
**Tightening the Bridle:
Guiding Judicial Discretion in Child Custody Decisions
(Pending Massachusetts House Bill 1207)**

“The Supreme Judicial Court and the Supreme Court of the United States have recognized that parents have a fundamental interest in their relationships with their children that is constitutionally protected. This interest is one of the ‘liberty’ interests protected by art. 10 of the Massachusetts Declaration of Rights, and the due process clause of the Fourteenth Amendment to the United States Constitution. However, parents’ interests in their relationships with their children are not absolute, because ‘[t]he overriding principle in determining [the rights of a parent to custody] must be the best interest of the child.’ . . . In custody disputes between parents there is no constitutional or statutory entitlement to any particular form of custody.”¹

I. INTRODUCTION

The Massachusetts Supreme Judicial Court (SJC) and the U.S. Supreme Court have held that the parent-child relationship is a constitutionally protected fundamental interest.² Nevertheless, courts are more willing to become involved when the State has prioritized the rights of the child before the rights of the parents; notably, courts have deemed it necessary to intervene in child custody matters in the event of a divorce.³ The current law in Massachusetts involves a best interest of the child (BIC) analysis for child custody determinations.⁴ A family court judge conducts this BIC analysis, and the statute implies that it is within this judge’s sole discretion to determine the

1. Opinion of the Justices to the Senate, 691 N.E.2d 911, 913-14 (Mass. 1998) (internal citations omitted).

2. *See id.* at 913; *see also* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (emphasizing constitutional importance of parenting one’s own children); Custody of Two Minors, 487 N.E.2d 1358, 1364 (Mass. 1986) (recognizing constitutional right to parent); Schechter v. Schechter, 37 N.E.3d 632, 640-41 (Mass. App. Ct. 2015) (accepting fundamental right to parent, but distinguishing paramount concern of child’s interests). An appellate court must make sure that the lower court has made its decision by fairly weighing all relevant factors. *See Schechter*, 37 N.E.3d at 641.

3. *See* Petition of the Dep’t of Public Welfare to Dispense with Consent to Adoption, 421 N.E.2d 28, 36 (Mass. 1981) (considering parents’ freedom from state interference “not absolute”); *Opinion of the Justices to the Senate*, 691 N.E.2d at 914 (reiterating no constitutional right to “any particular form of custody”).

4. *See* MASS. GEN. LAWS ch. 208, § 31 (2015) (empowering judges to determine BIC). There is currently no presumption in place either for or against shared legal or physical custody. *See id.* *But see* MASS. GEN. LAWS ch. 208, § 31A (2015) (discussing possible presumption against shared legal or physical custody in abusive relationships).

custody arrangement that is in the BIC.⁵

Massachusetts's approach, however, is not without opposition.⁶ Criticism has mounted against the BIC standard since the 1970s, with some opponents arguing that it promotes gender bias against fathers.⁷ Others claim that it is nearly impossible for a judge to determine what is truly in the best interest of a child, and that the BIC standard is much too arbitrary.⁸

In response to this criticism, in 2015, parents' rights groups introduced Massachusetts House Bill 1207 (House Bill 1207) and corresponding legislation in the State Senate, Senate Bill 834.⁹ House Bill 1207 proposes a presumption of at least one-third parenting time for each parent unless mitigating circumstances support a different outcome.¹⁰ The bill also lists supplemental factors that judges would be required to consider when determining parental responsibilities.¹¹

This Note will first analyze the history and development of child custody standards, and determine what the pendulum shifts in child custody can teach us.¹² Then, this Note will look at proposed alternatives to the BIC standard nationwide, and how they compare to House Bill 1207.¹³ This Note will discuss the guiding factors listed in House Bill 1207, and compare the guiding factors to those included in other states' proposed legislation.¹⁴ Additionally, this Note will determine how these factors can guide a judge's decision without limiting his or her discretion.¹⁵ This Note will then analyze criticisms and

5. See MASS. GEN. LAWS ch. 208, § 31 (discussing courts' power in determining BIC).

6. See Erin Bajackson, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. L. 311, 323 (2013) (discussing 1970s movement seeking presumption of joint physical custody, not just BIC standard).

7. See Dugan Arnett, *In Mass. and Elsewhere, a Push for Custody Reform*, BOS. GLOBE (Aug. 1, 2015), <https://www.bostonglobe.com/metro/2015/07/31/massachusetts-and-elsewhere-push-for-child-custody-reform/Xh4NOwx2qWyZ12VMuYPf9J/story.html> (articulating how judicial interpretation and implementation of BIC standard often negatively impacts fathers).

8. See *id.* (critiquing current Massachusetts child custody law); see also Bajackson, *supra* note 6, at 315 (discussing argument of courts granting fathers less parenting time than mothers under BIC standard). Some fathers' interest groups are pushing for a legislative alternative to protect fathers' constitutional right to parent and impose a shared parenting presumption. See Bajackson, *supra* note 6, at 325-26; Arnett, *supra* note 7 (discussing Massachusetts' fathers' support for child custody reform).

9. See Arnett, *supra* note 7 (discussing push for change through House Bill 1207 and possible implications); see also H.B. 1207, 189th Gen. Ct. (Mass. 2015) (outlining proposed changes); S.B. 834, 189th Gen. Ct. (Mass. 2015) (outlining proposed changes).

10. See Mass. H.B. 1207, § B(2)(a) (defining shared parenting under House Bill 1207). "Unless the parents agree or the court determines otherwise, a child shall reside one-third of the time or more with each parent." *Id.*

11. See *id.* § (D) (listing factors judges should evaluate when determining parental responsibilities). House Bill 1207 lists seven evaluative factors and nine limiting factors that judges should use to determine shared parenting time in both temporary orders and judgments. *Id.*

12. See *infra* Part II.A, B.

13. See *infra* Part II.C, D, E.

14. See *infra* Part III.A.1, 2.

15. See *infra* Part III.A.3.

support for the one-third parenting time presumption, and determines whether this presumption is an effective alternative.¹⁶ Finally, this Note concludes by asserting that adding guiding factors is a superior method of supplementing the BIC in Massachusetts, and that a shared parenting presumption is an unnecessary addition to child custody determinations.¹⁷

II. HISTORY

A. *The Paternal Presumption*

Beginning in ancient Rome and other ancient civilizations, fathers were the sole custodians of their children.¹⁸ Children were considered paternal property, and this property right was absolute.¹⁹ A slight shift in view occurred under early English common law; a father still had a property right in his children, but it became less concrete.²⁰ For example, a father could be deemed unfit or abusive, thus giving a court cause to break from the presumption of paternal custody.²¹ When fathers began leaving the home to work in factories during the Industrial Revolution, society recognized a need for a shift in child custody determinations.²² The paternal presumption era ended in 1839 with the Custody of Children Act in England, which marked the beginning of the Tender Years Doctrine (TYD).²³

B. *The Tender Years Doctrine*

When the Industrial Revolution reached the United States, the TYD followed.²⁴ The child custody pendulum made almost a complete period shift

16. See *infra* Part III.B.

17. See *infra* Part IV.

18. Bernardo Cuadra, Note, *Family Law—Maternal and Joint Custody Presumption for Unmarried Parents: Constitutional and Policy Considerations in Massachusetts and Beyond*, 32 W. NEW ENG. L. REV. 599, 601-03 (2010) (explaining absolute paternal authority over children in ancient cultures).

19. *Id.* Roman law provided fathers with a complete ownership right over their children, as fathers were considered “responsible for . . . child[ren]’s existence.” *Id.* at 601. This bestowed upon fathers absolute control over their children’s lives. *Id.* Mothers were barred from legal guardianship even when their children’s fathers died. *Id.* In early history, children’s interests were not evaluated in child custody decisions. See Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 340-41 (2008) (explaining “children’s low social status” in ancient Rome).

20. See Cuadra, *supra* note 18, at 602 (recognizing limited exceptions to fathers’ superior custody rights recognized in early common law).

21. See *id.* (noting automatic paternal presumption had few exceptions). While custody disputes before the Industrial Revolution were rare, a court of equity could consider the rebuttal of the automatic paternal presumption in unique situations. See *id.* at 602, 604.

22. See *id.* at 603-04. As men left their homes to work in factories, their role changed from caregiver to provider, weakening the paternal presumption. See *id.* at 604.

23. See Kohm, *supra* note 19, at 346 (describing England’s departure from paternal presumption). The Custody of Children Act of 1839 implemented the TYD “to common law tradition.” *Id.*

24. See Cuadra, *supra* note 18, at 603-04 (explaining impact of Industrial Revolution on child custody shift). As the family norm changed towards fathers working outside the home and mothers staying at home

when the TYD was established, because embedded within the TYD is the presumption that children of a tender age (often under seven years old) need nurturing from their mothers.²⁵ If a child were above the tender age, however, custody would likely be granted to the father because the paternal property right in children was still recognized.²⁶ Despite its many shortcomings, the TYD was a step in the right direction, as it was the first time courts attempted to act in the child's best interests.²⁷

The TYD soon evolved into a cultural belief that children needed to be raised by their mothers.²⁸ This represented the beginning of the maternal presumption in the early to mid-twentieth century—a far cry from the paternal presumption that had been in place only decades earlier.²⁹ Yet, this new standard was fleeting: women entering the workforce and social science findings suggested that children benefited from being raised by both parents rather than primarily one or the other.³⁰ The TYD was ultimately invalidated in 1973 by *State ex rel. Watts v. Watts*,³¹ which also introduced the idea that parents deserved equal consideration in child custody determinations.³²

with the children, so did society's ideas about parental roles in childcare. *See id.* Society's views on children also evolved, embracing the idea that children needed to be protected and nurtured. *See* Mary Ann Mason, *The Roller Coaster of Child Custody Law Over the Last Half Century*, 25 J. AM. ACAD. MATRIM. L. 451, 452-53 (2012). Children who would have previously been seen as a source of labor were now encouraged to enjoy their tender years. *See id.* at 453.

25. *See* 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, 90 (2011); *see also* *Mercein v. People ex rel. Barry*, 25 Wend. 64, 106 (N.Y. 1840) (arguing mother proper caregiver and upholding TYD). Judge Bronson claimed that mothers are uniquely endowed with a natural attachment to their infant children that no other relative could possess, and without sufficient reason, no judge should be able to violate this law of nature. *See Mercein*, 25 Wend. at 106.

26. *See* Bajackson, *supra* note 6, at 314 (explaining father's property interest in children withstood Tender Years era). Once a child exceeded the tender age, custody would typically be awarded to the father, sometimes automatically. *See id.*

27. *See* Mason, *supra* note 24, at 452-53 (arguing child-centered BIC standard emanated from TYD).

28. *See* Cuadra, *supra* note 18, at 603-04 (acknowledging new presumption concerning mothers' innate permanent custodian role); *see also* *Freeland v. Freeland*, 159 P. 698, 699 (Wash. 1916) (emphasizing mothers' natural right to parent her children). "Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than a father's." *Freeland*, 159 P. at 699.

29. *See* Bajackson, *supra* note 6, at 314 (discussing full spectrum shift towards maternal presumption). Societal changes, including the women's rights movement, the industrial revolution, and the advancement of social science, all led to changes in child custody standards. *Id.*

30. *See* Warshak, *supra* note 25, at 91 (discussing societal change in women's rights and roles). The results of psychological studies were the beginning of the idea of a joint custody presumption. *Id.*

31. 350 N.Y.S.2d 285 (N.Y. Fam. Ct. 1973).

32. *See id.* at 291 (invalidating TYD presumption).

The 'tender years presumption' is actually a blanket judicial finding of fact, a statement by a court that, until proven otherwise by the weight of substantial evidence, mothers are always better suited to care for young children than fathers. This flies in the face of the legislative finding of fact underlying the specific command of [the statute], that the best interests of the child are served by the court's approaching the facts of the particular case before it without sex preconceptions of any kind.

C. The BIC Standard

The BIC standard arose in the late nineteenth century, but was not popularly supported until decades later.³³ The BIC standard was created when scholars, unsatisfied with the all or nothing approach, began exploring a gender-neutral standard for child custody decisions.³⁴ Particularly during the 1970s, when more mothers began to join the workforce, society grew intolerant of the TYD, and no longer accepted the polarized maternal and paternal presumptions; thus, this shift in societal norms and belief structures ultimately led to the adoption of the BIC standard across jurisdictions.³⁵

In 1970, the Uniform Marriage and Divorce Act (UMDA) exemplified the trend toward the BIC, and brought further clarity to its implementation.³⁶ Among others, the UMDA included popular factors already being considered by many family court judges:

- (1) [T]he wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.³⁷

Finally, the UMDA included a provision stipulating that courts should not consider any part of a parent's conduct that does not affect the parent-child relationship.³⁸

While jurisdictions have not adopted identical definitions of BIC, the term generally refers to a court's deliberation of what form of custody will best suit a child, and who is best equipped to care for a child's best interests.³⁹ Family

Id. at 287-88.

33. See Bajackson, *supra* note 6, at 314-15 (discussing early studies regarding BIC). Scholars from various states began exploring the BIC standard as early as 1840. *Id.* at 314. Early on, the child's wishes were heavily considered, and the BIC standard was gender-neutral. See *id.* at 314-15.

34. See *id.* (discussing gender-neutral attributes to BIC standard).

35. See Cuadra, *supra* note 18, at 604-05. The TYD was no longer practical for society, and most states modified the BIC standard "as a result of cultural and constitutional considerations." *Id.*

36. See Unif. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 249 (1973) (requiring courts make custody determinations on basis of BIC). The commentary on the UMDA discusses the purpose of codifying existing law in most jurisdictions, and "the five factors mentioned specifically are those most commonly relied upon in the appellate opinions." *Id.* cmt.

37. *Id.* § 402. The factors mentioned are not exclusive, and the language of this section indicates that judges are free to evaluate all factors they deem relevant. *Id.* cmt.

38. *Id.* § 402. The purpose of this last sentence is to keep states that evaluate fault in custody cases from "encourage[ing] parties to spy on each other in order to discover marital . . . misconduct" to be used in custody battles. *Id.* cmt.

39. See generally *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY (2012), https://www.childwelfare.gov/pubPDFs/best_interest.pdf [<https://perma.cc/FXX7-BWRE>]. BIC is to be the main consideration when awarding custody, and "the happiness and welfare of the children shall determine their custody." MASS. GEN. LAWS ch. 208, § 31 (2015); see also *Charara v. Yatim*, 937 N.E.2d 490, 496

courts make BIC determinations by evaluating the relevant factors, which are either statutorily specified or determined by the judge based on what is relevant to a particular case.⁴⁰ While many states have incorporated BIC factors into their statutory schemes, Massachusetts has yet to do so.⁴¹ Among the states with such statutory schemes, common factors include: the emotional ties between the child and his or her parents, siblings, and other involved parties; the parents' ability to provide a safe and healthy environment for the child; the parents' mental and physical health; the child's mental and physical needs; and whether domestic violence has occurred in the child's home.⁴² Some states list limiting factors that are used against a parent in child custody decisions, while others leave open the opportunity for a judge to consider any factor that he or she deems relevant to a particular case.⁴³

1. Minnesota's Statutory Factors

On August 1, 2015, Minnesota implemented twelve statutory factors to guide judges in determining the BIC, representing the state's most significant change in BIC factors since 1978.⁴⁴ In 1974, Minnesota became one of the first states to implement specific BIC statutory factors.⁴⁵ The 2015 changes, however, are meant to shift the focus toward the child's needs rather than the parents' rights.⁴⁶ The new factors have advanced fathers' rights, modernized

(Mass. App. Ct. 2010) (noting Massachusetts BIC standard requires child-centered analysis, not based on parental interests).

40. See *Determining the Best Interests of the Child*, *supra* note 39, at 3 (explaining how judges make custody decisions using BIC standard).

41. See MASS. GEN. LAWS ch. 208, § 31 (requiring judges to consider all relevant factors). No current statute in Massachusetts lists specific factors that family court judges must weigh when making BIC determinations. See *id.*; cf. e.g., MICH. COMP. LAWS ANN. § 722.23(3) (West 2016) (codifying factors to consider and evaluate when making BIC determinations in Michigan); MINN. STAT. § 518.17(a) (2015) (listing twelve statutory factors judges must evaluate in Minnesota custody determinations); N.D. CENT. CODE § 14-09-06.2(1) (West 2015) (describing mandatory BIC factors used in custody decisions in North Dakota).

42. See *Determining the Best Interests of the Child*, *supra* note 39, at 3 (listing popular factors courts employ in BIC analyses across jurisdictions); see *infra* Part II.C (discussing other states' inclusion of statutory factors in custody decisions).

43. See *Determining the Best Interests of the Child*, *supra* note 39, at 3 (discussing popular limiting factors restricting custody). Other factors courts consider include federal and state constitutional protections such as due process. See *id.* at 4.

44. See MINN. STAT. § 518.17(a); see also Michael Boulette, *Unpacking Minnesota's (New) Best Interest Factors*, FAMILY-IN-LAW (July 31, 2015), <http://family-in-law.com/unpacking-minnesotas-new-best-interest-factors> [https://perma.cc/V9N9-RD7U] (discussing possible impact of new factors in Minnesota). Soon after Minnesota began using the BIC standard in 1969, it included statutory factors in 1974, which were then rewritten in 1978. Boulette, *supra*.

45. See Boulette, *supra* note 44 (outlining timeline of child custody in Minnesota). When Minnesota first included statutory factors in 1974, there were nine factors and one "catch-all" factor. *Id.* In 1981, three best interest factors were added to the statute. *Id.* In 1985, the Minnesota Supreme Court read a "primary caretaker presumption" into the factors. *Id.*; see *Pikula v. Pikula*, 374 N.W.2d 705, 712 (Minn. 1985) (holding primary caretaker awarded full custody when two fit parents seek custody).

46. See Boulette, *supra* note 44 (discussing child-centered purpose of factors).

outdated law, and created a more predictable set of factors for judges and families.⁴⁷

Before the 2015 change, the Minnesota statute's first factor required judges to determine "the wishes of the child's parent or parents as to his custody"; this factor is now completely replaced by one representing the needs of the child.⁴⁸ Minnesota also now requires that judges give weight to "any special medical, mental health, or educational needs" of a child "that may require special parenting arrangements."⁴⁹ A child's reasonable custody preference remains in the analysis depending on the child's "ability, age, and maturity to express an independent, reliable preference."⁵⁰ Another factor requires judges to consider domestic abuse that "has occurred in the parents' or either parent's household or relationship," and how it impacts "the child's safety, well-being, and developmental needs."⁵¹ The primary caretaker presumption, which the BIC replaced in the 1990s, was eviscerated even further by weighing each parent's history and nature of participation in caring for the child.⁵²

The remaining factors focus on the child's well-being, development, and ability to maintain significant relationships, while also evaluating the parents' abilities and desires in rearing their children, including their ability to cooperate with one another.⁵³ The 2015 Minnesota statute also includes nine principles

47. *Id.* (discussing purpose and proposed effects of new BIC factors).

48. See MINN. STAT. § 518.17(a)(1) (beginning factors with child-focused language). Judges are required to determine "a child's physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development." *Id.*; see also Michael P. Boulette, *A Practitioner's Guide to Minnesota's New Best Interest Factors*, 9 WM. MITCHELL J.L. & PRAC. 1, 3-4 (2016) [hereinafter Boulette, *A Practitioner's Guide*] (outlining previous statutory factors); Boulette, *supra* note 44 (highlighting significance and message of new factor). With this change to the first factor, "the 'rights' (or wishes) of the parent no longer even merit initial consideration" in Minnesota. Boulette, *supra* note 44 (discussing future impact of changes in Minnesota factors).

49. MINN. STAT. § 518.17(a)(2).

50. *Id.* § 518.17(a)(3); see also Boulette, *A Practitioner's Guide*, *supra* note 48, at 4 (demonstrating child's reasonable preference also existed in Minnesota's previous BIC statute).

51. MINN. STAT. § 518.17(a)(4). Domestic abuse between parents creates a rebuttable presumption that joint legal custody or joint physical custody is not in the BIC. *Id.* § (b)(9); see also MINN. STAT. § 518B.01(a) (2015) (defining "domestic abuse" for purposes of statute).

52. See MINN. STAT. § 518.17(a)(6) (presenting factor considering both parents' roles in caring for children); Boulette, *supra* note 44 (discussing Minnesota's elimination of primary caretaker factor). Previously, Minnesota required judges to make a finding and to evaluate which parent was the primary caretaker, but this factor has been replaced by one that looks at each parent's role in providing care for the child. See Boulette, *supra* note 44. Though the Minnesota Supreme Court fought for the primary caretaker presumption, the legislature ultimately won the war in eliminating all primary caretaker evaluation. See *id.*; Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 452 (1990) (explaining difficulty of Minnesota primary caretaker preference, including ambiguous definition of "primary caretaking").

53. See MINN. STAT. § 518.17(a)(1)-(12). Factors relating to the parents include: "any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs"; "the willingness and ability of each parent to provide ongoing care for the child"; "the disposition of each parent to support the child's relationship with the other parent"; and "the willingness and ability of parents to cooperate in the

that govern the application of the statutory BIC factors.⁵⁴ Most significantly, the statute requires the court to make detailed findings for each factor, and the court must explain how the factors led to its custody and parenting time decisions.⁵⁵

2. Michigan's Statutory Factors

In 1970, the Michigan legislature implemented the Child Custody Act of 1970, which incorporated multiple BIC factors into child custody law.⁵⁶ The twelve factors included in the 1970 law resemble those already discussed, and each must be “considered, evaluated, and determined by the court.”⁵⁷ The first factor requires judges to evaluate the existing relationship between both parents and the child.⁵⁸ The second and third factors review the capacity of the parties to provide “love, affection, . . . guidance, . . . education, food, . . . clothing, [and] medical care.”⁵⁹ The next two factors focus on the stability and permanence of the current living environment, as well as the desirability of maintaining that environment.⁶⁰ Additionally, the court must make a moral,

rearing of their child.” *Id.* § 518.17(a)(5), (7), (11)-(12). Factors relating to the well being of the child include: “the effect on the child’s well-being and development of changes to home, school, and community”; “the effect of the proposed arrangements on the ongoing relationships between the child and each parent, siblings, and other significant persons in the child’s life”; and “the benefit to the child in maximizing parenting time with both parents and the detriment to the child in limiting parent time with either parent.” *Id.* § 518.17(a)(8)-(10).

54. *Id.* § 518.17(b).

55. *Id.* § 518.17(b)(1). Through its findings, the court must strive “to promote the child’s healthy growth and development through safe, stable, nurturing relationships between a child and both parents.” *Id.* § 518.17(b)(2). Minnesota does not include a presumption either way regarding joint physical custody except if either or both parties request to use a rebuttable presumption that joint legal custody is in the child’s best interest. *Id.* § 518.17(b)(7), (9). Joint physical custody in Minnesota does not guarantee precisely equal parenting time. *Id.* § 518.17(b)(8).

56. See MICH. COMP. LAWS ANN. § 722.23 (West 2016) (listing BIC factors and describing how to evaluate them).

57. See *id.* (describing process used to evaluate BIC factors); *supra* notes 44-54 and accompanying text (discussing Minnesota’s statutory BIC factors); see also *Pierron v. Pierron*, 782 N.W.2d 480, 486-87 (Mich. 2010) (describing how court must evaluate each factor). A court must consider each factor for the purpose of resolving disputes concerning the welfare of the child and the child’s custody even if the court does not consider certain statutory factors to be related to the issues in a particular case. See *Pierron*, 782 N.W.2d at 486; *Parent v. Parent*, 762 N.W.2d 553, 556 (Mich. Ct. App. 2009) (holding court must evaluate all BIC factors, regardless of relevance). A trial court does not need to abide by a mathematical approach to the factors to make a custody determination; rather it is free to assign different weights to the factors. *Berger v. Berger*, 747 N.W.2d 336, 347 (Mich. Ct. App. 2008) (per curiam). If a trial court does not state its findings and conclusions regarding each factor, this failure constitutes reversible error. *Fletcher v. Fletcher*, 504 N.W.2d 684, 688 (Mich. Ct. App. 1993), *rev’d in part*, 526 N.W.2d 889 (Mich. 1994).

58. See MICH. COMP. LAWS ANN. § 722.23(3)(a) (requiring courts evaluate existing “love, affection, and other emotional ties” between parties and child); *Pierron*, 782 N.W.2d at 484-85 (preserving children’s emotional ties through continuing to live with her loving mother despite changing schools).

59. MICH. COMP. LAWS ANN. § 722.23(3)(b)-(c); see also *Fletcher v. Fletcher*, 526 N.W.2d 889, 883 (Mich. 1994) (noting one-sided recitation of facts suboptimal in evaluating capacity to give love, affection, and guidance); *Dempsey v. Dempsey*, 296 N.W.2d 813, 814 (Mich. 1980) (per curiam) (cautioning against assigning excessive weight to parties’ economic circumstances in deciding custody).

60. MICH. COMP. LAWS ANN. § 722.23(3)(d)-(e) (mandating judges evaluate stability, continuity, and

mental, and physical evaluation of the parties.⁶¹ Then the court must look into the “home, school, and community record of the child,” as continuity and stability are important tenets of Michigan’s BIC analysis.⁶²

As with other jurisdictions’ BIC analyses, Michigan evaluates the child’s reasonable preferences and each party’s willingness and ability to effectuate and encourage a parent-child relationship between the child and each parent.⁶³ The court will also scrutinize any evidence that may indicate either parent committed acts of domestic violence, regardless of whether the child witnessed these acts or was the victim.⁶⁴ Finally, Michigan includes the familiar catch-all factor, allowing the judge to insert any other factor he or she deems relevant for the particular set of circumstances.⁶⁵

D. The Shared Parenting Presumption

In 2015, twenty states began considering legislation that would change the laws governing child custody and promote shared parenting as the optimal physical custody arrangement.⁶⁶ Proponents of this sort of legislation argue that courts nationwide have ignored the equal rights of parents, and have denied fathers the right to jointly parent their children after a divorce.⁶⁷ Most of the

permanence of custodial home); *see also* Ireland v. Smith, 547 N.W.2d 686, 690 (Mich. 1996) (deciding fifth factor focuses on permanence of custodial home, not acceptability of homes).

61. MICH. COMP. LAWS ANN. § 722.23(3)(f)-(g) (listing factors including moral fitness and parties’ mental and physical health); *see also* Ziontz v. Ziontz, 36 N.W.2d 882, 888-89 (Mich. 1949) (Dethmers, J., concurring) (arguing evidence of mother’s continuous neglect for child’s welfare constituted grounds for denying custody).

62. *See* MICH. COMP. LAWS ANN. § 722.23(3)(h); *see also* Pierron, 782 N.W.2d at 484 (holding change to established custodial environment permissible when parties present clear and convincing BIC evidence).

63. MICH. COMP. LAWS ANN. § 722.23(3)(i)-(j); *see also* MINN. STAT. § 518.17(1)(a)(3) (2015) (including factor of reasonable preference of child); Treutle v. Treutle, 495 N.W.2d 836, 838 (Mich. Ct. App. 1992) (holding child’s preference does not automatically outweigh other factors).

64. MICH. COMP. LAWS ANN. § 722.23(3)(k).

65. *Compare id.* § 722.23 (3)(l) (including catch-all factor allowing court’s consideration of other relevant factors), with H.B. 1207, 189th Gen. Ct. (Mass. 2015) (including catch-all factor in House Bill 1207); *see also* Ireland, 547 N.W.2d at 691 (allowing actual and proposed childcare arrangements within statutory catch-all factor in custody disputes).

66. *See* Ashby Jones, *Big Shift Pushed in Custody Disputes*, WALL STREET J. (Apr. 16, 2015), <http://www.wsj.com/articles/big-shift-pushed-in-custody-disputes-1429204977> (discussing legislation pending in twenty states to afford fathers more rights to children after divorce). Most of these proposals encourage judges to maximize parenting time for each parent, sometimes mandating equal parenting time. *See* Shawn Garrison, *More States Considering Shared-Parenting Legislation*, DADSDIVORCE (May 13, 2015), <http://dadsdivorce.com/articles/more-states-considering-shared-parenting-legislation/> [<https://perma.cc/V6WX-H8F7>] (highlighting recent changes in joint custody law throughout many jurisdictions).

67. *See* Laura Beil, *The Custody Bias: Is the Justice System Unfair to Fathers Seeking Child Custody? And What Can Dads Do to Keep Their Kids?*, MEN’S HEALTH, <http://www.menshealth.com/guy-wisdom/custody-bias> (last visited Feb. 13, 2017) [<https://perma.cc/GJ2T-U733>] (discussing possible unfair bias against fathers in custody decisions). Even though fathers currently receive more custody than ever before, mothers constitute 83% of custodial parents. *Id.* A Nebraska report showed that courts award mothers sole or primary custody 72% of the time, while fathers are awarded sole or primary custody only 13.8% of the time. Caroline Cordell, *Shocking Statistics Show the Bleak Reality of Joint Custody in Nebraska*, MEN’S RTS. (Jan. 27, 2014),

proposed legislation includes either a preference or presumption of shared parenting or joint physical custody.⁶⁸ While the word presumption can mean many things in law, here it is known as a “mirror image presumption,” which means that the party opposing shared parenting has the burden to “produce sufficient evidence to rebut the presumption.”⁶⁹ Those in favor of a joint physical custody presumption have two main arguments: that legal and social sciences have identified benefits of joint custody, and that joint custody is a constitutional right.⁷⁰ Those opposed to a joint custody presumption have common rebutting arguments: “the inadequacy of the social science data,” “the view that a presumption is an ‘easy out’ for the judge,” “problems with ambiguous terminology,” and “the dangerous effect of a presumption on situations where domestic violence is present.”⁷¹

<http://mensrights.com/shocking-statistics-show-the-bleak-reality-of-joint-custody-in-nebraska> [https://perma.cc/5V56-2C95]. Furthermore, Nebraska courts award equal parenting time in only 12.3% of cases, and, most shockingly, 72% of child custody decisions in the state “result in dads seeing their children 5.5 days per month.” *Id.*

68. See Garrison, *supra* note 66 (discussing content of proposed shared parenting legislation).

69. Dorothy R. Fait et al., *The Merits of and Problems with Presumptions for Joint Custody*, MD. BAR J., 15 (Jan.–Feb. 2012) (defining joint custody presumption). A shared parenting presumption disfavors the party in opposition to shared parenting, rather than treating both parents equally. *Id.* The presumption also disfavors the use of the factors that judges use to evaluate the BIC. *Id.* at 15-16.

70. See Melissa A. Tracy, *The Equally Shared Parenting Time Presumption—A Cure-All or a Quagmire for Tennessee Child Custody Law?*, 38 U. MEM. L. REV. 153, 173 (2007). Proponents of presumptive joint custody use factors such as the psychological benefits of both parents caring for children, motivating parents to pay child support, clearing up court dockets, and modernizing statutes to reflect social norms to back their argument that social science supports a shared parenting presumption. See *id.* at 173. It is true that studies have shown that most children benefit from having both parents in their lives, and that parents benefit from having their children in their lives. See *id.* at 173-74. A joint custody presumption may also encourage previously disenchanted parents to pay child support and prevent relitigation of custody matters. See *id.* at 174-75. Advocates in favor of a presumption of shared parenting assert that the presumption follows the constitutional right to parent, and that this right cannot be obstructed without a “compelling state interest.” *Id.* at 175-76. Without the demonstration of a compelling state interest, shared parenting time is required to avoid violating a parent’s due process rights. *Id.* at 176. The Supreme Court stated that the BIC is unquestionably a substantial government interest, and as such, the state should strive to preserve the BIC over the fundamental interests of either parent. *Id.* at 177-78.

71. *Id.* at 178. Opponents to the presumption argue that “joint custody” is too ambiguous to determine, as different connotations of the term are associated with different jurisdictions. See *id.* Additionally, while studies may show that children benefit from two involved parents, a presumption of shared parenting does not ensure these benefits, and shared parenting is not the only path to take to ensure lasting relationships with both parents. *Id.* at 179. Most social science studies evaluate families who voluntarily chose shared parenting, not those upon whom it has been imposed. See *id.* Furthermore, opponents reject the argument that the presumption aids in judicial economy because it allows for less-reasoned judgments by giving judges an “easy out.” See *id.* at 179-80. A shared parenting presumption also risks granting custody to parents who have inflicted violence on family members. See *id.* at 180-81. Similarly, opponents assert that a joint custody presumption would endanger the lives of children who have already been affected by domestic violence, reinforcing the argument that shared parenting only works well for children whose parents can amicably cooperate. *Id.* at 181. Although occasionally there may be truth in advocates’ claims, “none is sufficiently weighty to support a presumption in favor of joint custody that might inadvertently work to require an abuser or his abused partner to remain in continual contact.” Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 406 (2005).

The District of Columbia is one jurisdiction that already includes a shared parenting presumption.⁷² The presumption is that joint custody is in the BIC unless it can be rebutted by a preponderance of the evidence.⁷³ The District of Columbia also includes specific exceptions to this presumption, such as child abuse, child neglect, or parental kidnapping.⁷⁴ Notwithstanding the presumption, the BIC remains of paramount concern for courts.⁷⁵ Other jurisdictions, such as Florida, Idaho, Iowa, Louisiana, and New Mexico, have also enacted similar legislation.⁷⁶

E. BIC in Massachusetts and Proposed Changes

Massachusetts considers the rights of both parents equally when making child custody determinations, and there is no statutory presumption either in favor or against shared legal or physical custody.⁷⁷ When it comes to domestic abuse, however, Massachusetts includes a statutory provision that creates a rebuttable presumption that it is not in the BIC to be placed in the custody of an abusive parent.⁷⁸ As of today, Massachusetts lacks statutory factors to guide

72. See 2014 Shared Parenting Report Card: A New Look at Child Welfare: A State-by-State Ranking, NAT'L PARENTS ORG. 15 (2014), https://nationalparentsorganization.org/docs/2014_Shared_Parenting_Report_Card%2011-10-2014.pdf [<https://perma.cc/C4RB-V5LJ>] [hereinafter 2014 State Parenting Report Card] (grading jurisdictions on performance promoting shared parenting, and noting District of Columbia's shared parenting presumption).

73. See D.C. CODE § 16-914(a)(2) (2013) (defining and requiring rebuttable presumption of joint custody).

74. *Id.*

75. *Id.* § 16-914(a)(3) (emphasizing consideration courts must give BIC).

76. See FLA. STAT. ANN. § 61.13(2)(c)(2) (West 2014) (requiring court to order shared parental responsibility unless detrimental to child); IDAHO CODE ANN. § 32-717B(4) (West 2015) (mandating presumption of joint custody in BIC "absent preponderance of evidence to the contrary"); IOWA CODE ANN. § 598.41(2)(b) (West 2016) (requiring court cite clear and convincing evidence "that joint custody is . . . not in the [BIC]"); LA. CIV. CODE ANN. art. 132 (1999) (stating absent agreement or if agreement not in BIC, court awards joint custody); N.M. STAT. ANN. § 40-4-9.1(A) (West 2015) (presuming joint custody in BIC in initial custody determination). See generally 2014 Shared Parenting Report Card, *supra* note 72 (listing states with shared parenting presumption in effect today).

77. See MASS. GEN. LAWS ch. 208, § 31 (2015) (mandating parents' equal rights in child custody determinations). "In making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody." *Id.* The statute specifically announces that there is no presumption either for or against joint physical or legal custody, except as provided in § 31A. *Id.*

78. MASS. GEN. LAWS ch. 208, § 31A (2015) (describing implementation of rebuttable presumption against shared parenting in event of demonstrated abuse).

A probate and family court's finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child.

Id.

judges in BIC determinations, although this may change through pending legislation.⁷⁹

Massachusetts probate and family courts have been criticized for their open-endedness in child custody decisions, which critics claim are far too subjective.⁸⁰ Fathers' rights groups in particular have been working tirelessly to change the current standards in Massachusetts child custody law; these groups claim that fathers deserve equal consideration as mothers in judicial decisions.⁸¹ The requirement that judges make findings by weighing all relevant factors about the particular child's best interest is one mitigating factor against unbridled judicial discretion.⁸² Nevertheless, the drafters of House Bill

79. See MASS. GEN. LAWS ch. 208, § 31 (granting discretion to judges to weigh all particularly relevant factors in determining BIC); H.B. 1207, 189th Gen. Ct. (Mass. 2015) (proposing statutory factors for use in BIC analysis); *Schechter v. Schechter*, 37 N.E.3d 632, 639 (Mass. App. Ct. 2015) (discussing requirement for judges to evaluate all relevant factors).

80. See *In re Custody of Kali*, 792 N.E.2d 635, 640 (Mass. 2003) (describing criticisms of BIC formulation); 14B MA PRAC., SUMMARY OF BASIC LAW § 8.257, Westlaw (5th ed.) (database updated Dec. 2016) [hereinafter MA PRAC. DATABASE] (criticizing Massachusetts custody decisions). Even though BIC is the most widely-used standard, it "has been criticized by a number of commentators, who contend that the open-endedness of the standard leads either to an inconsistency of results or to the systematic imposition by courts of unnamed prejudices regarding what outcomes represent a child's best interests." *In re Custody of Kali*, 792 N.E.2d at 640; see e.g., Crippen, *supra* note 52, at 499-500 (concluding BIC allows impermissible level of judicial discretion, "stimulates litigation," and "risks unwise results"); Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 16 (1987) (concluding BIC "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) (describing how BIC "is [an] . . . example of . . . futility of attempting . . . individualized justice . . . by reposing discretion"); see also Nicole Lapsatis, Note, *In the Best Interests of No One: How New York's "Best Interests of the Child" Law Violates Parents' Fundamental Right to the Care, Custody, and Control of Their Children*, 86 ST. JOHN'S L. REV. 673, 692-93 (2012) (arguing New York judges abuse their broad discretion in choosing arbitrary factors in BIC determinations). But see Ann M. Funge, *Articulated at Last: What Factors Constitute 'Best Interests of the Child,'* 33 PA. L. 24, 26 (2011) (discussing well-established concept that judges must determine BIC on case-by-case bases).

81. See MA PRAC. DATABASE, *supra* note 80 (describing current protections against subjective decisions by requiring a weighing of all relevant factors); see also Jenna Russell, *Fighting Dad*, BOSTON.COM (June 19, 2011), http://www.boston.com/lifestyle/family/articles/2011/06/19/newtons_ned_holstein_fights_for_divorced_fathers_rights (interviewing Ned Holstein, founder of Fathers and Families national advocacy group). Ned Holstein claims gender bias in custody decisions leads courts to decline granting fathers equal parenting time. See Russell, *supra*; *Ned Holstein: How Can We Best Live Our Lives When We and Our Children Have Suffered Injustice?*, NAT'L PARENTS ORG., <https://nationalparentsorganization.org/blog/205-ned-holstein-how-ca-205> (last visited Feb. 13, 2017) [<https://perma.cc/7NLX-6LVH>] [hereinafter *Holstein*] (discussing judges' lack of training in child development hinders their ability to make BIC decisions). Holstein believes courts are supporting stereotypes that fathers are "selfish, dangerous, indifferent to . . . children, cheaters, [or] workaholics," and these stereotypes led to courts depriving fathers of their children. *Holstein, supra*. He also argues the media portrays fathers as "vicious villains" or "foolish, egotistical, narcissistic idiots," leading to a societal bias against fathers. *Id.* The main category of those opposing the proposed reforms are women's domestic violence groups. See Russell, *supra* (describing opposition to reform aimed at granting more rights to fathers); Greenberg, *supra* note 71, at 406 (arguing current reforms force abused partner to remain in consistent contact with abuser).

82. See *Massachusetts Legislature Considers Controversial Changes to Child Custody Laws*, WBUR (Aug. 6, 2015), <http://radioboston.wbur.org/2015/08/06/shared-parenting> [<https://perma.cc/FH7L-56F3>] (describing drafters' purpose in writing House Bill 1207). Fathers' rights groups, including Ned Holstein's

1207 aim to encourage judges to consider specific BIC factors through its proposed legislation.⁸³ House Bill 1207 includes seven factors to be weighed in determining BIC, plus ten additional limiting factors.⁸⁴

House Bill 1207 would require Massachusetts courts to further the BIC while considering Massachusetts General Laws chapter 208, section 31A, and the bill's enumerated factors.⁸⁵ House Bill 1207's first factor requires a court to consider the child's relationship with each parent.⁸⁶ The court must also consider the reasonable wishes of the child while looking out for any undue influence one parent may have on the child against the other parent.⁸⁷ Next, Massachusetts probate and family courts would analyze the parents' relationship with one another, as well as their ability to cooperate for the purpose of shared parenting determinations.⁸⁸ The fourth factor requires judges to determine "the present and expected physical, emotional, and geographical availability of each parent."⁸⁹ Subsequently, the court must evaluate the history of the caregiving functions of each parent, and "the present interest, desire, and abilities of each parent to fulfill caregiving functions."⁹⁰ The ability of each parent to cultivate a positive relationship with his or her child is another factor addressed in the bill.⁹¹ Finally, House Bill 1207 includes the catch-all provision that allows a judge to weigh additional factors he or she deems relevant to a particular set of circumstances.⁹² After considering all of these factors, House Bill 1207 allows the judge to restrict parenting time based on the presence of limiting factors.⁹³

group, are hoping this bill will lead to more balanced custody decisions that equally consider fathers' and mothers' attributes. *See id.*

83. *See id.* (discussing perceived subjective decisions and latent flaws in Massachusetts child custody laws).

84. *See* Mass. H.B. 1207, § (D)-(E) (enumerating proposed statutory factors).

85. *See id.* § (D) (providing context for when factors evaluation takes place); *see also* MASS. GEN. LAWS ch. 208, § 31A (2015) (implementing rebuttable presumption against shared parenting for abusive parents).

86. Mass. H.B. 1207, § (D)(1).

87. *Id.* § (D)(2).

88. *Id.* § (D)(3).

89. *Id.* § (D)(4).

90. Mass. H.B. 1207, § (D)(5). "Caregiving functions are tasks that involve direct interaction with the child or arranging and supervising the interaction and care provided by others." *Id.*

91. *See id.* § (D)(6) (outlining methods of fostering positive family relationships). A positive relationship requires frequent and continuous contact not only between the custodial parent and child but between each parent. *Id.*

92. *Id.* § (D)(7) (allowing consideration of additional factors relevant to promoting positive parent-child relationship). Additionally, if a judge chooses to award temporary sole decision-making responsibility to one parent, the judge must compose a memorandum explaining the rationale behind the decision. *See id.*

93. *Id.* § (E). House Bill 1207 includes several limiting factors:

- (1) A parent's emotional abuse of a child.
- (2) A parent's having inflicted abuse on the other parent or child as provided for in G. L. c. 208, § 31A.
- (3) A parent's abuse of drugs, alcohol, or another substance that interferes with a parent's caregiving of the child or exposes the child to harm.
- (4) A parent's incarceration.
- (5) A parent's involving or attempting to involve the child in the parents'

In light of criticism from fathers' rights groups that fathers are not given equal consideration in BIC determinations, the drafters of House Bill 1207 included a presumption of shared parenting.⁹⁴ House Bill 1207 defines shared residential responsibility as a child living with each parent separately for different periods of time.⁹⁵ The definition iterates that shared parenting does not necessarily equate to absolutely equal parenting time, and that parenting time is dependent on the BIC.⁹⁶ The definition presumes that each parent will have at least one-third parenting time unless the parents agree or the court determines otherwise.⁹⁷ If one parent has more than two-thirds parenting time, and the child has reasonable parenting time with the other parent, the primary residential responsibility definition is satisfied under House Bill 1207.⁹⁸ Under House Bill 1207, a child custody determination should be based on weighing the BIC using the statutory factors while considering the shared parenting presumption.⁹⁹

III. ANALYSIS

A. Arguments in Favor of Statutory BIC Factors

1. Contrasts Between House Bill 1207 and Minnesota's BIC Factors

The proposed BIC factors in House Bill 1207 will update child custody law in Massachusetts, and bring the law into conformity with changes other states adopted decades ago.¹⁰⁰ Many of the factors included in House Bill 1207 are

disputes through manipulation or coercive behavior. (6) A parent's obstructing or impeding communication, cooperation, parenting time, or shared decision-making or attempting to do so. (7) A parent's interference with the other parent's access to the child. . . . (8) A parent's knowingly proving false information to any court regarding parent. (9) A parent's conviction for a child-related sexual offense. (10) Any other additional factors . . . the court deems relevant.

Id.

94. Mass. H.B. 1207, § (B)(1)-(2).

95. *Id.* § (B)(2)(a). The bill requires the following:

A child shall have periods of residing with and being under the care and responsibility of each parent; provided, however, that such periods shall be shared by the parents in such a way as to assure a child frequent, continued and developmentally appropriate contact with both parents and in accordance with the best interest of the child.

Id.

96. *See id.*

97. *Id.* A shared parenting presumption is separate from joint legal custody, or shared "decision-making responsibility," as it is called in House Bill 1207. *See id.* § 31(B)(1)-(2) (defining shared and sole decision-making responsibility and residential responsibility).

98. Mass. H.B. 1207, § (B)(2)(b).

99. *See id.* § (D) (requiring judges to evaluate factors and decide residential responsibility and decision-making responsibility, while also considering BIC).

100. *See id.* § (A) (outlining public policy in drafting bill); *see also Massachusetts Legislature Considers*

comparable to those found in Minnesota child custody law—some factors are identical.¹⁰¹ The relationship of the child with each parent is a mutually-included factor, although only the effect of the proposed custody arrangement on the parent-child relationship is weighed in Minnesota.¹⁰² Massachusetts follows Minnesota’s example of employing a child-centered approach with a BIC analysis by requiring an evaluation of the child’s reasonable expectations; House Bill 1207 also includes a provision where courts would consider any undue influence of either parent in the child’s choice.¹⁰³ Massachusetts also emulates Minnesota by proposing the requirement for judges to consider the ability of the parents to fulfill caregiving functions, cooperate with one another, and foster positive relationships between the child and the other parent.¹⁰⁴ Massachusetts statutes already require a limit on shared parenting when one parent has abused the child or other parent; Minnesota also expands the analysis by factoring in any abuse inflicted by a parent in other relationships.¹⁰⁵ If shared parenting is granted, equal time would not be guaranteed in either state, as courts must ultimately decide what parenting plan is in the BIC.¹⁰⁶

Minnesota revolutionized parental custody arrangements by creating laws that promote the BIC, and the state has continued its efforts in protecting the constitutional right to parent while not losing sight of what is most important: the BIC.¹⁰⁷ By implementing statutory factors, Massachusetts would step out of the murky waters consequent to broad judicial discretion by requiring judges

Controversial Changes to Child Custody Laws, supra note 82 (discussing need for change regarding child custody decisions).

101. Compare MINN. STAT. § 518.17(1)(a) (2015) (listing factors judges must consider when determining BIC), with Mass. H.B. 1207, § (D) (listing proposed BIC factors).

102. See MINN. STAT. § 518.17(1)(a)(9) (including factor requiring judges to consider how proposed arrangement will affect significant relationships in child’s life); Mass. H.B. 1207, § (D)(1) (describing need to evaluate relationship between each parent and child).

103. See MINN. STAT. § 518.17(1)(a)(3) (analyzing reasonable preference of children “of sufficient ability, age, and maturity”); Mass. H.B. 1207, § (D)(2) (requiring judges to evaluate children wishes “of sufficient age, capacity, and understanding,” absent parental influence).

104. Compare MINN. STAT. § 518.17(1)(a)(6)-(7),(9),(12) & (b)(3) (enumerating factors for consideration and discussing parents’ ability to provide for BIC), with Mass. H.B. 1207, § (D) (3),(5)-(6) (listing factors and evaluating parents’ ability to provide for BIC).

105. See Mass. H.B. 1207, § (E)(2) (listing second limiting factor); see also MASS. GEN. LAWS ch. 208, § 31A (2015) (imposing limit on BIC in event of abuse toward other parent or child). Minnesota requires judges to evaluate the nature and context of the domestic abuse, as well as the implications of the domestic abuse on the child’s safety, development, and well being if it has occurred in the parents’ household or in the intercourse of their relationship. MINN. STAT. § 518.17(1)(b)(9).

106. Compare MINN. STAT. § 518.17(1)(b)(8) (emphasizing how joint custody does not mean “equal division of time”), with Mass. H.B. 1207, § (B)(2)(a) (stating shared parenting does not mean equal time). House Bill 1207 does, however, include a shared parenting presumption that children shall reside one-third of the time or more with each parent if the court grants shared parenting, unless the parents agree otherwise. Mass. H.B. 1207, § (B)(2)(a).

107. See Boulette, *supra* note 44 (discussing history of Minnesota’s child custody law). Boulette also points out Minnesota’s purposeful effort to ensure that BIC determinations are increasingly focused on the child, even to the detriment of the rights of the parents. See *id.*

to show how weighing the relevant statutory factors aided in making BIC decisions.¹⁰⁸ These changes would bring clarity to judicial decision making, and are a step in the right direction for Massachusetts.¹⁰⁹

2. Comparisons Between House Bill 1207 and Michigan's BIC Factors

House Bill 1207 is comparable to the law implemented in Michigan through the Child Custody Act of 1970.¹¹⁰ Each of Michigan's child custody factors must be "considered, evaluated, and determined by the court," as similarly required by House Bill 1207.¹¹¹ The twelve statutory BIC factors in Michigan are mirrored in House Bill 1207.¹¹² Both jurisdictions specifically include the familiar catch-all factor that allows judges to evaluate any unlisted, yet pertinent, factor that is relevant to a particular child's best interests.¹¹³ House Bill 1207 emulates Michigan's middle-of-the-road approach to statutory factors without rising to the level of Minnesota's new child custody factors, which have yet to be proven effective.¹¹⁴

108. See *supra* notes 80-81 and accompanying text (describing criticisms of broad discretion and possibility for bias in BIC decisions in Massachusetts); see also Arnett, *supra* note 7 (considering changes in Massachusetts custody law necessary to accommodate changing society).

109. See Funge, *supra* note 80, at 29 (arguing Pennsylvania's statutory factors bring clarity to child custody decisions).

As any seasoned family law practitioner will admit, these now-mandatory factors were often but not comprehensively or as a practice examined when determining a child's best interests in the past. The fact that they all must now be examined statewide can only provide for more individualized and well-reasoned custody awards with less personal bias intruding upon the decisions. The 16th factor—"Any other relevant factor"—keeps the door open to other unusual factors that may be important in a particular case but not in others. The other express mandatory factor to consider—criminal convictions, guilty pleas and "no contest" pleas by a party or a member of a party's household—were part of the prior statute and will create no change in evaluating a child's best interests.

Id.

110. See MICH. COMP. LAWS ANN. § 722.23(3) (West 2016) (listing BIC factors and describing how to evaluate them); Mass. H.B. 1207, § (D) (describing factors and method of evaluation).

111. MICH. COMP. LAWS ANN. § 722.23(3) (outlining process courts must use to evaluate BIC factors); Pierron v. Pierron, 782 N.W.2d 480, 486 (Mich. 2010) (explaining factor evaluation required in Michigan courts). Even if the court deems some statutory factors irrelevant to a particular case, the judge must still make findings on each factor. *Pierron*, 782 N.W.2d at 486. If a trial court does not iterate a finding and conclusion for each factor, the error would merit a reversal on appeal. See *Fletcher v. Fletcher*, 504 N.W.2d 684, 688 (Mich. Ct. App. 1993), *rev'd in part*, 526 N.W.2d 889 (Mich. 1994). In Massachusetts, probate and family courts are already required to evaluate all relevant factors. *Schechter v. Schechter*, 37 N.E.3d 632, 641 (Mass. App. Ct. 2015) (discussing duty of court to ensure all relevant factors considered). House Bill 1207 does not contain the harsh language found in Michigan case law, however; it only requires the BIC to guide judges, and for judges to consider the factors included in the proposed legislation. See Mass. H.B. 1207.

112. See *supra* notes 57-64 & 84-93 and accompanying text (describing statutory factors in Michigan and proposed factors in House Bill 1207).

113. MICH. COMP. LAWS ANN. § 722.23(3)(l); Mass. H.B. 1207, § (D)(7).

114. See MICH. COMP. LAWS ANN. § 722.23(3)(a)-(l) (enumerating factors courts must consider in BIC decisions); MINN. STAT. § 518.17(1)(a)(1)-(12) (2015) (listing new factors used in BIC analysis); Mass. H.B.

3. BIC Factors Guide Rather than Stifle Judicial Discretion

Critics of the current BIC standard argue that it is largely ineffective, giving judges too much discretion and leading to arbitrary decisions in child custody cases.¹¹⁵ Several judges have countered that the imposition of statutory factors limits their ability to decide a child's best interests on a case-by-case basis.¹¹⁶ This argument is compelling to an extent, as it is especially necessary in child custody cases for a judge to make a decision based on the unique circumstances of each case: every family is different, and no two children's best interests look exactly alike.¹¹⁷ The proposed factors, however, can apply in almost all cases, and specifically support the judge's discretion to consider any factor relevant to a particular case.¹¹⁸ The mandatory use of these BIC factors will ensure that each judge makes specific determinations on factors impacting the BIC in each case.¹¹⁹ The use of statutory BIC factors will result in more reasoned, predictable, and less biased decisions that are therefore less likely to be appealed.¹²⁰

4. Precedential Use of House Bill 1207 Factors

House Bill 1207 includes the factors that Massachusetts family law practitioners typically see judges evaluate when making BIC determinations.¹²¹ In *Schechter v. Schechter*,¹²² Judge Agnes underwent a detailed analysis

1207, § (D)(1)-(7) (outlining proposed factors for courts to consider in BIC decisions).

115. See Lapsatis, *supra* note 80, at 692. Lapsatis asserts that the fundamental flaw in BIC decisions is the assumption that a judge will combine his or her discretion with New York's factors to come up with a decision that is truly in the BIC. *Id.*

A judge's unbridled discretion in custody disputes, in tandem with the well-established rule that the "best interests" criteria are guides and not absolute rules, has resulted in judges considering some factors more than others, disregarding factors completely, or capriciously incorporating other considerations that are not part of the often-cited recommended factors.

Id. at 692-93.

116. See *Massachusetts Legislature Considers Controversial Changes to Child Custody Laws*, *supra* note 82 (arguing judges do not need limits imposed upon their discretion); Funge, *supra* note 80, at 26 (asserting judges must determine each case based "on its own particular facts"). Judges should set aside all presumptions in order to determine which factors apply to each particular child's best interest. See Funge, *supra* note 80, at 26.

117. See Funge, *supra* note 80, at 26. It is essential that a BIC determination "result in more individually tailored and child-centric custody determinations, thereby better protecting the innocent bystanders to marital and relationship dissolution." *Id.* at 29.

118. See Mass. H.B. 1207 at (D)(7); see *infra* Part III.B.2 (discussing applicability of House Bill 1207 guidelines).

119. See Funge, *supra* note 80, at 29 (arguing statutory factors will ensure judges make more reasoned decisions).

120. See *id.* (predicting positive results after imposing mandatory statutory factors).

121. See *id.* (discussing wide use of factors in case law prior to statutory implementation).

122. 37 N.E.3d 632 (Mass. App. Ct. 2015).

discussing which factors should be relevant in child custody cases.¹²³ Judge Agnes determined that relevant factors include evaluating whether or not a child's past or present living conditions adversely affect his or her physical, mental, or emotional well being.¹²⁴ Judge Agnes's factors are notably similar to a number of House Bill 1207's factors, including the ability and desire for each parent to fulfill his or her caregiving functions.¹²⁵ The court further discussed the limiting factor of abuse, which is both included in Massachusetts law and reinforced in House Bill 1207.¹²⁶ Other factors the *Schechter* court deemed important included whether a parent's actions are likely to compromise his or her child's relationship with the other parent, and whether a parent is capable of separating his or her needs or desires from those of the child.¹²⁷ These factors are very similar to House Bill 1207's factors requiring judges to evaluate each parent's ability to cooperate with one another, and they apply a limitation on custody to a parent that interferes with the other parent's right to see his or her child.¹²⁸

Schechter also discussed the domestic violence factor, which is included as a limiting factor by inference in House Bill 1207.¹²⁹ The court also listed the factors to be considered in the event of relocation, which are incorporated in House Bill 1207 by requiring the judge to determine the present and expected physical and geographic availability of each parent.¹³⁰ The drafters of House Bill 1207 clearly intended to codify relevant factors already used by Massachusetts probate and family courts when making BIC decisions.¹³¹ The factors in House Bill 1207 are by no means a wide departure from what Massachusetts judges currently use in making BIC determinations, and should therefore be codified and retained.¹³²

123. See *id.* at 646 (listing common relevant factors for evaluation).

124. See *id.* (discussing how judge should determine BIC using relevant factors).

125. See H.B. 1207, 189th Gen. Ct. (Mass. 2015) (listing factor requiring judge to determine and weigh each parent's caregiving functions).

126. See *Schechter*, 37 N.E.3d at 646 (upholding lower court's limitation of custody where evidence of domestic abuse or violence exists); Mass. H.B. 1207, § 31(E)(2) (enumerating limiting factor of abuse).

127. See *Schechter*, 37 N.E.3d at 641. If a parent attempts to come in between his or her child and the other parent, this will be weighed against that parent as a factor. See *id.*

128. See Mass. H.B. 1207, § 31(D)(3), (E)(7).

129. See *Schechter v. Schechter*, 37 N.E.3d 632, 646 (Mass. App. Ct. 2015) (affirming lower court's decision to limit visitation when evidence of domestic violence existed); see also Mass. H.B. 1207, § 31(E)(2) (considering verbal and physical abuse towards child or other parent limiting factors).

130. See *Schechter*, 37 N.E.3d at 645 (discussing relocation factors); Mass. H.B. 1207, § 31(D)(4) (enumerating present and expected physical and geographical availability of each parent).

131. See *Schechter*, 37 N.E.3d at 646 (discussing relevant factors judges use for evaluating child custody cases).

132. See *supra* notes 123-129 and accompanying text (discussing use of some of House Bill 1207's factors in Massachusetts courts).

B. Arguments Against the Shared Parenting Presumption

1. A Shared Parenting Presumption Shifts the Focus from Children's Rights to Parents' Rights

Massachusetts should not implement a shared parenting presumption as suggested by House Bill 1207.¹³³ Advocates for a shared parenting presumption assert that it ensures fathers are given an equal opportunity to maintain a relationship with their children.¹³⁴ Advocates also argue that a shared parenting presumption is constitutionally mandated by the fundamental right to parent one's children.¹³⁵ While, admittedly, the right to parent one's children is constitutionally protected, it should not be afforded greater concern than the BIC.¹³⁶ Case law, public policy, and statutes in many jurisdictions mandate that the BIC must be the paramount concern in child custody cases.¹³⁷ If Massachusetts requires a presumption of shared parenting, it would take discretion away from judges' BIC determinations in favor of protecting parents' rights.¹³⁸ A shared parenting presumption undermines the BIC, and thus is too large a sacrifice.¹³⁹

2. Statutory Factors Already Accomplish the Proposed Purpose

Another stated purpose of the shared parenting presumption is to serve children, who allegedly benefit most from having both parents in their lives.¹⁴⁰ While this may be true in ideal circumstances, it is not true in situations where parents are unable or unwilling to cooperate, the child does not have a positive relationship with one of the parents, one parent decides to relocate, or a parent is found to have inflicted some form of abuse upon the child or former spouse.¹⁴¹ Allowing a judge to evaluate the factors included in House Bill 1207

133. See Mass. H.B. 1207, § 31(B)(2)(a) (defining shared parenting and requiring child spend at least one-third time with each parent); *supra* notes 95-97 and accompanying text (explaining shared parenting contents of House Bill 1207).

134. See *supra* note 67 and accompanying text (explaining alleged gender bias in child custody decisions).

135. See *supra* note 70 and accompanying text (explaining proponents' constitutional argument in favor of presumption). The Supreme Court stated that the BIC is unquestionably a substantial government interest, and it follows that the BIC prevails over the fundamental right to parent. See *supra* note 70 and accompanying text.

136. See *supra* note 70 and accompanying text (determining BIC primary concern over fundamental right to parent).

137. See D.C. CODE § 16-914(a)(3) (2013) (reiterating BIC remains primary consideration in child custody).

138. See *supra* note 71 and accompanying text (explaining argument of opponents that presumption gives judges "easy out").

139. See *supra* note 71 and accompanying text (arguing constitutional right to parent should not prevail over BIC).

140. See *supra* note 70 and accompanying text (arguing studies show children benefit from both parents in lives).

141. See *supra* note 71 (arguing children do not benefit when parents behave uncooperatively or abusively). A shared parenting presumption runs the risk of granting an abusive parent significant parenting

provides the judge the ability to decide if shared parenting is actually in the BIC after weighing all the relevant factors.¹⁴² This ensures that the BIC is the paramount concern while upholding the constitutional right to parent—so long as such parenting is in the BIC.¹⁴³ Codified factors facilitate the BIC, but a shared parenting presumption overextends the fundamental right to parent by assuming that shared parenting is in the BIC.¹⁴⁴ If both factors and a presumption are available options, factors are the superior method to ensure that a judge is deciding a custody arrangement truly based on the BIC.¹⁴⁵

IV. CONCLUSION

Judges are the trusted gatekeepers and referees in our society. The idea that judges have the capacity to bring about true justice and uphold our nation's laws is foundational to the American justice system. But what happens when the law is so broad that it is left to unpredictable interpretation? Do we still trust that every one of our gatekeepers can set aside all biases and preconceived judgments, and take a neutral position? If child custody law is truly set on ensuring the BIC above all else, then the law should also provide assurances that our most educated and trusted officials will uphold this standard. Tightening the bridle on judicial discretion does not reflect a distrust of family court judges' abilities to make reasoned judgments, but rather it reflects the utmost effort in ensuring that each child's best interests are the key concern in every child custody case.

If the portion of House Bill 1207 that sets forth statutory BIC factors passes, it will only result in more reasoned, more predictable, and less frequently overturned decisions. The factors will guide judges' decisions to ensure that the BIC is achieved in each case. Statutory BIC factors have worked well in many jurisdictions for decades, and are no longer experimental. Massachusetts is merely catching up with child custody law that has been proven effective in several other states, such as Michigan and Minnesota.

While statutory BIC factors will be a beneficial change to Massachusetts's child custody law, a shared parenting presumption will not have the same effect. A shared parenting presumption is a less effective way of guiding

time with a child who witnessed or experienced abuse. *See Tracy, supra* note 70, at 180-81.

142. *See* H.B. 1207, 189th Gen. Ct. § (D) (Mass. 2015) (stating judges must consider BIC and factors when determining parental responsibilities).

143. *See supra* note 70 and accompanying text (recalling Supreme Court determined BIC primary concern over fundamental right to parent); *supra* note 137 (affirming importance of BIC in child custody determinations).

144. *See Funge, supra* note 80, at 29 (arguing statutory factors ensure judges make reasoned decisions promoting BIC); *supra* note 67 and accompanying text (discussing purpose of presumption in protecting fundamental right to parent).

145. *See Funge, supra* note 80, at 26 (asserting judges must decide each case on its individual basis). Judges should set aside all presumptions in order to determine which factors apply to each particular BIC. *See id.*

judges' discretion than the implementation of statutory factors: the latter clarifies the BIC analysis, while the former clouds the analysis by putting the parents' interests above the BIC. Because the BIC is deemed the paramount concern in child custody law, we must allow judges the ability to craft individualized solutions that further the BIC, not the parents' rights. Studies have shown that in ordinary circumstances, a child benefits from having both parents play an active role in his or her life. The BIC analysis is consistent with this view: a judge looking to further the BIC will likely rule in favor of shared parenting and a parenting plan that grants significant parenting time to each parent, but only after determining that the relevant or statutory BIC factors support such a plan.

This Note does not suggest that certain portions of House Bill 1207 will solve an overworked, overcrowded, and adversarial family court system. House Bill 1207 is but a stepping stone on the path toward ensuring that the BIC truly is the pivotal concern in child custody matters. Additional steps can be taken to ensure the BIC, but they have yet to be suggested to the Massachusetts legislature. As reflected throughout history, child custody laws continuously evolve with an ever-developing society and transformation of the family unit. Implementing statutory BIC factors is one such adaption.

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