

NOTE

JOINT LEGAL CUSTODY: A PARENT'S CONSTITUTIONAL RIGHT IN A REORGANIZED FAMILY

I. INTRODUCTION

Historically, the United States Supreme Court has recognized a parent's constitutional liberty interest in the custody, care, and decision making in their children.¹ This right is recognized in the Fourteenth Amendment to the United States Constitution.² However, the Supreme Court has not expressly addressed whether or not parents have a constitutionally protected liberty interest in the joint legal custody of their children upon dissolution of their marriage. A parent's right to exercise joint legal custody upon termination of the marriage can be properly inferred from recognizing constitutional doctrine pertaining to related familial rights.³ Once recognized, states must protect that right by providing for a rebuttable presumption of joint decision making.

It must first be understood that divorce has become a common occurrence in the United States. Over one million children are involved in a divorce every year, with the fastest growing segment involving

1. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) ("[L]iberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.").

2. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (stating that a natural parent's liberty interest in the care, custody, and management of their child is protected by the Fourteenth Amendment); see also Lillian Wan, Note, *Parents Killing Parents: Creating a Presumption of Unfitness*, 63 ALB. L. REV. 333, 334 (1999) ("The Supreme Court of the United States has consistently held the right of parents to rear their children as they see fit is a liberty interest protected by the Fourteenth Amendment.").

3. See Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27, 40 (1985) (arguing that the constitutional right to joint custody "flows clearly from several strands of constitutional doctrine recognizing related rights").

parents with young children.⁴ This represents a drastic change in the way our children are being raised today as compared to a generation ago.⁵

This Note recognizes a constitutional right to joint legal custody by taking a parental rights perspective.⁶ This Note also recognizes that a presumption of joint legal custody is consistent with continued meaningful parenting in a reorganized family.

Part I of this Note will briefly describe the history of custody evaluations in our society. This section will also define joint custody and introduce the issues raised in this Note. Part II will present a brief hypothetical divorce, which will illustrate a fact pattern that the courts are often faced with. Part III will describe the problem resulting from the bipolar nature of custody awards when courts are empowered with discretion to determine what is in the best interests of children, without due regard to parental rights. The leading child custody cases relating to joint custody from New York and New Jersey will be examined to expose their bipolar outcomes to similar fact patterns. Part IV will examine past determinations of constitutionally protected fundamental parental rights. This section will also examine the most recent Supreme Court case in the area of constitutionally protected parental rights, *Troxel v. Granville*.⁷ Part V will be a constitutional analysis of current child custody philosophy in our nation, using a doctrinal approach to determine that a rebuttable presumption of joint legal custody is a constitutionally mandated parental right at the time of divorce. Part VI will discuss some less restrictive alternatives available to the courts in

4. See Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 399 (2000) [hereinafter *The Evolving Judicial Role in Child Custody*].

5. See *id.*

6. There is an ongoing scholarly debate over whether or not joint custody is in the best interests of the child. See Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 457-58 (1984) (arguing against a presumption of joint custody); JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 37-38 (1973) (arguing that courts should make a final determination of custody to the identifiable psychological parent); Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687, 694 (1985) (arguing the positive merits of joint custody) [hereinafter *Taking Children Seriously*]; JUDITH S. WALLERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAK-UP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980) (arguing that children have psychological relationships with both parents and would benefit from continuing those relationships); AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.09(2) (2002) (stating that courts should presume that joint decision-making between parents is in the best interests of the child, unless it is shown that joint decision-making would not be in the best interests of the child; and the parent opposing joint decision-making carries the burden of showing such is not in the best interests of the child).

7. 530 U.S. 57 (2000).

order to protect parental rights, while also effectuating the best interests of the child. This section will also present certain situations when joint custody is not advisable and an award of sole custody is appropriate. Part VII will conclude this Note.

Under the old common law, there was a paternal preference in child custody awards.⁸ The typical custody dispute merely focused on identifying which parent was the father, and an award to that person was made accordingly.⁹ Subsequent to this time, courts shifted to a maternal preference with the primary objective of identifying the mother so that an appropriate award of custody could be made to her.¹⁰ This maternal preference came to be known as the *tender years doctrine*, whereby it was presumed that young children should be placed in the care of the mother.¹¹ During the period of time that the tender years doctrine dominated custodial awards, the courts placed the burden on the father to prove the mother was unfit if the father was to have any chance of being awarded custody.¹²

The tender years philosophy dominated the courts' decision making up until the mid-1970s.¹³ Recognizing the constitutional nature of parental rights, the tender years doctrine was struck down by most courts as a violation of the equal protection clause of the Fourteenth Amendment because it discriminated against fathers.¹⁴ After this period, courts abandoned the tender years doctrine for gender-neutral rules and applied a *best interests of the child* test.¹⁵ The best interests of the child standard directs courts to identify which parent, regardless of gender, best serves the needs of the child.¹⁶ Once identified, that parent is normally given sole custody of the child, while the other parent is afforded visitation rights.¹⁷ Visitation preserves a role for the parent in the child's life, but the visiting parent has no legal authority to make decisions for the child—other than minor day-to-day decisions while the

8. See Scott & Derdeyn, *supra* note 6, at 464.

9. See *id.* at 465.

10. See *id.*

11. See *id.*

12. See *id.*

13. See *id.* at 466.

14. See *id.* at 466 n.49 (citing State *ex rel.* Watts v. Watts, 77 Misc. 2d 178 (N.Y. Fam. Ct. 1973)).

15. See Scott & Derdeyn, *supra* note 6, at 466.

16. See *id.*

17. See *Taking Children Seriously*, *supra* note 6, at 694 (arguing that visitation will be ordered to a non-custodial parent so long as that parent meets the minimum standards of abuse and neglect laws, even over the objection of the custodial parent).

child is physically in their care.¹⁸ This standard, however, fails to adequately balance the interests of parents in custody determinations. On the other hand, this standard does recognize that both parents have rights.¹⁹

Joint custody came into favor as a result of the adoption of the best interests of the child standard following the abolition of the tender years doctrine.²⁰ Joint custody is typically broken down into joint legal custody and joint physical custody.²¹ Under the joint legal custody model, both parents share the decision-making authority for major decisions affecting the children's welfare.²² The joint physical custody model affords both parents substantial access to the child by almost evenly splitting the amount of time the child spends with each parent.²³ For purposes of this Note, joint custody shall refer to the joint legal custody model. However, this Note shall also presume that the court would also have legal authority to order joint physical custody as well as joint legal custody of children.

Joint custody is best when both parents put aside their differences and work together towards the best interests of the child.²⁴ The child's adjustment to the divorce and the reorganization of the family is best facilitated when the parents set aside their anger towards one another and work towards a common goal of effectuating what is best for their children.²⁵ The goal of custody legislation is to promote the best interests of the child.²⁶ Courts have increasingly viewed joint custody awards as the best way to achieve this goal.²⁷ However, implicit in this view is the assumption that parents will be able to set aside their differences in order to effectuate the best interests of the child and in the event differences do arise, the benefit of joint parental custody and the increased parental

18. *See id.* at 694-95. Non-custodial parents have a liberty interest in visitation with their children. *See Franz v. United States*, 707 F.2d 582, 602 (1983). The court analyzed "the constitutional status of the right of a non-custodial parent and his or her children not to be totally and permanently prevented from ever seeing one another." *Id.* The court did not extend its holding so far as to call the right "fundamental." *See id.*

19. *See Scott & Derdeyn, supra* note 6, at 466.

20. *See id.* at 469.

21. *See id.* at 455 n.1 (citing *Beck v. Beck*, 432 A.2d 63, 65-66 (N.J. 1981)).

22. *See Scott & Derdeyn, supra* note 6, at 455.

23. *See id.*

24. *See id.* at 455; *cf.* Margaret F. Brinig, *Feminism and Child Custody Under Chapter Two of the American Law Institute's Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL'Y 301, 314 (2001). Some scholarly research indicates that joint custody has neither a positive nor negative effect on the parties. *See id.*

25. *See Scott & Derdeyn, supra* note 6, at 457.

26. *See id.*

27. *See id.* at 458.

interaction with the children will outweigh the potential harm to the child.²⁸ The first implicit principle can sometimes be problematic because the court may order joint custody over the veto of one of the parents.²⁹ The second implicit principle can also be problematic at times because some divorces that involve parental difficulties may involve domestic violence.³⁰ There is increasing data to support a connection between spousal abuse and child abuse.³¹ There is also evidence to support that children are powerfully affected by being exposed to domestic violence even if they are not the direct victims of the abuse.³² However, not all domestic violence is equal and some courts have taken steps to consider these cases individually.³³ In addition, many courts have instituted court-ordered parent education programs and mediation to address some of the implicit problems of court-ordered joint custody.³⁴ These courts proactively work towards facilitating the reorganization of the family.

While many states now have a presumption of joint custody upon dissolution of marriage, there are still some states that do not.³⁵ In those states that do not presume parents will have joint custody upon dissolution of the marriage, they appear to presume that joint custody is not in the best interests of the child and therefore will only order joint custody upon the voluntary and mutual consent of both parents.³⁶

II. THE INHERENT PROBLEM WITH THE SOLE CUSTODY MODEL

Often both parents are fit, and have expressed an interest in maintaining a meaningful role in their child's life. Unfortunately, at the time of divorce, parents do not always agree upon the proper division of parental responsibilities. A brief look at a hypothetical marital breakdown will expose the true problem.

Harry and Wendy began dating fifteen years ago while in college. Harry went on to get his master's degree in education, while Wendy

28. *See id.* at 457.

29. *See id.*

30. *See The Evolving Judicial Role in Child Custody, supra* note 4, at 416.

31. *See id.*

32. *See id.*

33. *See id.* at 420.

34. *See id.*

35. *See* Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 *CARDOZO L. REV.* 1523, 1538 (1994) (stating that some states have a presumption of joint custody).

36. *See Braiman v. Braiman*, 378 N.E.2d 1019, 1020-22 (N.Y. 1978) (stating that joint custody is encouraged primarily as a voluntary alternative).

went to medical school. After Harry finished his master's degree and obtained a teaching position as an elementary school teacher in a local public school, the couple married. Wendy continued on to finish her medical training after the two were married. After Wendy completed her medical training and residency, she joined a small pediatric practice. The couple decided to have a child, and a year later Wendy gave birth to a beautiful baby girl, Cindy.

Cindy was perfectly healthy except for a chronic asthma condition that required her to be closely monitored and treated with medication. Harry and Wendy both agreed that they would continue working after Cindy was born, so they hired an *au pair* to help take care of Cindy while they were both at work. Harry would usually be the first one home after work. He would take care of Cindy and also prepare dinner for the family. Wendy's practice demanded a great deal of time, but she managed to get home in time for dinner on most nights and also to put Cindy to bed on most occasions. On weekends, the couple shared responsibility for the household chores and both spent quality time with Cindy. Wendy also spent a great deal of time monitoring Cindy's asthma.

Around the time of Cindy's second birthday, they lost their live-in help and the couple had difficulty finding suitable care for Cindy. At this time, Wendy's practice began to thrive and her income was nearly triple the income that Harry was making at his teaching job. They both decided that it was in everyone's best interest to have Harry stay home with Cindy, while Wendy continued to practice medicine and provide financially for the family.

After quitting his job, Harry took Cindy to early childhood development classes and picked up a larger responsibility for the household chores. Two years later, Harry and Wendy enrolled Cindy in a nursery school that Harry had found. Harry took Cindy to school everyday and it is there that he met Missy, Cindy's teacher. By the middle of the school year, Harry and Missy had begun an affair. Wendy's best friend also had a son in the class and she told Wendy that she suspected that Harry and Missy were having an affair. Wendy approached Harry about what her friend had told her, and Harry admitted to having the affair. He also stated that he was in love with Missy and was not willing to give up his relationship with her. Wendy was angry and hurt by her husband's betrayal and contacted a lawyer about a divorce.

During the negotiations for the divorce, Harry was adamant that Wendy pay him lifetime maintenance, child support, and *at least* half of

the value of her medical practice. He also wanted to continue living in the house with Cindy and wanted Wendy to continue paying all the bills on the home after the divorce was final.

The couple, through their lawyers, argued for months over marital assets and a parenting arrangement. Harry's attorney explained to him that courts make custody determinations based upon the best interests of the child. Harry was confident that the court would find him to be the "primary caregiver" and completely fit. Wendy, on the other hand, was worried because she had heard that courts award custody to the primary caregiver and "psychological parent" when one could be identified. She now regretted the decision she made to continue working and to provide for the family. Wendy worried about Cindy's health constantly and wanted to remain an integral part of Cindy's life. She desperately wanted to participate in the decision making about Cindy's education, and she wanted to be able to provide medical care to Cindy in the event of an emergency.

Wendy approached Harry with a joint legal custody arrangement, whereby each parent would have a voice in Cindy's child-rearing and control. Harry told Cindy that he thought it would be best if they did not have joint custody because it would be difficult and awkward to co-parent with Wendy in light of all their current disagreements. Harry also felt it would be unnecessary because Wendy would be allowed to visit with Cindy every other weekend. He felt that during Wendy's visitation periods, she would be able to make some decisions regarding Cindy, albeit minor decisions (i.e., what to eat, what to wear, where to go, etc.). Wendy did not want to be reduced to a visitor in Cindy's life; she wanted to remain an active and involved parent. While Harry recognized Wendy's expertise as a pediatrician, he felt that he could find another pediatric practice that could take care of Cindy just fine.

In the end, Harry offered to agree to joint legal custody if Wendy would agree to his financial terms. Harry felt this was an adequate quid pro quo. Wendy thought Harry was being totally unreasonable, so she asked her attorney to take their dispute to court.

What is in Cindy's best interest? What will a court do to promote Cindy's best interest while also protecting Wendy's right to remain an active participant in the child-rearing and control of Cindy's life? These are very practical questions that courts are faced with everyday based on similar circumstances.

In some states with a presumption of joint custody, Harry would have the burden of showing that an award of joint custody would not be in Cindy's best interest and Wendy's right to joint custody should yield

to such a showing. In other states, joint custody would not be an option because Harry does not agree to it, therefore the court would probably award sole custody of Cindy to Harry after a routine hearing. The latter states would justify protecting and balancing Wendy's rights by allowing her to *visit* with Cindy.

III. ANALYZING THE POLARIZED OUTCOMES OF CUSTODY MODELS

The Harry and Wendy hypothetical divorce would most likely result in different custodial determinations based upon the state in which it would have been adjudicated. While many states now have a presumption of joint custody upon dissolution of marriage,³⁷ there are still some states that do not.³⁸ In those states that do not presume parents will have joint custody upon dissolution of the marriage, they appear to presume that joint custody is not in the best interests of the child and therefore will only order joint custody upon the voluntary and mutual consent of both parents.³⁹ While only ordering joint custody upon the voluntary mutual consent of both parents, those states will defeat one parent's desire to have joint custody merely because the other parent doesn't agree.⁴⁰ These states will typically order sole custody because it is found by that court to be in the best interests of the child.⁴¹

New York is one of the states that have held that joint custody should not be awarded unless it is voluntarily agreed upon by both parents.⁴² In *Braiman v. Braiman*, a father sought to modify a divorce decree that granted custody of the two minor children to the mother. After the father alleged the mother was unfit,⁴³ the trial court granted the father sole custody of the children and the mother appealed.⁴⁴ On initial appeal, the intermediate court⁴⁵ granted both parents joint custody of the children.⁴⁶ The Court of Appeals, New York's highest court, reversed

37. See *Beck v. Beck*, 432 A.2d 63, 71 (N.J. 1981) (“[Parental] opposition to *joint* custody does not preclude the court from ordering that arrangement.”).

38. See *Braiman*, 378 N.E.2d 1019, 1020-22 (N.Y. 1978) (stating that joint custody is encouraged primarily as a voluntary alternative).

39. See *id.*

40. See *id.* New York courts will order joint custody primarily after both parents voluntarily agree to such an arrangement. Therefore, one objecting parent can destroy the chances of a joint custody award. See *id.*

41. See *Scott & Derdeyn*, *supra* note 6, at 466.

42. See *Braiman*, 378 N.E.2d at 1020-22.

43. See *id.* at 1019.

44. See *id.*

45. New York's intermediate appellate court is broken down into four departments based on regional jurisdiction. The appeal was taken appropriately to the Second Department.

46. See *Braiman*, 378 N.E.2d at 1019.

and remanded the case back to the trial court for a new hearing.⁴⁷ The facts in *Braiman* indicate that the parents were entangled in a bitter relationship. Both parents accused each other of various vices and wrongs.⁴⁸ The mother claimed the father was an abuser, a gambler, and an inattentive parent.⁴⁹ The father, on the other hand, claimed the mother was a “barfly,” sexually promiscuous, and a neglectful mother.⁵⁰ The court noted that the evidence and testimony presented by both parents conflicted and was contradictory.⁵¹ The court, however, went on to note that the serious cross-accusations demonstrated the parents were embittered and embattled, therefore a court ordered joint custody award would only enhance family chaos.⁵²

The *Braiman* court went on to acknowledge that while joint custody may be in the best interests of the child when parents are amicable,⁵³ the court cannot accept that joint custody should be ordered when the parents are not.⁵⁴ The court acknowledged that “[d]ivorce dissolves the family as well as the marriage.”⁵⁵

In the hypothetical divorce of Harry and Wendy, Harry was unwilling to agree to joint custody unless Wendy acquiesced to Harry’s demands for potentially excessive financial consideration. Because of Harry’s adamant position, if Wendy was to seek judicial intervention in order to determine a fair distribution of the assets and a fair amount of maintenance to be paid to Harry, the court would also have to determine which parent should receive an award of sole custody of Cindy. As a result, Wendy would need to seek sole custody of her if she is to retain any legal right to decision making and control.

One can imagine some of the negative allegations Harry might make: Wendy puts her career before family; Wendy has no time to care for Cindy; Wendy has little psychological connection to Cindy since he is the one that takes the time to raise Cindy; Wendy is seeking custody of Cindy merely to avoid her financial responsibilities; etc. Wendy’s allegations might look something like this: Harry is a cheating leech; Harry used his child caring time to have an illicit affair with Missy; Harry has not taken the time to concern himself with Cindy’s chronic

47. *See id.* at 1021-22.

48. *See id.* at 1021.

49. *See id.* at 1019-21.

50. *See id.* at 1020.

51. *See id.* at 1019-21.

52. *See id.* at 1021.

53. *See id.* at 1021-22.

54. *See id.*

55. *Id.* at 1022.

asthma condition; Harry doesn't really want custody of Cindy, rather, he has tried to use Cindy's custody as an extortion tool in order to force Wendy to pay above and beyond what would have been a fair and reasonable financial settlement. This is merely a short list of some of the potential negative arguments that both Harry and Wendy might make in order to win custody. These allegations could be construed as indicia of a couple incapable of co-parenting, rather than the emotional and desperate allegations of parents faced with possible termination of their legal rights to decision making and control of their child. The conclusion that Harry and Wendy are incapable of co-parenting would appear to be flawed; after all, Harry previously agreed to co-parent and share legal custody of Cindy with Wendy, provided Wendy agreed to his financial terms.

New Jersey's highest court has also considered the effects of joint custody on the best interests of the child, and there the court ordered joint custody over the objection of one of the parents when the parents were not completely amicable, nor agreeable. In *Beck v. Beck*,⁵⁶ the parents of two children sought a divorce after fourteen years of marriage.⁵⁷ At the trial court level, the substance of the proceedings was to address equitable distribution, maintenance, and a visitation schedule for the father with the mother to have sole custody.⁵⁸ The trial court, *sua sponte*, issued joint custody to the parties without either party requesting joint custody.⁵⁹ In support of the decision to order joint custody, the court cited the special or unique situation involved in the case.⁶⁰ The court found the parents to be sophisticated people that have adhered to the visitation schedule that had been in place during the pending litigation and also found them to be positive towards each other in regards to the children.⁶¹

Shortly thereafter, the mother moved to amend the order because she opposed joint custody.⁶² They both filed certifications with the father opposing the mother's motion to amend the order.⁶³ The father had now taken the position that he wished to have joint custody.⁶⁴ The court

56. 432 A.2d 63 (N.J. 1981).

57. *See id.* at 66-67.

58. *See id.* at 67.

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

ordered a rehearing on the issue of custody and a trial ensued.⁶⁵ At trial, the father called several expert witnesses from the medical community, all with psychological backgrounds.⁶⁶ The judge met with the children for the first time.⁶⁷ The mother also produced her own experts.⁶⁸ Not surprisingly, the testimony by the experts of the parents varied on each side.⁶⁹ The mother's expert testified that joint custody was not advisable and characterized it as "hokey" and "very risky."⁷⁰ The father's expert, on the other hand, testified that joint custody was advisable because it would foster the relationship between both parents and have long-term benefits to the children.⁷¹

Against the express veto of the mother, who claimed that joint custody was inappropriate because she could not communicate with her former husband, the trial court reaffirmed its prior findings and ordered joint custody.⁷² The court accepted the conclusions from the father's expert and stated that it was not essential that the parents have an amicable relationship as long as they are acting in the best interests of the children and respect each other's legal rights.⁷³

The concept of both parents needing to voluntarily agree on joint custody is not without problems. Divorce brings about a huge strain on a couple's relationship and their ability to communicate requires a healing period before the parents can effectively co-parent.⁷⁴ In some cases, the other issues to be resolved at the time of the divorce make it very difficult for the parents to take anything but an adversarial posture.⁷⁵ This appears to be the case in the hypothetical divorce of Harry and Wendy. The *Beck* court recognized that disagreements between parents can be transitory in nature and should not be assessed in the heat of the moment.⁷⁶ That same court recognized that parents do not need to be friends in order to co-parent effectively; and more recently, some scholars have suggested that parallel parenting, as opposed to

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.* at 68.

72. *See id.* at 69.

73. *See id.*

74. *See* ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 176 (2000).

75. *See id.*

76. *See Beck v. Beck*, 432 A.2d 63, 72 (N.J. 1981) ("Moreover, the potential for cooperation should not be assessed in the 'emotional heat' of the divorce.").

cooperative parenting, is often transient and can lead to cooperative parenting over time.⁷⁷

In the case of Harry and Wendy, a court taking the *Beck* approach might make an award of joint custody. The court might find that Harry's allegations, if true, do not negate the possible benefits that Cindy might receive by maintaining Wendy's legal status as a custodial parent. By not assessing the animosity that Harry and Wendy are displaying in the heat of litigation, the court is able to focus on the benefits that Cindy would receive by having both parents active in her life decisions. The *Beck* court approached the award of joint custody, even over the objection of the primary custodial mother, as being in the children's best interest.⁷⁸

IV. CONSTITUTIONALLY PROTECTED PARENTAL RIGHTS

Whether or not parents have a constitutional right to joint custody of their children upon dissolution of the marriage is a question the Supreme Court of the United States has not yet addressed. The Supreme Court has continually held that parents have a constitutionally protected liberty interest in the custody, care, and decision making of their children.⁷⁹ The Court has further held that the right of families, even extended families, to live together is a liberty interest protected by the Constitution.⁸⁰ In defining familial rights, the Supreme Court has ruled that individuals have fundamental rights to marry,⁸¹ even when in prison,⁸² to choose who they can marry,⁸³ to choose whether or not to have children,⁸⁴ to abort unwanted pregnancies,⁸⁵ to decide upon the education of their children,⁸⁶ to decide who visits with their children,⁸⁷ and to decide to divorce.⁸⁸ While the Court has spoken on a wide variety of family issues and recognized many fundamental personal and family rights, the Court has not yet addressed whether or not parents have a

77. *See id.*; *see also* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 292 (1992).

78. *See Beck*, 432 A.2d at 72.

79. *See Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

80. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977).

81. *See Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

82. *See Turner v. Safley*, 482 U.S. 78, 96 (1987).

83. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967).

84. *See Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

85. *See Roe v. Wade*, 410 U.S. 113, 153 (1973).

86. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

87. *See Troxel v. Granville*, 530 U.S. 57, 68 (2000).

88. *See Boddie v. Connecticut*, 401 U.S. 371, 382 (1971).

fundamental liberty interest in maintaining legal custody of their children upon divorce. The Court has held that “government cannot treat the parent-child relationship as automatically less significant simply because the parents are unwed”⁸⁹ Some commentators have opined, however, that when the divorce is final and a parent is awarded custody, that parent’s right to custody of their children is fundamental and “cannot be terminated without some showing of unfitness, even if the child’s interests might be furthered by termination.”⁹⁰

The first level of analysis when challenging a state’s interference with parental rights involves establishing whether or not the infringed parental right is fundamental. Once a right or liberty interest is deemed to be fundamental, the burden of persuasion⁹¹ shifts to the state and the law will stand only if it is narrowly tailored to serve a compelling state interest.⁹²

The Supreme Court has varied on the terminology it uses to describe rights in family matters. In the past decade, in the abortion area, the Court has moved away from the use of the term “fundamental” and shifted the burden of persuasion to the party challenging the state interference to show “undue burden” on the exercise of the liberty interest.⁹³ And in the “right to die” area, the Court has also refused to refer to this right as fundamental and essentially applied an intermediate level of scrutiny.⁹⁴ However, in 2000, the Supreme Court in *Troxel v. Granville* reaffirmed the fundamental nature of parental rights.⁹⁵

89. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-20, at 1416 (2d ed. 1988); see also *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972).

90. IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 1346 (3d ed. 1998).

91. See *infra* Part V.

92. See Recent Decision, *Washington County Department of Social Services v. Clark—The Constitutionality of a Rebuttable Presumption in a Parental Rights Termination Case*, 43 MD. L. REV. 632, 638 (1984) (stating that the state carries the burden of persuasion when a presumption infringes on a constitutionally protected liberty interest); see also *Lois Shepherd, Looking Forward with the Right of Privacy*, 49 U. KAN. L. REV. 251, 263 (2001) (stating that once a right is determined to be fundamental, it would require a showing of a compelling state interest that is narrowly tailored); cf. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (holding that the right to assisted suicide is not a fundamental liberty interest and therefore the government need only show that the intrusion on this right is rationally related to a legitimate government interest).

93. See *Shepherd*, *supra* note 92, at 263 (analyzing the Supreme Court’s refusal to refer to the abortion right as fundamental); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 834 (1992) (avoiding the use of the term fundamental when referring to the liberty interest at stake).

94. See also *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 292 (1990) (holding that the right to die is a liberty interest).

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

A. *Past Determinations of Fundamental Rights Within the Family*

In the historical case, *Meyer v. Nebraska*,⁹⁶ the Supreme Court established the parent's constitutional right to raise and control the upbringing of their children. The Court held a Nebraska state statute, making it a crime to teach a foreign language to children who have not finished the eighth grade, was arbitrary and unreasonable and therefore infringed upon the liberty guaranteed by the Fourteenth Amendment.⁹⁷ The Fourteenth Amendment guarantees that no state shall "deprive any person of life, liberty, or property, without due process of law."⁹⁸ In analyzing this amendment, the Court noted that the amendment denotes various liberty interests including but not limited to the right to marry, and establish a home and bring up children.⁹⁹ The Court noted that the established doctrine applicable to an analysis of a state statute is "that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."¹⁰⁰ The Supreme Court held that a parent's right to engage a teacher to teach their children was within the protection of the Fourteenth Amendment and could not be overcome by such an arbitrary statute.¹⁰¹

Two years after the *Meyer* decision, in 1925, the Court decided *Pierce v. Society of Sisters*,¹⁰² wherein the Court, relying on *Meyer*, struck down a state law requiring children to attend public school, which deprived parents of their right to send their children to private school.¹⁰³ The Court recognized that children are "not the mere creature of the State."¹⁰⁴

While both *Meyer* and *Pierce* were decided during a time when the Court was willing to expand substantive due process, much of that expansion has subsequently been repudiated.¹⁰⁵ *Meyer* and *Pierce*,

96. 262 U.S. 390 (1923).

97. *See id.* at 399.

98. U.S. CONST. amend. XIV, § 1.

99. *See Meyer*, 262 U.S. at 399.

100. *Id.* at 399-400.

101. *See id.* at 400.

102. 268 U.S. 510 (1925)

103. *See id.* at 534-35.

104. *See id.* at 535.

105. *See Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting); *see also Lochner v. New York*, 198 U.S. 45, 64 (1905); *see* David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1126 (2001) ("[T]he Court has repudiated the interventionism of the *Lochner* era, it has clung to the narrow sliver of its *Lochner*-era precedents relating to parents and children.").

however, have been cited in many cases since this time, and they were recently cited to support the fundamental nature of parent rights in *Troxel*.¹⁰⁶

This parental right to control the education and upbringing of their children is by no means absolute.¹⁰⁷ In *Stanley v. Illinois*, the Supreme Court held that a putative father must demonstrate his willingness to assume responsibility for his children, but when he does, it “undeniably warrants deference” to his rights.¹⁰⁸ A parent’s interest or right to “companionship, care, custody, and management of his or her children,” is a substantial right.¹⁰⁹ Absent some powerful countervailing interest, this right requires protection.¹¹⁰ The countervailing interest must be weighed against the loss the parent would suffer as a result of the infringement on his or her fundamental right.¹¹¹ The private interest of a parent’s right to custody is a commanding interest that would require clear and convincing proof of a parent’s unfitness in order to terminate parental rights.¹¹²

Upon the dissolution of the marriage, the parents effectively terminate the traditional nuclear family living arrangements. They do not necessarily terminate the family. The Supreme Court has recognized that while the nuclear family is one ideal of American families, the right of family extends beyond the traditional nuclear family.¹¹³ In *Moore v. City of East Cleveland*, the Court struck down a zoning ordinance that determined which family members were allowed to live in a household.¹¹⁴ The ordinance in question did not allow for some extended family members to reside in the same household.¹¹⁵ The *Moore* Court stated that the Constitution protects the sanctity of family because it is deeply rooted in our tradition.¹¹⁶ In an apparent recognition of the various familial models in our society, the Court went further to state that our traditions are not limited to the bonds of the nuclear family.¹¹⁷ Along

106. See *Troxel*, 530 U.S. at 65.

107. See *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (stating that a natural father has the right to accept responsibility of his children, and if he fails to do so, the Constitution does not compel a state to listen to his opinions regarding the best interests of his children).

108. 405 U.S. 645, 651 (1972).

109. *Id.*

110. See *id.*

111. See *Santosky v. Kramer*, 455 U.S. 745, 758 (1982).

112. See *id.* at 747-48.

113. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977).

114. See *id.*

115. See *id.* at 496.

116. See *id.* at 503.

117. See *id.* at 504.

those lines, our society has experienced an acceptance for models of family that may not mirror the nuclear family.

Divorce has become a common occurrence in our society. Nearly half of all American marriages will end in divorce.¹¹⁸ The vast majority of these families experiencing divorce have children.¹¹⁹ As a direct result of divorce, families reorganize and take on a new model distinct from the nuclear family (i.e., single parent homes, parent and child cohabitating with extended family for needed support)¹²⁰ that would be protected by the rights recognized in *Moore*.

Once divorced, a single custodial parent is protected from a state's interference with their right to custody and control of their children. A state may not intrude upon that relationship and terminate it without a showing of unfitness, usually entailing abuse or neglect, by clear and convincing evidence.¹²¹

The level of a parent's fundamental constitutional rights at the time of divorce is at stake in this analysis of a parent's constitutional right to joint custody. In states where there is no presumption of joint custody, the states delegate to the parents the responsibility of voluntarily agreeing to joint custody.¹²² Or, in the absence of a voluntary agreement, the state will choose which parent shall make all the decisions for the child, while also determining which parent shall have their right to care and decision making terminated.¹²³ As support for this action, the state invokes its responsibility and right as *parens patriae* to champion the best interests of the child.¹²⁴ The state invokes this right even as against a natural parent that has established the necessary bond that the *Stanley* Court held would justify constitutional protection of the fundamental liberty interest in the custody, care, and decision making of their child.¹²⁵ The *Stanley* Court determined that while procedural due process entitles an unwed father to a hearing to allow the father to rebut a presumption of unfitness, it also recognizes that a degree of substantive due process is required as well.¹²⁶ The degree of substantive due process required before

118. See *The Evolving Judicial Role in Child Custody*, *supra* note 4, at 399.

119. See *id.*

120. See *id.* at 396.

121. See *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982).

122. See *Braiman v. Braiman*, 44 N.Y.2d 584, 591 (1978).

123. See *id.*

124. See *Santosky*, 455 U.S. at 766 ("As *parens patriae*, the State's goal is to provide the child with a permanent home.").

125. See *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) (holding that procedural due process requires that an unwed father be given a hearing to rebut a presumption of unfitness).

126. See *id.*

a state can intervene and terminate their legal right to decision making and control over their children remains an area that the Court has not yet addressed. The Court, in 2000, decided that some degree of substantive due process is required before a state can intrude upon at least one aspect of parental decision making.¹²⁷

B. The Latest Reaffirmance of the Fundamental Nature of Parental Rights

Recently, the United States Supreme Court decided a case in the area of a parent's right to choose who may visit with their children.¹²⁸ In *Troxel v. Granville*, the Court, in a plurality opinion, held that a Washington State grandparent visitation statute was unconstitutional as applied to the facts of the case.¹²⁹ However, the Court was deeply divided over the rights of parents and the nature of the parent-child relationship.¹³⁰

The Washington statute at issue allowed “‘any person’ to petition a superior court for visitation rights ‘at any time’” and also authorized a court to grant such visitation when it is found to be in “the best interest of the child.”¹³¹ Tommie Granville and Brad Troxel, who had never married, conceived two children together, Isabelle and Natalie.¹³² Brad subsequently committed suicide.¹³³ Prior to Brad committing suicide, he separated from Tommie and lived with his parents.¹³⁴ He regularly brought the children to his parent's home and exercised weekend visitation.¹³⁵ After Brad's death, Tommie informed Brad's parents that she wished to shorten the amount of visitation that Brad's parents had been exercising¹³⁶ to one short visit per month,¹³⁷ which would not include an overnight.¹³⁸ The grandparents petitioned the court for a more extensive visitation to include two weekends a month.¹³⁹ Tommie did not

127. See *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

128. See *id.*

129. See *id.* at 75.

130. See Andrew Schepard, *Muddled Impact of the High Court's Grandparent Visitation Decision*, N.Y.L.J., July 13, 2000, at 3 [hereinafter *Muddled Impact of the High Court's Grandparent Visitation Decision*].

131. *Troxel*, 530 U.S. at 60.

132. See *id.*

133. See *id.*

134. See *id.*

135. See *id.*

136. See *id.* at 60-61.

137. See *id.* at 61.

138. See *id.*

139. See *id.*

oppose any visitation; rather, she wished to grant the grandparents only the shorter visitation schedule that she proposed.¹⁴⁰

The Washington State Superior Court, the state's trial level court, ordered visitation to the petitioning grandparents, "one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays."¹⁴¹ Tommie Granville appealed the order and the Washington Court of Appeals remanded the case back to the superior court for findings of fact and conclusions of law.¹⁴² The superior court subsequently found that the ordered visitation was in the best interests of the children.¹⁴³ The superior court found the Troxels to be a loving family, all located within the vicinity and capable of providing opportunities for emotional support and life enrichment that would be in the best interests of the children.¹⁴⁴

Tommie Granville appealed the order and Washington's intermediate appellate court dismissed the Troxels' petition by focusing on the grandparents' lack of standing to petition for visitation unless there was a custody action pending.¹⁴⁵ The Troxels petitioned the Washington Supreme Court for review and the court disagreed with the appellate court on the standing issue but nevertheless affirmed the decision by concluding that the Washington statute unconstitutionally infringed upon the parent's fundamental right to rear their children.¹⁴⁶ The Washington Supreme Court held that the statute in question permitted the state to intrude upon, and interfere with, the parent's right to raise their children, without any showing of harm to the children.¹⁴⁷ The statute also allowed a court to order visitation with any third party, over objection of the parents, solely because it was in the best interests of the child.¹⁴⁸ The court stated that the best interests of the child standard was "insufficient to serve as a compelling state interest overruling a parent's fundamental rights."¹⁴⁹

The United States Supreme Court granted certiorari and affirmed the Washington decision.¹⁵⁰ A divided Supreme Court issued a plurality

140. *See id.*

141. *Id.*

142. *See id.*

143. *See id.*

144. *See id.* at 61-62.

145. *See id.* at 62.

146. *See id.* at 63.

147. *See In re Custody of Smith*, 969 P.2d 21, 30 (Wash. 1998) (consolidating three distinct visitation cases including *In re Visitation of Troxel*).

148. *See id.*

149. *Id.*

150. *See Troxel v. Granville*, 530 U.S. 57, 63 (2000).

opinion with three Justices (Chief Justice Rehnquist, and Justices Ginsburg and Breyer) joining in the opinion by Justice O'Connor.¹⁵¹ Justices Thomas and Souter filed concurring opinions, and Justices Stevens, Scalia, and Kennedy dissented.¹⁵² The plurality opinion reaffirmed the existence of a parent's constitutional right and went further to state that "the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the] Court."¹⁵³ The plurality opinion made clear that the Fourteenth Amendment's Due Process Clause has a substantive component that requires heightened protection against governmental interference with fundamental rights and liberty interests.¹⁵⁴ The opinion, however, does not go on to state the appropriate level of scrutiny that courts should apply in assessing claims of infringement upon this constitutional right.¹⁵⁵ Rather, as Justice Thomas points out in his concurring opinion, the Court "curiously" declined to provide the appropriate level of scrutiny to be applied to such fundamental rights.¹⁵⁶ Instead, the Court declared the statute unconstitutional "as applied" because it was "breathtakingly broad" and did not afford the parent's decision any deference.¹⁵⁷

Presumably, the Court declared the statute unconstitutional "as applied" in order to avoid declaring the statute facially unconstitutional.¹⁵⁸ Since most state court determinations in this area are determined on a case-by-case basis, the Court avoided the need to rewrite state grandparent laws across the nation by deciding exactly what would trigger a state's statute unconstitutional "as a *per se* matter."¹⁵⁹ By deciding the case at bar on an "as applied" basis, the Court is able to avoid formulating a rule of constitutional law broader than required by the facts in the case.¹⁶⁰ The plurality concluded that the effect of the

151. *See id.* at 60.

152. *See id.* at 75, 80, 91, 93.

153. *Id.* at 65.

154. *See id.*

155. *See Muddled Impact of the High Court's Grandparent Visitation Decision, supra* note 130, at 4.

156. *See Troxel*, 530 U.S. at 80.

157. *See id.* at 67.

158. *See Muddled Impact of the High Court's Grandparent Visitation Decision, supra* note 130 at 4.

159. *Troxel*, 530 U.S. at 73.

160. *See* *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (recalling two cardinal rules of federal courts: "[one], never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied") (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)).

Washington statute was to empower a court to disregard and overturn any decision by a fit custodial parent regarding a third party seeking visitation with their children based solely on the best interests of the child. The Court went on to state that the facts of the case indicated that the original court order was based on a mere disagreement and was not founded on any special factors that might justify a state interfering with the fundamental right of parents to make child-rearing decisions.¹⁶¹

Justice Souter's concurring opinion stated that he would strike the statute down on its face.¹⁶² He thought that this would be consistent with the Court's prior cases that addressed similar substantive issues.¹⁶³ He noted that in the history of cases decided by the Supreme Court, the Court has not determined the "exact metes and bounds to the protected interest" of the parent-child relationship.¹⁶⁴ Upon reaffirming his support for the constitutional right of parents in the nurture, upbringing, companionship, care, and custody of children, he concurred with the decision of the plurality opinion of the court, without stating an appropriate level of scrutiny to apply.¹⁶⁵ Justice Thomas' concurring opinion was less ambiguous regarding what he believed to be the appropriate level of scrutiny.¹⁶⁶ After agreeing with the plurality that a fundamental liberty interest was at stake, he concluded that "strict scrutiny" was the appropriate level of protection to be afforded to fundamental rights.¹⁶⁷

While grandparent visitation was at issue in *Troxel*, the case is most noteworthy for the Court's decision to reaffirm the fundamental nature of a parent's liberty interest in the custody, care, and control of their children.¹⁶⁸ It is also important to note that the Court recognized due process does not just mean "fair process," but involves a substantive component requiring "heightened protection against government interference."¹⁶⁹ Unfortunately, as Justice Thomas points out, the Court failed to provide us with the appropriate standard of review, or even the meaning of "heightened protection."¹⁷⁰

161. See *Troxel*, 530 U.S. at 68 (stating that the Washington Superior Court's order was based on a mere disagreement and not on special factors justifying the state's interference with Mrs. Granville's fundamental liberty rights).

162. See *id.* at 75.

163. See *id.*

164. *Id.* at 78.

165. See *id.* at 79.

166. See *id.* at 80.

167. See *id.*

168. See *id.* at 65.

169. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)).

170. See *Troxel*, 530 U.S. at 80.

Simplistically, there are three levels of scrutiny: Rational basis, intermediate scrutiny, and strict scrutiny. Rational basis scrutiny is usually upheld when the law bears a reasonable relationship to the attainment of some legitimate governmental objective.¹⁷¹ Strict scrutiny is the highest level of scrutiny and is normally satisfied only when a state has a compelling interest that justifies the interference and the law is necessary because there are no less restrictive alternatives.¹⁷² Intermediate scrutiny lies between the two extremes of rational basis scrutiny and strict scrutiny.¹⁷³ Intermediate scrutiny has been defined as requiring the legislation to be “substantially related to the achievement of an important government objective,” and is sometimes referred to as heightened scrutiny.¹⁷⁴

The use of the term “fundamental” normally ensures that strict scrutiny is the appropriate level of review.¹⁷⁵ In 1997, the Supreme Court decided *Washington v. Glucksberg*, wherein Justice Souter’s concurring opinion stated that the use of “precision in terminology” required reserving the term “right” for those instances in which a liberty interest trumps a governmental countervailing interest.¹⁷⁶ In *Glucksberg*, Chief Justice Rehnquist, writing for the majority, stated that extending constitutional protection to liberty interests places the issue “outside the arena of public debate and legislative action.”¹⁷⁷

However, in spite of the Court’s use of the term “fundamental” and “right,” it is apparent that the *Troxel* plurality was unwilling to articulate a strict scrutiny standard of review for a parent’s right to control a child’s upbringing. This Court’s unwillingness to articulate strict scrutiny might also be construed as an implicit rejection of strict scrutiny in this context.¹⁷⁸ In any event, it is clear that this Court held this liberty interest to some heightened scrutiny.¹⁷⁹ In the opinion of Justice Thomas, the Washington statute at issue failed to meet a legitimate state interest, no less a compelling state interest, indicating his belief that this statute

171. See BLACK’S LAW DICTIONARY 1269 (7th ed. 1999).

172. See *id.* at 1435.

173. See *id.* at 820.

174. *Id.*

175. See *Glucksberg*, 521 U.S. at 762 (Souter, J., concurring).

176. See *id.* at 768-69 n.10.

177. *Id.* at 720.

178. See Meyer, *supra* note 105, at 1152 (stating that the majority of Justices in *Troxel v. Granville* implicitly rejected strict scrutiny).

179. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

would have been found unconstitutional even under an intermediate scrutiny standard.¹⁸⁰

V. DOCTRINAL ANALYSIS OF PARENTAL RIGHTS

An examination of prior constitutional doctrine may help to determine whether or not a state's policy of primarily ordering joint custody only upon the voluntary consent of both parents is constitutionally permissible. This analysis is not intended to suggest that any one doctrine is dispositive on the issue. Rather, it is intended to explore the constitutional limitations on a state's interference with parental rights guaranteed by the Fourteenth Amendment.

When a state presumes that joint custody should be awarded only upon the voluntary agreement of the parents, the state has in essence delegated a veto power to one of the parents.¹⁸¹ Once a spouse has exercised the power to veto joint custody, the court then presumes that joint custody is not in the best interests of the child.¹⁸² This presumption is irrebuttable by either parent when the state predetermines that joint custody will only be awarded as a voluntary alternative.¹⁸³ At the time of the hearing, the court will not even attempt to balance the competing rights of parents. Instead, the court will merely seek to determine which parent best serves the children's needs in order to award sole custody to that parent.¹⁸⁴

In *Planned Parenthood v. Danforth*, the Court held that a spousal notification requirement before a woman could obtain an abortion constituted an unconstitutional veto power delegated by the state.¹⁸⁵ While the provision was not an express veto, the Court determined that it operated as a veto, which could be exercised without any justification.¹⁸⁶ The Court held that the state could not delegate, to a spouse, a veto power, which the state itself could not exercise.¹⁸⁷ The Court went on to acknowledge that the marital couple is an entity made up of two individuals, each with privacy rights to be free from unwarranted

180. *See id.* at 80 (Thomas, J., concurring) (“[T]he State of Washington lacks even a legitimate governmental interest—to say nothing of a compelling one—in second-guessing a fit parent’s decision regarding visitation with third parties. On this basis, I would affirm the judgment below.”).

181. *See Taking Children Seriously*, *supra* note 6, at 714 n.113.

182. *See Braiman v. Braiman*, 378 N.E.2d 1019, 1020-22 (N.Y. 1978).

183. *See id.* at 1020.

184. *See id.* at 1021.

185. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976). The Court also rejected an absolute parental veto over a minor child’s abortion. *See id.* at 74.

186. *See id.* at 71.

187. *See id.* at 69.

governmental intrusion into the decision whether to bear or beget children.¹⁸⁸ The Court also recognized the competing interests of the spouses, and favored balancing these rights. Since the woman is the one to bear the child and she is the one immediately affected by the pregnancy, “the balance weighs in her favor.”¹⁸⁹

While it is conceivable to argue that the “no veto” principle in *Danforth* stands for an “abortion only” doctrine, Professor Laurence Tribe asserts that the holding in *Danforth* can be synthesized with the holding in *Stanley*,¹⁹⁰ and other relevant family rights cases, to draw the conclusion that “the stereotypical ‘family unit’ that is so much a part of our constitutional rhetoric is becoming decreasingly central to our constitutional reality.”¹⁹¹ As the *Danforth* Court recognized, parents have individual rights that warrant protection.¹⁹²

In the context of joint custody, both parents may be fit and extremely involved in the care and control of their children at the point in time when the state would require each parent to consent to joint custody. A parent’s refusal to consent to such an arrangement is an actual veto power, which guarantees that one of the parents will have their legal rights to custody and control of their children terminated by the state.¹⁹³ The state delegates this veto power to the parents while they are still married, but they are negotiating their affairs for an upcoming divorce.¹⁹⁴ Presumably, the parent most likely to be designated sole custodian has the state-delegated authority to “hold up” the other parent for more favorable financial concessions by bargaining custody rights for monetary consideration.¹⁹⁵

In the hypothetical divorce discussed in Part II, Harry possessed the power to “hold up” Wendy, because he was confident that he would be awarded sole custody if a court had to choose between them. Therefore Wendy was given an ultimatum—she must agree to his financial terms in order to maintain her custodial status. This problem might be prevented if the law would presume joint custody in the absence of some

188. *See id.* at 70 n.11.

189. *Id.* at 71.

190. *See Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that father cannot automatically be presumed unfit).

191. TRIBE, *supra* note 89, § 15-20, at 1416-17.

192. *See Danforth*, 428 U.S. at 70.

193. *See Taking Children Seriously*, *supra* note 6, at 714 n.113.

194. *See id.* at 715.

195. *See id.*; *see also* Jana B. Singer & William L. Reynolds, *A Dissent On Joint Custody*, 47 MD. L. REV. 497, 511-12 (1987) (arguing against a presumption of joint custody because it fails to consider the woman’s financial bargaining position).

showing of unfitness or detriment to the child; therefore, parents would have less incentive to oppose joint custody and theoretically, fewer parents would have their legal rights to custody terminated.¹⁹⁶

The underpinnings of the “no veto” principle in *Danforth* are that the state cannot delegate more power than it possesses.¹⁹⁷ Therefore, it can be logically inferred that the burden the state carries¹⁹⁸ in order to terminate parental rights would be implicit in any delegation of the power to terminate parental rights.¹⁹⁹ But, parents are not required to present any reasons for rejecting joint custody, nor are they required to show “any” special factors that might warrant the conclusion that joint custody is not in the best interests of the child.²⁰⁰ The question remains, where did the burden go when the state delegated its power? As justification for terminating the parental rights of one of the parents, the state asserts that the parents’ inability to agree to joint custody is evidence of an inability to co-parent and effectuate the best interests of the children, in turn necessitating an award of sole custody.²⁰¹ This reasoning, however, seems circular at best. The parent seeking to defeat the other parent’s right to custody of the child may choose to do so for absolutely no reason if they wish. The draconian result of a parent losing their right to custody and control of their children is a foregone conclusion before the court has even intervened.

The state’s position that joint custody is only appropriate as a voluntary agreement between parents creates an irrebuttable presumption that sole custody is in the best interests of the child when parents seek judicial intervention.²⁰² Whether or not the irrebuttable presumption doctrine is an appropriate remedy for this constitutional question requires a threshold determination that at least intermediate scrutiny is appropriate.²⁰³ Considering the most recent Supreme Court decision involving parental rights, the *Troxel* decision made it apparent that “heightened protection” was warranted to protect a parent’s right to decide who may visit with their children.²⁰⁴ For purposes of this Note,

196. See *Taking Children Seriously*, *supra* note 6, at 716.

197. See *Danforth*, 428 U.S. at 52.

198. The precise burden the State carries is unclear, this Note argues that it is no less than some special factors showing that joint custody is not in the best interests of the child, and at most a showing of harm.

199. See *id.*

200. See *Braiman v. Braiman*, 378 N.E.2d 1019, 1020-22 (N.Y. 1978).

201. See *id.* at 1021 (stating that when parents come to court and accuse one another of serious vices and wrongs, an award of joint custody could only increase family chaos).

202. See *id.* at 1020.

203. See *TRIBE*, *supra* note 89, § 16-34, at 1622-24.

204. See *supra* Part IV.B.

heightened protection will be analyzed under the intermediate level of scrutiny.²⁰⁵

Intermediate level scrutiny may be appropriate when neither strict scrutiny nor rational basis (minimal scrutiny) is entirely appropriate to the analysis of the right at issue.²⁰⁶ The most common remedy when employing intermediate scrutiny is to require the court to permit rebuttal in an individualized hearing. The effect is to transform the irrebuttable presumptions into “burden-shifting devices.”²⁰⁷ Some scholars have described the irrebuttable presumption doctrine as “confused” and “unhelpful.”²⁰⁸ In effect, what they are arguing is that it presumes nothing and that it “simply chooses one substantive policy over another.”²⁰⁹ That argument is based on the premise that when a court invalidates an irrebuttable presumption, the court is really choosing to invalidate the presumption as a substantive rule that is overinclusive.²¹⁰ Professor Tribe argues that such criticisms miss a very valuable point, that striking down a rule as overinclusive may suggest that the state is forbidden from using the factor that lead to the condemnation.²¹¹ The “special feature” of the irrebuttable presumption doctrine is that it suggests that the state is free to use the factor so long as it is not conclusive.²¹² While there have been many cases where the irrebuttable presumption doctrine was not employed, thereby suggesting that it has been rejected or mortally wounded, it serves as a particular intermediate remedy when it is properly invoked.²¹³

In 1975, the Supreme Court decided *Weinberger v. Salfi*,²¹⁴ wherein the Court upheld a federal statute that prevented widows from collecting Social Security survivors’ benefits unless their relationship to the deceased wage earner began at least nine months prior to death.²¹⁵ The Court reversed the district court ruling, which was based on the irrebuttable presumption doctrine, because the noncontractual right to receive financial benefits from the government is not a constitutionally

205. *See id.* (discussing the Court’s reluctance in *Troxel v. Granville* to articulate the appropriate standard of review).

206. *See* TRIBE, *supra* note 89, § 16-34, at 1618.

207. *Id.*

208. *Id.* at 1622.

209. *Id.*

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.* at 1622-24.

214. 422 U.S. 749 (1975).

215. *See id.* at 781.

protected right.²¹⁶ The Court went on to state that to extend the irrebuttable presumption doctrine to this issue would “turn the doctrine of [prior] cases into a virtual engine of destruction for countless legislative judgments”²¹⁷ The Court’s refusal to extend the irrebuttable presumption doctrine to the right at stake, however, does not invalidate its appropriateness as a tool for review.²¹⁸ Rather, the Court distinguished the right at stake in this case from the rights at stake in *Stanley*,²¹⁹ and in *Cleveland Board of Education v. LaFleur*,²²⁰ where the irrebuttable presumption doctrine was properly employed.²²¹ The Court recognized that *Stanley* and *LaFleur* involved substantial rights and liberty interests protected by the Fourteenth Amendment’s Due Process Clause and the irrebuttable presumptions presented in those cases operated as heavy burdens on the ability to exercise those freedoms.²²²

The *Stanley* Court invalidated an irrebuttable presumption that prevented unwed fathers from being afforded a hearing before their children were placed up for adoption or in the care of third parties.²²³ The principle aim of the statute was to protect the welfare of children, promote the best interests of the community, and to strengthen family ties whenever possible.²²⁴ The Court recognized that these are legitimate state interests.²²⁵ But it was not the legitimacy of the state’s interest that was at issue.²²⁶ It was the means by which the state sought to further these interests that was at issue.²²⁷ The Court observed that the state did

216. *See id.* at 772 (“[O]f course Congress may not invidiously discriminate among such claimants on the basis of a ‘bare congressional desire to harm a politically unpopular group,’ or on the basis of criteria which bear no rational relation to a legitimate legislative goal.”) (citations omitted).

217. *Id.*

218. *See id.* at 771-72 (distinguishing the right at issue in this case from prior decisions where the irrebuttable presumption doctrine was validly employed).

219. *See Stanley v. Illinois*, 405 U.S. 645 (1975) (holding that unwed fathers cannot automatically be denied custody).

220. 414 U.S. 632, 642 (1974) (holding invalid school board regulations requiring pregnant school teachers to take unpaid maternity leave commencing four to five months before the expected birth).

221. *See Weinberger*, 422 U.S. at 771-72.

222. *See id.* at 771.

223. *See Stanley*, 405 U.S. at 656-57 (“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.”).

224. *See id.* at 652.

225. *See id.*

226. *See id.*

227. *See id.*

not register any gains towards its legitimate interest by separating children from the custody of fit parents.²²⁸ Instead, the state would spite its own goals by needlessly separating fit fathers from their children.²²⁹ While the State had asserted that most unwed fathers were unfit parents, the Court found that not all unwed fathers are in this category.²³⁰ Some unwed fathers are wholly suited to custody of their children.²³¹ Whether or not Stanley was suitable could only be determined by a hearing.²³² If he was found to be suitable, affording custody to him would further the state's interest.²³³

The irrebuttable presumption at issue in the context of joint custody is that joint custody is not in the best interests of children unless both parents voluntarily and mutually agree upon it. The state's paramount concern is in championing the best interests of the child.²³⁴ As the Court in *Stanley* found, these interests are legitimate.²³⁵ It is the means chosen to achieve that interest that is at issue. There is no conclusive evidence that joint custody is not in the best interests of the child over the objection of one of the parents.²³⁶ While joint custody over the objection of one of the parents may not be in the best interests of the child all of the time, there are times when joint custody is appropriate.²³⁷ What legitimate state interest is furthered by defeating joint custody where joint custody would have been in the best interests of the child? The state would spite its own aim of championing the best interests of the child by precluding joint custody when it is best for the children.²³⁸

Upon divorce, the state often conducts a custody hearing, wherein the state could determine whether both parents are fit and capable of retaining custody.²³⁹ The problem exists when the state restricts the award to an award of sole custody only.²⁴⁰ The irrebuttable presumption exists, not because the state denies a hearing, but because the state

228. *See id.*

229. *See id.* at 652-53.

230. *See id.* at 654.

231. *See id.*

232. *See id.* at 655.

233. *See id.*

234. *See id.* at 652.

235. *See id.*

236. *See supra* note 6.

237. *See generally The Evolving Judicial Role in Child Custody, supra* note 4 (discussing the benefits of joint custody and parental plans that promote co-parenting).

238. *See Stanley*, 405 U.S. at 653.

239. Presumably the state could utilize the hearing by which it determines sole custody to determine joint custody.

240. *See Braiman v. Braiman*, 378 N.E.2d 1019, 1021-22 (N.Y. 1978).

refuses to consider an award that would allow both parents to retain their legal rights to the custody, care and decision making of their children. This refusal creates the foregone conclusion that one of the parents will have their decision making rights terminated at the conclusion of the hearing.

Due process is not satisfied by merely having a hearing—the extent of procedural due process is influenced by the extent to which a party might suffer loss.²⁴¹ The constitutional rights of parents that have raised their children warrants deference and protection.²⁴² In a parental rights termination proceeding, the parents' interest is commanding and requires the state to support its allegations (usually abuse or neglect) by clear and convincing evidence.²⁴³ This standard is operable when the state seeks to permanently and irrevocably terminate the rights of a parent in their child.²⁴⁴

In a linear framework,²⁴⁵ this loss can be viewed as the most draconian and therefore should be placed on the extreme right of the scale. When the state seeks to intervene into the private realm of a parent's decision to decide who may visit with the child, the state must show some deference to the parent's decision about what is in their children's best interests.²⁴⁶ The state may not assert that its intrusion is justified based upon the best interests of the child without some "special factors" that might justify the state's intervention.²⁴⁷ Since the right at stake in *Troxel* was limited to the parental right to decide which third parties may visit with their children,²⁴⁸ we could put this right on the opposite end of the linear scale.

The potential loss of rights to a parent in a custody dispute is equal to that of a termination proceeding, except the parent will retain the right to visit with the child.²⁴⁹ This puts the loss on the linear scale somewhere between the right to decide who may visit with the children, and a total termination of all parental rights. That is to say, the state must show at

241. See *Santosky v. Kramer*, 455 U.S. 745 (1982).

242. See *Stanley*, 405 U.S. at 651 ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection.")

243. See *Santosky*, 455 U.S. at 747-48.

244. See *id.*

245. See *Franz v. United States*, 707 F.2d 582, 603 n.88 (1983) (stating that a sliding scale approach analyzes the infringement of fundamental rights as such: The higher the impairment, the greater the state's interest must be in order to justify the infringement).

246. See *Troxel v. Granville*, 530 U.S. 57, 70 (2000).

247. See *id.* at 68.

248. See *id.* at 67.

249. See *Franz*, 707 F.2d at 602.

least some deference and present some special factors to justify its intervention;²⁵⁰ and at most, the state might have to prove abuse, neglect or parental unfitness.²⁵¹ Assuming, *arguendo*, the state's burden lies on the left side of the linear scale, the state would be required to show some deference and special factors to justify its intrusion prior to a decision that one of the parents must have their rights terminated. However, the irrebuttable presumption that sole custody is in the best interests of the child if both parents cannot agree to joint custody fails to give any deference to the parent seeking joint custody who may in turn lose their rights.

The presumption that an award of sole custody is in the best interests of the child if parents cannot mutually agree to joint custody is contrary to the longstanding constitutional doctrine: Fit parents are presumed to act in the best interests of their children.²⁵² This presumption is a mechanism for placing the initial burden on the state.²⁵³ In *Troxel*, the Court noted that the initial problem with the Washington Superior Court was not that it intervened, but rather that it intervened without giving any "special weight at all" to the parent's decision.²⁵⁴ The Washington Superior Court placed the burden on the parent to disprove that visitation with the grandparents would be in the best interests of the children.²⁵⁵ This rationale directly contravened the longstanding presumption that fit parents act in the best interests of the child.²⁵⁶

A state's presumption that sole custody is in the best interests of the child, unless joint custody is voluntarily agreed to by both parents, presumes that both parents will not be able to act in the best interests of the child.²⁵⁷ The fact that both parents do not agree to joint custody operates as evidence that the parents will not act in the best interests of the children.²⁵⁸ Often, one of the parents refuses to agree to joint custody for concrete reasons (i.e., child abuse, ongoing domestic violence, severe

250. See *Troxel*, 530 U.S. at 68.

251. See ELLMAN ET AL., *supra* note 90, at 1345-46.

252. See *Troxel*, 530 U.S. at 68-69 ("[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."); see also *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

253. See *Troxel*, 530 U.S. at 69-70.

254. *Id.* at 69.

255. See *id.*

256. See *id.*

257. See *Braiman v. Braiman*, 378 N.E.2d 1019, 1020 (N.Y. 1978).

258. Lack of mutual agreement on a parenting plan would result in the court's intervention.

substance abuse, mental illness, etc.).²⁵⁹ If these reasons exist, the court should be able to identify them, and joint custody should not be ordered.²⁶⁰ In some instances, the parents are so embattled in the divorce they become unable to agree on almost any aspect of the divorce.²⁶¹ Often, the reason why couples seek judicial intervention is to solve the divorce-related stalemate problems so that they can move their lives along and end the conflict.

Several problems come to light when the presumption of sole custody arises because both parents are unable to agree to joint custody. First, the parental problems may be based on mere disagreements that have escalated as a result of the adversarial nature of divorce; and therefore the court is relying on a disagreement made in the heat of the moment as evidence of the parent's inability to co-parent in the future.²⁶² This policy fails to consider that parental disagreements at the time of divorce can be transitory.²⁶³ Second, it is often the parent most likely to win sole custody that is the objecting parent.²⁶⁴ In this situation the court will terminate legal custody of a parent that has not demonstrated any inability or lack of desire to co-parent.²⁶⁵ Third, the objecting parent may be exercising the veto power in a manner that is inconsistent with a decision made in the best interests of the child (i.e., financial bargaining, revenge, or other self serving reasons), yet they are subsequently awarded sole custody of the child, while the non-objecting cooperative parent would have their rights terminated.²⁶⁶

While the Supreme Court has noted that the best interest of the child standard is the appropriate standard for states to utilize in making custody determinations,²⁶⁷ the Court has also recognized that there is a strong presumption that parents act in the best interest of their children.²⁶⁸ A presumption that an award of sole custody is in the best

259. See *The Evolving Judicial Role in Child Custody*, *supra* note 4, at 420.

260. See *id.*

261. See MNOOKIN, *supra* note 74, at 176.

262. See *Beck v. Beck*, 432 A.2d 63, 72 (N.J. 1981) (stating that the potential ability for parental cooperation should not be assessed in the "heat of the moment").

263. See *id.*

264. See *Taking Children Seriously*, *supra* note 6, at 715 (arguing that substantive law that favors sole custody gives the parent most likely to win custody the incentive to withhold agreement to joint custody in order to receive favorable financial concessions).

265. See *id.*

266. See *id.* A parent most likely to win sole custody may have incentives to withhold agreements to joint custody. See *id.* If there was a presumption of joint custody, a parent opposing joint custody would have to go to court where joint custody might still be ordered. See *id.* at 716.

267. See *Reno v. Flores*, 507 U.S. 292, 303-04 (1993) (stating in dicta that the best interests of the child is an appropriate standard for custody determinations between parents).

268. See *Parham v. J. R.*, 442 U.S. 584, 602 (1979).

interest of the child when parents cannot voluntarily agree to joint custody assumes that the lack of agreement is enough to rebut the presumption that parents will act in the best interests of their children after divorce.

However, the best interests of the child standard is not without some mandatory deference to a parent's rights. The best interests of the child standard will not automatically trump a parent's Fourteenth Amendment rights.²⁶⁹ In *Palmore v. Sidoti*,²⁷⁰ the Supreme Court held that a state court could not use race or racial biases as factors to consider when determining the best interests of the child.²⁷¹ While the *Palmore* decision was not decided based on the parent's fundamental liberty interest in custody of their children, it did recognize that courts must weigh a parent's constitutional rights when deciding child custody, as between the parents themselves.²⁷² The court may not automatically infringe upon a parent's constitutional rights merely because one parent has asked the court to make a determination of custody of the children and the state chooses to make such a determination consistent with its right as *parens patriae*.²⁷³ Therefore, the Court determined that utilizing a factor such as race would infringe upon the parent's constitutional right to equal protection of the laws as guaranteed by the Fourteenth Amendment.²⁷⁴

In general, applying the best interests of the child standard can be problematic.²⁷⁵ As a result of abandoning the maternal or paternal presumptions, the courts are faced with a more difficult task of identifying the parent that best serves the child's interests.²⁷⁶ This places an increased burden on the court and results in much greater costs than

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Id.

269. See *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) (holding that a racial classification cannot justify taking custody away from a natural mother); see also *Caban v. Mohammed*, 441 U.S. 380, 394 (1979) (holding that it is unconstitutional to permit unmarried mothers but not involved unmarried fathers of a child a veto power over the child's adoption).

270. See *Palmore*, 466 U.S. at 434 (holding that a racial classification cannot justify taking custody away from a natural mother).

271. See *id.*

272. See *id.*

273. See *id.*

274. See *id.* at 433.

275. See *Scott & Derdeyn*, *supra* note 6, at 466-69.

276. See *id.* at 467.

under the earlier presumptions.²⁷⁷ It also becomes particularly troublesome when the court must make a custody determination between two fit parents.²⁷⁸ Often, the final decision of which parent best serves the child's needs is influenced by the personal biases and preferences of the judge.²⁷⁹ The court is forced to make its determination in a predictive manner which is sometimes reduced to mere speculation of which parent will serve the child's interests best.²⁸⁰ Fortunately, there are several viable alternatives that would better serve the needs of children, while also respecting parental rights.

VI. LESS RESTRICTIVE ALTERNATIVES TO SOLE CUSTODY

The problems with a custody system that prefers sole custody to promoting cooperative joint parenting are vast. The adversarial nature of modern day custody litigation tends to produce acrimony between the parents.²⁸¹ Court battles between parents are often bitter battles that pit the children against the parents and place children in the middle of a parental war.²⁸² In order to persuade the court that a particular party should be awarded sole custody of the children, the parents have an incentive to introduce very personal and damaging evidence against the other parent.²⁸³ Ironically, the parents are expected to communicate effectively and in the best interests of the child during and following a heated period of litigation.²⁸⁴ The adversarial nature of sole custody litigation basically creates a situation where one parent is deemed the "winner" and the other parent is deemed the "loser."²⁸⁵ The losing parent sometimes withdraws from the child's life after the litigation.²⁸⁶ Often, the nature of the losing parent's relationship with the child is reduced to pure fun and games and not that of a full parent and child relationship.²⁸⁷

277. *See id.*

278. *See id.* at 467 n.54.

279. *See id.* at 467.

280. *See id.*

281. *See id.* at 468.

282. *See* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 85 (1997) (stating that proceedings that pit the children against the parents, and place the children in the middle of parental battles are against the best interests of the children).

283. *See* Scott & Derdeyn, *supra* note 6, at 468.

284. *See id.*

285. *See Taking Children Seriously*, *supra* note 6, at 709.

286. *See id.* at 709-10; *cf.* Brinig, *supra* note 24, at 314 (arguing that awards of joint custody to fathers do not result in statistical decreases in depression as compared to non-custodial fathers).

287. *See Taking Children Seriously*, *supra* note 6, at 710.

One result of the application of the best interests of the child standard, in a determination of sole custody, is that predicting the parent most likely to win such litigation has become difficult.²⁸⁸ This has the effect of giving fathers an incentive to seek custody of the children because they now stand a better chance of winning than they did under the tender years analysis.²⁸⁹ While this is often a choice made with the best of intentions, this unpredictability can at times result in parents threatening to seek sole custody of their children in order to coerce a more favorable distribution of the marital assets.²⁹⁰

There are various alternatives to the harsh results of terminating parental rights while still protecting the best interests of the child. Several states already recognize that parents are not always able to co-parent at the time of the divorce, yet the courts will still order joint legal custody.²⁹¹ When parents are unable to effectively communicate, mediation can be an effective way of resolving disputes between parents.²⁹² It is possible for parents to negotiate and mediate their disputes in a way that benefits the interests of the parents while also protecting the best interests of the child.²⁹³ A court should not assume that parents are able to work out their differences and demonstrate cooperation during the divorce phase because the adversarial nature of litigation and even the mere involvement of attorneys can exacerbate the situation.²⁹⁴

A. *Proposed Alternatives to the Sole Custody Model*

The American Law Institute (“ALI”) has recently completed its work on *Principles of the Law of Family Dissolution*, and proposed reforms to the best interests of the child standard.²⁹⁵ The ALI addresses all areas of family dissolution. Chapter Two of the proposal deals with post-divorce and separation parenting plans. The ALI proposal focuses on promoting parental agreement to parenting plans.

288. See Scott & Derdeyn, *supra* note 6, at 469.

289. See *id.* at 468.

290. See *id.*

291. See Beck v. Beck, 432 A.2d 63, 71 (N.J. 1981).

292. See MNOOKIN, *supra* note 74, at 177.

293. See *id.*

294. See *id.*

295. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.02 (2002) [hereinafter PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION]; see also Andrew Schepard, *Beyond ‘Best Interests’: ALI’s Child Custody Dispute Resolution System*, N.Y.L.J., Jan. 17, 2002, at 3 [hereinafter *ALI’s Child Custody Dispute Resolution*].

The ALI proposal conspicuously refers to post-divorce parenting agreements as “parenting plans” rather than custody arrangements.²⁹⁶ The proposal requires the court to defer to parental plans submitted to the court by parents at the time of divorce, unless the plan presents harm to the child or was unknowingly (or involuntarily) agreed to. Interestingly, the ALI proposal specifically rejects the term “custody.”²⁹⁷ Since the term “custody” is not used, neither parent is awarded sole custody and neither parent is termed the visiting parent.²⁹⁸ The proposal also recognizes the role that the court plays in helping parents achieve agreement on parenting plans, by giving courts the discretion to provide parents with information regarding mediation and educational programs.²⁹⁹

In the event parents are unable to agree on a parenting plan, the court can compare the plans submitted by each parent to see which plan is more realistic, fair, and best serves the children’s needs.³⁰⁰ The court will then use its discretion to design a parenting plan.³⁰¹ The proposal would require courts to presume that parental decision making is to be granted jointly to the parents that have “been exercising a reasonable share of [the] parenting functions.”³⁰² Also, minor day-to-day decision making is to be made by the parent that is with the child on a particular day.³⁰³ This aspect of traditional child custody law has commonly been referred to as “joint legal custody.”³⁰⁴ This standard recognizes a parent’s right to decision making and control of their children, by maintaining a

296. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 295, at § 2.05(1).

297. See *id.* § 2.03 cmt. e.

298. See *id.*

299. See *id.* § 2.07 cmt. a-b. The ALI recognizes that “mediation can help parents avoid the time, expense, and acrimony of litigation. It can also help cultivate a more cooperative attitude between the parents in matters related to the raising of their children.” *Id.* § 2.07 cmt. b. The ALI approach empowers the court to take a proactive role in helping parents settle disputes rather than merely assuming that such disputes are indicia of parents that should not have joint decision-making. See *id.*

300. See *id.* § 2.09 cmt. a.

301. *Id.*

302. See *id.* § 2.09(2). The proposal recognizes exceptions when there is evidence of domestic violence. See *id.* The ALI commentary explicitly states that the parent opposing joint decision-making carries the burden of proving that joint decision-making is not in the best interests of the child. See *id.* § 2.09 cmt. a.

303. See *id.* § 2.09(3). The ALI proposal does not use the term custody, but the traditional physical custody determination is handled using an approximation standard. The approximation standard allocates time that the child will spend with each parent based upon the proportion of time that the child spent with each parent prior to the divorce or separation. See *id.* § 2.08(1).

304. See *ALI’s Child Custody Dispute Resolution*, *supra* note 295, at 3 (stating examples of decision-making that include: health care, education, and permission to marry).

role for each parent in the child's life so long as it is safe to the family.³⁰⁵ This standard appears constitutionally consistent with the holding in *Stanley v. Illinois*,³⁰⁶ whereby a parent's right to custody, care, and decision making may not automatically be reduced when a parent has demonstrated a willingness to assume responsibility for his children.³⁰⁷

The ALI proposal is not entirely unique; several states require parents to submit parenting plans in all divorce cases.³⁰⁸ Parenting plans are basically written agreements between parents which detail parenting time, decision making, and the children's residential arrangements.³⁰⁹ The State of Washington requires, by statute, that parents submit parenting plans for all divorce cases involving children.³¹⁰ This statute promotes co-parenting and even provides for mandatory settlement conferences at the court's discretion.³¹¹ Under the Washington statutes, the court will only order sole decision making when both refuse to agree to mutual decision making, or one of the parent's has committed some family domestic abuse or abandoned the child.³¹² Like the ALI proposal, the Washington statute does not use the term "custody." Rather, the words "decision-making" and "residential time" are used.³¹³ The court's default principle to order mutual decision making, when particular criteria are not met, is analogous to a rebuttable presumption of joint legal custody. Both parents will share in the decision making and neither parent will automatically lose their parental rights merely because the court's assistance was needed to resolve a problem.

In order to help parents settle disputes over contested issues, the Washington statute allows the court to mandate that the parents attend mediation. The goal of this mandated mediation is "to reduce acrimony which may exist between the parties and to develop an agreement assuring the child's close and continuing contact with both parents after the marriage is dissolved."³¹⁴ The mediation is to be kept confidential and the mediator is not allowed to testify at any related court

305. *See id.*

306. 405 U.S. 645 (1972).

307. *See id.* at 651, 658 (referring to unwed fathers).

308. *See* MONT. CODE ANN. § 40-4-234(1) (2001); TENN. CODE ANN. § 36-6-401 (2001); WASH. REV. CODE ANN. § 26.09.181(1) (West 1997).

309. *See* Theresa A. Peterson, Note, *The State of Child Custody In Minnesota: Why Minnesota Should Enact the Parenting Plan Legislation*, 25 WM. MITCHELL L. REV. 1577, 1599 (1999).

310. *See* WASH. REV. CODE ANN. § 26.09.181(1).

311. *See id.* § 26.09.181(5).

312. *See id.* § 26.09.191(1).

313. *Id.* § 26.09.191.

314. *Id.* § 26.09.015(1).

proceedings.³¹⁵ By providing for mediation in order to help parents resolve disputes, the statute recognizes the need for the state to provide mechanisms to the family so that both parents may remain integral parts of the child's life.

The State of California also has a statutory intention to create parenting plans that are in the best interests of the child.³¹⁶ The language of the California statute indicates that there is no preference for, nor presumption of, joint legal custody, joint physical custody, or sole custody.³¹⁷ Rather, the statute states that custody shall be awarded to parents jointly first, then, if it is not in the best interests of the child for the parents to have joint custody, to one of the parents solely.³¹⁸ The distinction may appear minor, however, the statute seems to focus on implementing effective parenting plans that are in the best interests of the child, rather than on titles of custody.³¹⁹ In the end, the statute lays out a formula for how California courts should award custody to the parents jointly unless it is rebutted by an analysis of the best interests of the child.³²⁰

B. Exceptions to the Joint Custody Model

There are times when a parent's right to joint custody must yield to the best interests of the child. Courts must recognize that high conflict families need to be carefully screened out.³²¹ The ALI proposal suggests that courts should steer parents to mediation and parent education programs in order to help the parents reach agreement on parenting plans.³²² However, the proposal takes into consideration that some parents should not meet face-to-face.³²³ When domestic violence has been shown, the court should place limits on parental contact in order to protect the parent from harm.³²⁴ This is not a problem for parent education programs because most do not require face-to-face meetings

315. *See id.* § 26.09.015(3).

316. *See* CAL. FAM. CODE ANN. § 3040 (Supp. 2002).

317. *See id.*

318. *See id.*

319. *See id.* (avoiding the use of the words "solely" and "jointly").

320. *See id.*

321. *See The Evolving Judicial Role in Child Custody, supra* note 4, at 396 (stating that high-conflict families can be defined as those involving repeated relitigation, family violence, child abduction, mental illness, or drug or substance abuse).

322. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 295, § 2.07(1).

323. *See id.* § 2.07(3).

324. *See id.* § 2.07(2)-(3).

between the parents. Mediation on the other hand does rely on face-to-face meetings.³²⁵

The ALI proposal might be too restrictive in terms of limiting face-to-face meetings between parents when there has been a showing of domestic violence.³²⁶ Limiting face-to-face meetings, and thereby precluding mediation, may have the effect of further disempowering victims of domestic violence. This approach may be more conservative than it needs to be. The *Model Standards of Practice for Divorce and Family Mediators* takes a less restrictive approach to mediation between parents when domestic violence has been shown.³²⁷ These standards provide for safety precautions to protect victims of domestic violence.³²⁸ They also require mediators to recognize that not all parental disputes involving domestic violence are appropriate for mediation.³²⁹ This methodology does not totally preclude mediation when domestic violence is present; rather, it proposes to handle domestic violence on a case-by-case basis.³³⁰ While domestic violence is a significant factor to consider when determining whether or not joint decision making is appropriate, it is not altogether dispositive.

The Washington State approach to presuming joint decision making is also not absolute. The statute states that the “permanent parenting plan shall not [always] require mutual decision-making”³³¹ When a parent willfully abandons his parental responsibility for an extended period of time or substantially refuses to perform his parenting functions, the parenting plan might not require joint decision making.³³² This approach seems to be consistent with the holding in *Stanley v. Illinois*.³³³ In *Stanley*, the Court held that a court must afford deference to an unwed father’s rights when he has demonstrated a willingness to assume responsibility for his children.³³⁴ The Washington statute carefully provides language that would appear to be consistent with a

325. See MODEL STANDARDS OF PRACTICE FOR DIVORCE AND FAMILY MEDIATORS Standard X, 38 FAM. & CONCILIATION CTS. REV. 110, 119 (2000).

326. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 295, § 2.07(3).

327. See MODEL STANDARDS OF PRACTICE FOR DIVORCE AND FAMILY MEDIATORS, *supra* note 325, Standard XI.

328. See *id.* at (D).

329. See *id.* at (C).

330. See *id.*

331. WASH. REV. CODE ANN. § 26.09.191(1) (2002).

332. See *id.*

333. 405 U.S. 645, 649 (1972).

334. See *id.* at 651.

parent's failure to assume parental responsibility, thereby allowing the state to defeat that parent's right to joint decision making.³³⁵

The statute also provides an exception to joint decision making when a parent has engaged in various forms of domestic violence, abuse to the child, or fear of grievous bodily harm to the child.³³⁶ The state's right as *parens patriae* allows the state to terminate a parent's rights when that parent has been shown to be unfit.³³⁷

The California statute, which provides for a preference of joint custody first, has a safeguard measure built in that gives the custody court the right to review voluntarily submitted parenting plans to ensure they are in the best interests of the child before being so ordered.³³⁸ The best interests of the child standard in California requires the court to consider several factors, including abuse against the child or the other parent.³³⁹ Allegations of abuse need substantial independent corroboration, and if established, will result in the abusive parent's disqualification.³⁴⁰ When allegations of abuse are made, the court is required to state in writing or in the court record its reasons for making the appropriate custody determinations.³⁴¹ Using the best interests of the child standard, which includes specific factors, the court may then rebut the initial preference for joint custody and order sole custody to either parent.³⁴²

While all of these proposed "less restrictive alternatives" provide for joint decision making between parents after divorce, they also recognize that there are situations when it would just be inappropriate to order joint decision making between the parents. Each of them mandates that before sole custody can be ordered, the court must first rebut the presumption that parents are to be granted joint decision making.

335. See WASH. REV. CODE ANN. § 26.09.191(1)(a). Procedural due process requires a hearing on when to rebut a presumption of unfitness when a parent has demonstrated a willingness to assume responsibility for their children. See *Stanley*, 405 U.S. at 657-58.

336. See WASH. REV. CODE ANN. § 26.09.191(b)-(c).

337. See *Santosky v. Kramer*, 455 U.S. 745, 767 n.17 (1982) ("Any *parens patriae* interest in terminating the natural parents' rights arises only at the dispositional phase, after the parents have been found unfit.").

338. See CAL. FAM. CODE ANN. § 3040 (Supp. 2002).

339. See *id.* § 3011 (West 2000). The court is also required to consider parental substance abuse. See *id.*

340. See *id.*

341. See *id.*

342. See *id.* § 3040

VII. CONCLUSION

A requirement that states grant joint custody to parents can be properly inferred from prior cases determining that parents have a fundamental right to custody, care, and decision making of their children. Before a state can intervene and defeat a parent's rights, there must first be at the very least a showing of some "special factors"³⁴³ that warrant such intervention.³⁴⁴ Defining those special factors might be difficult, but at most a showing of harm to the child would suffice.³⁴⁵ When a state presumes that sole custody is the only reasonable solution to parental litigation, the state fails to adequately protect the constitutional rights of parents.

Parental conflict is often enhanced by the adversary nature of child custody litigation. In order to protect the best interests of children and to protect the rights of parents, child custody courts must realize that parental conflict "ebbs and flows over time."³⁴⁶ The role of the child custody court must be more than declaring the family dead.³⁴⁷ It needs to be a facilitator of the reorganization of the family. Moreover, courts need to recognize that it is in the best interests of the children of this nation to preserve family bonds when parents are willing and capable of assuming responsibility for their parenting roles. The Constitution commands it.

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343. See *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

344. See *supra* Part V.

345. See *id.*

346. *The Evolving Judicial Role in Child Custody*, *supra* note 4, at 407.

347. See *id.*

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