

Best Interests of the Child – A Legislative Journey Still in Motion

by
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Little argument exists among scholars that the current model used in custody cases, the “best interests of the child” standard, has at least as many weaknesses as it does strengths. At best it can be described as a fact-driven process that most accurately protects a child’s physical, psychological, and emotional needs.¹ At worst it has been deemed an egocentric, utilitarian product of the state’s design to make children productive members of society rather than burdens upon it later in life.² The truth most likely lies somewhere in the vast distance between the two extremes—a different spot on the spectrum for each state that relies largely upon its own judicial interpretation of a guideline exceedingly vague in nature.

What may be more largely agreed upon is that this guideline, outlined in section 402 of the Uniform Marriage and Divorce Act (hereinafter “the Act” or “UMDA”) to give children a voice in the custody process, has sparked a firestorm of legislation calling into question just who should be the focus of the standard. At issue is whose rights – those of the children or the parents – should be of paramount consideration. Does the benefit of a meaningful and lasting relationship with both parents in most cases substantiate a presumption of joint custody?

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¹ See Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 130 (2009). Compare Elizabeth P. Miller, Note, *DeBoer v. Schmidt and Twigg v. Mays: Does the “Best Interests of the Child” Standard Protect the Best Interests of Children?*, 20 J. CONTEMP. L. 497, 497 (1994) (contending that “best interests” standard places the rights of parents above those of the child).

² See Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making – How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 21-22 (1998).

Also, should wars fought between the parents (either physically, verbally, or through any other means of visible conflict) be weighed when making custody determinations and to what extent? And flowing from this, how does the burden of children's exposure to high-conflict divorces play into current trends in "best interests" legislation? These are all questions being grappled with in state legislatures across the nation more than a century after the standard's wide-spread acceptance.

This Article addresses the most prevalent surges of legislation fueled by the evolution of the "best interests of the child" standard—fires that continue to burn on State House floors today. Laying the foundation for that discussion, Part I will focus primarily on the progression of custody cases in family law and how gender preferences have reversed since the United States was colonized. Part II will concentrate on the five factors defining the "best interests of the child" standard as designated by the Act, although the UMDA clearly states that this list is not to be interpreted as all-inclusive. Fathers' rights groups have attacked these factors as not taking into account their rights; thus, their struggle for legislative change is the theme addressed in Part III. Meanwhile, Part IV will emphasize the arguably equally ignored rights of the victims of domestic violence – often women – when determining the more suitable environment for a child post-divorce. Because these two previous positions are more parent-centered than child-focused, Part V then will examine the role empirical data has played in influencing legislation. Finally, Part VI will observe how the "best interests" standard is applied legally in jurisdictions around the world as the United States still searches for a more consistent application.

I. The Custody Pendulum – From Property Right to Fundamental Right

A. The Paternal Presumption

Despite the quite apparent preference to grant mothers custody throughout much of the last century, the right to custody of a child post-divorce was initially viewed as a property right favor-

ing the father.³ This originated in Roman and English law and was maintained throughout the colonization of the Americas.⁴ Under common law, women during the eighteenth and nineteenth centuries were not capable of entering into contracts or gaining employment, thereby presumably lacking the ability to secure a financial future for themselves or their children.⁵ Women were also over-ruled by men, since they were also presumed to lack the ability to make rational decisions.⁶ These facts alone were enough to indicate that the father was the sole bearer of opportunities and the only chance for a child to have a productive future of any kind.⁷

This paternal presumption prevailed regardless of circumstances which modern common sense would weigh in the mother's favor. For example, custody was granted to the father even if he was guilty of infidelity (although a mother's infidelity was still considered to be inexcusable and grounds to declare the mother unfit to raise a morally and socially responsible child).⁸ In an extreme case, a court still granted custody to the father despite his being guilty of murdering his wife's lover days after discovering their affair.⁹ In the event that the father died, the mother was often still passed over in terms of custody with the child going to another male relative.¹⁰

B. *The "Tender Years Doctrine"*

As the paternal presumption began to fade, custody standards shifted from English law to French Napoleonic Code during the early part of the nineteenth century.¹¹ This transition brought on a dual-presumption era known as the "tender years doctrine."¹² It was then that the age of the child became the de-

³ Shannon Dean Sexton, Note, *A Custody System Free of Gender Preferences and Consistent with the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System*, 88 KY. L.J. 761, 765 (1999-2000).

⁴ *Id.* at 766.

⁵ *Id.*

⁶ *Id.* at 765.

⁷ *Id.* at 766.

⁸ Sexton, *supra* note 3, at 765.

⁹ *Id.* at 768.

¹⁰ *Id.* at 766.

¹¹ *Id.*

¹² *Id.* at 767.

cing factor regarding which parent would gain custody.¹³ If the child was under the age of three (or seven according to some sources), he/she would be placed in the care of the mother.¹⁴ If over the age of three (or seven), automatic custody was granted to the father.¹⁵ The reasoning for distinction was that the mother was a more capable nurturer of a child in his/her formative years.¹⁶ The father still maintained the right to regain custody either once the child reached a mature age or if he could prove for any number of reasons that the mother was unfit.¹⁷ The reverse was not true for the mother, however, because it was extremely hard for her to overcome the presumption that the father was a suitable parent.¹⁸

C. *The “Best Interests of the Child”*

The custody pendulum completed its shift in the mid-to-latter part of the nineteenth century when the maternal presumption replaced both the paternal presumption and the tender years doctrine.¹⁹ Factors contributing to the shift to female favoritism include “the industrial revolution, the women’s rights movement, and changes in the field of psychology.”²⁰

While many scholars argue that this presumption still exists even today, various states started exploring a gender-neutral way of determining custody between 1840 and 1870 referred to as the “best interests of the child.”²¹ During this movement, “the ultimate decision of child placement [was taken] out of the hands of both parents.”²² Children fourteen and older were consulted as to which parent they would like to live with even though they were not technically parties to the divorce.²³ This age of maturity

¹³ Sexton, *supra* note 3, at 767.

¹⁴ *Id.* See also Wendy Hutchins-Cook, *Divorce: The Care of the Children*, 4 THE TROWBRIDGE FOUNDATION REPORT, ISSUE 2 (2003). (defining the tender years age as seven).

¹⁵ Sexton, *supra* note 3, at 767. See also Hutchins-Cook, *supra* note 14.

¹⁶ Mercer, *supra* note 2, at 18.

¹⁷ Sexton, *supra* note 3, at 767-68.

¹⁸ *Id.*

¹⁹ *Id.* at 768.

²⁰ *Id.*

²¹ See Mercer, *supra* note 2, at 20-21.

²² *Id.* at 22.

²³ *Id.*

was based upon Freudian psychology which indicated that children needed to be afforded greater freedom if their personalities were to avoid repression.²⁴ Some interpreted Freud as suggesting that children were “antisocial and dominated by a mass of uncontrolled impulses that had to be firmly redirected in order to achieve a healthy adult,” but most viewed Freud’s message to be that of promoting freedom amongst youngsters.²⁵

This “best interests” standard has developed into a more complex animal with several more components in the century-plus since Freud’s influence. However, the additions have remained facially gender-neutral. In 1970, the UMDA devised a five-factored model that aimed to take the child’s wishes into account, determine the most suitable caregiver for the child, and allow the child to maintain a healthy relationship with the non-custodial parent.²⁶ Despite this distinction, the “best interests of the child” remains a loosely defined term from jurisdiction to jurisdiction. In addition, many men argue that gender neutrality has never quite been achieved because a maternal presumption still seems to influence courts irrespective of the child’s best interests.²⁷

II. Best Interests of the Child Defined

Although loosely interpreted over the past four decades, section 402 of the Act (drafted in 1970) identifies five factors designed to give children more of a voice in deciding their uncertain futures following their parents’ divorce. These factors – selected because they were the factors most often cited in appellate decisions – take into account: 1) the wishes of the child’s parents as to custody; 2) the child’s wishes as to whom shall be his/her custodian; 3) the interaction and interrelationship of the child with the parent or parents, siblings, and anyone else who may significantly affect the child’s best interests; 4) the child’s adjustment to his/her home, school, and community; and 5) the mental and physical health of the individuals involved.²⁸ The

²⁴ *Id.*

²⁵ *Id.*

²⁶ McLaughlin, *supra* note 1, at 131.

²⁷ Sexton, *supra* note 3, at 770-71. *See also* Mercer, *supra* note 2, at 26. *See also infra* Part III.A-D.

²⁸ UNIF. MARRIAGE & DIVORCE ACT § 402 (1970).

court should not consider the conduct of a proposed custodian that does not affect his relationship to the child so as to discourage parties to the divorce in at-fault states from spying on one another to discover marital misconduct.²⁹ When examining these factors individually, it becomes quite apparent why they were so often cited in appellate decisions.

A. *The Wishes of the Child's Parent or Parents*

Parental rights have long been recognized in family law, perhaps beginning with the presumption that biological parents better serve the best interest of the child than a third party.³⁰ This presumption is rooted in the emotional and psychological bonds that parents form with their children after their birth, and for women, even during their pregnancy.³¹

However, parents also have a constitutionally protected relationship with their children;³² therefore their wishes should be considered in determining a child's home post-divorce. This parent-child relationship is a fundamental liberty interest, particularly concerning the care and custody of the child.³³ For this reason, it is imperative to begin by asking parents their preferences before this liberty interest is either stripped, or custody is decided against either or both of them.

Taking the parents' wishes into account may also sound more parent-focused than child-focused, which gives rise to the argument that parental rights have been respected much more over the years than children's rights. But what the parents want could have long-lasting effects on how a child will adjust to his or her new situation post-divorce. This impact on the child could affect the child's overall health because if a parent does not want a child, then the parent will be less inclined to fulfill the child's physical and emotional needs. Having a willing and engaged cus-

²⁹ *Id.*

³⁰ Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 50-51 (1997).

³¹ *Id.* at 50.

³² Miller, *supra* note 1, at 506.

³³ *Id.* See also *Meyer v. Nebraska*, 262 U.S. 390 (1923) (discussing freedom to both establish a home and raise children).

todian is inherently in the child's best interests and provides the best chance for the child to grow into a well-adjusted adult.³⁴

B. *The Wishes of the Child*

Giving the child a voice in the process is the very foundation upon which the "best interests" standard is based.³⁵ This factor is an important leap forward from the presumption periods defining a child's worth as a piece of owned property to a more even playing field that puts children's rights more in line with those enjoyed by their parents.³⁶ Children are no longer seen in terms of dollar signs, in essence a day laborer that could produce a profit by being rented out to plow someone's field or an extra farm hand on the parent's own piece of property.³⁷ For the first time in history, states adopting the Act recognized a law that in theory respects the autonomy of children, affording them the same rights that were previously reserved for their parents.³⁸

This factor also dispelled the notion that children could be used as pawns between parents to get a more favorable property settlement during the divorce process.³⁹ Many times, a parent who did not even want custody of the minor child would dispute custody until he or she would receive the bank account, vacation home, or desired split of assets.⁴⁰ Allowing children to speak on their own behalf can, in theory, curb some of that turmoil before it ever sees the inside of a courtroom.

And finally, if a child does not want to stay with one parent in particular, it begs the question – why? Several reasons could account for this preference including: 1) either verbal or physical abuse committed by one or both parents directed towards the child;⁴¹ 2) either verbal or physical abuse committed by one or both parents directed toward each other and witnessed by the

³⁴ See generally Mary Main et al., *Attachment Theory and Research: Overview with Suggested Applications to Child Custody*, 49 FAM. CT. REV. 426, 445 (2011) (discussing the importance to a child's development of valuable and continuous contact with both custodial and non-custodial parents).

³⁵ See Hutchins-Cook, *supra* note 14.

³⁶ Cahn, *supra* note 30, at 48-49.

³⁷ Mercer, *supra* note 2, at 15.

³⁸ *Id.* at 17.

³⁹ *Id.* at 34.

⁴⁰ *Id.*

⁴¹ For further discussion, see *infra* Part IV.A-E.

child;⁴² 3) high parental conflict in general within the family unit;⁴³ 4) fear of upsetting one parent more than another;⁴⁴ 5) a natural family dynamic that may involve more mother-child interaction during younger years that does not account for an increased role that may be assumed by the father as the child ages;⁴⁵ or 6) any other family dysfunction involving siblings and/or outside forces.⁴⁶

C. The Interaction and Interrelationship of the Child with Parents, Siblings, and Other Significant People

Any number of separate pieces make up the puzzle of a child's overall environment and for this reason, it is important that all of these external forces are examined when determining what post-divorce setting is truly in the child's best interests.

This factor, perhaps most importantly, guards against a child being placed into an abusive household.⁴⁷ This abuse could exist on many levels – either from a parent, a sibling, or a potential step-parent or step-sibling if one of the parents has already moved into another serious relationship. This is often where the role of psychologists is so valuable – in evaluating a broad range of situations and advocating for not just the parent, but the child as well.⁴⁸

Such professionals are often used by the courts to consider how the totality of a child's relationships contributes to his or her best interests.⁴⁹ Therefore, in determining what exactly this is, clinicians are specifically advised to weigh family dynamics, family interactions, and environmental variables when recom-

⁴² *See id.*

⁴³ For further discussion, *see infra* Part V.A.

⁴⁴ Interview with Larry V. Swall, Larry V. Swall & Associates, Liberty, MO, who began practicing law in 1990 (Aug. 2011).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *See generally infra* Part IV.A-E (discussing the importance of preventing batterers from being granted either sole or joint custody through the lens of battered women's activist groups).

⁴⁸ American Psychological Association, *Guidelines for Child Custody Evaluations in Family Law Proceedings*, 65 *AM. PSYCHOL.* 863, 864 (2010), <http://www.apa.org/practice/guidelines/child-custody.pdf>.

⁴⁹ *See id.* at 864.

mending what formula of puzzle pieces will best fulfill the child's physical and psychological needs.⁵⁰

Most attorneys agree that evaluating these interactions and environmental variables is important because these relationships have shaped the children for better or worse during the period leading up to the custody battle.⁵¹ They transform each child from an initial egocentric existence to the socialized beings they become as a result of their family, their peer group, and outside social institutions.⁵²

D. *The Child's Adjustment to Home, School and Community*

While home and school need no explanation, attorneys and psychologists have debated how exactly the courts should define "community" in the context of applying the "best interests of the child" standard.⁵³ Courts have interpreted "community" in at least four ways: 1) as an extension of the notion of continuity in a child's life; 2) as a way to highlight the importance of a child's cultural influences; 3) as representative of a child's religious community or education; and 4) as a symbol of the closeness of a child with his/her extended family.⁵⁴ No matter what definition is chosen by the court, all of these communities are important because "children constitute themselves and their identities through interactions with the community at large, not just

⁵⁰ *Id.* Determining this inexact science in times of high-conflict divorces, however, has been a topic of intense debate since the Act was adopted by many states over four decades ago. *See infra* Part V.A. Perhaps one of the boldest calls came from Goldstein, Freud, and Solnit in 1973 when they argued that the courts should not order visitation whatsoever, reasoning that "it is beyond the capacity of courts to help a child to forge or maintain positive relationships to two people who are at cross purposes with each other." Peter G. Jaffe & Dan Ashbourne, *Early Identification and Prevention of Parent-Child Alienation: A Framework for Balancing Risks and Benefits of Intervention*, 48 FAM. CT. REV. 136, 137 (2010) (internal citation omitted). This argument has gained popularity in minimizing court interference, but most stances on a so-called forced interaction with both parents (absent relationships involving abuse) are not so rigid. *Id.*

⁵¹ Swall, *supra* note 44.

⁵² Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 715 (1992).

⁵³ Linda K. Thomas, *Child Custody, Community and Autonomy: The Ties that Bind?*, 6 S. CAL. REV. L. & WOMEN'S STUD. 645, 647 (1997).

⁵⁴ *Id.* at 649.

through interactions with the smaller community defined as the family or the mother.”⁵⁵

Simply stated, a child’s home should always be a symbol of safety and stability. The importance of having this rock is especially true during the time of divorce. If one of the parents moves outside of the school district the child is accustomed to, uprooting the child from home, school, and community all at once may be too much for the child’s already fragile psyche to handle.⁵⁶ Dealing with all of this change while simultaneously trying to process the parents’ divorce adds stress, which is inherently detrimental to the child.⁵⁷

To avoid such a mental and emotional overload, clinicians have consistently weighed the following factors, indicating their intent to help offset the child’s transition by the promotion of their best interests. First of all, they examine how a child would cope with less regular contact with the non-custodial parent.⁵⁸ In addition, “the psychological impact of severing ties with a known community and establishing new ones elsewhere” is reviewed.⁵⁹ Other factors considered are which parent would be more likely to allow regular contact with the non-custodial parent, how a move might help a child’s psychological adjustment, and the motivation for this relocation.⁶⁰ If home, school, and community were not such fundamental building blocks of a child’s overall psyche, this examination would not be needed.

⁵⁵ *Id.* at 677-78.

⁵⁶ See *Herigon v. Herigon*, 121 S.W.3d 562 (Mo. Ct. App. 2003) (stating that uprooting children from home, school, and community would be highly disruptive and not in the children’s best interests).

⁵⁷ See generally Jessica J. Sauer, *Mediating Child Custody Disputes for High Conflict Couples: Structuring Mediation to Accommodate the Needs & Desires of Litigious Parents*, 7 PEPP. DISP. RESOL. L.J. 501, 510 (2007) (discussing the detrimental effects of stress on children in the context of high-conflict custody disputes).

⁵⁸ See Stephen P. Herman, *Child Custody Evaluations and the Need for Standards of Care and Peer Review*, 1 J. CENTER FOR CHILD. & CTS. 139 (1999).

⁵⁹ *Id.*

⁶⁰ *Id.*

E. *The Mental and Physical Health of all the Individuals Involved*

Once again, safety comes into play as a primary concern with the Act's consideration of the mental and physical health of all the individuals involved in a custody dispute. In many states, this factor includes any history of domestic violence between any of the parties involved.⁶¹ In cases where abuse is involved, custody or visitation orders are tailored to best protect both the child and the parent who have fallen victim to this violence.⁶² Furthermore, if the court finds that placing the child with the abusive parent is in the child's best interests, "the court shall enter written findings of fact and conclusions of law" explaining this placement.⁶³

Also closely related to and included beneath the umbrella of mental illness is any pattern of drug or alcohol abuse by either parent. Alabama, Indiana, Maine, Tennessee, and Virginia, specifically define the term "mental illness" to include those people suffering from alcohol and/or drug addiction.⁶⁴ Evidence of such abuse does not guarantee that custody will be denied to the abuser in every state, but rather that it will weigh heavily in the court's final determination.⁶⁵

Moreover, leaving a child with a parent who is mentally ill can be alarmingly detrimental to the child's well-being. Research indicates that children raised by parents suffering from a mental illness are more prone to become mentally ill themselves than children who are raised by parents not battling a mental disease.⁶⁶ In addition, this type of stressful environment has the propensity to lead to developmental or adjustment problems for the child.⁶⁷ Without this factor, children could very well find

⁶¹ MO. REV. STAT. § 452.375.2(6) (West 2010). For further discussion, see *infra* Part IV.A-E.

⁶² *Id.* § 452.375.2(6).

⁶³ *Id.*

⁶⁴ Sandra Anderson Garcia, *Drug Addiction and Mother/Child Welfare*, 13 J. LEGAL MED. 129, 177 (1992).

⁶⁵ See MO. REV. STAT. § 452.375.2(6) (West 2010).

⁶⁶ Stephanie N. Gwillim, *The Death Penalty of Civil Cases: The Need for Individualized Assessment & Judicial Education when Terminating Parental Rights of Mentally Ill Individuals*, 29 ST. LOUIS U. PUB. L. REV. 341, 359 (2009).

⁶⁷ *Id.* at 359-60.

themselves in a position of being the caretaker for a mentally ill parent rather than being the ones cared for.

A parent who is to assume custody must also have the means to be able to handle a child with special needs. Children have certain rights – one of which is “the right to diagnosis and treatment of medical and emotional conditions.”⁶⁸ If a child is placed with a parent who cannot provide these necessities, the child’s rights have arguably been violated.

To be clear, the weight given to mental illness as a factor was clarified by the Act in 1979 as those illnesses which would directly affect parenting or parental behavior.⁶⁹ If the mental condition in question “[does] not directly affect parenting skills or competence, it should not be considered in determining the child’s best interests.”⁷⁰

To summarize, the Act does not aim to punish those with diagnosed mental illnesses, nor does it intend to infringe upon either parent’s right to have a meaningful relationship with the child. This safeguard was established for children who are exposed to abuse or addictions, who otherwise may not get the chance to be a child due to the mental health of their parents, or who, if left without the necessary resources, may not get the medical diagnoses and treatments to which they are entitled.

III. The Fathers’ Rights Movement

The following two sections focus largely upon the first of the factors the Act lists for consideration – the wishes of the parent. However, the argument made by fathers’ rights groups across the nation over the last four decades concern much more than just wishes. These groups claim that this “wish” stems from their constitutional right to care for and parent their child.⁷¹

⁶⁸ Don R. Ash, *Bridge Over Troubled Water: Changing the Custody Law in Tennessee*, 27 U. MEM. L. REV. 769, 795 (1997) (internal citation omitted).

⁶⁹ Hutchins-Cook, *supra* note 14.

⁷⁰ *Id.*

⁷¹ Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 948 (1998).

A. *The Rise of Joint Custody*

Due to this fundamental liberty interest, advocates for fathers' rights began pushing for courts to award joint custody beginning in the late 1970s.⁷² Fathers in California wanted not only a presumption that joint custody was in the child's best interests, but for that presumption to prevail even if both parents did not agree with this arrangement.⁷³ This attempt for an automatic presumption failed, but fathers' rights groups refused to silence their objection to a bill sponsored by the Senate subcommittee on the Administration of Justice – an outcry that led to California clarifying its joint custody statute.⁷⁴

This era marked the dawn of a movement during which organized interest groups focused upon fathers' custody rights.⁷⁵ These groups “successfully lobbied state legislatures to enact statutes favoring joint custody” arguing “that joint custody was a more accurate reflection of modern family roles since fathers had become increasingly more involved in their children's lives.”⁷⁶ Within five years of California codifying the co-equal presumption in favor of joint custody, support for joint custody consideration spread to thirty states.⁷⁷

Although “statutory presumptions favoring some form of joint custody” do exist currently in many states, courts have not yet declared this custody arrangement to be a constitutionally protected right.⁷⁸ A major reason for this is that this presump-

⁷² Editorial, *1996 Georgia Legislative Session*, ATLANTA J. & CONST., Feb. 12, 1996, at A8.

⁷³ Hugh McIsaac, *Who Gets the Children? Clarifying Joint Custody*, L.A. TIMES, Dec. 18, 1988, at 3.

⁷⁴ *Id.* California later revoked its law favoring joint custody citing harm to children. Editorial, *supra* note 72.

⁷⁵ Nancy Ellen Yaffe, Note, *A Fathers' Rights Perspective on Custody Law in California: Would You Believe It If I Told You That the Law Is Fair to Fathers?*, 4 S. CAL. INTERDISC. L.J. 135, 139 (1995).

⁷⁶ *Id.*

⁷⁷ *Id.* at 139. However, these advances were largely enjoyed only by fathers who had been married; unwed biological fathers remained disadvantaged, particularly in situations in which they were denied the opportunity to ever establish a relationship with the child. *Id.*

⁷⁸ Bernardo Cuadra, Note, *Family Law – Maternal and Joint Custody Presumptions for Unmarried Parents: Constitutional and Policy Considerations in Massachusetts and Beyond*, 32 W. NEW ENG. L. REV. 599, 623 (2010).

tion eliminates entirely the individual best interests of the children at issue.⁷⁹ Critics argue that a joint custody presumption “flies in the face of the national trend to put children first in all custody decisions.”⁸⁰

In addition to the constitutionality of a father’s right to care for his child, fathers’ rights groups have also argued that custody determinations that take sex into account violate men’s rights to equal protection of the laws.⁸¹ The necessity of this challenge is rooted in precedent established by *United States v. Green*, in which Justice Story offered reasons for the award of custody to a father after a mother’s death:

[T]his is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education . . . It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody.⁸²

This equal protection argument is less likely to be recognized by the courts than the previous fundamental right to parent, and therefore fathers’ rights groups have made more headway with the first assertion.⁸³ The reason for this difference lies in the level of scrutiny that attaches to each claim.⁸⁴ The right to parent is a fundamental right demanding the application of strict scrutiny by the courts.⁸⁵ A gender-based contention requires that the court apply only an intermediate level of scrutiny, often allowing this preference to clear the lower bar of an “exceedingly persuasive justification” that is substantially related to those means.⁸⁶

⁷⁹ Editorial, *supra* note 72.

⁸⁰ *Id.*

⁸¹ McNeely, *supra* note 71, at 948. However, this argument is seen to be not as strong as the fundamental right to parent their child. *Id.*

⁸² 26 F. Cas. 30, 31-32 (1824). This decision turned the tide from the paternal to the maternal presumption in the United States. Thomas J. Simeone, *Great Expectations: New York’s Attempt to Eliminate Gender Preferences Between Parents in Child Custody Disputes*, 24 COLUM. J.L. & SOC. PROBS. 457, 460 (1991). Furthermore, this decision led to parental care and nurturing defining the interests of the child, rather than the child being the property rights of the parent. *Id.*

⁸³ McNeely, *supra* note 71, at 948.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* See also *United States v. Virginia*, 518 U.S. 515, 531 (1996).

Regardless of which claim is made, the goal for these groups is to compel the courts to allow significantly more time for fathers to spend with their children, even if this falls short of a fifty-fifty split.⁸⁷

B. Shared Parenting Legislation

A division of custody that gravitates more toward this equal (or nearly equal) time-share is shared parenting or joint physical custody.⁸⁸ Shared parenting not only allows each parent a more even distribution of time, but it also recognizes each parent as an equal legal guardian of the child.⁸⁹ More specifically, shared parenting is defined as a parenting plan in which “both of their parents substantially share in [the child’s] physical, psychological, emotional and spiritual development after separation or divorce.”⁹⁰ Proponents, including many fathers who wish to have a greater role in their children’s lives post-divorce, argue that this arrangement “maximizes the opportunity for a close, frequent, meaningful and continuing relationship between a child and parents regardless of marital status and preserves the dignity of all members of a separated family.”⁹¹

Therefore, it is not surprising that these fathers’ rights groups are in large part responsible for case law and statutes in eight states which currently declare a presumption of at least equal decision-making rights and responsibilities to each parent, although most are silent as to time distribution.⁹² For example, Alaskan courts recognize a shared parenting presumption if both parents can cooperate, communicate, and act in the child’s best interests.⁹³ Iowa law, on the other hand, provides both parents

⁸⁷ *Id.*

⁸⁸ Jennifer Wolf, *Shared Parenting Legislation*, ABOUT.COM SINGLE PARENTS, http://singleparents.about.com/od/legalissues/i/shared_parent.htm (last visited June 1, 2012).

⁸⁹ *Id.*

⁹⁰ Terry Nyblom, *Rebuttable Presumption of Joint Physical Custody October 2004 Questions & Answers*, <http://www.cpr-mn.org/Documents/JointPhysicalCustody/Joint%20Custody%20Questions%20and%20Answers.htm> (last visited Feb. 8, 2012).

⁹¹ *Id.*

⁹² See Cuadra, *supra* note 78, app. at 641-59.

⁹³ See, e.g., *Jaymot v. Skillings-Donat*, 216 P.3d 534, 540 (Alaska 2009).

with equal access to the child's records despite not explicitly stating a presumption of joint legal custody.⁹⁴

Kansas and Wisconsin do list joint legal custody as the preferred custodial arrangement,⁹⁵ as does Minnesota which implements "a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child."⁹⁶ A New Hampshire statute presumes that joint decision-making power is in the best interests of the child if either or both parents file an application,⁹⁷ while New Jersey courts have stated that joint legal custody is the preferred arrangement⁹⁸ as long as courts still weigh whether joint legal custody is the best arrangement for the child.⁹⁹

Texas has adopted a "rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child."¹⁰⁰ Collectively, these states exemplify the largest legislative steps forward for fathers' rights groups.

However, several more states have at least considered shared parenting legislation in the last seven years including Michigan, North Dakota, New York, and Massachusetts, which would have made shared parenting the legal standard in all cases in which both parents were deemed to be fit.¹⁰¹ Alabama has also considered rewriting child custody laws that would mandate shared equal custody unless one parent is declared unfit.¹⁰² The bill is backed by Republican Senator Paul Bussman, "a divorced father who says he got little time with his children when they

⁹⁴ IOWA CODE ANN. § 598.41(1)(e) (2006).

⁹⁵ WIS. STAT. ANN. § 767.41(2)(m) (2010); *In re Marriage of Debenham*, 896 P.2d 1098, 1099 (Kan. Ct. App. 1995).

⁹⁶ MINN. STAT. ANN. § 518.17(2) (West 2010).

⁹⁷ N.H. REV. STAT. ANN. § 461-A:5 (West 2010).

⁹⁸ *Grover v. Terlaje*, 879 A.2d 138, 142 (N.J. Super. Ct. App. Div. 2005).

⁹⁹ *Jackson v. Hagans*, No. FD-07-520-06, 2007 WL 3006499, at *3 (N.J. Super. Ct. App. Div. Oct. 17, 2007).

¹⁰⁰ *Naguib v. Naguib*, 137 S.W.3d 367, 371 (Tex. App. 2004) (citing TEX. FAM. CODE ANN. § 153.131 (West 2010)).

¹⁰¹ *Id.*

¹⁰² *Alabama Weighs Changes to Child Custody Laws Aimed at Uniting Broken Families*, FOXNEWS.COM (Apr. 16, 2011), <http://www.foxnews.com/politics/2011/04/16/alabama-weighs-changes-child-custody-laws-aimed-uniting-broken-families/>.

were growing up.”¹⁰³ However, Democratic Senator Vivian Davis Figures is among those opposed to such a bill’s passage in that it approaches child custody as “a one size fits all” issue.¹⁰⁴

C. *War in Iraq – The Price of Serving*

While shared time relies heavily upon the notion that both parents are geographically capable of having near equal access to the child, fathers’ rights groups have most recently become active in situations where that is not possible. The wars in Iraq and Afghanistan have unlevelled the playing field, making it impossible for service members (the majority of whom are men) to have consistent, continuous physical contact with their children.¹⁰⁵ Nevada definitively responded to this outcry in 2011 when Governor Brian Sandoval signed into law a child custody bill revising provisions governing the custody and visitation determinations for military service members.¹⁰⁶

This change in Nevada law is inspired by six reforms military parent advocates have called for since 2005.¹⁰⁷ These points, which are actively being implemented into state laws across the country, include:

prohibiting permanent custody orders for deployed parents; making temporary orders revert back after deployment; prohibiting deployment from being used as a factor in custody determination; allowing guardianship or visitation to be delegated when appropriate; holding expedited and/or electronic hearings for deployed parents; and extending military parent protections to National Guard and Reserves.¹⁰⁸

This advocacy, staunchly supported by groups such as Fathers and Families, has led to military parent child custody legislation being passed in more than two-thirds of all U.S. states.¹⁰⁹

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See generally *F & F-Inspired NV Child Custody Bill Signed by Governor*, FATHERS AND FAMILIES (June 1, 2011), <http://www.fathersandfamilies.org/?p=12924> (noting the inherent unfairness in punishing those who serve their country in the arena of family court).

¹⁰⁶ *Id.* (citing AB313, <http://www.leg.state.nv.us/Session/76th2011/Reports/history.cfm?ID=657>).

¹⁰⁷ FATHERS AND FAMILIES, *supra* note 105.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Such pressure has even caused the Pentagon to reverse its stance concerning child custody protections.¹¹⁰ In 2010, a spokesperson for the Department of Defense stated that federal child custody legislation protecting deployed members of the military “would only complicate family law, which is typically decided and enforced in state courts.”¹¹¹ One year later, the Pentagon publicly supported federal legislation known as the Service Members Family Protection Act which would prevent state family law judges from considering a parent’s military deployment when making custody determinations, reasoning that “the benefits outweigh the concerns.”¹¹² The bill, if passed into law, would also disallow permanent custody modifications during a service member’s deployment.¹¹³ The Pentagon had already been working with individual states to encourage legislative safeguards for military parents.¹¹⁴ However, those people who oppose this approach contend that such federal law will strip the state courts of their discretion to determine what exactly is in the best interests of each child.¹¹⁵

D. *Parental Alienation Syndrome*

Another theory coming under heavy criticism but largely backed over the years by fathers’ rights groups is Parental Alienation Syndrome (hereinafter “PAS”).¹¹⁶ PAS is “a situation in which one parent has manipulated a child to fear or hate the other parent” or a condition resulting from parental behavior which is “designed to poison a child’s relationship with the other parent.”¹¹⁷ Many fathers’ rights groups interpret PAS as an at-

¹¹⁰ Charlie Reed, *Pentagon to Support Bill to Protect Troops’ Child Custody Rights*, STARS AND STRIPES (Feb. 17, 2011), <http://www.stripes.com/news/us/pentagon-to-support-bill-to-protect-troops-child-custody-rights-1.135134>.

¹¹¹ *Id.*

¹¹² *Id.* (citing a letter Defense Secretary Robert Gates sent to Representative Michael Turner, the Congressman sponsoring the bill).

¹¹³ Reed, *supra* note 110.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Michele A. Adams, *Framing Contests in Child Custody Disputes: Parental Alienation Syndrome, Child Abuse, Gender, and Fathers’ Rights*, 40 FAM. L.Q. 315, 334 (2006).

¹¹⁷ BLACK’S LAW DICTIONARY 1223 (9th ed. 2009).

tack devised by mothers designed to alienate fathers, also explaining their children's reluctance to visit them.¹¹⁸

Child psychiatrist Richard A. Gardner coined the term "Parental Alienation Syndrome" in the 1980s originally as an explanation for the rise in reports of child abuse.¹¹⁹ Gardner initially blamed mothers as being the alienators in ninety percent of PAS cases, and accused mothers of often making false accusations of child abuse and sexual abuse against the other parent to cut off father-child contact.¹²⁰

Although Gardner's theory technically was born outside the context of the fathers' rights movement, men seeking a greater role in their children's lives have deemed PAS a success story.¹²¹ These groups tout the syndrome as "encapsulat[ing] the ability of fathers' rights campaigners to co-opt and adapt feminist rhetoric of equality, victimization, and freedom of choice, and combine it with taken-for-granted stereotypes of women to turn the successes of the women's movement into defeat for mothers."¹²²

Despite PAS not yet being recognized as a syndrome by the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*,¹²³ some states have attempted to legislate whether PAS evidence should be considered when making custody determinations.¹²⁴ At this time, no legislation has been enacted,¹²⁵ but family courts continue to cite some of the indicators that comprise PAS as "alienating behavior."¹²⁶

¹¹⁸ Adams, *supra* note 116, at 337.

¹¹⁹ Richard A. Gardner, *Commentary on Kelly and Johnston's "The Alienated Child: A Reformulation of Parental Alienation Syndrome"*, 42 FAM. CT. REV. 611, 616 (2004).

¹²⁰ Danielle Isman, *Gardner's Witch-Hunt*, 1 U.C. DAVIS J. JUV. L. & POL'Y 12, 14 (1996). Gardner later amended his claim to both parents being equally likely to alienate, although he maintained the mother was the more frequent offender during the 1980s and 1990s. Gardner, *supra* note 119, at 616.

¹²¹ Adams, *supra* note 116, at 323-24.

¹²² *Id.*

¹²³ Joan S. Meier, *Parental Alienation Syndrome and Parental Alienation: Research Reviews*, VIOLENCE AGAINST WOMEN (2011), http://www.vawnet.org/sexual-violence/print-document.php?doc_id=1679&find_type=web_desc_AR.

¹²⁴ Ann M. Haralambie, 1 HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 4:15 (West 2011).

¹²⁵ *Id.*

¹²⁶ Troy Anderson, *Mom Termed 'Parental Alienator' Wins Rare Vindication in Courts*, L.A. DAILY NEWS, June 18, 2006, at N1.

IV. Domestic Violence Advocates Movements

A. Parental Alienation Syndrome

Not surprisingly, advocates against domestic violence have a much different interpretation of PAS's real-world implications. These advocates renounce this theory – referred to as “junk science”¹²⁷ – and as one that often “shifts attention away from the perhaps dangerous behavior of the parent seeking custody to that of the custodial parent.”¹²⁸ In short, the parent acting to protect the child is then blamed for unjustifiably destroying the child's relationship with the abusive parent.¹²⁹

Further fueling this fire is a study revealing that many custody evaluators weigh parental alienation as more significant than a history of domestic violence when making their custody recommendations.¹³⁰ One survey represented 201 psychologists in 39 states and indicated that not only was domestic violence not a major factor in making recommendations, but that nearly seventy percent of custody evaluators endorsed “denying sole or joint custody to a parent who ‘alienates the child from the other parent by negatively interpreting the other parent's behavior.’”¹³¹ Missing from Gardner's theory is that it often times vilifies the abused without first objectively investigating the abuse allegations—never exploring the possibility of truth rather than denigration.¹³² Ironically, even Gardner himself acknowledged that PAS should not be applied in situations involving domestic violence.¹³³

¹²⁷ *What Is Parental Alienation Syndrome (PAS)?*, THE LEADERSHIP COUNCIL ON CHILD ABUSE & INTERPERSONAL VIOLENCE, <http://www.leadershipcouncil.org/1/pas/faq.htm>.

¹²⁸ Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting It Wrong in Child Custody Cases*, 35 *FAM. L.Q.* 527, 532 (2001).

¹²⁹ *Id.*

¹³⁰ Stephanie Dallam, *Are “Good Enough” Parents Losing Custody to Abusive Ex-Partners?*, THE LEADERSHIP COUNCIL ON CHILD ABUSE & INTERPERSONAL VIOLENCE (updated 2008), <http://www.leadershipcouncil.org/1/pas/dv.html> (citing Marc J. Ackerman & Melissa C. Ackerman, *Child Custody Evaluation Practices: A 1996 Survey of Psychologists*, 30 *FAM. L.Q.* 565, 579-82 (1996)).

¹³¹ Dallam, *supra* note 130.

¹³² Meier, *supra* note 123.

¹³³ Gardner, *supra* note 119, at 613.

Even though no mental health or medical association has recognized PAS as a disorder, many times courts have considered Gardner's theory to justify awarding sole custody to the parent accused of physical and/or sexual abuse.¹³⁴ In response, California Senator Sheila Kuehl (D) has sponsored legislation designed to end the use of PAS as a legal tactic.¹³⁵

An argument for the elimination of PAS as a consideration inside the courtroom – aside from its lack of evidentiary support and professional acceptance¹³⁶ – is that it often allows abusive fathers to maintain their control over women.¹³⁷ Court proceedings, by requiring personal contact, present opportunities for the batterer to threaten, stalk, intimidate, or physically attack the victim.¹³⁸ Furthermore, many of these female victims suffer from post-traumatic stress disorder (“PTSD”) as a result of the abuse they have already suffered, causing a demeanor many courts have found to be unreliable.¹³⁹ Battered women have a higher tendency to appear distraught in the courtroom than their abusers.¹⁴⁰ That, coupled with signs of anger and distress, has led to many victims' testimony being discredited by jurors¹⁴¹ – making justice for battered women in the family court system an elusive, and often unattainable goal.¹⁴²

¹³⁴ *Expert Dr. Robert Geffner: Courts Under Thrall of Dangerous 'Parental Alienation Syndrome' Myth Award Custody to Violent, Abusive Parents*, U.S. STATE NEWS, June 20, 2006, available at 2006 WLNR 12270211. Dr. Robert Geffner, President of the Institute on Violence, Abuse and Trauma (IVAT) at Alliant International University is frequently called to consult and testify in cases where abuse is alleged. *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ See Mary Przekop, Note, *One More Battleground: Domestic Violence, Child Custody, and the Batterers' Relentless Pursuit of Their Victims Through the Courts*, 9 SEATTLE J. FOR SOC. JUST. 1053, 1071-72 (2011).

¹³⁸ *Id.*

¹³⁹ *Id.* at 1078.

¹⁴⁰ *Id.* at 1079.

¹⁴¹ *Id.*

¹⁴² Rita Smith & Pamela Coukos, *Fairness and Accuracy in Evaluations of Domestic Violence and Child Abuse in Custody Determinations*, 36 JUDGES' J. 38, 38 (Fall 1997).

B. *Rebuttable Presumption Statutes*

To improve battered women's chances for attaining justice, advocates have successfully lobbied for rebuttable presumption statutes in some states "that direct judges to deny sole or joint custody to abusive parents unless they present persuasive evidence establishing their suitability to obtain custody."¹⁴³ Other states have adopted factor tests allowing judges to consider domestic violence as a factor in custody determinations.¹⁴⁴ Both attempt to resolve the tension between the potential benefit of ongoing parent-child contact and the importance of keeping children from harmful situations.¹⁴⁵

1. *Rebuttable Presumption Approach*

During the 1990s when many states were beginning to recognize the detrimental effects of joint custody assumptions, Congress passed a resolution stating that evidence of physical abuse produces "a statutory presumption that it is detrimental to the child to be placed in the custody of the abusive spouse."¹⁴⁶ Several states agreed with this federal resolution, resulting in nearly half of all states applying a rebuttable presumption that granting custody to an abusive parent was not in the child's best interests.¹⁴⁷ Some of these states go a step further in labeling unsupervised visitation as inherently not in the child's best interests, and requiring protection for battered women and children when determining visitation arrangements.¹⁴⁸ Depending upon the state, either specific factors or a preponderance of the evidence can rebut this presumption.¹⁴⁹

¹⁴³ Amy Levin & Linda G. Mills, *Fighting for Child Custody When Domestic Violence Is at Issue: Survey of State Laws*, 48 SOC. WORK 463, 463 (Oct. 2003), <http://www.cpr-mn.org/Documents/Fighting%20for%20Child%20Custody.pdf>.

¹⁴⁴ *Id.* at 467.

¹⁴⁵ *Id.*

¹⁴⁶ Lisa Bolotin, Note, *When Parents Fight: Alaska's Presumption Against Awarding Custody to Perpetrators of Domestic Violence*, 25 ALASKA L. REV. 263, 273 (2008) (quoting H.R. Con. Res. 172, 101st Cong. § 1 (1990) (enacted)).

¹⁴⁷ Bolotin, *supra* note 146, at 275.

¹⁴⁸ Levin & Mills, *supra* note 143, at 467.

¹⁴⁹ Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective are They?*, 28 WM. MITCHELL L. REV. 601, 676 n.50 (2001).

However, there are mixed reviews whether rebuttable presumption statutes have been effective in achieving the legislators' goals of protecting abused women and children.¹⁵⁰ For example, judicial response has varied in Hawaii due to the large number of restraining orders that have been issued against abusive parents.¹⁵¹ This results in no finding of domestic violence if the abuser agrees to the order – much murkier waters for the abused to navigate when trying to prove the impact violence has had on the children involved.¹⁵²

In other states, the threshold is set much higher in terms of legislation designed to preserve this presumption against custody for batterers.¹⁵³ Minnesota introduced legislation at the turn of the millennium that would require the court to document how and why an award of custody to the abuser would protect the other parties' emotional and physical well-being.¹⁵⁴ Furthermore, Minnesota's standard of what constitutes domestic abuse is more stringent than the standard set forth in the Domestic Abuse Act. Conservatives inside the state senate have met this higher threshold with frequent opposition, forcing such legislation to be withdrawn.¹⁵⁵ Several judges have also opposed legislation requiring a detailed account of their reasoning regarding the weight of domestic violence in custody decisions, citing the amount of work this would add for them when writing their opinions.¹⁵⁶

Differences in the ways these statutes have been applied throughout the states depend upon the following: 1) how domestic violence is defined; 2) the severity and or frequency of the abuse necessary to trigger the presumption; 3) the evidentiary standard (either preponderance of or clear and convincing) required to trigger the presumption; and 4) the type of custody (sole or joint) to which the presumption applies.¹⁵⁷ Furthermore,

¹⁵⁰ See generally *id.* (comparing how states which have applied the presumption against sole or joint custody for abusive parents for longer rank with those states that have more recently adopted the presumption).

¹⁵¹ *Id.* at 636.

¹⁵² *Id.*

¹⁵³ *Id.* at 652-54.

¹⁵⁴ Lemon, *supra* note 149, at 652.

¹⁵⁵ *Id.* at 652-53.

¹⁵⁶ *Id.* at 637.

¹⁵⁷ Bolotin, *supra* note 146, at 263.

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states also differ in the consideration given to offenders who have either completed a domestic violence treatment program, or those who have not committed acts of violence within a certain number of years.¹⁵⁸ Therefore, although rebuttable presumption statutes are preferred by many advocates of domestic violence prevention,¹⁵⁹ a state's adoption of this legislation is no guarantee that a battered woman or child will be able to claim victory inside the courtroom.

2. *Factor Approach*

Less popular still with domestic violence prevention advocates is the factor test, which they argue gives judges too much discretion when weighing abuse in making custody determinations.¹⁶⁰ What may be more disconcerting to these advocates are the vague parameters defining what a factor even is.¹⁶¹ For example, this factor approach may refer to evidence of "spousal abuse," "domestic violence," or "family violence."¹⁶² No matter what the definition, domestic violence is likely just one of a number of considerations that a state has adopted as part of its best interest of the child standard.¹⁶³ Furthermore, these statutes give no guidelines as to how much weight the courts should allot to any particular factor – including that of domestic violence.¹⁶⁴

Many advocates do acknowledge that factor approach statutes are an improvement from the times when domestic violence was deemed completely irrelevant.¹⁶⁵ But, when coupled with how many judges making these decisions are uninformed about the effects abuse has on battered women and children,¹⁶⁶ advocates are left with little confidence of a favorable outcome.

¹⁵⁸ *Id.* at 285-86.

¹⁵⁹ Levin & Mills, *supra* note 143, at 467.

¹⁶⁰ *Id.*

¹⁶¹ Amy B. Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 *UCLA L. REV.* 813, 827-28 (2000).

¹⁶² *Id.* at 827.

¹⁶³ *Id.* at 827-28.

¹⁶⁴ *Id.* at 828.

¹⁶⁵ Przekop, *supra* note 137, at 1097 n.115.

¹⁶⁶ Levin, *supra* note 161, at 829.

C. The Effect of Abuse on Children

Over the years, different courts have had varied opinions as to what impact domestic violence has on children.¹⁶⁷ Courts often reject the notion that children who have only witnessed abuse are not in fact victims of that abuse themselves.¹⁶⁸ However, others adopt one of two rationales: first, that harm to the mother and harm to the child do not overlap; or second, that separation will end the pattern of domestic violence.¹⁶⁹

Domestic violence advocates emphasize though that children who suffer from this “nonphysical child abuse” experience many of the same emotional and psychological traumas as those children who are physically beaten.¹⁷⁰ Such emotional effects include feelings of isolation and helplessness, higher incidents of suicide, constant anxiety, self-blame and additional stress from notions of guilt.¹⁷¹ As a result of this guilt, child witnesses of abuse have also exhibited language and cognitive delays, headaches, ulcers, rashes, and problems with both hearing and speech.¹⁷² Physical symptoms displayed by children in abusive environments include, but are not limited to, “colds, sore throats, bedwetting, insomnia, and fitful sleep.”¹⁷³

To further connect the link between “nonphysical” and “physical” child abuse, researchers have found “that children who experience domestic violence are abused at a rate fifteen times higher than the national average.”¹⁷⁴ Furthermore, despite which category of abuse children fall into, batterers create a learned pattern of abusive behavior, “sometimes referred to as the ‘intergenerational cycle of violence.’”¹⁷⁵ Battered women fear this tendency to view abuse as an acceptable practice, an

¹⁶⁷ See Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL’Y & L. 657, 700-07 (2003).

¹⁶⁸ *Id.* at 703.

¹⁶⁹ *Id.* at 700.

¹⁷⁰ Marlene Rapkin, *The Impact of Domestic Violence on Child Custody Decisions*, 19 J. JUV. L. 404, 406 (1998).

¹⁷¹ *Id.* at 407.

¹⁷² *Id.*

¹⁷³ *Id.* at 408.

¹⁷⁴ Levin, *supra* note 161, at 835 (internal citation omitted).

¹⁷⁵ *Id.* at 835-36 (internal quotation omitted).

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acceptance that often leads to children abusing their own wives and children or accepting abuse from a partner in the future.¹⁷⁶

The research referenced above has focused upon children who have been both victims of physical abuse and/or witnesses to acts of violence. However, the most remote category concerning domestic violence – children who have not witnessed abuse but are exposed to mothers who have been battered – suffers as well.¹⁷⁷ Research indicates that the visible side effects of violence—bed-ridden or hospitalized mothers, and those mothers who suffer from severe emotional impairments – harm children in that these mothers are unable to care for their children properly.¹⁷⁸ This harm damages more than just the children. It also handicaps battered mothers, whom the courts then deem unfit while awarding custody to the batterer who initiated the cycle of violence.¹⁷⁹

D. Batterers Continuing Control Through the Courts

Battered women’s advocates have long pointed out the irony and inherent unfairness in this judicial tactic – the batterer being rewarded for his battering – as support for their promotion of rebuttable presumption legislation.¹⁸⁰ Such complaints have often fallen on deaf ears though as some judges have viewed battered women as untrustworthy,¹⁸¹ or as a group that exaggerates their claims in an effort to gain custody.¹⁸² Many courts also do not recognize a link between spousal violence and custody, viewing the former “as a function of problems in the relationship,

¹⁷⁶ *Id.* at 836.

¹⁷⁷ Rapkin, *supra* note 170, at 406.

¹⁷⁸ *Id.*

¹⁷⁹ See Prezkop, *supra* note 137, at 1078-79.

¹⁸⁰ See generally Smith & Coukos, *supra* note 142, at 40 (discussing the continued abuse that occurs during custody litigation and how this lengthens the abuse on victims).

¹⁸¹ Przekop, *supra* note 137, at 1068; see also Meier, *supra* note 167, at 672 (referencing study of the Wellesley Battered Mothers’ Testimony Project which found battered women’s concerns were ignored by Massachusetts courts because these victims were viewed as “hysterical and unreasonable[.]” thereby justifying a treatment of “scorn, condescension and disrespect”) (internal quotations omitted).

¹⁸² Przekop, *supra* note 137, at 1065.

rather than as the perpetrator's own dysfunction."¹⁸³ In short, judges have minimized allegations of domestic violence as "family squabbles," rather than investigating the practical effects of this behavior.¹⁸⁴

Battered women also push for statutes largely blocking batterers from sole or joint custody because of the way women can be victimized all over again inside the courtroom.¹⁸⁵ Abusers may employ tactics such as: 1) using visitation to gain access to the mother rather than for a genuine want to care for the children; 2) assuming a calmer demeanor when in the presence of court personnel so as to disprove allegations of aggression; 3) explaining the mother's allegations of abuse as retaliatory attacks for other marital fault such as an affair; 4) filing several complaints as a way to retaliate or intimidate; and 5) withholding financial support as a way to influence a forced compromise desired by the batterer.¹⁸⁶ The inclination to use such tactics is often "inconsistent with the qualities needed to make a good parent."¹⁸⁷ Parents compelled to "control and abuse their intimate partners are unlikely to be capable of the loving, nurturing and self-disciplined behavior that good parenting requires[.]" which inherently is not in the child's best interests.¹⁸⁸

E. A Balancing Act of Rights

While it is the group's most preferred legislative scheme, battered women's advocates acknowledge that rebuttable presumption statutes do not come without an element of risk.¹⁸⁹ Such a presumption could lead to false accusations with one parent vying for judicial leverage over the other.¹⁹⁰ However, opponents argue that this risk is minimized by "proper evidentiary standards requiring stringent proof."¹⁹¹ Therefore, the protec-

¹⁸³ Meier, *supra* note 167, at 702.

¹⁸⁴ *Id.*

¹⁸⁵ Przekop, *supra* note 137, at 1064.

¹⁸⁶ *Id.* at 1065-71.

¹⁸⁷ Meier, *supra* note 167, at 705.

¹⁸⁸ *Id.*

¹⁸⁹ Rapkin, *supra* note 170, at 418.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

tion this presumption affords children outweighs any detrimental effect on parents.¹⁹²

Fathers' rights groups have expressed concern that such a presumption violates their due process rights under the Fourteenth Amendment.¹⁹³ Battered women's advocates counter that argument by maintaining that "a rebuttable presumption against awarding a spousal abuser custody is rationally related to protecting the best interests of a child," and that the spousal abusers' opportunities to rebut the presumption affords them all the fairness they are entitled.¹⁹⁴

There is also an inherent liberty interest that must be addressed in regard to a parent's right to care for and have access to his or her child.¹⁹⁵ This, however, is not an absolute right for those who do not act in the child's best interests.¹⁹⁶ Many children do benefit from continuous meaningful contact with both parents,¹⁹⁷ but battered women's advocates argue that the courts still must weigh the benefit of paternal involvement against the detriment of harm to the child.¹⁹⁸ The reluctance to do so where domestic violence is an issue is often justified by the judicial emphasis placed upon procedural and substantive norms to balance parental equality and paternal involvement.¹⁹⁹

Where battered women's advocates and fathers' rights groups may be able to agree is that they both are interested in protecting and fulfilling the best interests of the children.²⁰⁰ However, both groups do so primarily by arguing from the perspective of the parents' rights rather than the child's.²⁰¹ Each may say that the child then becomes a secondary benefactor of the battles fought at the parental level.²⁰²

¹⁹² *Id.*

¹⁹³ *See id.*

¹⁹⁴ Rapkin, *supra* note 170, at 418 (internal quotation omitted).

¹⁹⁵ Cuadra, *supra* note 78, at 623.

¹⁹⁶ *Id.*

¹⁹⁷ Jan Jeske, *Custody Mediation Within the Context of Domestic Violence*, 31 *HAMLIN J. PUB. L. & POL'Y* 657, 675 (2010).

¹⁹⁸ *See* Levin & Mills, *supra* note 143, at 467.

¹⁹⁹ Meier, *supra* note 167, at 680.

²⁰⁰ *See* Levin & Mills, *supra* note 143, at 469.

²⁰¹ *Id.*

²⁰² *See id.*

V. The Role Empirical Research Has Played in Influencing Legislation

While it is true that adults have been responsible for writing the legislation pertaining to child custody over the last three decades, this change would not have come about if not for the research and attention paid to the children who have suffered during high-conflict divorces.²⁰³ These studies have produced some practical changes in the way parents, courts, and legislatures should regulate dissolution and custody processes.²⁰⁴

A. *The Effects of High-Conflict Divorce*

Perhaps it is best to begin by explaining what exactly a high-conflict couple might look like. One account defines this litigious group in the following way:

In a high conflict relationship, the partners assume polarized positions about nearly every issue. The result is “constant fighting” via “angry and righteous interchanges.” Any topic, no matter how insignificant, can trigger an argument. Interactions escalate quickly because “every disagreement is taken as a personal affront that requires defending or attacking.” These couples participate in “very little actual dialogue” when left to communicate on their own because they prefer to “talk in monologues with almost no indication of any doubt as to their view of the other.”²⁰⁵

Research now demonstrates that the effects of this behavior on children are devastating.²⁰⁶ Developmental retardation, high levels of anxiety, low self-esteem, behavioral and emotional problems, insecurity, and high levels of aggression have all been linked to children suffering inside a high-conflict divorce and custody situation.²⁰⁷

Of course, legislation cannot entirely mandate the separation of a family – as each case presents its own circumstances and challenges – but measures have been taken to at least limit litigation with the couples described above due to its adverse effects

²⁰³ See Sauer, *supra* note 57, at 507.

²⁰⁴ See *generally id.* (referencing specifically the increase in mediation to limit the devastating effects of custody disputes on children).

²⁰⁵ *Id.* at 504-05.

²⁰⁶ *Id.* at 507.

²⁰⁷ *Id.* at 510-11.

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on children.²⁰⁸ For example, multiple professional groups, such as members of the judiciary, family court system, and mental health professionals, have united to provide assistance to these families in order to encourage a less adversarial process.²⁰⁹ This interdisciplinary collaboration was evident at the Wingspread Conference in September of 2000.²¹⁰ The conference report detailed a “plan for each profession and suggestions for collaborative models of conflict-reducing dispute resolution that protect or restore healthy family interactions.”²¹¹ A study at about the same time by the Florida Bar Association identified expedited hearings, as well as more counseling for both parents and children as the best ways to improve the court process for children.²¹²

However, resolve does not come easily for high-conflict couples prone to litigation.²¹³ Therefore, mediators have developed techniques and specific strategies in mediation to lessen this strain in custody disputes.²¹⁴ For example, encouraging the involvement of a counselor or therapist from the beginning of the mediation process is recommended to those parties willing to do so.²¹⁵ This approach has also proven to be particularly effective in cases involving domestic violence and other types of abusive behavior.²¹⁶

B. *Mediation & ADR*

Mediation is not always optional since certain states have passed legislation mandating the practice, particularly in cases involving children.²¹⁷ California, for example, passed legislation requiring mediation before any other adversarial process is em-

²⁰⁸ Alicia M. Homrich et al., *The Court Care Center for Divorcing Families*, 42 FAM. CT. REV. 141, 143 (2004).

²⁰⁹ *Id.* at 143-44.

²¹⁰ *Id.* at 144.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Sauer, *supra* note 57, at 505.

²¹⁴ *Id.* at 522.

²¹⁵ *Id.*

²¹⁶ *Id.* at 524.

²¹⁷ Joan B. Kelly, *A Decade of Divorce Mediation Research: Some Questions and Answers*, 34 NO. 3 FAM. & CONCILIATION CTS. REV. 373, 375 (1996).

ployed.²¹⁸ One study assessing the result of such legislation found that parents who participated in mediation not only reached a resolution more quickly than parents who did not, but also that resolution came in half the time and cost.²¹⁹ It is hard to draw specific conclusions on the effects of mandatory mediation as a whole though, because many states supplement this requirement with local court rules, thereby varying the procedure.²²⁰

Opponents have met mediation with much resistance though, because mediators were presumed to prefer joint custody at all costs.²²¹ The rise in mediation coincided with the rise in legislative support for joint custody.²²² Opponents attributed this to references in mediator training manuals indicating that “‘joint physical custody’ was the code phrase for ‘best interests of the child.’”²²³

Cases involving domestic violence have led to fractured legislation in mandatory mediation states.²²⁴ Jurisdictional differences include “allow[ing] opt-out provisions for the victim, . . . ban[ning] custody mediation in cases involving domestic violence, and . . . permit[ting] judicial discretion on an individualized, case-by-case basis in ordering custody mediation.”²²⁵ Minnesota, for example, allows victims to opt-out despite its mandatory mediation statute in cases where there is probable cause that physical or sexual abuse has occurred between the parties.²²⁶

²¹⁸ *Id.*

²¹⁹ *Id.* at 376.

²²⁰ Suzanne Reynolds et al., *Back to the Future: An Empirical Study of Child Custody Outcomes*, 85 N.C. L. REV. 1629, 1642-45 (2007). For example, in North Carolina, the judicial districts vary by adhering to one of the following approaches: 1) a waiting period is triggered by filing a custody action, which then leads to a court-ordered orientation session and a private mediation session; or 2) an orientation session is referred as soon as the custody action is filed without any waiting period. *Id.* at 1643. This approach provides more control for the parties and their lawyers. *Id.*

²²¹ *Id.* at 1648.

²²² *Id.*

²²³ *Id.*

²²⁴ Jeske, *supra* note 197, at 673.

²²⁵ *Id.*

²²⁶ *Id.* at 675.

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The growing momentum for mediation has not yet made its way to every state's legislative floor and is treated differently in the states it has reached. For example, while New York endorses mandatory mediation, Virginia implements mandatory mediation only after the parties negotiate a parenting plan, and North Dakota decided not to enact any laws regarding mandatory mediation until further research has been performed on this issue.²²⁷ The differences among the bills in these three states alone represent "the burgeoning development of legislation related to the use of court-ordered mediation in child custody disputes."²²⁸

C. *ALI Principles*

Aside from experiments with mediation legislation, legal organizations have taken other steps to reduce the stress felt by children during custody disputes. The American Law Institute (ALI) recently consulted a group of lawyers as to what changes should be considered in the practice of family law.²²⁹ In doing so, the ALI placed an increased focus upon the need for more predictability in custody cases to reduce the amount of time and money spent on litigation. In addition, the ALI Principles regarding the Law of Family Dissolution have taken the stance that more respect for family autonomy is also of utmost importance,²³⁰ leaving aside the question of whether this really serves the best interest of the child.

It is hard to argue with the benefit of predictability outlined in the ALI Principles, especially when considering the damage extensive litigation does to a child caught in the custody crossfire. More determinate factors such as Elizabeth Scott's proposed "approximation standard" – determining custody and visitation based upon how much time each parent spent with the child before the divorce – still do little in the way of taking the child's

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Kathy T. Graham, *Child Custody in the New Millennium: The ALI's Proposed Model Contrasted with Oregon's Law*, 35 WILLAMETTE L. REV. 523, 523 (1999).

²³⁰ Christine M. Szaj, *The Fine Art of Listening: Children's Voices in Custody Proceedings*, 4 J.L. & FAM. STUD. 131, 131-32 (2002).

voice into account.²³¹ It is a virtually automatic custody division that could be applied without ever once hearing what the child has to say about his or her preferences for the future. However, for the benefits that accompany predictability, scholars have argued that the formulation and application of more concrete criteria could be used “not as the alternative to a child’s best interests, but as the best way to achieve those interests.”²³²

Those interests are once again doubted when family autonomy becomes the ALI’s primary focus. This occurs in principle through the ALI’s notion of allowing the parents most of the decision-making power in determining future custody arrangements rather than having such matters decided by the court.²³³ By doing so, the child is omitted as an important and interested party.²³⁴ This heightened emphasis on parental autonomy creates a “zone of privacy that insulates families from external oversight by the courts and diminishes the power of children to voice their concerns and preferences directly or through their legal representatives in important matters affecting them.”²³⁵ Still, the ALI contends that the children’s best interests are the paramount concern. Under these Principles though, it is far too easy for “children’s needs [to be] funneled through the filter of parental interpretations at a time of intense emotional and physical family disruption, casting considerable doubt on whether these interests will be accurately represented.”²³⁶

Perhaps the most controversial element of the ALI’s model for child custody reform is its treatment of mandatory mediation. The ALI model would not mandate mediation as part of the legal process because removing consent “creates too great an opportunity for the dominant parent to coerce the other into an agree-

²³¹ Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL’Y & L. 5, 16 (2002). The “approximation standard” also takes into account the importance of keeping siblings together, ensuring at least a minimal amount of time between the child and each parent, and being mindful of exceptions that should be enforced as a result of domestic abuse. *Id.* See also Szaj, *supra* note 230, at 137 (noting that children have very few opportunities to voice their interests).

²³² Bartlett, *supra* note 231, at 5.

²³³ Szaj, *supra* note 230, at 131.

²³⁴ *Id.*

²³⁵ *Id.* at 131-32.

²³⁶ *Id.* at 132.

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ment.’”²³⁷ The ALI drafters also point to quality of mediation to justify why the practice is not nationally applied.²³⁸ In addition, at this time guardians at litem are optional under the Principles because the ALI recognizes no proof that their disinterested views will necessarily result in the best outcomes for the children involved.²³⁹

As discussed earlier, states are free to impose their own laws making mediation mandatory. California was the first state to do so in 1980.²⁴⁰ The ALI discredits the benefits of such legislation, contending that mandatory mediation lacks the true essence of alternative dispute resolution because it is not voluntary.²⁴¹ If couples do not want to be thrust into an environment requiring face-to-face interaction, the ALI presumes that there is little benefit that could come from such a requirement.

In short, despite the ALI’s best intentions, the ALI Principles provide little opportunity for children to be heard in custody disputes and can also leave many of them without much or any support in the legal system.²⁴² The Principles fail to strike a balance between parental autonomy, the rights of the child to voice an opinion, and effective methods of alternative dispute resolution. While predictability has its benefits, the positives do not outweigh the negatives concerning the ALI Principles for determining the “best interests of the child.”

D. *Parent Education Programs*

Parent education programs, initially designed to turn the parents’ attention to their children at a time when they could very well be distracted by financial and emotional issues,²⁴³ now

²³⁷ John C. Sheldon, *Anticipating the American Law Institute’s Principles of the Law of Family Dissolution*, 14 ME. B.J. 18, 26 (1999) (internal quotation omitted).

²³⁸ Bartlett, *supra* note 231, at 15.

²³⁹ Sheldon, *supra* note 237, at 26 (internal citation omitted).

²⁴⁰ Kelly, *supra* note 217, at 375.

²⁴¹ Alexandria Zylstra, *The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled*, 17 J. AM. ACAD. MATRIM. LAW. 69, 76 (2001).

²⁴² Szaj, *supra* note 230, at 137.

²⁴³ Bartlett, *supra* note 231, at 9.

exist in every state.²⁴⁴ Many states have also made such programs mandatory due to the many benefits for families coping with dissolution.²⁴⁵ Studies of these programs so far indicate that parents who attend and participate “are better able to work through difficult child-related situations than parents who do not participate.”²⁴⁶

These programs are still relatively new considering the history of child custody in America, yet three generations of themes have already developed concerning their educational focus.²⁴⁷ The first centered on the parents’ understanding of the dynamics and process of divorce; the second involved coping mechanisms for high-conflict couples; and the most recent trend focuses on children’s feelings as they may feel caught in their parents’ battle.²⁴⁸ Some courts are also distributing pamphlets to parents who have filed for divorce.²⁴⁹ However, this general information is not considered law in those states.²⁵⁰

E. *The Case for Mandatory Judicial and Attorney Education Programs*

Finally, some state legislatures have passed laws mandating judicial training in the area of domestic violence,²⁵¹ but legislation calling for an increase in judicial education in all areas of family law may be much more beneficial. This is especially important because many judges have “report[ed] that family law is

²⁴⁴ Rebecca Hinton, *Giving Children a Right to Be Heard: Suggested Reforms to Provide Louisiana Children a Voice in Child Custody Disputes*, 65 LA. L. REV. 1539, 1567 (2005).

²⁴⁵ *Id.*

²⁴⁶ Bartlett, *supra* note 231, at 10.

²⁴⁷ LINDA ELROD, CHILD CUSTODY PRAC. & PROC. § 1:14 (West 2010).

²⁴⁸ *Id.*

²⁴⁹ *Id.* The Association of Family and Conciliation Courts (AFCC) and the American Academy of Matrimonial Lawyers (AAML) also provide information to educate divorcing parents. Publications, AFCC Pamphlets, ASSOCIATION OF FAMILY AND CONCILIATION COURTS, https://www2583.sslldomain.com/afccnet/shopping/afcc_pamphlets.asp (last visited Feb. 13, 2012); Joan B. Kelly & Mary Kay Kisthardt, *Helping Parents Tell Their Children About Separation and Divorce: Social Science Frameworks and the Lawyer’s Counseling Responsibility*, 22 J. AM. ACAD. MATRIM. LAW 315 (2009).

²⁵⁰ Elrod, *supra* note 247.

²⁵¹ Levin, *supra* note 161, at 848-49.

their least preferred judicial assignment[.]”²⁵² This distaste for the assignment easily leads to family law issues not being treated with the importance they deserve, thereby “plac[ing] impediments to the administration of justice.”²⁵³

To combat this, states such as Missouri should mandate judicial educational programs to increase sensitivity to topics concerned in family law.²⁵⁴ This would be helpful in weighing many of the “best interests” factors that may be foreign to judges coming from other areas of law. For example, education in the area of child development and “interview guidelines for eliciting the reasons behind the child’s expressed preference, would help to prevent decisions based on inaccurate interpretations of the child’s responses during the judicial interview.”²⁵⁵

The judicial education already mandated for domestic violence matters is a good legislative start, but it is not nearly enough. California, Texas, and New Jersey have all implemented mandatory programs for judges who may deal with domestic violence, ranging anywhere from eight to forty hours per year.²⁵⁶ As this pertains to child custody specifically, “judges are often uninformed about domestic violence and its effects on victims and children” which can lead to “decisions that potentially endanger battered women and children.”²⁵⁷ For instance, judges often treat spousal abuse as irrelevant when assessing parental fitness.²⁵⁸ A common belief is that “a spousal abuser can be violent toward his wife yet[,] still gentle and loving toward his children” - in effect focusing more on parental behavior than the best interests of the child.²⁵⁹

And finally, how can judges be expected to give the “best interests” factor concerning mental illness its proper weight if they are provided with little to no guidance as to how it should

²⁵² *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 577 (1993) [hereinafter *Missouri Task Force*].

²⁵³ *Id.* at 577-78.

²⁵⁴ *Id.* at 578.

²⁵⁵ Barbara L. House, *Considering the Child’s Preference in Determining Custody: Is It Really in the Child’s Best Interest?*, 19 J. JUV. L. 179, 195 (1998).

²⁵⁶ Lynn Hecht Schafran, *There’s No Accounting for Judges*, 58 ALB. L. REV. 1063, 1075-76 (1995).

²⁵⁷ Levin, *supra* note 161, at 829.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 830.

and should not be applied in a child's best interests determination? Although judges are able to rely upon and "must ultimately defer to available expert evidence, requiring judicial education on mental illness can assist trial court judges in weighing expert testimony's credibility and ultimately guide the court to a situation that is truly in the best interest of the child."²⁶⁰

The National Judicial College (NJC) offers one way for judges to gain this necessary education in an effective manner. The NJC operates at both the state and federal levels, and provides a forum through which judges from various jurisdictions can communicate with one another regarding challenging topics.²⁶¹ A Superior Court judge in Washington described the courses held by the NJC as very helpful, and valued the opportunity to discuss legal matters with judges from all over the world.²⁶² This college provides a workable solution that judges may value due to the many viewpoints to which they would be exposed.

However, attorneys practicing in family law should also be held to the same educational standard because their roles working with these families demand a higher level of sensitivity and caution. For example, ongoing training has been proposed for all Missouri court systems "for the people making the decisions in family law theory, co-dependency theory, child development theory, family dysfunction theory, family violence and its effect on children, child sexual abuse, and substance abuse."²⁶³ By being better equipped in these areas, attorneys will be more effective working collaboratively with other professionals who are relied upon for their more specific expertise in the areas of child-parent relationships and child development.²⁶⁴ Such awareness will also place attorneys in a better position to more effectively draw judges' attention to relevant factors to more fairly apply the "best interests" analysis.

²⁶⁰ Gwillim, *supra* note 66, at 363-64.

²⁶¹ Sandra Leigh King, *Abandonment: How the Texas Legislature and Family Court System Fail to Meet the Needs of Texas Children*, 51 S. TEX. L. REV. 75, 92-93 (2009).

²⁶² *Id.* at 93.

²⁶³ *Missouri Task Force*, *supra* note 252, at 579.

²⁶⁴ John C. Lenderman, *Florida Dissolution of Marriage*, 1 ETHICAL CONSIDERATIONS IN FAMILY LAW § 7.2 (2011).

VI. Jurisdictional Differences in the Legal Application of the “Best Interests of the Child” Standard

As is readily apparent by now, there really is no uniformity in the “best interests” standard nationwide as forty-five states have adopted various versions of what factors should be considered in custody cases (including seven states which have no factors specifically listed at all).²⁶⁵ This grab-bag of factors likely exists because there is no compelling legislative model behind which to rally. However, more positive examples of the “best interests” standard do exist. Perhaps the United States will one day follow suit by implementing either one or a blend of the following – thereby creating a more workable template.

A. *Australia*

Many countries recognize Australia as the most complete and child-focused model of the “best interests standard.”²⁶⁶ If anything, criticisms of Australia are that its legal system is too concerned with the child, almost to the point of being unethically against the weight of the parents’ rights.²⁶⁷ It is the only nation that seems to give more rights to children, one of the most overlooked groups in global society, than to the adults who wield most of the legal power.

This is accomplished through a legislative concept known as the “paramouncy provision,” which was introduced in 2006.²⁶⁸ It simply states that, “in deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.”²⁶⁹ This sounds a lot like the United States’ intentions (or what any

²⁶⁵ Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 376 n.5 (2008).

²⁶⁶ *Best Interests of the Child: Meaning and Application in Canada*, 30, 34 (2009) [hereinafter *Canada*], <http://rightsofchildren.ca/wp-content/uploads/bic-report-eng-web.pdf> (last visited Nov. 11, 2011).

²⁶⁷ Jonathan Crowe & Lisa Toohey, *From Good Intentions to Ethical Outcomes: The Paramouncy of Children’s Interests in the Family Law Act*, 33 MELB. U. L. REV. 391, 392 (2009).

²⁶⁸ *Id.* at 391.

²⁶⁹ *Id.*

nation's intentions most likely should be in principle), but in Australia this value has been embedded in family law for the past thirty-five years.²⁷⁰ In practice, it aims to reduce the amount of conflict between parents, which alleviates the amount of harm suffered by the children as a byproduct of divorce.²⁷¹ This is accomplished by placing the best interests of the child absolutely above the interests of all other parties involved, even if the scales are tipped unfairly against the parents.²⁷²

One of the most striking differences between the United States and Australia is Australia's handling of divorce and custody cases in its federal system.²⁷³ Mandatory mediation in a relatively low-pressure environment - meaning away from the courtroom - has significantly reduced the stress on both children and parents even if the benefits are often not fully realized until after the process is over.²⁷⁴ In fact courtrooms, which inherently evoke adversarial emotions, are not entered until mediation has been completed and agreements are in place. Overall, parents have commented one year after mediation participation that especially in a child-inclusive method of mediation (a method incorporating separate consultation by a specialist with the children in each family), the process was a positive one and the system helped keep their children as the central focus:

- "They went into so much detail about the boys and their relationship with their Dad. My husband really heard what they said, which surprised me because he's a stubborn man. He could see from all their visual images how it really was for them[.]" (CI Mother).
- "I heard their opinions, which were an eye opener. It gave insight into what they were going through. I do stuff differently now. Getting past the hurt and seeing them more clearly is what happened[.]" (CI Father).

²⁷⁰ *Id.* at 392.

²⁷¹ *Id.*

²⁷² Crowe & Toohey, *supra* note 267, at 392.

²⁷³ See Margaret Harrison, *To Have But Not to Hold: A History of Attitudes to Marriage and Divorce in Australia 1858-1975* by Henry Finlay, 30 MELB. U. L. REV. 594, 600 (2006).

²⁷⁴ Jennifer E. McIntosh et al., *Child-Focused and Child-Inclusive Divorce Mediation: Comparative Outcomes from a Prospective Study of Postseparation Adjustment*, 46 FAM. CT. REV. 105, 110-11 (2008).

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- “It was not something I enjoyed going through, but look what it achieved: my former partner now listens to the children’s needs and is a better father[.]” (CI Mother).
- “I was pretty comfortable. [It’s] important they speak to someone with the knowledge. It’s a good opportunity if some underlying issue is not apparent to us, which is what happened in my case. The kids made it clear[.]” (CI Father).²⁷⁵

Australia endorses the view that as a nation “we pay now or we pay later.”²⁷⁶ As evidenced by the statements from parents above, experience since the implementation of this non-adversarial “approach indicates that children who are involved in child inclusive mediation have better relationships with both parents” post-divorce than those who are not.²⁷⁷ Perhaps those benefiting almost as much as the children are fathers who would often be left out of the processes in place in other countries.²⁷⁸

As should be the goal in all jurisdictions, Australia also boasts a collaborative effort among those who work with children and their families to serve the child’s best interests. Research conducted among practitioners working in a Queensland child service center identified three ways in which workers interpreted the child-centered “best interests” standard: 1) engaging all participants who help serve each child; 2) providing opportunities for positive parent-child interaction; and 3) encouraging children to participate in decisions about their future.²⁷⁹ In fact, the system is so child-friendly that workers have often reported dilemmas concerning how to keep the child’s needs paramount without undermining the role of the parents.²⁸⁰

This tension is not limited to child service centers, but scholars have argued that perhaps the Australian system is too heavily biased toward the interests of children.²⁸¹ The paramouncy principle has been criticized as “[going] further than is ethically

²⁷⁵ *Id.* at 117-18.

²⁷⁶ *Canada, supra* note 266, at 27.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ Judith Burton, *In the Child’s Best Interests: Strategies Workers Use to Make Supervised Contact with Non-Residential Parents a Positive Experience for Children*, CENTRE FOR SOCIAL CHANGE RESEARCH QUEENSLAND UNIVERSITY OF TECHNOLOGY 6 (Nov. 21, 2003), <http://eprints.qut.edu.au/116/1/Burtonjudith.pdf>.

²⁸⁰ *See id.*

²⁸¹ Crowe & Toohey, *supra* note 267, at 393.

warranted” despite its good intentions due to its unequal consideration.²⁸² Critics call for extensive justification in any case where consideration is automatically skewed, no matter what legislative intent may be for this uneven playing field.²⁸³

To summarize, Australia is arguably the world leader in its application of the “best interests of the child” standard, even if it still leaves some calling for reform. If it errs at all, it is on the side of caution and on the side of power for one of the least powerful groups in the world. It provides a degree of control for parties who could otherwise be caught in the crossfire of a war they likely did nothing to instigate.

B. Europe

Europe, on the other hand, takes a much more parent-friendly approach to its “best interests of the child” application. Rather than focusing on the child’s interests, only the parents’ interests are given due consideration in European courts. This seems contradictory to Europe’s adoption of the Convention on the Rights of the Child (hereinafter “CRC”), a comprehensive statement outlining children’s rights with Article 3 providing the following focus: “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.”²⁸⁴

Notwithstanding the CRC, in several European countries, children’s accounts are only taken into consideration *after* a decision has been made if their opinion is asked for at all.²⁸⁵ An English study reported that nearly three-quarters of the English judges polled said they didn’t believe children’s wishes should be ascertained during the legal process and if they were, the judges still were reluctant to take them into account.²⁸⁶

This cautious approach is even more prevalent in Germany where as many as eighty-eight percent of family court judges

²⁸² *Id.* at 392.

²⁸³ *Id.* at 393.

²⁸⁴ Halloran McLaughlin, *supra* note 1, at 144.

²⁸⁵ Branka Resetar & Robert E. Emery, *Children’s Rights in European Legal Proceedings: Why Are Family Practices So Different From Legal Theories?*, 46 *FAM. CT. REV.* 65, 69-71 (2008) (emphasis added).

²⁸⁶ *Id.* at 69-70.

polled said they did not provide children the opportunity to be heard in custody cases in which joint parental responsibility was decided.²⁸⁷ Only seventy percent of cases ending in sole parental responsibility involved the children's opinion.²⁸⁸ This minority of child participation exists despite a clear declaration in German law that children should have the opportunity to be heard.²⁸⁹ However, in all cases deemed to be "complicated," "children were summoned regardless of age."²⁹⁰

Italy, on the other hand, does not afford children the right to speak up during contentious battles for custody.²⁹¹ The child's wishes are followed in fewer than a tenth of the cases with the judges' reasoning for doing so including 1) "the necessity of maintaining the parent-child relationship," 2) "concern about the child's healthy development," 3) "the child's best interests," 4) the young age of the child, and 5) the desire not to separate children from members of the same family.²⁹²

Sweden's limitation of child participation is determined more by the fourth factor mentioned above – age – than any other single factor.²⁹³ Also hindering children in this system is that they have no formally appointed representative when parents are disputing custody.²⁹⁴ Therefore, no neutral adult is there specifically to help kids express their views, which may lead to many of their voices being muted even if they are given the opportunity to offer their opinions.²⁹⁵

While the European countries do have slightly varying applications, it is much more streamlined than the U.S. in terms of children's procedural rights.²⁹⁶ Additionally, the differences that still exist are being addressed by the European Family Commission through the unification of European family law, which should help harmonize the standard, making it more predictable

²⁸⁷ *Id.* at 70.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ Resetar & Emery, *supra* note 285, at 70.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 71.

²⁹⁴ *Id.*

²⁹⁵ Resetar & Emery, *supra* note 285, at 71.

²⁹⁶ *Id.* at 67.

in practice.²⁹⁷ However, much work remains for the Commission if children are truly be the focus because even this more balanced and cohesive approach is still not as child-friendly as Australia's trend-setting standard.

In conclusion, what the United States should take from Europe is the movement toward a uniform approach to the "best interests of the child" standard to promote predictability and to eliminate jurisdiction shopping efforts to find the most favorable judge. Beyond that, the United States should work to make implementation of the standard actually uniform in practice as well. Giving children the legal right to express their views in court means nothing if these rights are not exercised. Such is the dichotomy in each of the European legal systems reviewed above.

C. Canada

Canada is another country that tips its figurative cap to Australia's working of the "best interests" standard to the child's advantage.²⁹⁸ Although Canada has not yet risen to the Australian level, this country has come far enough to acknowledge that the issue is no longer about whether children should participate, but rather how participation should occur in custody disputes.²⁹⁹

At a Canadian conference held in 2009 to commemorate the twentieth anniversary of the CRC, members of the Canadian Bar Association examined methods instituted around the world and called for reform of its own system in three ways. First, Canada aims to increase the use of a unified family court system to streamline disputes and reduce the need for costly litigation.³⁰⁰ This system in which one judge decides all disputes arising from children and their families is perhaps the most effective and efficient way for families to resolve their differences. By reducing the length of litigation and making the process more cohesive, all parties benefit not only financially, but also in that they can begin the mending process faster than if their disputes were heard individually.

Second, Canada plans to stress early intervention for support services regardless of the family's income level to prevent an

²⁹⁷ *Id.*

²⁹⁸ *Canada, supra* note 266, at 26-30.

²⁹⁹ *Id.* at 25.

³⁰⁰ *Id.* at 30.

adversarial mindset from forming.³⁰¹ This again lends itself to the reduction of conflict – beneficial for all involved – and a quicker way to resolve the issues at hand. By encouraging early intervention, courts can actually help families make good decisions for their families at a time when they are the most stressed. Therefore, relationships existing on the backside of separation are likely to be healthier by avoiding the post-split battleground mentality.

And finally, the Canadian goal is to make court as a last resort,³⁰² because a courtroom is the most adversarial way to resolve any type of dispute – custody or otherwise. This approach closely mimics many states’ public policy encouraging cooperation during the dispute and co-parenting after separation. In essence, the Canadian model resembles the non-adversarial bar American public policy sets, but often fails to reach in practice.

Although the Canadian system as it stands now is in a state of flux, the United States should carefully consider Canada’s exploration and study of other jurisdictions when crafting a model for its own reform. Perhaps recognizing that the United States’ “best interests” system is not really “best” would be the all-important first step to finding a standard that is.

VII. Conclusion

Though custody standards have leaped from one end of the presumptive spectrum to the other and then landed somewhere in between over the past three hundred years, the United States will likely continue to see legislation further shape this model in the centuries to come. Currently, the division is clear – fathers want more access to children who were denied to them in decades past and battered women are desperate for cycles of violence to come to an end. However, the tension will likely continue forever as not all fathers who want equal access to their children are batterers, just as not all women who want to cut off this access are victims of abuse. What hopefully will not be lost in this murky mess is that it is the children whose rights and interests should be considered first and foremost. It is their futures that should be considered as all of this legislation hits the State

³⁰¹ *Id.*

³⁰² *Id.*

House and Senate floors. It is their physical and emotional development that should be on the forefront of every parent's mind no matter the amount of conflict involved in a particular dissolution. This vision is not clouded in some other parts of the world, and hopefully the United States will not stop until its legislative sight is near perfect as well.

