARRIAGE AND DIVORCE ACT § 102, 9A U.L.A. 158 (West 1987). This section enumerates the purposes of the UMDA, which includes promoting the amicable settlement of disputes, making reasonable provisions for the spouse and children, and mitigating potential harm to the spouses and children.

38. *Id.* § 402. Section 402 provides that the court shall determine custody in accordance with the child's best interests and all relevant factors shall be considered in making a determination, including:

- (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. The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Id.

39. UNIF. MARRIAGE AND DIVORCE ACT, prefatory note, 9A U.L.A. 149 (West 1987).

In 1992, the custody statutes of thirty-one states and the District of Columbia had statutorily-defined criteria that were to be used as a guide for making a decision on the best interests of the child.⁴⁰ Often, several factors are relevant in a particular case. Courts weigh all relevant elements and base custody determinations on a combination of factors instead of emphasizing one particular factor.⁴¹ About one-third of the states do not list specific best interest factors in their custody statutes. Instead, these states give courts very broad discretion, usually providing that custody shall be decided according to the child's best interests, without enumerating the various factors to consider.⁴² The language of these statutes typically provides that custody awards be made to further the child's "well-being,"⁴³ "welfare,"⁴⁴ "happiness"⁴⁵ or

The best interests of the child is emphasized rather than the fault of the parties, because "[t]here is no reason to encourage parties to spy on each other in order to discover marital (most commonly, sexual) misconduct for use in a custody contest." *Id.* § 402, comment.

40. ALASKA STAT. § 25.24.150 (1991); ARIZ. REV. STAT. ANN. § 25-332 (1991); CAL. CIV. CODE § 4608 (West Supp. 1991); COLO. REV. STAT. ANN. § 14-10-124 (West 1989); DEL. CODE ANN. tit. 13, § 722 (1981 & Supp. 1990); D.C. CODE ANN. § 16-911 (1989); FLA. STAT. ANN. § 61.13 (West 1985 & Supp. 1991); HAW. REV. STAT. § 571-46 (1988 & Supp. 1990); IDAHO CODE § 32-717 (1983); ILL. ANN. STAT. ch. 40, para. 602 (Smith-Hurd Supp. 1991); IND. CODE ANN. § 31-1-11.5-21 (West 1979 & Supp. 1990); KAN. STAT. ANN. § 60-1610(a)(3)(B) (1983 & Supp. 1991); KY. REV. STAT. ANN. § 403.270 (Michie/Bobbs-Merrill 1984); LA. CIV. CODE ANN. art. 131 (West Supp. 1991); ME. REV. STAT. ANN. tit. 19, § 752 (Supp. 1991); MICH. COMP. LAWS § 722.23 (Supp. 1991); MINN. STAT. ANN. § 518.17 (1990); MO. ANN. STAT. § 452.375 (Vernon 1986 & Supp. 1991); MONT. CODE ANN. STAT. § 40-4-212 (1989); NEB. REV. STAT. § 42-364 (1988); NEV. REV. STAT. ANN. § 125.480 (Michie 1986); N.J. STAT. ANN. § 9:2-4 (West Supp. 1991); N.M. STAT. ANN. § 40-4-9 (Michie 1989); N.D. CENT. CODE § 14-09-06.2 (1991); OHIO REV. CODE ANN. § 3109.04 (Anderson 1989 & Supp. 1990); OR. REV. STAT. § 107.137 (1990); VT. STAT. ANN. tit. 15, § 665 (1989); VA. CODE ANN. § 20-107.2 (Michie 1990); WASH. REV. CODE ANN. § 26.09.187 (West Supp. 1991); WIS. STAT. ANN. § 767.24(2) (West 1981 & Supp. 1991).

41. Nevius, *supra* note 31, § 10.02 at 10-17. *E.g.*, Miller v. Miller, 305 N.W.2d 666 (N.D. 1981). The Miller court noted that while there is no requirement that the trial court must make an express written finding as to each factor listed in this section, the record (particularly the findings and conclusions) should reflect the trial court's consideration of all applicable factors. *Id.* at 673.

42. ALA. CODE § 30-3-1 (1989); ARK. CODE ANN. § 9-13-101 (1991); CONN. GEN. STAT. ANN. § 46b-56 (West 1986); GA. CODE ANN. § 19-9-3 (1990); MISS. CODE ANN. § 93-5-23 (1972 & Supp. 1990); N.H. REV. STAT. ANN. § 458.17 (1983 & Supp. 1990); N.Y. DOM. REL. LAW § 240 (McKinney 1986 & Supp. 1991); N.C. GEN. STAT. § 50-13.2 (1987); OKLA. STAT. ANN. tit. 10, § 21.1 (West 1987 & Supp. 1991); PA. STAT. ANN. tit. 48, § 92 (Purdson 1985 & Supp. 1991); S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1985); S.D. CODIFIED LAWS § 25-4-45 (1984); TENN. CODE ANN. § 36-6-101 (1982 & Supp. 1990); WYO. STAT. § 20-2-112 (1987).

43. ALA. CODE § 30-3-1 (1989). The Alabama statute provides that:

Upon granting a divorce, the court may give the custody and education of the children of the marriage to either father or mother, as may seem right and proper, having regard to the moral character and prudence of the parents and the age and sex of the children; and pending the action, may make such orders in respect to the custody of the children as their safety and well-being may require.

Id.

44. ARK. CODE ANN. § 9-13-101 (1991). "In an action for divorce, the award of custody of the children of the marriage shall be made without regard to the sex of the parent but solely in accordance with the welfare and best interests of the children." *Id.*

45. GA. CODE ANN. § 19-9-3(a) (1990). "The duty of the court in all such cases shall be to exercise its discretion to look to and determine solely what is for the best interest of the

"benefit."⁴⁶

B. NORTH DAKOTA'S BEST INTERESTS OF THE CHILD STANDARD

North Dakota is one of the states that has statutorily provided factors used in determining what custody arrangement is in the child's best interests.⁴⁷ The North Dakota guidelines require courts to consider twelve factors.⁴⁸ Some of the circumstances courts have addressed in custody hearings include a mother's admitted homosexuality,⁴⁹ a parent's history of abuse as a child,⁵⁰ the child's preference as to with whom he or she would like to live,⁵¹ and the stability of the environment in which the child would be placed.⁵² Where both parents are equally willing, fit, and capable of assuming custody, the court undergoes the agonizing process of deciding which parent is to be the custodian and which is to be the visitor, who, for the most part, will not be involved in the child's daily existence.⁵³ The court's task is to carefully weigh closely balanced evidence. Often, the scales are

child or children and what will best promote their welfare and happiness and to make its award accordingly." *Id.*

46. N.H. REV. STAT. ANN. § 458.17(I) (1983 & Supp. 1990). "[T]he court shall make such further decree in relation to the support, education, and custody of the children as shall be most conducive to their benefit and may order a reasonable provision for their support and education." *Id.*

47. N.D. CENT. CODE § 14-09-06.1 (1991). "An order for custody of an unmarried minor child entered pursuant to this chapter must award the custody of the child to a person [who] . . . will, in the opinion of the judge, promote the best interests and welfare of the child." *Id.*

48. For a list of the 12 factors, see *supra* note 2.

49. *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981). The *Jacobson* court held that the mother's homosexuality was an overriding factor in determining custody. *Id.* at 82. Because the mother was openly living with her 18-year-old lover and planned to continue living with her if awarded custody, the court held that the best interests of the children would be better served by placing custody with the father. *Id.* at 80, 82.

50. *Branson v. Branson*, 411 N.W.2d 395 (N.D. 1987). In the court's award of custody of minor children to the father, one factor, though not determinative alone, was a psychologist's finding that because the mother had been abused as a child there was a "statistical probability" that she in turn might become abusive to her children. *Id.* at 400. Therefore, their best interests lay in custody being awarded to the father. *Id.*

51. *But see Gronneberg v. Gronneberg*, 412 N.W.2d 84 (N.D. 1988). Although the children expressed a preference for living with their father, the court found that their interests would best be served by custody with the mother since she would be more able and more willing to care for them. *Id.* at 94.

52. *Landsberger v. Landsberger*, 364 N.W.2d 918 (N.D. 1985). The court found that the father seemed more willing to devote his time to the two young daughters than did the mother, who seemed more interested in pursuing a career and going out in the evenings. *Id.* at 919.

53. *Roan v. Roan*, 438 N.W.2d 170 (N.D. 1989). The judge in *Roan* noted that when both parents are "fit and loving," the custody decision is especially difficult. *Id.* at 173. See also *Landsberger*, 364 N.W.2d at 918. "Unfortunately, thousands of years of experience since Solomon's famous decision have not given judges any better way to determine what is best for the children, particularly when choosing between two loving and fit parents." *Id.*

tipped toward one parent by a featherweight.⁵⁴

III. PARENTAL SMOKING AS A FACTOR TO CONSIDER WHEN AWARDING CUSTODY ACCORDING TO THE BEST INTERESTS STANDARD

"Smoking is a shocking thing—blowing smoke out of our mouths into other people's mouths." Samuel Johnson (1709-1784).

A. CONCERN FOR THE CHILD'S HEALTH

The dangers of passive smoking were brought to national attention in December of 1986 when the Surgeon General released the report *The Health Consequences of Involuntary Smoking*.⁵⁵ This report concluded that passive smoking leads to disease in healthy nonsmokers⁵⁶ and that the children of smoking parents, when compared to the children of nonsmoking parents, have an increased recurrence of respiratory infections, increased respiratory symptoms, and a somewhat smaller rate of increase in lung function as the lung matures.⁵⁷

Although the Surgeon General's report did not reach a conclusion on the correlation between cardiovascular disease and passive smoking,⁵⁸ several studies since then have investigated this relationship.⁵⁹ In the five years since the report, a number of studies

54. 438 N.W.2d at 174. The lower court had found that the evidence did not "overwhelmingly favor" either parent. *Id.* The *Roen* court determined that the mother would probably resume working because the boys were school-age, so the children would be in another's care. *Id.* However, custody was awarded to the mother because the children had been "progressing satisfactorily" in her care and she would spend more time with them than would their father. *Id.*; In *Bader v. Bader*, the court found both parents to be fit, loving, and competent, but granted custody to the mother. *Bader v. Bader*, 448 N.W.2d 187, 188 (N.D. 1989). The court noted the father had a tendency to be impatient and career oriented and foresaw the potential for future conflicts. *Id.* at 188.

55. INVOLUNTARY SMOKING, *supra* note 3. The report focuses on the health effects of exposure to secondhand or environmental tobacco smoke. *Id.* at 6. There is less risk from passive smoking than there is from active smoking, but the number of nonsmokers harmed by environmental tobacco smoke is large compared to the number of people harmed by other agents in the environment which *are* regulated to minimize their potential to damage human health. *Id.*

56. *Id.* at 7. The effects of involuntarily smoking are similar to actively smoking because both parties are ingesting the by-products of burning tobacco. *Id.*

57. *Id.* at 10. During their first two years, children of smoking parents are more often hospitalized for bronchitis and pneumonia than are the children of nonsmokers. *Id.* It is theorized that the respiratory infections and the decreased lung development seen in the children of smokers may increase the chance of acquiring lung disease in adulthood. *Id.*

58. *Id.* at 10-11.

59. Kyle Steenland, *Passive Smoking and the Risk of Heart Disease*, 267 JAMA 94, 100 (1992) (evidence indicates that heart disease is the primary public health burden caused by passive smoking). See Robert Beaglehole, *Does Passive Smoking Cause Heart Disease?*, 301 BRIT. MED. J. 1343, 1343 (1990) (suggesting that involuntary smoking leads to coronary heart disease); Charles Humble et al., *Passive Smoking and 20-Year Cardiovascular Disease Mortality Among Nonsmoking Wives, Evans County, Georgia*, 80 AM. J. PUB. HEALTH 599,

indicate a positive relationship between passive smoking and death from heart disease.⁶⁰ It is believed that passive smoking causes damage to the heart and coronary arteries by decreasing exercise tolerance, increasing blood platelet aggregation, and injuring the cells that line the arteries.⁶¹

Nonsmokers who live with smokers are exposed to many of the same hazards of cigarette smoke. They, like smokers, have higher levels of smoke by-products in their blood and urine and have an increased activity in the enzymes that metabolize potential cancer-causing agents.⁶² The New England Journal of Medicine reports that approximately seventeen percent of lung cancer cases among nonsmokers can be attributed to cigarette smoke exposure during childhood and adolescence.⁶³ It is well-

601 (1990) (suggesting that passive smoking does lead to coronary heart disease); K.J. Helsing et al., *Heart Disease Mortality in Nonsmokers Living With Smokers*, 127 AM. J. EPIDEMIOLOGY 915, 921 (1988) (findings of the study suggest that nonsmokers who live with smokers face a greater likelihood of death from arteriosclerotic heart disease than those who live in nonsmoking households).

60. Stanton A. Glanz & William W. Parmley, *Passive Smoking and Heart Disease Epidemiology, Physiology, and Biochemistry*, 83 CIRCULATION 1 (1991). The authors report that there are at least 10 studies that show nonsmokers who live with smokers have roughly a 30% increase in the possibility of death from heart disease. *Id.* at 10. The authors assert that the number of heart disease deaths caused by environmental tobacco smoke makes involuntary smoking the third highest preventable cause of death in this country. *Id.* at 10. See William B. Moskowitz et al., *Lipoprotein and Oxygen Transport Alterations in Passive Smoking Preadolescent Children: The MCV Twin Study*, 81 CIRCULATION 586 (1990). Children with long-term exposure to environmental tobacco smoke may face a higher risk of premature coronary heart disease. *Id.* Atherosclerotic coronary artery disease is related to increased levels of low density lipoproteins (LDL), or "bad cholesterol," and decreased levels of high density lipoproteins (HDL2), or "good cholesterol." *Id.* at 591. Cigarette smoking alters the serum cholesterol concentration and lipoprotein composition, therefore increasing the danger of coronary heart disease. *Id.*

61. Stanton A. Glanz & William W. Parmley, *Passive Smoking and Heart Disease Epidemiology, Physiology, and Biochemistry*, 83 CIRCULATION 1 (1991). Exposing subjects to secondhand smoke during exercise showed an increased demand on the heart and a decreased ability of the heart to meet that demand. *Id.* at 5. Cigarette smoke appears to cause the platelets (small discs in the blood thought to aid in coagulation) of nonsmokers to aggregate and thus heighten the potential for thrombus (blood clot) development. *Id.* at 6-7. It is also believed that the carcinogenic constituents in secondhand smoke damage the cells that line the arteries, thus allowing the platelets to stick to them, ultimately increasing the risk of arterial plaque. *Id.* at 1, 7-8.

62. Dale P. Sandler et al., *Deaths From All Causes in NonSmokers Who Lived With Smokers*, 79 AM. J. PUB. HEALTH 163 (1989). The author also reports that in one study, all "smoking-related" (lung, cervix, kidney, and pancreas) cancers diagnosed in never-smoking women subjects under age 50 were present in those women who were exposed to ETS at home. *Id.* at 165. *Contra* ROBERT D. TOLLISON, *CLEARING THE AIR: PERSPECTIVES ON ENVIRONMENTAL TOBACCO SMOKE* (1988). The author, in a book sponsored by Philip Morris, reports that there is no agreement among scientists on whether nonsmokers are harmed by inhaling cigarette smoke. *Id.* at 13.

63. Dwight T. Janerich et al., *Lung Cancer and Exposure to Tobacco Smoke in the Household*, 323 NEW ENG. J. MED. 632, 634 (1990). Exposure to 25 or more smoker-years during childhood and adolescence doubled the probability of lung cancer. *Id.* *Contra* Geoffrey Cowley, *Secondhand Smoke: Some Grim News*, NEWSWEEK, June 11, 1990, at 59. In an interview discussing the implications of the Janerich report in the NEW ENGLAND JOURNAL OF MEDICINE and the Surgeon General's report on the connection of lung cancer

documented that cigarette smoke has harmful effects on children's health from conception through adolescence.⁶⁴ Protecting them from the hazards of smoking, both active and passive, must become an objective of all who are concerned about the welfare of children.⁶⁵ Considering parental smoking in custody disputes is a natural progression of the continuing debate⁶⁶ over the hazards of passive smoking and its legal implications.⁶⁷

1. *The Constituents of Tobacco Smoke*

The cigarette has been compared to a tiny "chemical plant"

and secondhand smoke, a Philip Morris spokesman suggested that perhaps Dr. Janerich "tortured the data until it said what he wanted to hear." *Id.*

64. Jonathan E. Fielding, *Smoking: Health Effects and Control*, 313 NEW ENG. J. MED. 491, 495-96 (1985). Women who smoke during pregnancy give birth to infants who weigh an average of 200 grams less than infants born to nonsmokers. *Id.* at 496. Preterm deliveries attributed to maternal smoking range from 11% to 14% of all live births and the risk of early birth is directly correlated to the smoking dose. *Id.* Carboxyhemoglobin is elevated in maternal and fetal blood, with a deficiency in the amount of oxygen delivered to the fetal tissues. *Id.* Thus, maternal smoking increases the risk of fetal death. *Id.* See also 15 U.S.C. § 1333 (1988). One of four warnings required on cigarette packs since October 12, 1984 reads: "SURGEON GENERAL'S WARNING: Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight." *Id.* § 1333 (a)(1).

65. Committee on Environmental Hazards, *Involuntary Smoking—A Hazard to Children*, 77 PEDIATRICS 755, 756 (1986). The committee urged pediatricians to take prompt steps to reduce passive smoking among children. *Id.* at 756. The committee reports that cigarette smoke exposure leads to more instances of lower respiratory tract infections and more instances of respiratory symptoms. *Id.* Exposure to smoke also contributes to decreased pulmonary function and lung growth. *Id.* And, although it is not yet conclusive, passive smoking may increase the risk of later developing chronic obstructive lung disease, lung cancer, and heart disease. *Id.*

Cf. State v. Gallegos, 384 P.2d 967 (Wyo. 1963). The defendant in *Gallegos* offered a child under the age of 19 a cigarette and was charged with violating the Child Protection Act, which made it unlawful to endanger a child's health, welfare, and morals. *Id.* at 967.

66. See *Davis v. Licari*, 434 F. Supp. 23 (D.D.C. 1977). In *Davis*, the plaintiff filed suit for assault and other theories after the plaintiff, who was smoking in an elevator against building rules, was "restrained" by the defendants. *Id.* at 24. The defendants counterclaimed for assault and battery for "involuntary ingestion of sidestream cigarette smoke," nuisance, and invasion of privacy on the ground that the plaintiff caused harmful substances to enter their skin, mouth, throat, lungs, and other parts of their bodies." *Id.* at 25 n.6. *Shimp v. New Jersey Bell Telephone*, 368 A.2d 408 (N.J. 1976). The court ordered that Donna Shimp's employer provide her with safe (smoke-free) working conditions. *Id.* at 408. The *Shimp* court noted that while the company had a rule prohibiting smoking around sensitive telephone equipment, they had no similar rule prohibiting smoking near co-workers:

Human beings are also very sensitive and can be damaged by cigarette smoke. Unlike a piece of machinery, the damage to a human is all too often irreparable. If a circuit or wiring goes bad, the company can install a replacement part. It is not so simple in the case of a human lung, eye or heart. The parts are hard to come by, if indeed they can be found at all.

Id. at 416.

67. See Alvan Brody & Betty Brody, *The Legal Rights of Nonsmokers* (1977); Larry Kraft, *Smoking in Public Places: Living With a Dying Custom*, 64 N.D. L. REV. 329 (1988) (discussing legal theories and arguments used to combat the invasion of nonsmoker's airspace by smokers); David B. Ezra, Note, *Smoker Battery: An Antidote to Second-hand Smoke*, 63 S. CAL. L. REV. 1061, 1063 (1990) (a civil action for smoker battery may provide a remedy for those who are harmed by passively smoking).

which uses hundreds of available materials to produce hundreds more.⁶⁸ Several thousand toxic constituents have been identified in tobacco and tobacco smoke,⁶⁹ including tar,⁷⁰ nicotine,⁷¹ carbon monoxide,⁷² nitrogen dioxide,⁷³ acrolein,⁷⁴ hydrogen cyanide,⁷⁵

68. HENNINGFIELD, *supra* note 8, at 37. Some of the most significant constituents of tobacco smoke are not present in an unlit cigarette, but are produced when smoked. *Id.* at 37-38.

69. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, REDUCING THE HEALTH CONSEQUENCES OF SMOKING: 25 YEARS OF PROGRESS, A REPORT OF THE SURGEON GENERAL 79 (1989) [hereinafter 25 YEARS OF PROGRESS]. There are at least 2250 known compounds present in tobacco. *Id.* See also PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: THE CHANGING CIGARETTE, A REPORT OF THE SURGEON GENERAL 17 (1981) (discussing how growers are able to genetically manipulate the plant to alter the constituents of the leaf and how constituents can be altered by farming and curing methods).

70. HENNINGFIELD, *supra* note 8, at 31. Tar intake is one of the most significant health hazards in smoking. *Id.* at 32. It does not exist in unburned tobacco, but it is formed during the burning in the presence of water (from the leaves) and air at a high temperature. *Id.* at 31. See also G.L. MANGAN & J.F. GOLDING, THE PSYCHOPHARMACOLOGY OF SMOKING 18 (1984) (tobacco's various elements have been "demonstrated as cancer-initiating, cancer-promoting, and cancer-accelerating agents").

71. THE AMERICAN MEDICAL ASSOCIATION ENCYCLOPEDIA 727 (Charles B. Clayman ed., 1989). Nicotine acts mainly on the nervous system, which regulates involuntary body functions like heart rate. *Id.* at 727. A small quantity of the drug may slow the heart rate and induce nausea and vomiting in a novice smoker. *Id.* However, in regular smokers the heart rate is increased, the blood vessels are narrowed, and blood pressure is raised. *Id.* See HENNINGFIELD, *supra* note 8, at 35. Nicotine is readily absorbed through the capillary-rich skin of the nose or mouth. *Id.* In the form of smoke, it moves directly from the alveoli of the lungs into the arteries, going straight to the brain. *Id.* Carolyn Gloeckner, *Where There's Smoke, There's Disease*, CURRENT HEALTH, Nov. 1990, at 14. Nicotine causes the heart to beat faster so it needs more oxygen. *Id.* Simultaneously, it causes the blood vessels to narrow, and the heart receives less blood. *Id.*

72. HENNINGFIELD, *supra* note 8, at 32-33. Carbon monoxide readily transfers from the air-cells of the lungs into the blood stream. *Id.* at 33. It then combines with hemoglobin to form carboxyhemoglobin (COHb), resulting in a shortage of oxygen. *Id.* When the cardiac system detects the low oxygen level, the heart may operate inefficiently. *Id.*

See also 3 MARSHALL HOUTS et al., COURTROOM TOXICOLOGY 49 (1988). The authors report that COHb "averages 1-2% in urban nonsmokers" and that "sitting in a smoky room for 1.5 hours caused a 38% increase in the COHb saturation of nonsmokers." *Id.* at 53. The authors have listed the symptoms associated with carboxyhemoglobin:

Carboxyhemoglobin in
the Blood, %

Symptoms

10-20%	Shortness of breath Headache Temples may throb Nausea and vomiting may occur Drowsiness
20-30%	Headache Irritability Dimness of vision Possible confusion Nausea and vomiting may occur Pulse rate and respiratory rate may be increased
30-40%	Decreased bloodpressure Muscular uncoordination Dimness of vision Possible confusion Headache Shortness of breath Sleepiness

and polonium 210.⁷⁶

The components of environmental tobacco smoke are usually classified separately, as either existing in a gaseous phase⁷⁷ or a particulate phase, called tar.⁷⁸ Particulates tend to settle out quickly, while the constituents in the gaseous phase tend to remain in the air for longer periods,⁷⁹ which means there is a greater likelihood of inhaling the harmful components existing in the gaseous phase. The size of the particle may also increase once it is inhaled into the respiratory tract where it absorbs the moisture of the body.⁸⁰ Therefore, in order to accurately measure levels of exposure to toxic compounds, it is necessary that different

40-50%	Generalized weakness Mental Confusion Headache Fainting on exertion Collapse
50-60%	Unconsciousness Intermittent convulsions Respiratory failure Death if exposure is continued
60-70%	As above
70-80%	Rapidly fatal
80%	Immediately fatal

Id. at 52.

73. ROY J. SHEPARD, *THE RISKS OF PASSIVE SMOKING* 24 (1982). Nitric oxide is the primary component of fresh tobacco smoke and has a half-life of about ten minutes. *Id.* Nitrogen dioxide is formed as the nitric oxide ages. *Id.* Nitric oxide and nitrogen dioxide are both toxic, and they aid in the development of carcinogenic nitrosamines. *Id.* A fast-burning cigarette, one which has more nitrates in the tobacco, produces three times more nitric oxide than a slow-burning cigarette. *Id.* In order to facilitate proper burning, nitrates have on occasion been added to cigarettes made of lower grade tobacco. *Id.*

74. *Id.* at 23. Much of the stench of cigarette smoke is generated by acrolein. *Id.* Acrolein may also cause eye and throat irritation. *Id.* Heavy smoking in enclosed spaces may surpass the recommended acrolein levels in industrial conditions. *Id.* at 47.

75. *Id.* at 12. See also *THE MERCK MANUAL OF DIAGNOSIS AND THERAPY* 938 (15th ed. 1987) (cyanide in tobacco smoke reacts with the components in vitamin B12, causing a deficiency in some people); SHELDON SAUL HENDLER, *THE DOCTORS' VITAMIN AND MINERAL ENCYCLOPEDIA* 68 (1990) (metabolism of nerve tissue requires vitamin B12); TOM FERGUSON, *THE SMOKER'S BOOK OF HEALTH* 70 (1987) (smoking-related B12 deficiency is thought to be responsible for the disease tobacco amblyopia, which can cause dimming of vision in the center of the vision field and, in some cases, total vision loss; tobacco amblyopia is most often diagnosed in men who are heavy pipe smokers).

76. FERGUSON, *supra* note 75, at 107. Polonium 210 is a radioactive isotope and is the only constituent in cigarette smoke that, in the absence of any other compound, has produced tumors when inhaled by lab animals. *Id.* Smokers have approximately three times as much of this element in their lungs as nonsmokers. *Id.*

77. G.L. MANGAN & J.F. GOLDING, *THE PSYCHOPHARMACOLOGY OF SMOKING* 16 (1984). The primary components present in the gaseous phase are nitrogen, oxygen, and carbon dioxide. *Id.* The residual gases carbon monoxide, isoprene, acetone, hydrogen cyanide, and acetaldehyde are also present. *Id.*

78. Staff of Special Projects Office of the Health Program, *PASSIVE SMOKING IN THE WORKPLACE: SELECTED ISSUES* 10 (May 1986) [hereinafter *PASSIVE SMOKING*]. See ENVIRONMENTAL GLOSSARY 227 (1986). "Particulates are fine liquid or solid particles such as dust, smoke, mist, fumes, or smog, found in the air or emissions." *Id.*

79. *PASSIVE SMOKING*, *supra* note 78, at 11-12.

80. NATIONAL RESEARCH COUNCIL, ENVIRONMENTAL TOBACCO SMOKE, MEASURING

constituents from both groups, particulate and gas, be measured to achieve an accurate representation of hazardous materials in a specific room or space.⁸¹ The size and ventilation of automobiles, elevators, homes, and offices affect the concentrations of cigarette smoke and, therefore, the opportunity for harmful exposure to environmental tobacco smoke.⁸² Obviously, smoke in smaller areas has less space in which to dissipate. Thus, smoking in areas with small square footage or poor ventilation subjects those around a smoker to a stronger dose of ambient cigarette smoke. Increasing indoor ventilation to a level reducing the risk of harm from carcinogens is expensive. The volume of air in an area would have to be replaced an estimated 250 times more than usual.⁸³

2. *The Effects of Tobacco Smoke on Children*

The fact that active cigarette smoking causes disease is now uncontested by much of the scientific and medical community.⁸⁴ Even the tobacco industry reluctantly admits that "there is almost universal public awareness that smokers may encounter health risks."⁸⁵ However, there are numerous publications asserting that there is no sound proof that environmental tobacco smoke harms the health of nonsmokers.⁸⁶ One claim expressed in a book spon-

EXPOSURES AND ASSESSING HEALTH EFFECTS 122 (1986). Smoke particles are hygroscopic, which means they readily absorb moisture. *Id.*

81. PASSIVE SMOKING, *supra* note 78, at 10-12. Rather than measure total particulates in an area in order to gauge the level of tobacco smoke, it is more effective to measure specific particulates known to be formed by a burning cigarette. *Id.* at 12. This way, particulates not associated with smoke (like those created merely by the presence of people, thereby distorting the evidence) are not included. *Id.*

82. *Id.* As might be expected, there is less exposure to secondhand smoke in a well-ventilated room or outdoors where a draft can draw smoke away or disperse it. *Id.* at 15.

83. WILLIAM U. CHANDLER, BANISHING TOBACCO 23 (Worldwatch Paper 68, 1986). Instead of spending money on electricity costs for increased ventilation, the author asserts that eradicating cigarettes is the way to make indoor air safe. *Id.*

84. See generally Jonathan E. Fielding, *Smoking: Health Effects and Control (First of Two Parts)*, 313 NEW ENG. J. MED. 491 (1985). An estimated 350,000 plus deaths annually in this country are attributed to cigarette smoking. *Id.* It has also been calculated that each cigarette smoked reduces the smoker's life-span about five-and-a-half minutes. *Id.*

85. Greg Rushford, *Tobacco Interests Set Sights on EPA Staff Study*, LEGAL TIMES, Aug. 6, 1990, at 2. The industry is, however, attempting to diminish the significance of secondhand smoke risks by pointing to pollution and heredity as possible sources of disease for which passive smoking is blamed. *Id.* at 19.

86. See Walter E. Williams, *Cigarettes and Property Rights*, in CLEARING THE AIR: PERSPECTIVES ON ENVIRONMENTAL TOBACCO SMOKE 39, 43 (Robert B. Tollison ed., 1988) (claiming in a book sponsored by Philip Morris that the controversy over methods of preventing smokers from harming nonsmokers is "intellectually shallow" because it does not address the harm done to smokers, which is denying them the chance to "engage in an activity they enjoy"); R. Emmett Tyrell, Jr., *Environmental Smoke and the Press*, in CLEARING THE AIR: PERSPECTIVES ON ENVIRONMENTAL TOBACCO SMOKE 75-80 (Robert B. Tollison ed., 1988) (maintaining that the "reformist" press has mangled the Surgeon General's Report, is prejudiced against smokers, that the danger from smokers is insignificant, and that though the "reformist" press has jumped on the separating-smokers-from-nonsmokers bandwagon, it does not discriminate against the groups at high risk for

sored by the Tobacco Institute was that turning a disagreement between opposing groups into a "public health" matter, with the resulting enactments of clean indoor air laws, is an encroachment on personal freedom.⁸⁷

Nevertheless, evidence that passive smoking causes disease (most notably lung cancer in adults and respiratory illness in children) has now been established in numerous studies,⁸⁸ despite the fact that for years the tobacco industry has attempted to undermine reports of the dangers of smoking.⁸⁹ According to a paper presented at the American Academy of Pediatrics Annual Meeting in 1985, "[m]any children are already smoking on a regular basis by breathing the residual smoke from cigarettes lit and inhaled by their parents."⁹⁰ One may assume that many of these parents would be appalled to see a lit cigarette in their two-year-old child's

AIDS); Raphael J. Witorsch, *Parental Smoking and Respiratory Health and Pulmonary Function in Children: A Review of the Literature and Suggestions for Future Research*, in ENVIRONMENTAL TOBACCO SMOKE: PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM AT MCGILL UNIVERSITY 1989 214 (Donald J. Ecobichon & Joseph M. Wu eds., 1990) (reporting that the relationship between parental smoking and child respiratory illness decreases or might even disappear as the child grows up). *But see Panel Discussion on Child Respiratory Health*, in ENVIRONMENTAL TOBACCO SMOKE: PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM AT MCGILL UNIVERSITY 1989 234-35 (Donald J. Ecobichon & Joseph M. Wu eds., 1990) (hypothesizing that a decrease in respiratory illness may result from the older children now spending the greater part of their day at school, away from a smoky environment); K. Michael Cummings et al., *What Scientists Funded by the Tobacco Industry Believe About the Hazards of Cigarette Smoking*, 81 AM. J. PUB. HEALTH 894, 894-95 (1991) (reporting that the majority of scientists who have participated in tobacco institute-sponsored studies believe that smoking is an addiction that leads to many diseases and urging that scientists accepting tobacco industry research grants for studying tobacco and health should consider the ethical implications of acting on behalf of an industry which still claims that evidence of harm from tobacco is inconclusive).

87. ROBERT D. TOLLISON & RICHARD E. WAGNER, *SMOKING AND THE STATE: SOCIAL COSTS, RENT SEEKING, AND PUBLIC POLICY* 76 (1988). The author asserts that labeling an activity which some groups dislike a health hazard on the basis of unsound evidence is an example of interest groups seeking "political favoritism" by turning a minor disagreement into a cause. *Id.*

88. Ann Kent, *No Smoking Without Passive Victims*, THE TIMES (London), Aug. 31, 1990, at 15. Expert scientific committees from Great Britain, Australia, and the United States have all presented reports concluding that passive smoking is harmful. *Id.* According to one researcher, "[t]he evidence that passive smoking is harmful for babies and children is cast iron." *Id.* Dr. Nick Wald, professor of environmental and preventive medicine at St. Bartholomew's Hospital Medical School in London, believes that the association between passive smoking and adult lung cancer and childhood respiratory illness is stronger than that between passive smoking and asthma. *Id.*

89. Richard W. Pollay, *Propaganda, Puffing and the Public Interest*, PUB. REL. REV., Fall 1990, at 39. The author traces the tobacco industry's public relations tactics in promoting cigarette smoking from the 1920s campaign aimed at figure-conscious women to "Reach for a Lucky Instead of a Sweet" to the current strategy of creating doubts about the health consequences without actually denying they exist. *Id.* at 40, 50. The ploy of finding and loudly publicizing various bits of medical evidence which contradict evidence of tobacco's carcinogenic qualities was detailed in a 1972 tobacco industry memo and is still used today. *Id.* at 50, 51.

90. Perry & Silvas, *supra* note 7, at 791. The authors also report that approximately 13% of Sudden Infant Death Syndrome (SIDS) instances have been associated with parental smoking. *Id.*

mouth; however, the health effects from breathing smoke are serious, whether one is actively smoking or is a captive involuntary smoker in a highchair.⁹¹

For those children who are often in the company of smoking adults, inhaling environmental tobacco smoke has been found to cause wheezing,⁹² middle ear effusions,⁹³ exacerbation of asthma,⁹⁴ pneumonia,⁹⁵ frequent coughs,⁹⁶ bronchitis,⁹⁷ and, soon after exposure, a heightened susceptibility to respiratory

91. INVOLUNTARY SMOKING, *supra* note 3, at 44. Studies report an above-average incidence of respiratory illness in the children of smokers. *Id.*

92. Anne L. Wright et al., *Relationship of Parental Smoking to Wheezing and Nonwheezing Lower Respiratory Tract Illnesses in Infancy*, 118 J. PEDIATRICS 207, 207 (1991). Wheezing, increased lower respiratory tract illness, and decreased lung function are found in children who are exposed to cigarette smoke. *Id.* See also Yue Chen et al., *Influence of Passive Smoking on Admissions for Respiratory Illness in Early Childhood*, 293 BRIT. MED. J. 303, 304 (1986) (concluding that there is an association between exposure to cigarette smoke in the home and child hospitalization for respiratory illnesses). See generally MOSBY'S MEDICAL, NURSING, AND ALLIED HEALTH DICTIONARY 1247 (3d ed. 1990) (wheezing is heard when air passes under pressure through a narrow opening and is usually associated with asthma or bronchitis).

93. D. P. Strachan et al., *Passive Smoking, Salivary Cotinine Concentrations, and Middle Ear Effusion in 7 Year Old Children*, 298 BRIT. MED. J. 1549, 1549 (1989). The study concludes that middle ear effusion should be added to the list of passive smoking hazards. *Id.* at 1551. Passive smoking may heighten the risk of eustachian tube blockage by hindering mucociliary function, by causing congestion of the tissues of the nasopharynx, or by increasing susceptibility to respiratory infection. *Id.* at 1551. See generally STEDMAN'S MEDICAL DICTIONARY 491 (25th ed. 1990) (defining an effusion as the escape of fluid from the blood vessels or lymphatics into the tissues of a cavity).

94. David Evans et al., *Impact of Passive Smoking on Emergency Room Visits of Urban Children with Asthma*, 135 AM. REV. RESPIRATORY DISEASES 567, 567 (1987). The presence of one or more smokers in an asthmatic child's household resulted in 63% more emergency room visits than visits of asthmatic children from nonsmoking households. *Id.* at 570. See generally Andrew B. Murray & Brenda J. Morrison, *Passive Smoking by Asthmatics: Its Greater Effect on Boys than on Girls and on Older than Younger Children*, 84 PEDIATRICS 451, 458 (1989) (involuntary smoking has an injurious effect on asthmatic children of all ages and both sexes, though boys are more severely affected than girls); THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 623 (15th ed. 1987) (defining asthma as a reversible obstructive lung disorder characterized by increased responsiveness of the airways and occurring from a variety of stimuli, including inhalation of cigarette smoke).

95. Thomas P. Houston, *The Silent Killer: Environmental Tobacco Smoke*, 32 J. FAM. PRAC. 457, 457 (1991). Physicians treating young patients with reoccurring pneumonia should question the parents about the child's exposure to tobacco smoke. *Id.* Family doctors should inform parents that absolutely no smoking should be done indoors because cigarette smoke distributes itself throughout the house. *Id.* at 458. A study of live births from 1963 to 1965 in London recorded heightened occurrences of bronchitis and pneumonia linked to passive smoking in the first year of life. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: CHRONIC OBSTRUCTIVE LUNG DISEASE, A REPORT OF THE SURGEON GENERAL 393 (1984). These heightened occurrences did not carry over to ages two through five. *Id.* The incidence of bronchitis and pneumonia also increased accordingly with the amount of parental smoking and the number of siblings. *Id.*

96. Anne Charlton, *Children's Coughs Related to Parental Smoking*, 288 BRIT. MED. J. 1647, 1647 (1984). A study conducted in England found a strong association between parental smoking and recurrent coughing in children. *Id.* at 1649. It has been speculated that the coughs of smoking parents may transmit infections to children. *Id.*

97. Jonathan E. Fielding & Kenneth J. Phenow, *Health Effects of Involuntary Smoking*, 319 NEW ENG. J. MED. 1452, 1456 (1988). Young children of smoking parents have heightened instances of bronchitis and pneumonia. *Id.* This appears to be related mainly to the mother's smoking habits. *Id.* at 1457.

problems.⁹⁸ Passive smoking has also been associated with snoring in children⁹⁹ and with sudden infant death syndrome in very young children.¹⁰⁰ One usually fatal disease closely associated with active smoking is chronic obstructive pulmonary disease (COPD).¹⁰¹ This disease is characterized by the presence of chronic bronchitis and emphysema and by generalized airway obstruction (especially the small airways of the lungs).¹⁰² It is the fifth leading cause of death in this country and the mortality rate is increasing.¹⁰³ At this time, the possibility of passive smoking-related ailments leading to the future development of COPD is unknown.¹⁰⁴

Even more frightening than respiratory illness, two recent studies have reported that the children of smokers run an increased risk of cancer¹⁰⁵ and are more likely to develop serious

98. Dwight T. Janerich et al., *Lung Cancer and Exposure to Tobacco Smoke in the Household*, 323 NEW ENG. J. MED. 632, 635 (1990). Although the authors are unsure how this susceptibility occurs, they suspect that it might trigger changes that lead to lung cancer in adulthood. *Id.* See INVOLUNTARY SMOKING, *supra* note 3, at 38 (citing numerous studies from around the world which have concluded that passive smoking does indeed have a positive association with such respiratory illnesses as bronchitis, pneumonia, tracheitis, laryngitis, chronic cough, chronic phlegm, and wheezing in children).

99. See Giuseppe M. Corbo et al., *Snoring in Children: Association With Respiratory Symptoms and Passive Smoking*, 299 BRIT. MED. J. 1491 (1989). An Italian study reported that in a group of 1,615 children classified as never-snorers, occasional snorers, snoring with colds only, or habitual snorers, 82% of the habitual snorers were passive smokers. *Id.* The likelihood of snoring is associated with the number of cigarettes the parent(s) smoked. *Id.* at 1493. The study concluded that passive smoking may cause narrowing of the pharynx due to inflammation, which results in snoring. *Id.*

100. Bengt Haglund & Swen Cnattingius, *Cigarette Smoking as a Risk Factor for Sudden Infant Death Syndrome: A Population-Based Study*, 80 AM. J. PUB. HEALTH 29, 29 (1990). A Swedish study found that maternal smoking was strongly associated with sudden infant death syndrome (SIDS). *Id.* at 30. Compared to nonsmokers, the risk of SIDS was doubled by the mother's smoking up to nine cigarettes a day and was almost tripled by her smoking 10 or more cigarettes a day. *Id.* The evidence suggests that smoking may be the most significant preventable contributing factor to SIDS. *Id.*

101. Gordon L. Snider, *Chronic Obstructive Pulmonary Disease: Risk Factors, Pathophysiology and Pathogenesis*, 40 ANN. REV. MED. 411, 414-15 (1989).

102. *Id.* at 411-13. Reduced lung function, disability, and eventually, death results from airway obstruction. *Id.* at 412.

103. CURRENT MEDICAL DIAGNOSIS & TREATMENT 1992 191 (Stephen A. Schroeder et al. eds., 1991). An estimated 10 million Americans suffer from COPD. *Id.*

104. Gordon L. Snider, *Chronic Obstructive Pulmonary Disease: Risk Factors, Pathophysiology and Pathogenesis*, 40 ANN. REV. MED. 411, 415 (1989). The correlation between COPD and environmental air pollution such as cigarette smoke is not yet defined, but it is minimal compared to that of active smoking. *Id.* at 415. The major illnesses of COPD, chronic bronchitis, emphysema, and nonremitting asthma, are strongly associated with cigarette smoke. *Id.* at 411. See, e.g., MOSBY'S MEDICAL AND NURSING DICTIONARY 419 (3rd ed. 1990) (emphysema is an abnormal condition of the pulmonary system, characterized by overinflation and destructive changes of alveolar walls, with a resulting loss of lung elasticity); Carolyn Gloeckner, *Where There's Smoke, There's Disease*, CURRENT HEALTH, Nov. 1990, at 14 (when the dirt-sweeping cilia of the lungs are destroyed by smoking, the only way of expelling mucus is by coughing; the infected lungs produce more mucus until breathing becomes difficult).

105. See Esther M. John et al., *Prenatal Exposure to Parents' Smoking and Childhood Cancer*, 133 AM. J. EPIDEMIOLOGY 123 (1991). The authors report that the risk of cancer is

infections.¹⁰⁶ Also, though not life-threatening, passive smokers suffer the annoyance and the irritation of secondhand smoke. The tissues of the nose, throat, airway, and especially the eyes are affected by environmental tobacco smoke.¹⁰⁷

Not surprisingly, the issue of exposure to cigarette smoke has been addressed in several lawsuits. In *Roofeh v. Roofeh*,¹⁰⁸ the nonsmoking father sought a protection order to shield the children from their mother's smoking.¹⁰⁹ Though the court declined to agree as a matter of law with his petition that her smoking was as "detrimental and reprehensible to [him and the] children as would be hitting, slapping, punching or spitting," it did issue a temporary order limiting her smoking.¹¹⁰ Nonsmoking parents have sought various orders in other suits, including limiting visitation between a child prone to bronchial asthma and a smoking father,¹¹¹ and

higher in children even if it is the father who smokes, suggesting that either smoking damages the sperm, thereby predisposing the child to leukemia, lymphoma, and brain cancer, or that the possibility of developing these diseases is increased by exposure to secondhand smoke while in utero through the passively-smoking mother. *Id.* at 124. The association was highest between paternal smoking and brain cancer and leukemia. *Id.*

106. Anne T. Berg et al., *Group Day Care and the Risk of Serious Infectious Illnesses*, 133 AM. J. EPIDEMIOLOGY 154 (1991). In a study conducted to measure the association between group day care and serious infectious illness, the authors found that while day care attendance was not predictive of a serious infectious illness, sharing a bedroom and passively smoking was. *Id.* at 157.

107. INVOLUNTARY SMOKING, *supra* note 3, at 11. Irritation of the conjunctiva of the eyes and the mucous membranes of the nose, throat, and lower respiratory tract "are a frequent cause of complaints about poor air quality due to environmental tobacco smoke." *Id.* at 15. See also ROY J. SHEPARD, THE RISKS OF PASSIVE SMOKING 86 (1982) (reporting that most nonsmokers, ex-smokers, and almost 40% of current smokers experience tearing of the eyes when exposed to ETS).

108. 525 N.Y.S.2d 765 (1988).

109. *Roofeh v. Roofeh*, 525 N.Y.S.2d 765 (1988). The physician husband sought an order of protection barring his three-pack-a-day wife from smoking in the presence of him and their children. *Id.* at 768. He claimed that she was harming them by making them passive smokers and asked that she be arrested if she did not comply with the order. *Id.*

110. *Id.* at 769. While the protection order was denied because he did not allege that heavy smoking was a violation of any section of the Penal Code, the court did issue a temporary order that the mother confine her smoking to one room of the house, provided that no children were present in the room. *Id.* The court relied on its power in matrimonial matters to issue orders safeguarding the health and safety of the family. *Id.* See also Bryan Holzberg, *Wife Smoked Out*, NAT'L L.J., Mar. 7, 1988, at 39. Mrs. Roofeh claimed she only smoked her cigarettes in the T.V. room and accused her husband of being an "ayatollah" for seeking the order. *Id.*

111. *Badeaux v. Badeaux*, 541 So. 2d 301 (La. Ct. App. 1989). Although he noted the father's love for his son, the judge held that a factor in limiting visitation was the harmful effect the father's smoking had on the child's recurring upper respiratory infections. *Id.* at 302-03. For a reading of the Louisiana child custody statute, see LA. CIV. CODE ANN. art. 131(c)(2)(g) (West Supp. 1991) (mandating custody according to the best interest of the child and listing factors to be considered, including "[t]he mental and physical health of the parties involved"); *Wilk v. Wilk*, 781 S.W.2d 217 (Mo. Ct. App. 1989). In an appeal of a trial court's decision not to award joint custody, the court ruled that the lower court did not err in awarding custody of the three minor children to the wife. *Id.* at 221. Among the testimony cited was the doctor's advice to the mother that the children should not be taken to the father for visitation because he smoked and one of the children was asthmatic. *Id.* For a reading of the Missouri custody statute, see MO. ANN. STAT. § 452.375 (Vernon 1986

seeking to change custody of a child, citing smoking as one reason.¹¹² The most numerous cases are the latter, those in which one party wants a change of custody and appeals a previous custody order.¹¹³ Often, parental smoking in the presence of a child with respiratory problems triggers the appeal and is a circumstance the court considers.¹¹⁴ The usual result is the child being ordered out of the smoky environment.¹¹⁵ Cases dealing with secondhand smoke and custody involve children who already have asthma or respiratory illness. As of yet, no courts have modified custody at the request of a parent who is seeking to distance a currently

& Supp. 1991) (listing factors to be considered by the court in its custody award, including "[t]he mental and physical health of all individuals involved").

112. See *Pizzatola v. Pizzatola*, 748 S.W.2d 568 (Tex. Ct. App. 1988). A mother appealed an order granting custody of a four-year-old girl to the father. *Id.* Relying on the trial testimony, the court held that the interests of the child would be best served with the father because evidence indicated that, among other things, the mother occasionally drank to excess and smoked in the presence of the child, who was allergic to smoke. *Id.* at 569-70; *Harrell v. Harrell*, No. 1084, 1987 WL 6716, at *3 (Tenn. Ct. App. Feb. 19, 1987). A mother appealed a custody award to the father and the court affirmed, noting among other things, that the baby had respiratory problems and the mother had continued to take the child into a smoking environment, despite a previous injunction against exposing him to smoke. *Id.* But see *In re Morrow*, No. 2585, 1989 Ohio App. LEXIS 3218 (2d App. Dist. Aug. 11, 1989). The father sought and failed to obtain custody from the mother, charging, among other things, that he could better address the asthmatic child's health needs. *Id.* at *5. In expressing its concern for learning, behavior, and health problems, the majority, without addressing the issue of passive smoking, found that the child's physical health was not adversely affected by his current living arrangements. *Id.* at *8. The dissent, however, made specific mention of the fact that smoking in the custodial home was aggravating the child's respiratory illness and that this was one factor which warranted a change of custody. *Id.* at *11-12; *Baggett v. Sutherland*, No. CA 88-224, 1989 WL 5399 (Ark. Ct. App. Jan. 25, 1989). The father sought and failed to obtain a change in custody on the basis of, *inter alia*, a change in circumstance and the fact that the mother smoked in the presence of the children who were allergic to smoke. *Id.* at *1. Though the lower court found that circumstances were not so changed as to warrant a change of custody, it did acknowledge the fact that smoking was detrimental to the children. *Id.* at *2, *3. Not only was the mother forbidden to smoke in the home or allow anyone else to smoke in the home, the chancellor "made it clear that he would exercise continuing jurisdiction over the parties to insure compliance with that order." *Id.* at *3.

113. *E.g.*, *Satalino v. Satalino*, No. 11440/86, N.Y., Nassau County Supreme Court (Oct. 10, 1990) (finding that smoking in the home should be considered in making a custody decision but in this case smoking did not outweigh the father's previous drug problem and continuing recovery). *Accord Badaeux*, 541 So. 2d at 302 (limiting a visitation decree due to parental smoking); *Pizzatola v. Pizzatola*, 748 S.W.2d 568, 570 (Tex. Civ. App. 1988) (considering fact that the mother smoked in the presence of the child who was allergic to smoke in decision to uphold custody award to father).

114. See *Badaeux*, 541 So. 2d at 302. The mother of the asthmatic child asked for, and received, a reduction in the smoking father's visitation rights. *Id.*

115. *Smith v. Smith*, No. 89-301-II, 1990 Tenn. App. LEXIS 152 (Tenn. Ct. App. Mar. 7, 1990). A mother appealed from an order of the trial court changing custody of two children, one of whom was asthmatic, to the husband. *Id.* at *1, *2. Paramount in the court's decision to award custody to the father was the fact that smokers resided in the mother's home but not in the father's home. *Id.* at *2-3.

In a similar case, the Tennessee court held that the best interests of the child lay in custody with the father because the mother and grandmother, with whom the child lived, smoked. *Mitchell v. Mitchell*, No. 01-A-01-9012-CV-00442, 1991 WL 63674, *2 (Tenn. Ct. App. Apr. 26, 1991). The court also noted that they had been advised by the child's physician not to smoke in the child's presence, but chose not to stop. *Id.*

healthy child from a smoking parent solely on the basis of the future health consequences of passive smoking. There are several cases in which indifferent or unfit parents have lost their parental rights due to a combination of factors, one of which is smoking in the presence of a child with a respiratory illness.¹¹⁶

3. Other Hazards

Not only are the children of smokers forced to inhale their parent's smoke, they are also exposed to other risks more immediate than the gradual onset of respiratory illness or cancer. One danger of living with a smoker is fire.¹¹⁷ An estimated 1,500

116. *In re* Walter P., 278 Cal. Rptr. 602 (Cal. Ct. App. 1991). The California Department of Public Social Services brought an action to free a nine-year-old boy with numerous health problems from the custody of his parents who had failed to adequately provide for his health needs. *Id.* at 612. One factor that prompted the removal of the child from his parental home and into foster care was the parents' failure to protect the boy, who had chronic respiratory illnesses, from exposure to cigarette smoke. *Id.* at 604-05. In *In re* Lawrence, No. 90AP020007, 1990 Ohio App. LEXIS 4199 (5th App. Dist. Sept. 4, 1990). In terminating a single mother's parental rights, the court's justification for termination included the fact that the child had ongoing respiratory asthmatic problems, and that he should not be exposed to cigarette smoke. *Id.* at *11. In spite of this, his mother continued smoking in his presence. *Id.* at *11. The court also noted that the mother's stint of independent living was a "dismal failure, subsequently resulting in her children being taken from her and at the time the asthmatic child was removed he had to be hospitalized for bronchial pneumonia." *Id.* at *13. See also *In re* Tackett, No. CA 496, 1990 WL 34369 (Ohio Ct. App. Mar. 7, 1990). Included among the numerous facts which warranted termination of parental rights was the fact that one of the children suffered from severe chronic asthma and the father smoked. *Id.* at *2. *In re* Neer, No. 413, 1989 Ohio App. LEXIS 3260 (7th App. Dist. Aug. 23, 1989). The court terminated the mother's rights on grounds of neglect and abuse, specifically mentioning the fact that the mother had not complied with a lower court provision that there be no smoking in the home whatsoever because of the child's allergies. *Id.* at *5. For a reading of Indiana's custody statute, see IND. CODE ANN. § 31-1-11.5-21 (West 1979 & Supp. 1990) (listing various factors to be considered by the court, including "the mental and physical health of all individuals involved"). *In re* D.T., 547 N.E.2d 278 (Ind. Ct. App. 1989). In *D.T.*, the court terminated the parental rights of a formerly sexually-abusive mother. *Id.* at 286. Her smoking in the presence of her smoke-allergic child was included in the court's list of factors that warranted termination: "While certain of the factors alone - Lola's smoking, inadequate housing, low income - would not justify termination of parental rights, all the factors together are substantial evidence justifying termination." *Id.* For a reading of Ohio's custody statute, see OHIO REV. CODE ANN. § 3109.04(F)(1)(e) (Anderson 1989 & Supp. 1990) (including "[t]he mental and physical health of all persons involved in the situation"). *In re* J.W. and J.C., 736 P.2d 960 (Mont. 1987). In an action granting custody of two neglected boys to the county, evidence of the mother's unfitness included a pediatrician's testimony that despite one child's asthma and ongoing respiratory problems aggravated by cigarette smoke, the mother continued to smoke in his presence. *Id.* at 964-65. Also cited was the concern for the toddler's safety because the mother had, on occasion, left cigarettes burning. *Id.* For a reading of Montana's custody statute, see MONT. CODE ANN. § 40-4-212(1)(e) (1989) (providing for statutorily-defined custody criteria to be considered by the court, including "the mental and physical health of all individuals involved").

117. Les Nelkin, Note, *No Butts About It: Smokers Must Pay for Their Pleasure*, 12 COLUM. J. ENVTL. L. 317, 329 (1987). Statistics compiled by the National Fire Protection Association show that 56% of all fatal residential fires are caused by smoking. *Id.*

[S]tatistics show that 56 percent of fatal residential fires are the result of smoking. Of these, 88.9 percent start in bedding or upholstery, another 6.6 percent in clothing, and the balance in other combustibles. Many of the bedding and upholstery fires are the result of someone falling asleep while smoking.

Americans are killed each year in fires directly related to cigarettes.¹¹⁸ This is especially important because many of the victims of cigarette-caused fires are the helpless—babies, children, or the elderly.¹¹⁹ A second danger is a higher likelihood of being involved in an automobile accident.¹²⁰ A 1986 study found that smokers had fifty percent more accidents than nonsmokers, and received about forty-six percent more traffic tickets.¹²¹ This may be due to the character traits of impulsivity and risk-taking, which are more common among smokers than nonsmokers, and it may also be blamed upon physical reactions to smoking.¹²² Several theories have been advanced for this phenomenon: one, the smoker may be distracted by lighting up or other smoking activities, and two, perhaps the carbon monoxide in the cigarette affects the driver's ability to react quickly.¹²³ Obviously, parental smoking is dangerous to children indirectly and directly.

BRODY & BRODY, *supra* note 67, at 50 (citing National Fire Protection Ass'n, Boston, Mass., No. FR 75-1).

118. Myron Levin, *Fighting Fire With P.R.*, THE NATION, July 10, 1989, at 52. Cigarettes are the primary cause of fatal fires in this country, and cause up to 7,000 injuries and \$400 million a year in property damage or loss. *Id.* The author asserts that the tobacco industry has forestalled governmental regulation by winning the support of various firefighting groups through grants and donations of equipment. *Id.* at 53. *See* 25 YEARS OF PROGRESS, *supra* note 69, at 614. In order to determine the feasibility of developing cigarettes less likely to ignite furniture and mattresses, Congress passed the Cigarette Safety Act in 1984. *Id.* An interagency committee was formed to achieve the Act's objective. *Id.* After two years of research, the committee concluded that it was technically feasible and possibly commercially feasible to develop such a cigarette. *Id.* Two months before the committee made its report to Congress, a major cigarette company announced the prototype of a cigarette that, when lying flat, is purportedly unlikely to ignite most materials. *Id.*

119. Jeffrey R. Botkin, *The Fire-Safe Cigarette*, 260 JAMA 226 (1988). Typically, a cigarette is dropped onto a mattress or down into the sides of a sofa or chair where it smolders, producing smoke and toxic gas. *Id.* The victims are often found still in their beds, having died of smoke inhalation before the fire reached them. *Id.* For just a few of the numerous newspaper reports of fires caused by cigarettes, *see* Ron Soble, *Cigarette Starts Fire After Woman Dies*, L.A. TIMES, Oct. 1, 1991, at B4 (77-year-old chain smoker died of emphysema and heart disease while sitting and smoking in an upholstered chair; the cigarette ignited a fire which gutted her mobile home); Patrick McDonnell, *UCSD Student Dies in Fire*, L.A. TIMES, Oct. 28, 1990, at B11 (23-year-old woman died in a condominium fire caused by a smoldering cigarette left near a sofa); Peggy Hernandez & Tina Cassidy, *After Fatal Roslindale Fire, A Feeling Of Loss*, BOSTON GLOBE, May 29, 1990, at 1 (lit cigarette on an upholstered chair caused a four-alarm fire which killed six, including three children aged three, two, and ten months).

120. Joseph R. DiFranza et al., *The Relationship of Smoking to Motor Vehicle Accidents and Traffic Violations*, 86 N.Y. STATE J. MED. 464 (1986). The higher number of accidents reported in this study was in agreement with earlier studies done by different researchers documenting that smoking Air Force recruits had 40% more vehicle accidents and smokers made 24% more claims against their automobile insurance carriers. *Id.* at 465.

121. *Id.* Smokers are also arrested for drunk driving almost three-and-a-half times more often than nonsmokers. *Id.*

122. *Id.* at 466. Carbon monoxide and nicotine may lessen the smoker's driving ability. *Id.*

123. *Id.* Dropping burning embers while driving is probably one of the most common smoking-related causes of car collisions. *Id.*

B. CONCERN WITH GRANTING CUSTODY OF A CHILD TO A SUBSTANCE-ABUSING PARENT

Along with the concern for the physical health of children, courts should consider the ramifications of granting custody to a parent who is addicted to a drug.¹²⁴ Though use of tobacco is more socially acceptable than the use of other controlled substances,¹²⁵ evidence indicates that "tobacco is a pharmacologically addicting substance and that tobacco use can be considered a form of drug addiction."¹²⁶ According to Dr. William Pollin, former Director of the National Institute of Drug Abuse, cigarettes are more addictive than heroin or alcohol.¹²⁷ Tobacco's position in the hierarchy of drug abuse has been established by studies which have consistently concluded that people who use other addictive drugs are often also cigarette smokers or are illicit drug users who began using drugs after first smoking cigarettes.¹²⁸ A 1990 report by the Surgeon General concluded that "[s]mokers are more likely than nonsmokers to drink alcohol and use other drugs."¹²⁹ This

124. See M.H.A. Russell, *The Nicotine Addiction Trap: A 40-Year Sentence for Four Cigarettes*, 85 BRIT. J. ADDICTION 293 (1990). "In terms of intractability, the tendency to relapse after short-term cessation, and the proportion of users who become dependent, cigarette smoking is on a par with other forms of drug addiction." *Id.* at 294-95. The title of the article refers to the author's findings that cigarettes are so addictive that after smoking three or four, a teenager is trapped into a smoking-lifespan of about 40 years. *Id.* at 299.

125. See N.D. CENT. CODE § 12.1-31-03 (1985). Cigarettes are controlled substances in North Dakota. *Id.* This statute provides that the sale of cigarettes or cigarette paraphernalia to a minor is a class B misdemeanor. *Id.* The use of tobacco by a minor is also a class B misdemeanor. *Id.*

126. NICOTINE ADDICTION, *supra* note 21, at 149. The report notes that criteria used to categorize a substance as addicting are:

- (1) that highly controlled or compulsive patterns of drug taking occur, (2) that a psychoactive or mood-altering drug is ingested by use of the substance and is involved in the resulting patterns of behavior, and (3) that the drug is capable of functioning as a reinforcer that can directly strengthen behavior leading to further drug ingestion.

Id. Other properties of drugs include the production of pleasurable effects in users, the creation of tolerance and dependence, and adverse toxic effects. *Id.*

127. Board of Trustees, *Report C: Tobacco Product Liability*, 255 JAMA 1034, 1034 (1986).

128. NICOTINE ADDICTION, *supra* note 21, at 259. The 1985 High School Senior Survey by the National Institute of Drug Abuse demonstrated that among users tobacco was often the first dependence-producing drug with which they experimented. *Id.* at 263. See Denise Kandel & Richard Faust, *Sequence and Stages in Patterns of Adolescent Drug Use*, 32 ARCHIVES GEN. PSYCHIATRY 924 (1975). The authors report that the developmental stages of drug dependency follow a typical pattern of use in progression, going from no use of any drugs, to use of (1) wine or beer, (2) cigarettes and/or hard liquor, (4) marijuana, (5) and then other illicit substances. *Id.* at 931. The authors also found that drinking may continue without smoking, while cigarette smoking is usually followed by the drinking of hard liquor. *Id.*

129. SMOKING CESSATION, *supra* note 12, at 556. The report also discusses findings that, although men and women who quit smoking drink more than those who had never smoked and are more likely to drink and drive, they drink significantly less than current smokers and are less likely to drink and drive than current smokers. *Id.* See 25 YEARS OF PROGRESS, *supra* note 69, at 345. A 1964 Surgeon General's Report associated smoking in

Note is not suggesting that all or most cigarette users are potential illicit drug abusers; rather, it is establishing a basis for categorizing cigarettes as threshold drugs. In addition, the children of smokers are more likely to be smokers themselves, a fact that should be noted in custody disputes since instilling health-impairing and life-threatening habits in a child is not in his or her best interests.¹³⁰ In the wake of this evidence, it would be prudent for a court to hear testimony on the extent of the parent's dependence on nicotine and on whether the parent is a regular user of alcohol.

Because cigarettes are so addictive, caution should be exercised if the smoking parent says: "Give me custody, I'll quit."¹³¹ Quitting is easier said than done.¹³² If the danger of passive smok-

adolescence and adulthood to extraversion, which was defined as a tendency "to live faster and more intensely." *Id.* Behaviors that have been associated with extraversion include coffee and alcohol consumption, status as an "evening" person rather than a "morning" person, vehicle accidents, divorce, frequent job changes, impulsiveness, and "low levels of vocational success." *Id.*

130. Roselyn Payne Epps & Marc W. Manley, *A Physician's Guide to Preventing Tobacco Use During Childhood and Adolescence*, 88 PEDIATRICS 140 (1991). Tobacco addiction usually begins in childhood and by the end of the teens many tobacco users are addicted. *Id.* It is estimated that every day more than 3000 children in this country begin to use tobacco, 60% of them beginning by age 14. *Id.* Parental smoking is strongly linked to adolescent tobacco use. *Id.* at 142; Perry & Silvas, *supra* note 7, at 792. Parental smoking has a strong association with teen smoking. *Id.* Parental attitudes influence and shape a child early in life and the authors report that first grade children of smokers consider smoking as a more positive habit than the children of nonsmokers. *Id.* See also *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045 (Ind. Ct. App. 1990). In a widow's suit for her husband's wrongful death brought about by cigarette smoking, testimony was given that he began smoking discarded cigarette butts when he was five or six years old and that he was influenced by seeing his father, his parent's friends, and movie stars smoking. *Id.* at 1047.

131. See *Mitchell v. Mitchell*, No. 01-A-01-9012-CV-00442, 1991 Tenn. App. LEXIS 337 at *8 (Tenn. Ct. App. April 26, 1991). In a custody dispute concerning an asthmatic son, the court refused the mother's request for a new trial because of "newly discovered" evidence, specifically, that she and her mother, with whom she lived, were enrolled in a stop-smoking program. *Id.* The court found that this was a "newly-created" rather than a newly-discovered fact and more probably a showing of a "desire for the custody of the child rather than concern for the welfare of the child," since the mother had previously refused to follow the advice of the child's doctor to stop smoking in the child's presence. *Id.* at *8-*9 See also Pamela Sherrid, *A Nontoxic Childhood*, U.S. NEWS WORLD REP., Mar. 4, 1991, at 56. In the event of a smoker claiming that there are products which will minimize any danger of exposure, it should be noted that the author reports that "smokeless" ashtrays and other air-cleaning gadgets are not very effective at removing small particles or cigarette gases. *Id.* at 59. Cf. *Orke v. Olson*, 411 N.W.2d 97 (N.D. 1987). In this case the court considered the father's "redemption" as a parent (recovery from alcoholism and stable new marriage), which may be compared to a recent ex-smoker's claim that he or she should be granted custody because he or she has quit. *Id.* at 100. Addressing a custody appeal on the grounds of changed circumstances, the *Orke* court held that this redemption is not a satisfactory reason to uproot the child, as "[c]onsecutive determinations about custody cannot change custody back and forth as the scales settle slightly first toward one parent and then the other as their circumstances change. The concept cannot be so erratic." *Id.*

132. See FERGUSON, *supra* note 75, at 27. The typical smoker takes 10 puffs per cigarette; if she smokes a pack a day, she has taken 200 puffs that day. *Id.* Each dose of nicotine will reach her brain within seven seconds and will stimulate production of a number of the brain's strongest chemical messengers. *Id.* The brain chemistry is temporarily improved and she experiences lessened anxiety, heightened pleasure, and a

ing is a factor to consider in a custody dispute, it is foreseeable that this tactic would be used in every case. Along with the problem of placing the child in the role of informant, the court should consider the potential hazards of granting custody to a parent who, in addition to the stress of divorce or a custody battle, is trying to kick the habit.¹³³ Evidence indicates that smokers who stop smoking suffer nicotine withdrawal syndrome, which includes anxiety, craving for tobacco, irritability, difficulty in concentrating, restlessness, headaches, and drowsiness.¹³⁴ Because these unpleasant withdrawal symptoms last about a month, it is possible that before a custody decision is made a smoking parent would ask for a continuance of four to six weeks in order to quit smoking. This may be a viable solution, but caution should be exercised in agreeing to a delay because most relapses occur when the smoker is faced with some sort of "stressful crisis."¹³⁵ Few would disagree with categorizing a divorce and custody contest as a stressful crisis.

For many smokers, cigarettes signify one of the few dependable and constant sources of support in their lives and they genuinely mourn giving them up.¹³⁶ On a scale ranking stressful incidents from zero to 100, one-third of the participants in a Uni-

feeling of alert relaxation. *Id.* These positive psychological effects of smoking, along with the unpleasant withdrawal symptoms, make quitting a difficult task. *Id.* at 27-28.

133. See SMOKING CESSATION, *supra* note 12, at 533. Smoking has been described as a way to cope with stress as evidenced by the fact that smokers often believe that smoking helps them deal with stress and anxiety. *Id.*

Thus, in addition to the stress of separation from cigarettes, abstaining from cigarettes potentially could make the smoker feel less able to cope with stress and thereby constitute a biologically based source of stress. If the quitter feels unable to cope with stress without cigarettes, perceived stress may increase, and self efficacy may decrease, resulting in heightened anxiety and an overall negative shift in well-being.

Id. at 533 (citations omitted). Alternatively, it has been suggested that for those who want to quit, continued smoking may be more stressful than stopping, and kicking the habit may give them a higher sense of self-esteem. *Id.*

134. *Id.* at 531-32. The symptoms usually occur within 24 hours of quitting and last about a month. *Id.* As might be expected, smokers with more severe withdrawal symptoms are more likely to relapse. *Id.*

135. See Ron Borland, *Slip-ups and Relapse in Attempts to Quit Smoking*, 15 ADDICTIVE BEHAVIORS 236 (1990). Most slip-ups resulted when the quitter was in the presence of smokers. *Id.* at 239. A significant percentage of quitters smoke when they are feeling depressed, angry, or worried. *Id.* See also Robert F. Anda, *Depression and the Dynamics of Smoking: A National Perspective*, 264 JAMA 1541 (1990). Although researchers are unsure exactly why, depression lessens a smoker's ability to kick the habit. *Id.* at 1545. The smoker's personality traits may be responsible, such as low self-esteem, which may predispose one to smoke, or depression and learned helplessness, which may lessen the likelihood of quitting. *Id.* at 1544-45.

136. FERGUSON, *supra* note 75, at 180. The process of cessation has been compared to the stages of grief observed in the dying: Denial—the smoker denies that he or she will suffer the health consequences of smoking, believing that he or she is different; anger—once the smoker quits, he or she is prone to have temper flareups aimed at smokers who will not quit and at nonsmokers who do not understand how hard it is to quit; depression—this may include feelings of grief, described as similar to "losing a good friend";

versity of Pittsburgh study rated the stress of giving up cigarettes at 100, a rank equal to the stress associated with the death of a spouse.¹³⁷ Women experience a lower quit rate in smoking cessation than men do, though researchers are unsure why.¹³⁸

C. APPLICATION OF THE BEST INTERESTS OF THE CHILD STANDARD AND PARENTAL SMOKING

Because each custody dispute is unique, judges are able to recognize shifting values or cultural mores.¹³⁹ This discretion also enables the judiciary to formulate decisions in light of previously unknown data, such as the dangers of passive smoking.¹⁴⁰ Since North Dakota's custody statute mandates considering any relevant element, the best interests standard is amenable to a consideration of the dangerous environment that a smoking parent creates for a child.

In a custody contest between two parents, if a judge could predict that one parent's conduct would seriously harm the child's health, it would not be difficult to conclude that the child would be better off living with the other parent.¹⁴¹ Therefore, if one party would subject the child in question to irreversible health risks and

acceptance—eventually, successful quitters come to accept this change in their lives. *Id.* at 181.

137. Sally Squires, *Smoking Update: Why Women Can't Quit*, VOGUE, Apr. 1991, at 313.

138. *Id.* See also John R. Hughes & Dorothy Hatsukami, *Signs and Symptoms of Tobacco Withdrawal*, 43 ARCHIVES GEN. PSYCHIATRY 289 (1986). The authors report that women do have lower quit rates than men, but overall there is no difference in withdrawal discomfort between the sexes. *Id.* at 293. Cf. Peggy O'Hara et al., *The Influence of Menstrual Cycle Changes on the Tobacco Withdrawal Syndrome in Women*, 14 ADDICTIVE BEHAVIORS 595 (1989). The authors report an association between cigarette withdrawal symptoms and menstrual distress symptoms. *Id.* at 599. At least one study reports that some women experience the same symptoms in tobacco withdrawal as they do in premenstrual syndrome. *Id.* at 595. Apart from those previously mentioned as common to tobacco withdrawal syndrome, these symptoms include depression, tension, sleep disturbance, lethargy, and somatic complaints. *Id.*

139. Jessica Pearson & Maria A.L. Ring, *Judicial Decision Making In Contested Custody Cases*, 21 J. FAM. L. 703, 704 (1982-83) (citing Finlay, *Judicial Discretion in Family and Other Litigation*, 2 MONASH U. L. REV. 221 (1976)).

140. See Bruce Samuels & Stanton A. Glantz, *The Politics of Local Tobacco Control*, 266 JAMA 2110, 2111-12 (1991) (reporting that the studies released in the past two years which have labeled ETS a class A or "known human carcinogen" and also a cause of heart disease have led to over 400 local ordinances across the nation regulating smoking in public places); Robert Beaglehole, *Does Passive Smoking Cause Heart Disease?*, 301 BRIT. MED. J. 1343, 1344 (1990) (commenting that "[p]assive smoking is easier to control (by legislation and regulation) than active addictive smoking" and the health implications warrant continued efforts to reduce exposure to other people's tobacco smoke); Ronald M. Davis et al., *Common Courtesy and the Elimination of Passive Smoking*, 263 JAMA 2208, 2210 (1990) (reporting that according to a Roper survey, nearly half of all smokers smoke in public places without asking whether nonsmokers mind).

141. Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW AND CONTEMP. PROBS. 226, 261 (1971).

the other party would not, it is not necessary to make long-term predictions or psychological evaluations of what is likely to happen to the child's personality.¹⁴²

Thus, one may make two separate arguments for using parental smoking in a custody adjudication. One approach is to use parental smoking as a tiebreaking factor. Where all things are otherwise equal, a strong argument can be made that while a smoking parent is not "unfit" per se, the potential health consequences risked by passively smoking indicate that the best interests of the child are with the nonsmoking parent.¹⁴³

The alternative approach is to demonstrate to the courts that North Dakota's custody statute may be construed to include the proven health hazards of environmental tobacco smoke as a factor affecting the welfare of the child. North Dakota's best interests statute lends itself to a consideration of passive smoking via section 14-09-06.2(1)(l), which allows "[a]ny other factor considered by the court to be relevant to a particular child custody dispute" to be evaluated.¹⁴⁴ Awarding custody to a parent who will subject the child to a risk of cancer,¹⁴⁵ respiratory illness,¹⁴⁶ and other indirect dangers like fires or accidents is relevant to the decision.¹⁴⁷

In addition to North Dakota's statute, the custody statutes of twenty-one other states contain language amenable to a consideration of parental smoking and its effects on the child, either by listing factors such as "the mental and physical health of all individuals involved,"¹⁴⁸ or by language which invites similar

142. *Id.* Though there is no universal agreement on what is best for a child, there is agreement on what is not in the child's best interest. *Id.* Since the judge cannot know with certainty what will happen in the future but may know at the time of trial that the child's health is at risk with one parent, placing the child with a parent who does not endanger the child's health is the best solution. *Id.* at 260-61.

143. *Cf. Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981). In discussing the mother's homosexuality, the court held that they were "not concerned with the unfitness of Sandra, but rather the best interests of the children, accepting as fact that both Sandra and Duane are fit parents." *Id.* at 80 n.2. Similarly, a court might not find a smoking parent unfit, but the best interests of the child would dictate awarding custody to the parent who would not expose the child to environmental tobacco smoke. Therefore, where all else is equal, one parent's smoking might tip the balance in favor of the nonsmoking parent.

144. N.D. CENT. CODE § 14-09-06.2(1)(l) (1991).

145. Janerich, *supra* note 6, at 632.

146. E.A. Mitchell, *Passive Smoking in Childhood*, 103 N.Z. MED. J. 532 (1990). Studies have reported an association between passive smoking and hospital admissions for respiratory illnesses during the first five years of childhood. *Id.*

147. *Cf. Satalino v. Satalino*, 544 N.Y.S.2d 154 (1988). The court held that the father, a former alcoholic, was a fit custodian and found that since he was no longer drinking there was no evidence that the child was living in a "hazardous" or "detrimental" environment. *Id.* at 156. With today's recognition of the perils of secondhand smoke, it follows that a custody award to a smoking parent would mean placing the child in a hazardous or detrimental environment, a step back from the best interests of the child.

148. *See supra* note 19 (a listing of these particular statutes).

interpretations.¹⁴⁹ Even if one accepts the tobacco industry's dismissal of the medical and scientific theories on passive smoke,¹⁵⁰ there is little argument about the health consequences of active smoking.¹⁵¹

In *Von Bank v. Von Bank*,¹⁵² the trial court cited laxity in health care as one factor warranting transfer of custody from the mother to the father.¹⁵³ If the court remarks on toothaches and tooth decay and on a parent's carelessness in following dentist's instructions, can it ignore a parental compulsion that renders the child susceptible to frequent coughs, respiratory disease, lung cancer, decreased lung function, and coronary heart disease?¹⁵⁴

As more evidence is gathered on the consequences of breathing environmental tobacco smoke, health professionals around the world are urging that cigarette smoking be labeled a public health risk.¹⁵⁵ Since much of the data reveals a significant impact on the

149. See ALASKA STAT. § 25.24.150(c)(8) (1983 & Supp. 1990) ("evidence that substance abuse by either parent or other member of the household directly affects the emotional or physical well-being of the child"); CAL. CIV. CODE § 4608(a) (West Supp. 1991) ("the health, safety, and welfare of the child"); ME. REV. STAT. ANN. tit. 19, § 752(5)(1) (Supp. 1991) ("[a]ll other factors having a reasonable bearing on the physical and psychological well-being of the child"); NEB. REV. STAT. § 42-364(l)(c) (1988) ("[t]he general health, welfare, and social behavior of the children"); VT. STAT. ANN. tit. 15, § 665(b)(2) (1989) ("the ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, other material needs and a safe environment").

150. See Greg Rushford, *Tobacco Interests Set Sights on EPA Staff Study*, LEGAL TIMES, Aug. 6, 1990, at 2. Tobacco industry lobbyists have argued that the latest EPA draft report was written by "biased bureaucrats who were overly influenced by antismoking zealots." *Id.* at 19. An industry spokesman claims that if one looked simultaneously at all the studies done in the United States, there is no statistically important connection between environmental smoke and lung cancer, and if one looked at all the world studies, there is no association at all. *Id.*

151. 25 YEARS OF PROGRESS, *supra* note 69, at 11. Smoking is responsible for more than one of every six deaths in the United States and is the single most preventable cause of death. *Id.* One author estimates that smoking related deaths for 1990 may be broken down to roughly 350,000 plus cardiovascular deaths, 170,000 plus cancer deaths, and 75,000 plus deaths related to chronic lung disease. Alvin E. Smith, *The Immorality of the United States Tobacco Industry*, 77 J. FLA. MED. ASS'N 445 (1990).

152. 443 N.W.2d 618 (N.D. 1989).

153. *Von Bank v. Von Bank*, 443 N.W.2d at 619 (N.D. 1989). Several circumstances occurred after the father sought an amended decree of visitation which influenced the court in deciding that there were changes in circumstances requiring a reassessment of custody. *Id.* These included a change in the child's general health, especially the fact that the girl had a series of ear and throat infections, and a vaginal yeast infection. *Id.* The evidence at trial also showed that the child suffered from an abscessed tooth and several decaying teeth and that the mother was careless in carrying out dentist's orders. *Id.* Cumulatively, the evidence supported the lower court's finding that the home environment and care furnished by the mother affected the child's well-being. *Id.*

154. See *supra* notes 95-108 and accompanying text (various authors attribute passive smoking to contributing to such illnesses as wheezing, middle ear effusion and resulting infections, asthma, bronchitis and pneumonia, recurrent cough, and possible susceptibility to lung cancer).

155. See, e.g., Thomas P. Houston, *The Silent Killer: Environmental Tobacco Smoke*, 32 J. FAM. PRAC. 457, 458 (1991) (claiming that "[s]moking should not be a matter of free choice when it imposes health risks on the nonsmoking majority"); E. A. Mitchell, *Passive Smoking in Childhood*, 103 N.Z. MED. J. 532, 532 (1990) (urging that cigarette taxes be

health of children who passively smoke, it is likely the legal system will be called upon more frequently to address parental smoking in custody battles.¹⁵⁶

IV. CONCLUSION

Today, all fifty states and the District of Columbia determine custody decisions according to the best interests of the child.¹⁵⁷ A majority of states have a list of factors to guide courts in decision-making.¹⁵⁸ The remaining states have statutes providing that the welfare of the child be the primary concern, without enumerating specific factors.¹⁵⁹

The language of statutes which designate custody according to the best interests of the child indicate that whether there is a smoker living in the household of the party seeking custody is a legitimate concern. Therefore, smoking should be a factor in the custody determination. While smoking by either the parent or a cohabitant would not render a particular parent unfit, that parent would be comparatively less fit if all things are otherwise equal. Merely ordering a parent not to smoke in the presence of a child is not a viable solution. This requires a child to report the disobedient parent to the other parent or to an authority, most likely resulting in the child feeling guilty or being subjected to parental threats or pleadings.

No court has held a parent's smoking as the single determinant in a custody decision, but courts have held smoking to be one factor that was detrimental to the child's well-being.¹⁶⁰ Thus far,

increased, advertisements and sponsorships by tobacco companies banned, and smoking in public places limited in order to create an awareness that people are entitled to a smoke-free environment); Jonathan M. Samet & Mark J. Utell, *The Environment and the Lung, Changing Perspectives*, 266 JAMA 670, 673 (1991) (claiming that despite the difficulty of assessing a lifetime history of passive smoking and the subsequent uncertainties in predicting the risk of lung cancer caused by environmental tobacco smoke, a conclusory statement that environmental tobacco smoke does cause lung cancer seems unnecessary for the development of public policy on a carcinogen with a controllable source).

156. See Richard A. Dumas, *Smoking Could Become Custody Battle Weapon*, MICH. LAW. WKLY., June 24, 1991, at 1A (consent order issued requiring a mother to stop smoking in front of her children after her estranged husband asserted in court that her smoking was harming the children's health); *The Custody Case That Went Up in Smoke*, NEWSWEEK, Aug. 27, 1990, at 66 (smoking mother ordered to stop smoking in son's presence after father complained she was harming the boy's health).

157. 4 CHRISTOPHER L. BLAKESLEY, CONTEMPORARY FAMILY LAW § 39:06, at 32 (1988). Throughout the country, both case law and statutes provide that the best interests of the child is the standard to be applied in custody disputes. *Id.*

158. See *supra* note 40 (listing the states whose statutes enumerate factors to consider).

159. See *supra* note 42 (listing the states whose statutes do not enumerate specific considerations).

160. See *Smith v. Smith*, C.A. No.132, 1989 Tenn. App. LEXIS 758 (Tenn. Ct. App. Nov. 16, 1989). The mother's two older children, age 14 and 16, smoked and their 26-

courts are most concerned with parental smoking in situations where the child has asthma or another respiratory illness.¹⁶¹ Rather than only protecting children who have asthma, however, steps should be taken to prevent the onset of this or any other disease. Although more research needs to be done, smoking may result in asthma development.¹⁶² When a child's health is at stake, let the courts be mindful of the old maxim: An ounce of prevention is worth a pound of cure.

Wanda Uhlich

month-old brother had already shown an interest in smoking. *Id.* at *6. Custody was granted to the father based on the bad influence the older children exerted on the child and not on the hazard to the child's current health. *Id.* at *5 -*7.

161. *Supra* notes 114-20 and accompanying text (smoking seriously aggravating the condition of an already-ill child warrants the child's removal to a healthier environment).

162. See Michael Weitzman et al., *Maternal Smoking and Childhood Asthma*, 85 PEDIATRICS 505, 510 (1990) (urging that pediatricians educate parents not to smoke, regardless of their child's health, or their smoking may result in the development of asthma in their children); Priscilla Scherer, *Childhood Asthma: Twice the Risk If Mom Smokes*, 90 AM. J. NURSING 12, 12 (1990) (reporting that compared to the children of nonsmokers, children whose mothers smoke more than 10 cigarettes a day are twice as likely to develop asthma).