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William B. Reingold Jr.

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ABSTRACT. When parents are divorced or separated, a parenting plan serves as a legal instrument to govern the means by which they raise their children. Most parents are able to compromise and reach an agreed-upon parenting plan without resorting to a trial or court intervention. These agreed-upon parenting plans are, in a manner of speaking, contracts that these parents must abide by. But too often parenting plans are not treated or considered in the same way we perceive ordinary contracts. They should be. This essay examines the interplay between courts reviewing agreed-upon plans, the best interest standard, and basic contract interpretation.

AUTHOR. William B. Reingold, Jr., is a practicing family law attorney at Lasher Holzapfel Sperry & Ebberson, PLLC in Seattle, Washington. The opinions expressed in this essay are solely those of the author. Mr. Reingold would like to thank the staff at the *University of New Hampshire Law Review* for their exceptional editorial work.

INTRODUCTION

> "In these child custody cases, which always give our courts so much concern because they are of great magnitude and possess possibilities of grave consequences, the law places the solemn responsibility upon a trained judiciary, not only to exercise general control over the minor, but to weigh the evidence and ultimately determine, under all of the facts and circumstances, what is best for the child."[1]

When parents are divorced or separated, a parenting plan serves as a legal instrument to govern the means by which they raise their children.[2] Legislatures prescribing the content of a parenting plan endeavor to maintain the rights, responsibilities, and joys of childrearing, all while advancing the welfare of the children.[3] And although legislatures differ on how to effectuate these aims,[4] every plan is tailored to the case-specific needs of the child.[5] In turn, the level of detail

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1 Jones v. Davis, 314 S.W.2d 328, 330 (Tex. Civ. App. 1958).

2 For clarity, parenting plans are often referred to as "custody orders" or "custody agreements" in statutes and reputable treatises—*see, e.g.*, ARK. CODE ANN. § 9-13-101 (West 2021); MISS. CODE ANN. § 93-5-24 (West 2003); N.C. GEN. STAT. § 50-13.7 (West 2021); 27C C.J.S. Divorce § 1070 (2020)—though they are more or less synonymous in practice, see Elena Lauroba, The Effects of Divorce on Children, 42 INT'L J. LEGAL INFO. 56, 64 (2014) ("A Parenting Plan is an instrument detailing how both parents propose to exercise parental responsibilities and what their commitments are regarding the custody, care and education of the children."). The remainder of this article will predominately refer to parenting plans as agreements or orders relating to child custody, regardless of whether the jurisdiction being discussed is one in which the legislature does not use the term parenting plan.

3 Robin M. Deutsch & Arline S. Rotman, *Parenting Plans*, 26 FAM. ADVOC. 28, 33 (2004) ("The purpose of any proposed parenting plan is to allow the child adequate parenting time with each parent while respecting his or her developmental needs. To the maximum extent possible, parents should consider and try to minimize the additional stresses a child faces in navigating between two separate and often quite different households."); *cf. id.* at 28 ("In further recognition of the importance of both parents after separation, the language of custody is now changing. Parenting plans divide responsibility and define access and parenting time rather than visitation.").

4 *Compare* 75 ILL. COMP. STAT. ANN. 5/602.10(f) (West 2017) (enumerating fifteen terms that must be present in the plan, including "a requirement that a parent changing his or her residence provide at least 60 days prior written notice of the change to any other parent under the parenting plan or allocation judgment, unless such notice is impracticable or unless otherwise ordered by the court"), *and* ARIZ. REV. STAT. ANN. § 25-403.02(c) (2015) (requiring eight specific terms that must be in every plan, including "[a] procedure for periodic review of the plan's terms by the parents"), *with* KAN. STAT. ANN. § 23-3213(b) (West 2008) (prescribing just four required terms, one of which is designated for situations where either parent is a service member), *and* HAW. REV. STAT. ANN. § 571-46.5(c) (West 2005) (foregoing any requirements as to what must be in a plan but noting that "[a] detailed parenting plan may include, but is not limited to, provisions relating to" various subjects, including "[b]reastfeeding, if applicable").

5 *See In re* Marriage of Chandola, 327 P.3d 644, 658 (Wash. 2014) (en banc) (quoting *In re* Parentage of Jannot, 65 P.3d 664, 666 (Wash. 2003) (en banc)) ("Trial courts have broad discretion to create parenting plans tailored to the needs of the individuals involved in a particular dissolution. . . . It also vests appropriate authority in the trial court, which is best situated to 'assign the proper weight to each of the varied factors' relevant to a particular

found from one plan to the next can y widely.[6] They are not akin to longiloquent Apple Terms and Conditions,[7] nor are they designed to cover every conceivable childrearing quandary;[8] rather, the intent is to establish a workable system of rules parents can adhere to as their child grows and matures.[9]

Ideally, then, there is flexibility embedded within every parenting plan that obviates the need for a formal modification proceeding down the road.[10] Protracted

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case.")(citation omitted); Thompson v. Thompson, 887 N.W.2d 52, 58 (Neb. Ct. App. 2016) ("The trial court has discretion to set a reasonable parenting time schedule. The determination of reasonableness is to be made on a case-by-case basis. Parenting time relates to continuing and fostering the normal parental relationship of the noncustodial parent. The best interests of the children are the primary and paramount considerations in determining and modifying visitation rights.")(citations omitted).

6 *See sources cited supra* note 4. For example, one parenting plan may set out a lengthy list of decisions that need to be made jointly—ranging from body piercings to social media use to military enlistment—whereas another may only note one or two significant subjects, such as nonemergency healthcare matters and educational decisions.

7 At a minimum, these plans should establish a residential schedule, an allocation of decision-making authority, and a dispute resolution process *See generally* Elizabeth S. Scott, *Parental Autonomy and Children's Welfare*, 11 WM. & MARY BILL RTS. J. 1071, 1083–84 (2003) (outlining how, over time, policymakers have set out parenting plans promoting post-dissolution structure for the family).

8 *See* Elena B. Langan, *The Elimination of Child "Custody" Litigation: Using Business Branding Techniques to Transform Social Behavior*, 36 PACE L. REV. 375, 402–03 n.155 (2016) (observing that a broad, standalone reference to "education" could be interpreted as "refer[ing] to decisions affecting school selection, while 'school-related matters' relate to decisions required on a daily basis, such as field trip attendance and extra-curricular activities. Trial courts will be required to determine what the 'school-related matters' required to be addressed in the parenting plan actually include"); Jane W. Ellis, *Caught in the Middle: Protecting the Children of High-Conflict Divorce*, 22 N.Y.U. REV. L. & SOC. CHANGE 253, 261 (1996) ("[R]eliance on parenting plans that spell out the details of visitation scheduling may, however, be overly optimistic. In Washington State . . . the law requires all parents to create detailed plans for visitation schedules at the time of divorce. As yet, there are no empirical studies on whether a parenting plan helps contain or diminish post-divorce conflict between parents. All anecdotal evidence to date, however, suggests that the plan requirement has not lessened the number or intensity of post-divorce visitation disputes . . . .").

9 Brian S. Kennedy, Note, *Moving Away from Certainty: Using Mediation to Avoid Unpredictable Outcomes in Relocation Disputes Involving Joint Physical Custody*, 53 B.C. L. REV. 265, 295–96 (2012) (offering various examples of the ways parents may differ with regard to raising their child, and, correctly, suggesting that mediation serves as a strong vehicle to drafting a plan that accommodates these differences).

10 *See In re* Marriage of Taddeo-Smith and Smith, 110 P.3d 1192, 1194 (Wash. Ct. App. 2005); Parsons v. Parsons, 593 S.W.2d 483, 486 (Ark. Ct. App. 1980). There does, of course, need to be a requisite amount of guidance. For an example of a modification to establish more clarity as to a residential schedule, *see* Sanders-Bechtol v. Bechtol, No. 5-08-08, 2009 WL 118084, at *7 (Ohio Ct. App. Jan. 20, 2009).

family law litigation is not good for children,[11] so an emphasis on finality in these cases is universally accepted as sound policy.[12] Yet, achieving finality is easier said than done when children are at the heart of the case, which naturally entails crafting a parenting plan.[13] This is an inherently difficult undertaking for most parents, one that even courts struggle to resolve.[14] For some parents there is too great a divide between them, too little common ground, and they have to resort to trial for the establishment of a parenting plan.[15] Fortunately, despite the images we all conjure up of drawn-out, demoralizingly fractious family law donnybrooks,[16] parents rarely disagree on wanting what is best for their child.[17] Most relinquish their entrenched

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[11] *See* Troxel v. Granville, 530 U.S. 57, 101 (2000) (Kennedy, J., dissenting) ("Our system must confront more often the reality that litigation can itself be so disruptive that constitutional protection may be required; and I do not discount the possibility that in some instances the best interests of the child standard may provide insufficient protection to the parent-child relationship."); *In re* Parentage of Jannot, 65P.3d 664, 667 (Wash. 2003) (en banc) ("[E]xtended litigation can be harmful to children.").

[12] *See* Wade v. Hirschman, 903 So.2d 928, 932 (Fla. 2005); People v. Coyle, 654 P.2d 815, 819 (Colo. 1982) (en banc); *In re* J.W., 267 Cal. Rptr. 3d 554, 563 (Cal. Ct. App. 2020); *In re* Marriage of Valter, 548 N.E.2d 29, 31 (Ill. App. Ct. 1989); Englund v. Englund, 352 N.W.2d 800, 802 (Minn. Ct. App. 1984); *cf.* Barbara Ann Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571, 590 (1984).

[13] *See sources cited supra* note 2 and accompanying text.

[14] The candid prose from one Pennsylvania opinion illustrates the reality of judges grappling with custody cases:

> The instant case is difficult. Both parents are fit; both parents want what is best for their children. Additionally, both parents have been very cooperative with one another in an effort to facilitate warm relationships with the children at minimal emotional costs. However, the record in this case reveals that Mrs. Clapper wants to move to Connecticut to better her education, occupational skills and opportunities and quality of life. The record, read in its entirety, supports the trial court's finding that Mrs. Clapper's goals are related to self-improvement. While we cannot fault Mrs. Clapper for wanting to better her life, she may be accomplishing her goals at the expense of the children. The effect of the move would be to uproot Jessica and Jon from familiar and congenial surroundings and to remove them from their father, who up to this time has maintained a steady and frequent relationship with his children.

Clapper v. Clapper, 578 A.2d 17, 20 (Pa. Super. Ct. 1990) (internal citations omitted).

[15] *See* Trolf v. Trolf, 126 A.D.2d 544, 544 (N.Y. App. Div. 1987) ("[A]lthough the evidence adduced established that both of the parties are fit parents and love their children, the record is replete with examples of the hostility and antagonism between them and it has been demonstrated that they are unable to put aside their differences for the good of their children. Thus, an award of joint custody is not appropriate."). This is true even where the parents are able to resolve every other aspect of their case. *See In re* Marriage of Annis and Koehn, No. 65974-0-I, 2012 WL 1919096, at *1–*2 (Wash. Ct. App. May 29, 2012).

[16] *See* William B. Reingold, Jr., Summary Judgment and its Niche Role in Washington Family Law, 58 GONZ. L. REV. 209, 222 (2023) [hereinafter Reingold, Jr., Summary Judgment] ("Parties may be loath to turn the other cheek when aspersions are being cast upon them, leading to a vicious cycle in which both parties dredge up whatever they can to make the other party look worse in the eyes of the court.").

[17] KAREN BONNELL, THE CO-PARENTING HANDBOOK 31 (Susan Roxborough ed., 2017); E. Gary Spitko,

positions enough to compromise and create an agreed-upon plan.[18] And joint custody—an outcome in which both parents behave as "mature adults who can put aside their differences and operate in their children's best interests,"[19] sharing either physical custody or legal custody or some combination of the two—is ordinarily the end goal for parents attempting to work out a parenting plan's provisions without judicial intervention.[20] Once finalized and entered by the court, an agreed-upon plan becomes, in a manner of speaking, a contract by which those parents must abide.[21]

But, calling a parenting plan a contract is like calling an apartment complex an ecosystem—while there are overlapping similarities, fundamentally, they are two distinct concepts. Contract law is fundamentally "private law," meaning justice is owed amongst and between individuals rather than through enforcement of duties owed to society vis-à-vis governmental regulation of behavior.[22] Things become murky, however, once these contracts specifying how to coparent intersect with those constitutional rights that embrace familial autonomy.[23] Foundational rights to raise children must nevertheless be balanced (and at some point, give way) to other societal interests.[24] Implicit here is the sui generis status children hold in society, uniquely elevated above other individuals given the law's presupposition

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Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family, 57 WASH. & LEE L. REV. 1139, 1210 (2000).

[18] Agreed-upon parenting plans are occasionally called "shared parenting plans." See Making Shared Parenting Plans Work for Your Family, CUSTODYXCHANGE (last visited Jan. 18, 2023), https://www.custodyxchange.com/topics/plans/overview/shared-parenting-plan.php [https://perma.cc/6AL4-ET78]; see also OHIO REV. CODE ANN. § 3109.04 (West 2011).

[19] In re Marriage of Fortelka, 425 N.W.2d 671, 673 (Iowa Ct. App. 1988).

[20] See Tex. Fam. Code Ann. § 153.007(a) (West 2002) ("To promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreed parenting plan containing provisions for conservatorship and possession of the child."); accord In re Interest of B.N.L.–B., 523 S.W.3d 254, 261 n.5 (Tex. App. 2017).

[21] This is not a legal novelty, though this handling of a parenting plan comes in different flavors. Jordan v. Rea, 212 P.3d 919, 926 (Ariz. Ct. App. 2009); Zitnay v. Zitnay, 875 A.2d 583, 586 (Conn. App. Ct. 2005); Kiger v. Kiger, 338 So. 3d 1021, 1021 (Fla. Dist. Ct. App. 2022) (per curiam); Burns v. Burns, 114 N.E.3d 609, 613 (Ohio Ct. App. 2018); Maddox v. Maddox, 65 N.E.3d 88, 95 (Ohio Ct. App. 2016); Penland v. Penland, 521 S.W.2d 222, 224 (Tenn. 1975). But see WASH. REV. CODE ANN. § 26.09.070(3) (West 2008) ("If either or both of the parties to a separation contract shall at the time of the execution thereof, or at a subsequent time, petition the court for dissolution of their marriage . . . the contract, except for those terms providing for a parenting plan for their children, shall be binding upon the court . . . .").

[22] Curtis Bridgeman, *Contracts as Plans*, 2009 U. ILL. L. REV. 341, 354–55 (2009).

[23] Hatch v. Dep't for Child., Youth & Their Fams., 274 F.3d 12, 20 (1st Cir. 2001) (citing Troxel v. Granville, 530 U.S. 57, 65 (2000)) ("The interest of parents in the care, custody, and control of their children is among the most venerable of the liberty interests embedded in the Constitution.").

[24] *Cf., e.g.*, Jordan v. Jackson, 15 F.3d 333, 342 (4th Cir. 1994) ("The state's removal of a child from his parents indisputably constitutes an interference with a liberty interest of the parents and thus triggers the procedural protections of the Fourteenth Amendment.").

that they are in need of particular care, guidance, and protection.[25] State legislatures' collective response to these societal interests has been to embrace what is known as the "best interest" standard: the polestar for virtually all custody-related matters, and a standard that promotes individualized judgments on a case-by-case, child-by-child basis.[26]

This article is meant to discuss the interplay between courts interpreting agreed-upon parenting plans and the best interest standard. Parenting plans are not treated or viewed in the same way we perceive ordinary contracts. They should be. As of now, however, cardinal rules of contract interpretation can ring hollow in light of the ever-present best interest standard, as well as those family law attributes that make this realm of the law distinctly personal.[27] As discussed below, the best interest standard has been justly criticized for eschewing predictable outcomes.[28] It is my hope, as a practicing family law attorney, that this article will offer insight into interpreting parenting plans in a manner that engenders greater predictability when disputes arise, either through interpreting the agreed-upon parenting plan or during the drafting process.

Accordingly, this article will be segmented as follows: Part II provides a relatively brief summary of the best interest standard and its rise to near ubiquity in family law; Part III—the focal point of this article—delves into the relationship and discrepancies between parenting plans and basic contract interpretation; and, finally, Part IV offers certain suggestions for litigants drafting parenting plans with an eye toward future disputes based on the language of its provisions.

I. THE BEST INTEREST STANDARD: A CONTROVERSIAL TOUCHSTONE

Modern legal frameworks pertaining to child custody reflect and owe much to the ever-evolving social sciences on the subject.[29] With that being said, there is by

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[25] Donald L. Beci, *School Violence: Protecting Our Children and the Fourth Amendment*, 41 CATH. U. L. REV. 817, 834 (1992) (sampling various cases and statutes on the subject in areas of criminal law, labor law, and family law).

[26] *See infra* note 44, at 93 and accompanying text. The qualification—that the best interest standard is the heart of *virtually* all custody matters—is meant to underscore that a few issues extend the best interest standard beyond that of just the child. *See, e.g.*, *In re* Marriage of Weaver, 505 P.3d 560, 572 (Wash. Ct. App. 2021) ("The CRA [Child Relocation Act] shifts the analysis away from only the best interests of the child to an analysis that focuses on both the child and the relocating person.").

[27] Reingold, Jr., *Summary Judgment*, *supra* note 16, at 260.

[28] *See sources cited infra* notes 57–59 and accompanying text; C. Gail Vasterling, *Child Custody Modification Under the Uniform Marriage and Divorce Act: A Statute to End the Tug-of-War?*, 67 WASH. U. L.Q. 923, 927 (1989) ("Commentators have criticized the tremendous amount of judicial discretion available under the 'best interests' standard . . . .").

[29] Liz Trinder & Michael E. Lamb, *Measuring Up? The Relationship Between Correlates of*

no means a consensus amongst those in the legal community as to whether the best interest standard is, in fact, the most availing standard.[30] Consider the following prolegomenous quotes epitomizing the sharp contrast between those for and against its utilization as opposed to a set rule or presumption:

> For: "A norm is ill-suited for determining the future of a unique being whose adjustment is vital to the welfare of future generations . . . . Magic formulas have no place in decisions designed to salvage human values."[31]
>
> Against: "Individualized adjudication means that the result will often turn on a largely intuitive evaluation based on unspoken values and unproven predictions. We would more frankly acknowledge both our ignorance and the presumed equality of the natural parents were we to flip a coin."[32]

Understanding the best interest standard's ascendency calls for an understanding of the history that came before it. Blackstone's Commentaries trace the earliest accounts of parent-child laws well: Children in ancient Rome were subject solely to the father's control, a patriarchal dominion predicated on notions "that he who gave had also the power of taking away."[33] Over time the Romans loosened these strictures somewhat "[b]ut still they maintained to the last a very large and absolute authority: for a son could not acquire any property of his own during the life of his father; but all his acquisitions belonged to the father, or at least the profits of them, for his life."[34] English common law was by comparison tame,[35] though even then, mothers were "entitled to no power, . . . only to reverence and respect."[36] Custody disputes rarely arose in England because a mother's chance of prevailing was all but futile.[37] A departure from this historical precedent finally

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Children's Adjustment and Both Family Law and Policy in England, 65 LA. L. REV. 1509, 1522 (2005) ("In all, basic research on early social development and descriptive research on the multifaceted factors of divorce have together yielded a clearer understanding of the ways in which divorce affects children and of how the welfare of many children could be enhanced by changes in common practices."); *cf.* Allison R. Smith, Note, *Tightening the Bridle: Guiding Judicial Discretion in Child Custody Decisions (Pending Massachusetts House Hill 1207)*, 50 SUFFOLK U. L. REV. 337, 346 nn.70–71 (2017) (touching upon studies used to address joint custody jurisprudence).

30 *See* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 289 (1975).

31 Bazemore v. Davis, 394 A.2d 1377, 1383 (D.C. 1978) (en banc) (citing Lemay v. Lemay, 247 A.2d 189, 191 (N.H. 1968)).

32 Mnookin, *supra* note 30, at 289.

33 *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *452.

34 *Id.*

35 *Id.* at *453 ("A father has no other power over his son's estate than as his trustee or guardian; for though he may receive the profits during the child's minority, yet he must account for them when he comes of age.").

36 *Id.*

37 *See* Angela Marie Caulley, *Equal Isn't Always Equitable: Reforming the Use of Joint Custody Presumptions in Judicial Child Custody Determinations*, 27 B.U. PUB. INT. L.J. 403, 409 (2018);

occurred in 1839 through the enactment of the Custody of Children Act in England, establishing what became known as the "Tender Years Doctrine."[38]

The basic premise of the Tender Years Doctrine is straightforward: mothers are better suited to care for young children still in their "tender years" rather than fathers who, presumably, were busy working and less capable of childrearing.[39] Early American attitudes shared the conviction that children were property of the father,[40] but gradually the Tender Years Doctrine took root in America as well.[41] Consequently, courts and legislatures effectively reversed course and began presuming custody should fall to the mother rather than the father.[42] This shift in custodial inferences cannot be overstated. Swept up in this sea of change was an unconscious public sentiment that mothers were simply more equipped to rear children.[43] Not until the early 1970s did legislatures soften the Tender Years Doctrine's grip on custody matters.[44] It was then, with the passage of the Uniform Marriage and Divorce Act, that lawmakers and judges began adhering to what still remains the gold standard for resolving child-related disputes: "The Court shall determine custody in accordance with the best interest of the child" upon consideration of "all relevant factors."[45] Most legislatures eradicated gender preferences from their books within the next generation,[46] and the best interest standard has become a resounding cornerstone of family law jurisprudence:

> On balance, the literature suggests that there simply is no better alternative to the existing best interest standard relied on by virtually all jurisdictions in this country. While each jurisdiction has different ways of determining best interests, the standard remains the substantive formula courts nationwide rely on in determining contested custody

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Berardo Cuadra, Note, *Family Law—Maternal and Joint Custody Presumptions for Unmarried Parents: Constitutional and Policy Consideration in Massachusetts and Beyond*, 32 W. NEW. ENG. L. REV. 599, 602 (2010).

38 *Smith*, *supra* note 29, at 339.

39 Trevor S. Blake, *Child Custody and Visitation*, 3 GEO. J. GENDER & L. 373, 374 (2002).

40 Brianna F. Issurdutt, Note, *Child Custody Modification Law: The Never-Ending Battle for Peach of Mind*, 10 NEV. L.J. 763, 764 (2010).

41 *See, e.g.*, Boswell v. Pope, 56 So.2d 1, 3 (Miss. 1952) ("In all cases where any child is of such tender age as to require the mother's care for its physical welfare it should be awarded to her custody, at least until it reaches that age and maturity where it can be equally well cared for by other persons."); Bucks County Poor Directors v. Philadelphia Poor Guardians, 1 Serg. & Rawle 387, 389–90 (Pa. 1815) ("The law is too humane to separate children of such tender age from their mother. To tear them asunder, would be to violate the law of nature, to which all human laws should be subservient. . . . [T]he law, having fixed seven years for the age at which nurture ceases, a removal for nurture is tantamount to a removal till the age of seven years.").

42 *See supra* note 41 and accompanying text.

43 Smith, *supra* note 29, at 340.

44 Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule"*, 41 U. BALT. L. REV. 83, 92 (2011).

45 UNIF. MARRIAGE & DIVORCE ACT § 402 (amended 1973), 9A U.L.A. 282 (1998).

46 Warshak, *supra* note 44, at 94.

disputes.[47]

All of this is as interesting as it is well documented.[48] Relevant to this article is the influence the best interest standard has on parenting plan disputes. Prefatorily, then, we must discuss the positives and negatives concomitant with the best interest standard. The positives are simple. Lacking any presumptions, the court affords each child individual attention on an individual basis.[49] Factors that a court may assess in evaluating each case are myriad[50] and purposefully broad.[51] Courts may account for just about anything, including inter alia the age of the child, which parent historically cooked or handled housework, whether both parents are fully employed vel non, which parent was more present at parent-teacher conferences, the kinds of activities the child engages in and which parent is more involved with said activities, and so on.[52] A holistic analysis of the child's life and relation to their parents is grounded in advances in social sciences and finds footing upon the dual belief that flexibility and adaptability secure the greatest welfare for the child.[53] It follows that the underlying facts to every case are vitally important.[54] The parents

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47 Steven N. Peskind, *Determining the Undeterminable: The Best Interest of the Child Standard as an Imperfect but Necessary Guidepost to Determine Child Custody*, 25 N. ILL. U. L. REV. 449, 471 (2005); cf. Timothy P. Fadgen & Dana E. Prescott, *Do the Best Interests of the Child End at the Nation's Shores? Immigration, State Courts, and Children in the United States*, 28 J. AM. ACAD. MATRIM. LAW. 359, 377–78 (2016) (noting that some form of the best interest standard has been incorporated in the United Kingdom, Norway, Canada, and Australia).

48 *See generally* Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 779 n.87 (1985) (listing various sources that trace the history and development of the standard).

49 *See* Malave v. Ortiz, 970 A.2d 743, 748–49 (Conn. App. Ct. 2009) ("The best interest standard . . . is inherently flexible and fact specific and gives the court discretion to consider all of the different and individualized factors that might affect a specific child's best interest."); Joi Montiel, *The Inevitability of Discretion: What Proponents of Parenting Time Guidelines Can Learn from Thirty Years of Federal Sentencing Guidelines*, 8 DREXEL L. REV. 1, 6 (2015) ("Modest limitations on the discretion afforded by the best interest standard cannot only address the concerns of its critics but can also preserve a judge's ability to make individualized case-by-case determinations regarding a child's best interest.").

50 *See sources cited supra* note 4.

51 *See* Dahl v. Dahl, 459 P.3d 276, 315 (Utah 2015); *In re* Marriage of Burke, 541 N.E.2d 245, 259 (Ill. App. Ct. 1989); Flores v. Cruz, 1998 Guam 30 ¶ 10.

52 Warshak, *supra* note 44, at 97 ("Though most jurisdictions provide a list of factors for the court to consider, these are quite general and allow much room for judicial discretion.").

53 Lynn M. Akre, Comment, *Struggling with Indeterminacy: A Call for Interdisciplinary Collaboration in Redefining the "Best Interest of the Child" Standard*, 75 MARQ. L. REV. 628, 655–56 (1992) ("The increasing volume of research conducted on marital transitions and their impact on the child, coupled with the indeterminate standard of the best interest of the child, has led to an essential, albeit natural, collaboration between the social sciences and the legal profession in child custody determinations.").

54 William B. Reingold, Jr., *Finding Utility in Unpublished Family Law Opinions*, 19 ST. THOMAS

present their version of the facts for consideration as to what they believe to be in the child's best interest, and the court selects a narrative from the arguments to render a ruling one way or another.[55] The standard more or less trades the consistency of presumptions for case-by-case cogitation.[56]

By the same token, scrutiny of the best interest standard has led to forceful criticism from commentators and practitioners alike.[57] Think about the standard's hallmark of individualized justice by way of broad statutory factors.[58] It is irrefutably vague because it has to be,[59] which leads to an utter lack of predictability in judicial rulings.[60] Arguably, the standard's intrinsic subjectivity makes these determinations "at best inconclusive and . . . at worst biased in a manner that reinforces majoritarian cultural norms, allows state interests to override established caregiving relationships, and imposes an idealized notion of care on the caregiving relationship upon which the child is already dependent."[61] A clearly defined rule—even a poor one—would conceivably be better for children because it would reduce the

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L.J. 607, 615 (2023) ("For attorneys regularly mired in family law, statutes can often feel like a starting pistol at a track and field event—necessary to commence the litigation, but mostly an afterthought as compared to the facts being argued over.").

55 *See* Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1278 (2008) ("Narratives of family law bolster the privileging of finality, as courts determine the 'truth' about a familial dispute by settling on a single account of a disputed incident or circumstance.").

56 *See* Morris v. Morris, 412 A.2d 139, 141 (Pa. Super. Ct. 1979) ("Although best interests is necessarily a nebular term, rendering itself amenable to neither simple definition nor application, it embraces the child's physical, intellectual, moral, and spiritual well-being. . . . The variables may be complex . . . but we must continually hew to the pole star of a child's best interests, eschewing presumption and surmise."); *see also supra* note 31 and accompanying text.

57 *See, e.g.*, Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 16 (1987) ("[T]he best interest principle is usually indeterminate when both parents pass the threshold of absolute fitness."); Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1181 (1986) ("The 'best interests' standard is a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge. . . . Its vagueness provides maximum incentive to those who are inclined to wrangle over custody . . . ."); *see also* Seema Shah, *Does Research with Children Violate the Best Interests Standard? An Empirical and Conceptual Analysis*, 8 NW J. L. & SOC. POL'Y 121, 145–46 (2013).

58 *See supra* note 48–50 and accompanying text; Kathryn L. Mercer, *The Ethics of Judicial Decision-Making Regarding Custody of Minor Children: Looking at the "Best Interests of the Child" and the "Primary Caretaker" Standards as Utility Rules*, 33 IDAHO L. REV. 389, 391 (1997).

59 *See* Glendon, *supra* note 57, at 1181.

60 *See* Rebecca Aviel, A New Formalism for Family Law, 55 WM. & MARY L. REV. 2003, 2039 (2014) ("This kind of flexibility resulted in awards that were not only wildly inconsistent across the similarly situated . . . ."). Note that some judges will naturally gain a reputation as being "pro mom" or "down the middle" or some other epigrammatic moniker, but there is an unpredictable element to any hearing, something any family law attorney with a modicum of courtroom experience will tell you.

61 Pamela Laufer-Ukeles, The Case Against Separating the Care from the Caregiver: Reuniting Caregivers' Rights and Children's Rights, 15 NEV. L. J. 236, 261 (2014).

uncertainty of court outcomes.[62] Bereft of any such rule or standard, commentators have accordingly raised claims of possible abuse.[63]

Consider further that the trickledown effect of literally instantiating the child's best interest as paramount perforce relegates familial autonomy.[64] Parents would "be required to promote the best interests of a child over and above, and without regard to, the interests of any relevant adult."[65] Resources are likewise an afterthought to a certain extent, regardless of whatever financial restraints under which the family is operating.[66] Resources are not limited to just money, but also time and the ability to keep pace with the child's evolving desires and aptitudes.[67] And because best interest inquiries "become predictions of the future" based in large part on salient past acts that transpired prior to separation,[68] the plain fact is this can easily result in furnishing the court with an incomplete picture of the child's

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[62] Warshak, *supra* note 44, at 103 ("[A]ny clearly defined rule . . . would do the least harm to the fewest children because it would reduce the uncertainty of the likely judicial outcome and thus spare children the hostilities attendant to adversarial custody negotiations and litigation."). For example, Washington's codified policy on the best interest of the child, RCW 26.09.002, which mentions standard numerous times without any elaboration:

> The state recognizes the fundamental importance of the parent-child relationship to the welfare of the child, and that the relationship between the child and each parent should be fostered unless inconsistent with the child's best interests. Residential time and financial support are equally important components of parenting arrangements. The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, health and stability, and physical care. Further, the best interest of the child is ordinarily served when the existing pattern of interaction between a parent and child is altered only to the extent necessitated by the changed relationship of the parents or as required to protect the child from physical, mental, or emotional harm.

REV. CODE. WASH. § 26.09.002.

[63] *See* Warshak, *supra* note 44, at 105 (explaining concerns that judges will award custody to the litigant whose parenting more closely mirrors their own childrearing attitude); Comment, Jordan C. Paul, *"You Get the House. I Get the Car. You Get the Kids. I Get Their Souls." The Impact of Spiritual Custody Awards on the Free Exercise of Custodial Parents*, 138 U. Pa. L. Rev. 583, 600 (1989) ("[T]he drafters of the UMDA demonstrated that they were keenly aware of the potential danger for abuse of judicial discretion left open under the best interests standard."); See Glendon, *supra* note 57, at 1169–70 ("The most harmful effects of the present system are not those that appear in litigated cases where judges are often perceived to be acting in an arbitrary or systematically biased way as they award custody, set support for children and spouses, and reallocate marital property.").

[64] Shah, *supra* note 57, at 146.

[65] *Children's Rights*, STAN. ENCYCLE OF PHIL. ACHIVE (Oct. 16, 2002), [https://perma.cc/9RBK-M5B7] https://plato.stanford.edu/Archives/win2021/entries/rights-children/.

[66] Shah, *supra* note 57, at 146.

[67] *Id.* Indeed, a critical responsibility of parenting—one that is potentially swept under the rug based on a strict reading of the best interest standard—concerns setting limits on children's wants and wishes. Id. But, this reality is at loggerheads with the necessarily demanding standard. *See Children's Rights*, *supra* note 65.

[68] *See* Milfred Dale, *"Still the One": Defending the Individualized Best Interests of the Child Standard Against Equal Parenting Time Presumptions*, 34 J. Am. Acad. Matrim. L. 307, 313 (2022).

situation—i.e., the *parents'* situation and the *parents'* ability to provide for the child.[69] Again, this ties back into the unavoidably wide latitude trial courts are afforded in making these types of decisions, because a judge is going to make a determination regardless of whether she has a complete, pellucid grasp of the family's dynamics and circumstances.[70]

Creating these parenting plans in the first place is an onerous task[71] that implicates a bevy of considerations.[72] The undertaking is as solemn as any responsibility a court may be charged to carry out.[73] Given that encroaching on parents' day-to-day decision making would require encroaching on protected liberty

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[69] *Id.* at 312–13 ("The best interest of the child psycholegal task requires an assessment of multiple persons (e.g., the parties, the child[ren]), and other significant adults in the home involving individual and comparative analyses of required and relevant factors (identified by statute, case law, relevant social science research, and context) to develop a parenting plan that meets three objectives: (1) provides for the present and future health, welfare, and developmental needs of the child or children; (2) reasonably balances the constitutional and statutory rights of the parents, interested parties, and the child; and (3) provides an enforceable allocation of parental responsibilities to and for the child via a parenting plan.").

[70] *See* Glendon, *supra* note 57, at 1169 ("[W]idespread perceptions of the arbitrariness of the process must play an important part, not only in creating dissatisfaction with the way divorces are handled, but in promoting disillusion with the legal system in general.")

[71] Kinsella v. Kinsella, 696 A.2d 556, 577–78 (N.J. 1996) ("The 'best-interest-of-the-child' standard is more than a statement of the primary criterion for decision or the factors to be considered; it is an expression of the court's special responsibility to safeguard the interests of the child at the center of a custody dispute because the child cannot be presumed to be protected by the adversarial process.").

[72] This article has purposefully steered clear of delving into questions of morality, but those naturally factor into the equation given the subject matter. Leaving moral judgments in the hands of judges (particularly unelected judges) is ripe for criticism, and statutes outlining policy considerations about parent-child relations are often too vague to be helpful here. *See supra* note 61. Advocating for the child's best interest cabins the court's role to making credibility determinations that hinge on myriad questions ranging from what the child wants to the best overarching outcome. And although the best interests of a child are not always what the child wants—see *In re* Marriage of Presson, 465 N.E.2d 85, 88 (Ill. 1984) (denying a parent's petition to hyphenate a seven-year old's name in spite of the child's "sincere" desire: "No doubt [the child] is sincere; so also are the thousands of young children who tell their parents they wish to be called Bo Duke, Rick Springfield, Muhammed Ali, Mr. T and Huckleberry Hound! No one doubts their sincerity, and few adults would try to prevent this informal adoption of a fantasy name. Still, most adults recognize that these wishes are a result of immaturity and lack of reflection which will pass as the children develop more adult processes of reasoning.")—there should nevertheless be some place for the child's appreciation and understanding of the situation. *See* Christine M. Szaj, *The Fine Art of Listening*, 4 J. L. & FAM. STUD. 131, 132 (2002) ("Regardless of the parents' best intentions to keep the interests of their children at the forefront, children's experiences of separation and divorce are unique to them and require special attention directed to their needs."). How these sorts of questions factor into such consequential rulings are beyond the scope of this article.

[73] Ramsden v. Ramsden, 202 P.2d 920, 921 (Wash. 1949); Lancey v. Shelley, 2 N.W.2d 781, 784 (Iowa 1942); Woodrum v. Dunn, 508 S.W.2d 38, 39 (Ky. Ct. App. 1974).

interests,[74] courts rely upon the sedulous work of third-party experts and parenting evaluators who are either psychologists or other professionals who specialize in custody matters.[75]

> "[T]hese investigators and evaluators act as an arm of the court" because "the unique obligation of courts to serve the best interests of minor children in cases of divorce often requires independent investigations of allegations between warring parents, . . . not to mention the wisdom of Solomon when the most expedient solution might appear to be to 'saw the baby in half.'"[76]

This is especially so where the best interest of the child can, indeed, come down to a coin toss.[77] What if one parent wants a custody arrangement that follows a 2+2+5+5 schedule, whereas the other parent prefers a 2+2+3 schedule? For reference, here is how these two schedules look on paper:

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[74] *See, e.g.*, Parham v. J. R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course . . . ."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *cf.* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'").

[75] *See* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 413 (2008) ("Contemporary child-custody evaluators now perform a highly specialized forensic psychological task that demands a working knowledge of current assessment and postdivorce outcome literatures across a broad array of topics.").

[76] Reddy v. Karr, 9 P.3d 927, 930–31 (Wash. Ct. App. 2000).

[77] This is not an allusion to Professor Mnookin's provocative quotation at the outset of this section—*supra* note 32—as the following example hopefully makes clear.

The 2+2+5+5 Schedule:

	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.	Sun.
Week 1	Father	Father	Mother	Mother	Father	Father	Father
Week 2	Father	Father	Mother	Mother	Mother	Mother	Mother
Week 3	Father	Father	Mother	Mother	Father	Father	Father
Week 4	Father	Father	Mother	Mother	Mother	Mother	Mother

The 2+2+3 Schedule:

	Mon.	Tues.	Wed.	Thurs.	Fri.	Sat.	Sun.
Week 1	Father	Father	Mother	Mother	Father	Father	Father
Week 2	Mother	Mother	Father	Father	Mother	Mother	Mother
Week 1	Father	Father	Mother	Mother	Father	Father	Father
Week 2	Mother	Mother	Father	Father	Mother	Mother	Mother

Suppose both parents in this hypothetical have deep-seated reasons for wanting one schedule over the other; they don't care that both schedules establish an equal 50/50 split or that there's a lot of overlap in how these two schedules play out. The only question is whether it is in the child's best interest to go up to three or five days without seeing the other parent. Is this worth going to court over?[78] Parents are taking a risk entrusting judges with these decisions,[79] and a costly one at that.

[78] This is not to necessarily downplay the seriousness of these situations. There may be cases where the child's age, mental health, relationship with one parent, and other factors make the 2+2+3 versus 2+2+5+5 question worthy of serious reflection. As a general matter, school-age children are more independent. They tend to be more comfortable with separations from one parent as a result of going to school, spending more time with friends, and partaking in other social or extracurricular activities. In *that* sense, the 2+2+5+5 makes more sense. But, at the same time, it may be that a school-age child needs more frequent exchanges because going five days without seeing one parent is particularly challenging. (Think about a child who does not have a great relationship with one of their parents, and the idea of spending five challenging days with this parent would only worsen their relationship.) In that sense, the 2+2+3 schedule is more appropriate. One can effortlessly run through these imaginative justifications ad nauseum.

[79] Kim L. Picazio, *Tips for Being a Successful Family Law Attorney*, ASPATORE 2013 WL 2137493, at *15 (Apr. 2013) (observing that "[j]udges are not robots" but rather "come to the courtroom with their own life experiences, prejudices, opinions, and outlooks on the world").

There can be no doubt that as compared to an overburdened judge with a back-breaking docket, parents have far superior knowledge of their child's circumstances and sensibilities.[80] The best practice is to reach an agreed-upon parenting plan, one with an appropriate flexibility given the family dynamics at play.[81] More litigious or high-conflict personalities likely require a greater level of detail in the plan's provisions to keep future litigation at bay, whereas more "child-friendly" parents will need fewer strictures.[82] As the New York Court of Appeals explained, "joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion."[83] By contrast, "a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs . . . can only enhance familial chaos."[84] So, when drafting (what will hopefully become) an agreed-upon parenting plan, finding the balance between flexibility and detail is essential.[85] Creative drafting can obviate a plethora of possible future disputes,[86] though it is unrealistic to assume that the parents will never find themselves at loggerheads over some childrearing issues, particularly where the parenting plan is implemented when the children are very young.[87] And when these disputes do arise and the parties find themselves in court, the judge will naturally turn to the text of the parenting plan for guidance and/or interpretation.

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80 *Cf.* Michelle Markowitz, Note, *Is a Lawyer who Represents the "Best Interests" Really the Best for Pennsylvania's Children*, 64 U. PITT. L. REV. 615, 637 (2003) ("By ensuring that the GAL would tell the judge what was in the child's best interest, the judge could be assured she is making the correct decision. In this overburdened and under-funded system that protects a group that could be so easily taken advantage of, it seems unthinkable to have a judge making her decision without all of the facts.").

81 Peter V. Rother, *Balancing Custody Issues: Minnesota's New Parenting Plan Statute*, 57 BENCH & B. MINN. 27, 27–28 (2000); Corbin Howard, *Cases of Insomnia (Cured) and Ex-Husband's (Not Cured)*, 25 MONT. LAW. 26, 26 (1999) ("[W]hen you are drafting a parenting plan, pay attention to those who will live their lives according to it.").

82 *See* Howard, *supra* note 81, at 26.

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

84 *Id.*

85 J. Herbie DiFonzo, *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody*, 43 HOFSTRA L. REV. 1003, 1019 (2015).

86 *See, e.g.*, Rebecca N. Morrow, *Mediating Parental Relocation Cases Behind a Veil of Ignorance*, 49 WAKE FOREST L. REV. 771, 781 (2014).

87 *See* Tony Aloia, *Collaborative Family Law – The Big Picture*, 4 PEPP. DISP. RESOL. L.J. 418, 428 (2004) ("[O]bviously very young children are going to need revisions in parenting plans as they grow older because their needs and circumstances are going to change . . . ."); *cf.* Marsha Kline Pruett, *All Parenting Plans are not Equal*, 33 FAM. ADVOC. 23, 26 (2010) ("[C]hildren change rapidly and unpredictably. Rather than relying on a rigid schedule just to keep the family out of court, make a plan that incorporates "room to grow" but includes very specific ways to modify the plan without returning to court.").

II. INTERPRETING PARENTING PLANS

To recapitulate our discussion thus far, the best interest standard is largely understood to be a thorny criterion in crafting a parenting plan,[88] and there is a spate of literature regarding its nebulous nature.[89] As well-intentioned as the standard may be, many recognize that the lack of meaningful guidance often leads to inconsistent results.[90] Even the name of the standard—the best interest—advances the curious (almost paradoxical) notion that this is paramount over the interests of adults, social goals, and potentially fairness and equality.[91] Proponents of the standard counter that "issues surrounding custody are constantly evolving as society's ideas about children and parental rights change,"[92] which all but compels third-party professionals and experts (such as psychologists, social workers, and parenting evaluators) to be thrown into the fray to ensure individualized justice.[93] Where the parents cannot compromise and reach an agreed-upon plan, the court must step in and hand down a Solomonic decision as to what it deems is best for the child.[94] (Whether a court will defer to a parenting evaluator's opinion or child's therapist's views on the family—as opposed to focusing more so on the litigants' arguments grounded in the parties' own accounts of their shared history and parenting—is an open question that cuts to the heart of the unpredictability present in custody cases.[95]) But even when the parents can reach an agreed-upon plan, this

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88 *See* Morris v. Morris, 412 A.2d 139, 142 (Pa. Super. Ct. 1979).

89 *See* Pamela Laufer-Ukeles, *Introduction: Custody through the Eyes of the Child*, 36 U. DAYTON L. REV. 299, 300 (2011); John Thomas Halloran, *Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. & POL'Y 51, 71 (2014) ("[A] universal proactive statutory definition of what is in a child's best interest may run contrary to the purpose of the best interest standard in the first place because it seeks to impose specific guidelines on a condition that is as varied as human experience. In addition, it is difficult to not define a child's best interest solely in reactionary or comparative terms, so there is great latitude for what that best interest might consist of or mean.").

90 Lolita Buckner Innis, *It's the Hard Luck Life: Women's Moral Luck and Eucatastrophe in Child Custody Allocation*, 32 Women's Rts. L. Rep. 56, 57–58 (2010).

91 *See supra* notes 64–69 and accompanying text; Katharine T. Bartlett, *Prioritizing Past Caretaking in Child-Custody Decisionmaking*, 77 LAW & CONTEMP. PROBS. 29, 29 (2014); Christian R. Van Deusen, *The Best Interests of the Child and the Law*, 18 PEPP. L. REV. 417, 419 (1991) (calling the best interests standard "a rather nebulous and ill-defined standard that opens a plethora of considerations").

92 Laufer-Ukeles, *supra* note 89, at 305; *see* also Troxel v. Granville, 530 U.S. 57, 63 (2000) ("The demographic changes of the past century make it difficult to speak of an average American family.").

93 *See* Szaj, *supra* note 72 at 140–41 ("Their evaluations, testimony, and recommendations can significantly determine the outcome of child custody decisions, and as a result, raise serious questions about the extent to which these professionals should be allowed to participate.").

94 *Cf.* Jones v. Davis, 314 S.W.2d 328, 330 (Tex. Civ. App. 1958).

95 *See* In re Brown, 105 P.3d 991, 995 n.5 (Wash. 2005) (en banc) (explaining that a court ruling

does not rule out future disputes that go before the court.[96] This section addresses various issues litigants should be cognizant of prior to submitting their agreed-upon parenting plan to the court for interpretation.

A. Plain Language, Emotion, and Elasticity

A parenting plan's provisions will be interpreted and construed over time, at the very least by the parents who must abide by its terms.[97] Agreed-upon parenting plans require "the ascertainment of the thought or meaning . . . of the parties to . . . a legal document, as expressed therein, according to the rules of language and subject to the rules of law."[98] In other words, these are contracts. Yet the best interest standard's unpredictability and inconsistency run contrary to basic contract tenets.[99] "Whatever goals and social purposes underlie contract law, they are achieved through the interaction of private individuals."[100] Here the private individuals are complicating matters by contracting with regard to another private individual: their child, a minor, for whom they are responsible. The law of course has developed in light of this reality. (Contemplate, for example, how parties who violate the parenting plan's provisions are in contempt, not breach.[101]) There is also

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on a custody matter may "consider[ ] the report and recommendation [of an evaluator or other professional], along with the parties' comments and criticisms; the court is not bound by the report, but makes its own assessment of the child's best interest"); In re Custody of S.H.B., 74 P.3d 674, 682 (Wash. Ct. App. 2003) ("Although the trial court considered the evaluator's report and trial testimony in deciding where S.H.B. should reside, the court did not in any way abdicate its responsibility to independently determine the findings of fact.").

96 *See, e.g.*, Schreur v. Garner, No. M2010–00369–COA–R3–CV, 2011 WL 2464180, at *3 (Tenn. Ct. App. June 20, 2011) (reciting the trial court's statement that "[t]echnically speaking, the parties really set themselves up to come back into the court with their agreed-upon parenting plans").

97 *See* Howard, *supra* note 81, at 26 ("[A] parenting plan for divorcing parents who are cooperative and flexible and live in the same community probably can be pretty basic. A parenting plan for those parties who cannot help using every contact as an excuse to revisit every painful event in their marriage probably should be highly structured and detailed.").

98 H.T. Tiffany, *Interpretation and Construction*, in 17 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 1, 2 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1900).

99 *See* Felipe Jimenez, *A Formalist Theory of Contract Law Adjudication*, 2020 UTAH L. REV. 1121, 1160 (2020) (observing that "predictability about future behavior is essential" in contract law, and that "[a] coherent and predictable body of law allows individuals to plan with confidence, and to settle their disputes without the need to recur to litigation").

100 *Id.*

101 The dichotomy may not be worth an entire section in the body of this article, but it at least merits a brief entr'acte. Civil contempt functions as a well-accepted housekeeping measure to aid in the administration of justice. *See* Cooke v. United States, 267 U.S. 517, 534 (1925) ("It has always been so in the courts of common law and the punishment imposed is due process of law."). The power to hold an obstructive party in contempt "is not merely a right of the court, but also an indispensable element of the judicial process." Jennifer Fleischer, *In Defense of Civil Contempt Sanctions*, 36 COLUM. J.L. & SOC. PROBS. 35, 35 (2002). This authorization has existed in courts of law

an inescapable emotional fervor that underpins custodial disputes based on the already agreed-upon parenting plan—what is *right* in one parent's eyes may not comport with what is on the page of their shared plan. Thus, the intent of the parties in drafting their parenting plan becomes the court's sole focus.

On a basic level, the intent underscoring a particular agreed-upon parenting plan can only be surmised by its plain language, not only based on a line-by-line grammatical analysis but also a larger contextual review.[102] In *Maddox v. Maddox*,[103] the father posited error when the court ordered him to pay child support, which he claimed ran contrary to the parties' agreed-upon plan; however, the Court of Appeals correctly noted that the disputed provision qualified the pertinent term: "at this time, it is agreed that no child support shall be paid by either parent."[104] The prepositional phrase "at this time" therefore prohibited such action at present, (i.e., at the time the parties entered into the agreement), but did not categorically foreclose the possibility.[105] Similarly, the Court of Appeals of Georgia employed a plain reading of the parties' parenting plan in *Brown v. Brown*,[106] ruling that the trial court erroneously interpreted the plan's summer vacation schedule.[107] This schedule provided that "[e]ach parent shall be entitled to two consecutive weeks of uninterrupted parenting time with the minor children during the children's

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and equity since ancient times—see State v. Price, 672 A.2d 893, 895 (R.I. 1996) (quoting Rollin M. Perkins, Criminal Law 531 (2nd ed. 1969) ("Under the common law of England courts had inherent power to punish for contempt."); In re Lee, 183 A. 560, 561 (Md. 1936) ("It is an inherent right and not dependent upon legislative authority . . . .")—finding refuge in our country's common law tradition. *See* Eilenbecker v. District Court, 134 U.S. 31, 36 (1890); Anderson v. Dunn, 19 U.S. (6 Wheat) 204, 227 (1821). Breach of contract, by contrast, has little to do with the proper administration of justice in the same way civil contempt does. The remedial nature of civil contempt acts as a means to coerce the performance of a required act by the disobedient party. In re Birchall, 913 N.E.2d 799, 810 (Mass. 2009); *accord* Bramble v. Bramble, 929 N.W.2d 484, 490 (Neb. 2019); Dodson v. Dodson, 845 A.2d 1194, 1200 (Md. 2004); State v. Heiner, 627 P.2d 983, 986 (Wash. Ct. App. 1981); Knaus v. Knaus, 127 A.2d 669, 672 (Pa. 1956). The primary objective in contract law relates to returning the harmed party to the same economic position they would have been in had no breach of contract occurred. *See generally* 17B C.J.S. *Election of Remedies for Breach of Contract, Generally* § 834 (2023) ("In a breach of contract suit, the plaintiff either may rescind the contract and seek restitution, enforce the contract and recover damages based on expectation, or bring an action for specific performance. Which remedy is suitable depends on the particular facts of the case."). The only real overlap between contempt and breach regards the sweeping sentiment that "certainty of rights and obligations is the basic goal of contract law." Reynolds-Penland Co. v. Hexter & Lobello, 567 S.W.2d 237, 241 (Tex. Civ. App. 1978).

102 *See In re* J.M.P., No. 111825, 2023 WL 413180 at *2 (Ohio Ct. App. Jan. 26, 2023) ("A shared parenting plan is a contract subject to the rules of contract interpretation, with a focus on effecting the parties' intent as evidenced by the plain language of the agreement.").

103 Maddox v. Maddox, 65 N.E.3d 88 (Ohio Ct. App. 2016).

104 Id. at 95.

105 *See id.*

106 Brown v. Brown, 857 S.E.2d 505, 512 (Ga. Ct. App. 2021).

107 *Id.*

summer vacation from school."[108] Yet the trial court imbued ambiguity into this provision when it ruled that each parent is permitted up to two weeks of additional days that do not need to run consecutively.[109] The trial court's interpretation would render meaningless the phrase "two consecutive weeks of uninterrupted parenting time"; but more importantly, it would cast aside the parties' intent in fashioning their plan in the first place.[110]

While *Maddox* and *Brown* evince the utility of applying a plain reading toward agreed-upon parenting plans, two questions may surface in one's mind: (1) how is it that these parents, who previously came to an agreement on these terms, are returning to court with newly-perceived ambiguity? and (2) unlike *Maddox* and *Brown*, what would a genuinely ambiguous parenting plan look like? Beginning with the latter question, ambiguity ordinarily exists where a word, phrase, or provision in the document has, or is susceptible to, at least two reasonable but conflicting interpretations or meanings.[111] In *Ryan v. Hurt*,[112] the parties' parenting plan obligated each parent to inform the other "of all events where a parent might be allowed or expected to participate in the minor child's activities or events," offering several examples ranging from music recitals to teacher conferences.[113] At issue was the mother's refusal to divulge information related to karate and baseball practices.[114] The father accordingly filed an order to show cause and sought to hold her in contempt.[115] In response, the mother asserted that *practices* do not fall within the provision's scope, citing evidence that they previously negotiated the inclusion of practices in the parenting plan during mediation, ultimately electing to leave it out.[116] The trial court attempted to find a middle path: although it found that the mother did not violate the terms of the parenting plan, it also ordered that "[f]or future purposes, the Court will interpret paragraph 12 and the rest of the Parenting Plan to include 'practices' in the definition of the words 'activities' and 'events.'"[117] This reasoning constrained the Court of Appeals to first conclude the parenting plan was ambiguous.[118] The Court thereafter reversed the trial courts interpretation: "we conclude that during mediation regarding the parenting plan,

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108 *Id.*

109 *Id.*

110 *Id.*

111 *See* Gosiger, Inc. v. Elliott Aviation, Inc., 823 F.3d 497, 501 (8th Cir. 2016); Schachner v. Blue Cross & Blue Shield of Ohio, 77 F.3d 889, 893 (6th Cir. 1996); Hensman v. Parsons, 458 N.W.2d 199, 205 (Neb. 1990); Weston v. Holt, 460 N.W.2d 776, 779 (Wis. Ct. App. 1990).

112 Ryan v. Hurt, No. A-03-931, 2005 WL 88647 (Neb. Ct. App. Jan. 18, 2005).

113 *Id.* at *1.

114 *Id.* at *2.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* at *3.

the parties specifically considered whether to include 'practices' in paragraph 12 and chose not to include that language."[119]

As for the former question—exploring how two people who married and (presumably) loved and cared for one another could disagree so vehemently on how to raise their child in spite of their previously agreed-upon parenting plan—there is no straightforward answer. It is no secret that "[d]ivorce proceedings can manifest a distinctly adversarial complexion from both parties, often propelled by enmity and dejection that has likely built up over the course of years."[120] Parents who struggle to let go of the past may dig their heels in when challenged by their ex-spouse on decisions impacting the child's growth and development. They may even require a parenting coordinator just to keep relations from further deterioration.[121] And this

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[119] *Id.* at *4. Let's pause and discuss the quality of this ruling, which in my mind is somewhere between perplexing and pitiful. The first error comes from the trial court, which almost certainly lacked the authority to render a declaratory judgment in the context of a contempt setting's remedial objective of bringing a contumacious party into compliance with the parenting plan. *See supra* note 101; Becher v. Becher, 970 N.W.2d 472, 479 (Neb. 2022). The court ordering that the mother did not violate the parenting plan *this time*, while also setting forth a new rule so that *in the future* the mother would be in contempt for the same violation—"[f]or future purposes, the Court will interpret paragraph 12 and the rest of the Parenting Plan to include 'practices' in the definition of the words 'activities' and 'events'"—seems blatantly outside the purview of the court's authority.

Additionally, there was no reason for either the trial or appellate court to consider the parties' discussions about whether "practices" had been discussed during the drafting process. Both courts could have decided the case by simply looking at the text of the plan: each parent was required to inform the other "of all events where a parent might be allowed or expected to participate in the minor child's activities or events." Most people would intuitively understand that baseball and karate practices are events a parent may want to be allowed to participate in, at least based on the text in this parenting plan. Resorting to the parties' drafting discussions was completely unnecessary. And, as if that were not enough, there is the fact that parties are not typically allowed to bring up discussions had in mediation, which fall under the protection of Evidentiary Rule 408:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

NEB. REV. STAT. § 27–408. Taken together, this case presents a jumbled mess of reasoning—a point I raise only to again exemplify the risk of going to court over parenting disputes. *See supra* note 79 and accompanying text; *infra* notes 162–65 and accompanying text; State *ex rel.* L.B.-M. v. McLemore, 2007 WL 2985111 at *5; 20 Elizabeth A. Turner, Washington Practice: Family and Community Property Law § 33:22 (2022).

[120] Reingold, Jr., *Summary Judgment*, *supra* note 16, at 211.

[121] Matthew Sullivan, *Coparenting: A Lifelong Partnership*, 36 FAM. ADVOC. 18, 20 (2013) ("The issues that a parenting coordinator might assist with are not custody and timeshare conflicts, but day-to-day disputes that arise between high-conflict coparents. Parenting coordinators typically address and resolve issues, such as scheduling difficulties (disputes over holiday and vacation

is so even if they were able to grit their teeth and settle on an agreed plan, because these ex-spouses espousing lip service to the best interest standard essentially relegate their children to "pawns in a gruesome grudge match" post-divorce.[122] But thankfully, the anger most parents feel after a divorce will eventually lenify to the point where smaller day-to-day childrearing decisions are not dispute-worthy.[123] Absent willful ignorance, parents are generally aware that "divorce is not a single, static event but rather a series of experiences that very often affect children beyond the initial separation,"[124] so they are able to rise above the petty differences in their parenting styles. They reserve conflict for more fundamental decisions that affect the overall wellbeing of the child,[125] including decisions related to education and schooling, healthcare (including therapy and counseling), camps and extracurricular activities, and how often the child resides with each parent.[126]

The rub is this: most parents have strong emotional attachments to their children that render contracting difficult in the first place. Lincoln famously quipped that "love is the chain whereby to lock a child to its parent."[127] This is true, though the nature of this love ebbs and flows and sometimes flatlines altogether;[128] it adjusts to changing environments and expectations and circumstances, most obviously the maturation and growing independence children at one point begin to

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schedules), problem transitions, the transfer of clothing, the selection of extracurricular activities, and the introduction of the children to a new significant other.").

122 DiFonzo, *supra* note 85, at 1021.

123 There are of course exceptions. *See* Reingold, Jr., *Summary Judgment*, *supra* note 16, at 260.

124 Szaj, *supra* note 72, at 141.

125 Allan G. Osborne, Jr. & Charles J. Russo, Commentary, *Educational Decision-Making in K-12 Schools when Divorced Parents Disagree: What is in the Best Interests of the Child?*, 273 ED. LAW. REP. 1, 2 (2011) ("[C]onflicts are more likely to arise when making fundamental decisions affecting the overall education of children.").

126 *See* Katherine Elder, *The 6 Most Common Co-Parenting Conflicts (And How to Resolve Them)*, DELAWARE PSYCH. SERVS. (Jan. 28, 2022), https://www.delawarepsychologicalservices.com/post/the-6-most-common-co-parenting-conflicts-and-how-to-resolve-them [https://perma.cc/6RZB-DS4B].

127 JOHN. C. WAUGH, ONE MAN GREAT ENOUGH: ABRAHAM LINCOLN'S ROAD TO CIVIL WAR 187 (2007).

128 There probably does not need to be any authority for the self-evident proposition that some parents simply do not care for their children. If one is nonetheless needed, August Wilson's inimitable *Fences* lays bare this concept when Troy explains to his son that he has no obligation to like him, only to provide for him:

> It's my job. It's my responsibility! You understand that? A man got to take care of his family. You live in my house . . . sleep you behind on my bedclothes . . . fill you belly up with my food . . . cause you my son. You my flesh and blood. Not 'cause I like you! Cause it's my duty to take care of you. I owe a responsibility to you! Let's get this straight right here . . . before it go along any further . . . I ain't got to like you. Mr. Rand don't give me my money come payday cause he likes me. He gives me cause he owe me. I done give you everything I had to give you. I gave you your life! Me and your mama worked that out between us. And liking your black ass wasn't part of the bargain. Don't you try and go through life worrying about if somebody like you or not. You best be making sure they doing right by you. You understand what I'm saying, boy?

AUGUST WILSON, FENCES 40 (1986).

undertake.[129] Parents must likewise be prepared to adjust their expectations regularly despite what is in their agreed-upon parenting plan. Here's a discursive example:

Imagine two parents who divorce and establish a plan when their daughter is just six years old. Flashforward seven years, and the parents are [1] sending their now-teenage daughter to boarding school in another state, and [2] the mother currently has a rocky, tempestuous relationship with her. The mother will need to recalibrate numerous preexisting aspects of her relationship with the daughter. They won't speak face-to-face with each other on a daily basis anymore now that the daughter's going to a school in another state. Boundaries will be reevaluated given the distance between them (hence [1] above) which may be further complicated by the fact that this relationship is prone to embattlement (hence [2] above), so it may be that communications moving forward between them become painfully stifled when fights arise. It's doubly problematic. Now imagine that these two had a close, beautiful, exemplary mother-daughter relationship just a few years prior. Do you see how impossible it is to plan for this shift in dynamics back when the daughter was just six years old?

Setting aside the myriad variables that can cause a child to become distanced from the parent—which were also probably impossible to plan for, at least to some extent[130]—the point here is that responsible parents crafting a responsible parenting plan must carve a certain amount of elasticity into the plan.[131] *Elasticity*, as I'm referring to it, concerns the need for everyone involved to have some elbow room to operate and carry out the child's best interest.[132] Generally speaking, it

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[129] There is a great deal of writing on how parents love their children in different ways and that there are nuances to how we discuss parent-child affection. *See, e.g.*, Lisa Belkin, *Do ALL Parents Love One Child More?*, NY Times (Sept. 26, 2011, 10:54 a.m.), https://archive.nytimes.com/parenting.blogs.nytimes.com/2011/09/26/do-all-parents-love-on-child-more/ **[**https://perma.cc/SVH8-BVQG**]**("What's hard is accepting that relationships are fluid, determined by the ever-changing variables that make a child (and a parent) who they are at any given moment. Those ups and downs, imbalances and inequities, are not something to overcome, but rather realities to be accepted. We treat them differently because they ARE different. Navigating that reality is the key to being a parent.").

[130] It can be simpler to draft parenting plans in which the child is older and closer to turning eighteen, at least to the extent that there is less time for a seventeen-year-old son to go rogue and completely upend the dynamics between him and the parents. Even still, no reasonable person would deny the standard difficulties that attend teenagers' irrational self-assurance and all of its unfortunate concomitants. J.M. Barrie's, "I'm not young enough to know everything" line rings true with every new generation. JAMES MATTHEW BARRIE, THE ADMIRABLE CRICHTON 18 (1923).

[131] *See* Jacqueline Genesio Lux, *Growing Pains that Cannot be Ignored: Automatic Reevaluation of Custody Arrangements at Child's Adolescence*, 44 Fam. L.Q. 445, 455 (2010) ("It should no longer be presumed that a custody agreement entered at the time of divorce will be beneficial for all of a child's years of minority; agreements must have the potential to adapt to change.").

[132] *See* Rother, *supra* note 81, at 28 ("This flexibility may be helpful to the participants to resolve issues without the necessity of a trial, but it should be approached with a great deal of knowledge and preparation by the attorneys involved.").

would be unfair to hold a parent's feet to the fire under a parenting plan the same way a Fortune 500 company might strictly enforce a noncompete clause. This is particularly so because, as discussed, one way to promote the child's welfare is by taking into consideration their wants and desires.[133] Lacking a crystal ball when drafting these plans, parents who strategically factor in elasticity stave off rigidly inflexible scenarios that are not in the child's best interest.[134]

At the same time, elasticity can open the possibility for more disputes.[135] Deliberately broad language in agreed-upon parenting plans can open up an entirely new can of worms, especially when shoddily drafted. Ruminate over the following single-sentence provision and see if any alarms go off: "The custodial parent shall encourage short nightly calls with the nonresidential parent between 7:00 p.m. and 8:00 p.m." This sounds acceptable at first blush, but that impression fades once you cycle it through numerous connotations: what does "encourage" mean? does a verbal reminder carry more weight than a text reminder? what exactly constitutes a "short" call, and can some calls be too short? if the child does not want to call the other parent, how much time and energy should be devoted toward encouragement before giving up? (and does this mean that a parent who cannot get the child to call for weeks on end is simply not encouraging enough?) if the goal is a *nightly* call, is it justifiable to have the child call the other parents four nights? (how about just two nights?)

Although such a smattering of questions like this will probably never manifest into anything consequential,[136] the language nonetheless matters; and, as discussed next, courts can sometimes stray from the language of these plans under the cover

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133 *See sources cited supra* notes 69–72 and accompanying text.

134 Here's another short hypothetical for illustrative purposes: Imagine the parents are concerned about their child consuming too much social media and violent movies, so they agree to a provision limiting the amount of media the child watches each day to three hours. Presumably, one parent is more concerned about this issue than the other. (E.g., one spouse thinks two hours of television is too much, whereas the other considers five hours too much.) It would benefit the parties to include language in the provision establishing that the parents may deviate from this three-hour limit when reasonable under the circumstances, such as when the child is having a friend spend the night.

Or, even simpler, recognizing somewhere in the plan that they will not resort to contempt proceedings over the slightest infraction—if the plan says the kids will be dropped off at school by 8:30 and school doesn't start until 8:50, then the spirit of the plan is not frustrated if the children are dropped off a few minutes after 8:30 so long as they made it to school before class starts.

135 *See* Rother, *supra* note 81, at 28 ("If parties agree to vague language in order to settle a matter, but the underlying issues are not resolved, judicial economy will suffer. Although a contested hearing of the original action may be avoided, the parties stand a high probability of returning to court to litigate the meaning of any given term, which may also cast doubt on the proper standard to be applied in modifying the previous order.").

136 Remember that the intensity of the divorce eventually wanes, and most parents settle into a working, coparenting relationship—albeit sometimes awkward or uncomfortable. *See supra* notes 123–24 and accompanying text.

of contract interpretation.[137]

B. Judicial Interpretation of Parenting Plan Provisions

Where the parents previously reached an agreed-upon parenting plan, courts resolving drafting disputes will apply contract interpretation principles.[138] As a general matter, courts employ interpretive tools to assist in ascertaining the intent behind legal instruments,[139] whether they be statutes or contracts.[140] Interpretive canons are not dispositive,[141] but they carry weight.[142] Justice Frankfurter recognized that because "canons of construction are generalizations of experiences, they all have worth."[143] Evidence supporting Frankfurter's position is made plain by the fact that many of the canons are invoked without ever being specifically identified.[144] They aid in resolving technical cases by way of "familiar, if content-free, generic legal rules" that translate from one case to another "like a set of handy, all-purpose tools."[145] Of course, the canons are not without criticism,[146] but their

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137 *See* discussion *infra* Section III.b.

138 *See, e.g.*, Maddox v. Maddox, 65 N.E.3d 88, 95 (Ohio Ct. App. 2016); Mossbeck v. Hoover, No. E2020-00311-COA-R3-CV, 2021 WL 1714235, at *12 (Tenn. Ct. App. Apr. 30, 2021).

139 *See* Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9, 23 (2006); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 649 (1992) ("[A]s judicial creations, the canons can be understood best as devices that were designed to serve the self-interest of their inventors-the judiciary.").

140 *See* John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 653 (2016); Michelle Schuld, Note, *Statutory Misinterpretation: Small v. United States Darkens the Already Murky Waters of Statutory Interpretation*, 40 AKRON L. REV. 751, 769 n.119 (2007).

141 *See, e.g.*, Fenoglio v. Augat Inc., 254 F.3d 368, 372 (1st Cir. 2001) ("Pertinent here is the contra proferentem canon, that is, that uncertainties should be resolved against Augat, the drafter of the contract. . . . How much force should be given to such a canon where the contract is between two sophisticated parties is open to doubt.").

142 *See, e.g.*, Little Six, Inc. v. United States, 229 F.3d 1383, 1386 (Fed. Cir. 2000) (Dyk, J., dissenting) ("I find that the statute's structure, purpose, and history all support the conclusion that the statute's reference to chapter 35 is superfluous. Thus, I think the panel here places more weight on the canon of construction regarding resolving ambiguities in favor of the Native Americans than that canon can bear.").

143 Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947).

144 Evan C. Zoldan, *Canon Spotting*, 59 HOUS. L. REV. 621, 632 (2022) ("When [legal interpreters] want to highlight an interpretive principle's persuasive power, legal interpreters, including judges, advocates, and scholars, refer to the principle as a canon of interpretation.").

145 Macey & Miller, *supra* note 139, at 671.

146 *See* E.E.O.C. v. Illinois Dep't of Emp. Sec., 995 F.2d 106, 108 (7th Cir. 1993) (Easterbrook, J.) ("Such badminton with the canons of construction does nothing beyond demonstrating their limited utility. Far better to examine the statutes themselves."); Edwards v. United States, 814 F.2d 486, 488 (7th Cir. 1987) (Posner, J.) ("Like so many such maxims (the 'canons of construction'

proponents view them as vital and necessary to promoting fair and functioning judiciary.[147]

Although a court's interpretation of an already-agreed-upon parenting plan could well invite the use of various canons, this does not guarantee a correct reading of the parenting plan.[148] The purposefully broad language in these plans may easily render a court's invocation to contract interpretation nugatory.[149] Take for example the unpublished case of *State ex rel. L.B.-M. v. McLemore*.[150] The Washington State Legislature mandates specific forms (developed by the administrative office of the courts) be used for certain domestic matters, though parties are free to add language to these forms within reason.[151] In *L.B.-M.*, the agreed-upon parenting plan added the following conspicuous language to the provision governing dispute resolution protocols:

> Both parents have treatment programs and specific issues whereby they must provide proof to the court before any change of the residential schedule occurs. The issue of any change in custody or residential schedule may occur upon either parent bringing a proper motion or petition before the court.[152]

This language was made part of the parenting plan as a result of both parents'

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as they are grandly called), however, this one rests on an unrealistic premise about the legislative process."); Richard A. Posner, The Problems of Jurisprudence 279–80 (Harv. U. Press. 1990) ("The soundest criticism. . . is that they are just a list of relevant considerations, at best of modest utility. . . . [T]he canons are the collective folk wisdom of statutory interpretation and they no more enable difficult questions of interpretation to be answered than the maxims of everyday life enable the difficult problems of everyday living to be solved.").

147 Zoldan, *supra* note 144, at 642 ("Legal interpreters of all stripes refer to, discuss, and rely on the canons. Nevertheless, the modern turn toward the canons is driven in large part by textualists' stated goal of bringing rule-like objectivity to statutory interpretation.").

148 *Cf.* Brian G. Slocum, *Canons, The Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 401 n.218 (2007) ("Because of the applicability of a second canon, Justice Thomas was incorrect in his dissent in Martinez when he criticized lower courts for holding that habeas corpus jurisdiction still existed for noncriminal aliens subsequent to the Court's decision in St. Cyr.").

149 Recall Professor Corbin's sage observation regarding the relations between contracting parties over long periods of time:

> In almost all cases of contract, legal relations will exist, from the very moment of acceptance, that one or both of the parties never consciously expected would exist, and therefore cannot be said to have intended. Furthermore, the life history of any single contract may cover a long period of time, and new facts will occur after acceptance of the offer–facts that may gravely affect the existing legal relations and yet may have been utterly unforeseen by the parties. Many of these uncontemplated legal relations are invariably described as contractual. Therefore it appears that a necessary function of the courts is to determine the unintended legal relations as well as the intended ones.

Arthur L. Corbin, *Conditions in the Law of Contract*, 28 YALE L.J. 739, 740 (1919).

150 State *ex rel.* L.B.-M. v. McLemore, No. 59433-8-I, 2007 WL 2985111 (Wash. Ct. App. Oct. 15, 2007).

151 *See* WASH. REV. CODE § 26.18.220 (2019).

152 *L.B.-M.*, 2007 WL 2985111, at *3. Although this quoted language is not long enough to warrant a traditional block-quote indentation, the crux of this case illustration centers upon these two sentences; this indentation is for ease of reference.

problems with drug use at the time of the child's birth.[153] It was further agreed that the child's custodian would be the father's sister unless and until there was a modification.[154] But then, after successfully completing a year-long drug program, the mother moved to modify the plan and establish a residential schedule in which she and the child would have overnights together.[155] The dispute resolution language became the lynchpin for this matter, and the trial court interpreted it to mean that "modifications would not be subject to the modification statute."[156] Rather, the court reasoned that "modification would occur upon either parent's request after successfully participating in the programs and services ordered in the plan."[157] The Court of Appeals affirmed that the parents' agreed-upon plan effectively circumvented the modification statute, albeit for different reasons.[158] While the trial court ruled that the plan *required* modification after completion of treatment, the Court of Appeals "agree[d] with an alternative argument briefed by [the mother] and interpret[ed] the parenting plan to permit the trial court in its discretion to modify the parenting plan upon a parent's request after completing treatment."[159] To that end, "[i]f the court had intended to provide for modification under [the modification statute], there would have been no reason to require a showing that the petitioner had successfully completed court-ordered treatment."[160]

This analysis takes creative liberties and leaves the reader wanting. Note the following three points related to the dispute resolution provision at the heart of *L.B.-M.*:

- The word "whereby," which means "by, through, or in accordance with which."[161]
- That whether the parent completed any sort of treatment is missing from the provision, even though both the trial court and appellate court read this quasi-proviso into the plan. Adding in the element of completion conflicts with the word "whereby" insofar as it effectively nullifies the broader scope of the provision.
- That the word "upon" modifies the remainder of the clause that

153 *Id.* at *1.

154 *Id.*

155 *Id.*

156 *Id.* at *2.

157 *Id.*

158 *Id.* at *3 ("An appellate court may sustain a trial court judgment on any theory established by the evidence, even if the trial court did not consider it.").

159 *Id.*

160 *Id.* at *5.

161 MERRIAM WEBSTER'S NEW COLLEGIATE DICTIONARY 1342 (9th ed. 1985) [hereinafter *Webster's*].

references a "proper motion or petition."[162]

The appellant actually raised this latter point on appeal, but the argument fell on deaf ears.[163] The Court reasoned that this reference to a "proper motion or petition" speaks to the form of the modification request rather than the applicable standards, otherwise there would be "no reason to require a showing that the mother had successfully completed court-ordered treatment."[164] Even this reasoning strays from the provision's text and adds new language: now, suddenly, the treatment was *court ordered*. Although this element of the case may have been part of the lower court proceedings, the appellate opinion pretermits this information.

And perhaps the most curious aspect of this—the aspect hiding in plain sight—is that this provision having to do with modification is located under the "Dispute Resolution" section of the parenting plan, a section that outlines whether and how the parties attend mediation, arbitration, or court when parental disputes arise.[165] If, as Bryan Garner and Justice Antonin Scalia assert, "headings are useful navigational aid,"[166] then the drafters of this parenting plan sought to provide no assistance for future questions of interpretation. But none of these discrepancies ultimately mattered, and that is the point here—one commentator opined that, for most state courts, "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."[167] So it was for the *L.B.-M.* Court, affirming the trial court's "uncontested conclusion" that modification was proper and consistent under the applicable statute.[168]

A sharp contrast to *L.B.-M.* comes from the Supreme Court of the State of New York in *MG v. SA*,[169] which is exemplary in thoroughly scrutinizing the parenting plan. The case presented a gallimaufry of post-marital disputes, one involving interpretation of the plan's summer residential schedule.[170] The parties drafted the

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162 *L.B.-M.*, 2007 WL 2985111, at *3.

163 *Id.* at *5.

164 *Id.*

165 *See* 20 ELIZABETH A. TURNER, WASHINGTON PRACTICE: FAMILY AND COMMUNITY PROPERTY LAW § 33:22 (2022).

166 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXT 221 (2012).

167 Linda Jellum, *Parents Know Best: Revising Our Approach to Parental Custody Agreements*, 65 OHIO ST. L.J. 615, 626 (2004); *see also* Vasterling, *supra* note 28, at 927. *See generally* 27C C.J.S. *Divorce* § 1072 (2023) ("[S]ince the primary purpose of visitation is to promote the best interests of the children, not to fulfill the wishes or desires of the parent, visitation rights are not absolute but must yield to the good of the child and may be denied to either or both parents where the best interest of the child will be served.").

168 State *ex rel* L.B.-M. v. McLemore, 2007 WL 2985111, at *5.

169 MG v. SA, 2015 WL 1607704.

170 *Id.* at *3–4.

detailed "Summer Recess" provision as follows:

> The Children shall be with the Father from 6:00 P.M. on the last day of school through the end of the July 4th holiday, returning to the Mother no later than 10:00 A.M. on the day after the holiday. It is the intent of the parties that the Children shall then be with the Mother from the day after the observance of the July 4th holiday at 10 A.M. for a period of up to 30 days, during which time she may travel with the Children to France. It is also the intent of the parties that the Children shall also be with the Father for at least three (3) weeks of August every summer, plus Labor Day Weekend in September and at least one (1) week in August with the Mother. If either party wishes to amend the Summer Schedule in any particular year, they shall request a meeting with the parent coordinator [i.e., MS] named in paragraph "M" ... no later than March 31 of that year. The other party must respond within 72 hours of the request for the meeting, and the meeting must be scheduled within one week (depending upon the Parent Coordinator's availability). The parties shall confer with one another and ... MS in accordance with the criteria set forth in paragraph "M" ... with a view toward ensuring that the Summer Recess shall be apportioned so as to ensure that, taking into account the rest of the year's schedule, the Father spends 183 days with O (184 on leap years) and the Mother spends 183 days with B (184 on leap years).[171]

It may be that the parenting plan was too detailed, because the parents struggled to agree upon the meaning and effect of certain provisions in the ensuing years.[172] A specific question raised was whether the "the amount of weeks to which the parties are entitled to access to the children during August are a guideline or are mandatory."[173] Moreover, if the terms are mandatory, a subsequent question concerned how this residential time would be allocated between the parents, including whether the mother's week in August needed to be a single consecutive week.[174] Looking only to the four corners of the parenting plan, the court recognized that the overall intent of the parties was to establish a set of guidelines as opposed to mandatory protocols.[175]

This is absolutely correct in light of the surplusage cannon of construction—verba cum effectu sunt accipienda.[176] No word or phrase "should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."[177] In *MG v. SA*, the second and third sentences—the crux of the

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171 *Id.* The ellipses in this block quote come from the opinion itself. Presumably the Summer Recess provision is longer and more detailed.

172 *Id.* at *4.

173 *Id.*

174 *Id.*

175 *Id.* at *10.

176 *See* Brooks v. Byam, 4 F. Cas. 261, 266 (D. Mass. 1843) ("It is essential, that all the words employed should have an operative meaning. The law does not, of itself, strike out words, which the parties have introduced. It construes an instrument so as to give reasonable effect to all the words . . . .").

177 SCALIA & GARNER, *supra* note 166, at 174.

dispute—begin with the language "it is the intent of the parties."[178] Said language qualifies the word shall in both sentences. Placed in the context of a custodial dispute, interpreting these sentences as mandatory renders the intent language meaningless; put differently, the parties could have drafted the provision to simply begin the sentences with *the parties shall*, but they elected not to do so. However, the Court astutely gleaned that some of this provision was, in fact, mandatory.[179] It ruled that the number of weeks each party is respectively entitled to have with the children is not a guideline subject to adjustment: "The parties have been specific in their use of terms," as "there is a clear provision of the word 'week' which requires that a week time period in August must consist of seven consecutive days."[180] In effect, the court is drawing a distinction between seven days and a week, and how a week denotes "any seven consecutive days" or "a series of 7-day cycles."[181] The Court rightly assigned the proper grammar and usage to this language within the broader context of the provision.[182]

As prudent as it seems for courts to evaluate agreed-upon parenting plan disputes based on the specific language chosen by the drafters,[183] even appellate judges may not be able to find common ground. At issue in *Harrison v. Harrison*[184] was the parties' "teenage discretion" provision.[185] The children, upon turning fourteen, were allotted discretion "with respect to the time the child desires to spend with each parent."[186] This may have been a magnanimous gesture when the parties entered into the plan, vowing to impart their children with an agency every teenager ostensibly craves; but no good deed goes unpunished, and not long after turning fourteen, the oldest daughter informed the father, she planned to live with the mother fulltime.[187] (Go figure.) Left with little other recourse, the father posited that this infringed upon the essence of joint custody and sought a judgment declaring the provision void as against public policy.[188] The Majority opinion disagreed, resting its analysis on the best interest of the child and finding that the "flexibility is necessarily limited" for the child to deviate from the joint custody arrangement.[189] Justice Hardesty, writing for the dissent, sided with the father and asserted that the issue was not whether the child is given *too much* discretion, but

178 *MG*, 2015 WL 1607704, at *2.

179 *Id.* at *10.

180 *Id.*

181 Week, Webster's, *supra* note 161, at 1337.

182 *See* SCALIA & GARNER, *supra* note 166, at 140.

183 *See* Gaston v. Gaston, 954 P.2d 572, 574 n.3 (Alaska 1998).

184 Harrison v. Harrison, 376 P.3d 173 (Nev. 2016).

185 *Id.* at 175–76.

186 *Id.*

187 *Id.* at 175.

188 *Id.*

189 *Id.* at 176.

whether the child should have *any* discretion to begin with.[190] Affording the child any discretion "intrudes on what should be the district court's sole determination,"[191] and this elevation of the child's preferences usurps other statutory factors courts cull in these cases.[192] Justice Hardesty would accordingly invalidate the entire provision.[193]

These case illustrations exemplify the need for judges and lawyers to scrutinize agreed-upon parenting plan provisions the same way we scrutinize contracts. The (arguably) lax reading given to these agreements exacerbates the problem of unpredictable family law outcomes. Worse yet, some judges may look beyond the language of the parenting plan in favor of what they believe is best for the child.[194] One dissenting judge from the Court of Appeals of Washington even postulated that "the wording of a parenting plan is not . . . the deciding factor," and that "[n]o case has held that the wording of a parenting plan controls over the reality of where the children reside a majority of the time."[195] This is not to advocate for turning a blind eye toward the realities of a custody-related decision, which in and of itself can amount to an abdication of judicial decision making.[196] But we should not assign the same weight to an agreed-upon plan as compared to one decreed by a court after a trial on the merits.[197] The text of an agreed-upon parenting plan—one in

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190 *Id.* at 180 (Hardesty, J., dissenting).

191 *Id.* at 181 (citing NRS 125C.0025(1)).

192 *Id.* (citing NRS 125C.0035(4)).

193 *Id.*

194 *See In re* Marriage of Fahey, 262 P.3d 128, 142 (Wash. Ct. App. 2011) (Armstrong, J., dissenting).

195 *Id.*

196 *See* Jones v. Davis, 314 S.W.2d 328, 330 (Tex. Civ. App. 1958).

197 This is not necessarily the premise that underlies this article's thesis, though it is a feature that has, until now, not been addressed. Succinctly: it is apodictic that the law favors settlements of any kind, "and, when such settlement is effected, [the law] will presume that the parties consulted their own interests, and such settlement will not be interfered with, in the absence of fraud, mistake, or unconscionable advantage." Pearce v. Sutherland, 4 Alaska 120, 124 (D. Alaska 1910). In custody cases, settling disputes related to the drafting of a parenting plan takes on ancillary overtones as compared to settlements between more traditional adversarial parties. An agreed-upon parenting plan more or less serves as a bellwether of how the parties will be able to co-parent together. Namely, they swallowed their pride and set aside their emotions at least long enough to work with one another on achieving a settlement. Parents going through a divorce are understandably stressed. (An oft-cited study found divorce to be the second highest stressor one can experience, behind only the death of a spouse—*see Holmes-Rahe Stress Inventory*, Am. Inst. of Stress (last visited Mar. 26, 2023), https://www.stress.org/holmes-rahe-stress-inventory [https://perma.cc/F6TM-RQX4]. That the parents could successfully sift through this stress generated from the divorce augurs well for their children at the heart of matter.

The same cannot be said for those parents who needed to go to trial and have a court pen their parenting plan. Presumably these parents tried to work out a plan or agreement.

which the parents successfully compromised and contracted together, reaching an agreement with *their* chosen language in its provisions—should be reviewed by courts based on the exact terms employed, not the outside world and its forces that bear upon the instant dispute. Any other analysis diminishes the time and effort both parents devoted to ironing out every wrinkle they felt consequential.[198]

All of this is to say that it is not enough to discern the intent of the parties on a general level. There needs to be an examination of the grammar and syntax, the headings and placement of the disputed provision in the context of the entire plan,

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Presumably one (or both) had unreasonable (or unrealistic) demands that halted any meaningful negotiations. In turn, a trial ensues where both parties testify against the other's parenting in ways that, presumably, could be characterized as caustic and corrosive. "Even where both parents are fit, the proceedings can be acrimonious and may lead to hours of court time tied up in mudslinging , or a series of accusations, founded or not, between angry parents." Joy S. Resenthal, *An Argument for Joint Custody as an Option for All Family Court Mediation Program Participants*, 11 N.Y.C. L. REV. 127, 138 (2007). Absent a total and complete victory in which the court adopts one parent's proposed parenting plan—virtually unheard of if both parents are fit—neither party comes out feeling clean or centered. There's a reason why the term "custody battle" has become a familiar colloquialism. And people do not undertake a draining, acidic, marathonic custody battle with the prospect of immediately co-parenting with their ex-spouse upon completion of the trial.

It is true that an agreed-upon plan and a court-ordered plan are equally binding and enforceable. Both are court orders, after all. But, for purposes of *interpreting* these plans, we need to recognize and heed the terms of a plan in which the parents negotiated its terms. This is what they put in the plan, what they wanted on the page.* Deviating from what they wanted in the plan—as laid out by their specific terms and the language used to effectuate those terms—usurps the agency these parents made full use of in crafting their plan together. By contrast, those parents who required a court to render a plan may return to court with a parenting dispute based on a provision neither of them wanted included in the final plan. In such a scenario, the court adjudicating the parenting plan will of course start with the text, but will inherently understand that this parenting plan was based on what the trial judge felt was in the best interest of the child, not what either parent felt was best. By my lights, for a parenting plan in which the parties were not able to agree upon its terms, it makes more sense for the court to look beyond the four corners of the plan to identify what is in the child's best interest at this precise moment in time, reconciling these realities with what the trial judge already decreed and ordered in the plan. The notion that "discretion is valuable not only because it permits general rules to be adapted to individual situations, but because it is an important source of creativity in government and law," Glendon, *supra* note 57, at 1167, applies with much more force to these situations rather than to those involving agreed-upon parenting plans.

* This is obviously a bit tongue-in-cheek. As necessary as the divorce may be, neither party enters the marriage wanting it to fail, especially when they have children together. They do not *want* to have to set out parenting terms in a custodial agreement any more than they *want* to break it to their children that they are splitting up. Yet these are the parents who had the maturity and faculty to do so, even where those negotiations were nasty and arduous and pestilential; and *that* is the point here, because these parents' maturity is just another testament to their potential for coparenting once the divorce is finalized.

198 *See* Stibal v. Fano, 337 P.3d 587, 593 (Idaho 2014) (quoting 11 WILLISTON ON CONTRACTS § 31:5. *Courts may not rewrite the contract* (4th ed.)) ("A court shall construe contracts according to the plain language used by the parties, and the court shall not substitute that to which it thinks the parties should have agreed for what the contract shows they did agree.").

and the overall specificity of the wording as seen through the lens of a court reviewing a contract. Really, then, this discussion is just as vital—if not more so—for the litigants drafting the agreed-upon parenting plan in the first place; that way future disputes are as clear as possible and, by extension, reduce uncertainty where court intervention becomes necessary. I will briefly turn to this notion in the final section of this article.

CONCLUSION: SUGGESTIONS FOR DRAFTING PARENTING PLAN

Boiled down, two realities inhibit the idea of construing agreed-upon parenting plans as if they are contracts: [1] litigants imprecisely draft their plan because they are not thinking of it as a contract, and [2] the ever-looming best interest standard may always be invoked as a means to sidestep certain provisions. The preceding sections in this article are meant to underscore certain problems that arise when drafting and interpreting agreed-upon parenting plans. Going to court is a gamble. The judge may fixate on the black-letter text, or she may use the best interest standard as a point of departure. There is no guarantee one way or the other; while we want to believe that judges will review the text with dispassionate care, "no person, even an extremely rational one . . . reaches every decision by the cold light of reason."[199] The prophylactic to avoiding a judicial decision divorced from the text of the plan is to therefore leave as little room for interpretation as possible—that, in turn, requires a heightened attention to the grammar, syntax, and clarity that underpins the drafting of an agreed-upon parenting plan.

Drafting a parenting plan requires a complex forecasting of how the child's life will progress. It also requires the parents to accept the truth about their own situations and what they (the parents) can offer the child now and in the future. My own experience in drafting these plans for clients (from all walks of life) has led me to incorporate the following three practices:

1. Write examples into the plan showing how a specific provision will unfold. Two benefits arise from incorporating examples, they can be short or lengthy and detailed. First, they reduce the chance of future disagreements over how a specific provision plays out.[200] Second, if the parties do find themselves returning to court to interpret the disputed provision, the judge will almost necessarily operate under

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[199] EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT 35 (Random House 1998).

[200] *See In re* Marriage of McDonald and Crimson, No. 28139-6-III, 2011 WL 553130, at *1 (Wash. Ct. App. Feb. 15, 2011) (asserting on appeal that the parenting plan "failed to state with specificity the residential schedule of the children . . . ."); *cf.* David E. Braden, *Judicial Discretion v. Predictable Outcomes: A Review of the 2016 Amendments to the Illinois Marriage and Dissolution of Marriage Act*, 92 CHI.-KENT L. REV. 249, 285–86 (2017) (explaining how legislative amendments to the Illinois Marriage and Dissolution of Marriage Act provide for more comprehensive factors that, in theory, "avoid drawn out litigation that could be harmful to the children").

the textual canon ejusdem generis— "of the same kind or species."[201] (This is true whether the Court recognizes or realizes it.[202]) "Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned."[203] So, if the plan states that both parents "shall apprise one another of any noteworthy school-related updates, including report cards, absence reports, notes sent only to one parent, letters from teachers, field trip permission slips, etc.," then the parents (and court) have a great starting point if there is a question as to whether something is a "noteworthy school-related update."[204] Another option is to actually write out how a scenario will transpire in its entirety.[205] For instance, to illustrate a custody exchange, you could include: "E.g., if school is in session, Mother will have an overnight on Thursday; and then, on Friday, Mother will drop off the child at school; Father will be responsible for picking up the child from school, at which time his weekend residential time begins. If school is not in session . . ." and so on. Including examples gives everyone (including judges[206]) much-needed guidance as the parties become accustomed to coparenting with as little animosity as possible.[207]

2. Contemplate a wide range of unforeseen contingencies and situations. "Plans . . . make demands on our rationality," specifically "rational criticism for doing things inconsistent with those plans without some good reason."[208] In the face of unanticipated issues, asking a court to gap fill a parenting plan with appeals to *implied terms* frustrates the entire drafting process that these parents toiled over in reaching an agreement.[209] One parent will assert that the explicit terms of the

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201 Bumpus v. United States, 325 F.2d 264, 267 (10th Cir. 1963); *accord* United States v. Holmes, 646 F.3d 659, 665 (9th Cir. 2011).

202 *See* Zoldan, *supra* note 144 and accompanying text.

203 SCALIA & GARNER, *supra* note 166, at 199.

204 *See In re* RW Meridian LLC, 564 B.R. 21, 31 (9th Cir. 2017) (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000)) ("Sometimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'").

205 This ties into the Michael Bratman's philosophy that "human beings are essentially planning creatures." Bridgeman, *supra* note 22, at 366.

206 *Cf.* ROBERT F. BLOMQUIST, THE QUOTABLE JUDGE POSNER: SELECTIONS FROM TWENTY-FIVE YEARS OF JUDICIAL OPINIONS viii (2010) ("Lawyers like to think that they use language with precision. They do not. They use it with care, which is something different. Ambiguity abounds in American law.").

207 *See* Annette T. Burns, *Parenting Coordination and Co-Parenting Counseling*, 43 FAM. ADVOC. 36, 36 (2021) ("Any analysis of what might help co-parents should recognize that some families need less assistance, while others are engaged in what is known as intractable conflict (conflict that causes harm to both children and relationships) that may involve multiple returns to court. . . . When parents are taught to gain insight into their own relationships and behaviors, and how their behaviors affect their children, they may be able to learn skills to lessen damage to the children.").

208 Bridgeman, *supra* note 22, at 369.

209 Jones v. Davis, 314 S.W.2d 328, 330 (Tex. Civ. App. 1958).

plan should prevail, and the other will ask the judge to supplement those explicit terms based on either the current circumstances or discussions surrounding the drafting of the plan that were not made part of the final product. (These situations practically beg for the best interest standard to rear its head.) If you want explicit terms to have some teeth, then flexibility must be incorporated into the text. Suppose the parents have a ten-year-old golf prodigy who practices with a coach every day, competes regularly, and has been doing this since a young age; it would make sense for the parents to account for these practices (or tournaments) in drafting the plan. But what happens if the child burns out by the age of fourteen and no longer wants to compete? A good plan may incorporate language akin to: "In the event that X is injured for a protracted period of time (e.g., over three months) and cannot practice after school, or X no longer wants to play golf or compete anymore, the parents will meet with an agreed-upon counselor or mediator to work out a new residential schedule." Fundamentally this is just a call for the parents to regroup in case things with the child's tennis change; and although this may seem obvious, there are enough parents out there that want little to do with the other and including language mandating a specific protocol for addressing the matter facilitates good coparenting. The alternative, where parents do not address the issue head on due to residual anger from the divorce, will (at best) be awkward and (at worst) breed more resentment.[210]

3. Review the drafted parenting plan as if it were a contract that has nothing to do with family law. "Contractual agreement so thoroughly pervades human social behavior, virtually like air we breathe, that it attracts no special notice—until it goes bad."[211] Parents contracting to cooperate and raise their children need a plan that is sufficiently specific without being overly cumbersome. Again, these are not meant to be Apple Terms and Conditions; nonetheless, parenting plans limn rules for the parties to abide by, and "drafting rules effectively requires precise thinking, careful word choice, impeccable judgment, and analytical accuracy."[212] As touched upon with the foregoing suggestion, this has to be balanced against the need for flexibly averting unwelcome situations that are not best for the child.[213] There are numerous questions you can ask yourself here while drafting these plans: are there redundant sections? do section headings clearly overview (and provide direction on)

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210 Louis J. Liberman, *Post-Divorce*, 42 FAM. ADVOC. 32, 34 (2019); *cf.* Lehane v. Murray, No. LLIFA156012658S, 2015 WL 9684549, at *1 ("The parties do not communicate well. The plaintiff continues to have concerns with the defendant's parenting abilities, and it is clear that the difficulties of co -parenting have largely been due to the plaintiff's resentment towards the defendant . . .").

211 EDWARD O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE 171 (1998).

212 J. Lyn Entrikin & Richard K. Neumann, Jr., *Teaching the Art and Craft of Drafting Public Law: Statutes, Rules, and More*, 55 DUQUESNE L. REV. 9, 20 (2017).

213 *See also supra* notes 131–34 and accompanying text; In re Marriage of Presson, 465 N.E.2d 85, 88 (Ill. 1984).

the provision it is attached to?[214] are there any provisions that possibly conflict with one another? would a layman be able to understand the contents of every provision? would a layman understand this is a contract they have to adhere to regardless of how they personally feel about the child's welfare? do any of these provisions have the potential to backfire on one of the parents or the child?[215] If so, is there language that can qualify such an adverse outcome, or should the whole provision be scrapped to keep the entire enterprise from becoming too confusing?

Grammar and syntax can easily fall to the wayside when trying to draft a plan focusing on the child's best interest, and this naturally opens the door to possible disputes over ambiguity.[216] Yet "[r]ules of grammar underlie all legal rules applicable in the construction of contracts."[217] This is not to say that agonizing over a perfectly placed participle will carry the day in a parenting plan dispute, the same way that obsessing over a gerund's implications may not seem like the best use of time.[218] Good lawyers "nevertheless make time for exploring and playing with the infinite power of grammar."[219] At the very least, it is better to employ clean, clear grammar than to take your chances with sloppily-penned provisions in the hopes that an overburdened trial judge is able to grasp its substance.

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To summarize, I will return to my overarching thesis: agreed-upon parenting plans should be viewed and drafted like contracts. The problem is they are susceptible to the best interest standard's influence—a standard that, in this context, emerges at the expense of ordinary contract interpretation. This is a shame, because parents who were able to compromise on these plans have devoted time and care to account for a multitude of complex, emotional factors. Fairness

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214 *See supra* notes 165–66 and accompanying text.

215 Harrison v. Harrison, 376 P.3d 173, 175–76 (Nev 2016).

216 Preston M. Torbert, *Contract Drafting: A Socratic Manifesto*, 14 Scribes J. Legal Writing 93, 115 (2012) ("When considering ambiguity, shouldn't we recognize the significance of drafting our contracts in the English language? What peculiarities of English grammar or vocabulary cause what types of ambiguity in English?"); *cf.* Elizabeth Ruiz Frost, *Twists and Turns of a Legal Document Require Better Formatting*, 79 Or. St. B. Bull. 11, 16 (2019) ("Whether listing three items or 100, check each component to ensure it is parallel in form and grammar to its co-parts. I see parallelism issues frequently in contract drafting and when writers draft a rule with multiple elements or factors.").

217 Davis v. Pletcher, 727 S.W.2d 29, 33 (Tex. Civ. App. 1987); *see* JWJ Hotel Holdings, Inc. v. Revocable Trust of John Q. Hammons Dated December 28, 1989 as Amended and Restated, 638 B.R. 163, 170 (D. Kan. 2022) ("The Court begins its contract interpretation by applying the ordinary rules of grammar.").

218 Payless Shoesource, Inc. v. Travelers Companies, Inc., 585 F.3d 1366, 1371 (10th Cir. 2009) ("Operating on the assumption that most contracts follow most rules of grammar, courts tend to prefer interpretations that conform to those rules. At the same time, though, we know that grammatical rules are bent and broken all the time, and we will not enforce the more grammatical interpretation of a contract when evident sense and meaning require a different construction.").

219 Patrick Barry, *The Infinite Power of Grammar*, 67 J. LEGAL EDUC. 853, 856 (2018).

dictates that courts hold them to their agreement. To that end, these agreed-upon plans must be drafted not only to reduce future disputes, but for courts to render predictable outcomes aligned with the text of the parties' agreement. Given the fundamental liberty interests that attend custody agreements, it is appropriate to consider them solemn investments. We should treat them as such.