

Parents Know Best: Revising Our Approach to Parental Custody Agreements

LINDA JELLUM*

Historically, parents have not been able to determine custody of their children prior to marriage in the form of a prenuptial agreement. Although parents are able to enter into such agreements, courts normally have a great deal of latitude in ignoring these agreements. A majority of states merely consider the agreement as one factor in determining what is in the child's best interest, while the majority of the rest presume the agreement is in the best interest of the child unless the judge finds otherwise. Only two states defer to the parental agreement unless it would be harmful to the child. This Article maintains that this "parental deference standard" is the best of the three standards for three reasons. First, this standard would lead to better decision-making because it would remove the decision from the hands of judges. Second, this standard would significantly improve the child-custody process. Third, this standard best respects the parents' fundamental right to make parenting decisions for their children.

TABLE OF CONTENTS

I. INTRODUCTION.....	616
II. THE HISTORY OF MARITAL AGREEMENTS.....	619
A. <i>Alimony and Property Distribution Clauses</i>	619
B. <i>Child Custody Provisions</i>	623
III. CURRENT PARENTAL AGREEMENT STANDARDS: DESCRIPTION, STRENGTHS, AND WEAKNESSES	624
A. <i>The Best Interest Standard</i>	626
1. <i>Strengths of the Best Interest Standard</i>	629
2. <i>Weaknesses of the Best Interest Standard</i>	630
B. <i>The Presumption Standard</i>	634
1. <i>Strengths of the Presumption Standard</i>	635
2. <i>Weaknesses of the Presumption Standard</i>	636
C. <i>The Parental Deference Standard</i>	637

* Professor Jellum is an Assistant Professor at the Walter F. George School of Law, Mercer University, where she teaches Introduction to Law, Administrative Law, Statutory Interpretation, Corporations, and Advanced Transactional Drafting. Prior to her position at Mercer, Professor Jellum was lead counsel for the Washington State Office of the Attorney General, during which time she litigated child abuse and neglect cases. Professor Jellum has also been a faculty member at Seattle University School of Law and the University of Washington School of Law. She would like to thank Professors David Hricik, Adam Milani, and David Papke for their review of earlier drafts of this Article and for their insightful comments. Additionally, she would like to thank her research assistant, Christopher Mingledorff, for his invaluable help, and the Walter F. School of Law for providing her with the support to make this Article feasible.

1. <i>Strengths of the Parental Deference Standard</i>	638
a. <i>The Parental Deference Standard Will Lead to Better Decisions</i>	638
b. <i>The Parental Deference Standard Will Improve the Custody Process</i>	640
c. <i>The Parental Deference Standard Furthers Parents' Fundamental Right to Make Parenting Decisions</i>	644
2. <i>Weaknesses of the Parental Deference Standard</i>	654
IV. CONCLUSION	656

I. INTRODUCTION

Abolitionist and feminist Lucy Stone and anti-slavery activist Henry B. Blackwell drafted one of the earliest prenuptial agreements. Prior to their marriage in 1855, they agreed that if they were ever to separate, they would submit any marital issues that they were unable to resolve themselves, including the custody of any future child, to a tripartite arbitration panel.¹ At that time, wives lived under a system of coverture, where married women were not legally equal to their husbands.² Ms. Stone and Mr. Blackwell believed marriage should be an equal partnership. Because state law did not reflect this perception of marriage, they decided privately to resolve any marital dispute without resort to a court.³ However, states were not so quick to accept this view of marriage and were even less willing to allow parents to determine the custody of their children.

Nevertheless, parents should be the ones to decide custody, not judges. Ideally, custody decisions should be removed from the legal system altogether.⁴

¹ E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1141 (2000) (arguing that parents should be free to agree to mandatory, binding arbitration to decide custody issues). *But see* Miller v. Miller, 620 A.2d 1161, 1165–66 (Pa. Super. Ct. 1993) (holding that mandatory arbitration provisions in a settlement agreement are valid, but courts are not bound by the award); Glauber v. Glauber, 600 N.Y.S.2d 740, 743 (N.Y. App. Div. 1993) (holding that mandatory arbitration provisions in a settlement agreement are not binding on the court).

² See generally MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 242 (1985).

³ Spitko, *supra* note 1, at 1141.

⁴ Furthermore, child support issues would also be removed from the judge. Under most states' child support guidelines, the award is reduced when the non-custodial parent cares for the child for a substantial portion of the month. The prospect of lower support payments encourages some parents to seek a heftier visitation schedule than they can actually maintain. But the "dollars for days" formula also discourages the custodial parent from agreeing to

Imagine a system in which the parents themselves determine custody with minimal court involvement. Imagine further that the system not only allowed parents to make these decisions, but also expected it of them. Such a system could, but does not currently, exist. Even though parents can make agreements regarding the custody of their children prior to and during the divorce process,⁵ under most states' laws, judges decide custody under a standard that allows them wide discretion to reject parental agreements. Ultimately, parents are not making custody decisions; judges are.

This Article proposes that states defer to the agreements that fit parents make regarding child custody so long as the child will not be harmed. In making this argument, this Article first traces the early judicial reluctance to enforce prenuptial, postnuptial, and separation agreements and specifically to enforce child custody provisions of these agreements. Today, prenuptial, postnuptial, and separation agreements have gained widespread acceptance. However, not all provisions of marital agreements⁶ are enforced equally. While alimony and property distribution provisions are enforced, child-custody provisions are uniformly rejected.⁷

Because courts generally enforce monetary terms, such as alimony, more readily than non-monetary terms, such as custody, one family law scholar suggests that neither should be enforced.⁸ Specifically, she argues that courts find it difficult to enforce non-monetary terms (such as conduct within marriage) and refuse to enforce non-monetary terms that affect the welfare of the child.⁹ She further suggests that the non-monetary terms are generally more important to women, while the monetary terms, such as property distribution and alimony, are generally more important to men.¹⁰ Because the courts do not enforce terms equally, women are disproportionately impacted.¹¹ Thus, she concludes that

reasonable visitation. “[C]hild support schedules and community property rules—both of which introduce more certainty into the outcome if a case is contested—may make it easier for mothers to resist strategic claims by fathers.” ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 157 (1992) [hereinafter *DIVIDING THE CHILD*].

⁵ See *Shoup v. Shoup*, 556 S.E.2d 783, 787 (Va. Ct. App. 2001) (“Divorcing parents may and, indeed, are encouraged under Virginia public policy, to reach agreement respecting the care and support of their minor children.”).

⁶ The term “marital agreement” will be used to refer to all agreements made during marriage, including prenuptial, postnuptial, and separation agreements.

⁷ Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 *Nw. U. L. Rev.* 65, 78 (1998).

⁸ *Id.* at 69.

⁹ *Id.* at 78.

¹⁰ *Id.* at 70.

¹¹ *Id.*

courts should not enforce either term in a prenuptial agreement.¹² This Article concludes just the opposite: that both types of terms should be equally enforced.

After describing the judicial reluctance to enforce any provision in marital agreements, this Article identifies the three standards that states currently use when parents in a divorce action have made such a custody agreement. Most states regard the parental agreement, if at all, as one factor in an analysis of what is in the child's best interest ("the best interest standard").¹³ Some states presume that the parental agreement is in the child's best interest, but require the judge to reject the agreement if it is not ("the presumption standard").¹⁴ Finally, West Virginia requires judges to defer to the parental agreement unless it would be harmful to the child ("the parental deference standard").¹⁵ Thus, under the best interest standard, judges may enforce parental agreements; under the presumption standard, judges should enforce these agreements; and under the parental deference standard, judges must enforce these agreements unless the child would be harmed.

This Article argues that the parental deference standard is the best of the three standards for three reasons. First, this standard would lead to better decision-making because it would remove the decision from judges' hands and place it back where it belongs—with the parents. Second, it would significantly improve the child-custody process. Child custody hearings would be unnecessary when fit parents make non-harmful custody arrangements. Third, and most importantly, the parental deference standard best respects parents' fundamental right to make parenting decisions for their children. This Article explores the constitutional issues raised by all three standards under *Troxel v. Granville*.¹⁶ This Article will show that the best interest standard infringes on parents' fundamental right to make child custody decisions because it fails to defer to decisions made by fit parents.¹⁷ In contrast, the parental deference standard does not.

¹² *Id.* at 122–23.

¹³ See discussion *infra* Part III. A.

¹⁴ See discussion *infra* Part III. B.

¹⁵ See discussion *infra* Part III. C.

¹⁶ 530 U.S. 57 (2000).

¹⁷ This Article does not address whether parents should be able to circumvent child support obligations through custody agreements. In 1984, Congress enacted federal legislation requiring states to enact child support guidelines. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1321 (codified as amended at 42 U.S.C. § 667 (2000)). Because of the federal statute, the ability of parents to draft agreements that reduce their support obligations under their state's guidelines is doubtful. See, e.g., *Cox v. Cox*, 776 P.2d 1045, 1048 (Alaska 1989) (holding that state's presumptive guidelines enacted pursuant to federal law preclude custody agreements waiving child support unless approved by the court). The ability of parents to draft agreements that *increase* their support obligations is also questionable. See generally, Kenneth G. Southerlin, Jr., Comment, *Family Law—Berryhill v. Rhodes: Attempts to Circumvent Child Support Obligations Through Private Child Support Agreements Violate*

While many legal scholars have analyzed the various child custody standards, most have ignored parental agreements. Interestingly, the American Law Institute (“ALI”) has addressed such agreements and adopted the parental deference standard for agreements made during the divorce process. According to the ALI, a court must enforce a separation agreement unless voluntary consent by one of the parties was lacking or the agreement would be harmful to the child.¹⁸ However, the ALI rejected this standard for prenuptial and postnuptial agreements, which are made prior to the divorce proceedings.¹⁹ The ALI concluded that parents are less likely to have thoroughly explored the impact of their custody choices when they make agreements prior to the divorce.²⁰ This Article disagrees with this conclusion and argues that either the parental deference or the presumption standard raises fewer constitutional issues and will lead to a better custody process.

Because deferring to parental agreements is such a novel approach to child custody, the parental deference standard will likely meet considerable resistance. As discussed below, judges historically refused to enforce any marital agreements.

II. THE HISTORY OF MARITAL AGREEMENTS

A. *Alimony and Property Distribution Clauses*

Although many do not think of it in this way, marriage is essentially an oral contract between partners.²¹ The partners have legally enforceable rights and duties both towards each other and towards any children born to them.²² Divorce

Public Policy, 32 U. MEM. L. REV. 767 (2002) (discussing Tennessee’s reluctance to enforce private child support agreements); *cf.* In Re Marriage of Berezna and Heminger, 2 Cal. Rptr. 3d 351 (Cal. Ct. App. 2003).

¹⁸ AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.06 (2002) (hereinafter “ALI PRINCIPLES”).

¹⁹ *Id.* § 2.08 cmt. i.

²⁰ *Id.*

²¹ See *Stanley v. Illinois*, 405 U.S. 645, 663 (1972) (Burger, J., dissenting); see also Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1244–50 (1998) (suggesting that marriage should be viewed as contract rather than as a status conferred by the state); Silbaugh, *supra* note 7, at 111–20 (discussing the difference between the contract view and the status view of marriage and concluding that the debate does not explain whether prenuptial agreements should be enforced). Legal economists argue that under no-fault divorce laws, the marriage contract is illusory. The removal of fault based divorce grounds eliminates any remedy for breach, thus making the contract unenforceable. Scott & Scott, *supra*, at 1241 (citing Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 871 (1994)).

²² *Stanley*, 405 U.S. at 663 (Burger, J., dissenting).

is a breach of that contract. Because the marriage contract does not explicitly anticipate breach, divorce law developed to define and impose society's divorce expectations. Not all divorcing partners appreciated the states' willingness to define the terms of their separation. Thus, marital agreements were developed to avoid the states' default laws.

Prior to 1970, courts routinely refused to enforce marital agreements. While the courts were willing to enforce property distribution clauses in agreements contemplating a spouse's death, they refused to enforce these same agreements when they contemplated divorce. Courts were concerned that these agreements encouraged or sanctified divorce²³ and that they would usurp the role of the court in determining settlement rights.²⁴ There was a fear that these agreements would allow divorcing husbands to avoid paying support to needy wives.²⁵ Further, courts were concerned that women would be taken advantage of due to unequal bargaining power.²⁶ Thus, courts looked at these agreements with skepticism, born from paternalistic concern.

In response to the changing societal perception of marriage and divorce, the courts began to re-evaluate their paternalistic position. In 1970, the Florida supreme court transformed prenuptial and antenuptial doctrine in *Posner v. Posner*.²⁷ In that seminal case, the court stated that "[antenuptial agreements] should no longer be held to be void *ab initio* as 'contrary to public policy.'"²⁸ The Florida supreme court's opinion discarded years of judicial skepticism of marital agreements.²⁹ Other jurisdictions soon followed.³⁰

Although courts began to enforce them, marital agreements were not enforced as contracts. Unlike other contracts, marital agreements were scrutinized

²³ Or, alternatively they would discourage a party in a bad marriage from seeking divorce. Allison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 897 (1997) (noting that prenuptials that addressed property rights for surviving spouses were honored).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* (citing *Stilley v. Folger*, 14 Ohio 610, 613 (Ohio 1846)); see *Neilson v. Neilson*, 780 P.2d 1264, 1267 (Utah Ct. App. 1989) ("[S]uch agreements tended to limit the rights of an unsophisticated prospective spouse . . . [T]his spouse could not negotiate a fair contract with the other spouse because of differences in sophistication and bargaining power.") (citations omitted).

²⁷ 233 So. 2d 381 (Fla. 1970).

²⁸ *Id.* at 385.

²⁹ *Id.* at 384 (citing *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960) (reversing a trial court's award as unjustified under the terms of the parties' prenuptial agreement)).

³⁰ See e.g., *Buettner v. Buettner*, 505 P.2d 600, 602 (Nev. 1973) (citing *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970)); *Burtoff v. Burtoff*, 418 A.2d 1085, 1089 (D.C. 1980) (citing *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970)).

for both procedural and substantive fairness.³¹ Procedural fairness tested the agreement at the time it was executed.³² Substantive fairness tested the agreement at the time of enforcement.³³ Thus, for a marital agreement to be procedurally fair, the parties must have fully disclosed all assets, must have obtained separate counsel, must have disclosed any rights being waived, and/or must have had sufficient time to review the agreement.³⁴

Courts tested the agreement both at the time it was executed and at the time it was enforced for substantive fairness or reasonableness.³⁵ The courts had tremendous ability to set aside terms they found unfair.³⁶ Traditional contract principles would not have allowed courts to review these terms for reasonableness, only, at most, for procedural fairness.³⁷ Thus, while marital agreements were enforced, their terms were subject to judicial oversight.

Substantive fairness was eliminated in West Virginia in 1985 in *Gant v. Gant*.³⁸ In that case, the husband and wife signed a prenuptial agreement the day before they married in which the wife waived all right to alimony in the event of divorce.³⁹ Eventually the couple divorced, and the wife sought alimony. The trial court held that the agreement was unenforceable because the wife was not represented by counsel at the time she signed it and because the agreement was unfair.⁴⁰

The West Virginia supreme court reversed the lower court as to the validity of the prenuptial agreement and upheld the agreement.⁴¹ The court took the opportunity to examine the rule that allowed a trial court to scrutinize prenuptial agreements for substantive fairness.⁴² The court decided that the current law reflected an outdated view of women and marriage.⁴³ The court concluded that prenuptial agreements should be treated no differently from other contracts: because courts do not routinely inquire into the reasonableness of a contract either at the time of its execution or at breach, courts should not inquire into the

³¹ Silbaugh, *supra* note 7, at 74.

³² *Id.*

³³ *Id.* at 75.

³⁴ *Id.*

³⁵ *Id.* at 75.

³⁶ *Id.*

³⁷ Silbaugh, *supra* note 7, at 75.

³⁸ 329 S.E.2d 106 (W.Va. 1985).

³⁹ *Id.* at 109.

⁴⁰ *Id.* at 111.

⁴¹ *Id.* at 111, 118.

⁴² *Id.* at 114.

⁴³ *Id.* at 112.

reasonableness of a prenuptial agreement either at the time it is made or at the time of divorce.⁴⁴ The court reasoned that the general contract safeguards of fraud, duress, misrepresentation, and unconscionability would sufficiently protect the parties.⁴⁵ In breaking somewhat with traditional contract principles, the court required that the “circumstances at the time the marriage ends [be] roughly what the parties foresaw at the time they entered into the prenuptial agreement.”⁴⁶ The court specifically mentioned that the birth of children would be a relevant factor for a court to consider when determining if the circumstances were foreseeable.⁴⁷

Today, a few states have followed West Virginia’s lead and eliminated substantive fairness from judicial consideration of marital agreements.⁴⁸ However, most states continue to review these agreements with skepticism and judicial oversight.⁴⁹ While the trend is toward enforcing marital agreements as written, courts are hesitant to step away from their paternalistic perception that these agreements are inherently unfair to women.⁵⁰ Moreover, not all provisions

⁴⁴ *Gant*, 329 S.E.2d at 114.

⁴⁵ *Id.* at 116.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See, e.g.*, COLO. REV. STAT. ANN. § 14-10-112(2) (West 2003) (“[T]he terms of the separation agreement . . . are binding upon the court unless it finds . . . that the separation agreement is unconscionable.”); MONT. CODE ANN. § 40-4-201(2) (2003) (“[T]he terms of the separation agreement . . . are binding upon the court unless it finds . . . that the separation agreement is unconscionable.”). In *Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990), the Pennsylvania supreme court affirmed a lower court’s ruling enforcing a prenuptial agreement. The court decided that reviewing prenuptial agreements for substantive fairness reflected an outdated view of women and their bargaining power. *Id.* at 165. The court decided that the general contract safeguards of fraud, duress, and misrepresentation would sufficiently protect the parties. *Id.* at 166–67. In breaking somewhat with traditional contract principles, the court made clear that a full and fair disclosure of the parties’ financial positions was still required. *Id.* at 167. *Accord* *Laird v. Laird*, 597 P.2d 463, 467 (Wyo. 1979). The Uniform Premarital Agreement Act of 1983 expressly favors freedom of contract for marrying parties and limits review of substantive fairness to “unconscionability.” UNIF. PREMARITAL AGREEMENT ACT § 6, 9c U.L.A. 49 (2001). *But see* WASH. REV. CODE ANN. § 26.09.070(3) (West 1997) (“[T]he [separation] contract . . . shall be binding upon the court unless it finds . . . that the separation contract was unfair at the time of its execution.”).

⁴⁹ For a novel approach, see Theodore F. Hass, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879 (1988). The author suggests that spouses contractually limit, directly or indirectly, their right to a no-fault divorce. *Id.* at 894. The author suggests that the parties draft a prenuptial agreement that would allow them to divorce only for traditional fault based reasons. *Id.* Any party seeking a no-fault divorce would be penalized by, among other things, losing custody of the children. *Id.* at 917–18.

⁵⁰ “Other courts view requiring independent counsel as ‘constitut[ing] a paternalistic and unwarranted interference with the parties’ freedom to enter contracts.’ This position ignores the reality that judicial review of prenuptial agreements and the attendant evaluation of each party’s

of marital agreements are equally enforced. The next Section discusses the fact that, until recently, child-custody provisions were routinely rejected by the courts.

B. Child Custody Provisions

Traditionally, judges did not enforce parental custody agreements because of the state's obligation to protect the interests of children.⁵¹ Courts routinely stated that no private agreement of the parties would bar the courts from determining what was in the best interest of the child.⁵² For agreements made prior to the divorce, judges were concerned about the possibility for coercive bargaining between the parents, who may have different bargaining strengths due to domestic violence or the degree to which the parent wants custody of the child.⁵³ For agreements made during the divorce, judges did not trust parents to act responsibly toward their children while they were caught up in the acrimony of divorce.⁵⁴ Thus, historically, states refused to enforce any custody agreement at all, regardless of whether the agreement was made before the marriage, after the marriage, or at the time of the divorce.⁵⁵

educational and financial background is already a paternalistic exercise." Marston, *supra* note 23, at 915.

⁵¹ See, e.g., *Williams v. Williams*, 205 S.W.2d 949, 953 (Mo. Ct. App. 1947) (holding that oral prenuptial agreement by father to give stepmother legal custody of father's child would not be binding but would be considered as a factor in determining what was in the child's best interest).

⁵² See *Glauber v. Glauber*, 600 N.Y.S.2d 740, 742 (N.Y. App. Div. 1993) ("It is already well established by both statute and case law that contracts entered into by the parents with regard to the fate of their children are not binding on the courts. . . . [T]he responsibility [is on] the courts to make custody and visitation orders based upon the best interests of the child."). For example, in *Ekelem v. Ekelem*, 2003 WL 21014972, at *1 (Tenn. Ct. App. Apr. 16, 2003), the mother and father entered into a prenuptial agreement that provided that if they had children, the parties would seek joint custody. When the parties separated, however, the mother sought sole custody. *Id.* The trial court awarded custody to the mother and visitation to the father. *Id.* at *4. Arguing that "'profoundly limiting visitation' . . . [was] contrary to the parties' antenuptial agreement . . .," the pro se father appealed. *Id.* at *6. Affirming, the appellate court stated, "Even if the prenuptial agreement mandated joint custody, which it does not, this would not affect the trial court's authority, indeed, obligation, to determine custody and parenting time in accordance with the best interests of the children." *Id.* Accord *Schwab v. Schwab*, 505 N.W.2d 752, 758 (S.D. 1993); *McManus v. Howard*, 569 So. 2d 1213, 1215 (Miss. 1990); *Miller v. Miller*, 620 A.2d 1161, 1165-66 (Pa. Super. Ct. 1993).

⁵³ ALI PRINCIPLES, *supra* note 18, § 2.06 cmt. b.

⁵⁴ *Id.* cmt. a. (citing *Ford v. Ford*, 371 U.S. 187, 193 (1962) ("[T]he estrangement of husband and wife beclouds parental judgment with emotion and prejudice.")).

⁵⁵ See, e.g., *Mancuso v. Mancuso*, 789 So. 2d 1249 (Fla. Dist. Ct. App. 2001). In this case, the appellate court reversed the trial judge's order enforcing a provision of the settlement agreement that allowed the fifteen-month-old child to be rotated between the parents every forty-eight hours. The trial judge believed she was without authority to reject the rotation

Today, this refusal to enforce these agreements has given way.⁵⁶ Jurisdictions have begun to recognize that parents, not judges, can better decide who should be raising their children.

III. CURRENT PARENTAL AGREEMENT STANDARDS: DESCRIPTION, STRENGTHS, AND WEAKNESSES

When parents agree on the custody of their children, there are three standards judges use in deciding whether to honor these agreements. First, the vast majority of states require the judge to consider the agreement as one factor in a best interest analysis.⁵⁷ These states give no deference to parental agreements; rather, the judge's determination of the best interest of the child controls the decision.⁵⁸ Second, some states require judges to presume these agreements are in the best interest of the child, but require judges to set the agreements aside when the judge determines that the agreements are not in the child's best interest.⁵⁹ These states give some weight to parental agreements, but ultimately the judge's determination of the best interest of the child controls the decision.⁶⁰ Third, in West Virginia, judges must defer to the agreement unless it would harm the child or it was not voluntary.⁶¹ Under this standard, judges defer to parental agreements and the best interests of the child are essentially irrelevant.⁶² These standards will be explained and evaluated below.

provision. Neither party challenged the rotation provision on appeal, but the appellate court *sua sponte* reversed and remanded the case for the trial court to determine whether the rotation provision was in the child's best interest. The Uniform Premarital Agreement Act does not include child custody as a topic that can be negotiated. UNIF. PREMARITAL AGREEMENT ACT § 3(a), 9c U.L.A. 43 (2001). While it does not specifically exclude child custody, the Act does specifically exclude child support and any other matter violating public policy. *Id.* §§ 3(a)(8), (b).

⁵⁶ See discussion *infra* Part III.

⁵⁷ See discussion *infra* Part III.A.

⁵⁸ *Id.*

⁵⁹ See discussion *infra* Part III.B.

⁶⁰ *Id.*

⁶¹ See discussion *infra* Part III. C.

⁶² *Id.*

 Breakdown of Parental Agreement Standards By State

<u>Best Interest</u>	<u>Presumption</u>	<u>Parental Deference</u>
Alabama	California**	Oregon***
Alaska	Connecticut**	West Virginia
Arizona	District of Columbia	
Arkansas	Georgia	
California	Illinois**	
Colorado	Iowa**	
Florida	Kansas	
Hawaii	Louisiana	
Idaho	Maine **	
Indiana	Michigan	
Kentucky	Minnesota**	
Maryland	Mississippi**	
Massachusetts	Nevada**	
Missouri	New Jersey	
Montana	North Carolina	
Nebraska	South Carolina	
New Hampshire	Texas	
New Mexico	Vermont**	
New York		
North Dakota		
Ohio		
Oklahoma		
Pennsylvania		
Rhode Island		
South Dakota		
Tennessee		
Utah		
Virginia		
Washington		
Wisconsin		
Wyoming		

* These states use the deference standard only for parental agreements for joint custody. For all other agreements, these states use the best interest standard.

** These states use the presumption standard only for parental agreements for joint custody. For all other agreements, these states use the best interest standard.

*** This state requires judges to enforce without exception parental agreements for joint custody. For all other agreements, it uses the best interest standard.

A. *The Best Interest Standard*

In most states, no deference is given to parental agreements. Rather, the custody agreement is considered, if at all, as little more than the parents' preference for custody, and thus one element to consider in a best interest analysis.⁶³ Many states that use the best interest standard do not even acknowledge in their statutes that parental agreements exist at all.⁶⁴ For example, in Delaware, judges are directed to take the parents' preferences for custody into consideration, but the statute does not mention parental agreements at all.⁶⁵ While Arizona's statute does mention parental agreements, it does not contemplate the possibility that the parties might agree to anything beyond joint custody.⁶⁶

In two states, the presumption is actually against enforcing these agreements, but the standard remains the best interest of the child. For example, in Ohio, "[t]he court shall not approve a [custody] plan . . . unless it determines that the plan is in the best interest of the children."⁶⁷ In Vermont, the court must refuse to enforce any agreement that is not in a child's best interest.⁶⁸

But most states that use the best interest standard recognize that parents make these agreements and permit or encourage, but do not require, judges to award

⁶³ See, e.g., *Braun v. Headley*, 750 A.2d 624, 636 (Md. Ct. Spec. App. 2000) (stating that the desires of the natural parents and agreements between them are one factor for a judge to consider in a best interest analysis).

⁶⁴ Delaware, Idaho, Illinois, Indiana, Kentucky, Nevada, and New Mexico direct their courts to consider the wishes of the parents and the wishes of the child in a best interest analysis but do not mention parental agreements. DEL. CODE ANN. tit. 13, § 722(a)(1) (1999) (directing the court to consider all relevant factors including the wishes of the child's parents); IDAHO CODE § 32-717(1)(a) (Michie Supp. 2003); 750 ILL. COMP. STAT. ANN. 5/602(a)(1) (West 1999); IND. CODE ANN. § 31-17-2-8(2) (West 1999 & Supp. 2003); KY. REV. STAT. ANN. § 403.270(2)(a) (Michie 1999 & Supp. 2003); NEV. REV. STAT. ANN. § 125.480(4)(b) (Michie 1998); N.M. STAT. ANN. § 40-4-9(A)(1) (Michie 1999). Hawaii, North Dakota, Tennessee, and Utah direct their courts to consider the wishes of the child in a best interest analysis, but do not even mention the wishes of the parents. HAW. REV. STAT. § 571-46 (1993 & Supp. 2001); N.D. CENT. CODE § 14-09-06.2(1) (1997); TENN. CODE ANN. § 36-6-106(a) (2001); UTAH CODE ANN. § 30-3-10 (Supp. 2003). Arkansas, Virginia and Wyoming make no mention of the parents' or child's preferences being a factor in a best interest analysis. ARK. CODE ANN. § 9-13-101(a)(1)(A) (Michie Supp. 2001); VA. CODE ANN. § 20-124.2 (Michie Supp. 2003); WYO. STAT. ANN. § 20-2-201 (Michie 2003).

⁶⁵ DEL. CODE ANN. tit. 13, § 722(a)(1) (1999) (directing the court to consider all relevant factors including the wishes of the child's parents).

⁶⁶ ARIZ. REV. STAT. ANN. § 25-403(C) (West Supp. 2003) (allowing court to order for joint custody when both parents agree and the order is in the best interest of the child).

⁶⁷ OHIO REV. CODE ANN. § 3109.04(D)(1)(a)(i) (Anderson 2003).

⁶⁸ VT. STAT. ANN. tit. 15, § 666(c) (2002); accord WIS. STAT. ANN. § 767.11(12)(a) (West 2001 & Supp. 2003) (allowing court to reject custody agreement reached during mediation based on the best interest of the child).

custody consistent with the parents' agreement.⁶⁹ Also, these states require judges to reject these agreements when they are not in the best interest of the child. For example, Alaska requires its judges to review written agreements between the spouses to determine if the terms are just and in the best interest of the child.⁷⁰ In Oklahoma, the court shall order custody of the children based on the plan submitted by the parents with any changes deemed by the court to be in the best interest of the child.⁷¹ Similarly, in Nebraska, the court may reject a parenting plan if it is not in the child's best interest.⁷² Indeed, after conducting a hearing and specifically finding that joint custody is in the best interest of the child, a Nebraska court may order joint custody regardless of any parental agreement to the contrary.⁷³ South Carolina developed a similar standard judicially. In South Carolina, "[t]he general rule of law is that a contract between parents as to the custody of children will be recognized and enforced by the courts unless the welfare of the children requires a different disposition."⁷⁴

In a few states, the statutes address the role of parental agreements so opaquely that judges may set aside parental custody agreements ostensibly for any reason at all. For example, in Florida, a consent order that incorporates a parental custody agreement "shall be reviewed by the court and, if approved, entered."⁷⁵ The statute does not define when these agreements should be approved. In Massachusetts, the court may reject the parental agreement and award sole legal and physical custody to either parent.⁷⁶ Again, the statute does not limit the discretion of judges to reject the agreement. Similarly, in Mississippi, if the court finds the written parental agreement is "adequate and sufficient," the

⁶⁹ See, e.g., N.M. STAT. ANN. § 40-4-9.1(D) (Michie 1999) ("In any case in which the parents agree to a form of custody, the court *should* award custody consistent with the agreement unless the court determines that such agreement is not in the best interests of the child.") (emphasis added).

⁷⁰ ALASKA STAT. § 25.24.220(d)(2) (Michie 2002); accord TEX. FAMILY CODE ANN. § 153.007(b) (Vernon 2002) (directing the court to enter an order consistent with the parents' agreement if it is in the child's best interest).

⁷¹ OKLA. STAT. ANN. tit. 43, § 109(D) (West 2001); accord 750 ILL. COMP. STAT. ANN. 5/602-1(b)-(c) (West 1999) ("Upon the application of either or both parents . . . the court shall consider an award of joint custody. . . if it determines that joint custody would be in the best interests of the child . . .").

⁷² NEB. REV. STAT. ANN. § 43-2917 (Michie 1999).

⁷³ NEB. REV. STAT. ANN. § 42-364(5) (Michie 1999); accord N.H. REV. STAT. ANN. § 458:17(II)(a) (1992 & Supp. 2003) (allowing court to refuse to order joint custody regardless of any custody agreement to the contrary after conducting a hearing and specifically finding that joint custody is not in the best interest of the child).

⁷⁴ Crowe v. Lowe, 182 S.E.2d 310, 312 (S.C. 1971).

⁷⁵ FLA. STAT. ANN. § 61.183(2) (West 1997).

⁷⁶ MASS. ANN. LAWS ch. 208, § 31 (Law Co-op. 2003).

agreement may be incorporated into the judgment.⁷⁷ Adequate and sufficient are not defined. In Montana, “the terms of the separation agreement, except those providing for the support, parenting, and parental contact with children, are binding upon the court. . . .”⁷⁸ But the statute is silent regarding the effect of a custody term.⁷⁹ Statutes of such a vague standard even allow judges to reject more easily parental agreements than statutes with clearer standards. Moreover, appellate review is more effective when there are standards to evaluate judicial decision-making.⁸⁰ But these states should make the standard in their statutes clearer.

A few states that use the best interest standard impose somewhat tighter limits on judges. These states also view parental agreements as one element in a best interest analysis, but they require judges to explain on the record their reasons for rejecting the parental agreement. In Missouri, Pennsylvania, and Wisconsin, when the judge “declines to enter an order awarding custody either as agreed to by the parents or under the plan developed by the parents, the court shall state its reasons for denial on the record.”⁸¹ While statutes that require judges to explain their reasoning place somewhat tighter control on judicial discretion, these states leave the decision-making control in the judge’s hands rather than the parents. When reasons are given on the record, it is easier for the reviewing court to determine whether the trial court abused its discretion.⁸²

States that use the best interest standard thus consider parental agreements as merely one factor⁸³ in a best interest analysis. Judges are required to reject any

⁷⁷ MISS. CODE ANN. § 93-5-2(2) (West 1999).

⁷⁸ MONT. CODE ANN. § 40-4-201(2) (2003).

⁷⁹ *Accord* WASH. REV. CODE ANN. § 26.09.070(3) (West 1997) (requiring separation agreements to be binding on the court except “for those terms providing for a parenting plan for their children . . .”).

⁸⁰ *See, e.g.,* *Dinius v. Dinius*, 448 N.W.2d 210, 213 (N.D. 1989).

⁸¹ 23 PA. CONS. STAT. ANN. § 5307 (West 2001); *see also* MO. ANN. STAT. § 452.375(6) (West 2003); WIS. STAT. ANN. § 767.11(12)(a) (West 2001) (“The court shall state in writing its reasons for rejecting a[] [mediation] agreement.”) In *Sleater v. Sleater*, 42 S.W.3d 821, 824 (Mo. Ct. App. 2001), the appellate court reversed when the trial court did not accept the parental agreement and failed to make written findings to support its decision to reject it.

⁸² For example, in *Tompkins v. Baker*, 997 S.W.2d 84, 91 (Mo. Ct. App. 1999), the trial court cited only the parties’ stipulation as evidence that enforcing the settlement agreement was in the child’s best interest. The appellate court reversed and remanded saying that the trial court’s decision was not supported by substantial evidence because the parties’ agreement should only have been one factor in a best interest analysis.

⁸³ *See, e.g.,* *Neu v. Neu*, 303 A.D.2d 509, 510 (N.Y. App. Div. 2003) (“While ‘no agreement can bind the court to a particular disposition, the parties’ own agreement as to who should have custody constitutes a ‘weighty factor’ to which priority should be accorded absent extraordinary circumstances.’”) (quoting *Alanna M. v. Duncan M.*, 204 A.D.2d 409 (N.Y. App. Div. 1994) (holding that where children had been living with father for two and a half

agreement that is not in the child's best interest. Only in a few states must judges explain their decision to reject the agreement on the record.⁸⁴

1. *Strengths of the Best Interest Standard*

The best interest standard leaves judges with enormous discretion to decide child custody. This wide discretion is both its greatest benefit and its greatest downfall. Better decisions can be made when judges have the widest possible discretion to take into account that circumstances have changed since the agreement was made.⁸⁵ For example, prenuptial and postnuptial parental agreements are often made long before the divorce. Under this standard, judges need not give them much, if any, weight because the age of the agreement would affect its relevance if circumstances have changed. Additionally, agreements made prior to the birth of a child and while the child is young would be less likely to reflect a child's current needs than one made while the divorce is in process. The best interest standard allows judges to make these distinctions.

When judges have wide discretion to reject parental agreements, there is a better chance that the best decision for each child can be made, but at what cost?

years pursuant to parents' agreement, it was not abuse of discretion for court to award custody to father)).

⁸⁴ Interestingly, many of these statutes do not distinguish among agreements made before the child is born, after the child is born, but before the divorce, and during the divorce. *See, e.g.*, 23 PA. CONS. STAT. ANN. § 5307 (West 2001); MO. ANN. STAT. § 452.375(6) (West 2003). These statutes do not indicate that the parents' agreement must be made during the divorce process. In contrast, some statutes do talk about parenting plans, mediation agreements, or separation agreements, which are generally made during the divorce. *See, e.g.*, WIS. STAT. ANN. § 767.11(12)(a) (West 2001) (referring to "[a]ny agreement which [sic] resolves issues of legal custody or periods of physical placement between the parties reached as a result of mediation under this section . . ."). Theoretically, under these statutes, a parental agreement made prior to marriage would have the same weight as a parental agreement made during the divorce.

⁸⁵ In *Keen v. Keen*, 629 N.E.2d 938, 940 (Ind. Ct. App. 1994), the court said, "While a parent's agreement is entitled to great weight, the [parents'] facially ambiguous, perhaps intrusive, and, under these facts, unworkable agreement, must be subordinated to their child's best interests and, therefore, was not binding upon the trial court." Interestingly, the court recognized that parents have a fundamental right to "establish a home and raise their children . . ." *Id.* at 941. When the parents are capable of carrying out an agreement, the judge should "refrain from imposing his or her personal conception of a preferential arrangement." *Id.* "One obvious exception is when an agreement might endanger the child's physical health or significantly impair his emotional development." *Id.* The court created another exception: when the agreement is not in the child's best interest because it would demand further litigation. *Id.* The agreement in this case required "each party to give first option to the other for *child care* during periods when either party might otherwise have the child but could not for one reason or another be with the child on that particular day or during that period." *Id.* The court found the use of the term "child care" to be vague and unclear. *Keen*, 629 N.E.2d at 942.

2. Weaknesses of the Best Interest Standard

Child custody cannot be effectively litigated because judges are not equipped to distinguish between two equally fit parents.⁸⁶ While it is relatively easy to determine who should have custody when one of the parents is unfit, the decision is less clear when both parents are fit. The best interest standard does not make this decision clearer. There is no social consensus on what makes a person better able to parent a child.⁸⁷ If society does not agree, judges cannot know which parent will be the better choice. Absent a presumption for one parent, judges “who normally lack the ability to ‘measure minute gradations of psychological capacity between two fit parents’ would unwisely be called upon to determine relative parental fitness with scientific ‘precision.’”⁸⁸ One court expressed this dilemma when it stated, “All too often, we ask our courts to perform services which they are completely incompetent to provide. The raising of our children is just one such matter. The courts are simply the wrong tool for the job.”⁸⁹

The discretion judges retain under this standard encourages litigation. A standard with wide discretion leads to uncertain results. “[T]he best interests standard provides an uncertain backdrop for out-of-court negotiations.”⁹⁰ Prior to litigation, the parties cannot know which of two fit parents a judge is likely to prefer. Thus, they may refuse to negotiate a settlement under the mistaken belief that they will win.⁹¹ While some statutes include factors to be considered,⁹² these

⁸⁶ See *Garska v. McCoy*, 278 S.E.2d 357, 361 (W. Va. 1981) (“However, it is emphatically the case that hearings do not enhance justice, particularly since custody fights are highly destructive to the emotional health of children.”).

⁸⁷ See Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN’S STUD. 133, 172 (1992) (asking whether a parent who is laid back and does not push a child to excel at school or an intense parent who stresses the importance of academic accomplishment is the better parent).

⁸⁸ Kathryn L. Mercer, *The Ethics of Judicial Decision-Making Regarding Custody of Minor Children: Looking at the “Best Interest of the Child” and the “Primary Caretaker” Standards as Utility Rules*, 33 IDAHO L. REV. 389, 408–09 (1997) (quoting *Garska*, 278 S.E.2d at 360–61).

⁸⁹ *Lamb v. Wenning*, 591 N.E.2d 1031, 1034 (Ind. Ct. App. 1992), *transfer granted*, 600 N.E.2d 96 (Ind. 1992) (holding that a parent must demonstrate that an existing order is unreasonable to change a child’s primary physical residence when the parents have joint legal custody).

⁹⁰ DIVIDING THE CHILD, *supra* note 4, at 282 (Because very few cases in fact ever get to a judge, even though “the best interest standard does potentially confer a great deal of judicial discretion, that discretion is rarely being exercised directly by a state official.”).

⁹¹ *But see* Mary Kate Kearney, *The New Paradigm in Custody Law: Looking at Parents With a Loving Eye*, 28 ARIZ. ST. L.J. 543, 553–54 (1996). The author suggests that some discretion may be desirable since judges are attuned to social nuances and the needs of the particular case. Additionally, the author suggests that most lawyers who practice in front of a particular judge have a good sense of what to expect from that judge. *Id.* at 554.

standards do not categorically conclude that if a parent meets four of six criteria, for example, that parent deserves custody.

Additionally, this standard is costly to the litigants. It is difficult for a judge to comprehend fully the role that each parent has played in the child's development. Because the judge cannot know which parent is best without assistance, the parties hire experts to provide guidance.⁹³ Each testifying expert necessarily opines that the party doing the hiring is the more qualified parent.⁹⁴ A standard that encourages, and even requires, expert testimony is expensive to the litigants and discriminates against the parent with less money, generally the mother.⁹⁵

Also, appellate review cannot ensure that the decision that is in the best interest of the child is actually made.⁹⁶ Indeed, one trial judge stated, "I could make a decision in this case, in all probability, awarding the children to either one of the parents and have it stand up to appellate review."⁹⁷ Trial court decisions regarding child custody are reviewed only under a clear abuse of discretion⁹⁸ or clearly erroneous standard.⁹⁹ Judges are human, not infallible, and their personal opinions and biases will affect their decision-making. Under a standard that

⁹² See ARIZ. REV. STAT. ANN. § 25-403(A) (West 2000), which lists the following as factors to be considered: the wishes of the child's parents; the wishes of the child; the relationship of the child, parent, siblings, and others; the child's adjustment to home, school, and community; the mental and physical health of all involved; the ability of each parent to further the relationship of the child with the other parent; the primary caretaker and the existence of coercion to obtain an agreement regarding custody.

⁹³ Becker, *supra* note 87, at 173; see, e.g., Lapp v. Lapp, 293 N.W.2d 121, 126-27 (N.D. 1980) (mother hired two experts for trial, father hired one).

⁹⁴ Becker, *supra* note 87, at 173.

⁹⁵ *Id.* at 173.

⁹⁶ See, e.g., Lapp, 293 N.W.2d at 129 (disagreeing with trial court's decision to award joint custody on a six month alternating basis but unwilling to disturb the ruling due to the "clearly erroneous" standard of review); Hensarling v. Hensarling, 824 So. 2d 583, 586-87 (Miss. 2002) ("We may not always agree with a chancellor's decision as to whether the best interests of a child have been met . . . [h]owever, in custody cases, we are bound by the limits of our standard of review and may reverse only when the decision of the trial court was manifestly wrong or clearly erroneous . . .").

⁹⁷ Dinius v. Dinius, 448 N.W.2d 210, 219 (N.D. 1989) (Levine, J., dissenting) (describing the trial court as having a "flip-a-coin mentality"). In this case, the trial court awarded custody to the father rather than the primary caretaking mother. The supreme court affirmed. The dissent argued that not all the best interest statutory factors should be entitled to equal weight. Instead, the dissent urged the court to adopt the primary care presumption. *Id.*

⁹⁸ See Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980) (explaining that discretion is abused when the trial judge acts arbitrarily or unreasonably).

⁹⁹ Becker, *supra* note 87, at 173 ("[t]he record of appellate review in Minnesota, for example, demonstrates remarkably little interference with trial court custody decisions, despite the supreme court's obvious endeavor to facilitate appellate review by insisting on highly particularized trial court findings of fact").

allows such wide discretion, judges who are influenced by their own perspective may not make the best decisions for children.¹⁰⁰ Because the best interest standard provides so little guidance to a judge, judges can make any decision they wish, so long as they couch it in “best interests of the child” terminology.¹⁰¹ According to one former trial judge, “the best interest standard leaves the trial courts with nearly unbridled discretion to decide child custody disputes.”¹⁰²

Additionally, a standard that fails to hold parents accountable both for making custody decisions and for honoring their agreements promotes bad policy. While the state should not enforce agreements that would harm children, most agreements will not. Possibly, parents will make some bad custody agreements, especially if these agreements are made long before they have children. But parents can renegotiate their agreements as circumstances change. By not enforcing these agreements, states encourage parents not to make agreements but to litigate them instead. Failing to enforce the agreements also deprives the other parent of the benefit of the bargain.

For example, a father might agree to allow a mother physical custody of their child so long as the mother agreed not to relocate. After the divorce, once she has custody, the mother decides to relocate. The father petitions the court to enforce the agreement. The court refuses, thereby allowing the mother to keep the benefit of the bargain (she retains custody), but denying the father his benefit (keeping

¹⁰⁰ *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981) shows just how appalling decisions under the best interest standard can be. In *Garska*, the mother was only fifteen at the time she became pregnant by her mother’s boyfriend. *Id.* at 359. She went to live with her grandparents. *Id.* After birth, the child had serious respiratory problems, which required frequent hospitalizations. The mother and grandparents agreed that the grandparents would adopt the child so that he would qualify for medical insurance. *Id.* The father, who up until this point had provided no support to the child, petitioned the court for custody. He visited the baby for the first time and began to send \$15.00 a week to the mother for support. *Id.* Ignoring that the pregnancy resulted from statutory rape, the trial court awarded custody to the father because he was better educated, more intelligent, economically more stable, able to provide a better social environment, better spoken, and had “a better appearance and demeanor.” *Id.*

The West Virginia supreme court agreed that the educational and economic position of the father was superior to the mother’s, but concluded that those factors paled in comparison to the love, affection, concern, and tolerance the mother had already provided. *Garska*, 278 S.E.2d at 364. In reversing, the state supreme court rejected the best interest standard. *Id.* at 361–62. The court said, “in the interest of removing the issue of child custody from the type of acrimonious and counterproductive litigation which a procedure inviting exhaustive evidence will surely create, we hold today that there is a presumption in favor of the primary caretaker parent . . .” *Id.* at 362. To change the result, the supreme court changed the best interest standard by adding a primary caretaker presumption. *Id.* at 362–63.

¹⁰¹ See Becker, *supra* note 87, at 182.

¹⁰² *Id.* at 173 (citing Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 443–44 (1990)).

the child nearby). The father may not have agreed to the mother having physical custody if the mother had not agreed to remain nearby. By refusing to make the mother honor her side of the bargain, the mother gets a windfall: she has the child and she can relocate. The father loses.¹⁰³

To be fair, in this situation, the court should either re-litigate custody or enforce the agreement.¹⁰⁴ Because re-litigating custody would not be desirable in most situations, courts should enforce all terms of the agreement. Such a standard would thus put the burden on parents to honor agreements, to negotiate changes to them when necessary, and essentially to work together to develop workable plans for themselves and their children.

Lastly, the best interest of the child standard has been perceived as gender-biased. Women's rights advocates complain that the standard benefits men, while fathers' rights groups allege that women are the ones benefited.¹⁰⁵ Regardless of whether the standard favors fathers or mothers, a standard that is perceived to be gender-biased will cause increased frustration and hostility at the process and the judicial system.

Thus, under the best interest standard, litigation is encouraged because there is no certainty. Uncertainty leads to an expensive, time-consuming, acrimonious process that is perceived by many to be gender-biased. It leaves custody decisions in the hands of judges with little guiding criteria and little appellate oversight. Moreover, it promotes bad policy: parents are neither expected to make custody decisions, nor honor agreements they make.

¹⁰³ This example is based upon *Zeller v. Zeller*, 640 N.W.2d 53, 54–55 (N.D. 2002), where the parents agreed to joint legal custody and to a provision automatically transferring physical custody of the children from the mother to the father if the mother relocated. The trial court enforced the agreement. The appellate court held, “a stipulated divorce provision for an automatic change in custody upon the occurrence of a future event is unenforceable and the district court retains control over the rights of children, regardless of any contrary agreements of the divorcing parties.” *Id.* at 58; *accord*, *Parker v. Parker*, 55 S.W.3d 773, 778–82 (Ark. Ct. App. 2001) (refusing to enforce term in agreement that prevented wife from relocating).

¹⁰⁴ *See, e.g., In re Marriage of Arvin*, 689 N.E.2d 1270, 1273 (Ind. Ct. App. 1997) (holding that where mother never intended to honor covenant requiring her not to relocate, the father could repudiate the parties' agreement giving the mother physical custody of the child).

¹⁰⁵ Nancy D. Polikoff, *Gender and Child Custody: Exploding the Myths*, in *FAMILIES, POLITICS, AND PUBLIC POLICY: A FEMINIST DIALOGUE ON WOMEN AND THE STATE* 185 (Irene Diamond ed. 1983); *see Case Comment, A Difference in Perceptions: The Final Report of the North Dakota Commission on Gender Fairness in the Courts*, 72 N.D. L. REV. 1113, 1178 (1996) (finding that mothers received primary physical custody in only 73% of the 99 unappealed divorce cases reviewed in North Dakota).

B. *The Presumption Standard*

Because of its imperfections, some states added various presumptions,¹⁰⁶ including the parental agreement presumption, to the best interest standard. In states using the presumption standard, judges must presume that a parental agreement is in a child's best interest absent clear evidence that it is not. For example in Kansas, a parental agreement is presumed to be in a child's best interest; a court may make a different order only if it makes specific findings of fact stating that the plan is not in the child's best interest.¹⁰⁷ Similarly, in Georgia, the court shall ratify a custody agreement "unless the court makes specific written factual findings . . . that the agreement would not be in the best interests of the child . . ."¹⁰⁸ And in Louisiana, "[i]f the parents agree who is to have custody, the court *shall* award custody in accordance with their agreement unless the best interest of the child requires a different award."¹⁰⁹ In New Jersey, "[t]he court *shall* order any custody arrangement which is agreed to by both parents unless it is contrary to the best interests of the child."¹¹⁰

The District of Columbia and Michigan restrain judges' discretion slightly more. Judges in the District of Columbia must enter an order for custody as agreed by the parents unless *clear and convincing* evidence indicates that the arrangement is not in the best interest of the child.¹¹¹ Similarly, in Michigan, if parents agree to "parenting time terms, the court shall order the parenting time terms unless the court determines on the record by *clear and convincing* evidence that the parenting time terms are not in the best interests of the child."¹¹²

While new, the movement towards the presumption standard is far from universal. In fact, many states presume the parents' agreement is in the child's best interest only when the parents have agreed to joint custody.¹¹³ In Mississippi,

¹⁰⁶ For example, the joint custody presumption and the primary caretaker presumption were presumptions added in different states to the best interest standard. *See, e.g.,* Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981) (adding the primary caretaker presumption).

¹⁰⁷ KAN. STAT. ANN. § 60-1610(a)(3)(A) (Supp. 2002).

¹⁰⁸ GA. CODE ANN. § 19-9-5(b) (1994).

¹⁰⁹ LA. CIV. CODE ANN. art. 132 (West 2003) (emphasis added).

¹¹⁰ N.J. STAT. ANN. § 9:2-4(d) (West 2002) (emphasis added); *accord* N.C. GEN. STAT. § 50-13.1(g) (2001) (directing the court to incorporate any agreement reached by the parents as a result of mediation into the divorce order unless the court finds good reason not to).

¹¹¹ D.C. CODE ANN. § 16-914(h) (2001 & Supp. 2003).

¹¹² MICH. COMP. LAWS § 722.27a(2) (2002) (emphasis added).

¹¹³ *See, e.g.,* CAL. FAM. CODE § 3080 (West 1994) (presuming that joint custody is in the best interest of a child where the parents have agreed to it); CONN. GEN. STAT. § 46b-56a(b) (1995) (presuming that joint custody is in the best interest of a child where the parents have agreed to it); 750 ILL. COMP. STAT. 5/602.1(d)(1) (1999) (allowing the parties to determine the physical residence of the child in joint custodial situations); IOWA CODE ANN. § 598.41(3), (4)

for example, custody agreements that provide for joint custody are presumed to be in a child's best interest.¹¹⁴ In contrast, custody agreements that provide for sole custody are only incorporated into the judgment if "adequate and sufficient."¹¹⁵ In Maine, judges must order joint custody when parents agree to it unless there is substantial evidence that it should not be ordered.¹¹⁶

Under the presumption standard, judges are still expected to reject a custody agreement if they find that the agreement is not in the child's best interest.¹¹⁷ Thus, while both the best interest standard and the presumption standard rest on the best interest of the child, the degree of deference they give to parental agreements is different. Under the best interest standard, courts "should" give effect to parental agreements. Under the presumption standard, courts "shall" give effect to parental agreements unless there is evidence to reject them.¹¹⁸

1. *Strengths of the Presumption Standard*

The presumption standard gives greater weight to parental agreements than the best interest standard. In that way, the presumption standard limits judicial

(West 2001) (stating that the best interest standard does not apply when parents agree to joint custody); MINN. STAT. § 518.17(2)(d) (Supp. 2003) (requiring the court to use a rebuttable presumption that, upon request of either or both parties, joint legal custody is in the best interest of the child); MISS. CODE ANN. § 93-5-24(4) (1999 & Supp. 2003) (presuming that joint custody is in the best interest of a child where the parents have agreed to it); NEV. REV. STAT. § 125.490(1) (1998) (presuming that joint custody is in the best interest of a child where the parents have agreed to it); VT. STAT. ANN. tit. 15, § 666(a) (2002) (presuming that joint custody is in the best interest of a child where the parents have agreed to it). *But see* IND. CODE § 31-17-2-15 (1999) ("the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody"); NEB. REV. STAT. § 42-364(5) (1999) (requiring the court to conduct a hearing in open court and specifically find that joint custody is in the best interest of the child before awarding it even when parents have agreed to joint custody); N.H. REV. STAT. ANN. § 458:17 (II)(a) (1992) (requiring the court to state in its decision, the reasons for the denying joint custody when the parents agree to it); OKLA. STAT. tit. 43, § 109(D) (2001) (allowing the court to reject the parents' request for joint custody when it is not in the child's best interest).

¹¹⁴ MISS. CODE ANN. § 93-5-24(4) (1999 & Supp. 2003).

¹¹⁵ MISS. CODE ANN. § 93-5-2(2) (1999).

¹¹⁶ ME. REV. STAT. ANN. tit. 19-A, § 1653 (2)(A) (West 1998).

¹¹⁷ *See, e.g.*, CONN. GEN. STAT. § 46b-56a(b) (1995) (presuming joint custody to be in child's best interest where parents agree to it, but allowing court to refuse to award joint custody and so long as the court states its reasons for doing so); VT. STAT. ANN. tit. 15, §§ 666(a), (c) (2002) (presuming joint custody is in the best interests of a child where the parents have agreed to it, but allowing court to refuse to approve the agreement where it finds the agreement was not in the child's best interest).

¹¹⁸ Like statutes that use the best interest standard, statutes that use the presumption standard similarly do not distinguish between the various kinds of parental agreements; prenuptial, postnuptial, and separation agreements.

discretion more than the best interest standard. Uncertainty should decrease somewhat. More importantly, litigation should also decrease and settlements should increase because a judge would be required to enforce a custody agreement unless it was shown that the agreement was not in the child's best interest. With fewer cases proceeding to trial, acrimony should lessen.

2. Weaknesses of the Presumption Standard

But the presumption standard does not eliminate judicial discretion. Indeed, judges are required to reject parental agreements that are not in children's best interest.¹¹⁹ Thus, like the best interest standard, judges would have the flexibility to reject agreements made long before divorce when a parent could show that the agreement is not currently in a child's best interest. Thus, the timing of the agreement could very well affect its weight under this standard.

While judicial discretion would decrease, the decrease is not substantial. As long as a judge could support the decision to reject the agreement with specific findings, the parents' preferences would give way. Under the presumption standard, judges are still able to set aside parental agreements simply because they are not, in that judge's view, in the child's best interest.

Adding the parental agreement presumption to the best interest standard is certainly an improvement. Yet, it is precisely because judges retain much of the wide discretion they have under the best interest standard that adding this presumption will not significantly improve the process. While judges would have to support their decision not to enforce the custody agreement with specific findings showing that the agreement is not in the child's best interest, judges have been able to work around the best interest standard for years.¹²⁰ This presumption will merely make judges work harder when they choose to reject a custody agreement. Vague references to the best interest of a child will no longer be sufficient to support a decision that ignores a custody agreement.

¹¹⁹ See statutes cited *supra* note 117.

¹²⁰ For example, in *Presley v. Presley*, 989 S.W.2d 938 (Ark. Ct. App. 1999), the lower court refused to modify custody when the father violated the court's order and allowed a female guest to stay overnight while the children were present. The judge had earlier modified custody from the mother to the father because the mother allowed a male guest to stay overnight. *Id.* at 941 (Hart, J., dissenting). Additionally, there was evidence that the father left guns accessible to the children. *Id.* The youngest child, age four, began talking about guns and threatened to blow his grandfather's head off. *Id.* The children began swearing and lying while living with the father. *Id.* In contrast, the chancellor complimented the mother on changing her lifestyle. *Id.* The mother did everything the chancellor had required of her except pay child support. *Id.* The court maintained custody with the father and the appellate court affirmed. The dissenting female judge commented, "It is obvious that the chancellor imposed a different standard of conduct on the parties. . . . The chancellor's finding that it is in the best interests of the child to remain with their father is incredible based on the evidence presented." *Id.* at 941-42.

C. *The Parental Deference Standard*

There is a third alternative that has been adopted in West Virginia: parental deference. West Virginia's parental deference standard requires courts to enforce the terms of any custody agreement, so long as it was voluntary and knowing and absent harm to the child.¹²¹

While the presumption standard allows judges to reject any agreement that is not in children's best interest, the parental deference standard allows judges to reject only those agreements that are actually harmful to children or were not entered into voluntarily. Thus, judges would have much less discretion to reject parental agreements.

Adopting a parental deference standard for all parental agreements appears contrary to children's best interest. For example, when parents make custody agreements before they have children or before they divorce, they are unable to make plans that take into account the unique and special needs of their particular child at that particular time. Especially if made before they have children, these agreements may not reflect parents' beliefs at divorce regarding what is best for their children. These parents may truly believe that they would want a specific custody arrangement. After having children and realizing the enormous physical, emotional, and professional sacrifices children require of their parents, and realizing the intense rewards and satisfactions of being a parent, some parents might change their minds. If they then fail to renegotiate the parenting agreement, the old agreement may not reflect what they believe to be in their child's best interest at the time of divorce. Under a parental deference standard, it would be irrelevant if one parent no longer believed the agreement to be in their child's best interest. The agreement would control. Thus, it is tempting to find such a standard not protective enough of children because agreements that at least one parent no longer likes will be enforced. But, as discussed below, this standard is protective because custody decisions under this standard will better meet children's needs and the custody process will improve.

¹²¹ See, e.g., W. VA. CODE § 48-9-201 (2001) (requiring the court to order parental custody arrangement as agreed to by the parents unless the agreement is not knowing, not voluntary, or would be harmful to the child). Oregon adopted an even stricter standard for *joint custody*. Judges "may not overrule [joint custody] agreement[s] by ordering sole custody to one parent." OR. REV. STAT. § 107.169(4) (2001). Unlike West Virginia's statute, there is no harm override: according to the statutory language, when parents agree to joint custody, judges cannot reject the parents' agreement even if a child would be harmed under it.

1. *Strengths of the Parental Deference Standard*

a. *The Parental Deference Standard Will Lead to Better Decisions*

The parental deference standard will lead to better custody arrangements because parents will be making the decision. When parents make custody decisions during the divorce process, it is easy to see that the parents are in a better position to be making these determinations than judges. “[G]enerally, there is no person, including any trial or appellate judge who is better able to evaluate the persons best suited to be a guardian for a child than the child’s parents.”¹²² Parents alone know the unique needs of their children and the ability of both themselves and their spouse to parent. Better decisions are possible from parents because a judge does not know the child the way the parents do. When parents act together to make agreements, children benefit.¹²³

It is, perhaps, harder to see that when agreements are made prior to the divorce process, the parents will still make better decisions than judges. But the state *is* generally willing to let parents make parenting decisions without interference when the parents are not divorcing because it is assumed that they will make good decisions.¹²⁴ Parents alone know the unique needs and desires of their child and their own abilities and interests.¹²⁵ The state, in contrast, would function poorly as a parent.

Traditionally, judges refused to enforce parental agreements because these same knowledgeable parents could not be trusted to make good decisions at divorce. At divorce, parents would be more inclined to act selfishly and antagonistically, leading them to prioritize their own needs over those of their children.¹²⁶ The courts expected divorcing parents to make decisions based on their desire to hurt the other parent rather than to do what was best for their child.¹²⁷ For example, in the only custody case to reach the Supreme Court, the Court stated, “Unfortunately, experience has shown that the question of custody, so vital to a child’s happiness and well-being, frequently cannot be left to the

¹²² *Stills v. Johnson*, 533 S.E.2d 695, 703 (Ga. 2000).

¹²³ *See, e.g., Neu v. Neu*, 756 N.Y.S.2d 598, 599 (N.Y. App. Div. 2003) (“[W]itnesses testifying at the hearing unanimously agreed that both the child’s performance in school and his ability to cope with the frustrations caused by the parents’ separation had improved since the parties agreed on a new custody arrangement approximately five months before the mother filed her petition [to modify custody].”).

¹²⁴ *Spitko*, *supra* note 1, at 1198 (citing Stephen G. Gilles, *On Educating Children: A Paternalist Manifesto*, 63 U. CHI. L. REV. 937, 953–55 (1996)).

¹²⁵ *Id.* at 1199.

¹²⁶ *Id.* at 1201.

¹²⁷ *Id.* at 1202.

discretion of parents.”¹²⁸ When parents are divorcing, judges fear that children will be harmed by their parents’ decisions. Thus, traditionally, judges justified judicial oversight of custody decisions during divorce because the parents were expected to act out of their own self-interest and their desire to hurt the other parent rather than from concern about the best interest of their child.

Today, legislatures recognize that during divorce parents can put aside their differences and work together to determine what will work best for their children. Indeed, states expect divorcing parents to determine jointly the day-to-day arrangements for raising their children after divorce, such as attending to the child’s educational needs.¹²⁹ In this country, parenting plans¹³⁰ are the norm in

¹²⁸ Ford v. Ford, 371 U.S. 187, 193 (1962).

¹²⁹ See, e.g., ALA. CODE § 30-3-153 (2003) (“In order to implement joint custody, the court shall require the parents to submit, as part of their agreement, provisions covering matters relevant to the care and custody of the child”); ARIZ. REV. STAT. §§ 25-403(F), (I) (2001) (before awarding joint custody, the parents must submit a proposed parenting plan that addresses, among other things, a schedule for the physical residence of the child); COLO. REV. STAT. § 14-10-124(7) (2002) (“both parties may submit a parenting plan . . . that shall address both parenting time and the allocation of decision-making responsibilities.”); 750 ILL. COMP. STAT. 750/5-602.1(b) (1999) (“In [joint] custody cases, the court shall initially request the parents to produce a Joint Parenting Agreement”); MASS. GEN. LAWS ch. 208, § 31 (1994) (“if the issue of custody is contested and either party seeks shared legal or physical custody, the parties, jointly or individually, shall submit to the court at the trial a shared custody implementation plan setting forth the details of shared custody”); MO. REV. STAT. § 452.375 (9) (2003) (“Any judgment providing for custody shall include a specific written parenting plan [enforcement of which] shall be in the court’s discretion and shall be in the best interest of the child.”); MONT. CODE ANN. § 40-4-234(1) (1999) (requiring parents to submit a parenting plan for every divorce proceeding involving children); NEB. REV. STAT. § 43-2917 (1999) (“When the parenting plan is agreed to by both parties . . . [t]he court may, after a hearing and based on the best interests of the minor child, approve . . . or reject the plan”); NEV. REV. STAT. 125.520 (1) (1998) (“The court may, when appropriate, require the parents to submit to the court a plan for carrying out the court’s order concerning custody.”); N.M. STAT. ANN. § 40-4-9.1(F) (Michie 2003) (“When joint custody is awarded, the court shall approve a parenting plan for the implementation of the prospective custody arrangement prior to the award of joint custody.”); OHIO REV. CODE ANN. § 3109.04(G) (Anderson 2000 & Supp. 2003) (requiring parents to file “a plan for the exercise of shared parenting” if requesting joint custody); OKLA. STAT. tit. 43, § 109(C) (2003) (“If either or both parents have requested joint custody, said parents shall file with the court their plans for the exercise of joint care, custody, and control of their child”); 23 PA. CONS. STAT. § 5306 (2003) (“The court, in its discretion, may require the parents to submit to the court a plan for the implementation of any custody order made under this subchapter.”); WASH. REV. CODE § 26.09.181(1) (1997) (“each party shall file and serve a proposed permanent parenting plan”).

¹³⁰ Parenting plans are plans developed during divorce. Some states allow parents to address custody in such plans. See, e.g., W. VA. CODE ANN. § 48-1-235.4 (West 2003). Other states require parents to include only “those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child, [such as] . . . attending to adequate education for the child, . . . [and] ensuring the interactions

custody litigation rather than the exception. Courts expect parents to decide together what their children need. This parenting plan is then incorporated into the divorce decree.¹³¹ Thus, judicial deference to parental decisions, far from radical, is actually the norm in existing law because parents, rather than judges, know what is best for their children.

Also, given the assumption that parents will act selfishly and antagonistically during divorce, judicial reluctance to enforce agreements made *prior* to divorce makes little sense. These agreements are made before the parents enter into the acrimony of divorce. Rather than acting out of self-interest, the parents are acting together to formulate a future plan for their children¹³² and themselves that seems appropriate to them at that time. Parents' interests are generally aligned with those of their children prior to divorce.¹³³ Arguably, judicial hostility toward custody agreements should actually decrease when these agreements are made before divorce.

b. *The Parental Deference Standard Will Improve the Custody Process*

The parental deference standard will not only lead to better decisions, but also improve the child custody process. If courts were required to defer to custody agreements absent harm to the child, the custody process would improve dramatically. Child custody litigation itself is harmful to all involved. "[H]earings do not enhance justice, particularly since custody fights are highly destructive to the emotional health of children."¹³⁴ "[A] domestic relations proceeding in and of itself can constitute state intervention that is so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated . . . and constitutional protection may be required."¹³⁵ Whatever standard is used for custody agreements, litigation must be curtailed. Of all the parental agreement standards,

and interrelationship of the child with the child's parents and siblings . . ." MONT. CODE ANN. § 40-4-234(1) (1999).

¹³¹ Compare WASH. REV. CODE § 26.09.004(2) (1997) ("[The] [p]ermanent parenting plan . . . is incorporated in any final decree . . ."); MONT. CODE ANN. § 40-4-234(1) (1999); with NEB. REV. STAT. § 43-2903(3) (2003) ("[The] [p]arenting plan . . . may be incorporated into any final decree . . .").

¹³² Even when parents make these agreements before they have children, parents know themselves and their partners better than judges do.

¹³³ Scott & Scott, *supra* note 21, at 1323.

¹³⁴ Garska v. McCoy, 278 S.E.2d 357, 361 (1981).

¹³⁵ Troxel v. Granville, 530 U.S. 57, 101 (2000) (Kennedy, J., dissenting).

the parental deference standard most significantly reduces litigation while simultaneously protecting children.¹³⁶

As discussed earlier, under either the best interest standard or the presumption standard, judges retain discretion to reject the parents' agreements.¹³⁷ Thus, certainty is absent and litigation is likely. Under the parental deference standard, very few parental agreements would need to be litigated. Only those rare instances when a parent could demonstrate that the custody agreement would harm the child,¹³⁸ such as child or spousal abuse, and those even rarer cases when one parent could show that the other was unfit. Certainty would be almost assured. Litigation would decrease substantially because the parties could anticipate the result. Fewer appeals would be taken because fewer cases would be heard at the trial level. Because fewer cases would be heard, acrimony would generally decrease.¹³⁹ Whenever the amount of custody litigation is lessened, children benefit.

In addition, the appellate process is so lengthy that often a "wrong" decision becomes "right." When a trial court awards custody to the "wrong" parent under the best interests standard, the "right" parent appeals. The appellate court then concludes that the trial court erred. The case is remanded to the trial court to begin the process anew. Yet despite making a bad decision initially, the trial court will maintain custody with the "wrong" parent because the child has been living with the parent through the trial and appellate process.¹⁴⁰ Changing custody, even

¹³⁶ Compare Oregon's strict standard for *joint custody*. Judges "may not overrule [joint custody] agreement[s] by ordering sole custody to one parent." OR. REV. STAT. § 107.169(4) (2001). According to the statutory language, there is no harm override, thus no protection to children at all.

¹³⁷ See discussion *infra* Parts III (A) & (B).

¹³⁸ An example of a case in which enforcing the parents' agreement would be harmful to the child is *Santoro v. Santoro*, 638 N.Y.S.2d 478 (N.Y. App. Div. 1996). In this case, the parents agreed that the mother would have custody of the daughter and the father would have custody of the son. The father petitioned to modify custody when the mother "engaged in a persistent effort to prevent [the daughter] from seeing and being with the father and her brother. For almost six months the wife permitted no visitation whatsoever . . . the evidence indicates that [the daughter] and her brother had a close sibling relationship and that the [agreed upon arrangement was] traumatic and harmful to [the daughter]." *Id.* at 480.

¹³⁹ However, those cases that did make it to litigation would likely be very acrimonious, because the stigma of being harmful to one's child would be a difficult label for any parent to bear.

¹⁴⁰ See, e.g., *Moorehead v. Moorehead*, 602 N.Y.S.2d 403 (N.Y. App. Div. 1993), *appeal dismissed*, 632 N.E.2d 456 (N.Y. 1994). In this case, the father refused to pay child support as ordered and regularly canceled visitation. *Id.* at 406 (Miller, J., dissenting). At her financial and emotional "wits' end," the mother took the children to the father's house and demanded that he take some responsibility for the children. *Id.* He refused to accept the children unless she signed an agreement giving the father custody; she did. *Id.* The following day, the father refused to return the children. Although the mother indicated that she had no intention of giving up

when the other parent should have had custody initially, is not in the child's best interest once years have gone by and a bond has developed between the child and the "wrong" parent.¹⁴¹

Adopting the parental deference standard will limit the number of appeals. But this phenomenon demonstrates another point: namely, that a decision that is not in the child's best interest at the time it is made, may later become a decision in the child's best interest. In other words, there are no perfect decisions, just decisions that may be better at a particular time. A standard that seeks perfect decision-making at the expense of a tolerable process harms children.

Additionally, enforcing the parents' agreement would benefit parents. When parents avoid the courtroom they minimize the transaction costs involved in adjudication.¹⁴² They avoid the risk and uncertainty of litigation.¹⁴³ They also have incentive to negotiate agreements that better reflect their individual preferences,¹⁴⁴ because they can expect their agreements to be honored. Parents, not judges, would be deciding the fate of their children in almost every case. Because the court would be enforcing an agreement the parties developed themselves, parents would be more likely to stay involved with their children after

custody and had only signed the agreement under duress, the appellate court affirmed the lower court's decision to change custody from the mother to the father because the children were with the father during the 2 ½ year appellate process. "If the 1991 de facto transfer of custody had been accomplished improperly, by kidnapping or 'self-help', for example, then there might be valid social reasons for discounting the importance which would otherwise ascribe to the maintenance of stability in the child's life." *Id.* at 405. *Cf.* *Hefer v. Hefer*, 667 N.E.2d 1094, 1098 (Ill. Ct. App. 1996) ("Where there has been a lengthy period of temporary custody, the case may be more like a petition to modify custody than like an initial award of custody. . . . The parent who wishes to contest custody should be required to do so at the earliest possible time."); *Johns v. Johns*, 549 N.Y.S.2d 200, 202 (N.Y. App. Div. 1989) ("[t]he previous caretaking arrangement, whether the product of litigation or mutual consent, is to be accorded priority" in a best interest analysis); *Hansen v. Hansen*, 736 P.2d 1055, 1057 (Utah Ct. App. 1987) (considering where and with whom the child is living during the pendency of the divorce is relevant to a custody determination).

¹⁴¹ See e.g., *Sorentino v. Family and Children's Soc'y. of Elizabeth*, 367 A.2d 1168, 1171 (N.J. 1976) (holding that where state wrongfully refused to return child to fit parents, parents would have burden of proving that moving child from foster placement would not cause serious psychological harm to the child), *aff'd after remand*, 378 A.2d 18 (N.J. 1977) (affirming trial court's award of child to foster parents after remand); see also *Pennsylvania ex. rel. Bankert v. Children's Serv.*, 307 A.2d 411, 414 (Pa. 1973). "Of extreme significance [in the best interests of the child] is the fact that Charlene has been in the care and custody of [the foster parents] throughout her development from an infant of three weeks to a child of nine years. After such a period of time . . ." *Id.* "[The] bonds of affection have become so strong that to sunder them suddenly may result not only in the child's unhappiness, but also in its [sic] physical injury . . ." *Id.*

¹⁴² DIVIDING THE CHILD, *supra* note 4, at 55.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

divorce.¹⁴⁵ No longer would one parent feel wrongly excluded from his or her children's lives. Likely, compliance with visitation and child support orders would increase as well.¹⁴⁶

Finally, such a standard is workable. Divorcing parents can decide the custody of their children without acrimony.¹⁴⁷ In fact, divorcing parents should be deciding their children's custody. In a study of divorcing parents in California, researchers found that "nearly three-fourths of the families in our sample experienced little, if any, conflict over the custody and visitation terms."¹⁴⁸ For those parents who argued over custody, most were able to resolve their disagreements through mediation or court ordered-evaluation.¹⁴⁹ Only a handful, less than 2%, required formal adjudication.¹⁵⁰ Thus, parents can and do make good custody decisions even during discord.¹⁵¹ And when they cannot make the decision alone, mediation and arbitration are viable alternatives to help the parents decide. A judge should be the last resort.

¹⁴⁵ Fathers who have little contact with children after divorce have a much lower child support compliance rate than fathers who have regular overnight visits with their children. DIVIDING THE CHILD, *supra* note 4, at 252–53.

¹⁴⁶ According to a study of 1,100 divorcing families in California, 15 to 30% of the families made post-divorce modifications to the divorce decree. Eighty percent of these modifications were negotiated and adopted informally by the parents, rather than through the legal system. The child support compliance rate for re-negotiated agreements was 76%, compared to 71% for an overall average. DIVIDING THE CHILD, *supra* note 4, at 256. "The fact that some parents increased the amount of child support paid as family circumstances changed, while others decreased the amount, indicates that some proportion of divorced couples regard their agreement as a flexible one." *Id.* at 264.

¹⁴⁷ In 80% of the cases studied, the parents' request for custody did not conflict at the time the divorce was filed. Of these 705 cases, the judge awarded custody as requested in the petitions in 571 cases. In 134 of these cases, however, the decree provided for some other custodial arrangement. But the paperwork filed with the court in these cases did not show any parental conflict. Thus, the parents negotiated a different agreement during the divorce process. Typically, a divorce decree is issued more than a year after parties file for divorce. It is possible that family circumstances changed in some of these cases and the parents took these changes into consideration. DIVIDING THE CHILD, *supra* note 4, at 103.

¹⁴⁸ Robert H. Mnookin & Eleanor Maccoby, *Facing the Dilemmas of Child Custody*, 10 VA. J. SOC. POL'Y & L. 54, 60 (2002).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* Only a total of 4% even went to trial at all. *See also* DIVIDING THE CHILD, *supra* note 4, at 137 (citing the statistical data for this study).

¹⁵¹ ALI PRINCIPLES, *supra* note 18, § 2.06 cmt. a (supporting its adoption of the parental deference standard by claiming that agreements made during divorce are likely to be in children's best interest).

c. The Parental Deference Standard Furthers Parents' Fundamental Right to Make Parenting Decisions

A standard that fails to allow fit parents the right to make decisions regarding the custody of their children raises constitutional concerns. When parents are not divorcing, the state has shown great reluctance to intrude on the autonomy of the parent-child relationship for two reasons: first, state intervention is rarely productive, and second, the Supreme Court has recognized that parents have a fundamental right to raise their children without state involvement.¹⁵²

The state's principal goal in regulating the parent-child relationship is to ensure that parents will raise physically and emotionally healthy adults capable of becoming productive members of society.¹⁵³ So long as a parent is adequately caring for a child, there should be no reason for a state to intrude into that parent's child-rearing decisions, regardless of whether the parent is married. The "natural bonds of affection lead parents to act in the best interests of their children."¹⁵⁴

The Supreme Court has not specifically addressed the issue of whether parental custody agreements are constitutionally protected.¹⁵⁵ But the Supreme Court has recognized a constitutional right grounded in the Due Process Clause of the Fourteenth Amendment to raise one's children free from state interference.¹⁵⁶ While the right clearly exists, the scope of that right and the standard for reviewing state interference with that right are far from clear.

In the early 1920s, the Supreme Court first identified this right in *Meyer v. Nebraska*.¹⁵⁷ In *Meyer*, the Court struck down a state statute that criminalized teaching in any language other than English.¹⁵⁸ The Court held that the statute

¹⁵² Spitko, *supra* note 1, at 1155.

¹⁵³ *Id.* at 1179 (citing Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2405-19 (1995) (discussing the societal goals at stake in regulating the parent-child relationship)).

¹⁵⁴ *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (holding that the presumption that parents act in the best interests of their child should apply when parents commit their children to a state mental hospital).

¹⁵⁵ Indeed, the Court has not even addressed the issue of the proper standard for custody litigation. *But c.f.* *Ford v. Ford*, 371 U.S. 187, 193-94 (1962) (holding that the Federal Full Faith and Credit Clause does not prohibit South Carolina from reviewing a Virginia custody order based on the parties' agreement because Virginia did not treat custody agreements as contracts).

¹⁵⁶ See generally Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 980-92 (1988) (concluding that whether parental autonomy is a fundamental right is unclear from court precedent).

¹⁵⁷ 262 U.S. 390 (1923).

¹⁵⁸ *Id.* at 400.

violated the parents' constitutional right to educate their children.¹⁵⁹ The Court determined that the Due Process Clause protected a parent's fundamental right to raise a child without unnecessary state interference. "[T]hose who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."¹⁶⁰

The first case to uphold state interference with this right was *Prince v. Massachusetts*.¹⁶¹ In that case, a mother claimed that a child labor law violated her right to free exercise of religion and to parental autonomy.¹⁶² Ms. Prince was convicted of violating the law after she repeatedly furnished religious magazines to her child, who then sold them on the streets.¹⁶³ The Court upheld the conviction. *Prince* was subsequently credited with developing the harm standard: the state may interfere with parental autonomy whenever "harm to the physical or mental health of the child or to the public safety, peace, order or welfare has been demonstrated or may be properly inferred."¹⁶⁴

During the next fifty years, the Supreme Court further delineated this right. In *Moore v. City of East Cleveland*,¹⁶⁵ the Court "acknowledged a 'private realm of family life.'" ¹⁶⁶ When the State intrudes on this right, the Court "must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."¹⁶⁷ And in *Wisconsin v. Yoder*, the Court stated, the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."¹⁶⁸ While these cases identified this right, they did not clearly define its parameters.

¹⁵⁹ *Id.* at 401.

¹⁶⁰ *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (invalidating, under the due process clause, a state statute requiring parents to send their children to public school).

¹⁶¹ 321 U.S. 158 (1944).

¹⁶² *Id.* at 164.

¹⁶³ *Id.* at 159–661.

¹⁶⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972). In *Yoder*, the Court invalidated a state statute that required parents to send their children to public or private school until age sixteen. The parents in *Yoder* were Amish and refused to send their children to school for religious reasons. The Court concluded that "more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Id.* at 233. Unlike parental agreements, the statute at issue in this case included a free exercise claim.

¹⁶⁵ 431 U.S. 494 (1977). In *Moore*, the Court invalidated a state zoning statute that limited the occupancy of a single family home to members of a single family. *Id.* at 506.

¹⁶⁶ *Id.* at 499 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

¹⁶⁷ *Id.* (citing *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting)).

¹⁶⁸ *Yoder*, 406 U.S. at 232; see also *Hodgson v. Minnesota*, 497 U.S. 417, 450 (1990) (invalidating a proposed abortion statute that required both parents to be notified of a child's decision to have an abortion because "the requirement that *both* parents be notified, whether or

In 1982, the Court decided a parental termination case from New York.¹⁶⁹ A New York statute allowed the state to terminate parental rights upon a showing that the child was “‘permanently neglected.’”¹⁷⁰ Under New York law, the state needed only to meet its burden by a “‘fair preponderance of the evidence.’”¹⁷¹ The appellate court upheld a termination under this statute.¹⁷² New York’s highest court dismissed the parents’ appeal.¹⁷³ The United States Supreme Court reversed. It held that “the Due Process Clause of the Fourteenth Amendment demands . . . that the State support its allegations by *at least* clear and convincing evidence.”¹⁷⁴

According to the Court, a higher standard is required when the individual interest at stake is more substantial than mere loss of money, such as the loss of one’s child.¹⁷⁵ The Court also said that the clear and convincing evidence standard would further the state’s two competing interests—“a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of court proceedings”—while simultaneously protecting the parents’ interest in preserving the familial bonds.¹⁷⁶

The most recent case to be decided in this area, *Troxel v. Granville*,¹⁷⁷ offers the most insight into this constitutional doctrine. In *Troxel*, the Court invalidated a Washington statute that allowed any person to petition for visitation with any child at any time so long as it was in the child’s best interest.¹⁷⁸ This statute gave trial courts the ability to order visitation with anyone, over the objection of the

not both wish to be notified or have assumed responsibility for the upbringing of the child, does not reasonably further any legitimate state interest.”); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (holding that when a state terminates parental rights, due process requires that the state support its allegations by at least clear and convincing evidence); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (holding that the Due Process Clause prohibits presumptions that parents are unfit and requires a hearing before children can be taken away). *But cf.* *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (holding that an unwed, but fit father’s fundamental right was not violated when the state allowed the mother’s husband to adopt a child over the father’s objection).

¹⁶⁹ *Santosky v. Kramer*, 455 U.S. 745 (1982).

¹⁷⁰ *Id.* at 747 (citing N.Y. SOC. SERV. LAW §§ 384-b4(d), 7(a) (McKinney Supp. 1981–82)).

¹⁷¹ *Id.* (citing N.Y. FAM. CT. ACT § 622 (McKinney 1975 & Supp. 1981–82)).

¹⁷² *Id.* at 752.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 747–48 (emphasis added).

¹⁷⁵ *Santosky*, 455 U.S. at 756.

¹⁷⁶ *Id.* at 766.

¹⁷⁷ 530 U.S. 57 (2000).

¹⁷⁸ *Id.* at 75.

parent, when the court determined that visitation would be in the child's best interest.¹⁷⁹

In *Troxel*, the paternal grandparents petitioned the court after their son died and the mother decided to decrease their visitation.¹⁸⁰ Finding the visitation to be in the children's best interest, the trial court awarded the visitation over the mother's objections.¹⁸¹ The Washington supreme court reversed, reasoning that the Federal Constitution permitted the state to intervene only to prevent a present or future harm to the child.¹⁸² The grandparents appealed to the United States Supreme Court.

The Supreme Court was divided and issued a plurality opinion with numerous concurrences and dissents. Even so, each justice recognized that parents have a fundamental liberty interest in the care, custody, and control of their children.¹⁸³ With the exception of Justice Scalia,¹⁸⁴ the members of the Court believe that parental autonomy "is perhaps the oldest of the fundamental liberty interests" and entitled to some heightened constitutional protection.¹⁸⁵

The appropriate level of protection is less clear. The plurality opinion refused to decide whether harm to the child is needed to justify state interference with parental decision-making.¹⁸⁶ But the Court rejected the statute's standard: that the

¹⁷⁹ *Id.* at 61 (citing WASH. REV. CODE § 26.10.160(3) (West 1994)).

¹⁸⁰ 530 U.S. at 61.

¹⁸¹ *Id.* at 61–62. The trial court opinion shows the problems with the best interest standard. Because the trial judge fondly remembered his summer vacations with his grandparents, he found the visitation to be in the child's best interest. *Id.* at 72. "I look back on some personal experiences . . ." *Id.* "We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out." *Id.*

¹⁸² *Id.* at 63 (citing *In re Custody of Smith*, 969 P.2d 21, 28–30 (Wash. 1998)).

¹⁸³ The plurality, Justices O'Connor, Rhenquist, Ginsburg, and Breyer, agreed that there is a "fundamental right to make decisions concerning the care, custody, and control of [children]." *Troxel*, 530 U.S. at 72. Similarly, Justice Souter stated, "We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 77 (Souter, J., dissenting). And, according to Justice Kennedy, "the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child." *Id.* at 95 (Kennedy, J., dissenting). Justice Scalia recognized that the current Court precedent provides for this fundamental right but does not agree with these decisions. *Id.* at 92–93 (Scalia, J., dissenting).

¹⁸⁴ *Id.* at 91–93 (Scalia, J., dissenting).

¹⁸⁵ *Id.* at 65.

¹⁸⁶ *Id.* at 73 ("[W]e do not consider the primary constitutional question passed on by the Washington Supreme Court—whether the Due Process Clause requires all nonparental

state could intervene simply when it was in the child's best interest. According to the Court, the best interest standard did not sufficiently protect parental autonomy because it placed the "determination solely in the hands of the judge."¹⁸⁷ The Court noted that under the best interest standard, when a judge simply disagreed with the parent, the judge's view would prevail.¹⁸⁸ For example, *Troxel* "involve[d] nothing more than a simple disagreement between the Washington Superior Court and [the mother] concerning her children's best interests."¹⁸⁹ Thus, the plurality opinion held that the best interest standard is not sufficiently protective of parental autonomy, at least in third party visitation situations.

More importantly, the plurality opinion was very clear that states must defer to fit parental decisions. As long as a parent is fit, the state should have no reason to inject itself into the family to question that parent's childrearing decisions.¹⁹⁰ "[I]f a fit parent's decision . . . becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination."¹⁹¹ In *Troxel*, the trial court failed to give the mother's decision any weight and instead presumed that her decision was not in the best interest of the child.¹⁹² This presumption directly contradicted the traditional presumption that fit parents act in their children's best interest.¹⁹³ Thus, the Court held that the decision was not sufficiently protective of a parent's fundamental right.

Troxel thus stands for two propositions: the best interest standard alone does not sufficiently protect parental autonomy, and fit parental decisions require deference. Because parents have a constitutional right to raise their children and make decisions regarding their care and custody, a state should not be able to override that decision absent a compelling interest.¹⁹⁴ The state has a compelling

visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation.").

¹⁸⁷ *Id.* at 67.

¹⁸⁸ *Troxel*, 530 U.S. at 67.

¹⁸⁹ *Id.* at 72.

¹⁹⁰ *Id.* at 68–69.

¹⁹¹ *Id.* at 70.

¹⁹² *Id.* at 69; accord *Heltzel v. Heltzel*, 638 N.W.2d 123, 136 (Mich. Ct. App. 2001) (holding that requiring mother to prove that changing child's custody from the grandparents to herself would be in child's best interest violated mother's fundamental right to raise her child).

¹⁹³ *Troxel*, 530 U.S. at 69.

¹⁹⁴ *Accord Lamb v. Wenning*, 591 N.E.2d 1031, 1033 (Ind. Ct. App. 1992) ("[U]nder rare circumstances, the divorce court may properly refuse to approve a couple's agreement to joint legal custody where . . . the parents had made child rearing itself a battleground."); *Stills v. Johnson*, 533 S.E.2d 695, 702–03 (Ga. 2000) ("[T]he right to the custody and control of one's child is a fiercely guarded right in our society and in our law. It is a right that should be infringed upon only under the most compelling circumstances.") (citation omitted). The Supreme Court of Georgia held that the state may impose visitation only over a parent's

interest in protecting children from psychological, physical, or emotional harm.¹⁹⁵ Additionally, the state has a compelling interest to protect children from abuse or neglect.¹⁹⁶ But the state does not have a compelling interest in protecting children from the bad decisions of their parents.¹⁹⁷ “The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents”¹⁹⁸

During marriage, states cannot override a parent’s decision even if it is clearly not in a child’s best interest. States expect parents to act in their children’s best interest,¹⁹⁹ but cannot constitutionally intervene in the family whenever bad parenting decisions are made. For example, eating fast food is not in children’s best interest.²⁰⁰ Similarly, watching violent television is not in children’s best interests.²⁰¹ However, the state cannot constitutionally intervene. Only when the level of harm reaches neglect standards is state interference constitutionally allowed. “That some parents ‘may at times be acting against the interests of their children’ . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child’s best interests.”²⁰²

objection when failing to do so would be harmful to the child. *Brooks v. Parkerson*, 454 S.E.2d 769 (Ga. 1995).

¹⁹⁵ *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (“It is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor is ‘compelling’” (citing *New York v. Ferber*, 458 U.S. 747, 756–58 (1982))); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (“[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”).

¹⁹⁶ *Cf. Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (holding that when a state terminates parental rights, due process requires that the state support its allegations by at least clear and convincing evidence).

¹⁹⁷ “Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.” *Parham*, 442 U.S. at 603. *Accord Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y. of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Hodgson v. Minnesota*, 497 U.S. 417 (1990). “The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.” *Parham*, 442 U.S. at 603.

¹⁹⁸ *Stantosky*, 455 U.S. at 753.

¹⁹⁹ *Troxel v. Granville*, 530 U.S. 57, 69 (2000).

²⁰⁰ *See Pelman v. McDonald’s Corp.*, 237 F. Supp. 2d 512, 532 (S.D.N.Y. 2003) (“It is well-known that fast food in general, and McDonalds’ products in particular, contain high levels of cholesterol, fat, salt, and sugar, and that such attributes are bad for one.”).

²⁰¹ *See generally* John P. Murray, *The Impact of Televised Violence*, 22 HOFSTRA L. REV. 809, 822 (1994).

²⁰² *Parham v. J.R.*, 442 U.S. 584, 602–03 (1979) (citations omitted).

Parents have a fundamental right to make parenting decisions during marriage, even bad decisions. Assuming parents are fit, it makes no sense that they would lose the right to make decisions for their children solely because they divorce.²⁰³ Thus, statutes that permit judges to reject parental agreements solely because the agreement is not in the child's best interest implicate the parents' fundamental right. Such statutes allow judges to replace the parents' decision with their own whenever a judge disagrees with the parent, but without a compelling reason.²⁰⁴ Many of these statutes do not even require the judge to explain on the record why the parental agreement was rejected.²⁰⁵ Moreover, these statutes do not require judges to defer to fit parental decisions. Instead, parental agreements are accorded no more weight than the other best interest factors. Thus, states using the best interest standard fail to recognize that fit parents have a fundamental right to make custody decisions, and the state must afford them some deference absent a compelling interest to interfere. As such, these statutes are likely unconstitutional.

Similarly, the parental presumption standard also raises constitutional concerns. Under this standard, judges presume that parental agreements are in the best interest of the child, but must reject agreements that are not.²⁰⁶ Unlike the best interest standard, this standard gives more weight to parental agreements. However, like the best interest standard, the presumption standard requires judges to reject parental agreements whenever the judge determines that the agreement is not in the child's best interest.²⁰⁷ In other words, when the judge disagrees with the parents' decision, the judge can replace the parents' decision with his or her own. Because the standard does not require judges to have a compelling enough interest before they reject the parents' agreement, it is not protective enough of the parents' fundamental right.

In this regard, statutes with a presumption standard are similar to the statute that the Court held unconstitutional in *Troxel*. In *Troxel*, the statute allowed a judge to award visitation over a fit parent's objection so long as it was in a child's best interest.²⁰⁸ Similarly, the presumption standard allows a judge to reject a parental agreement over two fit parents' objections whenever the agreement is not in a child's best interest. In *Troxel*, the Supreme Court held that this standard was

²⁰³ See Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27, 29 (1985) (arguing that parents have a constitutional right to joint custody absent a showing of harm to child).

²⁰⁴ *Lamb v. Wenning*, 591 N.E.2d 1031, 1033 (Ind. Ct. App. 1992) ("The judiciary must be extremely reluctant to substitute its judgment for that of parents in the area of raising children.").

²⁰⁵ See, e.g., FLA. STAT. ANN. § 61.183(2) (West 1997).

²⁰⁶ See, e.g., GA. CODE ANN. § 19-9-5(b) (1999).

²⁰⁷ *Id.*

²⁰⁸ *Troxel v. Granville*, 530 U.S. 57, 60 (2000).

not sufficiently protective of the parents' fundamental right.²⁰⁹ Thus, both the best interest standard and the presumption standard fail to respect fit parents' decisions, fail to protect parental autonomy, and would likely not survive constitutional challenge.

Only the parental deference standard sufficiently protects parental autonomy. This standard requires judges to award custody in accordance with the parental agreement unless doing so would cause harm to the child. Harm might be defined as follows: abusing or neglecting a child; being substantially unable to perform normal parenting functions; having a long-term emotional or physical impairment that interferes with the parent's ability to perform parenting functions; acting in any way that would damage the child's psychological development; withholding access to the child from the other parent or sibling(s) for a protracted period without good cause; and abusing one's spouse.²¹⁰ The parental deference standard respects the decisions of fit parents while simultaneously protecting children from harm. It prevents judges from substituting their decisions for the parents', while protecting children from harmful custody arrangements. Because it protects the state's *parens patriae* role, respects parental autonomy, and reduces the costs and burdens of custody proceedings, this standard would raise few, if any, constitutional concerns.

Although only one jurisdiction has adopted this standard, the ALI recommended the parental deference standard for parental agreements made during divorce.²¹¹ The ALI concluded that a court must enforce a separation agreement unless voluntary consent by one of the parties was lacking or the agreement would be harmful to the child.²¹² In adopting this standard for separation agreements, the ALI did not cite constitutional concerns. Rather, the ALI concluded that agreements made during divorce are likely to be in children's best interests, especially compared to a plan ordered by the court over the parents' objections.²¹³

However, the ALI mistakenly endorsed another standard for prenuptial and postnuptial parental agreements. The ALI rejected the parental deference standard for agreements made prior to divorce and recommended the best interest

²⁰⁹ *Id.* at 67.

²¹⁰ See WASH. REV. CODE ANN. § 26.09.191(3) (West 1997) (allowing court to limit provisions in a parenting plan if any of the identified factors exist).

²¹¹ The goal of the ALI was to "achieve greater determinacy in family law while preserving the autonomy of partners and parents to make their own decisions about the terms under which relationships, entered into as if permanent, are dissolved." Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL'Y & L. 5, 6 (2002) (The Family Dissolution project began in 1989 and was completed in 2002.).

²¹² ALI PRINCIPLES, *supra* note 18, § 2.06.

²¹³ *Id.* § 2.06 cmt. a.

standard.²¹⁴ The ALI justified its choice of the less differential standard on the fact that “adults on the brink of marriage can be expected to be limited in their ability to evaluate their child’s needs, judge the other parent’s ability to meet the child’s needs or gauge their own interests.”²¹⁵ It concluded that judges should look at these agreements on a case-by-case basis.²¹⁶ Agreements made before divorce are relevant to what is in the child’s best interest, but should not control.²¹⁷ Again, the ALI did not consider the constitutional concerns. Rather, the ALI, without citing empirical research or other support, concluded that parents are less likely to have thoroughly explored the impact of their custody choices when they make agreements prior to the divorce.²¹⁸

As discussed above, this approach ignores the fact that due process demands that parents, not judges, make the decision about their children’s custody when such decisions are not harmful. Parents can, and do, make good decisions regarding their children, whether or not they are divorcing. Indeed, parents are presumed to act in their children’s best interests.²¹⁹ The best interest standard fails to recognize this fact; thus, it fails to defer enough to prenuptial and postnuptial parental agreements.

Additionally, prenuptial and postnuptial custody agreements should be binding on parents at the time of their divorce because these parents exercised their fundamental right at one time and now have simply changed their minds. Through an adoption process, parents can relinquish their fundamental right to raise their children through private ordering.²²⁰ Similarly, when a parent voluntarily enters into a custody agreement with a spouse, that parent exercises his or her fundamental right to decide custody when the contract is entered. That parent then waives any right to assert his or her fundamental right a second time. Instead, parents can, and should, renegotiate these agreements as necessary.²²¹ If the agreement becomes inappropriate, the parent has an obligation to change it.

²¹⁴ *Id.* § 2.08 cmt. i.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* § 2.06 cmt. a.

²¹⁸ *Id.* § 2.08 cmt. i.

²¹⁹ *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

²²⁰ Courts do not routinely inquire into whether the adoption is in the child’s best interest. It is presumed that parents will act in accordance with the best interest of their child, even parents who are unable to raise their child. *See, e.g.*, CAL. FAM. CODE § 8801.3 (West 1994) (allowing parents to sign adoption agreement in the presence of an adoption service provider); *cf. Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (holding that judges must defer to the decisions of pregnant women, at least during the first two trimesters, regarding abortion).

²²¹ Indeed, practioners would be wise to include a provision that indicates that by signing the agreement, the parent waives the right to contest it in court absent parent unfitness or harm to the child.

Absent harm to the child, the parent should not be able to wait for trial to challenge the agreement.

Additionally, when a parent has made an agreement and later refuses to honor that agreement, the state's need to protect the child and have an efficient process should trump the parent's fundamental right. In these situations, parents may be acting out of anger at their spouse rather than out of true concern about the custody arrangement previously agreed to.²²² If the arrangement were harmful to the child, or if the other spouse were unfit, the parent could successfully challenge the agreement.²²³ However, when the parent has merely changed his or her mind, especially if it is due to anger at the other spouse, state interference is not constitutionally justified. Rather, there should be some likelihood that the child will actually be harmed by the custody arrangement before the state imposes a process that will increase litigation and uncertainty.²²⁴

As discussed earlier, deferring to parental agreements regardless of when they were made will lead to better custody decisions and a better custody process.²²⁵ The state has a strong interest in preserving the welfare of the child and an administrative and fiscal interest in reducing the costs and burdens of custody proceedings.²²⁶ Children also have an interest in prompt and non-litigious proceedings. Thus, the state's *parens patriae* and procedural interests, coupled with the child's interest, should be sufficiently important to trump the parents' fundamental right when there is no threatened harm to the child.²²⁷

Currently, a parent's fundamental right to make childrearing decisions is ignored in all but one jurisdiction.²²⁸ Instead, these states have a standard that

²²² See *supra* discussion accompanying note 138.

²²³ See *supra* discussion accompanying note 139.

²²⁴ For example, in West Virginia, custody is prohibited if the parent who would otherwise be allocated responsibility under a parenting plan has abused, neglected, or abandoned the child, sexually assaulted a child, committed domestic violence, interfered with the other parent's access, or made repeated fraudulent reports of child abuse. W. VA. CODE § 48-9-209(a) (2001).

²²⁵ See discussion, *supra* Part III.C.1(a)-(b).

²²⁶ *Stantosky v. Kramer*, 455 U.S. 745, 766 (1982).

²²⁷ If the state's interests in improving the process and ensuring better child custody decision were not sufficiently important to trump the parents' fundamental right, then two different parental agreement standards would be constitutionally required. The appropriate standard would then depend on when the parents made their agreement. For example, the parental deference standard could apply to agreements made during divorce, while the best interest or presumption standard could apply to agreements made before the divorce.

²²⁸ See, e.g., MONT. CODE ANN. § 40-4-227(2)(b) (2003) ("The [Montana] legislature finds . . . that a parent's constitutionally protected interest in the parental control of a child should yield to the best interests of the child when the parent's conduct is contrary to the child-parent relationship."). While this statute appears to protect fit parents' fundamental right, Montana's child custody statutes do not. Montana uses the least protective standard for parental

gives judges the power to make these decisions rather than parents. Deference to parental custody agreements should not be the standard by default, but rather by design.²²⁹

2. Weaknesses of the Parental Deference Standard

Limiting judicial discretion will have many positive effects on the custody process. But it will also have some negative consequences. One consequence is that if courts defer to custody agreements, children may not have input into the determination. Currently, many courts consider and honor the preferences of older children when awarding custody.²³⁰ While the parental deference standard will reduce their input, it is likely that parents will consider their children's preferences, if known, when they contract, whether before or during the divorce. Moreover, asking children to choose between their parents is problematic,²³¹ and can be detrimental to the child and to the child-parent relationship.²³² Thus, whether judges should consider the child's preferences at all is uncertain at best.²³³

Another negative consequence of this standard is that courts will enforce custody arrangements that may not be "best" for children. It is possible that some parents may bargain away custody in return for better property and alimony provisions.²³⁴ Moreover, the less information the parents have when making their

agreements, the best interest standard: "[T]he terms of the separation agreement, except those providing for the support, parenting, and parental contact with children, are binding upon the court . . ." MONT. CODE ANN. § 40-4-201(2) (2003).

²²⁹ *Troxel v. Granville*, 530 U.S. 57, 79 (2000) (Souter, J., concurring) ("To say the least . . . parental choice in such matters is not merely a default rule in the absence of either governmental choice or the government's designation of an official with the power to choose for whatever reason and in whatever circumstances.").

²³⁰ See, e.g., DEL. CODE ANN. tit 13, § 722(a)(2) (1999); D.C. CODE ANN. § 16-914(a)(3)(A) (2001); HAW. REV. STAT. § 571-46(3) (Supp. 2001).

²³¹ Becker, *supra* note 87, at 188.

²³² Even if they wanted to choose, children rarely choose to live with a parent because of what is best for them. Rather, they may choose the parent who is more lenient, the parent whom they do not blame for the divorce, the parent who is of the same or opposite sex, or the parent who they simply like better at that time. *Id.* at 188-89.

²³³ *Id.* at 189-90.

²³⁴ When judges have discretion to determine child custody and child support, a parent who desperately wants custody may agree to less child support than needed to ensure custody will not be litigated. When child support cannot be bargained, it will have no effect on child custody negotiation. States that have removed child support from litigation by establishing support schedules have removed this impediment to fair bargaining. See Mnookin and Maccoby, *supra* note 148, at 62, (concluding that support schedules and community property laws made it easier for women to resist any attempts to link money and custody). But see DIVIDING THE CHILD, *supra* note 4, at 156, in which the authors cite the results from a study of

custody agreement, the less appropriate the custody arrangement is likely to be. Because the parental deference standard does not distinguish between agreements made before and during divorce, it might lead to “wrong” results. But, the parental deference standard precludes placing a child in a custody arrangement that would be harmful. Moreover, sometimes a custody arrangement that seems “wrong” at one time later becomes “right.”²³⁵

But even accepting that some decisions may be wrong, the number of wrong decisions should not be high. Parents can modify the agreement at any time if, for example, the childcare provision/distribution of workload changes during the course of the marriage. Even during the divorce process itself, the parents would be free to determine a new custody arrangement so long as they could agree to it. Only if they could not agree, would their pre-divorce agreement control. Further, as parents become more familiar with this process and thus understand the importance of updating agreements, even fewer bad agreements will remain.

Perfection cannot exist in this area.²³⁶ The judicial system must always balance perfect decision making with efficient judicial processes.²³⁷ The more perfect the result must be, the less efficient and more subjective the process becomes. Under the best interest standard, the focus has been on achieving a perfect result at the expense of having an efficient, certain process. It is time to refocus this priority.

1,100 divorcing families in California. There was “no statistically persuasive evidence that those mothers who experienced more legal conflict had to give up support to win the custody they wanted.” *Id.*

²³⁵ See *supra* discussion accompanying notes 140–41.

²³⁶ “The best that can be hoped for is a system that works better than others in most cases, and which doesn’t do too much damage in the instances where it doesn’t [work].” Mercer, *supra* note 88, at 409 (citing Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL’Y REV. 168, 186 (1984)). Justice Neely wrote the landmark decision in *Garska v. McCoy*, 278 S.E.2d 357 (W. Va. 1981), which is credited with developing the primary caretaker presumption.

²³⁷ See *Stantosky v. Kramer*, 455 U.S. 745, 758 (1982) (balancing the parents’ interest in perfect decision making in a parental termination case with the state’s interest in an efficient process).

IV. CONCLUSION

No one is satisfied with the current child-custody laws. Women's rights advocates deride the gender-neutral standards as biased against women,²³⁸ while fathers' rights advocates complain that they are the ones who are discriminated against.²³⁹ Women's and fathers' rights advocates have attempted to solve child-custody bias by suggesting that the legal standard should be changed to limit judges' wide discretion.

Some of the more common goals of family law reform include the following: first, encourage greater equality between mothers and fathers in childrearing; second, promote private ordering and encourage parental cooperation; and third, foster and protect the welfare of children by ensuring their continued involvement with both parents.²⁴⁰ Neither women's nor fathers' rights advocates have articulated a standard that would eliminate gender-bias in the courtroom, encourage parental cooperation, and serve the best interest of children of divorce. Instead, these groups have focused exclusively on only one of these factors: gender-bias in the courtroom. They have thus advocated new legal standards that would solely advance their own gender-based interests. Not surprisingly, neither side agrees with the other's proposed standard.

Even if changing the legal standard (which cannot be done) could effectively legislate equality, gender equality should not be the primary focus of child-custody reform. By focusing attention solely on the gender ramifications of the standard on parents, women's and fathers' rights advocates have lost sight of the other goals of child-custody reform: to encourage parental cooperation and to protect the welfare of children by ensuring their continued involvement with both parents. Rather than arguing about what standard is best for mothers or fathers, the emphasis should be on what standard is best for children and their parents: what standard leads to a more tolerable process for all involved.

"Contemporary divorce law has increasingly recognized the legitimacy of 'private ordering'—the notion that divorcing parents should have broad latitude to negotiate their own financial and custodial arrangements."²⁴¹ Because parents must go through a legal process to get a divorce, they cannot escape the legal

²³⁸ See, e.g., Amy D. Ronner, *Women Who Dance on the Professional Track: Custody and the Red Shoes*, 23 HARV. WOMEN'S L.J. 173, 178 (2000); June R. Carbone, *A Feminist Perspective on Divorce*, 4 THE FUTURE OF CHILDREN: CHILDREN & DIVORCE 183, 192 (1994).

²³⁹ See, e.g., William C. Smith, *Dads Want Their Day*, A.B.A. J., Feb. 2003, at 38, 39; Edward S. Rue, Comment, *Gender Equity and Procrustean Presumptions: A Comment on the Recent Changes in Wisconsin's Law Regarding Child Custody and Placement*, 2001 WIS. L. REV. 1177 (2001); Henry I. Shanoski, *Two Parents for Every Child of Divorce: Sustaining the Shared Parenting Ideal of Maine's Custody Law*, 14 ME. B. J. 86, 87 (1999).

²⁴⁰ DIVIDING THE CHILD, *supra* note 4, at 10.

²⁴¹ *Id.* at 8.

system entirely, but it could certainly play a smaller role.²⁴² A standard that refuses to recognize and reward private ordering is unsound. The laws in most states do just that.

A standard that gives judges wide discretion to decide child custody is less than ideal for children. A standard that allows parents to make these decisions will lead to better decisions being made. There should be no question that parents know themselves and their children better than judges. While a standard that gives judges wide discretion might seem to ensure that all children will end up in good custody arrangements, they will do so under a crippled process. Litigation will continue to be uncertain, lengthy, expensive, antagonistic, and gender-biased. When courts defer more to parents, the process will improve. In addition, certainty will increase, while judicial discretion will decline. Consequently, litigation expenses and acrimony will decrease.

A standard that gives judges wide discretion to decide child custody is less than ideal for parents. Such a standard impacts the parents' fundamental right to decide their children's care and custody. It allows judges to decide what parents will be doing rather than allowing parents to choose. A better standard would minimize judicial discretion, maximize the parents' autonomy, and protect children from harm. A parental deference standard would satisfy all three of these goals.

Whatever standard applies to parental agreements, litigation cannot nor should it disappear completely. It is precisely when parents cannot make decisions for their child that the state should step in to protect the child. The appropriate standard to then be applied is a discussion beyond the scope of this Article and already well covered. But, should the parental deference standard become the norm, more parents can be expected to enter into these agreements, just as prenuptial agreements became more commonplace once their enforcement became assured.

Family laws have changed so much during the last fifty years that accepting custody agreements, reached before and during divorce, can happen. Initially, states refused to enforce any prenuptial or postnuptial agreement. Now, states not only enforce them, some states treat these agreements as contracts.²⁴³ Initially, states were hostile to joint custody. Now, judges not only tolerate it, some have begun to prefer it.²⁴⁴ Thus, as society's views about marriage and parenting have changed, family laws have also had to change. It is time to change the perception that judges, rather than parents, should be making custody decisions. Our laws should not only reward parents who take on this role, but expect it of them.

²⁴² *Id.* at 56.

²⁴³ *Gant v. Gant*, 329 S.E.2d 106, 112 (W. Va. 1985).

²⁴⁴ Becker, *supra* note 87, at 169; see *DIVIDING THE CHILD*, *supra* note 4, at 107 ("This overwhelming tendency for California divorce decrees to provide for joint legal custody is of recent origin.").

