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Child Custody is No Place for a Magic Formula: Why a Presumption of 50/50 Physical Custody in West Virginia is Not in Its Children's Best Interests

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**CHILD CUSTODY IS NO PLACE FOR A MAGIC FORMULA: WHY A
PRESUMPTION OF 50/50 PHYSICAL CUSTODY IN WEST VIRGINIA
IS NOT IN ITS CHILDREN’S BEST INTERESTS**

ABSTRACT

The “best interest of the child” standard is used throughout family law and is the generally accepted standard for determining custody disputes. However, many states have introduced, and some have enacted, legislation that creates a presumption of joint, or “50/50,” physical custody between the parents. As psychological studies have shown, instability typically found in custody disputes can have a significant impact on a child’s life, influencing attachment style and abilities to successfully self-regulate. These findings make the 50/50 presumption a flawed concept. Courts should be able to take factors supported by this research into account when making custody determinations as enumerated in best interest statutes. This Note argues that generally, and in West Virginia specifically, a presumption of 50/50 physical custody is not in the best interest of the child in every case and therefore undermines the best interest standard because it takes away judges’ discretion in determining each case on a fact-intensive basis.

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INTRODUCTION

*“Divorce is a widespread phenomenon and custody of children becomes at times a major battleground with deep emotional wounds to the children the frequent result.”*¹

Susie’s parents are getting divorced.² Her mother has had drug problems, which are beginning to resurface due to the strain of the divorce. Susie’s mother has tried to interfere with Susie’s relationship with her father. Her mother has tried to coach Susie into making false accusations against Susie’s father in attempts to attain sole custody. Susie’s parents have not been getting along, and Susie is frequently finding herself caught in between her mother and father. Due to the lack of stability in her home life, Susie is now exhibiting behavioral problems at school and her grades are beginning to suffer. At the same time, Susie’s mother has decided to move out of the family home and relocate to a town an hour away from the marital residence. Her father is willing to make the drive to drop Susie off, but Susie worries about how she can get her homework done with all the time spent in the car. If Susie lived in a state that had a presumption of 50/50 physical custody, both of her parents would be awarded equal time with her, even though that arrangement may not actually be in her best interest.

Joint custody is not appropriate in every case. Generally, many divorcing parents are unable to cooperate and the presumption does not adequately take this difficulty into account. A presumption of 50/50 physical custody would effectively undermine a judge’s discretion to determine the best interests of the

¹ Judith R. v. Hey, 405 S.E.2d 447, 449 (W. Va. 1990), *superseded by statute*, W. VA. CODE § 48-5-707 (2001), *as recognized in* Lucas v. Lucas, 592 S.E.2d 646 (W. Va. 2003).

² This hypothetical is very loosely based on facts in Luis O. v. Jessica S., 932 N.Y.S.2d 500 (N.Y. App. Div. 2011) and Lynn v. Freeman, 157 N.E.3d 17 (Ind. Ct. App. 2020).

individual child during custody disputes and would be particularly harmful to West Virginia due to factors including greater distances and added instability.

This Note argues that a shift from the best interest of the child standard to a presumption of 50/50 physical custody would be harmful nationally and especially in West Virginia. This Note seeks to provide lawmakers with guidance for creating legislation with a presumption of custody through an analysis of the psychological dimensions that will be negatively impacted by such legislation and shows how a presumption of 50/50 physical custody would be particularly harmful to the children in West Virginia. Should West Virginia adopt a presumption of 50/50 physical custody, there needs to be a statute that specifically addresses concerns unique to the state, with the provisions modeled after other states' presumption laws.

This Note will proceed as follows. Part I of this Note examines the history of child custody standards. Part II examines the best interest of the child standard and proposed legislation in West Virginia. Part III examines why a presumption of custody is generally not in all children's best interests and how West Virginia's proposal for a presumption of 50/50 physical custody would have catastrophic effects on the wellbeing of the children in the state. Part IV offers a solution to the defects in the current proposal to reach a workable standard that would strike the right balance in meeting the best interests of each child. This Note examines situations where divorcing parents have not agreed to their own parenting arrangement, and the judge must exercise his authority in determining custody of the couple's children.

I. STANDARDS IN CHILD CUSTODY

The best interest of the child standard is utilized within the framework of custody determinations and allows a judge to make individualized decisions for each case. As history has evolved, the best interest standard was designed to place both parents on equal footing. A presumption of 50/50 physical custody, as already enacted in some states, would effectively operate to eliminate the role of the best interest standard.

A. Custody Generally

Custody refers to the allocation of the right to the control and care of a minor child.³ Legal custody gives a parent the authority to decide major life decisions on the child's behalf, whereas physical custody gives a parent the responsibility for the everyday supervision of the child, including providing a home.⁴ Sole legal custody means only one parent has the right and responsibility to make decisions about the child's wellbeing, including matters regarding

³ See W. VA. CODE ANN. § 48-1-219–220 (West 2021).

⁴ See *id.*

medical care, education, and religious, moral, and emotional development.⁵ Shared legal custody entails mutual responsibility in deciding major decisions regarding the same facets of the child's development as sole legal custody.⁶

Sole physical custody means that the child lives with and is supervised by one parent, with the other parent having reasonable visitation, unless determined by the court that visitation would not be in the best interest of the child.⁷ Shared physical custody means that a child has times where he resides and is supervised by each parent, provided that "physical custody shall be shared by the parents in such a way as to assure a child has frequent and continuing contact with both parents."⁸ In some states, "[s]uch frequent and continuing contact with both parents is rebuttably presumed to be in the best interests of the child unless the evidence shows otherwise."⁹ Shared physical custody may also mean that a child's daily control, care, and residence are divided between the parties.¹⁰ If two parents cannot agree on an arrangement, the court must make these determinations in accordance with the best interest framework.

Traditionally, child custody decisions were based on presumptions derived from stereotypes about men and women.¹¹ Until the early 19th century, courts following the common law granted fathers an automatic right to custody of their children based on the property ownership laws at the time—fathers were better suited to financially provide for their children.¹² As time passed, and as early as 1813, this assumption was replaced with the view that children of "tender years" required nurturing that was best provided by their mother.¹³ This view became known as the tender years doctrine.

During the early 1900s, the Supreme Court of the United States began to create a framework for the best interest of the child standard. A general understanding of these cases helps to contextualize the best interest of the child

⁵ *Id.* § 48-1-239b (West 2022).

⁶ *Id.* § 48-1-239a (West 2022).

⁷ *Id.* § 48-1-241b (West 2022).

⁸ *Id.* § 48-1-241a (West 2022).

⁹ *Id.* It is important to note that the "frequent and continuing contact with both parents" portion of the statute that includes a rebuttable presumption that this contact is in the best interests of each child is not the same thing as a presumption of 50/50 physical custody. This definition of shared physical custody only states that *contact* with both parents is in the best interest of each child unless evidence indicates otherwise. *Id.*

¹⁰ *See, e.g.,* MINN. STAT. ANN. § 518.003(d) (West 2022).

¹¹ Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule"*, 41 U. BALT. L. REV. 83, 89 (2011).

¹² *Id.* at 89–90.

¹³ *Id.* at 90 (quoting *Commonwealth v. Addicks*, 5 Binn. 520, 521 (Pa. 1813) ("[C]onsidering their tender age, they stand in need of that kind of assistance, which can be afforded by none so well as a mother.")).

standard and shows how the law has evolved to recognize the rights of parents. In *Meyer v. Nebraska*,¹⁴ one of the earliest cases on parental rights, the Court highlighted the importance of family in American society.¹⁵ A few years later, the Court in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*¹⁶ cited the *Meyer* case and relied on it to recognize that parents have the constitutional right to raise their children.¹⁷ A “child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”¹⁸ By the 1960s, the desire to be free from all gender stereotypes challenged the preference for the mother to be given custody of her young children.¹⁹ At this time, women were more represented in the workforce, and studies were published that supported the proposition that children benefited from spending time with their father following divorce.²⁰ Some critics of the tender years doctrine found that it harmed children “who were pigeonholed into a one-size-fits-all custody arrangement”²¹ Based on these changes, some advocated for a joint custody presumption to replace the maternal presumption.²²

By 1972, the best interest of the child standard replaced a reliance on gender-based assumptions that prevailed in child custody proceedings.²³ This standard was designed to be gender-neutral to overcome the tender years presumption.²⁴ Twenty states had completely outlawed the tender years doctrine by 1981.²⁵ In *Quilloin v. Walcott*,²⁶ the Supreme Court upheld the application of the best interest of the child standard in a case about placement of children with a third party.²⁷ By the mid-1990s, it was clear that the preference for gender-

¹⁴ 262 U.S. 390 (1923).

¹⁵ *Id.* at 399 (stating the Due Process Clause of the Fourteenth Amendment includes the freedom to “establish a home and bring up children”). See U.S. CONST. amend. XIV, § 1.

¹⁶ 268 U.S. 510 (1925).

¹⁷ *Id.* at 534–35 (citing *Meyer v. Nebraska*, 262 U.S. 390).

¹⁸ *Id.* at 535.

¹⁹ Warshak, *supra* note 11, at 91.

²⁰ *Id.*

²¹ *Id.* at 97.

²² *Id.*

²³ *Id.* at 92; MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 147 (2005) (endnote omitted) (“Even though as late as 1976 in more than thirty states the mother was awarded custody of her young children, so long as she was fit, the tender years doctrine was rapidly replaced by gender-neutral rules.”).

²⁴ Warshak, *supra* note 11, at 92; *State ex rel. Watts v. Watts*, 350 N.Y.S.2d 285, 288 (N.Y. Fam. Ct. 1973) (“[T]he best interests of the child are served by the court’s approaching the facts of the particular case before it without sex preconceptions of any kind.”).

²⁵ Warshak, *supra* note 11, at 94.

²⁶ 434 U.S. 246 (1978).

²⁷ *Id.* at 256.

based custody decisions had been replaced by the best interest of the child standard.²⁸

The best interest of the child standard is used pervasively throughout family law jurisprudence in America today.²⁹ It is so widely relied upon because it boasts the best standard for determining many issues in family law.³⁰ The best interest of the child standard is used in divorce, custody, adoption, visitation, abuse, neglect, and child protective services proceedings.³¹ In these situations, judges are tasked with determining what is best for any individual child in their respective situation.³² The best interest of the child standard assumes that judges are capable of making decisions about what is in an individual child's best interest and that judges actually make decisions in each child's best interest.³³ Because of the high amount of discretion judges have when making these decisions, some argue that a large amount of money, time, and energy spent fighting during custody proceedings only negatively impacts children and their parents.³⁴ However, other scholars argue that "[a] best-interests standard that retains the benefits to children of individualized decision making is preferable in the context of contemporary reforms that accommodate new knowledge and encourage non-adversarial resolutions of custody disputes."³⁵

The Model Marriage and Divorce Act, now enacted in only a handful of states,³⁶ codified the existing law in most jurisdictions of the best interest of the child standard and stated that "the court shall determine custody in accordance with the best interest of the child."³⁷ The Act enumerates factors including: (1) the child's parents' preference for custody; (2) the child's wishes in terms of custody; (3) the relationship of the child with his parents and siblings; (4) "the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved."³⁸ Although these factors are to be

²⁸ Warshak, *supra* note 11, at 93.

²⁹ Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. FAM. STUD. 337, 337 (2008).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*; GUGGENHEIM, *supra* note 23, at 173.

³⁵ Warshak, *supra* note 11, at 85.

³⁶ The statute, as proposed, is only enacted in a handful of states. UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=c5a9ecec-095f-4e07-a106-2e6df459d0af> (last visited Oct. 15, 2022). This does not mean that the best interest of the child standard is only used in a handful of states.

³⁷ MODEL MARRIAGE AND DIVORCE ACT § 402 (UNIF. L. COMM'N 1973); Warshak, *supra* note 11, at 93; *see generally Determining the Best Interests of the Child*, CHILD.'S BUREAU: CHILD WELFARE INFO. GATEWAY (2020), https://www.childwelfare.gov/pubpdfs/best_interest.pdf.

³⁸ MODEL MARRIAGE AND DIVORCE ACT § 402 (UNIF. L. COMM'N 1973).

considered, they are not an exhaustive list—the court should “consider all relevant factors.”³⁹ Most jurisdictions provide a list of factors for the court to consider—which are usually very general—allowing for a large amount of judicial discretion.⁴⁰

The best interest of the child standard is designed to highlight the primary concern of the courts in custody disputes—the wellbeing of the child.⁴¹ The best interest of the child standard allows for flexibility, as it can be adapted to each child’s circumstances in specific cases.⁴² Within the custody framework, there are several different options for arrangements.⁴³ The best interest of the child standard allows for flexibility within these custody arrangements. The standard is primarily concerned with the family that is at the center of each case and considers this more important than the expediency a presumption could offer.⁴⁴ A presumption would allow judges to skip over these specific, factual inquiries and start out with the assumption that 50/50 physical custody is in the best interest of each child.

B. States That Have Adopted Some Form of a Presumption

For many years now, different states have introduced bills to their respective legislatures that would create a presumption of 50/50 physical and legal custody in custody proceedings.⁴⁵ Those who advocate for a joint custody presumption argue that it allows both parents to have their constitutional rights to raise their children recognized after divorce.⁴⁶ However, this Note will discuss why joint custody is not always appropriate. At a minimum, before any state legislatures enact presumption laws, detailed studies must be conducted to assess the potential benefits, downfalls, and consequences of such a presumption.⁴⁷

³⁹ *Id.*

⁴⁰ Warshak, *supra* note 11, at 97.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See supra* Part I. These arrangements are defined differently according to state statutes, but generally mean the same thing.

⁴⁴ Warshak, *supra* note 11, at 97.

⁴⁵ Dorothy R. Fait, Vincent M. Wills & Sylvia F. Borenstein, *The Merits of and Problems with Presumptions for Joint Custody*, 45 MD. BAR J. 12, 13 (2012).

⁴⁶ *Id.*

⁴⁷ *Id.* at 13–14.

States including Kentucky,⁴⁸ Idaho,⁴⁹ Iowa,⁵⁰ Louisiana,⁵¹ Minnesota,⁵² New Hampshire,⁵³ New Mexico,⁵⁴ Utah,⁵⁵ Wisconsin,⁵⁶ and the District of Columbia⁵⁷ have passed legislation that enacts a presumption in favor of 50/50 custody. If both parents agree,⁵⁸ there is a presumption of joint custody in Alabama,⁵⁹ California,⁶⁰ Mississippi,⁶¹ and Nevada.⁶² All of these states' joint

⁴⁸ See KY. REV. STAT. ANN. § 403.315 (West 2022).

⁴⁹ IDAHO CODE ANN. § 32-717B (West 2022). There is a presumption of joint custody unless there is proof by a preponderance of the evidence that this would not be in the best interest of the child. *Id.* There is a presumption that joint custody is not in the best interest of a child if one of the parents is found to be a habitual domestic violence offender. *Id.*

⁵⁰ IOWA CODE ANN. § 598.41 (West 2022). If the court were to find a history of domestic violence, a rebuttable presumption against joint custody then exists. *Id.*

⁵¹ LA. CIV. CODE ANN. art. 132 (West 2022). In the absence of a parental agreement or if the agreement is not in the best interest of the child, “the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent.” *Id.*

⁵² MINN. STAT. ANN. § 518.17 (West 2022).

⁵³ N.H. REV. STAT. ANN. § 461-A:5 (West 2022).

⁵⁴ N.M. STAT. ANN. § 40-4-9.1 (West 2022).

⁵⁵ UTAH CODE ANN. § 30-3-10(3) (West 2022). There is a presumption for joint legal custody that can be rebutted by a showing by a preponderance of the evidence that this arrangement is not in the best interest of the child. There is a presumption that joint legal custody is in the best interest of the child, except where there is evidence of domestic violence, special physical or mental needs of a parent or child which would make joint legal custody difficult to implement, physical distance between the residence of the parents which would make joint legal custody unreasonable, or any other factor the court determines is relevant. *Id.* § (4). There is no presumption for or against joint physical custody or sole physical custody—the court is allowed to use “the widest discretion to choose a parenting plan that is in the best interest of the child.” *Id.* § (8).

⁵⁶ WIS. STAT. ANN. § 767.41 (West 2022). There is a presumption that joint legal custody is in the best interest of the child except if the court finds by a preponderance of the evidence that one parent has engaged in domestic violence. *Id.* § (2)(am). The court will grant sole legal custody only if it is in the best interest of the child and both parties agree or at least one party requests sole legal custody and the court finds one party is not capable of performing their parental duties or some other condition exists that would significantly interfere with a sole legal custody arrangement. *Id.* § (2)(b).

⁵⁷ D.C. CODE ANN. § 16-914 (West 2022).

⁵⁸ Even if both parents do not agree to joint custody, the judge may still grant it. If both parents agree to joint custody, the judge will most likely grant it in these jurisdictions.

⁵⁹ ALA. CODE § 30-3-152 (West 2022). “If both parents request joint custody, the presumption is that joint custody is in the best interest of the child. Joint custody shall be granted in the final order of the court unless the court makes specific findings as to why joint custody is not granted.” *Id.* § (c).

⁶⁰ CAL. FAM. CODE. § 3080 (West 2022).

⁶¹ MISS. CODE ANN. § 93-5-24 (West 2022).

⁶² NEV. REV. STAT. ANN. § 125C.0015 (West 2022).

custody presumptions differ. Different jurisdictions have created separate ways to rebut the presumption of joint custody—for example, in Idaho and Utah the presumption can be rebutted by a preponderance of evidence to the contrary, but in Louisiana the presumption must be rebutted by clear and convincing evidence.⁶³ However, many state statutes create an exception to the presumption when there is a finding of domestic violence. Many states have differing definitions of joint custody, adding to the variation between the statutes.

Other states such as Arizona,⁶⁴ Missouri,⁶⁵ Oregon,⁶⁶ and Virginia⁶⁷ have passed legislation with a consideration⁶⁸ of 50/50 custody. A presumption of 50/50 custody requires the party who is against a joint custody award to present enough evidence to rebut, or overcome the presumption.⁶⁹ In effect, a presumption like this would not treat both parents equally, as advocates of the presumption argue—instead, “a presumption would actually disfavor the parent opposing joint custody.”⁷⁰ Returning to the earlier example of Susie and her two divorcing parents, under a presumption, Susie’s father would have to be the one to put forth enough evidence that shared custody with Susie’s mother would not be in Susie’s best interest in order to overcome the presumption. This presumption places the burden on Susie’s father and, in a way, favors Susie’s mother even though a 50/50 physical custody arrangement should place parents on an even playing field.

Bills setting forth presumptions of joint custody have been proposed in more than 20 states, and as discussed, some have been passed.⁷¹ These proposals are controversial and continue to be proposed in different legislative years.⁷² Politicians opposing joint custody presumptions worry that these proposals fail to consider what is in the child’s best interest, instead focusing on the desires of parents.⁷³ Rick Scott, former governor of Florida, said that a Florida bill

⁶³ See *supra* notes 49, 51, and 55.

⁶⁴ See ARIZ. REV. STAT. ANN. § 25-403–403.03 (West 2022).

⁶⁵ See MO. ANN. STAT. § 452.375 (West 2022).

⁶⁶ See OR. REV. STAT. ANN. § 107.137 (West 2022).

⁶⁷ See VA. CODE ANN. § 20-124.2 (West 2022).

⁶⁸ A consideration will require the court to consider a type of custody but does not mandate a presumption for it.

⁶⁹ Fait, Wills, & Borenstein, *supra* note 45, at 15.

⁷⁰ *Id.*

⁷¹ Michael Alison Chandler, *More Than 20 States in 2017 Considered Laws to Promote Shared Custody of Children After Divorce*, WASH. POST (Dec. 11, 2017), https://www.washingtonpost.com/local/social-issues/more-than-20-states-in-2017-considered-laws-to-promote-shared-custody-of-children-after-divorce/2017/12/11/d924b938-c4b7-11e7-84bc-5e285c7f4512_story.html.

⁷² See *id.*

⁷³ Steve Bousquet, *Gov. Rick Scott Vetoes Controversial Alimony Bill, Says It Could Harm Children in Divorce Cases*, TAMPA BAY TIMES (Apr. 18, 2016),

proposing a presumption of joint custody would put “the wants of a parent before the child’s best interest by creating a premise of equal time-sharing”—he believes that such a decision should remain with the judge.⁷⁴ Presumptions therefore prioritize the rights of parents over a child’s wellbeing.

II. WEST VIRGINIA

Over the past several years, bills have been proposed to the state’s legislature that advocate for a presumption of 50/50 physical custody. A presumption of this nature would create a barrier for judges to truly make an evaluation as to what arrangement would be best for an individual child.

A. *Best Interest of the Child*

As of 2021, in West Virginia, courts apply the best interest of the child standard to child custody cases rather than presume parents should be granted 50/50 physical custody.⁷⁵ Unless parents agree to a parenting plan⁷⁶ or unless harmful to a child, the court will arrange custody⁷⁷ so that the time a child spends with each parent can attain the following best interest objectives: (1) promoting a meaningful relationship between parents who have been performing their parental duties; (2) considering the preferences of the child in some circumstances; (3) keeping siblings together; (4) protecting a child’s welfare from an arrangement that would damage emotional attachments or be one in which the child’s needs could not be met; (5) considering any prior agreements; (6) avoiding an extremely impractical agreement that would interfere with the child’s stability, including the distance between the parents’ homes, the cost of transport, the parents’ and child’s schedules, and the ability of the parents to cooperate; and (7) considering each parent’s ability to foster a positive relationship between the child and the other parent.⁷⁸ This means that the court will evaluate and weigh these factors in order to reach a custody arrangement that furthers these objectives and will be in a child’s best interest. West Virginia’s best interest of the child statute would be affected by proposed legislation that would enact a presumption of 50/50 physical custody.

<https://www.tampabay.com/news/politics/stateroundup/gov-rick-scott-vetoes-controversial-alimony-bill/2273409/>.

⁷⁴ *Id.*

⁷⁵ See W. VA. CODE ANN. § 48-9-102(a) (West 2022).

⁷⁶ See W. VA. CODE ANN. § 48-9-201 (West 2022).

⁷⁷ Unless under W. VA. CODE ANN. § 48-9-209 (West 2022), the court finds abuse or violence towards the child. See *infra* note 81.

⁷⁸ W. VA. CODE ANN. § 48-9-206 (West 2022). See also W. VA. CODE ANN. § 48-9-102 (West 2022) (enumerating factors that show how to serve the best interest of the child).

These statutes create guidelines for judges to consider when making custody determinations. These guidelines give the judge discretion to decide each case before the court, but they also give the judge a list of factors as to what should be considered. In the absence of a presumption, children in West Virginia will have their individual interests weighed when their parents are divorcing. When allocating custodial responsibility and decision-making responsibility of children whose parents do not live together (legal custody), it is the public policy of West Virginia to prioritize a child's best interest. To further this policy, "the Legislature declares that a child's best interest will be served by assuring that minor children have frequent and continuing contact with parents who have shown the ability to act in the best interest of their children."⁷⁹

B. Proposed Changes to West Virginia Custody Law: 50/50 Physical Custody Presumption

The Parenting Fairness Act of 2021, as written but not enacted, introduces a "rebuttable presumption that co-equal shared legal and physical custody with both of the child's parents is in the best interest of the child."⁸⁰ The Act justifies this change by enumerating that the objective of the Act is to reach fairness between parents, which is accomplished because joint custody is in the best interest of the child as supported by social science studies.⁸¹ The Act does not however, cite any of these studies in the proposal. The Act would change West Virginia Code § 48-9-206, the allocation of custodial responsibility statute, to also hold the same rebuttable presumption, and if the court were to deny the request for shared physical custody, it must be shown that shared physical custody would be harmful to the child's health.⁸²

⁷⁹ W. VA. CODE ANN. § 48-9-101 (West 2022).

⁸⁰ H.D. 2510, 85th Leg., Reg. Sess. (W. Va. 2021).

⁸¹ It is West Virginia's public policy, "as supported by the findings of leading published and peer-reviewed social science studies, that a rebuttable presumption exists and shall be applied that co-equal shared physical custody with both parents is in the best interest of the child absent limiting factors . . ." H.D. 2510, 85th Leg., Reg. Sess. (W. Va. 2021). West Virginia Code § 48-9-209 states that if a parent has abused a child, sexually assaulted a child, has committed domestic violence,

[h]as overtly or covertly, persistently violated, interfered with, impaired, or impeded the rights of a parent or a child with respect to the exercise of shared authority, residence, visitation, or other contact with the child, except in the case of actions taken for the purpose of protecting the safety of the child or the interfering parent or another family member, pending adjudication of the facts underlying that belief;

or has fraudulently reported abuse or violence, then the court will impose appropriate limitations to custody. W. VA. CODE ANN. § 48-9-209 (West 2022).

⁸² H.D. 2510, 85th Leg., Reg. Sess. (W. Va. 2021). "The court must document all the evidence of record upon which the court relies for its determination by a preponderance of the evidence that shared physical custody would endanger the child's physical, mental or emotional health." *Id.*

The Act could also retroactively affect previous custody determinations where one parent had more parenting time allocated than the other.⁸³ The proposed Act rests this provision on child developmental psychological research, seeming to imply that any previous custody determination that resulted in an unequal allocation of parenting time is not in the best interest of the child.⁸⁴ The Act states that if the award did not take into account the “current state of research,” then it cannot be the basis for the court’s finding.⁸⁵ This language could be problematic if enacted, as psychological research is often developing and the court could then be saddled with more work than if it just applied the best interest of the child standard.

West Virginia House Bill 2302, titled, “Establishing that shared legal and physical custody of a child in cases of divorce is presumed to be in the best interests of the child,” would make it even more difficult to obtain sole legal or physical custody, as it raises the standard by which the court determines the best interest of the child.⁸⁶ The proposed legislation would allow the court to grant shared custody even in cases where parents do not agree to shared custody.⁸⁷ The standard for rebutting the presumption that joint custody will be in the best interest of the child is clear and convincing evidence. This proposed legislation would also change the allocation of responsibility statute, § 48-9-206, to state that the court will allocate custodial responsibility

based upon a rebuttable presumption that shared custody is in the best interest of the child or children, except in instances where a judicial officer has found by a preponderance of the evidence of neglect or abuse. If the court denies the request for shared physical custody, the determination shall be accompanied by specific findings of fact and conclusions of law that the awarding of shared physical custody is not in the best interests of the child. The court must document clear and convincing evidence that it would endanger the child’s physical, mental or emotional health[.].⁸⁸

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ H.D. 2302, 85th Leg., Reg. Sess. (W. Va. 2021).

⁸⁷ The court shall consider granting shared physical and shared legal custody in cases where the parents do not agree to shared custody. If the court does not grant shared custody under this subsection, the court shall cite clear and convincing evidence that shared custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and a parent should be severed.

Id.

⁸⁸ H.D. 2302, 85th Leg., Reg. Sess. (W. Va. 2021). It may be problematic that the presumption is only rebuttable by a showing by a preponderance of the evidence that there is neglect or abuse.

The bill goes on to then list the best interest factors.⁸⁹

The presumption proposed in this legislation, however, would not be in the best interest of the child. By raising the standard to clear and convincing evidence, a stricter standard than preponderance of the evidence as proposed in The Parenting Fairness Act of 2021, the legislature would effectively dampen the role of judges in determining the best interest of each child appearing before the court. These presumptions and heightened standards would most likely make a judge's job to determine the best interest of a child even more difficult because these presumptions would constitute barriers that undermine the best interest standard. It would become much more difficult for a judge to make a finding that sole physical or legal custody is in the best interest of a child—only upon a showing of clear and convincing evidence could a judge grant sole custody to a divorcing parent. The best interest of the child standard was created to allow for individual determinations for each child by judges, and instead, these presumptions, as written, would significantly take away from these important individualized findings made by a judge exercising his own discretion.

III. WHY A PRESUMPTION OF 50/50 PHYSICAL CUSTODY WILL NOT BE IN ALL CHILDREN'S BEST INTERESTS

The 50/50 physical custody presumption is, in effect, a shortcut. It allows a judge to presuppose that joint physical custody is in the best interest of a child. Such a presumption can bypass the best interest of the child standard altogether, unless challenged by the party opposing joint custody. This rule would allow an arrangement of joint custody to be ordered even in cases where it may not be in the best interest of the child.

A. Psychological Theories Do Not Support a Presumption

This section will discuss different psychological theories and explain their importance in considering child custody arrangements. While research generally supports the conclusion that children do best with both parents in their

See generally Joan S. Meier, *Denial of Family Violence in Court: An Empirical Analysis and Path Forward for Family Law*, GEO. WASH. L. FAC. PUBL'NS & OTHER WORKS 1, 12 (2021) (allegations of abuse by women are often rejected and at least one study has concluded that “most custody evaluators’ recommendations were unsafe for children in homes where abuse was alleged, and even substantiated”). Presumptions with exceptions for domestic violence may not be effective at preventing the perpetrator from having custody of a child. Allison C. Morrill, Jianyu Dai, Samantha Dunn & Iyue Sung et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1101 (2005). Even where a presumption against custody to a perpetrator existed, 40% of fathers were given joint custody even though they had been found to have been violent with the child's mother. *Id.* This shows that presumptions in favor of joint custody with “weak” exceptions for domestic violence may be highly problematic. *Id.*

⁸⁹ See H.D. 2302, 85th Leg., Reg. Sess. § 48-9-209 (W. Va. 2021).

lives, this research does not necessarily also support the finding that a presumption of 50/50 physical custody would be in the best interest of each child.

1. Attachment Theory

Attachment theory, one of the best-known concepts in developmental psychology, opines that both natural and learned “programming allows for the formation of bonds between infant and caregiver.”⁹⁰ The bond is based upon the mental representation⁹¹ the infant has of the caregiver.⁹² The mental representation of the caregiver is formed through the infant’s repeated environmental interactions with the caregiver.⁹³ If a caregiver provides an infant with a nurturing, stable, and responsive environment, the infant is able to form a secure attachment with the caregiver.⁹⁴ By contrast, if a caregiver is inconsistent, abusive, or neglectful, an infant’s mental representation of the caregiver will reflect this and result in insecure attachments.⁹⁵ A safe and consistent environment is essential to the development of a secure attachment, which in turn results in stability in future relationships.⁹⁶

There are three⁹⁷ main forms of attachment styles that were identified in a famous study conducted by Ainsworth, Blehar, Waters, and Wall in 1978 known as the Strange Situation: secure, anxious-ambivalent insecure, and

⁹⁰ Karyn B. Purvis, L. Brooks McKenzie, Gottfried Kellermann, & David R. Cross, *An Attachment Based Approach to Child Custody Evaluation: A Case Study*, 7 J. CHILD CUSTODY 45, 47 (2010). Attachment theory is the work of both John Bowlby and Mary Ainsworth. *See id.*; *see generally* R. Chris Fraley, *Adult Attachment Theory and Research*, UNIV. ILL., DEP’T. OF PSYCH. (2018), <http://labs.psychology.illinois.edu/~rcfraley/attachment.htm>. Bowlby was “attempting to understand the intense distress experienced by infants who had been separated from their parents. Bowlby observed that separated infants would go to extraordinary lengths (e.g., crying, clinging, frantically searching) to prevent separation from their parents or to reestablish proximity to a missing parent.” R. Chris Fraley, *Adult Attachment Theory and Research*, UNIV. ILL., DEP’T. OF PSYCH. (2018), <http://labs.psychology.illinois.edu/~rcfraley/attachment.htm>.

⁹¹ A mental representation is defined as “a hypothetical entity that is presumed to stand for a perception, thought, memory, or the like during cognitive operations.” APA DICTIONARY OF PSYCH., AM. PSYCH. ASS’N, <https://dictionary.apa.org/mental-representation> (last visited Oct. 8, 2022).

⁹² Purvis, *supra* note 90, at 47.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* Bowlby theorized that attachment behaviors, like crying and searching for a caregiver, were responses that evolved to deal with separation from a primary caregiver. Fraley, *supra* note 90. Humans, like other mammals in their infancy, depend upon older and more knowledgeable caregivers. *Id.* If infants were securely attached to a caregiver by these behaviors, the infants would be more likely to survive. *Id.*

⁹⁶ *See* Fraley, *supra* note 90.

⁹⁷ A fourth attachment style, disorganized, was later discovered to categorize children who did not fit into the other three categories. Purvis, *supra* note 90, at 48.

anxious-avoidant insecure.⁹⁸ The Strange Situation study involved the coming and going of an infant's caregiver and these attachment styles were named based on observed responses of the infants.⁹⁹ Children with a secure attachment became stressed (e.g., cried) when their caregiver left, but were easily soothed when their caregiver returned and transitioned back to interacting with the environment (e.g., playing with toys left in the room).¹⁰⁰ Children with a secure attachment showed they felt a sense of safety, an essential component of secure attachment because they understood that their caregiver would be consistent in their care.¹⁰¹ Anxious-ambivalent children exhibited signs of stress when the caregiver left and when the caregiver returned—they did not show the same sense of safety as securely attached infants.¹⁰² The behaviors shown by the anxious-ambivalent children were linked with inconsistent care by a caregiver.¹⁰³ Children with an anxious-avoidant attachment style did not exhibit any signs of stress—they were not upset when their caregiver left and they did not need to be soothed when their caregiver returned.¹⁰⁴ Although first thought to be the best-adjusted children, these behaviors were later thought to be the result of a neglectful caregiver—the child learned to detach itself because when it would cry, no one would respond.¹⁰⁵

While these attachment styles are largely stable past infancy, attachment theory does account for change.¹⁰⁶ Change “can occur at anytime throughout life when this change is initiated by a catalyst of great enough proportion (i.e., a positive or negative life altering event) to redirect the trajectory of the individual,” including a divorce and its impact on a child.¹⁰⁷ Divorce, often a time of instability, can alter a child's attachment and subsequently their wellbeing. This is why it is so important for judges to consider the impact of custody arrangements on a child.

⁹⁸ *Id.* at 47.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 47–48.

¹⁰² *Id.* at 48.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 47.

¹⁰⁷ *Id.*

2. Parental Alienation and Cooperation

i. 50/50 Physical Custody Can Be Awarded Even When Parents Do Not Want It

One of the bills in West Virginia that proposes a presumption of 50/50 physical custody states that joint custody may be awarded even when the parents do not seek or agree to joint custody.¹⁰⁸ The court must consider granting 50/50 physical and legal custody where parents do not agree to such an arrangement. If the court chooses not to grant shared custody “under this subsection, the court shall cite clear and convincing evidence that shared custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and a parent should be severed.”¹⁰⁹

The presumption would require the court to “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. This shall be accomplished, to the extent feasible, through the ordering of shared physical and legal custody.”¹¹⁰ This presumption may be overcome if “there is a history of domestic abuse, or by a showing that joint allocation of decision-making responsibility is not in the child’s best interest.”¹¹¹ This presumption however, may not reflect the reality of the level of cooperation between divorcing parents.¹¹² Some divorce lawyers believe that a presumption of joint custody is unrealistic to start with in a divorce case due to the animosity between divorcing spouses—as Delegate-attorney Isaac Sponaugle stated—“[y]ou’re trying to pass policy that doesn’t apply to the reality out there.”¹¹³

ii. Parental Alienation Syndrome

Parental alienation syndrome, coined in 1985 by Dr. Richard Gardner, a licensed child and adolescent psychiatrist, is a type of emotional child abuse seen

¹⁰⁸ H.D. 2302, 85th Leg., Reg. Sess. (W. Va. 2021).

¹⁰⁹ *Id.* Note that this provision appears under the criteria for the temporary parenting plan section, however the presumption would have the same effect when determining the official custody order because the presumption would presume that joint custody is in the best interest of a child, even if that child’s parents want sole custody.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Joint custody increases the chances that children will be weaponized by parents, as “no restraints are placed on noncooperating parents.” RICHARD A. GARDNER, *JOINT CUSTODY & SHARED PARENTING* 90, 65 (Jay Folberg ed., 2d ed. 1991).

¹¹³ MetroNews Staff, *House Bill Changes Child Custody Parameters*, METRONews (Feb. 26, 2020, 2:52 PM), <https://wvmetronews.com/2020/02/26/house-bill-changes-child-custody-parameters/>.

in divorced families where one parent indoctrinates the child to vilify the opposing parent.¹¹⁴ The child then vilifies the alienated parent with no other justification.¹¹⁵ Parental alienation syndrome is controversial in both the psychological and legal worlds, as some believe there is no basis for the syndrome.¹¹⁶ However, a court may take into account parental alienation syndrome as a factor in the best interest analysis.¹¹⁷

Parental alienation syndrome and parental alienation are “separate phenomena that can occur after a highly conflicted divorce or child custody action.”¹¹⁸ Parental alienation happens when a child aligns himself with one parent, the “preferred parent,” and rebuffs a relationship with the other parent, the “alienated parent.”¹¹⁹ Parental alienation has been described as a “form of social and psychological brainwashing.”¹²⁰ Parental alienation syndrome happens “when a child becomes an unwitting ally to the alienating parent” and “occurs when one parent campaigns successfully to manipulate his or her children to despise the other parent despite the absence of legitimate reasons for the children to harbor such animosity.”¹²¹

Parental alienation may have detrimental consequences to a child’s wellbeing and development.¹²² A child’s relationship with his parents serves as the basis for that child’s future relationships.¹²³ As a result of one parent’s alienation, the child will suffer the consequences as shown in the development of relationships with others—including friends, future spouses, and eventually their own children.¹²⁴ Parental alienation requires a child to choose one parent over the other and places the child at the center of the custody battle—the child may even become the moderator between the two parents in order to ease tensions.¹²⁵ When placed in this position, the child may experience many emotions such as hopelessness, confusion, guilt, fear, and inadequacy, and may

¹¹⁴ Rebecca E. Hatch, *Proof of Parental Alienation in Action for Modification of Custody of Child*, 127 AM. JUR. PROOF OF FACTS 3d 237 (2022).

¹¹⁵ *Id.*; Richard A. Gardner, *The Parental Alienation Syndrome: Past, Present, and Future*, RICHARD A. GARDNER, MD, <http://richardagardner.com/ar22> (last visited Oct. 15, 2022).

¹¹⁶ Hatch, *supra* note 114. Parental alienation is not included in the current version of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V). *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*; see Fraley, *supra* note 90.

¹²⁴ Hatch, *supra* note 114.

¹²⁵ *Id.* See also *Sequeira v. Sequeira*, 993 N.Y.S.2d 309, 310 (N.Y. App. Div. 2014) (finding that the parents’ lack of cooperation and the father’s apparent hatred was enough for a modification of the parties’ joint custody agreement to then give the mother sole legal custody of their child).

suffer negative consequences at school.¹²⁶ The child may feel as though they have become intertwined in the parents' conflict, which then results in the child spending significant mental energy assessing their threat level.¹²⁷ The detrimental combination of being a witness to parental conflict and hypervigilance appears to be a cause of the heightened risk of adjustment problems in children after divorce.¹²⁸

iii. A Presumption of 50/50 Physical Custody Does Not Account for Parental Alienation

Litigation may worsen the effects of parental alienation and a presumption of joint custody could only intensify these effects by forcing two contentious parents to equally share their child.¹²⁹ When the court is determining custody under the best interest test, the court will look to the following details to decide if a change in custody based on parental alienation is justified:

- (1) denial of visitation by one parent to the other;
- (2) false claims of sexual or domestic abuse;
- (3) calling the police repeatedly regarding minor acts of the noncustodial parent;
- (4) creating fear or anxiety about the noncustodial parent to the child;
- (5) removing the child from the jurisdiction of the court;
- (6) failure to keep the noncustodial parent informed of the children's address or other vital information;
- (7) repeatedly calling the noncustodial parent names or never saying anything positive about the noncustodial parent;
- (8) denying or limiting telephone contact with the noncustodial parent; and
- (9) evidence of coaching of the children by the alienating parent.¹³⁰

¹²⁶ See Hatch, *supra* note 114.

¹²⁷ David Shumaker & Charlotte Kelsey, *The Existential Impact of High-Conflict Divorce on Children*, 19 PERSON-CENTERED & EXPERIENTIAL PSYCHOTHERAPIES 22, 25 (2020).

¹²⁸ *Id.*

¹²⁹ See Hatch, *supra* note 114. Where one parent instructs children to misbehave in the care of the other parent, makes disparaging comments about the other parent in the presence of the child, and refuses to communicate with the other parent, it will be in the best interest of the child to be placed in the primary physical custody of the nonoffending parent. *Amrane v. Belkhir*, 34 N.Y.S.3d 823, 824–25 (N.Y. App. Div. 2016).

¹³⁰ See Hatch, *supra* note 114.

When these facts are present, the court may award sole custody in order to satisfy the best interest criteria.¹³¹

Parental alienation and parental alienation syndrome affect the wellbeing and psychological health of a child and a presumption of 50/50 physical custody would make it difficult for the court to take these circumstances into account and give them the consideration required in order to reach an arrangement consistent with the best interest of a child. Dr. Gardner has observed that parents program “a child to become alienated from the other, often with the hope that this would enhance that parent’s position in the course of the litigation.”¹³²

While a presumption could lessen the level of animosity between divorcing spouses,

[e]ven ‘amicable’ divorces entail economic and relationship adjustments[.] [S]tudies find, however, that children whose parents undergo ‘high conflict’ divorces, with ‘ongoing legal battles, an inability to coordinate childrearing practices after the divorce, hostile family environments, and children witnessing overt verbal and physical aggression,’ experience worse outcomes than children whose parents ‘minimized conflict during divorce.’¹³³

The level of animosity may not go away after litigation ends. The job of a judge in making a custody determination is to evaluate all of the best interest factors in order to reach an agreement that will best serve that child at the present and as time goes on. Determining the best interests for each child is a fact-intensive inquiry and a presumption of 50/50 physical custody would effectively hinder the court’s ability to do so. West Virginia recognizes parental alienation and if a presumption of 50/50 physical custody were enacted in the state, the prevalence

¹³¹ See *Ladd v. Krupp*, 24 N.Y.S.3d 834, 836 (N.Y. App. Div. 2016). In *Ladd v. Krupp*, the court found that where the mother made attempts to strengthen the child’s relationship with the father and where the father interfered with the child’s relationship with the mother by disparaging the mother in front of the child and limiting the mother’s access to the child, sole legal and physical custody should be granted to the mother. *Id.* A custodial parent has the responsibility to foster purposeful contact between the child and the non-custodial parent and this willingness to assure such purposeful contact by the custodial parent is a factor that the court will consider when determining custody. *Dezil v. Garlick*, 980 N.Y.S.2d 506, 507 (N.Y. App. Div. 2014); *accord* *Matthew P. v. Gail S.*, 354 P.3d 1044, 1050 (Alaska 2015) (finding that willingness factor favored mother because the father would not take steps to ensure child’s contact with mother; therefore, sole custody was in child’s best interest). See *Heather B. v. Daniel B.*, 4 N.Y.S.3d 362, 365 (N.Y. App. Div. 2015) (awarding sole legal and physical custody to children’s father because sole custody was in children’s best interests where parents were unable to cooperate, and the mother impeded father’s relationship with children).

¹³² Gardner, *supra* note 115.

¹³³ DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & LINDA C. MCCLAIN, *CONTEMPORARY FAMILY LAW* 494 (5th ed. 2019) (citing CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW FAMILY LAW UNDERMINES FAMILY RELATIONSHIPS* 33 (2014)).

of parental alienation will likely be seen in ongoing, contentious custody litigation.¹³⁴

B. Arguments for and Against Custody Presumptions

The importance of individuality emphasized by the best interest of the child standard is regarded as “a great moral virtue” and “a tribute to our society’s collective sense that relationships between children and parents are unique and should be judged individually.”¹³⁵ Courts have also found that individual determinations allowed by the best interest of the child standard are best suited for custody proceedings due to the unique impact that divorce has on a child’s life. In *Bazemore v. Davis*,¹³⁶ the court stated that a presumption would most often not reach the best result:

A norm is ill-suited for determining the future of a unique being whose adjustment is vital to the welfare of future generations. Surely, it is not asking too much to demand that a court, in making a determination as to the best interest of a child, make the determination upon specific evidence relating to that child alone [M]agic formulas have no place in decisions designed to salvage human values.¹³⁷

The best interest of the child standard allows for courts to make individual determinations that best suit each child’s needs and the open nature of the standard allows for consideration of different outcomes to achieve those needs.¹³⁸ The individualized best interest standard gives the judge discretion to weigh all factors without choosing one as more important than the others and facially does not rest on gender stereotypes and other theories of “parental entitlements.”¹³⁹ Most courts apply the best interest of the child test through factors set forth in statutes or past cases.¹⁴⁰ The factors enumerated by statute or case law generally are supported by psychological research on the impact of divorce on children.¹⁴¹ After reviewing the literature available on the positive

¹³⁴ See *Stacey J. v. Henry A.*, 842 S.E.2d 703, 710 (W. Va. 2020).

¹³⁵ Warshak, *supra* note 11, at 98 (quoting ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 162 (2004)).

¹³⁶ 394 A.2d 1377 (D.C. 1978) (en banc).

¹³⁷ *Id.* at 1382–83 (citing *Lemay v. Lemay*, 247 A.2d 189, 191 (N.H. 1968)).

¹³⁸ Warshak, *supra* note 11, at 99.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; see Joan B. Kelly & Robert E. Emery, *Children’s Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 FAM. REL. 352, 356–58 (2003).

and negative impacts of divorce on children, psychologists Kelly and Emery determined that factors, like attachment style, are affected by divorce:

In the last decade, researchers have identified a number of protective factors that may moderate the risks associated with divorce for individual children and that contribute to the variability in outcomes observed in children of divorce. These include specific aspects of the psychological adjustment and parenting of custodial parents, the type of relationships that children have with their nonresident parents, and the extent and type of conflict between parents.¹⁴²

Importantly, the best interest standard allows the court to consider such factors derived from psychological research when making custody decisions.¹⁴³

Psychological research is to credit for eventually moving courts to consider the negative impact of children bearing witness to their parents' hostile exchanges.¹⁴⁴ This research made its way into courts through parenting plans which diminished contact between the two hostile parents during the child's transition from one parent's home to the other's.¹⁴⁵ A presumption of 50/50 physical custody would not allow these psychological principles, like attachment style and how it is impacted by hostile divorces, to be adequately considered, nor would it accommodate new research about how to best aid children whose parents live separately.¹⁴⁶

Critics of the best interest of the child standard argue that it is subjective enough to lead to unpredictable results.¹⁴⁷ A professor and adviser to the American Law Institute's project, "The concept of 'children's best interests,'" argues that the best interest standard "is a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge."¹⁴⁸ Some of these critics assert that the solution to this issue is returning to a presumption.¹⁴⁹ Supporters of the presumption of 50/50 physical custody argue that it will (1) reduce litigation and hostility; (2) circumvent any gender biases; (3) promote the child's relationship with both parents; (4) correspond with better outcomes for the child; (5) be preferred by children; and (6) protect

¹⁴² Warshak, *supra* note 11, at 99 (quoting Kelly, *supra* note 141, at 356–58).

¹⁴³ *Id.* at 100.

¹⁴⁴ *Id.* at 100–01.

¹⁴⁵ *Id.* at 101. For example, one parent may take the child to school in the morning and the other parent may pick the child up, therefore minimizing the parents' need to interact with each other. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 102.

¹⁴⁸ *Id.* at 106 (quoting Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1170 (1986)).

¹⁴⁹ *Id.* at 109.

each parents' rights.¹⁵⁰ The "solution" of a presumption, however, is extreme—it would altogether "bypass[] the list of best interest criteria."¹⁵¹ The presumption would not take into account the best interest factors, instead presuming that the child will split time evenly between parents.¹⁵²

Opponents of a joint custody presumption assert that it (1) requires cooperation between the two parents to such a degree that is unrealistic for parents who cannot agree on custody;¹⁵³ (2) gives fathers preferential treatment because it gives fathers who do not want parental responsibility an advantage in negotiating custody; (3) disturbs the stability of the relationship with the child's main caregiver; (4) allows the child to be further exposed to harmful parental conflicts; (5) is unrealistic because it would necessitate the divorced parents to live near each other; and (6) endangers children by placing them in close proximity to violence and abuse.¹⁵⁴ Instead of requiring that both parties produce evidence of each best interest factor in court, a joint custody presumption may extinguish the factors' relevancy unless the party who opposes "the joint custody presumption first produce[s] sufficient evidence to rebut the presumption. In addition, rather than being the central issue in every custody case, the best interest standard would not even be considered, unless and until the parent opposing joint custody first rebutted the joint custody presumption."¹⁵⁵

Further, opponents of the presumption also point out that most custody cases, about 90%, settle before trial, meaning most divorcing spouses reach an agreement without the need for a final determination by a judge.¹⁵⁶ The 10% of remaining cases are ones in which the divorcing spouses could not reach an agreement and are therefore more likely to be high-conflict, which would make implementing joint custody much more difficult.¹⁵⁷ Research has indicated that continued exposure to "parental conflict is harmful to children, and joint custody presumptions make the child's exposure to parental conflict inevitable, for the

¹⁵⁰ *Id.* at 110.

¹⁵¹ *Id.* at 111.

¹⁵² *Id.*

¹⁵³ Joint custody does not work for those who lack maturity and the necessary commitment to make shared parenting an effective arrangement. GARDNER, *supra* note 112, at 88. It should therefore not be "recommended indiscriminately." *Id.* at 89.

¹⁵⁴ Warshak, *supra* note 11, at 111.

¹⁵⁵ Fait, *supra* note 45, at 17.

¹⁵⁶ Amanda K. Krugler, *Kentucky's New Presumption for Joint Custody and Equal Parenting Time*, 107 KY. L. J. ONLINE BLOG (Feb. 19, 2019), <https://www.kentuckylawjournal.org/blog/index.php/2019/02/19/kentuckys-new-presumption-for-joint-custody-and-equal-parenting-time>.

¹⁵⁷ *Id.* See *Elissa A. v. Samuel B.*, 999 N.Y.S.2d 76, 76 (N.Y. App. Div. 2014) (awarding sole legal and physical custody to child's father as in the best interest of the child where mother interfered with father's visitation, mother was aggressive and started arguments, and acted with violence in front of the child).

sake of the child, the law should not force high-conflict parents into a custody arrangement that can harm the child's wellbeing simply to ensure that parents are treated fairly."¹⁵⁸ Opponents of a presumption argue that the idea that joint custody is in the best interest of every child is "an inappropriate tool for protecting children because too many parents are poor candidates."¹⁵⁹ These poor candidates include families with high-conflict parents, families that have experience with domestic violence, and families that have a child with special needs.¹⁶⁰ To support this argument, opponents of a presumption point to the lack of endurance of joint custody arrangements.¹⁶¹ A 2012 study found that four to five years after a joint custody arrangement was entered, only 49% of those arrangements lasted.¹⁶² For high-conflict families, the results were even less desirable, with only 27% of parents continuing to have joint custody.¹⁶³

Opponents of a presumption argue that advocates of joint custody "cannot assume a simple relationship between this type of custody arrangement and better parent-child relationships."¹⁶⁴ Some researchers believe that the biggest barrier to a child's adjustment post-divorce is the amount of parental conflict.¹⁶⁵ The more parental conflict, the more adjustment issues the child will experience.¹⁶⁶ High levels of parental conflict appear to lead to poorly adjusted children who are more emotionally troubled and show more behavioral problems than those in sole custody arrangements.¹⁶⁷ Frequency of contact with both parents is often considered a protective factor that leads to a better parent-child relationship.¹⁶⁸ The assumption may be that because joint custody facilitates

¹⁵⁸ Angela Marie Caulley, *Equal Isn't Always Equitable: Reforming the Use of Joint Custody Presumptions in Judicial Child Custody Determinations*, 27 B.U. PUB. INT. L.J. 403, 441 (2018).

¹⁵⁹ Krugler, *supra* note 156 (quoting Caulley, *supra* note 158, at 448).

¹⁶⁰ Krugler, *supra* note 156; Caulley, *supra* note 158, at 437-49.

¹⁶¹ Krugler, *supra* note 156.

¹⁶² *Id.*; JENNIFER E. MCINTOSH & BRUCE SMYTH, SHARED-TIME PARENTING: AN EVIDENCE-BASED MATRIX FOR EVALUATING RISK, IN PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT 155, 172 (Kathryn Kuehnle & Leslie Drozd eds., 2012).

¹⁶³ Krugler, *supra* note 156.

¹⁶⁴ Denise Donnelly & David Finkelhor, *Does Equality in Custody Arrangement Improve the Parent-Child Relationship?*, 54 J. MARRIAGE & FAM. 837, 837 (1992).

¹⁶⁵ *Id.* at 838; Shumaker, *supra* note 127, at 24.

¹⁶⁶ Donnelly, *supra* note 164, at 837.

¹⁶⁷ Causation is not possible to determine in these circumstances.

Couples with high levels of conflict before divorce might continue their hostilities during the divorce process, and this could very well affect the type of custody arrangement they are awarded. On the other hand, when parents have difficulties in agreeing on custody arrangements, these difficulties may carry over into the post-divorce period and affect the amount of hostility present.

Id. at 839.

¹⁶⁸ *Id.* at 837.

contact with both parents, then children would be better adjusted after divorce—however, this is not necessarily the case.¹⁶⁹ One study found that there was no difference in child adjustment between sole and joint custody arrangements.¹⁷⁰ Another study found that children in sole custody arrangements showed more “child to parent support and affection than those in equal custody situations,” showing no support that joint custody households lead to improved parent-child relationships.¹⁷¹ That study found that when parents often argue about custody and custody arrangements, the parent-child relationship suffers.¹⁷² These findings show that “[t]he simplistic idea that joint custody is better because it leads to improved parent-child relations should be abandoned, since the actual relationship between custody type and the parent-child relationship appears to be a much more complicated one.”¹⁷³

The question about whether the judicial economy of a presumption can outweigh a standard that allows judges broad discretion in determining what is best for a child’s welfare has no simple answer. The Supreme Court recognized concerns about presumptions in custody cases when it decided *Stanley v. Illinois*.¹⁷⁴

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.¹⁷⁵

In terms of custody disputes, “[A] motley mix of discretion, guidelines, and rules may be the best we can do. . . . [B]oth a purely discretionary and a purely rule-based system would have intolerable drawbacks.”¹⁷⁶ The best interest of the child standard as applied in current times is a just equilibrium of discretion and guidelines.¹⁷⁷ The factors enumerated in statutes and case law offer guidelines so

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 838; Marsha Kline, Jeanne M. Tschann, Janet R. Johnston, & Judith S. Wallerstein, *Children’s Adjustment in Joint and Sole Physical Custody Families*, 25 DEVELOPMENTAL PSYCH. 430, 435 (1989).

¹⁷¹ Donnelly, *supra* note 164, at 842–44.

¹⁷² *Id.* at 844.

¹⁷³ *Id.*

¹⁷⁴ 405 U.S. 645 (1972).

¹⁷⁵ *Id.* at 656–57.

¹⁷⁶ Warshak, *supra* note 11, at 160 (quoting Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA’s Best-Interest Standard*, 89 MICH. L. REV. 2215, 2219 (1991)).

¹⁷⁷ *Id.* at 160.

that the standard is not completely within the judge's discretion.¹⁷⁸ The best interest of the child standard offers a "uniform framework for the court's application of the standard through a nuanced investigation of a wide range of factors relevant to children's welfare."¹⁷⁹ A presumption would "greatly minimize the custody factors that a court is required to consider and dilute or eliminate" the best interest standard.¹⁸⁰ The "main drawback of granting joint custody so frequently and automatically is that it may do many children more harm than good."¹⁸¹ It may especially do children more harm than good in West Virginia because the state is rural and has been heavily affected by the opioid epidemic.

C. West Virginia Is Not a Good Candidate for a Presumption of 50/50 Physical Custody

1. West Virginia is a Rural State

In 2021, West Virginia had a population of about 1,782,959 people with 666,086 of those people living in rural areas.¹⁸² The definition of rural varies, but the Census Bureau defines urban as areas with populations of 2,500 or more people.¹⁸³ Applying this definition, about 20% of the United States' population is considered rural.¹⁸⁴ West Virginia residents' mean travel time to work in 2016–2020 was 26.1 minutes.¹⁸⁵ These statistics highlight the rural nature of the state and indirectly show that a presumption of 50/50 physical custody may not be practical nor in the best interest of each child in West Virginia. A retired circuit judge in Florida simply stated: "A lot of things interfere with getting kids back and forth. Who's going to get the child to the bus stop? There are all kinds of practical implications that the theoretical idea of 50/50 custody just doesn't take into account."¹⁸⁶ These concerns become especially problematic when a presumption of 50/50 physical custody would be implemented in a rural state

¹⁷⁸ See, e.g., W. VA. CODE ANN. § 48-9-102 (West 2022).

¹⁷⁹ Warshak, *supra* note 11, at 160.

¹⁸⁰ Fait, *supra* note 45, at 15–16. A presumption of 50/50 physical custody allows judges to avoid a complex and difficult factual investigation "by offering a seemingly benevolent resolution." GARDNER, *supra* note 112, at 90.

¹⁸¹ GARDNER, *supra* note 112, at 90.

¹⁸² *West Virginia*, RURAL HEALTH INFO. HUB, <https://www.ruralhealthinfo.org/states/west-virginia> (last visited Oct. 15, 2022).

¹⁸³ *Rural Health*, W. VA. STATE HEALTH PLAN 1 (1999), <https://hca.wv.gov/policyandplanning/Documents/Background%20Material/shpRurPiper.pdf>.

¹⁸⁴ *Id.*

¹⁸⁵ *West Virginia QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WV> (last visited Oct. 8, 2022).

¹⁸⁶ Bousquet, *supra* note 73.

because it requires higher levels of cooperation and coordination between the divorcing parents and may take away from a child's wellbeing if the child is constantly being transported long distances away.

West Virginia's proposed act, the Parenting Fairness Act of 2021, includes a provision modifying the allocation of custodial responsibility statute that states, "in cases of proposed relocation the court's analysis shall reflect the current state of research in child development psychology recognizing that shared parenting, including overnight time with each parent is in the best interest of the child or children."¹⁸⁷ While this may be true in some cases, this proposed legislation fails to consider that long distances may have an adverse impact on the child's wellbeing, therefore not satisfying the best interest criteria.¹⁸⁸ Specifically, it could exacerbate the issues discussed in regard to results of various psychological studies—the higher amount of parental conflict, the more likely a child is to have adjustment issues. The current West Virginia relocation of a parent statute states that at the hearing held to determine relocation, the relocating parent must show that the move is in the best interest of the child.¹⁸⁹ A presumption of 50/50 physical custody may negate this showing.

The Parenting Fairness Act of 2021 also instructs the court to consider the child's best interest pursuant to the relocation, but adds that the court shall "to the maximum extent possible require that the non-relocating parent be granted the maximum amount of parenting time possible."¹⁹⁰ Both the current and proposed parental relocation statutes instruct the court to use the best interest of the child standard in making these location determinations, however the language in the proposed legislation fails to take into account large geographical distances between parents. A presumption of 50/50 physical custody could mean some degree of relocation for the child if the other parent lives or moves far away.

Stability is a very important part of a child's life and can impact development and attachment.¹⁹¹ The Supreme Court of Appeals of West Virginia has previously found that location and relocation can cause instability in a child's life, finding in *Storrie v. Simmons*¹⁹² that relocation to another state would not be in the children's best interests. The court "found that their stability would be disrupted by the move, noting that both girls had been in the Ohio County school

¹⁸⁷ H.D. 2510, 85th Leg., Reg. Sess. (W. Va. 2021).

¹⁸⁸ *Id.*

¹⁸⁹ W. VA. CODE ANN. § 48-9-403 (West 2022); *see also* FRANCIS C. AMENDOLA, GEORGE BLUM, JAMES BUCHWALTER, KHARA SINGER-MACK ET AL., § 117 RELOCATION 67A C.J.S. PARENT & CHILD § 117 (2022); *see generally* BARBARA J. VAN ARSDALE, KRISTINA E. MUSIC BIRO, GEORGE L. BLUM, NOAH J. GORDON ET AL., § 860 RELOCATION OF CUSTODIAL PARENT AS FACTOR JUSTIFYING MODIFICATION OF CUSTODY ORDER 24A AM. JUR. 2D DIVORCE & SEPARATION (2022).

¹⁹⁰ H.D. 2510 85th Leg., Reg. Sess. (W. Va. 2021).

¹⁹¹ *See supra* Part III.A.

¹⁹² 693 S.E.2d 70 (W. Va. 2010).

system for a number of years, and that relocation would interrupt the continuity of their education.”¹⁹³ This case highlights just one of the issues the presumption of 50/50 physical custody presents when it comes to location—if parents live in geographical locations that would make the child’s life difficult or adversely impact the child—it makes the presumption very difficult to implement because, especially in a rural state, location may often be directly adverse to the best interest of the child.

The issue of location in a rural state means that a presumption of 50/50 physical custody would not always align with the best interest of the child. Other courts have found it significant that pick-ups and drop-offs would take several hours roundtrip to be completed when finding relocation was not in the best interest of the child.¹⁹⁴ Where parents live a good distance apart, an arrangement of 50/50 physical custody can fuel antagonism between parents, creating an unstable home environment for the child.¹⁹⁵ The fact that a presumption of 50/50 physical custody would hinder a court’s ability to evaluate the best interest factors in custody determinations, like the relocation or location of a parent, makes it a poor choice for rural states like West Virginia.

2. West Virginia’s Population Was Hit Hard by the Opioid Epidemic

West Virginia is a state that has been struck by addiction. West Virginia remains one of the nation’s poorest states.¹⁹⁶ The majority of the 7,000 children in the state’s custody are there because of their parents’ drug use and

¹⁹³ *Id.* at 80. Moving to a new school is stressful for children and often disrupts academic performance and emotional functioning. Rebekah L. Coley & Melissa Kull, *Is Moving During Childhood Harmful?*, MACARTHUR FOUND., https://www.macfound.org/media/files/hhm_brief_-_is_moving_during_childhood_harmful_2.pdf (last visited Oct. 16, 2022).

¹⁹⁴ *Lynn v. Freeman*, 157 N.E.3d 17, 24 (Ind. Ct. App. 2020). While the mother’s relocation proposal may have looked good on paper,

[w]hen the Court consider[ed] the practicality of Mother’s proposals, however, doubts ar[o]se. As an example, Mother propose[d] that Father could keep his Wednesday overnights by picking up [Child] after school in his new community. In turn, Mother would pick up [Child] from Father’s home on Thursday morning and get him to school. This would require Mother to pack up both her one-year-old and new infant for a one-hour drive to St. Joseph County, followed by a one-hour drive back to her chosen community. Regardless of Mother’s good intentions, the Court ha[d] doubts that Mother’s willingness will stand the test of time – not to mention inclement winter weather in Northern Indiana.

Id.

¹⁹⁵ *See Quinn v. Quinn*, 622 P.2d 230, 233 (Mont. 1981).

¹⁹⁶ Amelia F. Knisely, *Poverty Still Plagues West Virginia, But Signs of Hope Can Be Found*, USA TODAY (Feb. 27, 2020, 6:00 AM), <https://www.usatoday.com/story/opinion/2020/02/27/west-virginia-still-struggles-deep-poverty-but-hope-takes-root-column/4879484002/>.

accompanying negligence.¹⁹⁷ West Virginia had the highest number of deaths from overdose in the country in 2015.¹⁹⁸ The disproportionately high opioid abuse in the state can in part be attributed to the large amount of jobs that require difficult manual labor—such as manufacturing, timbering, and mining.¹⁹⁹ These jobs can often result in injuries to laborers that are treated with opioids, which are highly addictive.²⁰⁰ Substance abuse can be taken into account by the court during custody decisions and may be assessed in a parent’s custody interview.²⁰¹ Questions that may be asked during the custody process include whether there is any substance abuse and if that abuse is witnessed by the children.²⁰² If a parent suffers from a serious mental health issue or a substance abuse problem, “a child may be harmed by continued exposure to such an environment.”²⁰³ Parents with drug issues may also contribute to continued litigation surrounding custody.²⁰⁴ If a presumption of 50/50 physical custody were enacted, it could result in these issues not being properly considered at the initial granting of custody.

If West Virginia were to enact a presumption of 50/50 physical custody, an Arizona statute regarding substance abuse and custody provides a possible solution to this issue.²⁰⁵ The statute states that if the court makes a finding that there has been drug abuse by a parent “within twelve months before the petition or the request for legal decision-making or parenting time is filed, there is a rebuttable presumption that sole or joint legal decision-making by that parent is not in the child’s best interests.”²⁰⁶ West Virginia could take inspiration from this statute and provide that consideration must be given before the presumption of

¹⁹⁷ *Id.*

¹⁹⁸ *The West Virginia Drug Situation*, U.S. DRUG ENF’T ADMIN. 1, 2 (May 2017), <https://www.dea.gov/sites/default/files/2018-07/DEA-WAS-DIR-024-17%20West%20Virginia%20Drug%20Situation%20UNCLASSIFIED.pdf>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* See also David Gutman, *How Did WV Come to Lead the Nation in Overdoses?*, CHARLESTON GAZETTE-MAIL (Oct. 17, 2015), https://www.wvgazette.com/news/health/how-did-wv-come-to-lead-the-nation-in-overdoses/article_60c46a00-eec5-5c42-b6b0-2050439074f5.html.

²⁰¹ ALLAN POSTHUMA, ALLISON FOSTER, AUDREY G. MASILLA & BARRY BRICKLIN ET AL., HANDBOOK OF CHILD CUSTODY 1, 27 (Mark L. Goldstein ed., 2016).

²⁰² *Id.*

²⁰³ Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCH. 91, 99 (2002).

²⁰⁴ See *Alyssa R. v. Nicholas H.*, 760 S.E.2d 560, 563 (W. Va. 2014) (showing continued litigation after the grant of equal shared custody due in part to the father’s ongoing drug use and opioid addiction); see also *Neal v. Neal*, 491 S.W.3d 467, 474 (Ark. Ct. App. 2016) (affirming primary custody award to the father where it was in child’s best interest because the mother had moved three times since she left the father’s home, she worked off and on, was promiscuous, and there were questions over the mother’s continued drug use).

²⁰⁵ See ARIZ. REV. STAT. ANN. § 25-403.04 (West 2022).

²⁰⁶ *Id.*

50/50 physical custody be applied to any parent who has abused drugs or has been convicted of any drug offense within twelve months of the petition for custody.

Because of West Virginia's unique struggles, a presumption of 50/50 physical custody may not make sense in the state. Rather than employing a presumption that can only be rebutted by clear and convincing evidence that both parents should share custody, a judge should be able to continue making an evaluation without this impediment in order to determine the best interests of each individual child.²⁰⁷ Based on the proposed legislation, there is no indication that legislators took these considerations into account and, at the very least, the effects of a presumption should be seriously studied to determine if it would be realistically applicable in the state.

IV. A POSSIBLE SOLUTION

West Virginia should not enact a presumption of 50/50 physical custody as proposed. Kentucky serves as a tempting, but cautionary example. A survey of law in other states reveals that more artful solutions have been developed to address the problems discussed above.

A. The Cautionary Tale from Kentucky

While there is some evidence a presumption has succeeded in Kentucky, this would likely not hold true for West Virginia. In 2018, Kentucky introduced and signed into law House Bill 528, which created a presumption of 50/50 physical custody.²⁰⁸ The bill created a rebuttable presumption by a preponderance of the evidence that 50/50 physical custody is in the best interest of the child and requires the court to enter findings of fact when deviating from 50/50 custody.²⁰⁹ A year after Kentucky's presumption law was enacted, the state saw a decrease in its family court caseload and domestic violence filings.²¹⁰

²⁰⁷ A presumption would no longer "h[o]ld paramount" the best interest of the child. *In re* P.F., 848 S.E.2d 826, 830 (W. Va. 2020) (citing in part Syl. Pt. 5, *Carter v. Carter*, 470 S.E.2d 193 (1996)). *But see* H.D. 2302, 85th Leg., Reg. Sess. (W. Va. 2021).

²⁰⁸ H.B. 528, Leg. Reg. Sess. (Ky. 2018).

²⁰⁹ *Id.* House Bill 528 is codified in KY. REV. STAT. ANN. § 403.270 (West 2021). In Kentucky, there shall be a presumption, rebuttable by a preponderance of evidence, that joint custody and equally shared parenting time is in the best interest of the child. If a deviation from equal parenting time is warranted, the court shall construct a parenting time schedule which maximizes the time each parent or de facto custodian has with the child and is consistent with ensuring the child's welfare.

Id.

²¹⁰ Matt Hale, *Kentucky's Popular Joint-Custody Law Shows Why It's the Most Effective at Helping Families*, COURIER J. (Aug. 30, 2019, 11:59 AM), [https://www.courier-](https://www.courier-journal.com/story/news/2019/08/30/kentucky-popular-joint-custody-law-shows-why-it-s-the-most-effective-at-helping-families/5411110002/)

However, because the law only took effect in July 2018, further studies over longer periods of time need to be conducted to determine if this trend holds steady. It is also important to note that Kentucky's presumption law is rebuttable by a preponderance of the evidence, whereas West Virginia's proposed law's standard is clear and convincing evidence. It is therefore hard to say if the results can be translated across states. Also, it is not unreasonable to attribute the very low rate of trials over custody disputes to the application of the best interest of the child standard.²¹¹ In context, the best interest of the child standard operates alongside educational programs about the impacts of divorce on children, multidisciplinary approaches involving mental health professionals, mediations, and settlement conferences following mediation.²¹² Mediations have been found to result in significantly less trials regarding custody.²¹³ Even though the family court caseload may have decreased since the presumption was enacted in Kentucky, there is still litigation in the state directly regarding the application of the presumption.²¹⁴ For the reasons discussed above, the effects of a presumption of a 50/50 physical custody law may be different in West Virginia.

B. Pennsylvania's Exemplary Statutory Scheme

Instead of a presumption of 50/50 physical custody, West Virginia could pass a statute explicitly stating it does not give preferential treatment to either parent, but instead places them on an even playing field. West Virginia should have a clear, extensive factor list for judges to consider in determining the best interest of the child. This extensive list has had success in some other states. For example, Pennsylvania's statute enumerating its factors to consider when awarding custody not only includes an extensive list of factors, but also an explicit provision stating that there will be no preference given to either party based on gender.²¹⁵ The provision states, "no party shall receive preference based upon gender in any award granted under this chapter."²¹⁶ This is different than a presumption of 50/50 physical custody and may offer a better alternative because

journal.com/story/opinion/2019/08/30/kentuckys-joint-custody-law-leads-decline-family-court-cases/2158216001/.

²¹¹ See Warshak, *supra* note 11, at 161.

²¹² *Id.*

²¹³ *Id.*; Robert E. Emery, Lisa Laumann-Billings, Mary C. Waldron & David A. Sbarra et. al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. CONSULTING & CLINICAL PSYCH. 323, 323 (2001).

²¹⁴ See *George v. George*, No. 2020-CA-1057-MR, 2021 WL 4343434, at *1 (Ky. Ct. App. Sept. 24, 2021) (vacating custody order because it was not clear that circuit court applied the presumption properly); *Nichols v. Nichols*, No. 2020-CA-0837-MR, 2021 WL 4343472, at *1 (Ky. Ct. App. Sept. 24, 2021) (similarly vacating an order for lack of evidence as to the presumption's proper application).

²¹⁵ 23 PA. STAT. AND CONS. STAT. § 5328 (West 2022).

²¹⁶ *Id.* § 5328(b).

it calms historical fears of a mother or father receiving preferential treatment but also allows for individual determinations based on the enumerated factors to give the judge guidance.

Further, Pennsylvania has a statute listing the types of custody arrangements that may be ordered in accordance with the best interest of the child, making it clear a presumption does not exist and giving the judge a concrete list of options.²¹⁷ This statute makes it clear that any one of these custody arrangements may be appropriate in a child custody arrangement. This statute puts the focus on the best interest factors by ensuring that there is no default option. Pennsylvania even goes a step further and has a statute that explicitly states no presumption of custody will exist between the child's parents—"in any action regarding the custody of the child between the parents of the child, there shall be no presumption that custody should be awarded to a particular parent."²¹⁸ Pennsylvania's statutory scheme emphasizes that the focus should remain on the best interest factors when making custody determinations. If changes were to be made to any West Virginia best interest of the child statutes, Pennsylvania's custody statutes model a clear way to implement the best interest standard while allowing the judge discretion, but giving him concrete guidelines to follow.

C. If West Virginia Chooses to Enact a Presumption, Look to Utah

If West Virginia were to enact a presumption of 50/50 physical custody, it should model its statute after Utah's.²¹⁹ The Utah statute provides for a presumption of joint legal custody that can be rebutted by a showing by a preponderance of the evidence that the arrangement is not in the best interest of the child.²²⁰ Utah's statute provides a flexible standard, where the presumption does not apply when there is evidence of domestic violence, a parent or child has special physical or mental needs which would make the implementation of the arrangement difficult, and when the physical distance between the parents' homes would make joint custody unreasonable.²²¹ The statute also provides room for judicial discretion in the application of the presumption by including the language "or any other factor the court determines is relevant."²²² This proposed solution would be closer to achieving a result more in accordance with social science research to ensure children have a stable and secure home

²¹⁷ *Id.* § 5323.

²¹⁸ *Id.* § 5327.

²¹⁹ See UTAH CODE ANN. § 30-3-10 (West 2022).

²²⁰ See *id.*

²²¹ *Id.* § 30-3-10(3).

²²² *Id.* § 30-3-10(10).

environment.²²³ This solution would likely decrease the opportunity for a child to bear witness to parental hostility, which has detrimental effects for a child's adjustment and wellbeing.²²⁴ While a presumption of 50/50 physical custody would not be ideal for West Virginia, if the state chose to adopt such a presumption, these are measures the legislature could take to ensure custody arrangements are still to be in the best interest of each child.

CONCLUSION

Beginning with “a destination discourages consideration of other options, and discounts the preparation and dedication needed to make the journey.”²²⁵ The best interest of the child standard provides for a large amount of adaptability as it is applied by judges to dramatically different factual scenarios without “priz[ing] a particular arrangement.”²²⁶ The best interest of the child standard and its surrounding context reflect the work of psychologists and other social scientists to determine the impact of divorce on children and how to best aid their adjustment.²²⁷ A presumption of 50/50 physical custody would take away the court's ability to properly evaluate these psychological factors that are enumerated in the best interest of the child standard in each case. It is especially problematic that such a presumption would operate in the exact kind of cases in which joint custody would be most harmful—those that involve high-conflict parents. With a presumption, the court loses the opportunity to treat each child individually, which goes against societal values. A presumption that altogether fails to consider the needs and interests of a child and instead places that child in a position to be harmed should not be enacted, especially in West Virginia.²²⁸

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²²³ See *supra* Part III.

²²⁴ See *supra* notes 164, 167 and accompanying text in note 167.

²²⁵ Nancy Ver Steegh & Dianna Gould-Saltman, *Joint Legal Custody Presumptions: A Troubling Legal Shortcut*, 52 FAM. CT. REV. 263, 269 (2014).

²²⁶ *Id.*

²²⁷ Warshak, *supra* note 11, at 162.

²²⁸ Please note that since this Note was written, West Virginia has enacted a presumption of 50/50 shared equal custody between parents as of June 10, 2022. W. VA. CODE ANN. § 48-9-102a (West 2022); see W. VA. CODE ANN. § 48-9-102(b) (West 2022).

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