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DILEMMAS OF SHARED PARENTING IN THE 21ST CENTURY: HOW LAW AND CULTURE SHAPE CHILD CUSTODY

*J. Herbie DiFonzo**

I. INTRODUCTION: THE MONSTERS IN THE CHILD CUSTODY DEBATE

Here's the story: Odysseus, who is known as Odysseus the Cunning (or Ulysses for you Latin scholars) is trying to get home to his beloved wife Penelope.¹ It's taking him twenty years, but as you know, he's so cunning he won't ask for directions.² So we pick up the story when Odysseus has to navigate his ship through the narrow passageway between the sea monster Scylla and the giant whirlpool Charybdis.³ To avoid one is to encounter the other. If he backed away from Charybdis, the giant sea monster Scylla would swallow his ship.⁴ And vice versa.

Why am I telling you this story?

What if the sea monsters that Odysseus faced represent two different ways to decide child custody cases? Let me make Scylla the current legal rule, that parenting determinations are case-by-case decisions based upon the standard known as "the best interest of the child."⁵ This standard is often nominally filtered through a laundry list of

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1. See HOMER, *The Odyssey*, in THE COMPLETE WORKS OF HOMER 1 (S.H. Butcher & Andrew Lang trans., 1950); *The Legendary Story of Odysseus*, GREEKA.COM, <http://www.greeka.com/ionian/ithaca/ithaca-myths/odysseus.htm> (last visited Sept. 2, 2015).

2. See HOMER, *supra* note 1, at 250.

3. See *id.* at 181-84, 188.

4. *Id.*

5. See, e.g., N.Y. DOM. REL. LAW § 240(1)(a) (McKinney 2010).

factors, ten or twelve or so, depending on the state, but here's the truth: the statutes almost never prioritize these factors, and only a particularly clumsy judge will ever get reversed.⁶ Why is this version of Scylla a monster? Because, if the standard for custody decisions is that loose, it encourages damaging litigation since the result is so unpredictable.

So who is Charybdis in my story? Charybdis is actually a new monster, an ostensibly radical, and seemingly sensible, proposal making its way around the nation. It took two parents to create the child, two parents to raise the child, and so, when the parents separate they are each entitled to fifty percent of the child, that is fifty percent of parenting time.⁷ This idea has made its way around the country in calls for a legal presumption—that joint legal and physical custody of a child should be the norm, and joint means 50/50.⁸ Why is this Charybdis a monster? Because, the presumption on paper may bear little resemblance to the family in the flesh, and the focus on the legal presumption is on the rights of the parents and not the welfare of the children.⁹ This monster has not been enacted in any state, but the monster keeps trying hard to get in.

What's the modern-day Odysseus to do?

II. HOW THE COMMON LAW OF PARENTING EVOLVED

How did we as a society come to decide custody cases, why is this process such a mess, and what is a better alternative? That's the one-sentence summary of my lecture. As with all contemporary issues, history can shed some useful light. I call this historical journey "From the Rule of One to Shared Parenting."¹⁰

At common law, fathers had absolute dominion over children and property. Courts dealing with familial breakup were focused on the allocation of material groups, and "child custody doctrines evolved as a

6. See, e.g., COLO. REV. STAT. ANN. § 14-10-124(1.5)(a) (West 2005) (listing eleven factors for the court to consider in determining the best interests of the child for purposes of parenting time); 40 ILL. COMP. STAT. 5/602(a) (2015) (listing ten factors for the court to consider in determining the best interests of the child for purposes of custody); J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 217 (2014); GABRIELLE DAVIS ET AL., BATTERED WOMEN'S JUSTICE PROJECT, THE DANGERS OF PRESUMPTIVE JOINT PHYSICAL CUSTODY 4-5 (2010), available at <http://www.thelizlibrary.org/liz/Dangers-of-Presumptive-Joint-Custody.pdf>.

7. See DAVIS ET AL., *supra* note 6, at 3.

8. See DiFonzo, *supra* note 6, at 216-17; Dorothy R. Fait, et al., *The Merits of and Problems with Presumptions for Joint Custody*, MD. B.J., Jan.-Feb. 2012, at 12, 14-15.

9. See DAVIS ET AL., *supra* note 6, at 6-9.

10. See DiFonzo, *supra* note 6, at 215.

subset of property rights.”¹¹ American colonial courts evolved a *quid pro quo* between father and child:

The [father] retained a right to the physical custody, labor, and earnings of his children in exchange for the duty to support, educate, and train them to earn their own livelihoods. Since custody was originally incident to guardianship of lands, the father was seen as the natural guardian of the child. Thus, in virtually all cases, common law courts awarded sole custodial rights to the father, unless the court had determined the father to be an unfit parent.¹²

Colonial mothers were entitled to honor and deference, but were not endowed with legally enforceable parenting rights or responsibilities. This legal vacuum began changing in the late 18th and early 19th centuries as courts expanded the role of *parens patriae*, resulting in acknowledgment of a legal role for mothers, a lessening of the power of the father, and an increase in judicial supervision over the family. *Parens patriae* is a legal doctrine which essentially means that the state is the “*ubereparent*,” and the government may intervene in family life when the children are in jeopardy, as they often are when the parents are fighting over custody.¹³

While a father’s custodial supremacy remained central, courts assumed a greater willingness to weigh a mother’s childrearing capacity against her husband’s economic and political standing. These equitable principles altered the treatment of children from a view grounded in property concepts to one focusing on their welfare, which helped legitimate a parental role for women. In the early 19th century, American courts dealt with “two related cultural shifts: the industrial revolution’s remaking men into marketplace wage earners and the emergence of a ‘separate sphere’ for women as domestic caregivers.”¹⁴

Mothers gradually assumed a legal role reflecting their perceived instinctual superiority as caretakers both for young children and those with disabilities. Courts molded a “tender years” doctrine to award custody of children to their mothers upon separation or divorce. A mother was “God’s own institution for the rearing and upbringing of the child,” and awarding her custody placed “child culture in the hands of an expert.”¹⁵

11. *Id.* at 214.

12. *Id.*

13. Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 973 (2010).

14. DiFonzo, *supra* note 6, at 214.

15. *Hines v. Hines*, 185 N.W. 91, 92 (Iowa 1921); *see Mercein v. People ex rel. Barry*, 25

The 19th century cult of domesticity “extolled wifely virtues and elevated mother love to near-mythic heights.”¹⁶ Courts accordingly applied the tender years doctrine almost without question. Progressive Era legislation in the early 20th century expanded the role of the state as *parens patriae* across a range of issues, “increasing the power of judges to evaluate parental fitness, and, thereby, further undercutting absolute male authority within the household.”¹⁷

A social revolution in the 1960s forced the tender years doctrine to yield to gender-neutral custody standards. Divorce rates surged in that decade, sparking an animated debate on changing parental roles in light of an increase in child custody determinations. The 1960s also proved a hotbed for challenges to gender inequality, including second-wave feminism and the rise of fathers’ rights groups. Collectively, these developments loosened the link between gender and parenting and highlighted the importance of both parents in child raising after separation.

But, the demise of the tender years doctrine left courts without a presumption to direct their custody deliberations. I want to emphasize that both the colonial “father-wins” and the 19th and 20th century “mother-wins” rules were presumptions. They were not ironclad rules of law; each rule could be overcome by substantial evidence. And, as I argue, they shared many attributes with the modern day “shared parenting presumptions,” principally a move away from the best interests standard for child custody.

Beginning in the late 20th century, courts replaced the gender-based theories with the more inclusive, but less definitive, best interests standard. Deciding custody on the child’s best interests meant that courts became burdened with case-by-case custody determinations, sometimes involving a battle of experts in lengthy, and fiercely contested, custody litigation. Moreover, the best interests standard seemed, to many, to engender a risk of excessive judicial discretion, as well as an inducement to judicial inconsistency and subjectivity.

Gender is always in the equation. Courts in the 1970s began to realize that “the assumption a mother keeps the home, performs household duties, and will have more time to devote to the children and their welfare” was simply not true for many mothers.¹⁸ “Such an

Wend. 64, 106 (N.Y. 1840) (awarding custody of a child to the mother because “the law of nature has given to her an attachment for her infant offspring which no other relative will be likely to possess in an equal degree”).

16. DiFonzo, *supra* note 6, at 214.

17. *Id.*

18. *In re Marriage of Bowen*, 219 N.W.2d 683, 688 (Iowa 1974).

assumption,” one court observed, “fails to take into account the realities of the divorced or single mother, who must assume the obligations of both parents, and is often not at home caring for the child but out working.”¹⁹ Gendered doctrines also had to deal with an emerging belief that “what a child needs is not a mother, but someone who can provide ‘mothering.’”²⁰

Despite the nearly universal abolition of a formal tender years presumption, “some judges [retain] a tendency to prefer that custody of young children be placed in the mother.”²¹ Even courts articulating the best interests standard often hew to the unwritten presumption “that the interests of children of tender years will be best served when they are in the custody of their mother.”²² A relic of the common law, it seems that the tender years doctrine is forgotten, but not gone.

To varying degrees, states continue to weigh the primary caretaker’s role in childrearing as a factor in making custody determinations.²³ And, mothers are still the primary caretakers of their children.²⁴ A 2013 Census Bureau study reported that only 31% of fathers with children under the age of fifteen provided *any* care for their children, and only 10.1% were the primary caregivers.²⁵ A 2011 study found that married mothers spend almost twice as many hours per week

19. *Bazemore v. Davis*, 394 A.2d 1377, 1381 (D.C. 1978).

20. *Id.*

21. N.Y. DOM. REL. LAW § 240 cmt. C240:9 (McKinney 2010).

22. *Ross v. Ross*, 339 A.2d 447, 448 (D.C. 1975) (citations omitted); see Bernardo Cuadra, Note, *Family Law—Maternal and Joint Custody Presumptions for Unmarried Parents: Constitutional and Policy Considerations in Massachusetts and Beyond*, 32 W. NEW ENG. L. REV. 599, 605 & n.42 (2010) (citing studies showing that trial courts continue *sub rosa* to apply the tender-years presumption).

23. See, e.g., 40 ILL. COMP. STAT. 5/602(a)(3) (2015) (listing “the interaction and interrelationship of the child with his parent” as a factor to determine the best interest of the child with regards to custody); TENN. CODE ANN. § 36-6-106(a)(1) (2014) (listing “strength, nature, and stability of the child’s relationship with each parent including whether one . . . parent has performed the majority of parenting responsibilities relating to the daily needs of the child [and e]ach caregiver’s past and potential for future performance of parenting responsibilities” as factors to determine the best interest of the child with regards to custody).

24. See GRETCHEN LIVINGSTON & KIM PARK, PEW RESEARCH CTR., A TALE OF TWO FATHERS: MORE ARE ACTIVE, BUT MORE ARE ABSENT 1, 3 (2011), available at <http://www.pewsocialtrends.org/files/2011/06/fathers-FINAL-report.pdf> (noting that in 2010, twenty-seven percent of children lived apart from their father while only eight percent lived away from their mother, and that in 2000, mothers spent nearly double the amount of time with children than fathers).

25. LYNDIA LAUGHLIN, U.S. CENSUS BUREAU, WHO’S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2011, at 20 tbl.8 (2013).

in primary childcare activities than the fathers (12.9 hours vs. 6.5 hours).²⁶ While this is less true now than in the days of *Leave it to Beaver*,²⁷ it is still true in 2014 more often than not.²⁸

III. FROM THE RULE OF ONE TO THE SHARING OF CUSTODY

Both the common law presumption favoring fathers' custody rights and the tender years rule that supplanted it in the 19th century reflected the legal system's conviction that custody was indivisible: "after a marital breakup, children could properly be raised by only one parent, with the other parent entitled only to limited visitation."²⁹ Illustrating the "Rule of One" is a 1913 Arizona custody statute providing that "other things being equal, if the child is of tender years, it shall be given to the mother. If the child is of an age requiring education and preparation for labor or business, then to the father."³⁰

Except in extreme cases, these legal conventions also avoided judicial evaluation of the welfare of the children whose custody was being determined. Unless significant evidence showed that the child would be placed in serious jeopardy through an award of custody to the legally favored parent, the stock custody rules at play until the late 20th century encouraged, and generally required, courts easily to decide child custody cases by reference to categorical legal norms.

Whether courts decided custody under the common law *paternal* presumption or the tender years *maternal* presumption, the best interests of the child were not evaluated, but merely assumed. Indeed, until the 1970s, judges routinely refused to permit divorcing parents from sharing custody even when they desired to do so. As the Maryland Court of Appeals observed in 1934, the traditional objection to joint custody was that it "divided the control of the child, which is to be avoided, whenever possible, as an evil fruitful in the destruction of discipline, in the creation of distrust, and in the production of mental distress in the child."³¹ The dominant view was that a child needed the stability of a single home, run by only one parent, and that shifting the child from parent to parent would result in "a permanent injury to the child" by

26. LIVINGSTON & PARK, *supra* note 24, at 3.

27. (CBS television broadcast 1957-63).

28. See WENDY WANG, PEW RESEARCH CTR., PARENTS' TIME WITH KIDS MORE REWARDING THAN PAID WORK—AND MORE EXHAUSTING 6 (2013), available at http://www.pewsocialtrends.org/files/2013/10/parental-time-use_10-2013.pdf (reporting that "the time mothers spend on housework and child care is still about twice that of fathers").

29. DiFonzo, *supra* note 6, at 215.

30. ARIZ. REV. STAT. ANN. § 14-846(B) (1956) (repealed 1973).

31. McCann v. McCann, 173 A. 7, 9 (Md. 1934).

“constantly remind[ing him] that he is the center of a parental quarrel,” and would not be “conducive to good citizenship.”³² Joint custody arrangements were nearly incomprehensible to most courts, which felt “it [was] hardly possible for a child to grow up and live a normal, happy life under such circumstances.”³³

The greater social and legal acceptance of joint custody in the late 20th century came about when parents themselves began assuming more equal parenting responsibilities. Within a generation, state legislatures, courts, and scholars reframed joint custody as a way for a child to continue a strong and meaningful relationship with both parents. Sharing custody also aimed at reducing the trauma children experienced in marital dissolution, and avoided labeling the noncustodial parent as merely a “visitor” to his or her child.

This arrangement became popular as a way to bypass the often-brutal dynamics of adversarial child custody litigation. In many states—and I think this is significant—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.³⁴ Isn’t it amazing how long we as a society have used these inappropriate terms in family matters? “Custody” when we mean “residential parenting,”³⁵ and “visitation” when we’re actually talking about “parenting time.”³⁶

Legislatures, courts, and mental health professionals are in the process of exchanging the old common law language for expressions evocative of mutual parental involvement. Post-separation parenting responsibilities are increasingly addressed as decision-making and parenting time, and parents are often held responsible for drafting parenting plans to structure those decisions as they are reconstituting

32. *McLemore v. McLemore*, 346 S.W.2d 722, 724 (Ky. 1961) (quoting *Towles v. Towles*, 195 S.W. 437, 438 (Ky. 1917)) (Divided custody “would be greatly to the detriment of the children, because it would give them no fixed or permanent home, but rather keep them unsettled and on the move. Nothing can be more demoralizing to a home or destructive to good citizenship . . .”); *Martin v. Martin*, 132 S.W.2d 426, 428 (Tex. Civ. App. 1939) (“It is readily apparent that such practices are calculated to arouse serious emotional conflicts in the mind of the child . . .”).

33. *Logan v. Logan*, 176 S.W.2d 601, 603 (Tenn. Ct. App. 1943).

34. See DiFonzo, *supra* note 6, at 216; J. Herbie DiFonzo, *The New Jurisprudence of Parenting: From Sole Custody to Shared Parenting*, FAM. NEWS & VIEWS, Fall 2013, at 1, 1, 5, available at <http://afccny.org/wp-content/uploads/2013/11/AFCC-Issue-1-Final.pdf> (describing the changing statutory and case law vocabulary dealing with parenting issues).

35. See Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 154 (2014).

36. *Id.*

their families.³⁷ “More than the lexicon is at stake”—the aim is to push a culture change.³⁸

Shared parenting and parenting plans are not only legally more accurate, they nudge public policy in a more beneficial direction. In Colorado, for example, divorcing parents do not litigate custody and visitation.³⁹ Instead, they now have a proceeding “concerning the allocation of parental responsibilities.”⁴⁰ And, they are encouraged to do so by jointly working out a parenting plan.⁴¹ In Washington, divorcing parents find that custody and visitation issues have been converted into the allocation of “parenting functions.”⁴² These are broadly defined to include “those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child.”⁴³ Rather than legal custody and physical custody, the Washington statute deals with “decision-making authority” and “residential provisions.”⁴⁴ To paraphrase Alexander Pope, the sound should be an echo to the sense; and, here it is.⁴⁵

Shared parenting has risks, of course.⁴⁶ The primary one is fostering “confusion and instability for children at the very time they need a sense of certainty and finality in their lives,” particularly if the parents are not committed to the substantial collaboration and communication required for the success of joint custody.⁴⁷ Most courts and commentators agree with the New York Court of Appeals that “joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion,” while “[a]s a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos.”⁴⁸

37. *Id.* at 154-55, 157-58.

38. DiFonzo, *supra* note 6, at 225.

39. *See id.*

40. COLO. REV. STAT. ANN. § 14-10-123(1) (West 2005); *see id.* § 14-10-124(1.5)(a)–(b) (redefining physical custody as “[d]etermination of parenting time,” and legal custody as “[a]llocation of decision-making responsibility”); DiFonzo, *supra* note 6, at 225.

41. *See* COLO. REV. STAT. ANN. § 14-10-124(7) (West 2005 & Supp. 2013).

42. WASH. REV. CODE ANN. § 26.09.004 (West 2009).

43. *Id.*

44. *Id.* § 26.09.187.

45. *See* ALEXANDER POPE, *An Essay on Criticism, in POETRY AND PROSE OF ALEXANDER POPE* 37, 47 (Houghton Mifflin Company 1969).

46. *See* DiFonzo, *supra* note 6, at 215-16.

47. Taylor v. Taylor, 508 A.2d 964, 970 (Md. 1986).

48. Braiman v. Braiman, 378 N.E.2d 1019, 1021 (N.Y. 1978).

IV. THE CHILD CUSTODY CONTINUUM

A recent national report, co-authored by Marsha Kline Pruett and myself, stated that “[t]he most significant trend in contemporary child custody law is toward greater active involvement by both parents in postseparation childrearing.”⁴⁹ This area is abuzz with legislative activity. Child custody statutes are frequently amended and bills regularly introduced calling for more changes. Throughout the United States, as well as in many other countries, the child’s best interest is the paramount consideration in a custody determination. Most jurisdictions have promulgated an elaborate set of statutory factors.⁵⁰

But, no consensus has emerged as to the exact relationship between the best interests factors and actual child custody determination. The problem is that “the best interest of the child standard does not, on its own, offer much real guidance.”⁵¹ Typically, a judge must consider a large number of factors, but there is no priority set among those factors and no clear way to predict the custody decision.⁵²

Sometimes, the legal standards provide even less guidance. New York, unfortunately, provides a prime example.⁵³ New York’s custody statute gives judges virtually a blank check, only directing them to “enter orders for custody . . . as, in the court’s discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child.”⁵⁴ The statute specifies only certain violence and abuse factors as considerations for custody, but otherwise allows courts to write on a clean slate, or—as critics charge—a slate of their own devising.⁵⁵

What does joint custody (or shared parenting) mean? Does it result in both parents having legal custody (decision-making), but only one parent having physical custody (residence)? Or, will the parents share both legal and physical custody in approximately equal proportions? Or

49. Pruett & DiFonzo, *supra* note 35, at 156.

50. See, e.g., LA. CIV. CODE ANN. art. 134 (1993) (setting out twelve factors for the court to consider in determining the best interests of the child).

51. N.Y. DOM. REL. LAW § 240 cmt. C240:6 (McKinney 2010).

52. See *id.*; DiFonzo, *supra* note 6, at 217.

53. See N.Y. DOM. REL. LAW § 240 (McKinney 2010 & Supp. 2015).

54. *Id.* at § 240(1)(a).

55. *Id.* (providing that if allegations of domestic violence “are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child . . .”). The court “shall not place a child in the custody of a parent who presents a substantial risk of harm to that child . . .” *Id.* Nor may the court award custody to a person convicted of the murder of a parent, legal custodian or guardian, or sibling of the child at issue in the proceeding. *Id.* at § 240(1)(1-c)(a). The New York statute provides no distinction between legal and physical custody. See *id.* at § 240(1)(a).

will the parents be joint legal decision-makers with one parent the sole residential parent? Even a decree that physical custody will be equally shared (a goal of many proposed bills in statehouses throughout the United States) leaves key issues unresolved. Will the child spend alternate days (or weeks or longer) with each parent? Will the child live with one parent on extended weekends and holidays while residing during school days with the other? Or, more rarely, will the child take up a fixed residence while each parent rotates in and out of the family home? Given these, and many other, permutations, the joint-sole custody division is best viewed along a bumpy continuum, not a binary choice.

Joint legal custody, or joint decision-making, means that both parents participate equally in making significant long-term decisions regarding their child's health, education, religion, and welfare.⁵⁶ Joint physical custody, or shared parenting, means that the child is in the physical care of both parents.⁵⁷ But, as with many novel cultural explorations, there is no generally accepted formula for how many hours per week, month, or year the child must reside with each parent for the arrangement to legally constitute joint physical custody.⁵⁸

What do parents need to do in order to obtain shared parenting rights? Emphasizing mutual consultation and collaboration "has led many courts to refuse to sanction [joint custody] when parental cooperation and communication are severely lacking."⁵⁹ But this principle allows one parent to unilaterally veto joint custody by *failing to cooperate*. Some states have declared that a court may order joint custody without the consent of both parents, when it is in the best interest of the child.⁶⁰ One wonders about the quality of the parenting relationship in those cases. As one court pointed out, the parents not only have to be willing to cooperate in shared parenting, but they also have to be capable of doing so.⁶¹

Does shared parenting mean a set and specific division of the child's time? Let me give you a definitive legal answer. That answer is

56. Pruett & DiFonzo, *supra* note 35, at 153-54.

57. *Id.*

58. See DiFonzo, *supra* note 6, at 217.

59. Pruett & DiFonzo, *supra* note 35, at 156.

60. See, e.g., ALA. CODE § 30-3-152(b) (2014) ("The court may order a form of joint custody without the consent of both parents, when it is in the best interest of the child."); MO. REV. STAT. § 452.375.1(5)(1) (2014) ("[T]he court shall consider . . . joint physical and legal custody to both parents, which shall not be denied solely for the reason that one parent opposes a joint physical and joint legal custody award.").

61. See Meyer v. Anderson, No. 01CA53, 2002 WL 1251449, at *2 (Ohio Ct. App. June 7, 2002) (identifying the two essential components of successful shared parenting: "One is a strong commitment to cooperate. The other is a capacity to engage in the cooperation required").

yes, sometimes, in some states, depending on the circumstances.⁶² But no, not generally, although there is considerable pressure afoot throughout the country to make 50/50 the legal presumption.⁶³

Missouri's joint custody statute provides a typical modern example in awarding "each of the parents significant, but not necessarily equal, periods of time during which a child resides with or is under the care and supervision of each of the parents."⁶⁴ A fairly new Tennessee statute quite sensibly provides that the court must decree "a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child" consistent with a number of factors pertaining to the best interests determination, as well as "the location of the residences of the parents" and "the child's need for stability."⁶⁵ The key is flexibility consistent with the goals of shared parenting.⁶⁶

While most states have avoided temporal formulas, several have mandated specific residential custody percentages under certain circumstances.⁶⁷ For example, the Nevada Supreme Court held that a statute calling for "frequent associations and a continuing relationship with both parents" means that if a judge ordered joint custody, "each [parent] must have physical custody of child at least forty percent of the time," or 146 days per year.⁶⁸ Utah law defines joint physical custody to mean "the child stays with each parent overnight for more than thirty percent of the year."⁶⁹

Minnesota custody law has for some time had a rule that, barring strong evidence to the contrary, a parent is entitled to receive at least twenty-five percent of the parenting time for the child.⁷⁰ This Minnesota statute has had some interesting twists. In 2011, a bill was introduced in the Minnesota Legislature to require "that the parents share time with the

62. See DiFonzo, *supra* note 6, at 220-21.

63. See *id.*; see also Jonathan Ellis, *Shared Parenting Could Be New Divorce Outcome*, USA TODAY (Jan. 27, 2014, 8:29 PM), <http://www.usatoday.com/story/news/nation/2014/01/27/shared-parenting-could-be-new-divorce-outcome/4950111> (reporting that "[a] growing number of state lawmakers are examining child custody laws amid a push from advocates who argue that divorcing parents should share equal custody").

64. MO. REV. STAT. § 452.375(1)(3) (2011); see, e.g., 750 ILL. COMP. STAT. 750 ILCS 5/602.1(d) (2015) ("Nothing within this section shall imply or presume that joint custody shall necessarily mean equal parenting time.").

65. TENN. CODE ANN. § 36-6-1-6(a) (2014).

66. See, e.g., *Squires v. Squires*, 854 S.W.2d 765, 764 (Ky. 1993) ("Equal time residing with each parent is not required, but a flexible division of physical custody of the children is necessary.").

67. See DiFonzo, *supra* note 6, at 221.

68. NEV. REV. STAT. ANN. § 125.460(1) (West 2014); *Rivero v. Rivero*, 216 P.3d 213, 219 (Nev. 2009).

69. UTAH CODE ANN. § 30-3-10.1(2)(a) (LexisNexis 2003).

70. MINN. STAT. § 518.175(1)(g) (2014).

child equally.”⁷¹ The bill defined “equally” to mean “at least 45.1 percent parenting time for each parent.”⁷² During the legislative process, the bill was amended to reduce the required minimum parenting time to thirty-five percent.⁷³ It passed the state legislature with that formula, but was vetoed by Governor Mark Dayton.⁷⁴ The bill had strong support from fathers’ rights groups,⁷⁵ and strong opposition from domestic violence prevention advocates, as well as the Family Law section of the Minnesota Bar and the Minnesota chapter of the American Academy of Matrimonial Lawyers.⁷⁶ In his veto letter, the Governor said that he was swayed “by the strong opposition of so many organizations . . . who work every day with the most challenging divorces and their effects on the well-being, and even the safety, of parents and children.”⁷⁷ Prominent Minnesota family law professor Nancy Ver Steegh said that the Governor was right to veto the bill: “I do think that we want to promote . . . healthy ongoing relationships with both parents after divorce That’s really important to do, and for many families that’s an achievable goal.”⁷⁸ But dividing custody is more difficult for other parents. “It’s hard to imagine that 35/65 allocation is going to be [the] right amount for every family and that individual approach is going to be much better as opposed to a one-size-fits-all idea,” noted Ver Steegh.⁷⁹

Bills calling for a legal presumption of 50/50 parenting are regularly introduced in state houses throughout the United States, and they are often accompanied by campaigns by fathers’ rights groups claiming that the current system for deciding child custody cases is biased against men.⁸⁰ But other material insists that there is a gender war and that mothers are winning by playing dirty and blocking fathers from parenting.⁸¹

71. H.F. 322, 2011-2012 Leg., 87th Sess. (Minn. 2012).

72. *Id.*

73. S. Comm. on Judiciary and Pub. Safety, 87th Sess., at 6836 (Minn. 2012).

74. See Letter from Mark Dayton, Governor, Minnesota, to The Honorable Kurt Zellers, Speaker of the House, Minnesota 1 (May 24, 2012) (on file with *Hofstra Law Review*).

75. See Sasha Aslanian, *Dayton Vetoes Bill that Would Have Given Divorced Parents More Presumed Custody*, MPRNEWS (May 24, 2012), <http://www.mprnews.org/story/2012/05/24/joint-custody-bill-veto>.

76. See *id.*

77. Letter from Mark Dayton, *supra* note 74, at 1.

78. Aslanian, *supra* note 75.

79. *Id.*

80. See *supra* note 63 and accompanying text; Bryan Iehl, *A Rebuttable Presumption of Joint Physical Care*, IOWAFATHERS (Oct. 9, 2010), <http://www.iowafathers.org/JPC-IowaFathers-Thesis.pdf>.

81. See, e.g., STEPHEN BASKERVILLE, *TAKEN INTO CUSTODY: THE WAR AGAINST FATHERS, MARRIAGE, AND THE FAMILY* 221-57 (2007); RICHARD T. HISE, *THE WAR AGAINST MEN: PERPETRATORS, WEAPONS, FALLOUT, AND COUNTER-ATTACK STRATEGIES* 15-25, 100, 131 (2004).

What's wrong with shared parenting? What's wrong with 50/50 parenting? Nothing is wrong with shared parenting. Nothing is wrong with 50/50 parenting. So why do I *sound* as if I'm *opposed* to shared parenting?

I'm not opposed to shared parenting, of course. But I am opposed to letting an arithmetical formula decide child custody. Let's discuss how a 50/50 parenting presumption would work. First, note that a legal presumption is not the same thing as a general assertion that after a family breakup, children should spend as much time with both parents as possible. Today, many states have established the public policy of "assuring that children will have frequent and continuing contact with parents who have shown the ability to act in their best interests, and to encourage parents to share in the rights and responsibilities of raising their children after divorce or separation."⁸² That's a wonderful development in the law, but it's not what a presumption would do.

A presumption of 50/50 parenting would shift the starting point for a custody determination from what is in the best interests of the child to how the parents will divide the 168 hours in a week in half so that each parent would have 84 hours a week with their child. "A 50/50 presumption [changes] the critical [question] from what's best for the child to how can we treat the parents equally."⁸³ That's not the same question at all. A legal presumption of 50/50 parenting time replaces the best interests of the child with the best interests of the parents.⁸⁴

82. DiFonzo, *supra* note 6, at 217; *see, e.g.*, FLA. STAT. ANN. § 61.13(2)(b)(1) (West Supp. 2015) ("It is the public policy of this state that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities, and joys, of childrearing."); 40 ILL. COMP. STAT. 5/602(c) (2010) ("Unless the court finds the occurrence of ongoing abuse . . . the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child."); MO. REV. STAT. § 452.375.4 (2014) ("[I]t is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or dissolved their marriage is in the best interest of the child . . . [and] it is the public policy of this state to encourage parents to participate in decisions affecting the health, education and welfare of their children . . ."); TEX. FAM. CODE ANN. § 153.001(a) (West 2014) (declaring that the "public policy of this state" consists of "assur[ing] that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child; . . . provid[ing] a safe, stable, and nonviolent environment for the child; and . . . encourag[ing] parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage").

83. J. Herbie DiFonzo, *Child Custody—Parental Rights vs the Child's Best Interest*, THE CONVERSATION (Nov. 12, 2014, 5:38 AM), <http://theconversation.com/child-custody-parental-rights-vs-the-childs-best-interest-33620>.

84. *See* DAVIS ET AL., *supra* note 6, at 5. One group of commentators explains:

One of the seemingly attractive features of the [joint physical custody] presumption is that it bypasses the problematic application of the best interest of the child standard. Rather than having to grapple with a long list of ill-defined factors and suffer the agony

In general, a presumption is an inference drawn from certain facts that establishes the basic *prima facie* case, which may be overcome by the introduction of contrary evidence.⁸⁵ How would a court apply a 50/50 custody presumption? It would likely require the party opposing 50/50 custody to produce sufficient evidence to overcome the presumption and, thus, shift the burden of persuasion to the party who wants 50/50 custody. But what does shifting the burden mean in this context? Shifting the burden of proof means something very specific in civil and criminal litigation, where the goal is a clear winner and loser.⁸⁶ What does shifting the burden of proof mean in a case where the child's welfare is at stake? As some scholars have pointed out, a presumption springs to life precisely when it should not—when the parents are at odds on this central issue of parenting.⁸⁷ That's the moment for individualized problem solving, not for a mathematical calculation.

One commentator has suggested that “rather than treating both parents equally . . . a presumption would actually disfavor the parent opposing joint custody.”⁸⁸ Why might a parent oppose 50/50 parenting? There could be many reasons, ranging from the other parent's difficult work schedule to his or her substance abuse problems, to his or her virtual disappearance from the child's life.⁸⁹

Another reason could be domestic violence.⁹⁰ You might be thinking, surely domestic violence would be a valid justification to overcome a 50/50 presumption. Certainly it would be—in theory. But, anyone who has seen the video of NFL star Ray Rice punching his fiancé unconscious in an elevator must realize that domestic violence is often not taken seriously, even when there's a video—which there almost never is.⁹¹ Intimate partner abuse tends to be invisible and rarely

of protracted litigation, the . . . presumption permits the court to cut right to the chase and make a quick, easy and predictable custody award. The apparent appeal of the presumption comes at a cost, however: it takes consideration of the child's best interests out of the calculus altogether.

Id. (footnotes omitted).

85. See BLACK'S LAW DICTIONARY 1304 (9th ed. 2009).

86. See DiFonzo, *supra* note 6, at 223-24.

87. See Nancy Ver Steegh & Dianna Gould-Saltman, *Joint Legal Custody Presumptions: A Troubling Legal Shortcut*, 52 FAM. CT. REV. 263, 266 (2014).

88. Fait et al., *supra* note 8, at 15.

89. See Dianne Post, *Argument Against Joint Custody*, 4 BERKELEY WOMEN'S L.J. 316, 319-20 (1989).

90. See DAVIS ET AL., *supra* note 6, at 12-15.

91. See *id.* at 16-17; Ray Rice—*Dragging Unconscious Fiancee . . . After Alleged Mutual Attack*, TMZ, http://www.t TMZ.com/videos/0_c5nk3w3n (last visited Sept. 2, 2015); see also Jill Martin & Steve Almasy, *Ray Rice Wins Suspension Appeal*, CNN, <http://www.cnn.com/2014/11/28/us/ray-rice-reinstated> (last updated Nov. 30, 2014, 12:59 AM) (reporting that Ray Rice's suspension from the NFL for domestic abuse was vacated even after the release of the video, and

reported, and despite the clear statutory mandate, courts often fail to fully account for domestic abuse.⁹²

Some of the 50/50 parenting presumption bills make it nearly impossible for a court *not* to order 50/50 time, unless one of the parents has abused or seriously neglected his or her child.⁹³ For example, the Minnesota Bill discussed earlier provided that the legal presumption “may only be overcome by demonstrating an unfitness of the parent being challenged that would cause substantial harm to the children.”⁹⁴ The parent seeking to overcome the presumption had the burden of establishing that risk by “clear and convincing evidence.”⁹⁵ Surely this is too low a threshold for shared parenting—that a parent has the right to joint decision making and equal residential time, unless it can be clearly and convincingly established that he or she constitutes a serious menace to the child.⁹⁶

A presumption of 50/50 parenting would also weaken, if not eliminate, the best interest of the child standard. It would significantly lessen the importance of the other custody factors that a court is normally asked to consider.⁹⁷ Call this the law of inertia. If a court is told to start the process by presuming 50/50, it will be difficult for the parent who thinks joint custody is harmful to convince the court that it should hold more hearings, and do more work, and risk a possible appeal when the legislature has decreed that 50/50 is the preferred universal custody resolution.

What about social science research? A presumption for 50/50 parenting tests the limits of current research. In 1984, Elizabeth Scott and Andre Derdeyn identified the two key assumptions behind these custody presumptions: (1) that parents will “be able to cooperate in raising their child, regardless of whether or not they freely decided upon joint custody;” and (2) that “the harm to the child caused by any interparental conflict will be outweighed by the benefit of continuing a

that “the NFL[has a] long history of sweeping abuse under the rug”).

92. See DAVIS ET AL., *supra* note 6, at 16-17 (explaining that the domestic violence exceptions to presumptions of joint custody “have proved largely futile because of the very nature of domestic violence”).

93. See, e.g., H.F. 322, 2011-2012 Leg., 87th Sess. (Minn. 2012); H.B. 1255, 2011 Leg., 86th Sess. (S.D. 2011).

94. Minn. H.F. 322.

95. *Id.* Note that parents in family court often appear *pro se*, and it is difficult to believe that many of them will understand the evidentiary burden, much less determine how to “meet that burden without benefit of counsel.” DAVIS ET AL., *supra* note 6, at 7 n.20.

96. See *supra* notes 83-85 and accompanying text.

97. DAVIS ET AL., *supra* note 6, at 5.

parent-child relationship with both parents.”⁹⁸ These assumptions continue to be “problematic.”⁹⁹

Margaret F. Brinig summarized the recent experiences of the states with joint custody rules.¹⁰⁰ She observed that, although policies favoring joint custody

were popular in the 1980s when several states adopted them, the more recent practice, after some twenty years’ experience, has been to allow joint custody as one of several options, rather than to presume that it is in the best interests of children. In other words, after experimentation with joint custody, some states have realized that continual moving between households may be harmful to children, that the bulk of newly divorced spouses cannot remain as positively involved with each other on an everyday basis as joint physical custody requires, or that the presumption is causing more litigation to already crowded dockets.¹⁰¹

What also troubles me greatly is the thorny matter of logistics. How can a court or the parents divide a child’s week precisely in half? How do you synchronize the parents’ work schedules and the children’s school and activity schedules to arrive at that magical fifty percent figure? And what counts as parenting time? Certainly the school day does not, but what if one parent accompanies the child on a school field trip? What if both parents attend the same gymnastics competition—whose time is it? What about piano lessons, ballet, hockey practice? Much more significantly, what sense does it make to allow parents who do not live in the same school district to each have fifty percent of the child’s time? How much commuting is the child expected to do so that he or she can travel between the parents? Whose interest is served by that arrangement?

V. THE ALTERNATIVE TO A LEGAL PRESUMPTION: A PARENTING PLAN

What’s better than a 50/50 presumption? What’s better than a legal presumption is a parenting plan. In 2000, the American Law Institute (“ALI”), a group of legal scholars, issued the Principles of the Law of Family Dissolution (the “ALI Principles”).¹⁰² One portion focused on

98. Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 457 (1984).

99. *Id.*

100. Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 781-82 (2006).

101. *Id.* (footnotes omitted).

102. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS

how to improve the parenting decisions after a break-up of the family.¹⁰³ The ALI Principles set out a useful definition for a parenting plan as “a set of provisions for allocation of custodial responsibility and decision-making responsibility on behalf of a child and for resolution of future disputes between the parents.”¹⁰⁴

Note that a parenting plan should make arrangements for the present situation and set out options for the future, both because children’s developmental needs change dramatically over time, and because unforeseen parenting issues will arise. While the ALI Principles as a whole have not been adopted, this particular recommendation has proven quite successful.¹⁰⁵ Many states are now requiring that the question of what to do with the children of divorce changes from a demand for custody by one parent to a requirement that both parents work together to create a parenting plan.¹⁰⁶

Parenting plans aim “to achieve the public policy goal that children have frequent and continuing contact with both parents.”¹⁰⁷ These plans

may be crafted from scratch by the parents, or they may be customized from a menu of sample plans available from court or private organization websites. They should be flexible but fairly detailed, setting out each parent’s area of responsibility in providing for the child’s residential and physical care as well as emotional well-being, both at the time the plan goes into effect and as the child ages and matures.¹⁰⁸

Parents may well need assistance in negotiating and drafting these parenting plans. Help is available in the form of mediation and the many books and websites that offer guidance to parents trying to work out a plan.¹⁰⁹ Sometimes parents may need a great deal of assistance;

(2000).

103. *Id.* at §§ 2.01-.19.

104. *Id.* at § 2.03.

105. See John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIM. LAW. 411, 433-35 (2012) (discussing “parent education programs” established by courts “to help deal with the large number of actual or potential disputes about custody-related issues”).

106. See DiFonzo, *supra* note 6, at 215-21, 225-26; Sarah Abramowicz, *Contractualizing Custody*, 83 FORDHAM L. REV. 67, 89-91 (2014).

107. DiFonzo, *supra* note 6, at 226.

108. *Id.* at 225.

109. See, e.g., MIMI Lyster ZEMMELMAN, BUILDING A PARENTING AGREEMENT THAT WORKS: CHILD CUSTODY AGREEMENTS STEP BY STEP (Micah Schwartzbach, ed., 8th ed., 2014); Reena Sommer, *Parenting Plan E-Course: Learn How to Draft a Plan for Your Child’s Future*, DR. REENA SOMMER & ASSOCIATES, http://www.reenasommerassociates.mb.ca/parentplan_intro.html (last visited Sept. 2, 2015); ABA Section of Family Law, *Your Parenting Plan*, 33 FAM. ADVOC., Summer 2010. Many state court systems have posted parenting plan guidebooks and templates on the Internet. See, e.g., *Court Forms: Parenting Plan/Residential Schedule Modifications*, WASH.

sometimes they may need two, three, or more tries to work out a plan. That is okay—sensitive lawyers and good mediators are available. Critically, these plans should recognize the likelihood of future parenting disputes by incorporating problem-solving mechanisms, such as mediation, collaborative law, parent coordination, and arbitration, with adjudication in court only as a last resort. Unlike a court custody order, a parenting plan can include mechanisms to adjust to the child's developmental changes and to other significant family transformations.¹¹⁰ Parenting plans are, in a sense, “homemade custody resolutions,” but they are providing methods for “sharing custody more in keeping with child development [findings in psychology] and less likely to lead to further damaging litigation.”¹¹¹

Development of a parenting plan is a significant family law mechanism created in response to the “persistent dissatisfaction with the traditional adversarial divorce process” and intended to encourage “models emphasizing self-determination and problem-solving approaches.”¹¹² In the last generation, family courts have moved “towards a philosophy that supports collaborative, interdisciplinary, interest-based dispute resolution processes and limited use of traditional litigation.”¹¹³ In short, parenting plans aim “at reversing the trend toward the clean break as a social norm in child custody dispute resolution.”¹¹⁴ Husbands and wives may want a decisive break from each other, but that

CTS., <http://www.courts.wa.gov/forms/?fa=forms.contribute&formID=32> (last visited Sept. 2, 2015); *Parenting Plan*, N.H. JUD. BRANCH, <http://www.courts.state.nh.us/forms/nhjb-2064-f.pdf> (last visited Sept. 2, 2015); *Permanent Parenting Plan Order*, TNCOURTS.GOV, https://www.tncourts.gov/sites/default/files/docs/parenting_plan_july_1_2014.pdf (last visited Sept. 2, 2015); *Planning for Parenting Time: Arizona's Guide for Parents Living Apart*, AZCOURTS, <http://www.azcourts.gov/portals/31/parentingTime/PPWguidelines.pdf> [hereinafter *Planning for Parenting Time*] (last visited Sept. 2, 2015). Parenting plan guidelines and other assistance is also available on-line from private sources. See, e.g., Salvatore Delello, Jr., *Love and Divorce: Guidelines for Creating a Parenting Plan*, LOVE & DIVORCE, <http://www.userniche.com/loveanddivorce/asp/UserNicheMainPage.asp?ID=60> (last visited Sept. 2, 2015); *Parenting Plan Guidelines*, CUSTODYXCHANGE, <http://www.custodyxchange.com/parenting-plan> (last visited Sept. 2, 2015).

110. See, e.g., *Planning for Parenting Time*, *supra* note 109, at 21-44 (suggesting parenting plans to account for child development).

111. J. Herbie DiFonzo, *There's a Great Way to Figure Out Child Custody. Most Divorce Courts Don't Use It.*, WASH. POST (Nov. 14, 2014), <http://www.washingtonpost.com/posteverything/wp/2014/11/14/no-children-should-not-spend-equal-time-with-their-divorced-parents>.

112. Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 659-60 (2008).

113. Peter Salem, *The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?*, 47 FAM. CT. REV. 371, 371 (2009).

114. Francis J. Catania, Jr., *Learning from the Process of Decision: The Parenting Plan*, 2001 BYU L. REV. 857, 870 (2001).

is not possible in a family with children. The legal system should be engaged, as my colleague Andrew Schepard often puts it, not in the dissolution of the family, but in the reorganization of the family.¹¹⁵

Many state statutes now insist that litigants draft a parenting plan as part of the process for obtaining shared parenting. New York is unfortunately not among these states, so part of my focus is to raise this issue among fellow New Yorkers.¹¹⁶ The Empire State's divorce law is antiquated in many respects, and one of the worst is the lack of emphasis on non-adversarial methods of making parenting time and decision-making choices. Our state statutes need to be amended to reflect the best practices of modern family law, including parenting plans as a necessary component of each divorce case to keep both parents as actively involved in their children's lives as possible.¹¹⁷

Will parenting plans always work? Of course not. Sometimes divorcing parents are so furious at each other that they are unwilling to work constructively to provide for their children's best interests. But this is not news. The failure or refusal of spiteful litigants to work collaboratively to insure the welfare of their children is a recurrent problem that has plagued the family law system that looks to the best interests of the child as the rubric for decision.¹¹⁸ And here is the sad part of my story. Parents this angry cannot be stopped. Venomous, vindictive, vengeful parents cannot be dissuaded from trying to destroy each other and their children. The courts will have to deal with these tragic cases, and my proposals will do little for these extremists. Make no mistake: parents this crazy will fight over best interests, and they will *absolutely* fight over presumptions. They don't care about their children—they are using their children as pawns in a gruesome grudge match against their ex-spouse. A presumption will not provide litigious parents a shortcut to resolve the case. It will only supply them with another angle of attack.

But here's the good news: most divorcing parents are distressed, but not destructive. Most parents are able to overcome the sorrow of a marital breakup and focus on the goal that their children need to remain in their family even if the parents separate. If these parents, troubled and uncertain about the future, come to a legal system that pushes them into traditional litigation modes, they will likely respond in kind. Some

115. See Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Deferential Case Manager*, 22 U. ARK. LITTLE ROCK L. REV. 395, 405-12 (2000).

116. See N.Y. DOM. REL. LAW § 240(1)(a) (McKinney 2010 & Supp. 2015).

117. See Cantania, *supra* note 104, at 870-75 (discussing the benefits of using parenting plans).

118. See DAVIS ET AL., *supra* note 6, at 4-5.

attorneys are complicit in this urge to litigate, leading their clients down the road to a courtroom confrontation, as if that were the natural way to resolve divorce and custody.

So what can we do? I think the most promising efforts chart a safer and truer course, for Odysseus as for us. How can we (and our friend Odysseus) avoid the Scylla of uncertainty emblematic of the somewhat unpredictable best interests standard?¹¹⁹ And how can we all turn away from the Charybdis of the legal presumption that treats child custody as an equation in algebra? One possible journey through these monsters urges separating and divorcing parents out of the courtroom and into a framework that helps them concentrate on mapping out a future with their children. What I'm advocating is a process, not a formula.

Here's what the 2014 national report, *Closing the Gap: Research, Policy, Practice and Shared Parenting*, prepared by the Association of Family and Conciliation Courts, said on these points:

Promotion of shared parenting constitutes a public health issue

. . . .

When [courts must] make decisions concerning parenting arrangements [they should do so] based on the specific and unique needs of individual children.

. . . .

... Children's best interests are furthered by parenting plans [providing] for continuing and shared parenting relationships that are safe, secure, and developmentally responsive[,] and [which] avoid a template calling for a specific division of time imposed on all families.

. . . .

It is inappropriate to have a presumption that covers all situations when not enough is known to verify that the presumption will benefit almost all children and families.

. . . .

... In lieu of a parenting time presumption, a detailed list of [the best interest] factors [should be considered] in each case.¹²⁰

Moving divorcing parents out of courtrooms and into living rooms to draft parenting plans is a major step in changing the culture of divorce. Will parenting plans always succeed? Surely not. Changing the divorce culture to enhance parental self-determination and move away from litigation will not be easy. But, keep in mind that culture change is usually extraordinarily slow until one day it becomes the new normal.

119. See *id.*; HOMER, *supra* note 1, at 181.

120. Pruett & DiFonzo, *supra* note 35, at 160, 167-68.

Our society is already moving in the direction of increasingly shared parenting.¹²¹ And we are collectively, in our typical nudging, budging, and fudging way, gradually turning toward parenting plans rather than briefs, mediation rather than litigation, and sharing the parenting rather than dividing the child. The legal and mental health worlds need to do their best to facilitate that process. Thank you very much for your kind attention.

121. See, e.g., NEBRASKA OFFICE OF STATE COURT ADMINISTRATOR, NEBRASKA 2002-2012 CUSTODY COURT FILE RESEARCH STUDY DECEMBER 31, 2013, at 10 (reporting that the “rate of joint custody in Nebraska has steadily increased in the past decade”). See generally Marla Cancian, et al., *Who Gets Custody Now? Dramatic Changes in Children’s Living Arrangements After Divorce*, 52 DEMOGRAPHY 1381, (2014), available at <http://link.springer.com/article/10.1007%2Fs13524-014-0307-8> (showing significant increases in shared custody in Wisconsin in recent years).
