# EQUAL ISN'T ALWAYS EQUITABLE: REFORMING THE USE OF JOINT CUSTODY PRESUMPTIONS IN JUDICIAL CHILD CUSTODY DETERMINATIONS

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## I. INTRODUCTION

2017 was plagued with rhetoric regarding the rights of men and women in this country. Following the inauguration of Donald J. Trump, thousands of women took part in the "Women's March" all over the country to protest President Trump, both because of their disapproval of his past comments about women and their uncertainty of his agenda as president.[1] Claims made at these marches include claims that women in the United States are systematically oppressed and have fewer rights than a gun,[2] that the government makes women pay for and unfairly taxes hygiene products while providing men with free razors,[3] and that women are paid less than men for equal work.[4] These claims have spurred widespread debate and controversy across social media about gender inequities in the United States today.[5] Critics of these claims note that we live an egalitarian society: both

[1] *See* Steve Moore, *What I Learned at the Women's March*, FOX NEWS (Jan. 23, 2017), http://www.foxnews.com/opinion/2017/01/23/steve-moore-what-learned-at-womens-march.html. Men, as well as women, attended these marches.

[2] *See* Matthew Travis, *The Top 10 Women's March Signs . . . This Should Be Fun*, THE KING'S RIGHTS (Jan. 28, 2017), http://thekingsrights.com/the-top-10-womens-march-signs/. Thisarticle shows the picture of one protester holding a sign that says, "I dream women will one day have the same rights as guns."

[3] *See* Lachlan Markay (@lachlan), TWITTER (Jan. 21, 2017, 3:57 PM), https://twitter.com/lachlan/status/822910976622264320. Markay's tweet shows a photo of one protester iholding a sign that says, "Make them pay for razors if we pay for tampons."

[4] Common talking points among modern day feminists include the so-called "wage gap" and the push for "equal pay for equal work." As Victor Fuchs has noted, rather than a "wage gap," inequities among men and women in the workforce are as a result of *motherhood* rather than *gender*. *See* VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY, 3 J. OF ECON. PERSP. 1, 33-35 (1989).

[5] *Compare* Dina Leygerman, *You're Not Equal. I'm Sorry.*, MEDIUM (Jan. 22, 2017),

men and women pay for hygiene products and both are taxed equally, sex-based wage discrimination has been illegal for decades, and women and men are both legally guaranteed all of the same rights in this country.[6] While reasonable minds may differ as to whether we truly live in an egalitarian society, in the world of judicial child custody determinations, one thing is clear: mothers and fathers are not—and have not—been treated equally.[7]

Consider the story of Jesse West.[8] Jesse is a hardworking father.[9] He is fit, proper, and loved by his son.[10] Some of Jesse's fondest memories include the times he spent camping, fishing, and exploring the outdoors with his son.[11] Much to Jesse's dismay, he is only able to see his son a few days each month.[12] Jesse has even spent over $45,000 in the past few years desperately trying to change this.[13] How can all of this be possible? Because Jesse is going through a divorce.[14]

Jesse's story is not unique.[15] Fathers across the country are fighting back against what they perceive to be gender-bias[16] in the family court system to

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https://medium.com/bigger-picture/about-your-poem-1f26a7585a6f#.q3eu8zrem, *with* Elise Y, *Yes, I Am Equal. I'm Sorry You're Offended by Us Women Who Lack a Victim Mindset*, FUTURE FEMALE LEADER, http://futurefemaleleader.com/yes-equal-im-sorry-youre-offended-us-women-lack-victim-mindset/.

[6] Elise Y, *supra* note 5.

[7] *See infra* Part II.

[8] *See* David Blanchette, *Groups Push Legislation for Fathers' Equality in Court*, STATE JOURNAL-REGISTER (Jan. 29, 2017, 9:57 PM), http://www.sj-r.com/news/20170129/groups-push-legislation-for-fathers-equality-in-court.

[9] *Id.*

[10] As explained by Jesse, the court handling his custody dispute noted that he was a fit and proper parent. *Id.*

[11] *Id.*

[12] Jesse is only able to see his son on Thursday of each week and every other weekend. *Id.*

[13] *Id.*

[14] *Id.*

[15] *See id.*

[16] *See id.* As noted by Jesse West, "[Fathers] are not looked upon as caregivers, and that's one of the problems you have in society, when the judges generally still rule in favor of the mothers. Gender shouldn't even be an issue. This doesn't have to be dads versus moms. Justice should be blind in these cases. Everything should be split down the line." *Id. See also* Sharon Jayson, *More Dads Demand Equal Custody Rights*, USA TODAY (June 14, 2014, 9:03 AM), http://www.usatoday.com/story/news/nation/2014/06/14/fathers-day-divorce-custody-partner-husbands-wives/10225085/ ("Guys are living in a world where there are equal rights in the workplace. They live in families where their wives' pay is as much as theirs. Now, they're becoming insistent that their role be respected in family court and that the traditional stereotypes have to go."); Dugan Arnett, *In Mass. And Elsewhere, a Push for Custody Reform*, BOS. GLOBE (Aug. 1, 2015),

"level the playing field" for fathers in family court matters.[17] Jesse even founded the *Dads Can Too* organization in 2016 to support single fathers who seek to be more involved in the lives of their children and to lobby for change in the way fathers are treated in custody determinations.[18] Jesse wants courts to adopt a presumption that a joint custody arrangement is the preferred type of arrangement between two fit parents, and if a parent opposes a joint custody arrangement, they should have the burden to prove otherwise.[19] While a presumption of joint custody is strikingly at odds with the status quo in judicial custody determinations, it is a trend courts are suddenly seeing.[20]

For decades, judges have settled child custody disputes among divorcing parents by focusing on the best interest of the child.[21] The push for fathers' rights in the family court system, criticism of the discretionary best interest of the child standard, and the widespread acceptance of shared parenting[22] have prompted many courts to rethink the way custody disputes are settled.[23] Now, instead of judges analyzing and *determining* whether a joint custody arrangement will serve the child's best interests, judges are doing what Jesse wants—*presuming* that joint custody is in the best interest of the child.[24]

Historical custody models have sent messages to children indicating that

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https://www.bostonglobe.com/metro/2015/07/31/massachusetts-and-elsewhere-push-for-child-custody-reform/Xh4NOwx2qWyZ12VmuYpf9j/story.html.

[17] *See* Jayson, *supra* note 16. ("[E]vidence is growing that when marital bonds sever or cohabiting couples with children split, more men are unwilling to accept the visitation and child-support arrangements of yesterday and are doing what they can to remain relevant in their kids' lives.").

[18] Blanchette, *supra* note 8.

[19] See id.

[20] *See infra* Part I (discussing the standard custody models used by courts today).

[21] For a detailed discussion of the best interest of the child standard, see *infra* Subsection II.A.

[22] "Shared parenting" is often used interchangeably with "joint custody." *Ohio Parental Rights and Shared Parenting FAQs*, DIVORCE NET, http://www.divorcenet.com/states/ohio/ohfaq06 (last visited May 7, 2017). Under a shared parenting arrangement, "the court may allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order requiring the parents to share all or some of the aspects of the physical and legal care of the children. It does not necessarily mean an equal, 50/50 division of time with the children, child support, or any other issues." *Id.*

[23] *See* Linda Nielsen, *Shared Physical Custody: Does It Benefit Most Children?*, 28 J. AM. ACAD. MATRIMONIAL L. 79, 83 (2015) ("The present legal debates focus primarily on whether custody laws should be revised so that shared parenting with a minimum of 35% shared time becomes the 'rebuttable presumption'").

[24] *See* Blanchette, *supra* note 8; *see also infra* Subsection II.B (discussing joint custody presumptions).

they are either property to be awarded or prizes to be won.[25] The law has since rejected these messages and recognized that when settling custody disputes, children's interests are paramount.[26] Unfortunately, the use of joint custody presumptions in custody determinations sends a troubling new message to children: it is far more important for mom and dad to be treated fairly than for your interests to be protected. The law should not tolerate this.

Part I of this Article discusses the evolving history of child custody law, from the view of children as paternal property to the widespread acceptance of shared parenting arrangements.[27] Part II discusses, analyzes, and critiques current attempts to reform traditional best-interest decision making, which includes a proposal by the American Law Institute (ALI) and the movement of states toward using joint custody presumptions in custody determinations.[28] Finally, Part III acknowledges the troubles of joint custody presumptions and argues that the interests of children necessitate reforming the way courts employ joint custody presumptions.[29] This Paper argues that joint custody presumptions should not automatically arise in custody determinations and argues that reform is needed to ensure that joint custody presumptions only arise after triggering facts are established by a parent seeking a joint custody presumption.[30] This Article proposes a detailed reform to the presumption of joint custody and submits that when a parent is seeking a presumption that joint legal custody is in the best interest of the child, the parent should be required to prove that he or she is able to communicate and cooperate with the other parent.[31] Additionally, when a parent is seeking a presumption that joint physical custody is in the best interest of the child, the parent should be required to not only prove that he or she is able to communicate and cooperate with the other parent, but also that he or she has a close relationship with the child, has adequate resources to support the child, lives in close proximity with the other parent, and is a fit parent.[32] This Article concludes that this proposed reform model strikes the needed balance between the current and historical practices of courts and leads to the best outcomes for families in child custody cases.

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[25] *See infra* Section I.A (describing the historical view of children as paternal property and the evolution to the view of children as prizes in best-interest decision-making).

[26] *See infra* Section I.A (discussing the best-interest of the child standard).

[27] *See infra* Part I.

[28] *See infra* Part II.

[29] *See infra* Part III.

[30] *See infra* Part III.

[31] *See infra* Section III.A.

[32] *See infra* Section III.B.

## II. THE HISTORY AND EVOLUTION OF CHILD CUSTODY LAW

For many married couples, the unexpected inevitably occurs—divorce.[33] Just as a couple's life becomes more complex upon the birth of a child, a couple's divorce becomes more complex once a child is involved, particularly when determining with whom the child should reside and which parent should continue to make decisions on her behalf.[34] The history and evolution of child custody laws have seen remarkable shifts, evolving from models based on winning to models based on sharing.[35] Notably, child custody laws have shifted from the tenet that fathers have property rights in their children, to legislation mandating that children's interests must be placed before the father's property rights, to the widespread acceptance of the concept of shared parenting.[36] The acceptance of shared parenting agreements has revolutionized the way custody decisions are made today and has provided momentum for custody reform.[37]

### A. *Winning Custody of the Child: Traditional Approaches to Custody Determinations*

Child custody law has developed remarkably over time. What once was a regime focused on paternal patriarchy eventually developed into a regime focused on the welfare of children.[38] Although child-focused decision

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[33] Empirical studies have shown that although marrying couples are aware of the statistics regarding divorce, they do not consider divorce statistics to be personally relevant, thus believing that their own marriages are significantly more likely to succeed than the average couple. *See* Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439, 440 (1993); Heather Mahar, *Why Are There So Few Prenuptial Agreements?* (Harvard Law School John M. Olin Centerfor Law, Economics and BusinessDiscussion Paper Series, Paper 436, 2003), http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf.

[34] *See* Richard S. Victor, *Is the Presumption of Joint and Equal Custody/Parenting Time Best for Children?*, 93 MICH. BAR J. 26, 27 (2014) ("[F]amily law and the cases dealing with custody and parenting time disputes have as many emotional and behavioral science ramifications to their makeup as the legal statutes themselves.").

[35] *See infra* Sections I.A-B (discussing the changes of custody law over time).

[36] *See infra* Sections I.A-B (discussing specific rules that used to dominate custody decision-making).

[37] *See infra* Part II (discussing custody reform attempts by the American Law Institute and various state legislatures).

[38] *See* Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 220 (2012) ("American law was not long for English notions of *paternal* patriarchy, and courts in this country soon began to focus on the well-being of children rather than the property rights of their parents.").

making is conceptually easy to understand—i.e., that the child's well-being is paramount—custody decision making proved to be difficult in practice.[39] Judges often relied on numerous heuristics to help guide their decision making, somehow managing to choose a superior parent—the winning parent—to receive custody of the child.[40] Whether courts used rules, heuristics, or presumptions, the law had one conviction: children should only be raised by one parent.[41]

1. From Property to Prizes

The history of child custody law begins with the English common law concept of absolute paternal property—that children are the property of their father.[42] During the eighteenth and early nineteenth centuries, in a child custody dispute between the mother and father of a minor child, the father's right to custody was virtually absolute, regardless of the well-being of the child.[43] As it was the duty of the father to provide for and protect his child, the right to custody was solely his.[44] Only in an instance of "*moral contamination* to the child"[45] or the father's inability to care for his child would the father not prevail.[46]

In the late nineteenth and early twentieth centuries, the view of children

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[39] *See id.* at 221.

[40] *See* Cynthia Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews After Troxel*, 2003 WIS. L. REV. 115, 120 (2003).

[41] *See infra* note 119 and accompanying text.

[42] *See* JAY FOLBERG, JOINT CUSTODY AND SHARED PARENTING 4 (1991); DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERIN J. ROSS & DAVID D. MEYER, CONTEMPORARY FAMILY LAW 673 (2012) ("During the colonial period and the early republic, American jurisdictions followed English common law, which gave fathers absolute control of their children according to the doctrine of *pater familias*, a concept rooted in Roman law, which made the father "master" of the family, with authority over its members.").

[43] ABRAMS ET. AL., *supra* note 42.; Kathy T. Graham, *How the ALI Child Custody Principles Help Eliminate Gender and Sexual Orientation Bias from Child Custody Determinations*, 8 DUKE J. GENDER L. & POL'Y 323, 324 (2001).

[44] *See* Carter v. Carter, 156 Md. 500, 505 (Md. 1929) ("[A]s between the mother and father, the primary right to the custody of the children is in the father, since it is his duty to provide for his children's protection, maintenance, and education.").

[45] *Ex parte* Hewitt, 45 S.C.L. 326, 327 (S.C. Ct. App.1858). *See also* Norman v. Norman, 107 S.E. 407, 408 (W. Va. 1982) ("The general rule that the father is the natural custodian of his minor children will not be enforced to its full extent in a case where, because of his cruel treatment of his wife, she is compelled to abandon their home for her safety.").

[46] *See* Clark v. Bayer, 32 Ohio St. 299 (Ohio 1877) ("As a general rule the parents are entitled to the custody of their minor children. When they are living apart, the father is, *prima facie*, entitled to that custody, and, when he is a suitable person, able and willing to support and care for them, his right is paramount to that of all other persons.").

as paternal property began to fade,[47] partly due to dramatic economic and social changes shaping the dynamics of the family unit.[48] During this time, trial courts began settling custody disputes by focusing on the welfare of children rather than on the property rights of their fathers.[49] As explained by one court, "[t]he cardinal principle in [custody] matters is to regard the benefit of the infant paramount to the claims of either parent . . . the primary object of all courts, at least in America, is to secure the welfare of the child, and not the special claims of one or the other parent."[50] As such, a new custody model was born: the best interest of the child standard.[51] Under this standard, courts are afforded broad discretion to "act[] as *parens patriae* and do what is best for the child."[52] This model presupposes that among feuding parents, the trial judge— not the child's parents—is in the best position to make a custody determination after weighing the facts of each case.[53]

Traditional best-interest decision making takes an all-or-nothing approach to custody determinations, ultimately viewing children as prizes.[54]

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[47] *See* FOLBERG, *supra* note 42.

[48] *See* Graham, *supra* note 43; FOLBERG, *supra* note 42. As explained by Jay Folberg, "[D]ramatic social and economic upheavals of the nineteenth century" such as industrialization, "the transition to wage labor," "the separation of the home and workplace which placed fathers in factories and shops" and mothers in the home, all contributed to "reshap[ing] the dynamics of the family." *Id.*

[49] *See* McAndrew v. McAndrew, 382 A.2d 1081, 1083-84 (Md.1978) ("Maryland has long since abandoned the concept of the child as parental property, and the equity courts of this state have exercised their jurisdiction 'with the paramount purpose in view of securing the welfare and promoting the best interests of the children.'") (quoting Ross v. Hoffman, 372 A.2d 582, 585 (1977)); Elizabeth Gresk, *Opposing Viewpoints: Best Interests of the Child vs. The Fathers' Rights Movement*, 33 CHILD. LEGAL RTS. J. 390, 390 (2013); Starnes, *supra* note 38, at 220.

[50] Flint v. Flint, 65 N.W. 272, 272 (Minn. 1895).

[51] *See* FOLBERG, *supra* note 42, at 4 (explaining how the "best interest test" resulted from judges beginning "to speak of the child's needs as the paramount consideration in awarding custody").

[52] *See* Finlay v. Finlay, 148 N.E. 623, 626 (N.Y. 1925); Starnes, *supra* note 38, at 220. For a detailed discussion of the *parens patriae* doctrine, see Sandra Keen McGlothlin, *No More "Rag Dolls in the Corner": A Proposal to Give Children in Custody Disputes a Voice, Respect, Dignity, and Hope*, 11 J. L. & FAM. STUDIES 67, 72-74 (2008).

[53] *See* Starnes, *supra* note 38, at 221("Best-interest statutes . . . ultimately leave the custody decision to individual trial judges who are thought to be in the best position to weigh the specific facts of each case.").

[54] *See* Robert D. Felner & Stephanie S. Farber, *Social Policy for Child Custody: A Multidisciplinary Framework*, 50 AM. J. ORTHOPSYCHIATRY 341, 345 (1980) (describing custody litigation as an "adversarial process, in which a child's parents are the adversaries and the child is the prize").

Under this approach, judges are placed in the unenviable[55] position of choosing one parent—the *best* parent—"to serve as the child's custodian."[56] During traditional custody litigation, both parents claim to be the superior parent while attacking the fitness of the other in hopes of a victory.[57] The victorious parent is awarded physical custody[58] of the child, and by default, the losing parent is granted visitation rights.[59]

Although it may appear peculiar to designate a winning parent and a losing parent, especially between two fit parents, this winner/loser model is premised on the belief that children "are better off with only one, clearly identified custodian."[60] This belief stems from the influential[61] work of Joseph Goldstein, Anna Freud, and Albert Solnit on the "psychological parent"—the parent who "provides day-to-day affection and stimulation" for the child.[62] Under this theory, if a psychological parent is identified, regardless of whether he or she is the child's natural parent, the relationship between the child and her psychological parent should remain undisturbed.[63]

Today, courts tend to reject the all-or-nothing approach to custody determinations.[64] However, courts in all fifty states still employ some form

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[55] *See* DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & DAVID D. MEYER, CONTEMPORARY FAMILY LAW 657 (3rd ed. 2012). As noted by the authors, "Child custody decisions are among . . . the most difficult for judges . . . ."

[56] Starnes, *supra* note 38, at 221.

[57] *See id.* ("Traditional custody litigation thus involves a zero-sum game in which each parent claims to be better for the child, and each parent is tempted to establish his or her own superiority by attacking the competency of the other.").

[58] For a detailed discussion of legal custody and physical custody, see *infra* Subsection I.B.1.

[59] *See* DEP'T OF LEGIS. SERV. 2011, *Child Custody: Background and Policy Implications of a Joint Custody Presumption* (Dec. 2011), available at dls.maryland.gov/pubs/prod/CourtCrimCivil/Child-Custody.pdf. ("Traditionally, when one parent was granted custody of a minor child, the other parent would generally be awarded visitation rights.").

[60] Starnes, *supra* note 38, at 221.

[61] *See* ABRAMS ET AL., *supra* note 55, at 682 (noting that more than one thousand child custody decisions have cited the work of Goldstein, Freud, and Solnit).

[62] *Id.* (discussing the concept of the "psychological parent"); Rita Kramer, *Parent and Child: A New Approach to Adoption and Custody*, N.Y. TIMES (Oct. 7, 1973), http://www.nytimes.com/1973/10/07/archives/the-psychological-parent-is-the-real-parent-parent-and-child-a-new.html?_r=0.

[63] *See* Rita Kramer, *Parent and Child: A New Approach to Adoption and Custody*, NY TIMES (Oct. 7, 1973), http://www.nytimes.com/1973/10/07/archives/the-psychological-parent-is-the-real-parent-parent-and-child-a-new.html?_r=0. *Id*.

[64] *See infra* Section I.B. (discussing the abandonment of the all-or-nothing approach and widespread embracement of shared parenting).

of best-interest analysis when settling custody disputes.[65] Best-interest statutes typically outline a list of factors that courts assess when making best-interest determinations.[66] For example, the Uniform Marriage and Divorce Act (UMDA) outlines a list of five relevant factors for courts to consider when making best-interest determinations.[67] Under the UMDA, trial courts must consider the wishes of the parents, the wishes of the child, the relationship between the child and her parents, the child's adjustment, and the physical and mental health of the parents and child in making a decision that is best for the child.[68] The UMDA has not been widely adopted by the states.[69] However, most state statutes resemble the UMDA model, with many states adding in additional factors.[70]

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[65] *See* McGlothlin, *supra* note 52, at 80 ("In a custody proceeding, the courts in all states use the 'best[] interests of the child' standard.").

[66] *See, e.g.*, MICH. COMP. LAWS ANN. § 722.25(1) (West 2016) ("If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control."). For a detailed list of all relevant factors, see *id.*

[67] *See* McGlothlin, *supra* note 52, at 80, 81; UNIF. MARRIAGE & DIVORCE ACT § 402 (1974).

[68] The five relevant factors are as follows: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
(4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved. Unif. Marriage & Divorce Act § 402 (1974).

[69] *See* Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 Mich. L. Rev. 2215, 2216 (1991) ("Although the UMDA has not been widely adopted, its child custody provisions reflected, and to an important degree continues to reflect, standard American law.").

[70] For example, in Michigan, courts are instructed to consider:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child. (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any. (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs. (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity. (e) The permanence, as a family unit, of the existing or proposed custodial home or homes. (f) The moral fitness of the parties involved. (g) The mental and physical health of the parties involved. (h) The home, school, and community record of the child. (i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference. (j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents. (k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child. (l) Any other factor considered by the court to be relevant to a particular child custody dispute. MICH.

2. Difficulties in Best-Interest Decision Making

Engaging in best-interest decision making did not prove to be an easy task for trial judges despite its egalitarian, flexible, and seemingly simple approach.[71] In practice, best-interest decision making was plagued with indeterminacy.[72] Because of this, courts often relied on heuristics—either "operat[ing] as presumptions, starting points, or simply [] tiebreakers"—to guide their decision making.[73] The first heuristic is known as the tender-years doctrine. Under this heuristic, it was presumed that a child of *tender*[74] years was best placed with her mother, unless her mother was unfit.[75] Courts reasoned that a mother "would most adequately serve the child's best interest" during the child's tender years because of the mother's "role of nurturing caretaker in most families."[76] As noted by one Maryland court, courts should not defy nature and "snatch helpless . . . infants from the bosom of an affectionate mother."[77]

The tender-years doctrine quickly caught fire and dominated custody decision making during much of the twentieth century.[78] Although

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COMP. LAWS ANN. § 722.23 (West 2017).

[71] *See* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 480-81 (1984) (describing the best interest of the child standard as "a standard that seems wonderfully simple, egalitarian, and flexible"); Starnes, *supra* note 38, at 221 (noting that best-interest decision making was difficult); Kathleen Nemechek, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437, 441 (1998) ("Under the best interest approach, many late nineteenth century courts struggled to establish some minimum standards for child rearing that parents would be required to meet in order to receive custody.").

[72] See Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 112 (1987).

[73] Starnes, *supra* note 38, at 221. *See also* Fineman & Opie, *supra* note 72, at 112. (noting that the indeterminacy of best-interest decision making "necessitated the rapid evolution in many jurisdictions of "rules of thumb'").

[74] A child of "tender" years refers to infants and very young children. ABRAMS ET AL., *supra* note 55, at 673.

[75] Fineman & Opie, *supra* note 72, at 112. A related heuristic presumed that for older children, the best custodial parent was the parent of the same sex as the child. *Id.* Both the tender-years doctrine and its related heuristic and had the purpose and effect of "implement[ing], as a legal norm, the placement of infants and older female children with their mothers, while fathers claimed the benefits of older male children whose labor could contribute to the fathers' economic well-being." *Id.*

[76] Nemechek, *supra* note 71, at 441. *See also* Helms v. Franciscus, 2 Bland Ch. 544, 563 (Md. 1830) ("The mother is the softest and safest nurse of infancy, and with her it will be left in opposition to this general right of the father.").

[77] *Helms*, 2 Bland Ch. at 544.

[78] Starnes, *supra* note 40, at 120.

influential, the tender-years doctrine was a target for harsh criticism during the 1960s and 1970s as a result of the women's movement, the advent of no-fault divorce, and societal acceptance of changing gender roles.[79] This "rule of thumb" was highly criticized because of the "gender-based stereotype underpinning the doctrine," as it operated as a rule of near absolute maternal preference.[80] As criticisms became more prevalent, courts around the country began rejecting the tender-years doctrine on constitutional grounds, finding that the application of the doctrine discriminates on the basis of sex.[81] Without a presumption to use, courts were left to rely on the more burdensome, gender-neutral best interest of the child standard.[82] Today, all fifty states reject the tender-years doctrine.[83]

The second heuristic is known as the primary caregiver preference.[84] Under this heuristic, if a parent can show that he or she is the child's

[79] *See* Starnes, *supra* note 38, at 221; Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS, 226, 235-36; Robert F. Cochran, Jr., *The Search for Guidance in Determining the Best Interests of the Child at Divorce: Reconciling the Primary Caretaker and Joint Custody Preferences*, 20 UNIV. RICHMOND L. REV. 1, 11 (1985). For a supporting view of the use of the tender-years doctrine today, see Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 336 (1982).

[80] *See* Starnes, *supra* note 38, at 221; Nemechek, *supra* note 71, at 441. For example, in *Watts v. Watts*, the highest court in New York struck down the tender-years doctrine noting that "there shall be no *prima facie* right to the custody of the child in either parent." State ex. rel. Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285, 287 (Fam. Ct. 1973). Further, as noted in *Watts*, data at the time showed that mothers were awarded custody in over 90% of adjudicated child custody disputes. *Id.* at 286.

[81] *See* Ex parte Devine, 398 So. 2d 686, 695 (Ala. 1981) ("[W]e conclude that the tender years presumption represents an unconstitutional gender-based classification which discriminates between fathers and mothers in child custody proceedings solely on the basis of sex."); *Watts*, 77 Misc. 2d 178, 350 N.Y.S.2d at 290 ("[A]pplication of the 'tender years presumption' would deprive respondent of his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution.").

[82] See J. Herbie DiFonzo, From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy, 52 FAM. CT. REV. 213, 214 (2014).

[83] Starnes, *supra* note 38, at 221, 222. Although the doctrine has been rejected in all fifty states, "[t]oday, some critics charge that sex-based heuristics survive in the form of a preference for the children's primary caretaker, who most often is the mother." *Id.* Mississippi law employs a modified version of the tender-years doctrine. *See* Kole v. McCarty, 52 So.3d 1221, 1228 (Miss. Ct. App. 2011). In *McCarty*, the Mississippi Court of Appeals applied the tender-years doctrine as a rebuttable presumption, noting that it does not apply to a seven-year-old child, and is a weaker presumption for male children than female children. *Id.*

[84] The "primary caregiver preference" is also commonly referred to as the "primary caretaker preference." For a detailed discussion of the primary-caregiver preference, see Cochran, *supra* note 79, at 32-38.

primary caregiver,[85] then "a preference arises in favor of granting custody to that parent"—a preference that essentially operates as a presumption.[86] The weight that family courts give this presumption varies from state to state. However, in some states such as West Virginia, the presumption can only be overcome if the non-primary caregiver proves that the primary caregiver is unfit.[87] If neither parent can prove that he or she is the child's primary caregiver, no preference is afforded to either parent.[88]

The primary caregiver presumption has been praised for its ability to reduce the difficulties associated with best-interest decision making.[89] Specifically, because the heuristic provides predictability, if a family has an established primary caregiver, the parents can easily predict which parent will be awarded custody.[90] The heuristic is also thought to foster continuity, as the use of the presumption will ensure that the parent with whom the child has spent the most time is the parent the child will continue to spend the most time with.[91] Further, proponents of the primary caregiver

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[85] A parent can show his or her status as a primary caregiver by providing evidence of duties such as:

preparing and planning of meals;

bathing, grooming and dressing;

purchasing, cleaning and care of clothes;

medical care, including nursing and trips to physicians;

arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings;

arranging alternative care, *i.e.* babysitting, day-care, etc.;

putting child to bed at night, attending to child in the middle of the night, waking child in the morning;

disciplining, *i.e.* teaching general manners and toilet training

educating, *i.e.* religious, cultural, social, etc.; and

teaching elementary skills, *i.e.* reading, writing and arithmetic.

*Id.* at 34.

[86] *Id.* at 23.

[87] *Id.* at 34.

[88] *Id.*

[89] *Id.* For a detailed discussion of the difficulties of best-interest decision-making, see *infra* Subsection I.A.3.

[90] *See* Cochran, *supra* note 79, at 34. ("[I]f there is a primary caretaker, under such a preference, the parents will know that the parent will get custody unless the other parent can overcome the preference.").

[91] *See id.* at 34-35 ("The primary caretaker will be the parent who has spent the most time caring for the child in the past . . . The primary caretaker will be likely to continue to spend substantial time caring for the child in the future."); *see also* Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CALIF. L. REV. 335, 348 (1982) ("[T]here is no better means by which a judge can measure a parent's capacity of willingness to provide primary care than his or her past performance.").

presumption suggest that awarding custody to the primary caregiver is consistent with the concept of the psychological parent since a child has bonded most with her primary caregiver.[92]

Like the tender-years doctrine, the primary caregiver presumption is criticized for its discriminatory effects against men.[93] Although the presumption is, on its face, gender neutral, in practice, the presumption essentially serves as a proxy for motherhood since most primary caregivers are women.[94] The primary caregiver presumption has been rejected in all fifty states; however, some states still weigh primary caregiving as a factor for consideration in best-interest decision making.[95]

3. The Troubles of Best Interest Decision Making

The *best* interest of the child standard is somewhat of a misnomer. Although it has been praised for its repudiation of historical gender-based custody models, its criticisms are many. The troubles of best-interest decision making stem from the best-interest statutes themselves; best-interest statutes commonly provide a catch-all clause that allows judges to consider any factor they deem relevant to a particular custody determination.[96] These clauses are problematic because they provide trial judges with unfettered discretion in best-interest decision making.[97] As

[92] *See supra* notes 84-88 and accompanying text.

[93] *Cf.* Cochran, *supra* note 79, at 37.

[94] *See* DiFonzo, *supra* note 82, at 215. (noting that the primary caregiver presumption "achieve[s] the same maternal preference results as the tender years doctrine"); *see also* Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. Pa. L. Rev. 921, 923-24 (noting that it is "relatively unusual" for fathers to take on the role of the primary caretaker in most marriages). The presumption only operates as a preference for women if women are the traditional mothers; it disfavors career moms.

[95] *See* Graham, *supra* note 43, at 324 ("Several jurisdictions focus on the primary-caretaker standard for determining custody, but most jurisdictions continue to rely on the best-interests standard in deciding which of the two parents should have custody of the children."); DiFonzo, *supra* note 82, at 215 (noting that although courts may weigh primary caregiving as a factor for consideration in a custody determination, it is not given "presumptive weight").

[96] *See, e.g.*, ALASKA STAT. ANN. § 25.20.090 (West 2017) ("[O]ther factors the court considers pertinent."); MICH. COMP. LAWS ANN. § 722.23(l) (West 2017) ("Any other factor considered by the court to be relevant to a particular child custody dispute."); VA. CODE ANN. § 20-124.3 (West 2017) ("Such other factors as the court deems necessary and proper to the determination.").

[97] *See* ABRAMS ET AL., *supra* note 42, at 675; J. Herbie DiFonzo, *There's a Great Way to Figure out Child Custody. Most Divorce Courts Don't Use It*, WASHINGTON POST (Nov. 14, 2014), https://www.washingtonpost.com/posteverything/wp/2014/11/14/no-children-should-not-spend-equal-time-with-their-divorced-parents/?utm_term=.408d24b15151 ("This standard opened up the possibility of excessive judicial discretion.").

noted by Professor Cynthia Lee Starnes, the broad discretion trial judges are afforded has "dubbed" best-interest decision-making as "a regime of judicial patriarchy."[98] Because of this discretion, it is easy for judges to base custody decisions on their personal values, moral codes, and biases rather than on statutory best-interest factors or psychological research.[99] Essentially, as articulated by Professor Carl E. Schneider, best-interest statutes are "too little a rule and too much an award of discretion."[100]

Further, as noted by Professor Robert H. Mnookin, determining what is best for a child is usually "indeterminate and speculative."[101] This is because best-interest decision making is forward looking and it requires a judge to predict what is best for the child now and in the future, without the help of a crystal ball or any general guidance.[102] Difficulties also arise with best-interest decision making because best-interest statutes do not specify what values are "best," there is no societal consensus regarding what family values are "best," and judges often lack adequate information about the most basic aspects of a child's life, making it difficult to craft a custody arrangement that best serves the child's interests.[103]

Additionally, although best-interest decision making is gender neutral,[104] it may still result in gender-biased decisions.[105] A study done by Professor Mnookin and Professor Eleanor Maccoby in the 1990s on divorcing parents in California found that although California law contains a presumption favoring joint custody, in 70% of the cases, the mother was awarded physical custody.[106] Subsequent research has shown similar results. In a study done by Professor Julie E. Artis, Professor Artis found that a majority of Indiana family court judges favor and support the tender-years doctrine, although it had been abolished years ago.[107] Professor Artis also found that

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[98] Starnes, *supra* note 38, at 220.

[99] *Id.* at 221; Graham, *supra* note 43, at 325 ("[T]he broadness of the standard makes it possible for a judge to insert his or her own biases into the process, intentionally or unintentionally.").

[100] Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2219 (1991).

[101] Mnookin, *supra* note 79, at 229.

[102] See generally *id.*

[103] *Id.* at 258-59.

[104] States have begun codifying the gender neutrality of custody decisions. *See, e.g.*, N.M. STAT. ANN. § 40-4-9.1(C) (West 2017) ("In any proceeding in which the custody of a child is at issue, the court shall not prefer one parent as a custodian solely because of gender.").

[105] For a discussion of the impacts of gender-neutral laws having non-gender-neutral impacts, see *Graham*, *supra* note 43, at 329-31.

[106] ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 268 (1992).

[107] *See* Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the*

judges who support the tender-years doctrine awarded physical custody to the mother in 91.7% of cases, and those who opposed the doctrine awarded physical custody to the mother in 77.6% of cases.[108] Both studies give rise to the inference that although best-interest decision making seeks to be gender neutral, custody determinations are still plagued with archaic notions of the proper roles of mothers and fathers.[109] For example, one North Dakota court considered a father's ability—or lack thereof—to braid his child's hair in determining if he was a proper custodial parent.[110] It is important to note that gender bias does not only disadvantage fathers. It can also work against mothers, especially those who are career oriented,[111] single,[112] or otherwise not stereotypical homemakers.[113]

Historically, the best interest of the child standard has been exceedingly challenging for courts to apply.[114] This is especially true in cases where both parents appear fit—cases that may lead judges to use inappropriate decision-making tactics.[115] For example, some judges have considered coin flipping to be an appropriate response.[116] Affording trial judges

*Tender Years Doctrine*, 38 LAW & SOC'Y REV. 769, 771 (2004) ("More than half of the judges expressed support for the tender years doctrine at some point during the interview."). Professor Artis contributes a judge's view of the tender years doctrine to their gender. *Id.* As noted by Professor Artis, "these views of the tender years doctrine can be explained, in large part, by the gender of the judge; female judges are less likely to support the tender years doctrine than male judges." *Id.*

[108] *See id.* at 794.

[109] *See* MACCOBY & MNOOKIN, *supra* note 106, at 271 ("[D]espite some revolutionary changes in the law to eliminate gender stereotypes and to encourage greater gender equity, the characteristic roles of mothers and fathers remain fundamentally different.").

[110] Dalin v. Dalin, 512 N.W.2d 685, 687 (N.D. 1994).

[111] *See, e.g.*, Gulyas v. Gulyas, 254 N.W.2d 818, 818-19 (Mich. Ct. App. 1977) (describing that custody to the father was proper over the mother, although the mother "ha[d] the capacity to give love and affection to the child," because the mother was "an energetic and ambitious career woman," and the father was "less ambitious than the mother" and "more of a homebody").

[112] *See, e.g.*, Eigner v. Eigner, 261 N.W.2d 254, 260 (Mich. Ct. App. 1977) (noting that although the mother loved her children and could financially provide for them, placing the children with the mother "was not as desirable as the setting with their father, who had remarried").

[113] *See, e.g., id.* (noting that the mother, who was not the preferred custodian, "worked full-time and maintained a reasonable social life" while "the children spent considerable time with baby-sitters at day care centers, and with their maternal grandmother").

[114] *See* Gabrielle Davis, Kristine Lizdas, Sandra Tibbetts Murphy & Jenna Yauch, *The Dangers of Presumptive Joint Physical Custody*, BATTERED WOMEN'S JUSTICE PROJECT 5 (May 2010).

[115] *See* Starnes, *supra* note 38, at 220-21.

[116] *See Judge Removed for Deciding Case with Coin Toss*, FOX NEWS (Nov. 3, 2007), http://www.foxnews.com/story/2007/11/03/judge-removed-for-deciding-case-with-coin-

significant discretion in best-interest decision making is disturbing, as it could easily lead to devastating outcomes for children and families. As neutral decision-makers, judges are supposed to base custody determination on what is best for the child, not what they personally believe is right or what happens by chance.[117]

By name, the best interest of the child standard reigns supreme, but in reality, it is wholly inadequate. Troubles associated with traditional best-interest decision making and reliance on the winner/loser custody model prompted courts and legislatures to rethink the way judicial custody arrangements are crafted.[118] What was once a regime focused on winning and losing eventually evolved into a regime focused on sharing.

### A. *Sharing Custody of the Child: A Contemporary View of Custody Determinations*

A divorcing couple can split their assets in half, but the same is not true of their child. Historically, courts disfavored and avoided joint custody arrangements whenever possible.[119] Societal changes and shifting gender roles provided momentum for reforming the traditional winner/loser custody model and embracing the concept of joint custody.[120] With joint custody as an option, no parent must be the designated winner in a child custody determination—both parents can share parenting responsibilities and maintain a meaningful relationship with their child.[121]

#### 1. Defining Joint Custody and Shared Parenting

Over the past few decades, courts and legislatures have begun abandoning the traditional winner/loser custody model in favor of the "revolutionary concept of joint custody."[122] Unfortunately, the meaning of

toss.html; David Ashenfelter, *Coin Toss Could Backfire on Judge*, CHRON (Feb. 10, 2002, 6:30 AM), www.chron.com/news/nation-world/article/Coin-toss-could-backfire-on-judge-2060948.php.

[117] *See supra* notes 50-53 and accompanying text.

[118] *See infra* note 120 and accompanying text.

[119] *See* McCann v. McCann, 173 A. 7, 9 (Md. Ct. App. 1934) (expressing how joint custody awards should be "avoided whenever possible" as they are "an evil fruitful in the destruction of discipline, in the creation of distrust, and in the production of mental distress in the child").

[120] *See* DiFonzo, supra note 97 ("The greater social and legal acceptance of shared custody in recent decades came about when parents began shouldering more equal parenting responsibilities."). For a detailed discussion of the joint custody movement, see *infra* Subsection I.B.2.

[121] *See infra* Subsection I.B.1 for a discussion of how joint custody arrangements operate.

[122] Starnes, *supra* note 38, at 222 ("The last two decades have seen a dramatic

"joint custody"—or even "custody"—is not always clear.[123] The term custody is categorized into two types: *legal* custody and *physical* custody. Legal custody refers to a parent's authority to make important decisions for the child such as the child's education, medical care, and religious upbringing.[124] When parents are awarded joint legal custody, they are required to consult one another and make decisions together.[125] Neither parent has the power to override the other, even in the event of a disagreement.[126] In contrast, if a parent is awarded sole legal custody, that parent is given full authority to make those aforementioned decisions.[127] Although it may be advantageous for both parents to confer on these important decisions pertaining to the child, if the parents do not agree, the decision of the parent with sole legal custody will prevail.[128]

In contrast, physical custody refers to where the child will reside on a daily basis.[129] Traditionally, if a court awarded a parent sole physical custody, that parent was referred to as the "custodial parent," and the other was referred to as the "non-custodial parent." The child's primary residence was with the custodial parent, and the non-custodial parent would receive visitation rights.[130] With an award of sole physical custody also came the authority to make daily decisions for the child. Today, an award of sole physical custody does not guarantee that the custodial parent will receive sole legal custody; it is common for parents to be awarded joint legal custody while one parent has sole physical custody.[131] If a custody

challenge to the fundamental tenet that courts must choose between two fit parents and award sole custody to the superior parent. In the 1980s, courts and legislatures increasingly embraced the revolutionary concept of joint custody.").

[123] *See* Starnes, *supra* note 38, at 222-23 ("But the type of joint custody intended by legislators and other legal actors is not always clear."); Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, the Approximation Rule and Shared-Parenting*, 25 N. ILL. U. L. REV. 347, 352 (2005) (noting that at the start of the joint custody movement, the term "joint custody" was "not clearly defined").

[124] Nancy Ver Steegh & Hon. Dianna Gould-Saltman, *Joint Legal Custody Presumptions: A Troubling Legal Shortcut*, 52 FAM. CT. REV. 263 (2014).

[125] *Id*.

[126] *Id*.

[127] *Id*.

[128] See *id*.

[129] JENNIFER K. BOTTS & LAUREN C. NESTOR ET AL. GEN. ASSEMB. OF MD. DEP'T OF LEGIS. SERVICES OFFICE OF POLICY ANALYSIS, CHILD CUSTODY: BACKGROUND AND POLICY IMPLICATIONS OF A JOINT CUSTODY PRESUMPTION 3 (2011).

[130] See Melissa A. Tracy, *The Equally Shared Parenting Time Presumption-A Cure-All or a Quagmire for Tennessee Child Custody Law?*, 38 U. MEM. L. REV. 153, 159 (2007).

[131] *See* J. Herbie DiFonzo, Kristin Pezzuti, Nicole Guliano, & Diana Rivkin, *Joint Custody Laws and Policies in the Fifty States: A Summary Memorandum* 3 (AFCC Think Tank on Closing the Gap: Research, Practice, Policy and Shared Parenting, Feb. 7 draft,

order awards joint physical custody to the parents, the parents receive "relatively equal time with the child"[132] and are required to communicate with one another regarding daily decisions.[133] Further, if parents receive joint physical custody, they likely receive joint legal custody as well. Although parents may receive equal time with the child under a joint physical custody arrangement, the notion of joint custody does not require an equal split of time with the child.[134] An arrangement in which a child spends anywhere from 30-50% of her time with each parent is said to be a joint custody arrangement.[135]

The law has recently seen a linguistic shift from traditional custody phrases—i.e., joint custody, physical custody, and legal custody—to non-binary phrases.[136] The phrases *legal custody* and *physical custody* are being replaced with *decision-making authority* and *parenting time*, respectively.[137] In addition, the phrase *joint custody* is commonly being replaced with the phrase *shared parenting*, meaning the parents are awarded both joint legal custody and joint physical custody of the child.[138] Like joint custody, the phrase shared parenting is often used ambiguously.[139] Shared parenting implies that both parents have equal decision-making authority but not always equal parenting time.[140] The American Law Institute provides a notable example of this non-binary linguistic shift by urging the substitution of traditional custody terminology such as *custody arrangement*, *physical custody*, and *legal custody* with "an alternative

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201),
https://www.masslegalservices.org/system/files/library/JtCiustodySummary%20Memo-5.pdf *See* DiFonzo working paper draft, at 3 ("The states will often allow one without the other, most frequently joint legal custody without joint physical custody.").

[132] Starnes, *supra* note 38, at 223.

[133] Ver Steegh & Gould-Saltman, *supra* note 124, 263.

[134] *See* Starnes, *supra* note 38, at 223 n.138; *see also* Taylor v. Taylor, 508 A.2d 964, 967 (Md. Ct. App. 1986) ("Joint physical custody is in reality 'shared' or 'divided' custody. Shared physical custody may, but need not, be on a 50/50 basis . . . ."); Melli, *supra* note 123, at 352 ("Originally, [joint custody] apparently referred to equal time with both parents but, increasingly, the term refers to amounts of time that are substantial but, nevertheless, less than half time.").

[135] *See* Melli, *supra* note 123, at 352 (noting that shared parenting implies "that the child spends at least 30-35%" of her time with each parent).

[136] *See* Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice and Shared Parenting: AFCC Think Tank Final Report*, 52 FAM. CT. REV. 152, 154 (2014) ("Use of the term 'custody' is rapidly diminishing.").

[137] *See id.*

[138] *See id.* at 153-54.

[139] *See id.* at 154 ("[T]he concept of shared parenting is often used without clarification about whether it is decision making, parenting time, or both . . . .").

[140] See *id*.

vocabulary that avoids bipolar labels"[141] such as *parenting plan*,[142] *custodial responsibility*,[143] and *decision-making responsibility*.[144] By replacing traditional terminology such as "custody" and "visitation," and "sole" and "joint," with "custodial responsibility" the ALI seeks to "avoid the win-lose conceptualization suggested by the more conventional terminology" and "reinforce the reality that not only primary responsibility for the child but all other forms of physical responsibility are also important, and custodial in nature."[145] This change in vocabulary further seeks to unify the roles and responsibilities parents have in raising their child regardless of the proportion of time each spends with her by sending the message that "neither parent is a mere 'visitor.'"[146]

2. The Joint Custody Movement

The concept of joint custody dates back to the 1970s, "reflecting a desire to bring gender and emotional equality to child custody decisions"[147] and to "avoid the 'win-lose' mentality of child custody disputes."[148] The concept of joint custody quickly gained widespread support, especially among activist groups.[149] Some mothers rejected the concept of sole custody because of the burdens and lack of financial support that arise with sole parenting.[150] Meanwhile, fathers argued against sole custody because sole

[141] *See* Starnes, *supra* note 38, at 224.

[142] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(2) (AM. LAW INST. 2002) ("A parenting plan is a set of provisions for allocation of custodial responsibility and decisionmaking responsibility on behalf of a child and for resolution of future disputes between the parents.").

[143] *Id.* § 2.03(3) ("Custodial responsibility refers to physical custodianship and supervision of a child. It usually includes, but does not necessarily require, residential or overnight responsibility.").

[144] *Id.* § 2.03(4) ("Decisionmaking responsibility refers to authority for making significant life decisions on behalf of the child, including decisions about the child's education, spiritual guidance, and health care.").

[145] *Id.* § 2.03 cmt. e.

[146] *Id.*

[147] DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERIN J. ROSS & DAVID D. MEYER, CONTEMPORARY FAMILY LAW 743 (2012). During this time, fathers' rights groups pushed for greater roles in their children's lives post-divorce. *See* Melli, *supra* note 123, at 352.

[148] Linda Elrod, Child Custody Prac. & Proc. § 1:8 (2012).

[149] *See* MARY ANN MASON, THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE—AND WHAT WE CAN DO ABOUT IT 40 (1999) (describing the joint custody movement as "the most politically attractive concept of the 1990s"); Starnes, *supra* note 38, at 222 ("By 1989, 34 states had enacted joint-custody statutes of some type.").

[150] *See* David Sheff, *If It's Tuesday, It Must Be Dad's House* DAVID SHEFF, http://davidsheff.com/article/tuesday-dad-house/ (last visited Mar. 13, 2017). In particular, as noted by David Sheff, "The women's movement renounced the status quo because full-time

custody was customarily awarded to mothers, essentially turning fathers into biological strangers.[151] Both mothers and fathers perceived joint custody as a solution to the burdens that arise with sole parenting and as a solution to ensure that each parent maintains regular contact with his or her child.[152] With joint custody now available as an option, both mothers and fathers would be encouraged to more actively be involved in their child's life.[153]

The concept of joint custody was also thought to be better than the traditional winner/loser custody model for children. Many commentators have noted that regular contact with both parents is essential for a child's health adjustment post-divorce.[154] In particular, research has shown that one of the most significant problems that children experience after a divorce is the absence of a meaningful relationship with one of their parents.[155] Joint custody arrangements are thought to alleviate this concern because they afford both parents the ability to have continued involvement with the child, thus allowing the child to develop a strong, positive relationship with both of her parents.[156]

The family court system also sought to benefit from the concept of joint custody.[157] Under the traditional winner/loser custody model, judges were

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moms, single or remarried, who often received little or no child support, had their hands full–there was little time to follow personal agendas." *Id.* In contrast, there are feminists who resist the notion of joint custody on the ground that mothers assume the majority of caregiving responsibilities during marriage and incur significant human capital costs as a result. The belief among these women is that at divorce, these mothers should not be forced to share custody of their children with fathers who have contributed substantially less to the children, while incurring no human capital costs as a result of caregiving. I'm grateful to Professor Cynthia Lee Starnes for this insight.

[151] *See id.* ("Fathers meanwhile rebelled against the prejudice that often significantly or completely cut them off from their children."); *see also* Taylor v. Taylor, 508 A.2d 964, 970 (Md. Ct. App. 1986) (explaining that when one parent receives sole custody of the child, the status of the non-custodial parent may be reduced "to the second class status of a visitor").

[152] *See id.*; Taylor v. Taylor, 508 A.2d 964, 970 (Md. Ct. App. 1986) ("Proponents of joint custody point out that it offers an opportunity for a child to enjoy a meaningful relationship with both parents, and may diminish the traumatic effects upon the child that can result from a dissolution of the marriage.").

[153] *See* Starnes, *supra* note 38, at 222 (noting that with joint custody as an option, both parents would be respected and encouraged to spend significant time with their children").

[154] *See* ANDREW SCHEPARD, CHILDREN, COURTS, AND CUSTODY INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 36-38 (2004). As noted by Andrew Schepard, the three most important factors for a child's healthy adjustment post-divorce are regular contact with the non-custodial parent, the presence of a well-functioning custodial parent, and the reduction of parental conflict. *Id.*

[155] *Id. See also* Sheff, *supra* note 150.

[156] *See* Sheff, *supra* note 150.

[157] *See* Starnes, *supra* note 38 at 222.

often charged with the difficult task of picking a winning parent between two fit parents.[158] With joint custody as an option, judges could now analyze other potential custody arrangements without being bound to one prototypical arrangement, ensuring the custody arrangements that they would craft and approve were in the best interest of the child.[159]

Although the concept of joint custody has widespread conceptual appeal, critics still question whether joint custody arrangements are beneficial for children.[160] Among the most prevalent concerns is the belief that joint custody fosters confusion and instability for children, especially during a time in which children most need stability and certainty.[161] In his much-cited work, *If It's Tuesday, It Must Be Dad's House*, David Sheff examines the effects joint custody arrangements have on children.[162] Sheff presents the question, "How many adults can imagine having two primary homes?"[163] Sheff's silence on the issue is telling—very few, if any, could.[164] Unfortunately, having two primary homes is the reality that many children of divorce face.[165]

Sheff points out that a stable home is among the most important "cradle[s] of development" for children.[166] While joint custody arrangements provide some built-in stability—such as the child knowing that if it is Tuesday, she must be at dad's house—the stability provided is not enough.[167] Sheff notes that joint custody wrongfully assumes that children can adjust and function properly when divided between two homes, two families, two sets of rules, and two sets of family values.[168] While some children may easily adjust, those who cannot adjust often live with a sense of not belonging anywhere.[169]

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[158] *See supra* note 56 and accompanying text.

[159] *See id.* (noting that with joint custody as an option, "[j]udges could avoid the difficult task of choosing between two fit parents").

[160] *See id.* at 223.

[161] *See* Taylor v. Taylor, 508 A.2d 964, 970 (Md. Ct. App. 1986) ("The principal criticism leveled at joint custody is that it creates confusion and instability for children at the very time they need a sense of certainty and finality in their lives.").

[162] *See generally* Sheff, *supra* note 150.

[163] *Id.*

[164] See *id.*

[165] See *id.*

[166] *Id.*

[167] *Id.* ("Certainly children in joint custody can have a semblance of stability from a stable custody schedule–if it's Tuesday it must be Dad's house–but there is also built-in instability, with weekly (or whatever) departures, arrivals, and transitions, and then, just when they're settled in, it's time to leave again.").

[168] See *id.*

[169] *Id.* ("Some children are apparently flexible enough to adapt, but others become

The concept of joint custody has also been widely criticized as being simply unworkable in the majority of custody disputes.[170] Critics stress that joint custody awards are only appropriate in a small number of cases, namely those that involve parents who can get along well.[171] Since the vast majority of custody arrangements are made by cooperating parents outside of the family court system, allowing judges to impose custody arrangements that require a significant amount of parental cooperation for those parents who have already demonstrated they lack effective cooperation tactics seems counterintuitive.[172] Although some research suggests that children benefit from continuing contact with each parent, critics also stress that joint custody arrangements can be harmful when children are repeatedly exposed to parental conflict.[173] While the concept of joint custody has its fair share of critics, it continues to influence legal scholarship, reform attempts, and the laws of the states today.[174]

3. Joint Custody in Practice

It is not uncommon for courts today to award joint custody to divorcing parents.[175] Joint legal custody awards are more common than joint physical custody awards, but joint physical custody awards in the form of equal time sharing are not as common.[176] Although all states permit their courts to

traumatized."); *see also In re* Marriage of Burham, 283 N.W.2d 269, 272 (Iowa 1979) ("[D]ivided custody is destructive of discipline . . . tends to induce a feeling of not belonging to either parent, . . . [and] in some instances it permits one parent to sow seeds of discontent concerning the other . . . .") (citations omitted).

[170] *See* Dana Harrington Conner, *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, 18 DUKE J. GENDER L. & POL'Y 223, 228 (2011) ("The vast majority of custody disputes resolved by trial judges are the least likely to be successful candidates for joint custody.").

[171] *See infra* Subsection III.A (discussing in detail the importance of communication and cooperation).

[172] *See* Dorothy R. Fait, Vincent M. Wills & Sylvia F. Borenstein, *The Merits of and Problems with Presumptions for Joint Custody*, 45 MD. B.J. 12, 16 (2012) (noting that approximately 90% of custody cases are settled outside of the family court system and the remaining 10% of cases typically involve high-conflict parents).

[173] *See infra* note 351 and accompanying text. *Cf.* Nielsen, *supra* note 23, at 91 (noting that research has shown "children in shared parenting families had better outcomes than those in sole residence even when there was high conflict or where one of the parents had been forced to share.").

[174] *See* Starnes, *supra* note 38, at 223-24 ("Despite its critics, the notion that children generally benefit from shared-custody arrangements continues to greatly influence legal thinking . . . .").

[175] *See* Nielsen, *supra* note 23, at 81 ("[S]hared parenting after . . . parents separate has become more common worldwide.").

[176] A Wisconsin study found that in 2007, one-third of divorcing parents that year had

craft joint custody arrangements, laws governing the circumstances in which a joint custody award is appropriate differ.[177] For example, some states first require one or both parents to request joint custody, while others do not.[178] Iowa provides a representation of the first approach.[179] Under Iowa law, courts must consider granting joint custody—joint legal custody, joint physical custody, or both—to parents if either parent requests the court do so.[180] If a court does not award joint custody, it must base its decision on clear and convincing evidence that joint custody would be unreasonable and would not be in the best interest of the child.[181] When a parent requests joint custody, Iowa courts do not *presume* that joint legal custody is in the best interest of the child.[182] Rather, courts must explain their rationale for not awarding joint custody.[183] In contrast, Indiana provides an example of the second approach.[184] Under Indiana law, a court may award either legal custody or physical custody jointly upon a showing that joint custody would serve the child's best interests.[185] No request by the parents is necessary.[186] Although Iowa's approach and Indiana's approach differ, they both share a

an equal time sharing custody arrangement and one-quarter of divorcing parents had a 25% time share arrangement. Maria Cancian et al., *Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 DEMOGRAPHY 1381, Y1387 (2014). Further, a 2008 study in Washington State of 4,354 families found that approximately half of the children spend at least 35% of time with each parent. Thomas George, *Residential Time Summary Reports Filed in Washington from July 2007 to March 2008*, Washington State Center for Court Research 4 (2008).

[177] *See* Pruett & DiFonzo, *supra* note 136, at 156.

[178] *See infra* notes 178-86.

[179] *See* IOWA CODE § 598.41(1)(a) (2018) ("The court may provide for joint custody of the child by the parties.").

[180] IOWA CODE . § 598.41(2)(a) ("On the application of either parent, the court shall consider granting joint custody in cases where the parents do not agree to joint custody."). Iowa law provides some framework for distinguishing between joint physical care and joint legal custody. *See* IOWA CODE § 598.41(5)(a) (2018).

[181] IOWA CODE § 598.41(2)(b) ("If the court does not grant joint custody under this subsection, the court shall cite clear and convincing evidence, pursuant to the factors in subsection 3, that joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and a parent should be severed.").

[182] *Id.* § 598.41(2)(a).

[183] *Id.* § 598.41(2)(b).

[184] *See* IND. CODE §§ 31-14-13-2.3(a); 31-17-2-13 (2017).

[185] *Id.* §§ 31-14-13-2.3(a); 31-17-2-13.

[186] *Id.* § 31-14-13-2.3(a) ("In a proceeding to which this chapter applies, the court may award legal custody of a child jointly if the court finds that an award of joint legal custody would be in the best interest of the child."); IND. CODE § 31-17-2-13 ("The court may award legal custody of a child jointly if the court finds that an award of joint legal custody would be in the best interest of the child.").

common perspective: the paramount concern for the judge is still the best interest of the child.[187]

While all states permit their courts to award joint custody to parents, some states have taken a step further in embracing joint custody and have adopted a preference—although not a presumption—favoring joint custody in either statute or case law.[188] For example, Virginia law articulates that, "court[s] shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children."[189] Other states articulate their preference for joint custody more assertively. Kansas law, for example, ranks custody arrangements in order of preference, indicating a preference for joint legal custody over sole legal custody.[190] Similarly, one Alaska court explicitly noted that "[j]oint legal custody is preferred" over sole legal custody.[191] Today, twelve states have provisions in their law expressly favoring joint custody arrangements.[192]

Although joint custody arrangements are becoming the preferred type of arrangement, awarding joint custody is not always a straightforward task.[193] Courts often look to several factors to determine whether joint custody is appropriate.[194] For example, in *Taylor v. Taylor*, when first adopting the concept of joint custody, the Maryland Court of Appeals noted that the

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[187] *See, e.g.*, Taylor v. Taylor, 508 A.2d 964, 970 (Md. Ct. App. 1986); ARIZ. REV. STAT. § 25-403.02(B) ("Consistent with the child's best interests in section 25-403 and sections 25-403.03, 25-403.04 and 25-403.05, the court shall adopt a parenting plan that provides for both parents to share legal decision-making regarding their child and that maximizes their respective parenting time."); HAW. REV. STAT. § 571-46(a)(1) (2017) ("Custody should be awarded to either parent or to both parents according to the best interests of the child, and the court also may consider frequent, continuing, and meaningful contact of each parent with the child unless the court finds that a parent is unable to act in the best interest of the child.").

[188] *See infra* notes 187-190.

[189] VA. CODE § 20-124.2(B) (2017).

[190] *See* KAN. STAT. ANN. § 23-3206 (2017) ("The [custody] order shall provide one of the following legal custody arrangements, in the order of preference: (a) Joint legal custody . . . (b) Sole legal custody."). The same hierarchy does not apply to joint physical custody arrangements. *See* KAN. STAT. ANN. § 23-3207 (2017) (governing joint physical custody arrangements).

[191] *See* Peterson v. Swanthout, 214 P.3d 332, 336 n.6 (Alaska 2009).

[192] Sally Hong, *Child Custody Presumptions*, LEGAL MATCH (Nov. 7, 2017; 9:45 AM), http://www.legalmatch.com/law-library/article/child-custody-presumptions.html (listing the states as Florida, Idaho, Iowa, Louisiana, Minnesota, Missouri, New Hampshire, New Mexico, Texas, Utah, Wisconsin, and The District of Columbia).

[193] *See* Starnes, *supra* note 40, at 120 (noting that choosing a child's custodian is a complex task).

[194] *See generally* Taylor v. Taylor, 508 A.2d 964, 970-74 (Md. Ct. App. 1986) (adopting the concept of joint custody).

single most important factor in determining the appropriateness of a joint custody award—both for joint legal custody and joint physical custody—is the "capacity of the parents to communicate and reach shared decisions affecting the child's welfare."[195] The court further noted that joint custody should "[r]arely, if ever," be awarded "in the absence of a record of mature conduct on the part of the parents evidencing an ability to effectively communicate with each other concerning the best interest of the child."[196]

The court in *Taylor v. Taylor* set out several other factors for courts to consider in evaluating the appropriateness of a joint custody award.[197] These factors include: the willingness of parents to share custody; the fitness of the parents; the established relationship between the child and her parents; the reasonable preference of a child; the potential disruption to the child's school and social life; the geographic proximity of the parents' homes; the demands of the parents' employment; the age and number of children involved; the sincerity of the parents' request; the financial status of the parents; the impact on federal or state assistance; and the potential benefit to the parents.[198] The court expressed that trial judges' decisions should not solely rest on these factors—any circumstances that reasonably relate to the joint custody matter should be considered in determining the appropriateness of a joint custody award.[199] In practice, courts' approaches to joint custody determinations, such as the approach in *Taylor*, resemble traditional best-interest decision making, but instead of courts choosing a winning parent and a losing parent, courts can designate both parents as "winners."[200] Nonetheless, this approach does little to limit the tremendous amount of discretion that judges exercise in making such decisions. This has prompted numerous attempts to reform custody decision making.[201]

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[195] *Id.* at 971. Other courts have also considered the ability of parents to effectively communicate and cooperate in determining the appropriateness of a joint custody award. *See, e.g.*, Beck v. Beck, 432 A.2d 63, 71-72 (N.J. 1981); Turner v. Turner 455 So.2d 1374 1380 (La. 1984); Heard v. Heard, 353 N.W.2d 157, 161-62 (Minn. App. 1984); K.L.B. v. L.A.B., No. CN98-07272, 2004 WL 1146701, at *2 (Fam. Ct. Del. Mar. 24, 2004) (noting that effective communication is "the single most important prerequisite" to a joint custody award).

[196] *Taylor*, 508 A.2d at 971. The court further explained that perhaps a joint custody award would be appropriate if "it is possible to make a finding of a strong potential" that the parents could effectively and maturely communicate regarding the child's best interests in the future. *Id.*

[197] *See id.* at 971-74

[198] *Id.* For a detailed discussion and analysis of each factors, see *id.*

[199] *Id.* at 974.

[200] *See supra* Section I.A.

[201] *See infra* Part II.

## III. CONTEMPORARY SHIFTS IN CHILD CUSTODY LAW

Although the concept of joint custody has its fair share of critics, both critics and proponents agree that shared parenting arrangements can result in substantial advantages to children when they are used appropriately, and are thus still worthy of consideration by judges.[202] This belief has permeated legal thinking concerning child custody models and has been at the heart of current attempts by the ALI and various state legislatures to reform traditional best-interest decision making.[203] The purpose of these reforms are twofold: to reign in judicial discretion and to ensure that children benefit from continuous contact with each parent.

### A. *The ALI Approximation Standard*

In its *Principles of the Law of Family Dissolution*, the ALI introduces a compelling new physical custody model that differs drastically from traditional custody models. This new model, termed the "allocation of custodial responsibility"[204] model, was first advocated by Professor Elizabeth S. Scott.[205] Under this model, absent an agreement by the parents as to the allocation of custodial responsibility, a court should fashion a future custodial arrangement that quantitatively *approximates* the caretaking arrangement[206] that occurred while the family was intact (the approximation).[207] For example, if the parents equally participated in caretaking during the marriage, the caretaking arrangement upon divorce would resemble a joint custody arrangement.[208] In the event that the

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[202] See *infra* Sections II.A-B.

[203] See *infra* Sections II.A-B.

[204] The ALI defines "custodial responsibility" as both "physical control of and access to the child"—a phrase that has traditionally been known as "child custody." PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08 cmt. a (AM. LAW INST. 2002). It encompasses the living arrangement of the child, including "with whom the child lives and when, and any periods of time during which another person is scheduled by the court to have caretaking responsibility for the child." *Id.*

[205] *Id.* § 2.08 rep. notes cmt. b.

[206] As noted by the ALI, "A parent's proportion of past caretaking functions measured primarily by the time spent performing the functions." *Id.* § 2.08(1) cmt. c. However, mere "presence in the home, in itself, is not a caretaking function." *Id.* § 2.08 cmt. b, illus. 3.

[207] *Id.* § 2.08(1) ("[T]he court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation."). Regarding legal custody, the ALI recommends a rebuttable presumption favoring joint custody. *Id.* § 2.09(2).

[208] *See id.* § 2.08 cmt. b, illus. 1; Starnes, *supra* note 38, at 224. If the family did not share equally in caretaking, "custody orders would represent points on a continuum of residential responsibility." *Id.*

parents never lived together, a court would portion the time each parent spent caring for the child prior to the filing of the custody action.[209] As for legal custody, the ALI suggests that courts allocate "decision-making responsibility" in accordance with the child's best interests by analyzing a list of non-dispositive factors.[210] One notable change in the ALI's model from traditional best-interest decision making is that the ALI encourages courts to presume that joint decision-making responsibility is in the best interest of the child if the parents have "been exercising a reasonable share of parenting functions."[211] If there is a history of domestic violence or child abuse, or if joint decision-making responsibility is not in the child's best interests, the presumption is overcome.[212]

As is true with many things in the law, the ALI outlines several exceptions to the approximation rule.[213] First, the approximation should not be used if it poses specific risks to the child's welfare or safety.[214] Second, the approximation should not be used if its application does not comport with the objectives of the rule, all of which tend to mirror traditional factors from the best interest of the child standard.[215] The model

[209] *Id.* § 2.08(1).

[210] *Id.* § 2.09(1). As noted by the ALI, when determining whether a legal custody arrangement is in the child's best interest, the court should consider: the allocation of custodial responsibility under § 2.08;the level of each parent's participation in past decision-making on behalf of the child; the wishes of the parents; the level of ability and cooperation the parents have demonstrated in past decision-making on behalf of the child; a prior agreement, other than one agreed to under § 2.06, that would be appropriate to consider under the circumstances as a whole including the reasonable expectations of the parents and the interests of the child; the existence of any limiting factors, as set forth in § 2.11. *Id.*

[211] *Id.* § 2.09(2). This provision applies to both legal parents or parents by estoppel. *Id.*

[212] *Id.*

[213] *See id.* § 2.08(1).

[214] *See id.* § 2.11(1)(a)-(d). As noted by the ALI, use of the approximation standard would be inappropriate if a parent has: (1) "abused, neglected, or abandoned a child;" (2) "inflicted domestic violence, or allowed another to inflict domestic violence"; (3) "abused drugs, alcohol, or another substance in a way that interferes with the parent's ability to perform caretaking functions;" or (4) "interfered persistently with the other parent's access to the child," unless said parent had "a reasonable, good-faith belief" that their actions were "necessary to protect the safety of the child or the interfering parent or another family member." *Id.*

[215] *See id.* § 2.08(1)(a)-(h). As noted by the ALI, deviation from the approximation standard is appropriate to (1) allow each parent to have a significant relationship with the child; (2) accommodate a firm, reasonable preference of a child of a specific age; (3) "keep siblings together"; (4) to ensure the child does not experience harm because of attachment to one parent over the other; (5) ensure equity by taking into account any prior arrangement which demonstrates the "reasonable expectations of the parties" and the "interests of the child"; (6) avoid an impractical or instable arrangement; (7) avoid an impractical arrangement if a parent relocates; and (8) avoid significant harm to the child. *Id.*

has practical limitations as well.[216] For example, a court should not consider a temporary arrangement resulting from the parents' separation when determining the proportion of caretaking functions used in the approximation.[217] Furthermore, if there is no clear history or pattern of caretaking functions, a court should not use the approximation method.[218] Rather, in the latter scenario, the court should allocate custodial responsibility based on the child's best interests.[219]

According to the ALI, the best interest of the child standard is "too subjective to produce predictable results" because of its qualitative nature. [220] Further, its "unpredictability encourages strategic bargaining and prolonged litigation."[221] With its new allocation of custodial responsibility model, the ALI seeks to ensure predictability, consistency, stability, and ease in custody litigation; the ALI has urged state law makers to abandon traditional custody models that are unrealistic and based on "emotion-based aspirations about the future," in favor of one that the ALI believes is realistic and based on the actual expectations of the parties involved in the custody litigation.[222]

The approximation model seeks to accomplish many goals for both the child and her parents. Most importantly, the model seeks to "preserve the greatest degree of stability for the child's life" by relying on previously established patterns of caretaking.[223] In doing so, the child will experience minimal disruption, albeit some disruption is inevitable.[224] The model also

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[216] *See id.* § 2.08(2)-(3).

[217] *Id.* § 2.08(2) ("In determining the proportion of caretaking functions each parent previously performed for the child . . . , the court should not consider the division of functions arising from temporary arrangement after the parents' separation, whether those arrangements are consensual or by court order. The court may take into account information relating to the temporary arrangements in determining other issues under this section.").

[218] *Id.* § 2.08(3) ("If the court is unable to allocate custodial responsibility . . . because there is no history of past performance of caretaking functions, as in the case of a newborn, or because the history does not establish a sufficiently clear pattern of caretaking, the court should allocate custodial responsibility based on the child's best interests, taking into account the factors and considerations that are set forth in this Chapter, preserving to the extent possible this section's priority on the share of past caretaking functions each parent performed.").

[219] *Id.*

[220] *Id.* § 2.08 cmt. b.

[221] *Id.*

[222] *Id.*

[223] ALI PRINCIPLES, *supra* note 142, at § 2.08 cmt. B; *see also* Starnes, *supra* note 38 at 224.

[224] *See* ALI PRINCIPLES, *supra* note 142, § 2.08 cmt. b (discussing how post-divorce, a child's life—as well as the parents' lives—will not be the same as they were while the family was intact).

seeks to preserve parental autonomy.[225] By relying on previous patterns of past caretaking, a court quasi-defers to the arrangement that the parents believed was in the best interest of the child.[226] Deferring to a prior arrangement not only reduces conflict between the parents, but it also discourages "strategic bargaining and prolonged litigation."[227]

Although compelling, the approximation model has its drawbacks. For example, the approximation model can be seen as yet another gender based approach, in that it serves as a proxy for motherhood—like the tender-years doctrine[228] and the primary caretaker presumption[229]—since most primary caretakers are women.[230] Further, while the ALI approximation model has conceptual appeal, it is unrealistic for a majority of families. Divorce quickly uproots the family unit, so fashioning a custodial arrangement based on a past caretaking arrangement assumes that how a family lives apart does not differ from how the family lived together while intact. This assumption is inappropriate for the vast majority of families. Although the approximation model has not gained much traction among the states, the model is compelling.[231] It "encourages a new way of thinking about post-divorce parental responsibility" while also keeping up with current legal thinking that children generally benefit from shared-parenting arrangements.[232]

### B. *Joint Custody Presumptions*

The use of presumptions[233] in judicial custody determinations is not a new phenomenon.[234] Presumptive custody models such as the paternal

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[225] *See id.* (discussing how the approximation model does not draw a court into comparing parenting styles and values, matters which "are not appropriate for judicial resolution").

[226] *See id.* (explaining that relying on previously established patterns of past caretaking is "designed to correspond reasonably well to the parties' actual expectations, sometimes better than their own stated preferences at divorce.").

[227] Starnes, *supra* note 38, at 224; ALI PRINCIPLES, *supra* note 142, § 2.08 cmt. b.

[228] *S*ee *supra* Subsection I.A.2. for a brief discussion of the tender-years doctrine.

[229] *S*ee *supra* Subsection I.A.2. for a brief discussion of the primary caregiver presumption.

[230] *See supra* note 94 and accompanying text.

[231] *See* HARRY KRAUSE AND DAVID MEYER, BLACK LETTER OUTLINE ON FAMILY LAW, 214, (West, 4th ed. 2006) (explaining that as of today, only one state, West Virginia, has adopted the approximation standard).

[232] Starnes, *supra* note 38, at 224.

[233] *See Presumption*, BLACK'S LAW DICTIONARY (4th pocket ed. 2011) (explaining that in legal terms, a presumption is an "assumption that a fact exists.").

[234] *See* DiFonzo, *supra* note 82, at 213 ("Presumptions have played a decisive role in child custody determinations.").

preference rule, the tender-years doctrine, and the primary caregiver presumption dominated custody law for centuries and were eventually rejected in favor of the non-presumptive best interest of the child standard.[235] What is new, however, is the approach many states are now taking: presuming that a joint custody arrangement is in the best interest of the child.[236] Public perception of joint custody presumptions is favorable.[237] However, when a custody model places the interests of the child second to that of her parents, the model cannot stand.[238]

1. An Overview of Joint Custody Presumptions

In response to widespread criticism of the best interest of the child standard and the continuing embracement of shared parenting, courts have begun relying on a drastic new model for making custody determinations—the joint custody presumption.[239] This custody model is strikingly at odds with the best interest of the child standard, as it initially forgoes judicial decision making regarding the best interest of the child and places the interest of the child in second place.[240] Under this new model, instead of a judge awarding parents with joint custody after analyzing whether a joint custody arrangement is in the best interest of the child, a judge takes a legal shortcut—he *presumes* that a joint custody arrangement is in the best interest of the child.[241]

The specific language contained in joint custody presumption statutes varies considerably from state to state.[242] As noted by Professor Nancy Ver Steegh, states take one of two approaches regarding joint custody presumptions: "presumptions of general application" (general presumptions) or "presumptions arising at the request of the parents" (parental request presumptions).[243] New Mexico provides an example of the first approach, in which a joint custody presumption automatically arises in a child custody determination upon the parents' entry into the

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[235] *See supra* Sections I.A-B, II.A.

[236] *See infra* Section II.B.1 (discussing the various types of joint custody presumptions among the states).

[237] *See infra* Section II.B.2 (discussing the joint custody presumption movement).

[238] *See infra* Section II.B.3 (critiquing the use of joint custody presumptions and arguing for states to abandon the use of joint custody presumptions).

[239] *See* Ver Steegh & Gould-Saltman, *supra* note 124, at 263 ("Some believe that joint legal custody presumptions provide a transparent starting point for judicial decision-making.").

[240] *See* Davis et al., *supra* note 114, at 6.

[241] *Id.*

[242] *See* MINN. STAT. ANN. § 518.17 (West 2017);.N.M. STAT. ANN. § 40-4-9.1(A) (West 2017).

[243] *See* Ver Steegh & Gould-Saltman, *supra* note 124, at 263.

courtroom.[244] Under New Mexico law, "[t]here shall be a presumption that joint custody is in the best interests of a child in an initial custody determination."[245] New Mexico, like many other states, does not differentiate between joint legal custody and joint physical custody.[246]

In contrast, Minnesota law recognizes the joint custody presumption, however, the presumption does not automatically attach in every child custody determination.[247] Under Minnesota law, the presumption that joint legal or joint physical custody is in the best interest of the child is triggered if either parent, or both parents, request it.[248] Although the presumption strong, it is not absolute.[249] The presumption may be rebutted if domestic abuse has occurred between the parents.[250] If neither parent requests the presumption, Minnesota law requires judges to apply the best interest of the child standard, recognizing there is no starting point for or against joint custody.[251]

2. The Push for Presumptions

Today, the idea of joint custody presumptions has gained widespread support, as evidenced by a growing number of states considering shared parenting bills as well as survey responses indicating favorable public view of shared parenting.[252] In 2016, for example, twenty states considered shared parenting bills.[253] Additionally, in 2016, Public Policy Polling conducted a survey of 580 Maryland voters on their thoughts toward shared parenting and Maryland's child custody laws.[254] Seventy-nine percent of participants held the belief that mothers and fathers should be treated equally in child custody determinations.[255] Additionally, 63% of participants supported changing Maryland's laws to create a presumption that both joint legal and joint physical custody in the best interest of a child.[256] In contrast, only 15% indicated that they would oppose this

[244] *See* N.M. STAT. ANN. § 40-4-9.1(A) (West 2017).

[245] *Id*.

[246] See *id*.

[247] *See* MINN. STAT. ANN. § 518.17.

[248] *Id.* § 518.17(7), (9).

[249] *See id.* § 518.17(9).

[250] *Id*.

[251] *See id.* § 518.17(7).

[252] Robert Franklin, *It's a Landslide: Maryland Voters Endorse Shared Parenting*, BALTIMORE POST EXAMINER (Dec. 17, 2016) http://baltimorepostexaminer.com/landslide-maryland-voters-endorse-shared-parenting/2016/12/17

[253] *Id*.

[254] *Id*.

[255] *Id*.

[256] *Id*.

change.[257]

Other surveys, even those that have not solely focused on joint custody presumptions, provide similar results indicating a positive public perception of joint custody. For example, a 2008 Arizona study found that 90% of participants favored joint custody.[258] Additionally, a 2011 survey in Arizona, although possibly not a representative national sentiment, found that 70% of participants said that if they were family court judges, they would order children to spend equal time with each parent.[259] The views of American citizens are not unique.[260] In similar surveys conducted in the United Kingdom and Canada, researchers consistently find that 70%-80% of respondents favor shared parenting arrangements.[261]

The goal of joint custody presumptions is admirable in that it aims to ensure that both parents are continually involved in the child's life by encouraging them to share in the responsibilities and rights of raising their child.[262] Supporters urge that the use of joint custody presumptions can "provide a transparent starting point for judicial decision making," which the best interest of the child standard lacks.[263] Supporters also advocate for increased legislation favoring joint custody because they believe that joint custody awards are more in tune with the "modern family" of today.[264] In addition, supporters contend that joint custody presumptions can lead to predictable outcomes and eliminate gender bias in custody decisions.[265] Although the idea of a presumption that joint custody is in the best interest of the child is gaining support among state legislatures and constituents, the use of joint custody presumptions has many potential pitfalls.

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[257] *Id*.

[258] Linda Nielsen, *Shared Physical Custody: Does It Benefit Most Children?* 28 J. OF THE AM. ACAD. OF MATRIM. LAW. 79, 82 (2015) *(*citing Sanford L. Braver et al., *The Court of Public Opinion*, AFCC Annual Conference, Vancouver, British Columbia (2008)).

[259] Sanford L. Braver et al., *Lay Judgements About Child Custody After Divorce*, 17 PSYCHOL., PUB. POL'Y & L. 212, 234 (2011).

[260] *Id*.

[261] *Id*. at 218; *See also* Leading Women for Shared Parenting, *Polling and Voting Results on Shared Parenting*, http://lw4sp.org/polling-voting/.

[262] Ver Steegh & Gould-Saltman, *supra* note 124, at 263.

[263] *Id*.

[264] Erin Bajackson, Note, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIMONIAL LAW. 311, 323 (2013) (noting that father's rights group argue "that joint custody [is] a more accurate reflection of modern family roles").

[265] Maritza Karmely, *Presumption Law in Action: Why States Should Not Be Seduced into Adopting a Joint Custody Presumption*, 30 NOTRE DAME J. L., ETHICS & PUBLIC POL'Y 321, 32 (2016) (noting that once states began embracing the concept of joint custody, they recognized that joint custody arrangements are not proper if there has been a history of domestic violence among the parents).

3. The Problems with Joint Custody Presumptions

The term *presumption* is a dangerous word; it is considered among the "slipperiest member[s] of the family of legal terms."[266] Joint custody presumptions are especially dangerous because they run afoul to the fundamental purpose of judicial custody determinations—to craft a custody arrangement that is in the child's best interest.[267] By relying on presumptions to determine custody arrangements, judges put societal aspirations of equality above the needs of the child.[268] While joint custody presumptions seek to promote parental equality and ensure that children maintain meaningful relationships with their parents, joint custody presumptions are neither realistic nor effective in doing so.[269] Therefore, the use of presumptions in custody determinations must be reformed.

i. Generally

Presumptions can be categorized into two types: *mirror image* presumptions and *purely evidentiary* rebuttable presumptions.[270] A mirror image presumption arises on its own and is a mirror image of a burden of proof.[271] The party that opposes the presumption has the burden to present sufficient evidence to rebut the presumption.[272] For example, in the criminal law context, the state must prove a defendant's guilt beyond a reasonable doubt.[273] Here, the presumption would be that a defendant is innocent until proven guilty beyond a reasonable doubt.[274] The party opposing the presumption—i.e., the state—would then have the burden to present sufficient evidence to prove that the defendant was guilty beyond a reasonable doubt.[275]

In contrast, a purely evidentiary rebuttable presumption is one that arises after a party proves a predicate fact—it does not arise on its own.[276] In the context of premarital agreements, for example, the ALI suggests that a

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[266] KENNETH BROUN ET AL., MCCORMICK ON EVIDENCE 726 (West 7th ed. 2014).

[267] *See supra* note 53 and accompanying text.

[268] *See supra* notes 247-253 and accompanying text (describing survey research indicating that most respondents favor shared parenting arrangements).

[269] *See supra* notes 254-257 and accompanying text.

[270] Dorothy Fait, Vincent Wills & Sylvia Borenstein, *The Merits of and Problems with Presumptions for Joint Custody*, 45 MD. B.J. 12, 15 (2012).

[271] *Id*.

[272] *Id*.

[273] *Id*.

[274] *Id*.

[275] *Id*.

[276] *Id. See also*, Keith Hall, *Practitioners' Notes: Evidentiary Presumptions*, 72 TULANE L. REV. 1321, 1321-24 (1998). (discussing what is and what is not an evidentiary rebuttable presumption).

rebuttable presumption about the voluntariness of a signed premarital agreement arises if the party seeking to have a premarital agreement enforced shows that the agreement was executed at least thirty days before the marriage, both parties were advised of, and had the opportunity to, seek independent legal counsel, or if the parties did not seek counsel, the agreement states the terms in plain language.[277] Proof of the predicate facts in this example would then shift the burden of production to the opposing party to rebut either the presumed fact (that the premarital agreement was signed voluntarily) or the predicate facts.[278] Most presumptions are purely evidentiary presumptions.[279]

Joint custody presumptions are best categorized as mirror image presumptions because they arise automatically and require the parent opposing the presumption to provide evidence to rebut the presumption.[280] If the opposing parent is successful in rebutting the presumption, the burden would then shift back to the parent seeking the presumption.[281] In practice, mirror image joint custody presumptions "begin at the end: [they start] with the legal conclusion that [joint custody] is in the best interest of the child."[282] This is problematic because joint custody presumptions force judges to conclude that joint custody is in the best interest of the child without evidence to support the finding.[283] In effect, joint custody presumptions "appl[y] a legal 'conclusion' that is not universally true," particularly given research showing that joint custody arrangements are often *not* in the best interest of the child.[284] In addition, joint custody presumptions are criticized because they forego individualized decision making, which has long been the hallmark of custody determinations.[285]

Joint custody presumptions are also highly criticized because they arise in the very situations in which their use is most problematic—when parents disagree.[286] In these situations, critics oppose the use of joint custody

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[277] *See* ALI PRINCIPLES, *supra* note 142, § 7.04(3).

[278] *See* Fait, Mills & Borenstein, *supra* note 172, at 15.

[279] *See id.*

[280] *See id.*

[281] *See id.*

[282] Davis et al., *supra* note 114, at 6.

[283] *See* Ver Steegh & Gould-Saltman, *supra* note 124, at 265 ("General joint legal custody presumptions tacitly rest on a number of assumptions, but several unspoken assumptions are particularly troubling because the suppositions are not universally true for families.").

[284] Davis et al., *supra* note 114, at 6.

[285] *See* Ver Steegh & Gould-Saltman, *supra* note 124, at 266 ("[R]ed flag cases . . . warrant additional scrutiny rather than a one-size-fits-all solution.").

[286] *See id.* ("Parents who disagree about the advisability of shared decision-making, or who jointly oppose it, are not strong candidates for joint legal custody.").

presumptions—specifically, presumptions of general application—to settle disputes among feuding parents because disagreeing parents are thought to be the worst candidates for joint custody.[287] This is because the parents' inability to agree and cooperate with one another signals "more disagreement, potential danger, or parenting problems down the road."[288] It is conceptually difficult to understand how one can presume that a custody arrangement requiring tremendous amounts of communication and cooperation between parents is in the best interest of the child when parents have so thoroughly demonstrated their inability to communicate and cooperate with one another.[289] Shockingly, this is exactly how joint custody presumptions, operating as mirror image presumptions, work.

As noted by the Supreme Court in *Stanley v. Illinois*, when addressing the constitutionality of the presumption that an unwed father is not fit to care for his child, "[p]rocedure by presumption is always cheaper and easier than individualized determination."[290] The same is true of joint custody presumptions. The use of presumptions is cheaper than traditional best-interest decision making because the parents are not involved in costly and protracted custody litigation.[291] Further, the use of presumptions is easy for judges; they get to take a decision-making shortcut and forego an individualized determination of the child's best interests.[292] This is concerning because joint physical custody can easily be awarded, even if it is detrimental to the child, so long as the presumption is used.[293] As Justice White so profoundly expressed in *Stanley*, "when . . . procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities[,] . . . it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."[294] In the case of joint custody presumptions, they simply cannot stand in their current state.

ii. Specifically

Joint custody presumptions are not just conceptually problematic; they are also problematic in practice.[295] Allowing judges to forgo judicial

[287] *See id.*

[288] *Id*.

[289] *See infra* Section III.A (detailing the importance of communication and cooperation for parents involved in joint custody arrangements).

[290] Stanley v. Illinois, 405 U.S. 645, 656-57 (1972).

[291] *See* Fait, Mills & Borenstein, *supra* note, 172, at 17 ("[A] presumption of joint custody may result in a cheaper and shorter custody trial.").

[292] *See* Ver Steegh & Gould-Saltman, *supra* note 124, at 286.

[293] *See* Davis et al., *supra* note 114, at 7.

[294] *Stanley*, 405 U.S. at 656-57.

[295] *See supra* Section II.B.3.

decision making and to use a legal shortcut is troubling because for the vast majority of post-divorce families, joint custody arrangements are simply impractical and unworkable, and they cause more harm than good for both parents and children.[296] Most importantly, when joint custody presumptions are used, courts reduce the importance of the child's best interest—something that has always been paramount in custody determinations.[297] Because the rationales for using joint custody presumptions cannot be supported, the use of joint custody presumptions must be reformed.[298]

a. Impractical, Unworkable, and Harmful

For some divorcing parents, joint custody may work like a dream.[299] However, the reality for some parents is that joint custody is a nightmare—they simply cannot get along. This is especially troubling for joint legal custody arrangements because effective cooperation and communication is essential for a successful joint legal custody plan. For example, consider the story of Allison and Peter.[300] In *Nicita v. Kittredge*, the Superior Court of Connecticut was tasked with modifying an unworkable joint custody order between Allison and Peter.[301] Upon divorce, Allison and Peter *agreed* to joint legal custody of their children and indicated that all major decisions "shall be considered and discussed in depth by and agreed to by both parties to the greatest extent possible."[302] Additionally, the couple agreed to "exert their best efforts to work cooperatively in developing future plans consistent with the best interests of the children and in amicably resolving such disputes as may arise."[303] An agreement that may have started out with the best of intentions ended up being disastrous.[304]

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[296] *See infra* Sections III.A, III.B for a discussion of the perils of joint custody presumptions.

[297] *See infra* Section II.B.3.ii.

[298] *See infra* Section III.D.

[299] *See* Ver Steegh & Gould-Saltman, *supra* note 124, at 265 ("For some separating and divorcing parents, joint legal custody is safe, appropriate, and beneficial for children.").

[300] *See* Nicita v. Kittredge, No. FA010726151, 2004 WL 2284292 (Conn. Super. Ct. Sept. 22, 2004).

[301] *See id.* at *6 ("Based upon all of the above, it is clear to the court that the original orders in the judgment of dissolution must be modified in order to minimize contact between the parties and to minimize any opportunities the parties may have to continue to battle each other, all to the detriment of [the children]."). In the original order, the parties agreed to joint legal custody of the children, and Allison was awarded primary physical custody of the children. *Id.*

[302] *Id*.

[303] *Id.* at *1.

[304] *See id.* at *5 (explaining that "the parties' co-parenting of [their] children is a disaster").

Although Allison and Peter agreed to fully cooperate for the sake of their children, their conduct demonstrated otherwise.[305] While the parenting plan was in effect, Allison "consistently [took] unilateral action over the objection of or without seeking input from [Peter]."[306] Meanwhile, Peter consistently and rigidly "resist[ed] any attempt or position offered by [Allison] when she [did] seek his input."[307] For example, Allison and Peter agreed to make decisions about their children's religious upbringing together.[308] Without consulting with Peter, Allison decided to raise the children in the Jewish faith.[309] Peter was upset that Allison did not consult with him.[310] Allison then signed one of the children up for Hebrew school at times that interfered with Peter's weekend parenting time.[311] In response, Peter refused to allow his child to attend Hebrew school during his weekend time and also took the children to church on his weekends with them, ultimately sending the children mixed messages about their religion.[312]

The religion example is one of many examples of Allison and Peter's inability to co-parent.[313] In addition to the ongoing religious battle, Allison listed the children's step-father as "the father" and emergency contact on school activity registration forms to the exclusion of Peter.[314] Further, Allison regularly committed the children to activities during Peter's parenting without first consulting Peter.[315] Peter was no saint, though. He hired a private investigator a few days after the divorce in order to find evidence that Allison was unfit to serve as a parent.[316] When Peter was unsatisfied with the evidence, he hired three more investigators to find such evidence.[317] Peter would also call Allison "derogatory names and speak ill

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[305] *See id.* at *1. Allison and Peter's agreement specified that they would "exert their best efforts to work cooperatively in developing future plans consistent with the best interests of the children and in amicably resolving such disputes as may arise." *Id.*

[306] *Id.* at *2.

[307] *Id.*

[308] *See id.* at *1, *2. As of the date of divorce, Allison and Peter "had not committed to raising their children as either Jewish or Christian." *Id.* at *2.

[309] *See id.* at *2.

[310] *See id.*

[311] *See id.*

[312] *See id.*

[313] *See id.* at *2-*4 (noting that "the number of examples of inappropriate conduct by the parties is too numerous to list").

[314] *Id.* at *4.

[315] *See id.*

[316] *See id.* at *3. Peter was attempting to find evidence of the alleged alcohol abuse by Allison.

[317] *See id.*

of [her]" around the children.[318] Due to Allison and Peter's "inability to civilly co-parent their two children," the court amended the parenting plan to make it more workable.[319]

The story of Allison and Peter is not unique; many divorcing couples are incapable of cooperating with one another.[320] As noted in *Nicita*, actions like Allison's and Peter's can cause children "great emotional pain."[321] In a case like Allison and Peter's, continuing a joint legal custody arrangement creates the risk of inflicting, emotional and physical, harm on the children, which is not in their best interest.[322]

The same problems Allison, Peter, and their children faced can arise from a joint legal custody presumption. Presumptions assume that parents are able to cooperate effectively and communicate on matters relating to the child's best interests without any judicial fact finding to determine if they can. This is problematic because the parents most likely to be susceptible to the presumptions are the very parents who have not been able to work out an agreement amicably without judicial intervention.[323] It may be inferred that these high-conflict parents will also be unable to work amicably under a post-divorce joint custody arrangement post-divorce.[324] Since research has shown that prolonged exposure to parental conflict is harmful to children, and joint custody presumptions make the child's exposure to parental conflict inevitable, for the sake of the child, the law should not force high-conflict parents into a custody arrangement that can harm the child's wellbeing simply to ensure that parents are treated fairly.[325]

There is little research demonstrating that joint custody arrangements work in the long term. However, there are a plethora of studies questioning the stability and desirability of the agreements over time.[326] In their study of joint custody arrangements, Professors Mnookin and Maccoby found that over time, approximately half of all families did not maintain the joint

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[318] *Id.* at *5.

[319] *Id.*

[320] As noted by Professor Robert H. Mnookin, "only a minority of parents communicate comfortably" after a divorce. *Id.*

[321] *Id*.

[322] *See id*.

[323] *See* ABRAMS, CAHN, ROSS, MEYER & MCCLAIN, *supra* note 147, at 783 ("Most parents agree amount initial custody and visitation arrangements.").

[324] *See* Karmely, *supra* note 265, at 330 (noting that there is often animosity between parents who do not agree on a custody arrangement outside of the court system are the same parents "who will likely be ordered to presume joint custody").

[325] *See id.* ("The most consistent and well-documented concern about joint physical custody presumptions is its impact on high-conflict families.").

[326] *See* Davis et al., *supra* note 114, at 7.

custody arrangement initially ordered.[327] Another study found that only one-third of parents who were initially awarded joint custody preserved the arrangement over time.[328] Further, a study conducted by Susan Steinman showed that one-third of parents who originally volunteered to enter into a joint custody arrangement eventually opted for a sole custody arrangement because the arrangement was simply unworkable.[329] This research is concerning because it reveals that joint custody arrangements do not work for parents. If joint custody is unworkable for parents who entered joint custody arrangements with the best of intentions, it is highly unlikely that joint custody arrangements will work where joint custody is presumed to be in the best interest of the child, much to the dismay of one or both parents.

b. Putting Baby in a Corner

Although numerous custody models have developed over time, each with their own faults, they have all contained one common thread—the *child*.[330] As previously discussed, traditional best-interest decision making seeks to determine which parent will serve the best interests of the *child*;[331] the tender years doctrine presumes that the mother will inherently best serve the interests of the *child* because of her nurturing demeanor;[332] and the primary caregiver presumption, recognizing the importance of stability and continuity, presumes the child's primary caregiver best serves the interests of the *child*.[333] In contrast, joint custody presumptions primarily serve the interests of only one relevant party in custody determinations—the *parents*.[334]

When a joint custody presumption is used, it places the child second in terms of importance; the interests of her parents—mainly, equal treatment—come first.[335] This is true in both parental request states and

[327] *See* MACCOBY & MNOOKIN, *supra* note 106, at 103, 300.

[328] *See* Margaret A. Little, *The Impact of the Custody Plan on the Family: A Five Year Follow Up*, 30 FAM. CT. REV. 243 (1992).

[329] *See* Susan Steinman, *The Experience of Children in a Joint Custody Arrangement*, 51 AM. J. ORTHOPSYCHIATRY 403 (1981).

[330] *See supra* Part I for a discussion of the development of child custody models overtime.

[331] *See supra* Section I.A for a discussion of the best interest of the child standard.

[332] *See supra* Section I.B for a discussion of the tender-years doctrine.

[333] *See supra* Section I.B for a discussion of the primary caregiver presumption.

[334] *See* Victor, *supra* note 34, at 27 (noting that changing Michigan custody law, which is based on the best interest of the child, to presume that joint custody is in the best interest of the child would replace the law with one looking out for "the best interest of the parent").

[335] *See* Ver Steegh & Gould-Saltman, *supra* note 124, at 266 ("In the context of a joint legal custody presumption, the best interests analysis is supplanted by the presumption."); *see also* Victor, *supra* note 34, at 27 (noting that joint custody presumptions "provide[] for

general application states. When a presumption arises, either automatically or by parental request, judicial best-interest determination is abandoned.[336] Only when either parent rebuts the presumption will the judge engage in fact-intensive decision making to determine whether joint custody truly is in the best interest of the child.[337]

This is problematic for several reasons. First, presumptions have the effect of eliminating any judicial involvement in custody determinations.[338] Although trial judges possess near-limitless discretion in traditional best-interest decision making,[339] when acting pursuant to presumption statutes, judges are essentially stripped of their discretion.[340] This goes too far in the effort to reign in judicial discretion. Some decision-making discretion should be allocated to judges to determine whether a joint custody arrangement is in the best interest of the child. There is no one-size-fits-all family, so no one-size-fits-all model is appropriate; judges must continue to make custody determinations based on the facts and circumstances of each family instead of being mandated to award joint custody.[341] Further, eliminating judicial discretion leaves open the possibility that judges will make inappropriate custody determinations, and almost ensures continuing litigation between feuding parents. If presumptions persist, a judge, constrained by such limitations, may in practice rule no differently than a bystander flipping a coin to determine a custody arrangement since both would involve an almost equal amount of effort.

Further, when judicial discretion is eliminated, joint custody presumptions require judges to disregard their fundamental role as *parens patriae* to do what is best for the child.[342] This sends the message that the

specific and substantially equal periods of parenting time without regard to the child's best interest").

[336] *See* Davis et al., *supra* note 114, at 5 ("The apparent appeal of the presumption comes at a cost, however: it takes consideration of the child's best interests out of the calculus altogether.").

[337] *See* Ver Steegh & Gould-Saltman, *supra* note 124, at 266 ("Unless specifically provided otherwise by statute, a best interests analysis is only undertaken in the event that the presumption is successfully rebutted by one or both parents.").

[338] See *id*.

[339] For a discussion of the harmful effects of judicial discretion in best-interest decision-making, see *supra* Subsection I.A.3.

[340] *See* Lyn R. Greenberg, Dianna J. Gould-Saltman & Robert Schneider, *The Problem with Presumptions—A Review and Commentary*, 3 J. CHILD CUSTODY 139, 150 (2008) (noting that joint custody presumptions "tie[] the hands of decision-makers"); *see also* Victor, *supra* note 34, at 27 ("However, mandatory and presumptive guidelines . . . bind family court judges from the discretion they require when hearing cases.").

[341] *See* Victor, *supra* note 34, at 27 (noting that custody determinations are not "black-and-white issues").

[342] *See* Dorothy R. Fait, Vincent M. Wills & Sylvia F. Borenstein, *The Merits of and*

interests of the child come second to that of her parents; that she is a "ragdoll" who is "tossed in the corner."[343] There is no question that divorce may have harmful effects on children, especially in highly contested custody disputes—the sort of disputes in which the presumption is likely to arise.[344] Because of this, the paramount concern for judges should be what is best for the child, not for her parents. The law must recognize that "[n]obody puts Baby in a corner."[345]

c. Economic Consequences

The impracticality and unworkability of joint custody arrangements can also have hidden economic consequences.[346] Consider, for example, a joint custody arrangement between a mother and father who have active young children, always going to and from their mother's house, their father's house, school, and their extracurricular activities. Because of the day-to-day challenges of parenting and scheduling conflicts, the parents inevitably fail to follow the custody arrangement. Instead, without complaint from the father, the mother takes over the majority of the child's daily care, and the custody arrangement begins to resemble a sole custody arrangement.[347] The mother now bears additional financial burdens that come with sole parenting. These burdens would be further exacerbated if the mother was not receiving—or receiving very little—child support from the father.

What now? Would the father willingly give money to his ex-spouse if it were for the benefit of his children? If the father were making child support payments, how would they be impacted? Could the mother successfully seek a modification of child support due to these new circumstances? Could the parents simply seek a new custody arrangement because they found out the harsh reality that what was statutorily presumed to be

*Problems with Presumptions for Joint Custody*, 45 MD. B.J. 12, 15 (2012) ("Certain members of the judiciary contend that a presumption of joint custody may remove or interfere with a trial judge's discretion in matters of custody.").

[343] *See* Starnes, *supra* note 40, at 123.

[344] *See* Fait, Mills & Borenstein, *supra* note 172, at 16. ("Psychologists and domestic violence groups take issue with the fact that, while most custody cases settle (the statistic most frequently cited is about ninety percent), the minority ten percent of cases that are actually litigated usually represent the cases involving high conflict between the parents, which of course is detrimental to the child.").

[345] DIRTY DANCING (Great American Films Limited Partnership 1987).

[346] *See supra* Subsection II.B.3 (discussing the impracticality and unworkability of joint custody arrangements).

[347] A situation like this could easily arise with the father taking over the majority of the child's daily care. I provide the mother of the parent taking over the majority of the child's daily care as the example because most primary caretakers are women.

workable simply was not? Probably not.[348] The burden would be on the mother to initiate and pursue proceedings to modify custody and/or child support, and in doing so she will incur transaction costs in the process.[349] Based on the circumstances prompting the modification actions, she would be less able bear the burden than the father.[350] Since the answers to the preceding questions are most likely "no," joint custody arrangements should not be presumed best in every family.

Critics also argue against joint custody presumptions—in particular, joint physical custody presumptions—because they are not economically feasible.[351] When parents are awarded joint physical custody, they must both maintain homes suitable for a child, which can be quite costly.[352] As a result, the child suffers because there would be fewer resources for her—each parent will likely offer less individually than they could offer jointly.[353] Before a joint custody presumption is presumed workable, courts should inquire into whether a parent's economic state can allow him or her to sufficiently provide for the child.

d. Continuing Litigation

Proponents of joint custody presumptions often argue that the use of presumptions will significantly reduce custody litigation.[354] However, research has not demonstrated this to be the case.[355] Due to the inherent impracticality of joint custody presumptions, it is likely that they will actually increase custody litigation.[356] This was demonstrated in *Nicita*, in which over seventy-five motions were filed with the trial court in effort to modify the unworkable joint custody arrangement.[357] Thus, although joint custody presumptions seem to promote administrative efficiency, in

[348] *See* Karmely, *supra* note 265, at 329-30 (noting that most parents are not able to judicially enforce a joint physical custody parenting plan because courts will not enforce parenting plans through contempt actions).

[349] I am grateful to Professor Cynthia Lee Starnes for providing insight on the burdens faced by mothers (or fathers placed in similar situations) to modify custody and/or child support awards.

[350] *Id.*

[351] Karmely, *supra* note 265, at 329.

[352] *See id.*

[353] *Id.*

[354] Greenberg et al., *supra* note 340, at 145.

[355] *See id.* at 146 ("We have found no controlled studies demonstrating that determinative custody presumptions . . . have been effective in reducing child custody litigation.").

[356] *See supra* Subsection III.A.2.c.

[357] *See* Nicita v. Kittredge, No. FA010726151, 2004 WL 2284292 (Conn. Super. Ct. Sept. 22, 2004).

practice, they can produce significant administrative burdens.[358] This can be harmful to the child because re-litigation and exposure to unresolved conflict in the long-term are considered to be among the most harmful aspects of a family breakup to a child.[359]

e. Domestic Violence Concerns

Critics of joint physical custody presumptions are also greatly concerned with the negative implications that joint physical custody can have on families experiencing domestic violence.[360] Part of this criticism stems from research that suggests abusive parents are not just poor candidates for physical custody generally, but for joint physical custody as well.[361] One major concern regarding joint physical custody in a family that has experienced or continues to experience domestic violence is that joint physical custody requires frequent and ongoing contact between the domestic violence perpetrator (abuser) and the child, and, most significantly, requires ongoing contact between the abuser and the victim parent.[362] This is concerning because when joint physical custody is awarded, it allows the abuser to maintain control of, and continue to abuse and harass, the victim parent.[363] Control, abuse, and harassment could occur in person when the child is exchanged between mother and father, by the abuser blaming the victim parent for the family dissolution, either to that parent or to the child, instructing the child not to obey the victim parent, or engaging in "perpetual [custody] litigation," which takes a strong emotional and financial toll on victim parents.[364]

Further, exposure of abuse can be harmful and highly stressful to children.[365] For example, research has suggested that perpetrators of

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[358] *See* Davis et al., *supra* note 114, at 21.

[359] ABRAMS ET AL., *supra* note 147, at 658; Susan W. Savard, *Through the Eyes of a Child: Impact and Measures to Protect Children in High-Conflict Family Law Litigation*, 84 FLA. B.J. 57 (2010).

[360] *See* Ver Steegh & Gould-Saltman, *supra* note 124, at 265 ("For those with a history of intimate partner violence, child abuse, substance abuse, mental illness, or deep-seated and unresolved disagreements on major parenting issues, joint legal custody will exacerbate problems and trap children in untenable situations.").

[361] *See* Davis et al., *supra* note 114, at 12.

[362] *Id*. at 12.

[363] *See* Peter G. Jaffe, Janet R. Johnston, Claire V. Crooks & Nicholas Bala, *Custody Disputes Involving Allegations of Domestic Violence: Toward A Differentiated Approach to Parenting Plans*, 46 FAM. CT. REV. 500, 501 (2008) ("Spousal abuse does not necessarily end with separation of the parties.").

[364] *See* Jaffe et al., *supra* note 363, at 503-04; Peter G. Jaffe et al., *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interest*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 81, 82-83 (2005).

[365] *See* Davis et al., *supra* note 114, at 12-13.

domestic violence "serve as poor role models for their children"[366] and have difficulties establishing a "meaningful parent-child relationship[s]."[367] Abusive parents can be so engrossed in their abusive actions that they forget about the needs of their children or place them in the middle of the abuse.[368] Additionally, even if the abuser does not have physical access to the victim parent, the potential for abuse continues to exist in alternative forms. In fact, research has shown that between 30% and 60% of children whose mothers had been abused are likely to be abused themselves.[369] In these situations, instead of abusing the victim parent, the abuser often channels their violence onto the child.[370]

f. Parental Inequities

Proponents of joint custody presumptions also argue that the use of presumptions places both parents on "equal footing" during custody determinations.[371] This is thought to "level the playing field" among parents because neither parent would be preferred over the other.[372] However, in practice, joint custody presumptions do not promote this type of equality.[373] Rather, joint custody presumptions create a "profound imbalance of power between parents who disagree" because of the presumptions' burden shifting approach.[374] For example, when used in child custody litigation, a mirror-image presumption requires the parent opposing the presumption to provide sufficient evidence to rebut the presumption and ultimately shifts the burden of persuasion to him or her. Rather than placing both parents on equal footing, presumptions work to disfavor the parent who opposes joint custody and places no burden on the parent seeking the presumption.

Critics also note that joint custody presumptions are harmful to parents who are "poorly positioned to rebut them," such as victims or domestic

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366 *See* Davis et al., *supra* note 114, at 12.

367 Jaffe et al., *supra* note 363, at 515.

368 Davis et al., *supra* note 114, at 13.

369 Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Women Battering*, 5(2) VIOLENCE AGAINST WOMEN 134 (1999).

370 *See* Jaffe et al., *supra* note 363, at 502 ("Perpetrators of domestic violence are more likely to be deficient if not abusive as parents.").

371 Ver Steegh & Gould-Saltman, *supra* note 124, at 267.

372 A "level playing field" is one in which "both parents enter negotiation or the legal system without either being equipped with special rights or privileges. Each parent has the opportunity and the obligation to provide information bearing on the needs and interests of the child. *Id.*

373 *See* Ver Steegh & Gould-Saltman, *supra* note 124, at 267.

374 *Id*.

violence or unrepresented parents.[375] For example, in a presumption state, if a victim of domestic violence opposes the presumption of joint custody due to domestic violence issues, it is likely that he or she will not attempt to rebut the presumption because of threats from the abusive parent or fear of not being believed.[376] In addition, an unrepresented parent seeking to rebut the joint custody presumption may suffer because the parent does not likely have the knowledge or financial ability to attempt to rebut the presumption.[377] In both scenarios, the opposing parent is unable to bring to the court's attention that joint custody may not be in the best interest of the child. Instead, these vulnerable parents—as well as the child—suffer from a custody regime which inherently values procedure over substance and fails to actually "level the playing field" among parents.[378] A proper custody model is one that would "level the playing field" for parents while also placing concern for the interest of the child back in the game.

## IV. PUTTING THE CHILD FIRST AGAIN

Today, child custody law seeks to further the public policy of "assuring that children will have frequent and continuing contact with parents who have shown the ability to act in their best interest, and to encourage parents to share in the rights and responsibilities of raising their children after divorce or separation."[379] In some cases, joint custody arrangements can advance this policy. However, a presumption that joint custody is in the best interests of all children is an inappropriate tool for protecting children because too many parents are poor candidates for joint custody.[380] Because of the perils of joint custody arrangements, a presumption that joint custody is in the best interest of the child—whether it be joint legal custody or joint physical custody—should not automatically attach upon the parents' entry

[375] *See id*. (noting that domestic violence survivors and unrepresented parents are "least equipped to rebut [a joint custody] presumption").

[376] *See id*.; Jaffe et al., *supra* note 363, at 82 ("Perpetrators may use perpetual litigation as a form of ongoing control and harassment.").

[377] *See* Ver Steegh & Gould-Saltman, *supra* note 124 (noting that unrepresented parents may not understand how to rebut a joint custody presumption).

[378] *See id*.

[379] TEX. FAM. CODE ANN. § 153.001 (West 2017). This language is not specific to Texas. Many states use similar language in their statues to promote this overall policy. *See, e.g.*, ALA. CODE § 30-3-150 (West 2017) ("It is the policy of this state to assure that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children and to encourage parents to share in the rights and responsibilities of rearing their children after the parents have separated or dissolved their marriage.").

[380] For a critique of joint custody presumptions, see *supra* Subsection II.B.3.

into a courtroom or upon the mere request of one or both parents.[381] Instead, if the use of joint custody presumptions is going to continue to shape the legal landscape of judicial custody determinations, their use must be reformed.[382] Joint custody presumptions should operate as evidentiary rebuttable presumptions, rather than mirror image presumptions, and should only arise after triggering facts are established by the parenting seeking a presumption.[383] A parent seeking a presumption that joint legal custody is in the best interest of the child should have to prove that he or she is able to communicate and cooperate with the other parent. A parent seeking a presumption that joint physical custody is in the best interest of the child should have to prove that he or she has the ability to communicate and cooperate with the other parent, has a close relationship with the child, has adequate resources to support the child, lives in close proximity with the child, is otherwise fit. This change to the law would ensure that the interests of the child remain paramount in every judicial custody determination and promote the healthy adjustment and development of the child.

### A. *The Joint Legal Custody Presumption: Communication and Cooperation*

The confusion regarding the definition of joint custody further complicates custody determinations.[384] The texts of many state statutes conflate the terms joint legal custody and joint physical custody into one term—joint custody.[385] This is perplexing, especially in presumption states, because the two types of custody differ so significantly.[386] Because of the differences between joint legal custody and joint physical custody, requirements for a successful joint legal custody arrangement differ from the requirements for a successful joint physical custody arrangement. As for joint legal custody, when making major life decisions for the child together, it is essential that the parents are able to communicate and cooperate effectively with one another.[387]

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[381] *See supra* Subsection II.B.1 (discussing the different types of joint custody presumptions).

[382] *See infra* Section III.A.

[383] *See infra* Subsections III.A.1-2.

[384] *See supra* notes 123-129 and accompanying text.

[385] *See, e.g.*, ALA. CODE § 30-3-151 (West 2017) ("Joint legal custody and joint physical custody."); GA. CODE ANN. § 19-9-6(4) (West 2017) ("Joint custody" means joint legal custody, joint physical custody, or both joint legal custody and joint physical custody.").

[386] *See supra* Subsection I.B.1 (discussing the differences between legal custody and physical custody).

[387] For a discussion of the importance of communication and cooperation, see *infra* Subsection III.A.1.

Finding consensus about a topic of law is a difficult—if not impossible—task. However, when it comes to joint legal custody arrangements, legal scholars, judges,[388] psychologists,[389] and activists[390] all agree that joint custody works best for families that are able to communicate and cooperate with one another. In fact, Professor Michael E. Lamb notes that a recent review by social scientists of more than one thousand studies of childhood adjustment over the past fifty years concluded that one of three "most important factors that promote healthy development and adjustment" in children and adolescents is the quality of the relationship between his or her parents.[391] Among the most prevalent concerns with joint legal custody arrangements generally, and with the use of joint legal custody presumptions specifically, is the inability of parents to cooperate and work amicably with one another to act in the child's best interest, as the failure to do so can have harmful effects on the child.[392] To avoid a disastrous situation as in *Nicita v. Kitteridge*, the parent seeking a joint legal custody presumption should have to prove to the court that he or she has been able to communicate and cooperate amicably with the other parent, both when the family was intact and when the family was apart, and provide assurance to the court that he or she will continue to do so.[393]

Providing evidence of parent's ability to communicate and cooperate with the other parent to the court may not be an easy task, but it is possible. The parent seeking a joint legal custody presumption should be required to

[388] *See, e.g.*, *Farrell v. Farrell*, 819 P.2d 896, 899 (Alaska 1991) ("[J]oint legal custody is only appropriate when the parents can cooperate and communicate in the child's best interest."); *Darvarmanesh v. Gharacholou*, No. M2004-00262-COA-R3CV, 2005 WL 1684050, at *217 (Tenn. Ct. App. July 19, 2005) (quoting Dodd v. Dodd, 737 S.W.2d 286, 290 (Tenn. Ct. App. 1987)) ("[I]n order for a joint custody arrangement to serve the best interest of the child, it requires a "harmonious and cooperative relationship between both parents.").

[389] *See* Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Development*, 16 APPLIED DEVELOPMENTAL SCI. 98, 99 (2012) (noting that one of "the most important factors that promote healthy development and adjustment" in children and adolescents is "[t]he quality of the relationships between the parents and other significant adults.").

[390] *See* Blanchette, *supra* note 8. As noted by the director of legislative affairs for the Illinois State Bar Association, "it will take a lot of cooperation and good will with the parents in every case to make a shared-custody decision work, with parents who have often demonstrated serious problems getting along with each other." *Id.*

[391] *See* Lamb, *supra* note 389 at 99.

[392] Lamb, *supra* note 389, at 99 (noting that conflict between the parents "is associated with maladjustment while harmonious relationships between the adults support healthy adjustment.").; *see also* Subsection II.B.3.a.i 389.

[393] *See generally Nicita v. Kittredge*, No. FA010726151, 2004 WL 2284292 (Conn. Super. Ct. Sept. 22, 2004).

provide testimony, witnesses, phone records, and/or email records to prove to the court that he or she has been able to communicate and cooperate with the other parent, and agree to continue to do so.[394] Tensions do run high when parents are considering and going through a divorce, so it would be unrealistic for the parent seeking the presumption to provide the court with evidence of saint-like qualities. Due to the tensions of divorce and the fallacies of human nature, the parent seeking a joint legal custody presumption may have used distasteful language towards the other parent or may not always have fully cooperated with the other parent, both during the marriage and post-separation. If the parent has done so, instances like these should not be used to the detriment of the parent seeking the joint legal custody presumption. As long as there is no evidence showing that the parent seeking the joint legal custody presumption has been hostile, threatening, or coercive toward the other parent, or that the parent has systematically failed to cooperate, he or she should satisfy the communication and cooperation standard.[395]

In essence, the parent seeking a joint legal custody presumption would have to ask the court to embrace the psychological principle that past performance is indicative of future performance.[396] Unfortunately, problems may arise if the presumption-seeking parent is suddenly uncooperative and fails to communicate with the other parent after a custody arrangement is crafted. If this were the case and a joint custody arrangement were in operation, the other parent could seek a modification of the custody arrangement based on a change in circumstances, just as many states currently allow.[397] However, one instance of failure to cooperate should not warrant a change in the custody arrangement.[398] Rather, the other parent should have to show pervasive and repetitive behavior by the parent who sought the presumption that has interfered with the best interest of the child.[399] Thus, if the presumption-seeking parent

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[394] Phone records should include voicemail messages, text messages, and call logs.

[395] *See, e.g.*, *T.M.C. v. S.A.C.*, 858 P.2d 315, 319 (Alaska 1993) ("Sustained noncooperation between the spouses is grounds for denying joint custody, because lack of cooperation hinders good communication in the best interests of the child.").

[396] *See* Karen Franklin, *"The Best Predictor of Future Behavior is . . . Past Behavior" Does the Popular Maxim Hold Water?*, PSYCHOLOGY TODAY (Jan. 3, 2013), https://www.psychologytoday.com/blog/witness/201301/the-best-predictor-future-behavior-is-past-behavior (noting that the principle "the best predictor of future behavior is past behavior" has been circulated in psychological literature of decades).

[397] *See, e.g.*, MICH. COMP. LAWS § 722.27(1)(c) (providing for a modification of a custody arrangement for "proper cause shown" or for a "change of circumstances").

[398] *See, e.g.*, *T.M.C.*, 858 P.2d at 319.

[399] *See id.*; Nicita v. Kittredge, No. FA010726151, 2004 WL 2284292, at *5–6 (Conn. Super. Ct. Sept. 22, 2004).

satisfies the communication and cooperation standard, the court may then properly presume that joint legal custody is in the best interest of the child.

### B. *The Joint Physical Custody Presumption: Communication, Cooperation, and then Some*

The ability of parents to communicate and cooperate is not only crucial for joint legal custody arrangements; it is also crucial for joint physical custody arrangements. If parents are poor candidates for joint legal custody because of their inability to communicate and cooperate, they are also poor candidates for joint physical custody because joint physical custody arrangements also involve communication and cooperation between the parents.[400] Since joint physical custody differs so significantly from joint legal custody, the requirements of the parent seeking a presumption that joint physical custody is in the best interest of the child should extend beyond proving his or her ability to communicate and cooperate with the other parent.[401] Just as joint physical custody requires more from each parent—more time, more energy, more money, etc.—a presumption that joint physical custody is in the best interest of the child too requires more.[402]

#### 1. Close Relationship

In addition to the communication and cooperation factor, the parent seeking a joint physical custody presumption should also have to prove that he or she has a close relationship with the child, something many states already consider when crafting custody arrangements.[403] Research has shown that another one of the "most important factor[s]" to promote healthy development and adjustment for the child is the quality of the child's relationship with her parents.[404] Because of the importance of parental

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[400] For example, parents would have to coordinate things such as drop off times and schedule changes. Further, parents who share physical custody of the child also commonly share legal custody of the child, thus evidencing that the two types of custody work hand in hand with one another.

[401] *See supra* Subsection I.B.1 (discussing the differences between legal custody and physical custody).

[402] *See infra* Subsections III.B.1-4.

[403] *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/602.7(b)(5) (listing as a factor for considering whether a custody arrangement is in the child's best interest is "the interaction and interrelationship of the child with his or her parents"); IND. CODE ANN. § 31-14-13-2(4)(A) (listing as a factor for considering whether a custody arrangement is in the child's best interest is "[t]the interaction and interrelationship of the child with . . . the child's parents").

[404] *See* Lamb, *supra* note 389, at 99. This does not only include biological parents, but other parental figures as well.

relationships and the impact of those relationships on the child's healthy adjustment and development post-divorce, the parent seeking a joint physical custody presumption should be required to prove the existence of a close relationship with the child.[405] The existence of a close relationship should be established through testimony or interviews from the parent, the child, and others that know the family well.

Unfortunately, the concept of a "close relationship" is a bit nebulous. The parent seeking the joint physical custody presumption should not have to show that he or she partakes in the majority of child care—so as to not disadvantage career-oriented parents—or that the child comes to him or her first whenever she has a problem or seeks advice. Instead, the court should look to factors such was whether the parent is actively involved in the child's life and whether the child feels a connection to the parent.

2. Resources

Research has further demonstrated that the quality of the social, economic, and physical resources available to the parents is among one of the "most important factor[s]" to ensure a stable life for the child post-divorce."[406] Therefore, the parent seeking a joint physical custody presumption should be required to show that he or she has such resources. The parent seeking the presumption would not need to prove that he or she is among the most affluent or that he or she is better off than the other parent. In an ideal world, if the presumption-seeking parent has a low income, it would not weigh against him or her in a custody contest because it would be unfair to do as long as he or she has met all of the other factors. Any financial inequities among the parents should be resolved through child support rather than through refusal to award a presumption-seeking parent joint custody of his or her child. Ideally, child support would solve any potential burdens the presumption-seeking parent has. However, many believe that child support payments are inadequate.[407]

Instead of the presumption-seeking parent proving that he or she has superior resources, the parent would need to prove that he or she has available resources to sustain a healthy, stable life for the child. For example, courts should follow the example of Texas courts and consider whether the parents are willing and able to provide "minimally adequate health and nutritional care" and "whether an adequate social support system consisting of an extended family and friends is available to the child."[408]

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[405] *See id*.

[406] The availability of adequate resources is associated with health adjustment, and poverty and social isolation is associated with maladjustment. *Id.*

[407] I'm grateful to Professor Cynthia Lee Starnes for this insight.

[408] TEX. FAM. CODE ANN. § 263.307 (West 2017).

Since the quality and availability of resources a parent has is not directly correlated with his or her ability to make decisions for the child, this requirement should not be relevant for a joint legal custody presumption.

3. Proximity

The parent seeking a joint physical custody presumption should also be required to prove that he or she lives in close proximity to the other parent, thus making a joint physical custody arrangement more practical and workable than it would be if the parents lived far from one another. This should be a requirement because experts have agreed and courts have acknowledged that joint physical custody agreements work best when parents live in close proximity to one another.[409] This is because joint physical custody arrangements, like joint legal custody arrangements, require a great deal of communication and cooperation in order to be workable for the family post-divorce.[410] If, for example, the parents lived across the street or even across the town from one another, a joint physical custody agreement among amicable parents is likely workable because proximity promotes communication and cooperation. On the other hand, if the parents lived across the state or even across the country, a joint physical custody agreement would be highly impractical because the lack of proximity would make it easier to avoid communication and cooperation. Living in close proximity to one another is not necessary to ensure a workable joint legal custody arrangement because the distance between two parents' homes is not a dispositive factor in whether parents can communicate and cooperate with one another.[411] Decisions regarding the child do not need to be made face-to-face; they can easily be made over the phone, by email, or by text message.

Requiring the parent seeking a joint physical custody presumption to prove that he or she lives in close proximity to the other parent also helps foster stability and continuity in the child's life, factors that are of paramount concern.[412] Parents who live in close proximity to one another are able to ensure shorter travel times between the two homes, that the child is able to participate in extracurricular activities and sports teams, and that the child is still involved in her social network.[413] As for the child's

[409] *See, e.g.*, Baldwin v. Baldwin, 265 Ga. 465, 458 S.E.2d 126 (Ga. 1995) ("[T]he trial court must give due consideration to the feasibility of a joint custody arrangement.").

[410] *See supra* Subsection III.A.

[411] *See* ALI PRINCIPLES, *supra* note 142, at § 2.09 cmt. c ("[P]arents who have demonstrated an ability cooperate can often make important decisions together about the child, even from a considerable distance.").

[412] *See* Taylor v. Taylor, 508 A.2d 964, 970 (Md. Ct. App. 1986)

[413] *See* Victor, *supra* note 34, at 27-28 (advocating against the use of joint custody presumptions because "[n]o consideration is given to where the parents live or the distance a

schooling specifically, part of the close proximity test would require the parent seeking the presumption to prove that the child would be able to attend the same school to further ensure stability and continuity in the child's life.[414]

This close proximity test may seem a bit fuzzy since "close proximity" is an ambiguous term. No bright line rule should be set regarding how many miles apart the two parents live when determining whether the parents live in close proximity to one another; the parents may live twenty miles apart in a rural setting or three miles apart in an urban setting. Rather, a judge must determine whether the parents live close enough to one another to ensure that a joint physical custody arrangement is workable for the parents and, most importantly, beneficial for the child.

4. Fitness

Presumptive joint physical custody opponents are particularly concerned with awarding joint physical custody when one parent has engaged in domestic violence, child abuse, or substance abuse because of the harmful effects each can have on the child.[415] These concerns continue to influence state custody legislation, both in states that have joint custody presumptions and those that do not.[416] For example, in Alaska, a non-presumption state,[417] and in Alabama, a presumption state,[418] there is a rebuttable presumption against joint custody if domestic violence has occurred.[419] In

child must travel between homes for shared and equal parenting time. No consideration is given to where a child attends school. No consideration is given to whether a child is enrolled in activities and events such as school groups, extracurricular activities, and outside sports teams, which are healthy for social development, and the effect distance and need for travel

during school time will have on this aspect of a child's life . . . No consideration is given for a child's social network, including friends and events, which would otherwise be part of his or her growth and maturity").

[414] *See Taylor*, 508 A.2d at 970 (detailing the importance of stability and continuity).

[415] *See supra* Subsection II.B.3.b.iv (describing concerns about domestic violence).

[416] *See* Peter G. Jaffe, Claire V. Crooks, & Hon. Frances Q.F. Wong, *Parenting Arrangements After Domestic Violence: Safety as a Priority in Judging Children's Best Interest*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 81 (2005) ("[A]ll states have recognized domestic violence as an important factor in determining child custody and visitation plans.") (citing 1–10 NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, FAMILY VIOLENCE: LEGISLATIVE UPDATE (1995–2004).

[417] *See* ALASKA STAT. ANN. § 25.24.150(c) (West 2017) ("The court shall determine custody in accordance with the best interests of the child.").

[418] *See* ALA. CODE § 30-3-152(c) (West 2017) ("If both parents request joint custody, the presumption is that joint custody is in the best interest of the child.").

[419] *See* ALA. CODE § 30-3-131 ("In every proceeding re is at issue a dispute as to the custody of a child, a determination by the court that domestic or family violence has

contrast, other states consider domestic violence as a factor to be considered, but a showing of domestic violence does not automatically rebut the presumption that joint custody is in the best interest of the child.[420] States also often consider family violence—including child abuse—when crafting custody arrangements. Indiana, for example, instructs its courts to consider both domestic violence and family violence.[421]

The same is true regarding the abuse of controlled substances or alcohol. In California, for example, courts are required to consider a parent's "habitual" or "continual" use of illegal controlled substances, prescribed controlled substances, and alcohol when making custody determinations.[422] To alleviate concerns that arise from the unfitness of a parent, the parent seeking a joint physical custody presumption should be required to prove that there have been no instances of domestic violence, child abuse, or substance abuse. If the opposing parent alleges there have been instances of domestic violence, substance abuse, or child abuse, the court should not simply rely on the statements of the opposing parent. Rather, the court should be able to require the opposing parent to provide corroborating evidence such as testimony from third parties or documentation and reports from law enforcement officials, medical facilities, child protective services, or other agencies.[423]

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occurred raises a rebuttable presumption by the court that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of domestic or family violence."); ALASKA STAT. ANN. § 25.24.150(g) ("There is a rebuttable presumption that a parent who has a history of perpetrating domestic violence against the other parent, a child, or a domestic living partner may not be awarded sole legal custody, sole physical custody, joint legal custody, or joint physical custody of a child.").

[420] *See, e.g.*, ALASKA STAT. ANN. § 25.20.090(8) (West 2017); MICH. COMP. LAWS ANN § 722.23(k) (West 2017)

[421] IND. CODE ANN. § 31-14-13-2(7) (West 2017) ("Evidence of a pattern of domestic or family violence by either parent."). Other states are more explicit in their statutes. For example, California requires its courts to consider "any history of abuse by one parent or any other person seeking custody against . . . [a]ny child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary." CAL. FAM. CODE § 3011(b)(1) (West 2017).

[422] *See* CAL. FAM. CODE § 3011 ("The habitual or continual illegal use of controlled substances, the habitual or continual abuse of alcohol, or the habitual or continual abuse of prescribed controlled substances by either parent.").

[423] *See id.* California requires its courts to "require independent corroboration, including, but not limited to, written reports from law enforcement agencies, courts, probation departments, social welfare agencies, medical facilities, rehabilitation facilities, or other public agencies or nonprofit organizations providing drug and alcohol abuse services." *Id.*

### C. *Shifting the Burden*

If the parent seeking a joint custody presumption, whether it be joint legal custody, joint physical custody, or both, proves the required predicate facts entitling him or her to a presumption, the burden to rebut the presumption should then shift to the other parent.[424] The opposing parent should then be required to present evidence refuting any of the four factors in order to rebut the presumption.[425] If the parent successfully rebuts the presumption, the judge should not presume that joint custody is in the best interest of the child. On the other hand, if the parent seeking a presumption does not prove all the predicate facts outlined above, he or she should not be entitled to a presumption that joint custody—either joint legal custody or joint physical custody—is in the best interest of the child. If a presumption is rebutted by the opposing parent or the parent seeking the presumption fails to meet his or her burden, the judge should default to the custody allocation model of the state. Based on the pros and cons of numerous custody models, the state model should be the ALI's approximation standard, as opposed to the usual best interest of the child standard, because the ALI model is a substantial improvement over the discretionary best interest of the child standard.[426]

### D. *Defending Reform*

Joint custody presumptions have proved to have widespread conceptual appeal.[427] However, what is unappealing is the fact that the use of joint custody presumptions in their current state as mirror image presumptions requires courts to consider the best interest of the parents before the best interest of the child.[428] This proposal seeks to abandon this procedure and place the interests of the child first again by requiring some judicial insight into the dynamics of each family when using joint custody presumptions in

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[424] This is similar to traditional evidentiary burden of persuasion. *See generally* FED. RULE EVID. 301.

[425] *See* Hall, *supra* note 276, at 1324 (describing how presumptions are applied and noting that once one party proves a predicate fact(s), he or she will win unless the adversarial party satisfies his or her "burden of production by presenting evidence to rebut the presumption"). (citing LA. EVID. CODE ANN. art. 305)

[426] *See supra* Section II.A.

[427] *See supra* Subsection II.B.2 (discussing the joint custody presumption movement among the states).

[428] *See* J. Herbie DiFonzo, *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody*, 43 HOFSTRA L. REV. 1003, 1015 (2015) ("A legal presumption of 50/50 parenting time replaces the best interests of the child with the best interests of the parents."). (citing Davis et al., *Battered Women's Justice Project: The Dangers of Presumptive Joint Physical Custody* 4-5 (2010), available at http://www.thelizlibrary.org/ liz/Dangers-of-Presumptive-Joint-Custody.pdf).

custody determinations.

This proposal finds balance between the discretionary best interest of the child standard and the almost discretionless use of joint custody presumptions as mirror image presumptions. The best interest of the child standard is noble because of its commitment to putting the interest of the child first. However, because it affords judges almost limitless discretion, the child's interests may be substituted for the thoughts, beliefs, and biases of the judge crafting the custody arrangement.[429] The use of joint custody presumptions is also noble because of its commitment to allowing children to maintain meaningful relationships with their parents. However, allowing almost no discretion to judges can result in custody arrangements that are inappropriate and unworkable. Allowing a parent to simply request that a judge order that joint custody is in the best interest of the child without any insight into the dynamics of the family has the potential to be too detrimental to the child. Requiring the presumption-seeking parent to prove predicate facts before a presumption arises protects the interest of the child and reigns in judicial discretion by not allowing judges to consider anything they deem relevant in crafting a custody arrangement. The predicate facts that the presumption-seeking parent must prove protect the interest of the child because they are those that research and state lawmakers consider important and in the best interest of children.

But what about the qualities of the other parent? Should the court also analyze whether the non-presumption seeking parent has demonstrated the ability to communicate and cooperate with the presumption-seeking parent? Or whether the non-presumption seeking parent has a relationship with the child, adequate resources to support the child, and is generally fit to parent? The answer is no. Under this proposal, a parent seeking a joint custody presumption—whether joint legal custody or joint physical custody—should be treated as conceding that the other parent meets all of the criteria. After all, if the parent seeking a presumption is requesting to share custody with the other parent, he or she must believe that the child would benefit from spending time with the other parent. Therefore, the court should not be required to engage in the same set of analyses for each parent. If a court were required to do so, then using joint custody presumptions would be meaningless, because the court's analysis would essentially turn into a standard best interest of the child analysis, something that use of joint custody presumptions seeks to do away with.

This proposal only requires the use of joint custody presumptions when one parent seeks a joint custody presumption, rather than requiring both parents to seek a presumption. Requiring both parents to seek a joint custody presumption would be counterintuitive because if both parents were

[429] *See supra* note 38 and accompanying text.

asking the court for joint custody, they would likely have the ability to create a custody arrangement themselves, without the assistance of the family court system.[430] Cooperating parents should be encouraged to create custody arrangements outside of the family court system, and this proposal should be employed for the minority of parents who are unable to come to a custody agreement outside of court in order to ensure that the interests of the child remain protected.[431] With the adoption of this proposal, the law can return to respecting the conviction that "[t]he cardinal principle in [custody] matters . . . is to secure the welfare of the child, and not the special claims of one or the other parent." [432]

## V. CONCLUSION

The inadequacies of best-interest decision making are many, and proponents of joint custody presumptions present a compelling case for reform.[433] However, as expressed by the *Stanley* Court, procedure by presumption is a dangerous legal shortcut.[434] Due to their inherent impracticalities and troubles, joint custody arrangements should not be presumed workable without any judicial insight into the practicality of such an arrangement.[435] As such, the broad, automatic use of joint custody presumptions as mirror image presumptions should be abandoned because although the use of joint custody presumptions may be conceptually appealing, the use of them is out of touch with the realities of shared parenting.[436] Instead, if joint custody presumptions are to persist, they must be reformed and must operate as evidentiary, rebuttable presumptions, arising only once certain triggering facts are established.[437] Under this new regime, the future looks brighter for fit parents, such as Jesse West, who are desperately trying to maintain relationships with their children in a system that makes it difficult to do so.[438] This change to the current joint custody movement would recognize the benefits of shared parenting and put the interests of the child first again, all while sending the message to courts and

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[430] *See supra* note 172 and accompanying text.

[431] There are some parents who are capable of cooperating with one another, but prefer not to share custody for reasons such as military deployment or extensive traveling. Ver Steegh & Gould-Saltman, *supra* note 124, at 264. In these cases, the parents should still be encouraged to craft an agreement outside of the family court system.

[432] Flint v. Flint, 65 N.W. 272, 272 (Minn. 1895).

[433] *See supra* Subsection II.B.2.

[434] *See* Stanley v. Illinois, 405 U.S. 645, 656-57 (1972).

[435] *See supra* Subsection II.B.2; Section III.A.

[436] For an analysis of the unworkability of joint custody presumptions, see *supra* Section III.A.

[437] *See supra* Sections III.A-B.

[438] *See supra* notes 8-14 and accompanying text.

legislatures that what is *equal* for the parents is not always *equitable* for the child.