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Child Support and Joint Physical Custody

Raymond C. O'Brien

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In ubiquitous fashion, the best interest of the child is common to both child support and child custody determinations. And yet formulations of what constitutes a child's best interest is opaque, perennially infused with cultural permeations and societal aspirations. In practice it is more pronouncement than application. Past influences include stereotypes of gender hierarchy, who qualifies as a parent, the means by which parenthood may be established, and purported goals for projected parent-child interactions. But the devil is in the details. Amidst these influences is the concrete necessity of providing a child with financial support. How much money is enough to provide a "minimum decent standard of living"[1] and in a manner that residential and nonresidential parents are treated fairly.[2] A child's best interest is elusive but at a minimum it includes, "the child's interests in sustained growth, development, well-being, and continuity and stability of its environment."[3]

The structure of a child's best interest consists of both physical custody and child support. One interacts with the other to provide a trial judge a basis for

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1. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.04(1)(a) (AM. L. INST. 2002).

2. *Id.* § 3.04(3)–(4).

3. *In re* Shyina B., 752 A.2d 1139, 1143 (Conn. App. Ct. 2000) (quoting Schult v. Schult, 699 A.2d 134, 139 (1997)) (internal quotation marks omitted).

determining the child's overall well-being.[4] State statutes permit a trial judge wide discretion in allotting custody between parents. For example, in practice, when a trial judge assigns one parent sole physical custody of the child, a residential parent, this parent is likely to receive greater amounts of child support due to that parent's greater expenses associated with providing the child with a residential home, food, and recreation[5]. The other parent, nonresidential, the one with liberal visitation rights but without significant custody time with the child, will be required to financially support the residential parent. Common sense and mandated state statutory child support guidelines support this conclusion. Likewise, if two parents share a relatively equal amount of child physical custody—both are residential because the child spends substantially equal time with each—logic would suggest that parental child support would balance itself out between the two, lessening or eliminating child support from either of the two parents. Each parent would share the home, food, and recreation costs equally. But even if the child has two residential parents one may have fewer economic resources than the other, hence the other parent may be ordered to pay child support to "ensure all parties the same standard of living if, before payment of child support, the parents had equal income."[6]

Increasingly legislatures, courts and a proportion of parents favor joint custody (residential) arrangements. Such a development is proper to modern understanding of gender, assisted reproductive technology, and the fundamental right of parents to raise their child. It is logical that joint custody arrangements, many evidenced in parenting plans inaugurated by the American Law Institute, would arise from a progression of previous custody arrangements. This Article describes this development of custody. But while custody is more often determined by parents with the assistance of arbitrators and mediation, child support is neglected. Indeed, this Article argues that parents deserve the same type of services for child support determinations as is provided for child custody under the parenting plan structure of the American Law Institute. Anything less, subverts the rights of both the parent and the child.

Currently child support is part of divorce or separation litigation. It is dominated by the expectation that statutory child support guidelines provide fair and equitable support obligations. But the guidelines are inadequate, as will be described in this Article. And their inadequacy is contrary to the federalization of child support, illustrated by a series of federal statutes, including the Family

4. *See generally* Boswell v. Boswell, 721 A.2d 662, 668–72 (Md. 1998) (discussing the best interest of the child standard applied to visitation).

5. *See* Rogers v. Rogers, 622 N.W.2d 813 (Minn. 2001).

6. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.05(2)(a); *see also id.* at § 3.06(1) ("The child-support formula should grant systematic relief to the support obligor whose income, after payment of child support at the full preliminary-assessment percentage, is insufficient to sustain a minimum decent standard of living.").

Support Act of 1988.[7] That Act mandated that states enact child support guidelines, anticipating that they would provide presumptive support amounts based on specific descriptive numeric criteria.[8]

But as will be illustrated,[9] the guidelines often do not adequately take into consideration the human factors involved, and often they are utilized without proper understanding of their limitations.[10] Second, even though federal law mandates that the guidelines by reviewed at least every four years, the premises upon which they are based may become outdated as cultural permeations evolve. For example, some states have established trends toward a preference, even a presumption, of joint physical custody between non-cohabiting parents.[11] No matter how joint physical custody may be defined, if such a preference or presumption is not accommodated in the guidelines, two consequences may result.

Third, there may arise confusion in application of the specified amount by trial courts, resulting in an actual deficiency in providing for a child's best interest. This occurs, for example, when a state trial court orders a joint physical custody arrangement between two non-cohabiting parents and then reduces one parent's child support obligation as a result, thinking that the two parents are sharing the burden of support equally.[12] And yet, unless both parents share equal financial resources throughout the child's minority, there needs to be a support payment to ensure that the child sustains a "minimum decent standard of living."[13]

And fourth, in the highly litigious arena of divorce, child custody, and child support, it is feasible that one parent may petition for joint physical custody

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7. Family Support Act of 1988, Pub. L. No. 100–485, 102 Stat. 2343 (1988); *see* Linda Henry Elrod, *The Federalization of Child Support Guidelines*, 6 J. AM. ACAD. MATRIM. LAW. 103, 111 (1990) (stating that the federal law was enacted because state child support orders varied drastically for no apparent reason).

8. § 103(a)(3), 102 Stat. at 2346; Rogers v. Rogers, 598 So. 2d 998, 1000 (Ala. Civ. App. 1992) ("An award of child support resulting from the application of the guidelines is presumed correct.").

9. *See* Serrano v. Serrano, No. 2018-CA-001888-ME, 2020 Ky. App. Unpub. LEXIS 178 (Ct. App. Mar. 13, 2020); *see* discussion *infra* Section IV.A.

10. *See, e.g.*, Griggs v. Griggs, 304 So. 741, 745–47 (Ala. Civ. App. 2020).

11. *See, e.g.*, Erin Bajackson, *Best Interests of the Child — A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. L. 311, 323 (2013); Linda D. Elrod & Milfred D. Dale, Golden Anniversary Issue, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L. Q. 381, 393 (2008) (commenting that "the last forty years have seen various attempts to reign in judicial discretion with new presumptions, preferences, and lists of factors" to consider).

12. *See, e.g.*, Sutchaleo v. Sutchaleo, 228 So. 3d 475, 479–80 (Ala. Civ. App. 2017) (illustrating that parent's extended physical custody of the child was a sufficient reason to deviate from the child support guidelines as long as the trial judge recorded this reason).

13. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.0 (1)(a).

solely in order to achieve a reduction or elimination of child support.[14] Indeed, there are those who posit that petitioning for joint physical custody is a strategy born of the fathers' rights movement meant to lessen child support.[15] The strategy may begin with parental separation and they initially agree to a temporary order of joint physical custody, based on joint allegations that this will work. Then, as litigation ensues the temporary status becomes long-lasting and may eventually be incorporated into a final court decree.[16] Once the trial court orders joint physical custody between the parents together with an ensuing request for equalization of child support, the order may be modified only with a petition alleging a material change of circumstances.[17] This process is costly financially and personally.[18] The new awareness of joint physical custody finds that often women may be more willing to settle for less alimony or child support to avoid even a small chance of losing custody of their children.[19]

Often detrimental to a parent with fewer resources, child support orders remain in place while joint custody arrangements seldom last for very long. Either because of a child's preference to be with one parent rather than the other, a growing disharmony between the two parents, or squabbles over newly arising issues such as new partners, finances, or recycled grievances, the child "drifts" into being physically with only one of the parents.[20] Only the financial burden has increased, not the child support payment, which was reduced to

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14. *See e.g.*, Lucero v. Lucero, 750 N.W.2d 377, 385 (Neb. Ct. App. 2008) (holding that Nebraska's child support guidelines proved that when a court orders "visitation or parenting time periods of 28 days or more in any 90-day period, support payments may be reduced by up to 80 percent, but that such determinations is made using the trial court's discretion.").

15. *See* Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 112 (2016) ("Growing legal coercion made child support obligations inescapable, activists focused on achieving legal reforms that would secure corresponding custody rights.").

16. *See* Maritza Karmely, *Presumption Law in Action: Why States Should Not Be Seduced Into Adopting A Joint Custody Presumption*, 30 N.D. J. L. ETHICS & PUB. POL'Y 321, 339, 341 (2016) (citing Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 664 (2001)).

17. Lunney v. Lunney, 91 So. 3d 350, 355 (La. Ct. App. 2012) (stating that "there must be a material change in circumstances affecting the child's best interest before there can be a significant modification of custody" (citing Bergeron v. Bergeron, 492 So. 2d 1193, 1194 (La. 1986)).

18. *See In re* Marriage of Minjares, 941 N.W.2d 604 (Iowa Ct. App. 2019) (holding that parents' discord at divorce and continuing afterwards did not constitute substantial change of circumstances sufficient to modify custody).

19. *See* Margaret F. Brinig, *Default Rules in Private and Public Law: Extending Default Rules Beyond Purely Economic Relationships: Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 788–89 (2006).

20. See Karmely, *supra* note 16, at 348 (citing Mary Ann Mason, *The Roller Coaster of Child Custody Law Over the Last Half Century*, 24 J. AM. ACAD. MATRIM. L. 451, 458 (2012)); *see also* Brinig, *supra* note 19, at 784 (reporting statistics of children drifting into patterns resembling sole physical custody with visitation); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.08(3) (supporting converting dual residence to single residence).

accommodate joint custody.[21] Invariably the child suffers the loss of "important life opportunities."[22]

It is not surprising that psychologists agree that joint physical custody is more likely to result in a child's positive outcome because it allows the child increased access to both parents.[23] Nonetheless, when residential time with a parent is increased at the cost of a decrease in child support, a child will likely suffer, most assuredly when there is a disparity in income between the two parents.[24] "Economics affect children's well-being through several mechanisms, including its effects on family stress, time with parents (e.g., when mothers must work more, they have less time with children), quality of parenting, and basic resources to meet material needs."[25] Child custody is inextricably connected with child support and while significant attention is focused on custody, the same cannot be said of child support. The same level of parental participation that goes into a custody parenting plan must be expended on formulating a child support plan. Parents need to be encouraged, assisted, and compelled to initiate support plans that are isolated from gender stereotypes, committed to personal practical possibilities, and not reliant on state modification or enforcement.

First, this Article traces the evolution of parenthood to provide a sense of each parent's constitutional importance. A parent's right—an expanded definition of who constitutes parents—to make decisions concerning the care, custody, and control of his or her child is now grounded in the Constitution's Due Process Clause.[26] In addition to biological parents, now there are expanding procedures to recognize parentage claims by adoptive parents, nonmarital partners, same-sex partners, stepparents, estoppel parents, de-facto parents, and parentage occurring through assisted reproductive technology (ART).[27] Among these ART possibilities are posthumous conception, surrogacy contracts, and intended parents occasioned by gamete donations. The expansive nature of parental

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21. See Karmely, *supra* note 16, at 348–53.

22. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.04(2).

23. *See, e.g.*, Karmely, *supra* note 16, at 363 ("[The] social policy argument [is] that the best interest of the child is served when both parents are involved in the child's life."); CHRISTY M. BUCHANAN, ELEANOR E. MACCOBY & SANFORD M. DORNBUSCH, ADOLESCENTS AFTER DIVORCE 66–67 (1996).

24. *See* Christy M. Buchanan & Parissa L. Jahromi, *The Best Interests of the Child: Article & Empirical Study: A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 432 (2008).

25. *Id.* at 420–21.

26. *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982); Troxel v. Granville, 530 U.S. 57, 77 (2000) (Souter, J., concurring); *but see* Raymond C. O'Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209, 1247–56 (1994). The American Law Institute defines a legal parent, a parent by estoppel, and a de facto parent. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmts. a–c; *Id.* at § 2.04(1).

27. *See generally* Raymond C. O'Brien, *Marital Versus Nonmarital Entitlements*, 45 ACTEC L. J. 79, 140–42 (2020).

claims, based on heightened awareness of the fundamental nature of parentage, supports greater scrutiny of custody and attendant support considerations. The fundamental Due Process right guarantees equality of treatment irrespective of gender, race, physical handicap, or religious practices.[28] As a consequence, legislation and judicial pronouncements emphasize joint decision-making, jointly drafted parenting plans, and custodial responsibility for modification and initiation. Arguably the same should be apply to child support.

Second, this Article explains the evolution of child custody arrangements and how this comports with an evolving understanding of parenthood.[29] Each historical permeation was intended to satisfy the best interest of the child, a consistent standard throughout. Today, both parents are often employed outside the home, both parents are presumptively required to support their children, and imputed income may be assigned without regard to gender.[30] These features are required in state child support guidelines.[31] As child custody arrangements evolved child support assessment did too. Distinctively, modern child support requirements result from a series of federal requirements, prompting states to issue statutory guidelines, establish obligation, enforce payments, and punish those who fail to pay. But the federalization of child support comes at a cost. The focus of state legislatures is on complying with federal mandates, often ignoring the practical elements of child support. Among these elements are the increasing incidence of joint custody petitions, the retaliatory effect of domestic abuse allegations, the surrender of support to maximize custody, and the socially fluid nature of custody and support.

Third, this Article discusses child support, why it originated and how it has become federalized. The argument is made that state child support has become so besotted with federal compliance that states have neglected the local nature of child support, its connection with child custody, its fluidity, and its connection with the best interest of the child. State-sanctioned mathematical child support guidelines often do not recognize the economic consequences of a child physically occupying two different homes for a comparable amount of time.[32] Guideline worksheets, forced to classify parents as "custodial parent" or "noncustodial parent," "residential parent" or "nonresidential parent" do not actually accommodate joint physical custody with relatively equal parenting

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28. *See, e.g.*, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12(1) (Criteria for Parenting Plan—Prohibited Factors).

29. *See* Raymond C. O'Brien, Obergefell*'s Impact on Functional Families*, 66 CATH. U. L. REV. 363, 379–87 (2016).

30. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.15 (imputing income to the residential parent in computing child support awards).

31. O'Hara v. O'Hara, No. 2017-CA-001643-ME, 2018 Ky. App. Unpub. LEXIS 925, at *5 (Ct. App. Dec. 21, 2018) ("The child support guidelines require each party to pay their proportionate share of support without consideration of gender.").

32. *See, e.g.*, Serrano v. Serrano, No. 2018-CA-001888-ME, 2020 Ky. App. Unpub. LEXIS 178 (Ct. App. Mar. 13, 2020); *see* discussion *infra* Section III.A.

time.[33] Furthermore, support guidelines are based on false assumptions, and their inability to adjust to fluid physical custody changes invariably render them inadequate or worse, unjust. Having statutory guidelines are not sufficient, there must be more, there must be parental involvement in child support similar to what occurs with child custody awards.

This Article concludes that mandated child support guidelines are a permanent fixture of child support. But guidelines are the beginning of the child support assessment, not the end. Guidelines must be reviewed at least every four years and review should be attentive to the changing nature of custody arrangements and incorporate more practical worksheets. So too, parents need to be more involved in the review of the guidelines themselves, the manner and frequency of modification, and the integration of realistic support with realistic custody. To achieve this, courts should order that services be provided to parents so that they may establish support plans similar to parenting plans.[34] The federalization of child support has lessened local and personal attention on the practical aspects of child support. Rebutting the guidelines with individual circumstances is simply not enough. The truth of the matter is that child support is just as important as child custody to the best interest of the child. The two are interrelated and that is the point of this Article.

I. EVOLUTION OF PARENTHOOD

In 2015, the Supreme Court held that neither the states nor the federal government could deprive same-sex couples of the fundamental right to marry.[35] Whatever anyone may think of the Court's holding, the Court acknowledged that a nation's understanding of what constitutes a fundamental right may evolve.[36] "[R]ights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[37] Today—any day—when we posit the fundamental right of a parent to the care, custody and control of his or her child, this right arises from historical precedent and evolving social underpinnings.

A. Parentage as Fundamental

The importance of child custody derives from the fundamental nature of parenthood itself. When any person asserts a right to child custody, support, visitation, or even parentage itself, that person claims a status that is strictly

33. *Serrano*, 2020 Ky. App. Unpub. LEXIS 178, at *17–19 (in part citing the lower court's opinions).

34. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.07.

35. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

36. *Id.* at 669.

37. *Id.* at 671–72.

scrutinized and protected against all but compelling state purposes.[38] There are innumerable references in judicial opinions upholding the fundamental right of a parent to raise his or her child.[39] This fundamentality rests upon a platform, a history, of an evolving group of "preferred" rights.[40] These "preferred rights" were identified as "particular forms of expression, action, or opportunity perceived as touching more deeply and permanently on human personality." [41] Among these are rights to travel,[42] to vote,[43] protection from racial classifications,[44] and a liberty interest that includes a right to essential services,[45] intimate conduct,[46] and marriage.[47]

The fundamental liberty interest of parents to raise their children is one of the oldest of the fundamental liberty interests recognized by the Supreme Court.[48] State legislatures were gradual when codifying the presumptive ability of both parents to raise his or her child, with one specifying that "there shall be no prima-facie right to the custody of the child in the father or mother."[49] But such modern envelopments are the result of cultural developments argued and purchased in recent decades. The same may be said of same-sex parents, surrogate parents, de facto parents, and intentional parents. All of these have enhanced the understanding of a parent's fundamental right to the care, custody, and control of his or her child. Parenthood is fundamental.

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38. *Id.* at 667.

39. *See, e.g.*, *id.* ("[Marriage] safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education"); Troxel v. Granville, 530 U.S. 57, 60 (2000) ("fundamental right of parents to rear their children"); Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("fundamental liberty interest of natural parents in the care, custody, and management of their child"); Stanley v. Illinois, 405 U.S. 645, 657 (1972) ("important interests of both parent and child"); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("traditional interest of parents with respect to the religious upbringing of their children"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (discussing the right to "establish a home and bring up children").

40. *See* Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943).

41. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 770 (2d ed. 1988).

42. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630 (1969).

43. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).

44. *See, e.g.*, Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 484 (1982).

45. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 214, 230 (1982) ("The state may not make illegal immigrants a 'subclass of illiterates' by prohibiting them from attending school.").

46. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct.").

47. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

48. Troxel v. Granville, 530 U.S. 57, 65 (2000) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925); Prince v. Massachusetts, 321 U.S. 158, 165 (1944); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citations omitted); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Parham v. J.R., 442 U.S. 584, 600 (1979); Santosky v. Kramer, 455 U.S. 745, 753 (1982).

49. *See* GA. CODE. ANN. § 19-9-3 (2019).

B. Gender Neutrality

There was a time when the father of the child was thought to own his children, the value of their services, and the right to their custody in the father's declining years. Then a shift in the gender paradigm occurred, the custody rights of a father, most particularly a father not married to the child's mother, were considered as minimal or nonexistent.[50] The mother gradually was accorded presumptive rights. First, by establishing a tender-years presumption that presumptively awarded physical custody of a child to the child's mother if the child was of tender years.[51] But as women entered the workforce more often and courts began applying equal protection scrutiny, there developed a shift towards both natural parents having the constitutional right to custody of their children."[52] Presumptively child custody was henceforth gender neutral.

Gender neutrality is required by the American Law Institute's Principles of Law of Family Dissolution: Analysis and Recommendations.[53] The Principles lists factors that may not be considered when making a custody determination, such as a consideration of "the sex of a parent or of the child,"[54] which is in accord with the goals of minimizing reliance on stereotypes, preserving diversity in parenting arrangements, and focusing on the Principles' goal of planning for the child's needs.[55] Similarly, the 2017 revision of the Uniform Law Commission's Uniform Parentage Act was proposed in part to provide gender neutral terms, specifically to ensure equal treatment of children born to same-sex couples.[56] The Act creates the mechanism by which parentage may be established and therefore it pertains to child custody determinations too.[57]

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50. *See*, *e.g.*, Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding that an unwed father is entitled to a parental fitness hearing under the Due Process Clause and the Equal Protection Clause).

51. *See*, *e.g.*, Gilliland v. Gilliland, 969 So. 2d 56, 66 (Miss. App. Ct. 2007) (defining the presumption as an assumption that, when a child is of such a tender age, custody should be awarded to the mother until child reaches an age when it can be equally cared for by the other parent); State ex. rel. Watts v. Watts, 350 N.Y.S.2d 285, 290 (N.Y. Fam. Ct. 1973) (holding tender-years presumption a violation of equal protection and stating that "[l]egislative classification may legitimately take account of need or ability; they may not be premised on unalterable sex characteristics that bear no necessary relationship to the individual's need, ability or life situation.").

52. *Stanley*, 405 U.S. at 661 (Burger, J., dissenting); *see also* Gender Fairness Implementation Comm'n, *Gender Fairness in North Dakota's Courts: A Ten-Year Assessment*, 83 N.D. L. REV. 309, 334 (2007) (finding there was no clear gender bias found but there was a perception of bias).

53. PRINCIPLES OF THE LAW. OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12(1)(b)

54. *See id*.

55. *Id.* § I2 II.

56. UNIF. PARENTAGE ACT Prefatory Note (UNIF. L. COMM'N 2017). "To the extent practicable, a provision of this [act] applicable to a father-child relationship applies to a mother-child relationship and a provision of this [act] applicable to a mother-child relationship applies to a father-child relationship." *Id.* § 107.

57. *See* O'Brien, Obergefell*'s Impact on Functional Families*, *supra* note 29, at 379–81.

Despite advocacy for gender neutrality, the perception, and perhaps the reality, of gender discrimination persists. The recent ascendency of joint physical child custody is due in part to "dissatisfaction with the legal treatment of divorced fathers who, supporters believed, seldom won custody under the ostensibly gender-neutral best-interests standard."[58] Among issues singled out as receiving disparate legal treatment are petitions by custodial mothers to change the name of the child, the mother's relocation of the child, and the mother's ability to restrict third-party access to the child, often the father's parents.[59]

Increasingly, fathers' rights advocates protested that post-divorce restrictions on noncustodial fathers' access to their children was gender discriminatory and diminished the parent-child relationship, hence was not in the best interest of the child.[60] In addition, they argued, the nonresidential fathers were required to support this discrimination with a substantial financial child support obligation. Cost and denial of access to their children fostered resentment in many fathers.[61] And child support could no longer be taken lightly. Federal mandates compelled states to be aggressive in enforcement through wage-withholding, passport refusals, and civil or criminal incarceration.[62] Faced with what was perceived as discrimination and financial compulsion fathers organized to promote legislation that ensures greater access to child custody.[63] Thus, "[i]n legislatures across the country, men's groups have promoted joint-custody legislation, returning year after year in some states to lobby for favorable laws. The efforts have been intensive—including testimony, letter-writing and email campaigns, media-advertising campaigns, blogging, and the placement of news stories, editorials, and op-eds."[64]

"Joint-custody campaigns have encountered stiff opposition in most states from coalitions of opponents including, most prominently, advocates for mothers."[65] Advocates for mothers "have effectively promoted statutory provisions categorically disfavoring the parent who has violently threatened either his child or the other parent. In response, fathers' groups have sought to weaken these laws while urging lawmakers (also successfully) to emphasize parental alienation as a key factor in the custody decision."[66]

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58. Katharine T. Bartlett & Elizabeth S. Scott, *Gender Politics and Child Custody: The Puzzling Persistence of the Best Interest Standard*, 77 L. & CONTEMP. PROBS. 69, 77 (2014) [hereinafter Bartlett & Scott] (citations omitted).

59. *See* Troxel v. Granville, 530 U.S. 57 (2000).

60. Bartlett & Scott, *supra*, note 58 at 71–72.

61. *Id.* (citations omitted).

62. *See* Weinstein v. Albright, 261 F.3d 127 (2d Cir. 2001).

63. Dinner, *supra* note 15, at 107–10.

64. *Id.* One of the reasons for the rejection of the primary caretaker presumption of custody was that it seemingly preferred mothers over fathers. Michael Abramowicz & Sarah Abramowicz, *Bifurcating Settlements*, 86 GEO. WASH. L. REV. 376, 399 (2018).

65. Bartlett & Scott, *supra* note 58, at 78.

66. *Id.* at 83 (citations omitted).

Beneath the accusations is the gender stereotype of the father committing domestic violence against the mother, with the corresponding gender stereotype of the mother alienating the children from the father. Besides being based in gender, both allegations "rest on private family information that might be difficult for a court to verify."[67] The American Law Institute provides for acute investigation of violence or abusive behavior through the appointment of a guardian ad litem, an attorney to represent the child, or a neutral person or agency.[68] And, of course, any court should have the discretion to interview the child, or to appoint another to do so.[69]

Interestingly, modern proposals suggested by the American Law Institute advocate that couples themselves address gender when formulating parenting plans with the help of mediators.[70] Or, as an alternative to parenting plans, an allocation of custodial responsibility under an approximation schedule.[71] Professor Elizabeth S. Scott defines a custody sharing arrangement as an allocation of custody "proportionately between the parents on the basis of the caretaking roles they had while the family was intact."[72] As such, and consistent with the objectives of the American Law Institute, the "parents continue to share decision-making authority and each parents' allocation of physical custody is determined on the basis of the family's past practices."[73] Fathers, Professors Bartlett's and Scott's research suggests, perform about one-third of child care.[74]

Gender is most often thought of in the context of mother and father, man, and woman, but assisted reproductive technology has widened the scope of gender. Two persons of the same sex can now become parents to a child and still share a genetic connection. Likewise, a single person can intend to become a parent through a surrogacy contract, and genome editing now makes it possible for more than two persons to make a direct genetic contribution to a child that they can now assert is their own. It seems that as we seek to make gender irrelevant,

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67. *Id.* at 89. Parental alienation occurs when one parent disparages the other to the children in order to alienate the children from the other parent. *See, e.g.*, Schutz v. Schutz, 581 So. 2d 1290, 1291, 1293 (Fla. 1991) (holding that mother was ordered to say good things about the father to reverse her parental alienation).

68. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.13; *see also id.* § 2.11 (protection of family member from violence); *see also id.* § 2.05(2)(f) (parenting plan requires description of violent circumstances); *see also id.* § 2.05(3) (court must have a screening process to identify domestic violence); *see also id.* § 2.07(2) (requiring mediators to screen for domestic violence); *see also id.* at § 2.07(3) (precluding involuntary face-to-face mediation).

69. *Id.* § 2.14.

70. *See id.* § 2.05.

71. *Id.* § 2.08.

72. Bartlett & Scott, *supra* note 58, at 101.

73. *Id.*

74. *Id.* (citing Suzanne Bianchi, *Maternal Employment and Time with Children: Dramatic Change or Surprising Continuity?*, 37 DEMOGRAPHY 401, 411 (2000)).

it becomes increasingly relevant to fashioning parenthood and resulting child custody claims.

C. Assisted Reproductive Technology

In 1978 a baby, Louise Joy Brown, was conceived and born as a result of assisted reproductive technology (ART), specifically in vitro fertilization (IVF).[75] This was a revolutionary development at the time, but today an increasing percentage of the populations in the United States and throughout the world are using assisted reproduction in their pursuit of parenthood: "Perhaps as much as 12% of the white female population [in the United States] between the ages of 35 and 44, who also have at least a bachelor's degree, have used [it]."[76] This is true even though the significant cost of ART is not covered by medical insurance. Data collected from fertility clinics located throughout the United States illustrate the increased use of assisted reproduction:

> In 2013, the [National Center for Chronic Disease Prevention and Health Promotion, Division of Reproductive Health] collected data from 467 fertility clinics then in operation and able to verify data submitted. These clinics reported in 2013, that the number of ART cycles performed in the United States increased 25% from 2004 to 2013, for a total of 190,773 ART cycles performed in 2013. From these cycles '[t]he number of infants born who were conceived using ART increased from 59,458 in 2004 to 66,706 in 2013.' The CDC reports that in 2013 approximately 1.5% of all infants born in the United States were conceived using some form of ART.[77]

The rapid utilization of assisted reproduction is significant because "for the first time in history, it is now possible for a baby to have more than two genetic parents."[78] Traditionally persons could increase parentage options through state-sanctioned statutory adoption, including most recently stepparent adoption. Today, through the use of ever-expanding medical technologies, a parent-child

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75. The term ART means any medical or scientific technology or method designed to assist one or more persons to cause a pregnancy through means other than by sexual intercourse. *See* UNIF. PARENTAGE ACT § 102(4) (including "intrauterine or intracervical insemination; . . . donation of gametes; . . . donation of embryos; . . . in vitro fertilization and transfer of embryos; and . . . intracytoplasmic sperm injection.").

76. Hallie A. Hamilton, Note, *Three-Parent Babies and FDA Jurisdiction: The Case for Regulating Three-Party In Vitro Fertilization as a Drug Biologic*, 53 CREIGHTON L. REV. 427, 433 n.46 (2020) (citing Gretchen Livingston, *A Third of U.S. Adults Say They Have Used Fertility Treatments or Know Someone Who Has*, PEW. RES. CTR. (July 17, 2018), https://www.pew-research.org/fact-tank/2018/07/17/a-third-of-u-s-adults-say-they-have-used-fertility-treatments-or-know-someone-who-has/).

77. Raymond C. O'Brien, *Assessing Assisted Reproductive Technology*, 27 CATH. U. J. OF L. & TECH. 1, 10–11 (2018) (citing to Ctr. for Disease Control and Prevention, *2013 Assisted Reproductive Technology: National Summary Report* CDC 1, 3 (2015), ftp://ftp.cdc.gov/pub/Publications/art/ART-2013-Clinic-Report-Full.pdf).

78. *Id.* at 49.

relationship may now occur through surrogacy, contract intentionality, estoppel, and coupled with the use of artificial insemination, posthumous conception, and mitochondrial transfer.[79] Enlarging the scope of parentage prompts the issue: if a parent has a fundamental right to custody or visitation with a child, who constitutes a parent in this modern age?

Symbolic of modern availability of parentage, in 2017 the Uniform Parentage Act was amended to accommodate same-sex couples, who are increasingly utilizing ART to become parents.[80] State laws, like the Uniform Parentage Act, have had to catchup to societal changes. For example, when a female same-sex married couple gave birth to a child through the use of artificial insemination and a donor sperm, they attempted to place both of their names on the child's birth certificate as legal parents.[81] But a state statute provided that the state did not have to issue a birth certificate to the female spouse of a woman who gave birth in the state.[82] When the state statute was challenged, the Supreme Court of the United States held that the state statute was unconstitutional because it denied same-sex married couples equality of treatment with opposite-sex married couples.[83] The decision is a recent illustration of the fundamental right of a parent that cannot be conditioned upon gender, including sexual orientation.

There are two other ways that the parameters of parentage may be expanded. First, even though an individual has no genetic relationship with a child, if that "individual resided in the same household with the child for the first two years of the life of the child, including any period of temporary absence, and openly held out the child as the individual's child[,]" then that individual is presumed to a parent of that child.[84] The "intentionality" of the individual is the deciding factor in becoming, in the terms of the American Law Institute, a parent by estoppel or a de facto parent.[85] And second, if an individual consents in writing, or by clear and convincing evidence, to assisted reproduction with the intent to

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79. *See* Raymond C. O'Brien, *The Immediacy of Genome Editing and Mitochondrial Replacement*, 9 WAKE FOREST J. OF L. & POL'Y, 419, 491 (2019). A baby boy was born in Mexico City on April 6, 2016 after removing nuclear DNA from the target egg's defective mtDNA and placing it within a donated egg with healthy mtDNA. The nuclear DNA of the donated egg is similarly removed so that the healthy mtDNA is the only contribution made by the donor, but a genetic contribution, nonetheless. *Id.* at 470.

80. UNIF. PARENTAGE ACT § 107 (Unif. Law Comm'n 2017).

81. Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017).

82. *Id.*

83. *Id.* at 2078–79 (citing the holding in Obergefell v. Hodges, 576 U.S. 644 (2015)); *see also* Henderson v. Box, 947 F.3d 482, 487 (7th Cir. 2020) (holding that "after *Obergefell* and *Pavan*, a state cannot presume that a husband is the father of a child born in wedlock, while denying an equivalent presumption to parents in same-sex marriages.").

84. UNIF. PARENTAGE ACT § 204(a)(2); *see* O'Brien, Obergefell's *Impact on Functional Families*, *supra* note 29, at 400–02; *see also* PRINCIPLES OF FAMILY LAW DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (establishing both a parent by estoppel at cmt. (b), and a de facto parent at cmt. (c)).

85. PRINCIPLES OF FAMILY LAW DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03.

be a parent of a child conceived by assisted reproduction, then that person is a parent of the child.[86]

Surrogacy has been available for a long time, an early form of ART. There are currently two options. First, what is referenced as genetic surrogacy is mentioned in Hebrew Scripture.[87] It is a practice whereby a woman agrees to become pregnant and carry the child to term using her own gamete (egg) and donor sperm.[88] Modern genetic surrogacy does not require intercourse as was the case in the time of the Bible, it may be achieved through artificial insemination.[89] The older practice involved a man seeking a child with a woman other than his wife, usually prompted by the wife's inability to conceive a child. Compare genetic surrogacy with the second form of surrogacy, gestational surrogacy. This is a modern development that involves a more advanced form of assisted reproduction.[90] Most often gestational surrogacy involves both a donated egg and sperm, either from the parties themselves or purchased from an expanding list of fertility clinics. Conception occurs outside the surrogate herself, the egg fertilized with the sperm in a medical laboratory. Then, after conception, a fertilized egg—an embryo—is then placed in the surrogate who then carries the fetus to term, surrendering the infant to the intended parents after birth.

Surrogacy may involve at a minimum five adult persons: the two donors, two parents, and one surrogate. State statutes outline the parameters of any enforceable surrogacy agreement. It must specify interests of all involved, including the spouse of the surrogate, spouses of donors, and spouses of the intended parents.[91] In spite of the increasing use of national and international surrogacy, there continues to be hesitancy regarding surrogacy[92] and court

86. *See* UNIF. PARENTAGE ACT §§ 703–04; *see, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282, 293 (1998) (holding that a man or woman consenting to an act that brings a child into being is a parent of that resulting child); *see also In re* Parentage of M.J., 787 N.E.2d 144 (Ill. 2003) (finding that the Illinois Parentage Act does not bar common law theories of parentage in the absence of written consent).

87. *See Genesis* 16:1–16; *see* UNIF. PARENTAGE ACT § 801(1).

88. UNIF. PARENTAGE ACT § 801(1).

89. *Id.*

90. *See id.* § 801(2).

91. *See, e.g.*, *id.* § 804.

92. *See, e.g.*, Rachel Wexler, *Artificial Reproductive Technology and Gendered Notions of Parenthood After* Obergefell*: Analyzing the Legal Assumptions That Shaped the Baby M Case and the Hodge-Podge Nature of Current Surrogacy Law*, 27 TUL. J. L. & SEXUALITY 1, 3–4 (2018) (discussing state statutes restricting or outlawing surrogacy); Tara R. Melillo, *Gene Editing and the Rise of Designer Babies*, 50 VAND. J. TRANSNAT'L L. 757, 758 (2017) (discussing designer babies); *See generally* Deborah S. Mazer, *Born Breach: The Challenge of Remedies in Surrogacy Contracts*, 28 YALE J. L. & FEMINISM, 211, 215 (2016) (discussing surrogacy contract enforcement); Jessica M. Camano, *International, Commercial, Gestational Surrogacy Through the Eyes of Children Born to Surrogates in Thailand: A Cry for Legal Attention*, 96 B. U. L. REV. 571, 572 (2016) (discussing problems with international surrogacy).

decisions regarding validity of surrogacy contracts vary.[93] Embedded in the judicial and legislative debate is the issue of who qualifies as a parent of the child of ART? "Do all parents, whatever their numbers, acquire equal parental standing, with equal liability for child support and equal standing to seek custody and visitation?"[94] This issue is still debated in the context of parental rights. But there are those who argue that parentage during this age of ART must be viewed hierarchically, with primary parents, those making a substantial genetic contribution, receiving physical custody awards.[95]

Hierarchical entitlement to custody seems particularly pertinent in the context of mitochondrial replacement, a newer and another form of ART. The process includes a procedure during which embryos are modified and then "result in offspring with genetic material from three different persons, including two women of different maternal lineage."[96] As science develops, even more parental status claims may emerge. Certainly, the development—and acceptance of—ART will affect the way that we view parental status, rights, and responsibilities. As with the evolution of fundamental rights and gender neutrality, ART will influence policy and practice.

II. EVOLUTION OF CUSTODY ARRANGEMENTS

A. One Parent, Father or Mother

As Lewis Carroll aptly advised: "Begin at the beginning . . . and go on till you come to the end: then stop."[97] Hence we must acknowledge that in the English courts of the Nineteenth Century, in the few cases of divorce and awarding custody of children that came before judges, the child's father was entitled to custody unless he was found to have committed a grave act of immorality.[98] But this rule did not emigrate from England to America. Instead, courts in the United States applied a best interest standard and "awarded" custody of the child to one

93. *See, e.g.*, P.M. v. T.B., 907 N.W.2d 522, 533–34 (Iowa 2018) (holding that the surrogacy agreement did not violate public policy); Rosecky v. Schissel, 833 N.W.2d 634, 652–53 (Wis. 2013) (holding that there was no state public policy objection to enforcing a genetic surrogacy agreement as long as it is in the best interests of the child). For a survey of surrogacy laws, *see Surrogacy Laws*, THE SURROGACY EXPERIENCE, https://www.the surrogacyexperience.com/u-s-surrogacy-law-by-state.html.

94. June Carbone & Naomi Cahn, *Changing American State and Federal Childcare Laws: Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 10 (2017).

95. *Id.* at 46.

96. O'Brien, The Immediacy of Genome Editing and Mitochondrial Replacement, *supra* note 79, at 471; G. Owen Schaefer & Markus K. Labude, *Genetic Affinity and the Right to 'Three-Parent IVF'*, 34 J. ASSISTED REPROD. & GENETICS 1577, 1577 (2017).

97. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 110 (1865).

98. *See, e.g.*, King v. De Manneville (1804) 102 Eng. Rep. 1054–55 (KB); Shelley v. Westbrooke, (1817) 37 Eng. Rep. 850 (Ch); *see also* LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500–1800, 667–69 (1977).

or the other parent, most likely the mother.[99] Courts at that time concluded that one parent, not both, would provide more permanency for the child and furthermore, since the father was more likely to work outside of the home, the mother was the logical choice for custody of the child.[100] Recall that until 1979, many states had statutes that permitted alimony to be paid only from husbands to former wives.[101] Because the former wife had the promise of financial support from her husband until her remarriage or death, coupled with domestic characteristics courts thought advantageous to children, the mother consistently received custody.

Maternal preference for custody became known as the tender years presumption, which presumes that "in all cases where any child is of such tender age as to require the mother's care for the child's physical welfare, the child should be awarded to her custody, at least until the child reaches that age and maturity where the child can be equally well cared for by other persons."[102] By 1925, the maternal tender years presumption was characteristic of custody awards throughout the United States but gradually, by the middle of the twentieth century, many women and mothers became more independent, both economically and socially.[103] Many worked outside the family home, making women more on par with their husbands when it came to availability for child care. By the time California became the first state to adopt no-fault divorce in 1969, an increasing number of women were working outside the home. Other states quickly adopted no-fault divorce and gradually there were parallel changes to laws affecting division of property, alimony, and child support distributions.[104] "As late as 1970, 40% of American families met the model of

99. *See* Troxel v. Granville, 530 U.S. 57 (2000).

100. *See generally* Dinner, *supra* note 15, at 81–82; Jay Einhorn, *Child Custody in Historical Perspective: A Study of Changing Social Perceptions of Divorce and Child Custody in Anglo-American Law*, 4 BEHAV. SCI. & L. 119, 125 (1986); David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984).

101. *See* Orr v. Orr, 440 U.S. 268, 279, 283 (1979) (holding that state statutes that permit alimony only from the husband to the wife violates Equal Protection).

102. Benal v. Benal, 22 So. 3d 369, 373 (Miss. Ct. App. 2009) (holding that the trial court did not err when awarding custody of child to the child's mother).

103. *See*, *e.g.*, Bozman v. Bozman, 830 A.2d 450, 496–97 (Md. 2003) (abolishing the marital tort exception); Warren v. State, 336 S.E.2d 221, 226 (Ga. 1985) (abolishing the marital rape exception); State *ex rel.* Williams v. Marsh, 626 S.W.2d 223, 232 (Mo. 1982) (permitting ex parte orders for domestic violence); Roe v. Wade, 410 U.S. 113, 154 (1973) (women had a bodily privacy right to obtain an abortion); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (a single woman had the same right as a married woman to possession of contraceptives); Stuart v. Bd. of Supervisors of Elections, 295 A.2d 223, 227–28 (Md. 1972) (a woman had a right to retain her birth name).

104. *See*, *e.g.*, Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 990 (1995) (discussing division of property and child support); Jana B. Singer, Symposium on Divorce and Feminist Theory: *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L. J. 2423, 2423 (1994) (discussing validity of "economic justifications for alimony").

one wage earner, a stay-at-home-wife, and two children; today less than one in four families do."[105]

In spite of the modern perception of equal economic self-sufficiency between both parents, when awarding child custody, mothers continued to disproportionately receive custody of their children.[106] Consistently, statistics illustrate that children are most often awarded to the sole physical custody of their mothers.[107] Women continue to have access to the workforce, yet they also are perceived as possessing advantageous skills in providing a child with emotional stability and security.[108] And not only judges, but guardians ad litem (GAL), while protesting the use of the tender years presumption, nonetheless recommend that the mother be awarded custody because the GAL is simply "old fashioned."[109] Furthermore, statutory factors determining what is meant by the best interest of the child are often weighed in such a fashion that they favor activities normally performed by mothers.[110] Hence, while the tender years presumption may explicitly be rejected by statute or by judicial decision,[111] in practice mothers disproportionately are awarded sole physical custody of the child and fathers awarded liberal visitation.

Sensing gender discrimination, male activist groups formed in the 1960s arguing that "social and legal construction of gender roles, far from subordinating women, oppressed men."[112] They pointed to "the fact that only three percent of fathers received physical custody of their children upon divorce [and this] established prima facie proof of sex discrimination."[113] The legal and cultural milieu of activism in the 1960s and 1970s provided a base for arguments of gender discrimination, equal protection, due process, and privacy. State legislators were attentive, and this is reflected in an evolution of custody, summarized as follows:

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105. Elrod & Dale, *supra* note 11, at 386.

106. Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 L. & SOC'Y REV. 769, 770–71 (2004).

107. *See* Elizabeth Gresk, *Opposing Viewpoints: Best Interests of the Child vs. The Fathers' Rights Movement*, 33 CHILD. LEGAL RTS. J. 390, 390 (2013).

108. *See, e.g.*, Co v. Matson, 313 P.3d 521, 529 (Alaska 2013) (dismissing use of tender years and using factors under best interest of child standard).

109. *See, e.g.*, *In re* Van Dorn, No. 5-18-0234, 2018 Ill. App. Unpub. LEXIS 2110, at *13–15 (App. Ct. Nov. 30, 2018).

110. *See, e.g.*, Montgomery v. Montgomery, 20 So. 3d 39, 44 (Miss. Ct. App. 2009); Lackey v. Fuller, 755 So. 2d 1083, 1089 (Miss. 2000) ("The [tender] age of the child is simply one of the factors we consider in determining the best interests of the child.").

111. *See* State *ex rel.* Watts v. Watts, 350 N.Y.S.2d 285, 290 (N.Y. Fam. Ct. 1973) (holding that the presumption runs afoul of Equal Protection guarantees); *see also* UNIF. MARRIAGE & DIVORCE ACT § 402, 9 U.L.A. 282 (1998) (codifying best interest of the child without reference to gender); *but see* Ramsay Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335, 335–37 (1982) (arguing that the doctrine better protects the best interest of the child).

112. Dinner, *supra* note 15, at 88.

113. *Id.* at 114 (citing Letter from Carlo E. Abbruzzese, Chairman, Family Law Action Council, to the President of the United States (n.d.) (on file with MFM Online, MEN Int'l)).

> In the late 1970s, the prevailing doctrine was that the best interests of the child would be served by awarding sole custody to the parent who had served as the primary caretaker. By the mid-1980s, nearly two-thirds of states recognized that joint custody could sometimes be in the best interests of the child. Between 1979 and 1982, twenty-one states passed joint custody statutes; these ranged in the strength of their preference from merely making joint custody an option available to the court to a presumption in favor of it. By 1984, thirty-two states recognized joint custody in some form, and several more states followed suit in the late 1980s. Many of these statutes went beyond legal recognition to create a presumption that joint custody served the best interests of the child. A study by political scientist Herbert Jacob surveyed twenty-six states that passed joint custody statutes; fathers' rights groups campaigned actively in fourteen of them.[114]

The culture of the times, the rising influence of men's activist groups, and the ascendency of strict enforcement of child support obligations contributed to increased petitions for joint physical custody. "Fathers' rights activists supported strong presumptions in favor of joint custody at the state level, coupled with minimal federal involvement in child support."[115] And at the same time, "women's rights activists supported joint custody statutes only when parents agreed to this arrangement, and insisted on a powerful federal child support enforcement apparatus."[116] Many fathers and the groups that represented them thought of this system as unfair. They viewed no-fault divorce as a means by which a father who had committed no marital fault, could nonetheless be deprived of his children because the mother petitioned for divorce and was then awarded sole physical custody of the couple's children. And furthermore, fathers were then obligated to pay enforceable child support to the mother who now has sole physical custody of their children.[117] And while it is arguable that fathers sought joint physical custody to lessen child support obligations, one commentator disputes this, writing that "[c]onsiderable evidence exists demonstrating that activists sincerely wanted divorced fathers to play greater caregiving roles in their children's daily lives"[118] through joint physical custody. Or, at a minimum, states should enforce visitation orders with similar fervor to enforcement of child support.

Reviewing custody arrangements, we can conclude that gender, and the stereotypes associated with each, was often determinative in assigning child custody. But increasingly, financial resources obtained through employment or

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114. *Id.* at 121–22 (citations omitted).

115. *Id.* at 123.

116. *Id.* Federal involvement in the collection of child support became more pronounced after passage of the Child Support Enforcement Amendments Act of 1984, which provided financial incentives to states to enforce collection of child support from parents. *Id.* at 138.

117. *Id.* at 121.

118. *Id.* at 124–26.

through stricter enforcement of child support became determinative. And throughout any custody dispute, the mother and the father were viewed as litigants by legislators and courts, the state trial courts serving as final arbiter on what is best for the child. Eventually the focus will be on ways to avoid gender stereotypes, but the state trial court continues to be the arbiter between two litigants.

B. Primary Caretaker Presumption

Seeking to avoid the gender inequality of the tender years presumption, but nonetheless hoping for an easier way—a presumptive way—to resolve custody disputes between two equal parents, a few states adopted what is known as the primary caretaker presumption.[119] Chief Justice Neely of the West Virginia Supreme Court of Appeals formulated the parameters of who constitutes a child's "primary caretaker" by identifying which parent has taken responsibility for:

> (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.[120]

There were immediate concerns about using a presumption of primary caretaker for an award of custody. Some argued that it conditioned primary status on only certain duties, not ones such as earning outside employment

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119. *See* Garska v. McCoy, 278 S.E.2d 357, 360, 363 (W. Va. 1981) (holding that a court must give positive consideration to the parent who has been a primary caretaker for the child); *see also* High v. High, 697 S.E.2d 690, 700 (S.C. Ct. App. 2010) (holding that there is an assumption that child custody will be awarded to primary caretaker); MINN. STAT. ANN. § 518.17(6) (2019) ("the history and nature of each parent's participation in providing care for the child").

120. *Garska*, 278 S.E.2d at 363. Compare these functions with what is deemed necessary when any parent has custody of a child:

> Parenting functions are defined to include maintaining a safe, stable, consistent, and nurturing relationship with the child; attending to the child's ongoing developmental needs, including feeding, clothing, grooming, emotional stability, and appropriate conflict resolution skills; attending to adequate education for the child; assisting the child in maintaining a safe, positive, and appropriate relationship with each parent and other family members; minimizing the child's exposure to harmful parental conflict; assisting the child in developing skills to maintain safe, positive, and appropriate interpersonal relationships; and exercising support for social, academic, athletic, or other special interests.

State v. Jeffrey T., 932 N.W.2d 692, 704 (Neb. 2019) (citing the NEB. PARENTING ACT § 43-2922(17)).

wages so as to support the family.[121] Others argued that primary caretaker roles do not adequately accommodate the changes in the modern family. The point being that instead of caretaking, it would be better to use an approximation standard. That is, to the extent possible, custody should be awarded in a manner that approximates the role of each parent in the child's life.[122] Some commentators are willing to provide the primary caretaker presumption with a slim preference when compared to everything else that is proposed.[123] And yet consistent among all commentators is the suggestion that both parents work jointly to achieve a custody arrangement that, at least initially, avoids litigation. A summary of this suggestion is that:

> [W]hen a divorce is contemplated, parents should make a sincere effort to solve the problems of child custody themselves, thereby placing a high premium on family privacy and autonomy. But when there are insoluble conflicts which the couple cannot solve privately or through mediation, the couple must go to court. In such cases . . . a judge ought to approach child custody disputes from the vantage of the needs of the child based on the child's particular age, attachments, and stage of development. Additionally, the judge should consider the adult who can satisfy those needs best.[124]

While the primary caretaker presumption gained few adherents, it did initiate a new emphasis on joint efforts by parents to formulate a child custody arrangement. The new approach builds upon functions that the parents performed when living together, but now the emphasis is upon bringing each parent's understanding of what works to the formulation of a mutually agreed upon custody plan. Eventually this approach, incorporating function and joint parental involvement, will be adopted by the American Law Institute either through parenting plans,[125] or if this is not possible, allocation of custodial responsibility between the two parents.[126] Under the ALI, the parents are offered services to develop a parenting plan between themselves.[127] But if they are unable to, then a court may "allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the

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121. *See, e.g.*, Mary Kate Kearney, *The New Paradigm in Custody Law: Looking at Parents with a Loving Eye*, 28 ARIZ. ST. L. J. 543, 561–62 (1996).

122. *See* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 617 (1992).

123. *See* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 568 (1984).

124. Sanford N. Katz, *"That They May Thrive" Goal of Child Custody: Reflections on the Apparent Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker Presumption*, 8 J. CONTEMP. HEALTH L. & POL'Y 123, 132 (1992) (citing to Joseph Goldstein et al., *Beyond the Best Interests of the Child* (1973)).

125. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.05.

126. *See id.* § 2.08.

127. *Id.* § 2.05 cmt. a–b. See *infra* Section II.D.

proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation."[128]

Consistent with goals associated with the American Law Institute, an award of custody based on allocation of custodial responsibility seeks to continue the child's relationship with both parents,[129] but subject to the child's reasonable preferences, sibling integrity, and practicalities, such as economic and physical constraints.[130] The foremost rebuttal of the use of any allocation of custodial responsibility occurs whenever such an allocation would result in "substantial and almost certain harm to the child."[131]

Rather than dismiss the primary caretaker custody arrangement, it should be viewed as a step towards focusing on each parent's "caretaking and other parenting functions"[132] that contributed to the "child's best interest."[133] It initiated a trend that would focus less on achieving fairness between the parents and more on prioritizing the best interest of the child.[134] Because it was thought that a child would be better served by physical access to both parents, legislatures and courts became more favorably disposed towards joint physical custody arrangements.

C. Joint Physical Custody

Due in part to the evolving cultural parameters of gender, economic opportunity, and personal liberty, interaction with both parents increasingly appeared to be in the child's best interest. Haltingly, to accommodate this, state legislatures and courts rejected the approach of a winning and a losing parent, focusing only on the attributes of each parent. Instead, rival groups advocating for mothers and those advocating for fathers agreed each parent performing a reasonable share of parenting functions were equally qualified. Absent domestic violence or similar conflicting issues, courts began to focus on "shared custodial responsibility and rights between parents, rather than legal neutrality as to which [] individual parent gained total custody."[135] Focus was on parents sharing childcare functions, not winning custody and allowing the other parent to visit.

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128. *Id.* § 2.08(1).

129. *Id.* § 2.08(1)(a); *see, e.g.*, W. VA. CODE § 48-9-206 (LexisNexis 2001).

130. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.08(1)(b)–(1)(f); § 2.08(4).

131. *Id.* § 2.08(1)(h); *see, e.g.*, E.O.R. v. M.D.W., No. 17-0355, 2018 W.Va. LEXIS 160, at *10–12 (W. Va. 2018) (holding that allocation was warranted and appointing monitor to ensure safety of the child).

132. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.05(2)(c).

133. *See id.* § 2.02(1) (including meaningful contact with both parents, certainty, and predictable decision making).

134. *Id.* § 2.05(2).

135. Dinner, *supra* note 15, at 125.

By the 1980s, joint physical custody became more of an option.[136] Was this to be a preference, a presumption, or was it to be reserved to those times when the parents requested it? California became the first state to "incorporate a presumption that joint custody served the best interests of the child when both parents agreed to that arrangement."[137] Just as it had done with no-fault divorce and enforceable nonmarital contracts involving intimacy, California's adoption of joint physical custody spearheaded greater discussion of the option across the nation. "Within three years, every state had considered joint custody legislation, and thirty had enacted statutes recognizing this custody arrangement. By 1989, of the thirty-three states that had enacted statutes recognizing joint custody, thirteen included 'preferences' or 'rebuttable presumptions' in favor of joint custody."[138] Individual state statutes varied, but "generally limited the presumption formally to instances of agreement between the parties, but also included friendly parent provisions that in effect broadened that presumption."[139]

In an effort to promote the values associated with joint physical custody, courts sought to craft joint custody arrangements, such as the following: One parent has physical custody from Monday at 5:30 p.m. until Wednesday at 5:30 p.m.[140] The other parent has parenting time from Wednesday at 5:30 p.m. until Friday at 5:30 p.m. each week.[141] In addition, the parents shall alternate weekends, from Friday at 5:30 p.m. until Monday at 5:30 p.m. The parent commencing the custody time is responsible for transportation throughout the custody period.[142] And finally, the parents will share the child during holidays and summer vacations.[143] Predictably, while meeting the goals encapsulated in joint physical custody, the arrangement soon falters if the parents do not communicate well or lack mutual respect.[144]

Viewed academically joint physical custody makes a great deal of sense. Under normal circumstances a child thrives through equal access to both parents, and state and federal constitutions forbid utilizing gender in all but the most

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136. Joint physical custody is distinguished from joint legal custody in Blank v. Blank, 930 N.W.2d 523, 536 (Neb. 2019) (holding that "'[j]oint legal custody' is the mutual authority and responsibility of the parents for making mutual fundamental decisions regarding the child's welfare, including choices regarding education and health." (citation omitted)).

137. Dinner, *supra* note 15, at 133 (citing to Law of Sept. 22, 1979, ch. 915, § 1, 1979 Cal. Stat. 3149, 3150 (amended 1983) ("There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child . . .")).

138. *Id.* at 135 (citation omitted).

139. *Id.*

140. *See In re* Marriage of Luethje, No. 19-0768, 2020 Iowa App. Unpub. LEXIS 102, at *3 (Ct. App. Jan. 23, 2020).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 11–12; *see also In re* Marriage of Hansen, 733 N.W.2d 683, 698, 700 (Iowa 2007) (holding that respect and communication issues prohibit use of joint physical custody).

compelling circumstances. But at a practical level, even though women were employed in the workforce, and men were able to perform all household chores, the vast majority of families still adhered to traditional gender roles. Mother remained primary caretakers of children and fathers remained the primary breadwinner. Custody laws were ostensibly gender neutral, with an emphasis on shared parenting functions, but in reality, the gender roles were not gender neutral. This gender disparity has an impact on child support.

Men typically earn more from employment than women; mothers typically perform more childrearing functions than fathers. Because a mother typically was less invested in a paid career, typically had fewer financial resources, and typically needed the child support payment to provide a home for her children, any reduction in support had dire consequences. When divorce or physical separation occurs the lower earning mother often has to support her single parent household on her salary alone, usually with negligible or no decrease in the costs associated with the physical presence of children. Divorce and the loss of a second income "deepened the economic insecurity of poor mothers and children."[145] Thus, while joint custody seemed fair and rationale, it in fact had adverse impact on financial support for a parent with fewer economic resources.

Conceptually, the financial child support obligation is meant to equalize the child's joint parenting residential situation. When custody is awarded to the residential parent and visitation to the other, the nonresident parent pays the resident parent for the support of their child since the nonresident parent is not expected to maintain an intact household for the child. But when there is a joint custody arrangement, each parent is expected to maintain two separate households to provide the child with equality of living arrangements. But when there is joint custody, it seemingly negates child support from a nonresident to a resident parent since each parent is separately providing a home for the child. Ostensibly this seems fair, but in fact it is not if one of the parents has fewer financial resources than the other. One commentator describes the resulting unfairness:

> By failing to account for the gendered division of labor within marriage, fathers' rights activism devalued women's caregiving labor, diminished mothers' bargaining position at divorce, enabled men's continuing control over ex-spouses, and deepened economic inequality between men and women at divorce. Indeed, most elements of the [fathers' rights] movement evolved in ensuing decades toward extreme antifeminist and misogynist positions, often arguing that women manipulated accusations of domestic violence and child abuse to advance their custody and property interests at divorce.[146]

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145. Dinner, *supra* note 15, at 139.

146. *Id.* at 146 (citing Kelly Allison Behre, *Digging Beneath the Equality Language: The Influence of the Fathers' Rights Movement on Intimate Partner Violence Public Policy Debates and Family Law Reform*, 21 WM & MARY J. WOMEN & L. 525, 534–45 (2015)).

One parent's post-divorce financial insecurity may occur in three separate ways. First, the compulsory state child support guideline will mandate that both parents contribute to the financial support of their children. This is the start of every child support calculation. Guidelines seek to provide the child with "a minimum decent standard of living when the combined income of the parents is sufficient to achieve such result without impoverishing either parent."[147] The process expects the parent with more income to pay more support to the one with less, so as to provide the child with "a standard of living not grossly inferior to that of either parent."[148] But the guideline amounts may not be calculated to take this into account, and even if they do, they may be rebutted if the rebuttal would permit the "residential parents [to be] treated fairly."[149] That is, since joint custody makes both parents residential parents, rebuttal fairness would mean no support from one to the other.

Initially, "fairly" means less support for the lower income parent because it is expected that his or her support duties are relatively equal to the other joint parent. Ostensibly this seems justified and probably reasonable if the child spends relatively equal time with each parent. But even if the child spends substantially equal time with each of the parents, this calculation does not take into consideration the fact that the lower income parent must provide a home for the child, often with fewer economic resources. In reality, a child often "drifts" towards one parent from the other and the corresponding costs rise with the increasing presence of the child. Throughout, the parent with fewer economic resources will not be able to provide a "minimum decent standard of living"[150] for the child similar to the other parent without financial support. These facts are often overlooked in the guidelines.

Second, parents who serve as primary caregivers during marriage often reduced their investment in a career as a consequence. Therefore, these parents "suffered a competitive disadvantage when divorce forced them to reenter the labor market."[151] Because one parent, usually the mother, often sacrificed career development to stay at home and raise the children, that parent is less able to reenter the workforce and compete with the other parent who was able to develop a career while his or her children were being raised at home. Income disparity between the adults is compensated for in the division of marital property and/or spousal support ordered by the court at divorce.[152] Such apportionment is

147. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.04(1)(a).

148. *Id.* § 3.04(1)(b).

149. *Id.* § 3.04(3).

150. *Id.* § 3.04(1)(a).

151. Dinner, *supra* note 15, at 142.

152. *See, e.g.*, Rainwater v. Rainwater, 869 P.2d 176, 180–81 (Ariz. Ct. App. 1993) (holding that after a long term marriage and child care responsibilities, wife was entitled to an award of rehabilitation and also financial support until death or remarriage to provide her with a standard of living comparable to marriage).

customary throughout the majority of states.[153] But the child support guidelines do not expressly provide for career compensation adequate enough to rectify the disparity in reduced employment opportunities. Hence, the resulting need to provide support to the parent who has made a sacrifice for the family to "provide all family members with a minimum decent standard of living."[154]

And third, the underlying premise of state statutory child support guidelines is misleading.[155] Specifically, the child support guidelines "apply the 'intact family' child cost data to parental incomes and the number of children involved[] and then add other factors, such as health care insurance premiums and child care costs."[156] By using data applicable to one intact household as the premise upon which to calculate the guidelines the result is misleading. There are in fact two distinct intact households when parents no longer cohabit.[157] As a result, because there are two separate households, which must be separately maintained, the guidelines do not take into consideration the reality of child support. "Accordingly, current guidelines should be adjusted for the additional cost of a second household to accurately reflect actual ability to pay[.]"[158] The lack of a proper premise upon which to calculate child support is explained as follows:

> Parents in divorced or unwed situations live in separate households while intact families generally live in the same household. Thus, a parent's ability to pay is dramatically impacted if the parents are unwed or divorced because the parents are paying two mortgages/rent and two sets of household utilities. . . . Moreover, using economic data for an intact household creates a fictional standard of living that exceeds what is achievable by the parents for themselves. Therefore, the view that a child is entitled to an intact family standard of living in a divorced or unwed situation is inappropriate and unreasonable. It is more appropriate and reasonable to base child support on a realistic ability to pay that accurately reflects available income of parents living in two separate households.[159]

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153. *See* J. Thomas Oldham, *An Overview of the Rules in the USA Regarding the Award of Post-Divorce Spousal Support in 2019*, 41 HOUS. J. INT'L L. 525, 527 (2019).

154. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.04 cmt. (c)(i).

155. R. Mark Rogers & David A. Standridge, *Child Support Cost Tables: The Case for Second Household Adjustment*, 49 N. M. L. REV. 256 (2019).

156. *Id.*

157. The American Law Institute acknowledges this in its recitation of child support objectives. "Normally, the preparation standard of living of all family members cannot be maintained at dissolution, for the cost of maintaining two household at a given standard of living is substantially greater than that of maintaining one." PRINCIPLES OF THE L. OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.04, cmt. (c).

158. Rogers & Standridge, *supra* note 156, at 257.

159. *Id.* at 258.

Not surprisingly, the federalization of child support through mandated guidelines and enforcement has focused states' attention on meeting federal standards, often neglecting the reality of what is socially occurring.[160] Nonetheless, an amount established under the state guidelines is presumptively correct, only rebuttable if there is one or more factors that would make the amount established by the guidelines extraordinarily unjust.[161] And while it may be possible to argue that joint physical custody and the establishment of two separate households is a sufficient rebutting factor, such a process is expensive, time consuming, and often beyond the understanding of the parties involved. At a minimum, state child support guidelines must specifically accommodate the fact of joint physical custody—and the added financial consequences borne by a parent with financial disparity.[162] But this is inadequate too. Child support is important, and the inequities brought about because of the increased use of joint custody demand a process similar to what is provided to parents in formulating parenting plans. Specifically, parents should be offered court-ordered services to prepare child support orders.[163] When proposing parenting plans as a custody arrangement, the American Law Institute stipulated that parents must have access to information, mediation, and informed consent when developing a plan by which they would share child custody. The parenting plan process recommended by the ALI is worthy of consideration when addressing disparity of child support.

D. Parenting Plans

Each custody arrangement discussed previously incorporates what was then thought to be in the best interest of the child. Hence, best interest is not a stand-alone custody arrangement, rather it is the goal and substance of each and every child custody arrangement. Sole custody in the father or mother, an award to a primary caretaker, or joint physical custody between two equal parents was each considered, at a point in time, to be in the best interest of the child. This assimilation is illustrated in a Nebraska Supreme Court decision, holding that "Nebraska law neither favors nor disfavors any particular custody arrangement

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160. Family Support Act of 1988, Pub. L. No. 100–485, § 103(a)(3), 102 Stat. 2343 (codified at 42 U.S.C. § 667(b)(2)) (illustrating the federal mandated rebuttable presumption in state child support guidelines).

161. *Id.*

162. *See, e.g.*, State v. Jeffrey T., 932 N.W.2d 692, 713 (Neb. 2019) (citing to Neb. Ct. R. § 4-212 (rev. 2011)):

> When a specific provision for joint physical custody is ordered and each party's parenting time exceeds 142 days per year, it is a rebuttable presumption that support shall be calculated using worksheet 3. When a specific provision for joint physical custody is ordered and one party's parenting time is 109 to 142 days per year, the use of worksheet 3 to calculate support is at the discretion of the court. . . . For purposes of these guidelines, a "day" shall be generally defined as including an overnight period.

163. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.07.

and instead requires all such determinations to be based on the best interests of the child."[164] Clearly the substance is best interest, the form is mutable.

In addition to evolving custody arrangements, legislators and courts now seek to avoid a winning and a losing parent. They avoid determination language that awards the child to one or the other parent as if the child were a prize awarded at the end of a conflict. In times past, judges were "called upon to evaluate the child's life chances in each of the homes competing for custody and then to predict with whom the child will be better off in the future."[165] Today, as is illustrated in an Iowa decision, there is a preference for "joint decisionmaking on routine matters" between both parents.[166] This shift in attitude is true even when parents are contentious and having difficulty communicating.[167]

As a result, parents are increasingly encouraged to develop workable "parenting plans" that focus on the child's needs after parents cease cohabiting.[168] The plans are expected to incorporate criteria for resolving future disputes between the parents, careful to use litigation as the last resort, and maximizing each parent's continuing participation in the child's life.[169] To assist parents in formulating these plans, courts may provide parents with information, services to address conflicts such as domestic violence, and mediation services to assist in arriving at an agreement.[170] Parenting plans have changed the way that custody is addressed in state courtrooms. One commentator observes "the vocabulary of child custody law has changed to emphasize 'shared parenting,' 'decision-making,' and 'parenting plans' in place of the more rigid and possessory terms, such as 'custody' and 'visitation,' which sound like refugees from criminal punishment."[171]

The American Law Institute (ALI) provides a comprehensive approach to using parenting plans, and its approach has been adopted by a majority of individual states.[172] First beginning with the definition, the ALI defines a parenting plan as a set of provisions for allocation of custodial responsibility and decision-making responsibility on behalf of a child and for the resolution of

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164. Jeffrey T., 932 N.W.2d at 697.

165. Montgomery Cnty. Dep't of Soc. Servs. v. Sanders, 381 A.2d 1154, 1163 (Md. Ct. Spec. App. 1977).

166. *In re* Marriage of Hynick, 727 N.W.2d 575, 580 (Iowa 2007).

167. *See, e.g.*, Pace v. Pace, 595 S.W.3d 347, 352–53 (Ark. 2020).

168. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.05.

169. *See id.* § I2 II; *see also id.* § 2.10 (detailing a process for dispute resolution unless otherwise specified in parenting plan).

170. *Id.* § 2.07(1). Costs associated with these services should be reasonable or at no cost at all. *Id.* § 2.07(6).

171. J. Herbie DiFonzo, *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody*, 43 HOFSTRA L. REV. 1003, 1009 (2015).

172. For an example of a parenting plan *see* Sayre v. Furgeson, 66 N.E.3d 332, 335 (Ohio Ct. App. 2016); *see also* MINN. STAT. ANN. § 518.1705 (2006); *see also* Or. Rev. Stat. § 107.102 (2017).

future disputes between the parents.[173] The goal, as with other arrangements, is to maximize the child's best interest by assisting parents to formulate a plan for the future. Allocation of custodial responsibility is more than what was envisioned in the primary caretaker arrangement discussed above.[174] Rather, the ALI proposal draws upon past conduct, but also anticipates future conduct: including "(a) parental planning and agreement about the child's custodial arrangements and upbringing; (b) continuity of existing parent-child attachments; (c) meaningful contact between the child and each parent; (d) caretaking relationships by adults who love the child, know how to provide for the child's needs, and place a high priority on doing so; (e) security from exposure to conflict and violence; [and] (f) expeditious, predictable decision-making and the avoidance of prolonged uncertainty respecting arrangements for the child's care and control."[175]

The process contemplated by the ALI begins whenever parents cease to cohabit, usually occasioned by a petition for divorce or legal separation. Of course nonmarital cohabitants are parents and may formulate parenting plans too.[176] The parent or parents seeking child custody must then, in states requiring them, file with the court a parenting plan, accompanied by an affidavit describing, among other items, past parenting responsibilities for the child, employment obligations, child care possibilities, and any expected changes to these items in the future.[177] Importantly, if there are allegations or reports of parental conflict, domestic violence, or child abuse, these issues should be made known.[178] If there is credible evidence that conflict or abuse exists in the household then mediation to arrive at a plan should not occur unless both parents agree to participate in a meaningful way.[179]

What separates formulation of a parenting plan from computation of child support is that with the latter, there are no direct court-ordered services that assist

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173. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. d.

174. *See supra* Section II.B.

175. PRINCIPLES OF THE L. OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.02(1). Fairness between the parents is a secondary objective. *Id.* § 2.02(2); *but see id.* § 3.04 cmt. (c)(i) ("Contemplated child-support rules must be rigorously examined in terms of the equity and adequacy of outcomes.").

176. *See* O'Brien, *Marital Versus Nonmarital Entitlements*, supra note 27, at 113.

177. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.05(2). States may offer assistance to parents needing it in developing a parenting plan. *See id.* § 2.07.

178. *Id.* § 2.05(2)–(3) ; *see also* §§ 2.06(2), 2.07(1)(c), 2.07(2)–(3) (permitting the court to hold an evidentiary hearing to determine if child abuse or domestic violence has occurred). "Currently, all fifty states and the District of Columbia require courts making a custody determination to consider domestic violence by one parent against another." J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law in Policy*, 52 FAM. CT. REV. 213, 224 (2014).

179. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.07(2).

parents to understand and formulate a comprehensive child support order. The state is more heavily invested in a child custody arrangement, so it assists parents in developing an adequate parenting plan. Once the plan is formulated and filed with the court, it may serve as a temporary or a final plan[180] based on what appears to be in the child's best interest.[181] And, throughout its viability, the plan may be enforced through provisions in the plan itself, civil remedies, or criminal prosecution.[182]

At a minimum any acceptable parenting plan submitted to the court for approval should include the following: (1) a description of the child's living arrangements at each parent's home, and (2) the schedule/formula of when that child will reside at each home. This is referred to as the custodial schedule. The parenting plan must also include a process by which significant child care decisions may be made, and a plan for resolving disputes that may arise and recourse for violations of the plan's terms.[183] The process for future modification of any plan approved by the court may be specified in the plan too.[184] Interestingly, parenting plans are meant to be inclusive of all types of families, any number of living arrangements, multiple custodial persons, and scheduling designed by the parents themselves. There are some limitations. Those persons defined as parents enjoy Constitutional Due Process protections that empower them to withdraw visitation or custody arrangements from nonparents.[185]

Once the parenting plan is properly submitted the court is bound to give the agreement "deference" unless the agreement "(a)is not knowing or voluntary, or (b) would be harmful to the child."[186] And while allegations of domestic violence or child abuse are easily alleged and serious, it is the parents' unwillingness to cooperate in drafting another mediation-assisted agreement that

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180. *See, e.g.*, *In re* Marriage of Wilson, 68 P.3d 1121, 1127 (Wash. Ct. App. 2003) (holding that a parenting plan becomes a permanent one whenever the court so specifies).

181. *See* Bessette v. Bessette, 434 P.3d 894, 270–71 (Mont. 2019) (distinguishing among stipulated, temporary and final parenting plans); *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.05(4) (providing for temporary allocation of parenting).

182. *See id.* § 2.19.

183. *Id.* § 2.05(5). Mediation is one method of resolving disputes. *See id.* § 2.07.

184. *Id.* §§ 2.05(6), 2.15–2.16 (granting courts power to modify upon material change in circumstances or if the plan is not working as contemplated); *see, e.g.*, Sinram v. Berube, 432 P.3d 709, 712–13 (Mont. 2019) (utilizing provision in plan permitting modification thereby avoiding a petition for court-ordered modification); Todd M.S. v. Julie M.G., 741 S.E.2d 837, 843–44 (W. Va. 2013) (holding that modification based on terms of the parenting plan does not require substantial change of circumstances).

185. PRINCIPLES OF THE L. OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. a–b (defining legal parents, parents by estoppel, and de facto parents).

186. *Id.* § 2.06(1); *see also* § 2.111 (listing factors that rebut the approval of a parenting plan); *see, e.g.*, Thorton v. Bosquez, 933 N.W.2d 781 (Minn. 2019) (domestic abuse rebuts any deference for the parental agreement); Araya v. Keleta, 65 A.3d 40, 44 (D.C. 2013) (an "intrafamily offense" is a rebuttable factor).

will rebut the deference attaching to the parenting plan.[187] Overall, public policy concludes that a properly executed parenting plan "is more likely to succeed than one that has been ordered by the court over the objection of one or both parents."[188] Thus, the goal is to provide the parents with services that will produce a constructive plan of custody. A similar commitment for child support is warranted.

But what if parents cannot work together to formulate an effective parenting plan? Stated another way, what if the presumption in favor of a parenting plan is rebutted by the inescapable fact that the parents cannot cooperate, or that the presence of violence or abuse cannot be mitigated? The ALI then offers an alternative. A court may "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."[189] Even though a court is imposing a custody arrangement upon the parents, the objectives it utilizes are similar to those meant to be incorporated into a parenting plan drafted by the child's parents. Also, by mimicking the past custodial responsibilities a court is utilizing what the parents have done in the past, thereby involving the parents more directly in any custody arrangement. And finally, "reliance on past caretaking . . . [corresponds] reasonably well to the parties' actual expectations" not clouded by anger, loss and anxiety often associated with divorce.[190]

Allocation of custodial responsibility by a court rather than through a parenting plan still seeks the following objectives in uniformity throughout the state: (1) to permit the child a reasonable relationship with each parent; (2) to accommodate a child's preferences if the child is of a reasonable age; (3) to keep siblings together if it appears this would further the welfare of a child; (4) to accommodate a child's individual welfare and one parent's unique ability to meet the child's needs; (5) to accommodate any established parenting arrangement if it is reasonable and serves the child's interests; and (6) to emphasize the practical circumstances that involve the child's stability, including scheduling, transportation, costs, and parental cooperation.[191] And, as with any child custody order, should there be a material change of circumstances, such as a relocation of a custodial parent or a danger of harm to a child, the custody allocation may be modified.[192] If there is insufficient

187. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.06(3).

188. *Id.* § 2.06 cmt. a.

189. *Id.* § 2.08(1).

190. *Id.* § 2.08 cmt. b.

191. *Id.* § 2.08(1)(a)–(f). Courts often find sibling integrity in the best interest of a child. *See, e.g.*, *In re* Marriage of Will, 489 N.W.2d 394, 398 (Iowa 1992).

192. PRINCIPLES OF THE L. OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.08(1)(g)–(h) (specifying relocation in accordance with § 2.17(4) and accommodating "substantial and almost certain harm to the child").

evidence to establish a pattern of past custodial responsibility, then the court should make an award based on the child's best interest and the practical circumstances involved.[193]

The American Law Institute distinguishes a child's physical custody from his or her legal custody, which is a common distinction among the states. The ALI refers to legal custody as significant decision-making responsibilityand this includes the "mutual authority and responsibility . . . for making mutual fundamental decisions regarding the child's welfare, including choices regarding education and health."[194] Although different from physical custody, when awarding legal custody the ALI first looks to any agreement between the parties. Indeed, even if there is no express agreement, if there has developed a pattern of decision-making responsibility then presumptively this pattern is to be adopted unless contrary to the best interest of the child.[195]

If there is no mutual agreement, or no existing pattern of decision making, then decision making responsibility is allocated by the court based on what is in the best interest of the child.[196] And throughout physical and legal custody the American Law Institute promotes each parent's involvement with the child. This is illustrated by permitting a parent without joint decision making authority nonetheless to possess "sole responsibility for day-to-day decisions" whenever the child is in that parent's physical control.[197] That parent also has access to school and health care records unless such access would not be in the best interest of the child.[198]

Enforcement of the parenting plan begins with a complaint from a parent alleging that another parent "intentionally and without good cause violated a provision."[199] The court will then enforce the plan by first looking to whether there is an enforcement mechanism built into the plan. If not, the court will apply other remedies, such as make-up visitation time, reasonable expenses associated with the infraction, order that the offending parent undergo counseling, or modify the plan.[200] Enforcement through civil contempt is also a remedy.[201] But enforcement mechanisms do not include permitting parents to commit offenses in retaliation for the other parent's violation. And finally,

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193. *Id.* § 2.08(3)–(4).

194. Blank v. Blank, 930 N.W.2d 523, 536 (Neb. 2019) (citing NEB. REV. STAT. § 42-2922(11) (2016)).

195. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.09(2).

196. *Id.* § 2.09(1). State courts will look to the allocation of physical custody, the level of each parent's decision making in the past, the wishes of the parent, level of cooperation between the parents in the past, and the existences of limiting factors such as abuse, violence, neglect, or parental alienation. *See id.* § 2.11(1).

197. *Id.* § 2.09(3).

198. *Id.* § 2.09(4).

199. *Id.* § 2.19(1).

200. *Id.* § 2.19(1)(a)–(f).

201. *See, e.g.*, *In re* Custody of Halls, 109 P.3d 15, 18 (Wash. Ct. App. 2005).

parents may depart from the terms of the plan if they mutually agree and the departures is consistent with the terms of their plan agreement.[202]

Many states utilize ALI parenting plans when addressing child custody, either expressly or implicitly, by requiring, as a condition for joint custody, that the parents communicated with each other and demonstrate respect.[203] But because joint custody is involved in either arrangement there is the possibility that the parent with fewer financial resources may suffer unjustly. To illustrate, a Minnesota court awarded joint physical custody of the children to the parents upon their divorce.[204] The mother received 57% of parenting time and the father received 43%, well within the parameters of what would constitute joint physical custody[205]. Then, because the parents purportedly had relatively equal amount of time with the children, they agreed to deviate from the state sanctioned child support guidelines and instead to use an expense-sharing formula.[206] This agreement resulted in no child support being paid to the parent with the lesser income even though the proportion of that parent's income would be adversely affected by the significant physical presence of the child.[207] But for the parent with greater income, the income proportion needed to care for the child would be less, plus there is no payment of child support to the other parent. Obviously, a joint custody plan can be advantageous to this parent, the parent with greater financial resources.

There is a financial incentive for the higher income parent to petition for joint physical custody because, if granted, it will likely result in reduced or no child support payments. And even if joint custody is not granted, the threat of it may incentivize the lower income parent to surrender child support, spousal support or division of marital property so as to retain as much physical custody of the child as possible. As one commentator writes, "the parent more invested in custody will often trade away marital property, spousal support, or child support for a greater share of custody. Some claim that the less-invested parent may threaten to initiate custody litigation to pressure the other parent to make such tradeoffs."[208]

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202. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.19(2)–(3).

203. *See, e.g.*,, Klimek v. Klimek, 775 N.W.2d 444, 450 (Neb. Ct. App. 2009) (holding that "communication is an essential requirement for joint custody to be successful").

204. Pudlick v. Pudlick, No. A18-1652, 2019 Minn. App. Unpub. LEXIS 1031, at *1–2 (Ct. App. Nov. 4, 2019).

205. *Id.* at *2.

206. *Id.*

207. *See id.* at *1–2, *9–10.

208. Abramowicz & Abramowicz, *supra* note 56, at 391–92 (citations omitted); *see also* Elizabeth S. Scott, *supra* note 122, 651–52; Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 178–79 (1984) (denigrating trading custody for money); Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 963–65 (1979) (discussing the disadvantages encountered by a parent seeking more custody of a child).

Child support is impacted by joint physical custody, often to the detriment of a parent with fewer economic resources yet willing to trade financial support or marital property for maximum amounts of child custody. Yet while courts often provide extensive services to couples drafting parenting plans, such services are absent when couples negotiate child support arrangements. These arrangements, left to attorneys to negotiate the states' mathematical guidelines, are suffused with allegations of domestic violence, parental alienation, and fictitious schemes of joint parenting times. Child support determinations deserve the same court-ordered services as are offered for child custody. But first we need to review how child support is calculated.

III. CHILD SUPPORT

A. Purposes

If the best interest of the child is the focus of child custody, then it follows that the goal of child support should be to enhance any custody arrangement. And yet, the calculation of child support has not kept pace with the evolution of child custody. Joint physical custody is often overlooked in guideline formulations or accommodated in a facile manner. For example, Nebraska child support guidelines specify "that when [] visitation or parenting time periods of 28 days or more in any 90-day period, support payments may be reduced by up to 80 percent . . . using the trial court's discretion."[209] Thus, if a child support paying parent has physical custody of his or her child for the entire summer, three months, that parent's child support payment should be supplemented by fifty percent to accommodate for the added costs associated with the physically present child.[210] And yet, this supplement is not certain, it is discretionary as a rebuttable factor, contrasted with the knowledge that the other parent must still maintain the child's other home for that child's eventual return.[211]

The fault lies in the computation of a state's statutory guideline, which is static, and not always rectified by rebuttable factors.[212] The guideline is mandatory as the starting point and a court must find, and reduce to writing, its rebutting determination that the percentage of time each parent will have physical custody will not accurately reflect the ratio of funds each parent will

209. Lucero v. Lucero, 750 N.W.2d 377, 383–85 (Neb. Ct. App. 2008) (holding that trial courts must use specific guideline worksheets accommodating different custody periods).

210. *Id.* at 389.

211. *See, e.g.*, Frost v. Monahan, No. A-18-1081, 2020 Neb. App. LEXIS 107, at *23–24 (Ct. App. Apr. 7, 2020) (holding that physical custody of the child did not warrant an abatement of child support).

212. *See, e.g.*, Serrano v. Serrano, No. 2018-CA-001888-ME, 2020 Ky. App. Unpub. LEXIS 178, at *10–11 (Ct. App. Mar. 13, 2020) (noting that state legislation has not provided for a statutory support calculation for joint custody).

directly spend on supporting the child.[213] Thus, the child support guideline is the rebuttable support amount each parent must pay. Any rebuttal must be supported with written findings as to why the application of the guideline amount would be unjust or improper.[214] This of course generates bargaining between the parties, but this bargaining is not comparable to that which goes into drafting a parenting plan.[215] State-ordered services offered to the parents are not mandated and often parents—and their attorneys—are perplexed by the mathematical basis of the guidelines. The state's child support guidelines should serve as a baseline upon which the couple may build a workable support framework that focuses on the best interest of the child, similar to child custody. This is not a novel suggestion: "We see the primary function of contemporary divorce law not as imposing order from above, but rather as providing a framework within which divorcing couples can themselves determine their post dissolution rights and responsibilities."[216]

An illustration of guidelines deficiency, the inefficiency of rebutting the guideline amount, and the unfairness that results occurred in a decision from the Kentucky Court of Appeals.[217] The facts include a couple married for seven years and two children were born during this time.[218] When they separated, the parents formulated a joint custody arrangement that coordinated work schedules and minimized the need for formal daycare.[219] Under the state's guideline calculation the father was obligated to pay $722 in child support because he earned more than the mother, but without a written finding, the court reduced this to $67 a month.[220] It appears that the trial court deviated—rebutted—the state guideline amount because the couple had agreed to a joint custody arrangement and the guideline did not incorporate an allowance for joint custody.

The state trial court's deviation was understandable but its rebuttal and failure to issue written findings prompted the other to appeal its ruling and thus claim the higher amount of $722 monthly. The state's appellate court identified the issue as a legislative failure to incorporate joint custody into the state's child

213. *See* Vogus v. Vogus, 460 P.3d 1220, 1223–24, 1223 n.11 (Alaska 2020) (citing Alaska R. Civ. Proc. 90.3(b)).

214. *See* Griggs v. Griggs, 304 So. 741, 746 (Ala. Civ. App. 2020) (citing Rule 32(A), Ala. R. Jud. Admin.).

215. *See* Brinig, *supra* note 16, at 811–12 (suggesting that "bargaining occurs despite the apparent rigidity and statewide applicability of child support guidelines").

216. Mnookin & Kornhouser, *supra* note 208, at 950.

217. Serrano v. Serrano, No. 2018-CA-001888-ME, 2020 Ky. App. Unpub. LEXIS 178, at *26–28 (Ct. App. Mar. 13, 2020).

218. *Id.* at *1.

219. *Id.*

220. *Id.* at *27; *see also* Carver v. Carver, 488 S.W.3d 585, 593 (Ky. 2016) (noting a court must file a specific finding for deviation from the guideline amount); *see also* Fam. Support Act of 1988, 42 U.S.C. § 667(b)(2) (2018) (requiring a written or specific finding to rebut the guidelines presumption).

support guidelines.[221] Since 2018, Kentucky joined with other states in finding that joint custody is in the best interest of the child,[222] but "[t]o whatever degree the legislature has kept pace with society when it comes to custody itself, it lags much further behind when it comes to the child support statutes."[223] Indeed, "the legislature has yet to devise a statutory support calculation for what has become a far more common custody arrangement—joint custody and equal parenting time."[224] The appellate court also stated, "[m]aking either joint custodian with equal parenting time pay his or her support obligation to the other is obviously unjust and, frankly, antithetical to the custody award."[225] Thus, to achieve fairness, "the judiciary is left to decide [child] support by creatively applying existing statutes and the existing sole custody worksheet to circumstances for which they are not designed."[226]

The judiciary may rebut the guideline financial award with a finding that the amount is extraordinarily unjust or inappropriate. Kentucky confines the meaning of this phrase to seven criteria enumerated in statute,[227] but meeting the extraordinary level is difficult. For example, the Kentucky appellate court in *Serrano* held that an award of joint custody with equal parenting time is not a sufficient extraordinary factor so as to effectively rebut the presumption provided by the guideline.[228] This merits a brief discussion of the guidelines.

B. Function

The establishment and enforcement of child support obligations through state and federal statutes is recent but unyielding. Courts have "repeatedly recognized, one of the most fundamental duties of parenthood is 'the obligation of the parent to support the child until the law determines that he is able to care for himself.'"[229] And yet the level of that parental support was vague, encompassing necessities at first and then focusing on the child's needs and the parent's ability to pay. In our discussion of the evolution of custody arrangements in the beginning there was one residential parent and one

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221. Serrano v. Serrano, No. 2018-CA-001888-ME, 2020 Ky. App. Unpub. LEXIS 178, at *3 (Ct. App. Mar. 13, 2020).

222. *See* KY. REV. STAT. ANN. § 403.270(2) (West 2018).

223. *Serrano*, 2020 Ky. App. Unpub. LEXIS 178, at *13.

224. *Id.* at 17. The court suggested that courts begin to use another form of guideline, one which will allow for joint custody and two separate households. *Id.* at 33, 36–37. *See id.* at 33–37 (identifying the Colorado Method of calculating child support as one such method and recommending the lower court use it).

225. *Id.* at 26–27.

226. *Id.* at 18; *see also* Pennington v. Marcum, 266 S.W.3d 759, 765 (Ky. 2008) (holding that standardization is difficult when statutes do not address all of the possible permeations).

227. KY. REV. STAT. ANN. § 403.211(3)–(4) (West 2018).

228. *Serrano*, 2020 Ky. App. Unpub. LEXIS 178, at *31–32. But holding that the trial court may find that the cost of providing two homes is extraordinary. *Id.*

229. Monmouth Cty. Div. of Soc. Servs. for D.M. v. G.D.M., 705 A.2d 408, 410 (N.J. Super. Ct. Ch. Div. 1997) (quoting Wills v. Jones, 667 A.2d 331, 332 (Md. 1995).

nonresidential parent, the nonresidential parent was expected to pay for whatever the residential parent needed to provide for the child's needs. Even then, child support awards were spotty, variable, and lacked interstate enforceability. "Research at the state level . . . documented considerable variation in award values, even among families of similar size and socioeconomic characteristics."[230] Inconsistency in awards fostered both lack of payment and lack of enforcement.

Nonetheless, child support became increasingly important after California became the first state to permit no-fault divorce in 1969. Previously divorce could only be brought by an innocent spouse who could show a provable fault by the other spouse, such as adultery, desertion, or cruelty. After 1969, divorce could be obtained by either spouse, innocent or guilty, simply by showing the couple experienced irreconcilable differences, which led to the irremediable breakdown of the marriage.[231] Other states quickly joined California and enacted similar no-fault statutes and divorce rates soared,[232] which accelerated the child support determinations. By 1970, the National Conference of Commissioners of Uniform State Laws voted to make "irretrievable breakdown" the sole ground for divorce, which was defined as parties living separate and apart for more than 180 days.[233]

In 1973, the National Conference enacted codified provisions for awarding child support in its Uniform Marriage and Divorce Act, one of the first efforts to codify family law standards. The Act provided highly discretionary factors for a court to consider when ordering a parent, without regard to marital fault, to pay an amount "reasonable or necessary" for a child's support.[234] The court was to consider the following factors:

> (1) the financial resources of the child; (2) the financial resources of the custodial parent; (3) the standard of living the child would have enjoyed had the marriage not been dissolved; (4) the physical and emotional condition of the child and his educational needs; and (5) the financial resources and needs of the noncustodial parent.[235]

Interpretations of these factors were subjective, and results lacked consistency.

Gradually there developed an increasing number of children in single-parent households that were defined by state standards as below the poverty line. Concomitantly, these identified children were more likely to experience poor health issues, behavioral problems, higher school dropout rates, incarceration,

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230. Marsha Garrison, *Autonomy of Community? An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 43 (1998).

231. *See* CAL. FAM. CODE § 2310(a) (2015).

232. *See* Raymond C. O'Brien, *The Reawakening of Marriage*, 102 W. VA. L. REV. 339, 354 (1999) (noting divorce rate doubled between 1960 and 1990).

233. UNIF. MARRIAGE & DIVORCE ACT § 302 cmt. (a)(2) (UNIF. L. COMM'N 1973).

234. *Id.* § 309.

235. *Id.*

and early childbearing and divorce rates. While not confined to poor homes, there were multiple instances of child abuse, neglect, abandonment, and surrender, resulting in foster care placements for children. Foster care placement was expensive and by 1980 "more than 500,000 children resided in foster care while child-protective agencies worked with families by providing services and an open time frame for modification of adverse behavior."[236]

Ultimately, the Federal government paid for foster care but to curb expenditures Congress enacted a series of legislation that, in effect, federalized child support in each of the states. First, Congress passed the Adoption Assistance and Child Welfare Act (AACWA) in 1980, which mandated that states meet definitive standards or otherwise federal foster care payments would cease.[237] Among these specified standards are: (1) a written case plan for each child; (2) a description of where the child is placed and the reasonable services offered to the parents to facilitate family reunification; (3) as an alternative, services provided to establish another permanent placement for the child; (4) an administrative review of the child's placement at least every six months; and (5) a judicial review no later than eighteen months after the initial placement and periodically thereafter.[238] States were forced to comply with the federal mandates and as a result "within five years of its passage, the AACWA reduced the number of children in foster care to 270,000."[239] Yet, numbers of children in foster care began to rise again.[240]

Following its 1980 legislation, Congress enacted a statute in 1997 that focused less on reasonable services offered to parents and more on finding reasonable placements for children as quickly as possible.[241] The focus shifted from parents to children. Freeing children from interminable foster care benefitted federal coffers, but it was a significant shift in policy.[242] The Adoption and Safe Families Act (ASFA)[243] was enacted in 1997 and had as its stated goal to "achieve permanency for children at an accelerated pace."[244] Specifically, the

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236. Raymond C. O'Brien, *Reasonable Efforts and Parent-Child Reunification*, 2013 MICH. STATE L. REV. 1029, 1042 (2013).

237. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 471 (b), 94 Stat. 500 (1980). *But see generally* Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J. L. & SOC. JUST. 233 (2014) (discussing child support and its interaction with child welfare); Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229 (2000).

238. Adoption Assistance and Child Welfare Act of 1980 § 475(5)(B)–(C).

239. O'Brien, *Reasonable Efforts and Parent-Child Reunification*, *supra* note 236, at 1042.

240. *Id.* at 1042–43.

241. *Id.* at 1043.

242. *See generally* Kathleen S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 B.C. THIRD WORLD L. J. 223 (2009) (noting the significant change in policy as focus shifted from the parents to the children).

243. Adoption and Safe Families Act of 1997, Pub. L. 105–89, § 1(a), 111 Stat. 2115 (1997) [*hereinafter* ASFA]; 42 U.S.C. § 671(a)(15)(B)(ii) (2012).

244. O'Brien, *Reasonable Efforts and Parent-Child Reunification*, *supra* note 236, at 1043.

1997 legislation requires the state to petition a court for termination of parental rights if a child resides in foster care for more than fifteen of the last twenty-two months.[245]

A year earlier, Congress replaced the open-ended welfare benefits provided by Aid to Families with Dependent Children (AFDC) with time-limited benefits coupled with strict work requirements. This legislation was titled the Temporary Assistance for Needy Families (TANF). It was part of broader legislation titled the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).[246] The legislation had a profound impact on state child support because it offers federal grants to the states but requires states to comply with federal mandates in return.[247] Specifically, PRWORA requires that states submit plans on how each will implement family assistance programs, including a plan on how the state will require a parent to engage in employment as soon as possible, but no later than twenty-four months.[248] In addition, the state must certify that it will implement a child support enforcement program,[249] which includes federal and state measures: a Federal Parent Locator Service. States are required to have a State Directory of New Hires; a separate organization to "provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations;" a state disbursement unit to collect and disburse support payments; and a statewide information system, including a case registry system to track the collection of child support and a system to "facilitate the collection and disbursement of support payments."[250]

In 1984, Congress required states to adopt nonbinding formulaic child support guidelines. Then, in 1988, federal legislation required that these guidelines be given presumptive effect and any rebuttal requires a written justification.[251] The American Law Institute comments that "the factors that underlay inadequate or unjust discretionary child-support awards could not be expected to vanish in the face of formulaic guidelines; those factors might instead be expected to influence rulemakers who construct the guidelines."[252] Developments such as joint custody are expected to be addressed by those responsible for formulating the guidelines themselves.

Each state is able to formulate a child support guideline that seems most appropriate to any set of circumstances as long as it take into consideration

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245. ASFA § 103(a)(3)(E).

246. H.R. Rep. No. 104-651 (1997), *as reprinted in* 1996 U.S.C.C.A.N. 2183.

247. *See, e.g.*, Hodges v. Thompson, 311 F.3d 316, 320 (4th Cir. 2002) (holding that if a state fails to comply with federal requirements it must pay a penalty).

248. *See* 42 U.S.C. § 602(a)(1)(A)(ii).

249. *See id.* § 602(a)(2).

250. *See id.* §§ 653(a)(1), 653a(a)(1)(A), 654(4)(A), 654a(b), 654a(e)(4)(A)–(B), 654a(g)(1).

251. *See id.* § 667(b)(2).

252. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § I4.

certain minimal requirements and a process of review at least every four years.[253] States have enacted three different types of guidelines: (1) Melson Formula, (2) Percentage of Income, and (3) Income Shares Model.[254] A majority of states use the income shares model, in part because it begins with the premise that a child should be provided with support from both parents as if the parents had never separated.[255]

Once a state adopts a guideline formula it then must determine income, gross and net, future modification parameters, plus at what point should support end.[256] And, of course, what constitutes sufficient grounds for rebuttal of the guideline amount.[257] There are those who criticize using intact family spending data to create a guideline amount when in fact two separate households exist.[258] But any guideline is presumptive and maybe rebutted by such factors incorporated into the guideline such as joint custody, medical necessities, and childcare, or insurance. Otherwise, objections to the guidelines may occur through rebuttal, but even here there are limits. Rebuttal must be based on written findings making the award unjust, such as added expenses such as childcare.[259]

Ordering child support should not be equated with receipt of child support. Consistently, less than half of parents obligated to receive child support actually receive the full amount due, and the other half receive partial payment or nothing at all.[260] Nonetheless, federal efforts to collect unpaid child support have aggressively expanded since the Child Support and Establishment of Paternity amendments of 1974 and 1975, whereby states were directed to locate parents

253. *See* 45 C.F.R. § 302.56 (2019).

254. *See Child Support Guideline Models by Model Type*, NAT'L CONF. STATE LEGISLATURES (July 10, 2020), http://www.ncsl.org/research/human-services/guideline-models-by-state.aspx; *see also* Laura W. Morgan, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION (2018) (comparing types of child support guidelines).

255. *See* Voishan v. Palma, 609 A.2d 319, 321–22 (Md. 1992) (detailing the computations of support by means of the income shares model); *see also* LA. REV. STAT. ANN. § 9:315.19 (2016) (providing example statutory income shares payment schedule).

256. *See, e.g.*, COLO. REV. STAT. ANN. § 14-10-115(3)(c) (West 2018) (defining income); VT. STAT. ANN. TIT., 15 § 656a(b) (West 2018) (adjustments for additional dependents); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.14 (defining a parent's income for the purpose of establishing a child support award); *Id.* §§ 3.17–3.23 (review and modification of child support); *Id.* § 3.24 (duration of the child support obligation); Ricci v. Ricci, 154 A.3d 215 (N.J. Super. Ct. 2017) (adulthood ends the obligation for support).

257. *See, e.g.*, COLO. REV. STAT. ANN. § 14-10-115(8)(e) ("here its application would be inequitable, unjust, or inappropriate"); Permitting rebuttal for specified reasons or "even if a factor enumerated in this section does not exist." *Id.*

258. *See, e.g.*, R. Mark Rogers and David A. Standridge, *supra* note 156, 257; Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 117–20 (2008).

259. *See* Griggs v. Griggs, 304 So. 3d 741 (Ala. Civ. App. 2020).

260. Timothy S. Grall, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, P60-263, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2015, 12 (2020), https://www.census.gov/content/dam/Census/library/publications/2018/demo/P60-262.pdf.

and establish paternity.[261] For example, in 1988 Congress enacted the Family Support Act,[262] which required wage withholding, automatic tracking and monitoring systems, and the Act also created a special Commission on Interstate Child Support Enforcement. Then, in 1990, the Omnibus Budget Reconciliation Act required the Internal Revenue Service to collect child support arrearages of $500 or more when required by the state.[263]

Once federal enforcement of child support collection showed progress, additional legislation followed. In 1992, the Child Support Recovery Act made it a federal crime to withhold interstate child support,[264] and in 1994, the Full Faith and Credit for Child Support Orders Act required each state to enforce the child support orders of other states and prohibited modification of them without proper jurisdiction.[265] By 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),[266] which required each state to enact the Uniform Interstate Family Support Act,[267] codifying procedures for establishing jurisdiction for initiating or modifying any support order. Overall, federal enforcement included refusal to issue a passport,[268] permitting states to employ civil incarceration for refusal to pay child support,[269] and enactment of the Deadbeat Parents Punishment Act of 1998.[270]

Undoubtedly the federalization of child support has forced states to develop consistent state-wide support orders, it has forced states to better identify parents and collect child support from each, and in this mobile society it has made collection available across state lines. There is some federal involvement in child custody, but federal involvement is not nearly as prevalent as with child

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261. 42 U.S.C. § 651 (2016). A separate unit at the Department of Health and Human Services was directed to monitor state performance and help states perform their duties. *See* § 653(h)(1)–(2). In addition, sovereign immunity was waived. *Id.* § 659(a). Suits may be brought in federal courts. *Id.* § 652(a)(8). States could forward uncollected support award to the Secretary of the Treasury for collection. *Id.* § 652(b).

262. Family Support Act of 1988, Pub. L. 100-485, §§ 101(a)(3)(A), 123, 126(a).

263. *See* 42 U.S.C. §§ 664(b)(2)(A), 666(b) (2012).

264. 18 U.S.C. § 228 (2012).

265. 28 U.S.C. § 1738B(a) (2006).

266. Pub. L. No. 116-193, §§ 652–666 (codified at 42 U.S.C. §§ 652–666 (2012)).

267. Uniform Interstate Family Support Act, Pub. L. No. 104-193, § 321, 110 Stat. 2221 (1996).

268. *See, e.g.*, Eunique v. Powell, 302 F.3d 971, 972, 976 (9th Cir. 2002) (holding that denial of a passport is within the control of Congress); *see* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).

269. *See, e.g.*, Turner v. Rogers 564 U.S. 431, 435, 444 (2011) (holding that "[t]he Federal Government has created an elaborate procedural mechanism designed to help both the government and custodial parents to secure [child support payments]").

270. 18 U.S.C. § 228 (2012). A list of the most wanted Deadbeat Parents is kept by the Office of the Inspector General of the U.S. Dept. of Health and Human Services. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T HEALTH & HUM. SERVS., *Status of Deadbeats: Wanted Deadbeats*, https://oig.hhs.gov/fraud/child-support-enforcement/wanted.asp (last visited Aug. 24, 2020).

support.[271] But federal involvement comes at a cost, which is more than simply the loss of state autonomy. Arguably, that states have focused for decades on how best to comply with federal mandates so as to maximize federal entitlements. The dilemma this poses is that often states have not focused on the practical realities of child support, issues such as developing effective guidelines that accommodate joint physical custody.[272] But most of all, states have failed to provide the type of court-ordered services that accompany child custody orders. This failure results in unfairness, litigation, and worst of all, it runs counter to the best interest of the child.

C. Observations

Child support is firmly established as a federal-state effort, prompting a number of observations concerning the purpose of child support and the manner in which it is formulated and enforced at the state and federal levels.[273]

First, child support is a parental responsibility without regard to gender, marital status, or economic background. One court summarized the rationality of imposing consequences for nonpayment as punishing a parent for failing "to live up to a most basic civic and even moral responsibility: the provision of support to . . . children."[274]

Second, because of the increasing federalization of child support any determination of support must begin with the state statutory guidelines. They are presumptively correct and any rebuttal of the amounts produced warrants written findings of extraordinary circumstances.[275] States utilize one of three primary guideline formulations and each is designed to provide a presumptive amount of support that can then be rebutted, supplemented, or modified in accordance with state procedures. And while premarital and marital agreement between adults may determine the parameters of adult duties, such an agreement may not adversely affect the rights of a child or alter the presumptive authority of state support guidelines.[276] Agreements may be advantageous in enforcing,

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271. *See, e.g.*, Parental Kidnapping Prevention Act, Pub. L. No. 96-611, 94 Stat. 3568 (1980) (codified in parts of 18, 28, 42 U.S.C.).

272. *See* Jo Michelle Beld & Len Biernat, *Federal Intent for State Child Support Guidelines: Income Shares, Cost Shares, and the Realities of Shared Parenting*, 37 FAM. L. Q. 165, 194 (2003).

273. *See, e.g.*, Blessing v. Freestone, 520 U.S. 329 (1997) (describing the interlocking set of cooperative federal-state programs fashioned to collect child support).

274. Eunique v. Powell, 302 F.3d 971, 975 (9th Cir. 2002).

275. *See* Dudgeon v. Dudgeon, 318 S.W.3d 106, 107 (Ky. Ct. App. 2010).

276. *See, e.g.*, *In re* Marriage of Best, 901 N.E.2d 967, 970 (Ill. App. Ct. 2009) (holding that premarital agreements cannot impair child support or child custody rights); *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 3.07(2)(d) ("[T]he parents have agreed to a greater amount, or the parents have agreed to a lesser amount and their agreement has been reviewed and approved by the court[.]"); *see also id.* § 3.13.

for example, private agreements that enhance support obligations, such as paying for college or graduate school.[277]

Third, while today's child custody determinations most often begin with adult parents aided in arriving at a custody agreement—parenting plan—that maximizes their involvement and future enforcement, the same is not true with child support. "Balancing has not previously been systematically applied in the development of child-support rules and formulas."[278] Yet, the American Law Institute proposes a child support structure by which the parties may work toward compromise utilizing concrete objectives.[279] These objectives include: first, each parent's income should be shared to provide the child with a minimum standard of living whereby one parent's standard of living is not grossly inferior to that of the other;[280] second, that the child fairly share in important life opportunities without causing either parent to be treated unfairly;[281] and third, that the support obligation be comprehensible, readily enforceable and modifiable, and minimize conflict between the parents.[282]

Fourth, too often we are locked in language that has become outdated by the movement towards adoption of joint physical custody. For example, the ALI child support objectives are based in a formulaic support guideline. The ALI adopts one derived from that used in Massachusetts.[283] The formula balances "the precise extent to which the higher-income parent enjoys a higher standard of living that the other parent . . . [based on] the relative strength of competing interests."[284] Yet throughout its comments on the child support guideline, the ALI is locked in language that addresses residential parent versus nonresidential parent, obligor and obligee. For example: "The base is an estimate of the percentage of obligor income that will ensure all parties the same standard of living when the residential parent otherwise has income equal to that of the obligor parent."[285] When addressing joint custody parents (dual resident parents),[286] the American Law Institute retains the child support formula guideline but admits that child expenditures are greater now that there are two households. It also cautions that the child support award should minimize any distinction in the child's standard of living in either of the two different

277. *See, e.g.*, Shortt v. Damron, 649 S.E.2d 283 (W. Va. 2007) (finding that a father's agreement to pay for college was enforceable).

278. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § I5 II.

279. *Id.* § 3.04.

280. *Id.* § 3.04(1).

281. *Id.* § 3.04(2)–(6).

282. *Id.* § 3.04(7)–(9).

283. *Id.* § 3.05 cmt. (b).

284. *Id.* § 3.04 cmt. (d).

285. *Id.* § 3.05 cmt. (b).

286. Defined as dual resident parents who, share primary residential responsibility for a child, each providing a residence substantially equivalent to a primary residence. *See id.* § 3.02 cmt. e.

households.[287] And then the ALI offers as a proper modification of the stated formula a support award based on the degree of "each parent's percentage of residential responsibility."[288] Such a process is litigious, lengthy, and unnecessary. It would be better that the guideline be a part of a mediated process initiated by the court, which addresses from the start all unique features of child custody and child support. One impacts the other and both benefit from a process similar to that which produces a good parenting plan.

IV. CONCLUSION

Child custody and child support share a common goal, the best interest of the child. But child custody determinations have benefitted from progressive understanding of the fundamental rights of each parent, the avoidance of stereotypes such as gender or sexual orientation, and the emergence of parenthood through assisted reproductive technology. Partially as a result of this understanding, child custody has increasingly drifted towards a joint arrangement crafted by parents with the assistance of court-ordered services. This joint arrangement is called a parenting plan by the American Law Institute. Most importantly, this plan is drafted with the professional assistance, persons familiar with the issues and able to offer constructive proposals outside the litigious atmosphere of court hearings.

Child support awards would benefit from similar professional assistance, not in a rebuttal of child support guidelines, but rather working with the guidelines to accommodate the issues that do and may arise. Arguably, the federalization of child support has dulled state efforts to better respond to the challenges posed by joint physical custody arrangements. Federalization is a given, as are the guidelines which it mandates. But what may be done now is to provide a better process by which to establish a fair and just child support order. This process would be similar to that used to draft a child custody parenting plan.

287. *Id.* § 3.08(1)(c).

288. *Id.* § 3.08 cmt. (d).