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A PRACTITIONER'S GUIDE TO MINNESOTA'S NEW BEST INTEREST FACTORS

Michael P. Boulette¹

The history of contemporary child custody laws has been a struggle between certainty and sensitivity—between the desire to ensure predictability for parties and consistency between families while recognizing the uniqueness of each family's circumstances.² In many ways, Minnesota's own journey has been this struggle in microcosm: a journey from legal presumptions to fact-sensitive analysis and from a focus on the "primary parent" to an appreciation for children's need for both parents.

2015 represented a watershed moment in this journey—witnessing a complete overhaul of the statutory factors governing virtually all custody and parenting time decisions, known as the "best interest factors."³ We would not exaggerate to call these changes once-in-a-generation, if not once-in-a-life-time. But to say these changes are significant is not enough. As parents and practitioners begin to make use of these new factors, we are all left to ask ourselves, "now what do they mean?" Without precedent or practice to guide us, lawyers and litigants face uncertainty as they struggle to apply Minnesota's new best interest factors both in and out of court.

Such was the genesis of the present article. This piece, which originally began as a (mercifully) shorter blog post,⁴ is intended as a practitioners guide through Minnesota's new best interest factors, helping to provide historical and legislative context to the new law. To that end, the article explores our new factors within the context of a larger, legislative evolution on custody and parenting time matters, while also acknowledging the ways in which the new factors are truly *sui generis*. Part I provides a brief history of the Minnesota's statutory "best interest" factors, both as enacted and as applied by our Courts. Part II then discusses the more recent legislative battles pitting proponents of mandatory shared-parenting and joint custody on the one hand against advocates for judicial discretion and fact-sensitive custody determinations on the other. Part III, directly addresses the text of the new law, commenting on each new best interest factor in turn and providing brief historical context and analysis. Finally, Part IV concludes with a note of caution for attorneys applying these new factors in practice.

Before proceeding though, I must offer the predictable lawyer's caveat. It is my genuine hope that this article will provide some small guidance for attorneys attempting to chart a course amidst Minnesota's array of recent family law changes, but I must also disclaim any extraordinary abilities of prognostication. The meaning of this new law will, inevitably, rest in the hands of Minnesota's Court of Appeals and ultimately our Supreme Court. As this article is being written, neither has decided even a single case applying the new law. Thus, while I hope my colleagues will find this article thoughtful, thorough, and well researched, I adopt no false modesty when I say: your guess is as good as mine.

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² J. Herbie DiFonzo, *Dilemmas of Shared Parenting in the 21st Century: How Law and Culture Shape Child Custody*, 43 HOFSTRA L. REV. 1003, 1004 (2015); 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, 429 (1990).

³ MINN. STAT. § 518.17, subdiv. 1–2 (2016); MINN. STAT. § 257.025; *but c.f.* MINN. STAT. § 257C.04 (defining a child's best interest in third-party custody matters).

⁴ Michael Boulette, *Unpacking Minnesota's New Best Interest Factors*, FAMILY-IN-LAW.COM, (July 31, 2015), <http://family-in-law.com/unpacking-minnesotas-new-best-interest-factors/> (last visited Mar. 6, 2016).

I. A BRIEF HISTORY OF “BEST INTERESTS”

It is no exaggeration to say the practice of family law has become steeped in the milieu of a child’s best interests. These best interests are the “paramount commitment” in “all matters involving court-established family relationships,”⁵ and have been so—in Minnesota at least—for well over 100 years.⁶ The phrase itself is so well worn as to have become a virtual platitude of professional practice—a term used so often and so reflexively that we seldom pause to consider its content, or to take note of how significantly that content has changed over time.

It is only relatively recently that a commitment to the best interests of a child has required a searching, case-by-case inquiry on the part of the judiciary. At common law, children were relegated largely to the same status as chattel and awarded (along with all the families’ other property) to their fathers.⁷ The rise of the “tender years” doctrine in the late nineteenth and early twentieth centuries brought about a preference for maternal care hardly more fact sensitive.⁸ Indeed, it is only within living memory that Minnesota sought to sever the legal notion of a child’s best interest for sex-based parental presumptions.⁹ In 1969, Minnesota’s legislature amended its terse custody statute,¹⁰ to provide for consideration of “all facts in the best interests of the children” including the age and sex of the child and “the child’s relationship with each parent prior to the commencement of the action.”¹¹ In so doing, the legislature also sought to undermine the established tender-years presumption by prohibiting consideration of a parent’s sex in deciding custody.¹²

These efforts met with limited success.¹³ In 1974, apparently dissatisfied with the court’s application of its prior mandate, the legislature enacted a more comprehensive list of nine specific best interest factors to be

⁵ Olson v. Olson, 534 N.W.2d 547, 549 (Minn. 1995).

⁶ State ex rel. Flint v. Flint, 63 Minn. 187, 189, 65 N.W. 272, 273 (1895).

⁷ J. Herbie DiFonzo, *supra* note 2, at 1004-05.

⁸ See, *inter alia*, Newman v. Newman, 179 Minn. 184, 186, 228 N.W. 759, 760 (1930) (“In relation to the welfare of such children, no one can take the mother’s place. Children are her problem. Nature binds her in the service of her children”); Johnson v. Johnson, 223 Minn. 420, 427, 27 N.W.2d 289, 293 (1947) (“Almost without exception we have held that under the foregoing statute the custody of very young children should be awarded to the mother”); Lindberg v. Lindberg, 282 Minn. 536, 538, 163 N.W.2d 870, 871 (1969) (“[C]ustody of young children should be awarded to the mother unless to do so would be detrimental to their welfare”); Hanson v. Hanson, 284 Minn. 321, 325, 170 N.W.2d 213, 216 (1969) (“This court has on many occasions applied the rule that, normally, other things being equal, the welfare of children of tender years is best served by their being placed in the custody of their mother if this can reasonably be arranged”); Borchert v. Borchert, 279 Minn. 16, 20, 154 N.W.2d 902, 905 (1967) (“While the life of defendant has been, to say the least, indiscreet, we have frequently held that a bad wife does not necessarily mean a bad mother, and that children of tender years are normally better off with the mother than with the father”).

⁹ Sheri A. Ahl, *A Step Backward: The Minnesota Supreme Court Adopts A “Primary Caretaker” Presumption in Child Custody Cases: Pikula v. Pikula*, 70 MINN. L. REV. 1344, 1350 (1986).

¹⁰ “Upon adjudging the nullity of a marriage, or a divorce or separation, the court may make such further order as it deems just and proper concerning the care, custody, and maintenance of the minor children of the parties, and may determine with which of the parents they, or any of them, shall remain, having due regard to the age and sex of “such children.” An Act of Apr. 18, 1905, 1905 ch. 71, §3585, 1905 Minn. Laws 715, 718; See also Ahl, *supra* note 9, at 1349.

¹¹ Act of June 6, 1969, ch. 1030, § 1, 1969 Minn. Laws 2081, 2081-82; see also Ahl, *supra* note 9, at 1349.

¹² *Id.*

¹³ Reiland v. Reiland, 290 Minn. 497, 500, 185 N.W.2d 879, 881 (1971) (observing that the 1969 amendment “does no more than express views contained in prior decisions of this court”).

considered in child custody matters.¹⁴ Noticeably absent from the revised factors were the child's age and sex, further eschewing relics of the tender years era.¹⁵

Substantive change, however, remained elusive.¹⁶ And, in 1978, Minnesota's best interest factors were overhauled yet again.¹⁷ Cribbed largely from the Uniform Law Commissions Uniform Marriage and Divorce Act,¹⁸ Minnesota adopted seven best interest factors (and one prohibition) which provided the statutory cornerstone for child custody determinations for the next 37 years:

¹⁴ The 1974 factors included:

- (a) The love, affection and other emotional ties existing between the competing parties and the child;
- (b) The capacity and disposition of competing parties to give the child love, affection and guidance and continuation of the educating and raising of the child in its religion, creed, if any, or culture;
- (c) The capacity and disposition of competing parties to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs;
- (d) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- (e) The permanence, as a family unit, of the existing or proposed custodial home;
- (f) The mental and physical health of the competing parties;
- (g) The home, school and community record of the child;
- (h) The cultural background of the child;
- (i) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference; and
- (j) Any, other factor considered by the court to be relevant to a particular child custody dispute.

Act of Mar. 28, 1974, ch. 330, § 1, 1974 Minn. Laws 555; Ahl, *supra* note 9, at 1351.

¹⁵ Ahl, *supra* note 9, at 1377.

¹⁶ *Id. citing* Rosenfeld v. Rosenfeld, 311 Minn. 76, 84, 249 N.W.2d 168, 172 (1976); Staudacher v. Staudacher, 310 Minn. 189, 191, 246 N.W.2d 34, 35 (1976); Davis v. Davis, 306 Minn. 536, 538, 235 N.W.2d 836, 838 (1975); Erickson v. Erickson, 300 Minn. 559, 560, 220 N.W.2d 487, 489 (1974); Petersen v. Petersen, 296 Minn. 147, 148-49, 206 N.W.2d 658, 659 (1973); *see also* Gary L. Crippen & Sheila M. Stuhlman, *Minnesota's Alternatives to Primary Caretaker Placements: Too Much of A Good Thing?*, 28 WM. MITCHELL L. REV. 677, 680 (2001) (observing in reference to the 1974 amendments, "Despite these statutory changes, the dominant rule of law changed little in the courts").

¹⁷ Act of Apr. 6, 1978, ch. 772, § 39, 1978 Minn. Laws 1062, 1076-78; Ahl, *supra* note 9, at 1352.

¹⁸ The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the 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.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

§ 402. [Best Interest of Child], Unif. Marriage & Divorce Act § 402.

- (a) The wishes of the child's parent or parents as to his custody;
- (b) The reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;
- (c) 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 interests;
- (d) The child's adjustment to his home, school, and community;
- (e) The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
- (f) The permanence, as a family unit, of the existing or proposed custodial home; and
- (g) The mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.¹⁹

Just a year later, in 1979, the Legislature revived two of its earlier 1974 factors, adding: “the capacity and disposition of the parties to give the child love, affection, and guidance, and to continue educating and raising the child in his culture and religion or creed, if any,” and “the child’s cultural background.”

A regular pattern of amendment and addition to the best interest factors continued for the next twenty years. In 1981, the legislature added further texture to Minnesota’s custody laws by introducing distinct physical and legal custody regimes into Minnesota’s statutes, which could be awarded solely to one parent or jointly to both on the basis of best interests.²⁰ Such awards were governed by three additional best interest factors to be used in assessing joint custody requests:

- (a) The ability of parents to cooperate in the rearing of their children;
- (b) Methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods; and
- (c) Whether it would be detrimental to the child if one have sole authority over the child's upbringing.²¹

¹⁹ Act of Apr. 6, 1978, ch. 772, § 39, 1978 Minn. Laws 1062, 1076–78.

²⁰ Act of June 1, 1981, ch. 349, § 5, 1981 Minn. Laws 1699, 1701-02; historically, joint or “divided” custody awards were disfavored in Minnesota, a trend that continued well into and through the 1990s. *See* *Kaehler v. Kaehler*, 219 Minn. 536, 539, 18 N.W.2d 312, 314 (1945); *Wopata v. Wopata*, 498 N.W.2d 478, 482 (Minn. App. 1993); *Nolte v. Mehrens*, 648 N.W.2d 727, 731 (Minn. App. 2001).

²¹ 1981 Minn. Laws 1699, 1701-02. In 1986, the legislature went still further, adopting a rebuttable presumption of joint legal custody in all cases. *See* Act of Mar. 24, 1986, ch. 406, § 1, 1986 Minn. Laws. 580. As originally enacted, no exception to the presumption was made for cases of domestic abuse. In 1990, the legislature amended the presumption to create a presumption against joint legal custody in cases of domestic abuse. An Act of Apr. 26, 1990,

Best interests considerations expanded still further in 1987 as the legislature included, “the effect on the child of the actions of an abuser, if related to domestic abuse...that has occurred between the parents.”²²

Despite a decade of dramatic legislative change, Minnesota’s courts were slow to adopt the more searching, fact-sensitive inquiry demanded by statute, and custody awards continued to favor the traditional, (female) stay-at-home caregivers of the era.²³ In 1985, the Minnesota Supreme Court enshrined its reticence into a formal presumption in *Pikula v. Pikula*, holding:

[W]hen both parents seek custody of a child too young to express a preference, and one parent has been the primary caretaker of the child, custody should be awarded to the primary caretaker absent a showing that that parent is unfit to be the custodian.²⁴

Basing its opinion in (now) dubious social science,²⁵ the Court reasoned “continuity of care with the primary caretaker” to be both “central and crucial to the best interest of the child,” as well as “the single predicator of a child’s well-being about which there is agreement, and which can be competently evaluated by judges.”²⁶ By contrast, the Court continued, other best interest factors “while plainly relevant to a child’s wellbeing and security, are...both inherently resistant of evaluation and difficult to apply in any particular case.”²⁷ To facilitate lower courts in making primary caretaker determinations, the Supreme Court, borrowing from a West Virginia decision, adopted a non-exhaustive list of ten day-to-day care activities to be examined:

(1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends’ houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.²⁸

Skeptics of *Pikula*’s approach chose another label: diaper counting.²⁹ The net effect was an “explosion of

ch. 574 § 14, 1990 Minn. Laws. 2123, 2132. A similar presumption against joint physical custody in cases of domestic abuse followed in 1991 An Act of May 29, 1991, ch. 271, § 4, 1991 Minn. Laws. 1242, 1244.

²² Act of May 13, 1987, ch. 106, § 1, 1987 Minn. Laws. 211. Consideration of domestic abuse was also added as a joint custody best interest factor two years later. *See* Act of May 22, 1989, ch. 248, § 3. 1989 Minn. Laws. 834, 836.

²³ *Berndt v. Berndt*, 292 N.W.2d 1, 2 (Minn. 1980).

²⁴ *Pikula v. Pikula*, 374 N.W.2d 705, 712 (Minn. 1985).

²⁵ Hon. James T. Swenson, *Best Interest Factors*, MINNESOTA CHILD CUSTODY DESKBOOK §7.1 (Gary Debele Ed. 2006).

²⁶ *Pikula*, 374 N.W.2d at 712.

²⁷ *Id.*

²⁸ *Pikula*, 374 N.W.2d at 713 (*citing* *Garska v. McCoy*, 167 W. Va. 59, 68, 278 S.E.2d 357, 362 (1981)).

²⁹ Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 22 FAM. L.Q. 367, 460 (1989) (observing that *Pikula* “spawned an incredible amount of litigation concerning who changed more diapers”).

litigation,”³⁰ and a return to the preference for maternal care in all but the most extreme circumstances.³¹

Unsurprisingly, *Pikula*’s reliance on presumptive placements found little support among lawmakers who had spent over a decade creating a fact-sensitive list of statutory factors.³² And, in an attempt to override the primary caretaker presumption, the legislature added two new best interest factors in 1989: “the child’s primary caretaker” and “the intimacy of the relationship between each parent and the child”³³ The legislature expressly prohibited one factor--including its new primary caretaker factor--from being used to the exclusion of others, thus removing the presumptive nature of primary caretaker determinations. Or so it was thought.

In the Court’s eyes at least, these efforts went largely unnoticed. Mirroring its reaction following 1969’s and 1974’s legislative amendments, the Supreme Court adopted an attitude of veritable ennui, reaffirming its commitment to the primary caretaker presumption just six months later. In *Maxfield v. Maxfield*, a 4-3 majority of the Court reversed a trial court decision granting custody of three young children to their (non-primary caretaker) father.³⁴ In so doing, the Court interpreted the 1989 amendments not as a rejection of *Pikula*, but of, “the mechanical way in which *Pikula* was being applied.”³⁵ Despite what the dissent described as “the legislature’s third attempt to force this court to abandon inflexible presumptions about who is best able to care for a young child,”³⁶ a majority of the Supreme Court again affirmed the primary caretaker preference as, “the golden thread running through any best interests analysis.”³⁷

The legislature’s response was as quick as it was unequivocal. In 1990, the legislature again amended Minn. Stat. § 518.17, this time to include language that did not brook disagreement: “The primary caretaker factor may not be used as a presumption in determining the best interests of the child.”³⁸ After more than thirty years, the court finally took notice.³⁹ The primary caretaker presumption was no more.

Following the demise of the primary caretaker preference, legislative amendments in the 1990’s and 2000’s continued to move Minnesota towards greater support for shared-parenting arrangements and away from *Pikula*’s preference for traditional caretakers. Thus, in 1994, the legislature expanded the best interest factors to include, “the disposition of each parent to encourage and permit frequent and continuing contact

³⁰ See *Crippen*, *supra* note 4, at 452.

³¹ *Maxfield v. Maxfield*, 452 N.W.2d 219, 225 (Minn. 1990) (Yetka, J. dissenting) (“The *Pikula* presumption, although neutral on its face, has a readily apparent disparate impact on fathers. In other words, we seem to have completed a full cycle and are attempting to get the tender-years doctrine in through the back door so that, once again, it will be the mother who is invariably granted custody of the children unless she is found to be unfit”).

³² *Ahl*, *supra* note 9, at 1351.

³³ See Act of May 22, 1989, ch. 248, § 2. 1989 Minn. Laws. 834, 835-36.

³⁴ *Maxfield*, 452 N.W.2d at 219.

³⁵ *Id.* at 222.

³⁶ *Id.* at 225 (Yetka, J. dissenting).

³⁷ *Id.* at 223.

³⁸ Act of Apr. 26, 1990, ch. 574 § 13, 1990 Minn. Laws. 2123, 2132.

³⁹ *Vangsness v. Vangsness*, 607 N.W.2d 468, 476-77 (Minn. Ct. App. 2000) (stating that, the 1990 “[L]egislative changes to the custody statute explain why, in the decade since *Maxfield*, no published opinion has explained, applied, or even cited (in more than a passing manner), *Maxfield*’s “golden thread” analysis. Thus, under current Minnesota law on placing custody of children in dissolution matters, the legislature requires that the decision be based on an undifferentiated balancing of the child’s best interests, and the “golden thread” analysis has been abandoned in practice”).

by the other parent with the child.”⁴⁰ And in 2000, the legislature enacted Minn. Stat. § 518.1705 to provide for parenting plans in lieu of more traditional custody labels and “visitation” schedules.⁴¹

More recently, in 2006, the legislature removed one of the last vestiges of the primary caretaker preference from Minnesota’s custody statutes, legislatively overruling the Minnesota Supreme Court’s decision in *Auge v. Auge*.⁴² *Auge*, relying on similar notions of “continuity and stability” as *Pikula*, (though decided two years earlier), gave the parent with physical custody a presumptive right to relocate children out-of-state absent a positive showing of endangerment.⁴³ Attacked by father’s rights groups as regressive,⁴⁴ the amended law required courts to apply a unique set of best interest factors to requests to remove children out-of-state, while placing the burden squarely on the parent requesting remove.⁴⁵ The same year, the legislature also adopted a 25 percent minimum parenting time presumption—roughly equivalent to a “traditional” biweekly parenting time schedule of one weekday overnight and every other weekend.⁴⁶

By the end of 2006, Minnesota’s best interest factors had grown from their humble origins to a mammoth 17-factor test, with various custody presumptions (and non-presumptions).⁴⁷ Critics, however, remained dissatisfied.⁴⁸ Minnesota laws were perceived as implicitly biased against fathers—in their application if not in their language—and drastically in need of updating to address the needs of contemporary families.⁴⁹

II. ADAPTING TO 21ST CENTURY FAMILIES

Minnesota’s own lurching journey towards modernizing its custody laws has largely been propelled by a decade long debate between advocates of mandatory shared parenting and proponents of case-specific decision-making. In an ironic historical reversal, the former—largely represented by “father’s rights” groups—sought to protect the rights of non-custodial parents through strict joint custody presumptions, while the latter argued for preserving judicial discretion based on a multi-factor test.

Following the 2006 amendments discussed above, legislation introduced in 2007 attempted to create a rebuttable presumption of joint physical custody.⁵⁰ House File 1262 extended Minnesota’s rebuttable joint legal custody presumption to include physical custody, while disclaiming any connection between the joint

⁴⁰ Act of May 6, 1994, ch. 630, art. 12, § 4, 1994 Minn. Laws. 1815, 1871.

⁴¹ MINN. STAT. § 518.1705 (2014); An Act of Apr. 25, 2000, ch. 444, art. 1, § 3, 2000 Minn. Laws 980, 981; see generally Heather Crosby, *The Irretrievable Breakdown of the Child: Minnesota's Move Toward Parenting Plans*, 21 HAMLINE J. PUB. L. & POL’Y 489, 491 (2000); Theresa A. Peterson, *The State of Child Custody in Minnesota: Why Minnesota Should Enact the Parenting Plan Legislation*, 25 WM. MITCHELL L. REV. 1577, 1579 (1999).

⁴² Act of May 22, 2006, ch. 280, § 13, 2006 Minn. Laws 1, 7–8; *Auge v. Auge*, 334 N.W.2d 393 (Minn. 1983).

⁴³ *Auge v. Auge*, 334 N.W.2d at 399.

⁴⁴ Sheree Speer, *Moving the Kids: What Would Solomon Do?*, BENCH & B. MINN., Oct. 2006, at 24, 26.

⁴⁵ MINN. STAT. § 518.175, subdiv. 3 (2006).

⁴⁶ Act of May 22, 2006, ch. 280, §§ 11-12, 2006 Minn. Laws. 1, 7.

⁴⁷ MINN. STAT. § 518.17 (2006).

⁴⁸ See generally, Nicole M. Schave, *“Best Interests” of Minnesota: Adopting A Presumption of Joint Physical Custody*, 33 HAMLINE J. PUB. L. & POL’Y 165 (2011).

⁴⁹ *Id.* at 176.

⁵⁰ William A. Winter & Michael P. Boulette, *Custody and Parenting Time Minnesota Amendments Codify Compromises*, BENCH & B. MINN., Oct. 2014, at 20, 21.

physical custody label and equal parenting time.⁵¹ Despite this significant caveat, the bill failed to garner sufficient support, and proponents were forced to settle for a study group to evaluate the potential effects of a joint physical custody presumption.⁵²

The study group issued its final report on January 14, 2009,⁵³ and, despite a distinguished membership, its recommendations amounted to little more than a call for further study.⁵⁴ Proposals for immediate, legislative change were similarly milquetoast:

We recommend that any statutory changes enacted by the Minnesota Legislature affecting the custody or parenting of minor children increasingly promote and allow for the cooperative agreements between the parties.

We recommend that any statutory changes enacted by the Minnesota Legislature affecting the custody or parenting of minor children continue to provide the ability for the court to consider the individual needs of children and families, including the child's support system of extended family members, friends, and community.

We recommend that any statutory changes enacted by the Minnesota Legislature affecting the custody or parenting of minor children consider the essential importance of the safety of children and parents.

We recommend amending current statutes to make it clear that current law provides no presumption for or against joint physical custody, except in cases of domestic abuse, in which case there would be a rebuttable presumption against joint physical custody.⁵⁵

Notably, the final recommendation—proclaiming Minnesota agnostic on the issue of joint versus sole physical custody—did little more than restate current case law.⁵⁶

The report's guarded conclusions did little to deter advocates of presumptive shared-parenting. In 2011, a bipartisan group of lawmakers introduced an even more ambitious bill: House File 322 providing for a presumption of joint physical custody and equal parenting time in virtually all cases.⁵⁷ Following debate

⁵¹ H.F. 1262, 85th Leg., Reg. Sess. (Minn. 2007-2008).

⁵² Minn. H.J., 85th Leg., Reg. Sess. 9180-81 (2007-2008); An Act of May 8, 2008, ch. 299, § 25, 2008 Minn. Laws 1, 14.

⁵³ MINNESOTA JOINT PHYSICAL CHILD CUSTODY PRESUMPTION STUDY GROUP REPORT (2009) http://www.mncourts.gov/Documents/0/Public/NewsPostings/MN_Joint_Physical_Child_Custody_Presumption_Study_Group_Report_2009_DSprint.pdf.

⁵⁴ *Id.* at 5.

⁵⁵ *Id.* at 21.

⁵⁶ *Schallinger v. Schallinger*, 699 N.W.2d 15, 19 (Minn. Ct. App. 2005) (“There is neither a statutory presumption disfavoring joint physical custody, nor is there a preference against joint physical custody if the district court finds that it is in the best interest of the child and the four joint custody factors support such a determination.”).

⁵⁷ H.F. 322, 87th Leg., Reg. Sess. (Minn. 2011-2012). The bill, as introduced, provided in relevant part:

(a) In cases of marital dissolution or unmarried parentage, when paternity has been established, both parents enjoy a rebuttable presumption of joint legal and joint physical custody of their children, and a rebuttable presumption the court will award a parenting minimum of 45.1 percent for each parent.

in both the House and Senate, House File 322 was substantially amended to allow instead for an increase in the minimum parenting time presumption, from 25 percent to 35 percent (equivalent to roughly one additional overnight on a bi-weekly basis).⁵⁸

Despite strong bipartisan support in both the House and Senate, the Governor pocket vetoed House File 322 based on objections from the family law community.⁵⁹ In his veto letter, the Governor cautioned “[e]very marriage is different; therefore, each divorce has its own unique set of facts, conditions, and circumstances. Thus it is very difficult to codify one set of presumptions and preferences, which will apply to every family situation.”⁶⁰ In closing, however, the Governor encouraged collaboration between competing stakeholders, challenging them to draft consensus legislation, which could be adopted the following session:

My view is that this dialogue and, hopefully, collaboration among legislators of both parties and the various stakeholders should continue into the 2013 Legislative Session. I will commit experts from my administration to become even more engaged, with the goal of producing legislation, which I can sign into law next year.⁶¹

Heading the governor’s call for collaboration, an *ad hoc* coalition began working to develop consensus legislation.⁶² Referring to themselves as the Custody Dialogue Group, stakeholders included several organizations from the 2009 Study Group Report (the Minnesota State Bar Association’s Family Law Section, the Minnesota Coalition for Battered Women, the Minnesota Chapter of the American Academy of Matrimonial Lawyers, and the Center for Parental Responsibility), as well as the Minnesota Legal Advocacy Project, the Minnesota Chapter of the Association of Family and Conciliation Courts, and Family Innocence Project.⁶³

(b) The burden of overcoming the presumption rests on the parent challenging the presumption. The presumption may only be overcome by demonstrating and unfitness of the parent being challenged that would cause substantial harm to the children. The clear and convincing evidence standard must be used in making a fitness determination.

(c) Knowingly making false allegations of child or spousal abuse is sufficient grounds to challenge the parental fitness of the accuser. Allegations raised in the context of divorce or custody proceedings deserve heightened scrutiny as to their veracity.

(d) Allegations of substance abuse, mental illness, spousal or child abuse or neglect, and any subsequent issuance of protective orders are not sufficient to cause cessation or reduction in parent and child contact. When the fitness of a parent is challenged, the court must find by clear and convincing evidence that the parent’s behaviors would qualify the parent’s child to be found in need of protective services under section 260C.007, subdivisions 13 and 15 or the parent is found to meet the criteria as a chemically dependent person under section 253B.02, subdivision 2. In no instance may the court limit parent and child contact absent compelling necessity to prevent substantial and imminent harm to the child.

⁵⁸ S.J. 87th Leg., Reg. Sess. 6837 (Minn. 2011–2012).

⁵⁹ Winter & Boulette, *supra* note 50.

⁶⁰ H.J., 87th Leg., Reg. Sess. 10063–10064 (Minn. 2011-2012).

⁶¹ *Id.* at 10064.

⁶² Mindy F. Mitnick & Michael D. Dittberner, *Minnesota Overhauls Best Interest Factors*, ASSOCIATION OF FAMILY & CONCILIATION COURTS ENEWS, 8 (Dec. 2015), <http://www.afccnet.org/Portals/0/PublicDocuments/eNEWS/eNews%2012.23.pdf?ver=2015-12-29-094742-000>.

⁶³ Winter & Boulette, *supra* note 50, at 21.

Working with the assistance of an outside facilitator, the Dialogue Group began by developing 26 consensus principles to guide their work, including: (1) reducing family conflict, (2) focusing on children's needs, (3) providing safety for all, (4) maintaining confidence in the judicial system, and (5) recognizing the diverse contexts in which children live.⁶⁴ The Dialogue Group then worked to create consensus legislation on a range of family law issues from parenting time, to child support, and even division of child tax dependency exemptions.⁶⁵ Their efforts were rewarded with the passage of modest legislative amendments in 2014,⁶⁶ and an array of amendments to the family law statutes in 2015, including the overhaul of Minnesota's best interest factors.⁶⁷

III. AN INTRODUCTION TO MINNESOTA'S NEW BEST INTEREST FACTORS

Of course, understanding the genesis of Minnesota's new best interest factors can hardly suffice. History may be instructive, but it is also limited. Applying these new factors in any given case necessarily requires a factor-by-factor analysis to recognize both the ways in which these new factors build and expand on their predecessors, as well as those ways in which they are *sui generis*.

In applying this new statute, practitioners and decision-makers must first be mindful of a new "core principle" running through Minnesota's best interest factors.⁶⁸ In place of *Maxfield's* declaration that the: "[G]olden thread running through any best interests analysis is the importance, for a young child in particular, of its bond with the primary parent,"⁶⁹ Minnesota's new best interest factors adopt a new "golden thread": "that it is in the best interests of the child to promote the child's healthy growth and development through *safe, stable, nurturing* relationships *between a child and both parents*."⁷⁰ Not only does this principle govern the application of all 12 of the new best interest factors, it may not be cast aside lightly. Instead, courts must

[C]onsider both parents as having the capacity to develop and sustain nurturing relationships with their children unless there are substantial reasons to believe otherwise. In assessing whether parents are capable of sustaining nurturing relationships with their children, the court shall recognize that there are many ways that parents can respond to a child's needs with sensitivity and provide the child love and guidance, and these may differ between parents and among cultures.⁷¹

While a court's final custody and parenting time decision must specifically consider each of the twelve statutory best interest factors, this analysis will necessarily be guided (and perhaps shaped) by an appreciation of a child's need for both parents. Moreover, as the court considers how best to promote these relationships, it will be guided by core values of safety, stability, and nurturance for the child.

⁶⁴ Mitnick & Dittberner, *supra* note 62. See *Minnesota Custody Dialogue Group Principles*, FAMILY-IN-LAW.COM (Apr. 5, 2013), <http://family-in-law.com/wp-content/uploads/2015/02/Minnesota-Custody-Dialogue-Principles-Final.doc>.

⁶⁵ H.F. 446, H.F. 451, H.F. 464, H.F. 465, H.F. 512, H.F. 518, 89th Leg., Reg. Sess. (Minn. 2015-2016).

⁶⁶ *Id.*; see also Act of May 1, 2014, ch. 197, §§ 1-3, 2014 Minn. Laws 1-3.

⁶⁷ Act of May 11, 2015, ch. 30, art. 1, § 3, 2015 Minn. Laws 1, 2.

⁶⁸ Mitnick & Dittberner, *supra* note 62.

⁶⁹ *Maxfield*, 452 N.W.2d at 223.

⁷⁰ MINN. STAT. § 518.17, subdiv.1(b)(2) (2016) (emphasis added).

⁷¹ MINN. STAT. § 518.17, subdiv.1(b)(3) (2016).

With this new “golden thread” in mind, then, courts and practitioners must consider each of the twelve factors, some new, some simply revised, to determine a final designation of legal custody, physical custody, and an appropriate parenting time schedule, and make detailed findings explaining how each factor lead to its conclusions.⁷² Similarly, this article will explore each best interest factor in turn, and offer practical suggestions for analysis and application.

- (1) *The child's physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development.*

While the new best interest factors and their authors provide no one paramount factor,⁷³ and “no order of importance [between] the factors”⁷⁴ the structure of Minn. Stat. § 518.17’s revisions conveys an unmistakable message as to its shift in focus.⁷⁵ In place of “the wishes of the child’s parents as to custody,” the revised best interest factors place the child’s needs as the opening consideration.⁷⁶ The structural shifts mirrors the desire to “shift [the] focus from the rights of parents to the needs of children,” as the primary determiner of custody and parenting time questions.⁷⁷ Under this analysis, custody determinations are no longer a matter of what the parents want or deserve (weighed against their historical caretaking), but a question of what custody and parenting arrangement best fits the children’s needs on an ongoing basis.⁷⁸ Though parents and practitioners have long been encouraged to consider the children’s needs in custody and parenting time matters,⁷⁹ this factor represents the first time such needs have become an explicit part of the statutory calculus. The shift in the best interest factors towards prioritizing the needs of children is further reflected in the standard for modifying parenting time schedules, amended in 2014 to provide “consideration of a child's best interest includes a child's changing developmental needs.”⁸⁰ By shifting focus onto a child’s needs (and away from historical parenting responsibilities), the Dialogue Group hoped to end, or at least diminish, the “perception that the issue of custody was a win-lose contest between parents.”⁸¹

Notably, the factor’s oblique reference to the “proposed arrangements,” remains the sole, vestigial remnant of “the wishes of the child’s parents as to custody.” Parental preference has taken on a distinctly subordinate status.⁸²

⁷² MINN. STAT. § 518.17, subdiv. 1(b)(1) (2016).

⁷³ *Id.*

⁷⁴ *Id.*; see also MINN. STAT. §518.17, subdiv. 1 (2016).

⁷⁵ See *Minnesota Custody Dialogue supra* note 64, at 22 (“The re-write of the Best Interest Factors was focused through the lens of meeting children's diverse needs and promoting their healthy development”).

⁷⁶ Compare MINN. STAT. §518.17, subdiv. 1 (2015), with MINN. STAT. §518.17, subdiv. 1 (2014).

⁷⁷ Mitnick & Dittberner, *supra* note 62.

⁷⁸ *Id.* at 10; *c.f. Pikula*, 374 N.W.2d at 713.

⁷⁹ See Swenson, *supra* note 25, at §7.2(A); see also Minnesota Supreme Court Advisory Task Force on Visitation and Child Support Enforcement, A PARENTAL GUIDE TO MAKING CHILD-FOCUSED PARENTING TIME DECISIONS 8 (Jan. 2001).

⁸⁰ MINN. STAT. § 518.175, subdiv. 5(a) (2014).

⁸¹ See *Minnesota Custody Dialogue, supra* note 64, at 22. See also Mitnick & Dittberner, *supra* note 62 (observing that the new factors “switch the focus from the battle between parents to understanding the needs of children”).

⁸² See Swenson *supra* note 25, at §7.2(A) (questioning whether “the parents’ wishes add anything to the [best interest] analysis”).

- (2) *Any special medical, mental health, or educational needs that the child may have that may require special parenting arrangements or access to recommended services;*

Lest parents and practitioners miss the message, it is the child's needs that warrant primary consideration in all custody and parenting time matters, including any "special medical, mental health or education needs."⁸³ While consideration of a child's special needs was hardly unheard of in case law,⁸⁴ the new Factor provides a more "explicit consideration of children with special needs,"⁸⁵ and, "alert[s] the court to unique needs that may be present for the child and includ[es] them in the consideration of parenting arrangements."⁸⁶ Such additional specificity is undoubtedly overdue given 2010 data demonstrating that approximately 5% of school-age children in Minnesota are reported as having a disability.⁸⁷

- (3) *The reasonable preference of the child, if the court deems the child to be of sufficient ability, age, and maturity to express an independent, reliable preference;*

As in Minnesota's pre-2015 factors, a child's preference remains one factor for consideration in determining best interests. Such preferences may even become an "overwhelming consideration" in determining custody of an older, teenage child.⁸⁸ However, as with its predecessor, consideration of a child's preference "does not permit a court to delegate to children its role of determining an appropriate [parenting time] schedule or the role of the custodial parent to make specific arrangements to comply with that schedule."⁸⁹ Most notably, the revised factor provides for a more nuanced evaluation of a child's preferences. Instead defaulting to a solely age-based threshold for evaluating a child's preference,⁹⁰ new statutory language asks the court to evaluate the reliability and independence of that preference. Such an approach is certainly not novel, but remains consistent with case law looking to reliability⁹¹ and independence⁹² of a child's preference where concerns exist regarding the potential for parental manipulation. Also as before, the need

⁸³ MINN. STAT. § 518.15, subdiv. 1(a)(1).

⁸⁴ See *Psyc v. Wojtsiak*, 400 N.W.2d 409, 413 (Minn. Ct. App. 1987) (reversing a district court's refusal to modify custody where a child with disabilities "improved considerably" in the care of the other parent, and the child's "self-esteem and performance had significantly increased in the time he had been living with his father"); see also *In re Custody of N.A.K.*, 649 N.W.2d 166, 176 (Minn. 2002) (suggesting that a child's special needs may create "extraordinary circumstances" sufficient to warrant granting custody to a non-parent.)

⁸⁵ See *Mitnick & Dittberner*, *supra* note 62.

⁸⁶ See *Minnesota Custody Dialogue*, *supra* note 64, at 23.

⁸⁷ Matthew W. Brault, *School Aged Children with Disabilities in U.S. Metropolitan Statistical Areas: 2010*, American Community Survey Briefs 4 (Nov. 2011), <http://www.census.gov/prod/2011pubs/acsbr10-12.pdf>.

⁸⁸ *Ross v. Ross*, 477 N.W.2d 753, 756 (Minn. Ct. App. 1991).

⁸⁹ *Barrett v. Barrett*, 394 N.W.2d 274, 279 (Minn. Ct. App. 1986).

⁹⁰ See *Maxfield*, 452 N.W.2d at 223 (holding that a 10 year old child was old enough and mature enough to "express a preference where and with whom he wishes to live during his approaching teenage years"); see also *Mowers v. Mowers*, 406 N.W.2d 60, 64 (Minn. Ct. App. 1987) (affirming consideration of the preferences of a child age 7 years, 10 months).

⁹¹ *Schwamb v. Schwamb*, 395 N.W.2d 732, 735 (Minn. Ct. App. 1986) (preference deemed not to be reliable where it results from parental coaching).

⁹² *In re Weber*, 653 N.W.2d 804, 810 (Minn. Ct. App. 2002) (child's "expressed preference for a change in custody resulted from manipulation by his father"); *Hoffa v. Hoffa*, 382 N.W.2d 522, 525 (Minn. Ct. App. 1986) ("the children's preference was not a reasonable one because it was tainted by manipulative conduct"); *Roehrdanz v. Roehrdanz*, 438 N.W.2d 687, 691 (Minn. Ct. App. 1989) ("We do not believe that the children's custodial preference in this case, so clearly influenced by their father's manipulation, is determinative of their best interests").

to weigh a child's preference—even her mature, independent and reliable preference—has little bearing on the wisdom of offering that preference as evidence. Practitioners should continue to be mindful that eliciting a preference from a child in open court or even in a judicial interview may have strong, adverse consequences for the child.⁹³

- (4) *Whether domestic abuse, as defined in section 518B.01, has occurred in the parents' or either parent's household or relationship; the nature and context of the domestic abuse; and the implications of the domestic abuse for parenting and for the child's safety, well-being, and developmental needs;*

Since 1987, Minnesota's best interest factors have provided for an explicit consideration of domestic abuse.⁹⁴ However, section 518.17's domestic abuse factor previously looked only to “the effect on the child of the actions of an abuser.”⁹⁵ This limited consideration of domestic abuse fell short, ignoring the myriad ways in which abuse can manifest (e.g. its nature and context), and the broader implications for abuse on parents and parenting as distinct from simply the “effect on the child of the actions of an abuser.”⁹⁶

By contrast, the revised factor draws nearly verbatim from work from the National Child Custody Differentiation Project.⁹⁷ The Custody Differentiation Project pioneered “an approach to domestic violence-informed decision making” characterized by four discrete steps of identifying abuse, determining its nature and context, determining its implications, and accounting for the abuse's nature, context, and implications.⁹⁸ Adopting much of the Project's analytical framework, the revised domestic abuse factor asks courts to engage in a similar multi-step inquiry. First, the court must determine whether abuse, as defined by Minnesota's Domestic Abuse Act,⁹⁹ has occurred.¹⁰⁰ Second, if abuse has occurred, the court

⁹³ *Anderson v. Sullivan*, No. CX-01-1932, 2002 WL 31368113, at *3 (Minn. Ct. App. Oct. 22, 2002) (“Putting a 14-year-old child on the witness stand in the midst of a bitter custody dispute, to determine which parent she loves more, would be entirely inappropriate”).

⁹⁴ Act of May 13, 1987, ch. 106, § 1, 1987 Minn. Laws. 211.

⁹⁵ MINN. STAT. § 518.17 (2014).

⁹⁶ *See e.g. Luedtke v. Luedtke*, No. A04-2347, 2005 WL 3289383, at *2 (Minn. Ct. App. Dec. 6, 2005) (affirming district court determination “that any acts of abuse that may have occurred between the parties did not affect the children, and, therefore, the acts did not control the custody decision”).

⁹⁷ *See Gabrielle Davis, A Systematic Approach to Domestic Abuse—Informed Child Custody Decision Making in Family Law Cases*, 53 FAM. CT. REV. 565 (2015); *see also Nancy Ver Steegh and Gabrielle Davis, Calculating Safety: Reckoning with Domestic Violence in the Context of Child Support Parenting Time Initiatives*, 53 FAM. CT. REV. 279 (2015).

⁹⁸ *Davis, supra* note 90, at 565–566.

⁹⁹ *See* MINN. STAT. § 518B.01, subdiv. 2(a):

“Domestic abuse” means the following, if committed against a family or household member by a family or household member:

- (1) physical harm, bodily injury, or assault;
- (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or
- (3) terroristic threats, within the meaning of section 609.713, subdivision 1; criminal sexual conduct, within the meaning of section 609.342, 609.343, 609.344, 609.345, or 609.3451; or interference with an emergency call within the meaning of section 609.78, subdivision 2.

¹⁰⁰ Notably, the Custody Differentiation Project advises that at the early stage of identifying abuse, “practitioners employ a screening device that is sensitive to a broad range of characteristics, including physical, sexual, emotional, economic, and coercive controlling abuse.” *Davis, note 90 supra* at 568. By maintaining a limited understanding of

must explore its nature and context, or “who is doing what to whom and to what effect.”¹⁰¹ And finally, the court must determine what implications abuse may have for parenting and the needs, safety and well-being of the child.

As alluded to above, this new inquiry is both broader and more nuanced than examining merely abuse’s “effect on the child.”¹⁰² Instead, “implications for parenting” asks not just what the child experiences, but also what the parents experience, both individually and in a co-parenting relationship.¹⁰³ The implications of abuse on parenting will necessarily be directly impacted by the context and motives behind the abuse, requiring the court to adopt different interventions depending on the myriad ways in which domestic abuse may affect children, parents, and parenting.¹⁰⁴

(5) *Any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs;*

Under this revised factor, a parent’s physical and mental health continues to be relevant in custody determinations, though arguably far less relevant than under the pre-2015 Factors.¹⁰⁵ The revised factor slightly expands the consideration of health to include “chemical health.” However, it also carefully qualifies whose health information is relevant (a parent’s) and when that information is relevant (when it “affects the child’s safety or developmental needs.”) By comparison, Minnesota’s pre-2015 Factor called upon courts to consider ‘the mental and physical health of all individuals involved,’ without qualification or limitation.¹⁰⁶ As a result, case law suggested that a parent placed his or her physical and mental health at issue, thereby waiving any applicable privilege, simply by seeking custody of her child.¹⁰⁷ The revised factor now explicitly limits itself to health issues with a demonstrable impact on the child’s safety or needs.

This narrower factor provides stronger grounds for parents to object to providing their medical and mental health records as a matter of course in custody proceedings, in the absence of an affirmative showing of an impact on the child’s safety or developmental needs.¹⁰⁸ Similarly, the revised factor offers an opportunity for Minnesota’s courts to reevaluate the routine exchange of medical records in custody proceedings, and better protect the sensitive, mental health information of parent in the absence of bona fide and demonstrable concerns.¹⁰⁹

(6) *The history and nature of each parent's participation in providing care for the child;*

domestic abuse as solely physical abuse (as defined by MINN. STAT. § 517B.01) Minnesota’s new domestic abuse factor fails to cast the wide net arguably called for by the Custody Differentiation Project.

¹⁰¹ Davis, *supra* note 90, at 569.

¹⁰² *Minnesota Custody Dialogue*, *supra* note 64 at 23.

¹⁰³ Davis, *supra* note 90, at 569–71.

¹⁰⁴ *Id.* at 571.

¹⁰⁵ See *e.g.* Jones v. Jones, 377 N.W.2d 38 (Minn. Ct. App. 1985).

¹⁰⁶ MINN. STAT. § 518.17, subdiv. 1(a)(9) (2014).

¹⁰⁷ Morey v. Peppin, 353 N.W.2d 179, 183 (Minn. Ct. App. 1984) *rev'd*, 375 N.W.2d 19 (Minn. 1985).

¹⁰⁸ See Jamie Driggs & Alan Eidsness, *Family Law: Don’t Subpoena Mental Health Records*, MINN. LAW. (May 7, 2015).

¹⁰⁹ See, *e.g.* Culbertson v. Culbertson, 455 S.W.3d 107, 133 (Tenn. Ct. App. 2014), *reh'g denied* (May 20, 2014), *appeal denied* (Oct. 17, 2014) (examining the various approaches to waiver of privilege adopted by different states and adopting a position more protective of psycho-therapist patient privilege).

Factor six sounds the death knell for the phrase “primary caretaker,” a term which is now a stranger to Minnesota’s custody law. Instead, the revised factor looks to “the history and nature of each parent’s participation in providing care,” without need to determine the “primacy” of one parent’s contributions over the other’s. Consistent with the goal of minimizing conflict between parents by focusing on the needs of children, factor 6 does not ask the Court to judge which parents’ care was better, or more important.¹¹⁰ Instead, findings under this factor would be expected to be more descriptive and less evaluative.¹¹¹ Despite this more descriptive cast, findings under this factor must still clearly consider how any “history of care” affects and impacts the Court’s determination of future parenting arrangements.¹¹²

Despite a strong shift away from *Pikula*’s historical focus on “primary caretaking,” many of the “indicia of primary parenting,” relied on by *Pikula* may continue to be relevant in giving substance to “the history and nature of care.”¹¹³ Thus, day-to-day care such as bathing, bedtime, and meal preparation undoubtedly has relevance. So too will “emotional and intellectual care.”¹¹⁴ However, parents and practitioners should not expect that either form of historical care will be determinative of future parenting arrangements. Lengthy discursive testimony on years of caretaking should generally be avoided in trial testimony or affidavits under the new factors, instead linking historical caretaking to an analysis of future care under Factor 7.

(7) *The willingness and ability of each parent to provide ongoing care for the child; to meet the child's ongoing developmental, emotional, spiritual, and cultural needs; and to maintain consistency and follow through with parenting time;*

In implicit counter-balance to Factor 6’s focus on historical caretaking, Factor 7 asks courts to inquire as to each parent’s *prospective* ability to meet the child’s needs,¹¹⁵ moving from a “who-did-more” focus on past caretaking to a consideration of how best to manage future care arrangements.¹¹⁶ In addition to balancing out Factor 6’s emphasis on historical care, Factor 7 may be particularly relevant where care arrangements will change dramatically going forward—for instance where a stay-at-home parent will be returning to work or where one parent has historically been denied the ability to provide care. The practitioner representing this “out parent,” in such scenario may wish to focus her case on such future arrangements, with clear, anecdotal examples of her client’s willingness and ability to provide care.

¹¹⁰ Mitnick & Dittberner *supra* note 62.

¹¹¹ *Minnesota Custody Dialogue*, *supra* note 64, at 23 (observing “This factor allows a descriptive consideration of each parent’s prior involvement in caregiving”).

¹¹² MINN. STAT. § 518.17, subd. 1(b)(1) (2016).

¹¹³ See *Pikula*, 374 N.W.2d at 713 (citing *Garska v. McCoy*, 167 W. Va. 59, 68, 278 S.E.2d 357, 362 (1981)) (listing the indicia of primary parenthood to include: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e. transporting to friends’ houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e. babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e. teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic).

¹¹⁴ *Regenscheid v. Regenscheid*, 395 N.W.2d 375, 379 (Minn. Ct. App. 1986).

¹¹⁵ Even under Minnesota’s pre-2015 best interest factors, a parent’s ability to provide prospective care was relevant to a best-interest analysis. See *Hoffa v. Hoffa*, 382 N.W.2d 522, 525 (Minn. Ct. App. 1986); *Swenson*, *supra* note 25 at § 7:2(c), citing *Trebelhorn v. Uecker*, 362 N.W.2d 342, 345 (Minn. Ct. App. 1985).

¹¹⁶ See Mitnick & Dittberner, *supra* note 62.

Factor 7 also incorporates some remnants of what had been Minn. Stat. § 518.17, subdiv. 1(a)(10):

The capacity and disposition of the parties to give the child love, affection, and guidance and to continue educating and raising the child in the child's culture and religion or creed, if any.

Again, however, the factor is reframed in terms of meeting the child's emotional, spiritual and cultural needs rather than the more amorphous concerns of "love, affection, and guidance."¹¹⁷ Factor 7 also seeks far more measurable information than its predecessor—looking to a parent's "willingness and ability" to meet these specific needs. Such information, while perhaps not strictly quantifiable, is at least less "inherently resistant of evaluation,"¹¹⁸ than the parent's "capacity and disposition," permitting courts, practitioners, and parties to more readily offer evidence relative to these portions of Factor 7.

Finally, Factor 7 provides the factors' sole reference to "continuity" previously contained in a separate best interest factor.¹¹⁹ Despite what could be construed as a merely passing reference, practitioners and decision-makers should be slow to discount the importance of continuity (and stability, discussed below) in crafting effective parenting arrangements.¹²⁰ Note, however, that continuity is not to be equated with care primarily by one parent. Decision-makers should instead look to "each caregiver's responsiveness to the child from one day to the next, bearing in mind that children can often adapt and benefit from differences in temperament and behavior among the adult caregivers who interact with them."¹²¹ Regular and predictable adherence to the parenting time schedule will be certainly part of any consideration of "continuity," but the inquiry should neither start nor end strictly with the amount of parenting time.

(8) *The effect on the child's well-being and development of changes to home, school, and community;*

Focusing explicitly on changes to the child's home, school and community, Factor 8 partially incorporates considerations previously spread across three best interest factors, namely:

The child's adjustment to home, school, and community.¹²²

The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;¹²³

The permanence, as a family unit, of the existing or proposed custodial home.¹²⁴

¹¹⁷ Factor 1 and Factor 7 also arguably incorporates the pre-2015 best interest factor of "the child's cultural background." See MINN. STAT. § 518.17, subdiv. 1(a)(11). See Ahl, *supra* note 9, at 1362–63 (discussing the legislative history of this factor).

¹¹⁸ *Pikula*, 374 N.W.2d at 712.

¹¹⁹ MINN. STAT. § 518.17, subdiv. 1(a)(7) (2014) ("the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity").

¹²⁰ Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 158 (2014).

¹²¹ *Id.*

¹²² MINN. STAT. § 518.17, subdiv. 1(a)(6) (2014).

¹²³ *Id.* at subdiv. 1(a)(7).

¹²⁴ *Id.* at subdiv. 1(a)(8).

But in place of its predecessors' "more static analysis,"¹²⁵ and implied preference for the status quo, Factor 8 inquires more directly: what changes will occur in the child's life and to what effect.¹²⁶ This is not to say courts may not continue to appropriately weigh the benefits to maintaining the children's pre-separation school and community. But consideration of these benefits must fall within the context of "effect on the child's well-being and development," rather than simply by virtue of their duration or permanence.

- (9) *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;*

Factor 9 functionally replaces the pre-2015 factor examining a child's relationships with parents, siblings and other important persons:

The interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests.¹²⁷

The revised factor does not elicit fundamentally different information than its pre-2015 counterpart, nor are the revisions likely to affect courts' general skepticism of custody arrangements that separate siblings.¹²⁸ But in place of a more ineffectually descriptive consideration of a child's "interaction" and "interrelationship" with her parents and siblings, Factor 9 solicits information more directly relevant to the issues at hand: what *effect* will future arrangements have on these relationships.¹²⁹ Factor 9 is thus far less "resistant of evaluation and difficult to apply in any particular case," than its predecessor.¹³⁰

- (10) *The benefit to the child in maximizing parenting time with both parents and the detriment to the child in limiting parenting time with either parent;*

Of all twelve new best interest factors, none seems riper for future litigation than Factor 10. A wholly new addition to section 518.17, some have read Factor 10 as a veiled presumption in favor of equal parenting time.¹³¹ It is not difficult to understand why.

As drafted, Factor 10 is amenable to at least two equally reasonable interpretations, either:

1. [The Court shall presume that there is a] benefit to the child in maximizing time with both parents; or

¹²⁵ *Minnesota Custody Dialogue*, *supra* note 64, at 23.

¹²⁶ Compare the analysis in *In re Kremer v. Kremer*, 827 N.W.2d 454, 460 (Minn. Ct. App. 2013) in which father's arguments were largely based on mother's "unstable" "chaotic" and "transitory" lifestyle, to the more direct analysis under the revised factors.

¹²⁷ MINN. STAT. § 518.17, subdiv. 1(a)(5) (2014).

¹²⁸ *Sefkow v. Sefkow*, 427 N.W.2d 203, 215 (Minn. 1988) ("We do not favor split custody as a general rule; indeed we support the general policy that the best interests of minor children are usually served by permitting them to remain together"); *see also* *Maxfield v. Maxfield*, 439 N.W.2d 411, 417 (Minn. Ct. App. 1989).

¹²⁹ *Minnesota Custody Dialogue*, *supra* note 64, at 23.

¹³⁰ *Pikula*, 374 N.W.2d at 712.

¹³¹ *See generally*, Michael Boulette, *The Benefits of Maximizing, or the Equal Time Myth*, FAMILY-IN-LAW.COM (Oct. 23, 2015), <http://www.family-in-law.com/the-equal-time-myth>; Michael Boulette, *Making Sense of Minnesota's New Shared-Parenting Presumptions*, FAMILY-IN-LAW.COM (Aug. 14, 2015), <http://family-in-law.com/making-sense-of-minnesotas-new-shared-parenting-presumptions>.

2. [The Court shall consider whether or not there is a] benefit to the child in maximizing time with both parents.

The first alternative represents a legislative conclusion that all children benefit from “maximized” parenting time, while the second asks the court to inquire what (if any) benefits can be achieved through maximized time. As between these two alternatives, the text offers little assistance.

Guidance from the Dialogue Group and its members is similarly limited. One article, authored by two dialogue group members, suggests Factor 10 merely provides for “an analysis of the benefit and detriment of various time-sharing arrangements.”¹³² By contrast, a different article by the Dialogue Group as a whole explains the new factor “emphasizes the appropriately substantial participation of both parents in a way that benefits the child on a case by case basis.”¹³³ The interpretive discrepancy even of among the factor’s creators is notable, but neither explanation does much to clarify the textual ambiguity.

Still more problematic is the practical question present in the mind of most practitioners: what evidence should parties’ offer with respect to his factor. Must practitioners be prepared to offer evidence supporting the specific benefits to *this* family and *these* children from “maximized” time, or will these benefits be assumed by the court leaving the parties’ to determine how best to “maximize” time under the specific circumstances of the case? Viewed from the perspective of the bench, what findings should we expect in support of this factor? Must the court consider the precise benefits the children derive from time with each parent, and then determine how to maximize these benefits? Or may a court simply look to how best to “maximize” time in light of family logistics? Put more simply, should Factor 10 be viewed as about maximizing benefits to a child, or about maximizing time for each parent? Certainly the factors’ overarching focus on children’s’ needs suggests an answer, but neither the factor’s language, nor its legislative history resolve the question.

Factor 10 also leaves unanswered precisely what is meant by “maximized” time. The Dialogue Group itself clearly stated that maximized time is not “a presumption of equal parenting time,”¹³⁴ a conclusion consistent with the legislative clashes predating Factor 10’s adoption.¹³⁵ But even accepting that maximized time is not necessarily equal time, the text of the statute practically drips with ambiguity, leaving practitioners in need of additional guidance.

While Factor 10’s origins remain murky, it is not unreasonable to assume some portion of its genesis lies in Wisconsin custody statutes which provide:

The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent and that maximizes the amount of time the child may spend with each parent, taking into account geographic separation and accommodations for different households¹³⁶

¹³² Mitnick & Dittberner, *supra* note 62.

¹³³ *Minnesota Custody Dialogue*, *supra* note 64, at 23.

¹³⁴ *Id.*

¹³⁵ See Part II, *supra*. It would seem usual that stakeholders so adamantly opposed to a rebuttable of 35% parenting time in 2012, would have agreed to a more far reaching presumption of equal time just a few years later. It also should not be overlooked that the Dialogue Group’s consensus legislation also sought to strengthen the 25% parenting time presumption without increasing the amount of minimum parenting time. See Act of May 11, 2015, ch. 30, art. 1, § 6. 2015 Minn. Laws. 1, 7.

¹³⁶ WIS. STAT. § 767.24(4)(a)2. Much like Factor 10, this provision was added to Wisconsin’s law as part of sweeping changes in that state intended to facilitate greater involvement by both parents. See Thomas J. Walsh, *In the Interest*

Much like Factor 10, Wisconsin's language calls upon courts to maximize time (albeit without the specific benefit-determinant calculus present in Minnesota's law). Also like Factor 10, some have argued that Wisconsin's statute "mandates equal placement because a child's time with his or her parents cannot otherwise be 'maximized.'"¹³⁷

At least with respect to the Wisconsin statute, however, such arguments have met with limited success. In *Landwehr v. Landwehr*, Wisconsin's Supreme Court rejected a father's arguments equating "equalized" time with "maximize" time, holding instead, that the statute required only that:

[T]he court must attempt to maximize the children's time with each parent within the context of the various other considerations the court is instructed to contemplate under § 767.24 [Wisconsin's best interest factors]. The term "maximize" does not supersede the trial court's discretion to construct a schedule it determines is in the best interest of the child and otherwise in conformity with the intricate dictates of [the best interest standard]¹³⁸

Or, rephrased slightly differently, the court will not presume a legislative preference for equalized time when statutory language calls merely for maximized time.

Beyond the more banal observation that "maximize" and "equalize" are analytically discrete concepts, a concurring opinion in *Landwehr* offers a second insight relevant to the application of Factor 10. Writing for herself, Chief Justice Abrahamson suggested an alternate interpretation of "maximized" time more broadly consistent with the Dialogue Group's focus on the needs of children, and based on the quality, rather than the quantity, of parent-child interactions:

I conclude that in complying with Wis. Stat. § 767.24(5m) by considering the best interest of the child and the 17 factors, the circuit court shall also "maximize[] the amount of time the child may spend with each parent" by setting a placement schedule that considers the *actual* amount of time the child is likely to spend with the parent. In other words, the circuit court in setting a placement schedule should, in addition to considering all the other factors required by statute, take into account the actual amount of time the child is likely to spend with each parent. Thus the circuit court might consider such matters as the time the child is, for example, in school, or with a caretaker, or asleep, and the times a parent works or is otherwise unavailable to be with the child.¹³⁹

Under this more nuanced reading, "the benefits of maximizing parenting time," calls upon the Court to consider not just amount of time a child spends with her parent, but the value of the that time—placing a premium on parent-child interaction and parent involvement over the bare accumulation of hours. Such a reading, though certainly not the only plausible interpretation of Factor 10, has the benefit of both textual support and validation in social science.¹⁴⁰

of A Child: A Comparative Look at the Treatment of Children Under Wisconsin and Minnesota Custody Statutes, 85 MARQ. L. REV. 929, 943 (2002).

¹³⁷ *Landwehr v. Landwehr*, 2006 WI 64, ¶ 10, 291 Wis. 2d 49, 58, 715 N.W.2d 180, 185.

¹³⁸ *Id.* at 188.

¹³⁹ *Id.* at 193 (Abrahamson, C.J., concurring).

¹⁴⁰ *See, inter alia* Jennifer E. McIntosh, *Legislating for Shared Parenting: Exploring Some Underlying Assumptions*, 47 FAM. CT. REV. 389, 391 (2009) (observing that "Research commentaries on children's outcomes converge around

Until the case law surrounding this factor solidifies, practitioners would be well advised to provide the court with sufficient evidence to support their preferred interpretation of the factor so as to avoid waiving any arguments on appeal.¹⁴¹

(11) *Except in cases in which domestic abuse as described in clause (4) has occurred, the disposition of each parent to support the child's relationship with the other parent and to encourage and permit frequent and continuing contact between the child and the other parent;*

Factor 11 maintains and slightly expands Minnesota's "friendly parent factor," added in 1994. In addition to each parent's willingness to "encourage and permit frequent and continuing contact,"¹⁴² however, the revised factor broadens its scope to each parents' support for the child's relationship with the other parent.¹⁴³ While arguably a substantive addition, the factors inclusion of "support [for] the child's relationship with the other parent," largely reflects considerations already present in case law.¹⁴⁴

(12) *The willingness and ability of parents to cooperate in the rearing of their child; to maximize sharing information and minimize exposure of the child to parental conflict; and to utilize methods for resolving disputes regarding any major decision concerning the life of the child.*

Finally, Factor 12 consolidates many of the "joint custody factors" previously contained in Minn. Stat. § 518.17, subdiv. 2 into a single, comprehensive factor.¹⁴⁵ Unlike its predecessors, however, Factor 12 must be considered in every case—not only those where joint custody is sought. Factor 12 also removes any consideration of "whether it would be detrimental to the child if one parent were to have sole authority over

the importance of parenting and relationship qualities and psycho-social resources above the sheer structure of care arrangements"); Michel E. Lamb & Joan B. Kelly, *Improving the Quality of Parent-Child Contact in Separating Families with Infants and Young Children: Empirical Research Foundations*, THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS 2ed. 187, 194 (2009). (concluding after a review of research that, "The clear implication is that active paternal involvement, not simply the number or length of meetings between fathers and children, predicts child adjustment"); Melissa A. Milkie et al., *Does the Amount of Time Mothers Spend with Children or Adolescents Matter*, 77 J. MARRIAGE & FAM. 355 (2015) (finding that parental engagement rather than parental preference goes furthers to promote child well-being).

¹⁴¹ Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988).

¹⁴² MINN. STAT. § 518.17, subdiv. 1(a)(13) (2014).

¹⁴³ See Pruet & DiFonzo, *supra* note 120, at 157.

¹⁴⁴ See generally, Lemcke v. Lemcke, 623 N.W.2d 916, 919 (Minn. Ct. App. 2001) (observing that, "A majority of courts, including Minnesota courts, agrees that a sustained course of conduct by one parent designed to diminish a child's relationship with the other parent is unacceptable and may be grounds for denying or modifying custody").

¹⁴⁵ Prior to the 2015 amendments, courts were required to evaluate the following four factors where joint custody was requested:

- (a) The ability of the parents to cooperate in the rearing of their children;
- (b) Methods for resolving disputes regarding any major decision concerning the life of the child, and the parents' willingness to use those methods;
- (c) Whether it would be detrimental to the child if one parent were to have sole authority over the child's upbringing;
- (d) Whether domestic abuse, as defined in section 518B.01, has occurred between the parties.

MINN. STAT. § 518.17, subdiv. 2 (a)-(d) (2014).

the child's upbringing,"¹⁴⁶ a concept which remained poorly developed in case law despite its having been a part of Minnesota's custody statute for nearly 25 years.¹⁴⁷

While, Factor 12 offers an "an expanded consideration of the components of co-parenting that affect children,"¹⁴⁸ the text by itself does not suggest a meaningful departure from the prior joint custody factors. As before, practitioners may expect that joint custody requests—particularly with respect to legal custody—will continue to hinge primarily on the parties' ability or "inability to communicate and cooperate."¹⁴⁹ Though the revised language does provide a sharper focus on the ways in which parental communication and cooperation specifically affect children.

IV. SAME AS IT EVER WAS?

The purpose of this article has been two-fold. First, to review the historical and legislative landscape in which Minnesota's new best interest factors were enacted. Then, second, to briefly review each new factor in turn, while offering practical and applicable guidance to practitioners and decision-makers attempting to understand the new law.

Of course, none of the preceding discussions answers the sixty-four thousand dollar question: will these new best interest factors actually change custody outcomes for Minnesota families. Past experience should leave us skeptical. Historically, Minnesota's Courts have not responded to dramatic changes in custody laws by reaching markedly different outcomes.¹⁵⁰ Instead, change appears to have emerged more organically—perhaps responding more as a result of changing families than changing laws. This is perhaps as it should be. Though social norms are slow to change, they have a definite and measurable impact on the application of child custody laws. And in some ways, these shifting norms may be preferable, accounting for changing societal attitudes over time rather than in a single, sweeping legislative change.¹⁵¹

In the meantime, however, our courts continue to be afforded extraordinarily broad discretion in deciding custody and parenting time matters.¹⁵² It is thus unlikely that a decision-maker convinced of the

¹⁴⁶ MINN. STAT. § 518, subdiv. 2(c) (2014).

¹⁴⁷ See Swenson, *supra* note 25, at § 7.3(c).

¹⁴⁸ Mitnick & Dittberner, *supra* note 62.

¹⁴⁹ Wopata v. Wopata, 498 N.W.2d 478, 481 (Minn. Ct. App. 1993); see also Estby v. Estby, 371 N.W.2d 647, 649 (Minn. Ct. App. 1985) (joint legal custody should be awarded where parties "can cooperatively deal with parenting decisions); Digatono v. Digatono, 414 N.W.2d 498, 502 (Minn. Ct. App. 1987) (sole legal custody justified based on intense turmoil in parents' relationship); Andersen v. Andersen, 360 N.W.2d 644, 646 (Minn. Ct. App. 1985) (parties' intense anger towards one another resulting in "tug-of-war" over child justified sole legal custody award); Heard v. Heard, 353 N.W.2d 157, 161–62 (Minn. Ct. App. 1984) (reversing an award of joint legal custody because parties' inability to communicate led to quarrels between the parties that resulted in stress for the children); but see Rosenfeld v. Rosenfeld, 529 N.W.2d 724, 726 (Minn. Ct. App. 1995) (affirming award of joint legal custody where hostility existed between the parties but they were able "to set aside their personal feelings for the best interest of the children when required"); Zander v. Zander, 720 N.W.2d 360, 366 (Minn. Ct. App. 2006) (affirming a joint legal custody award despite conflict between parties during the pendency of litigation because "the parties have a history of effective co-parenting and have indicated their desire to do what is best for their children" and where parties showed ability to cooperate on some issues during the proceeding).

¹⁵⁰ See discussion in part II *supra*; see also Ahl, *supra* note 9, at 1377, 1350 (regarding the judiciaries' response to Minnesota's 1969 and 1974 amendments).

¹⁵¹ See generally, M. Cancian, D.R. Meyer, P.R. Brown, & S.T. Cooks, *Who Gets Custody Now? Dramatic Changes in Children's Living Arrangements After Divorce*, 51 DEMOGRAPHY 1381 (Aug. 2014).

¹⁵² Vangsness v. Vangsness, 607 N.W.2d 468 (Minn. Ct. App. 2000).

appropriateness of a particular outcome on July 31, 2015, would reach a wholly (or even largely) different decision when the new factors went into effect on August 1, 2015. Some will suggest that such discretion reduces the best interest standard to simply “the individual beliefs of the decision maker,” amounting to a reduction of custody cases to “parental conduct rather than the best interest of¹⁵³ the child.” Others will caution that such is the inevitable nature of case-by-case decision-making. But practitioners, decision-makers, and litigants must continue to apply the law as we find it the unique facts of each family, each parent, and each child, treating each custody case as unique rather than “enunciating an immutable rule of law applicable in any other proceeding.”¹⁵⁴

¹⁵³ 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, 444-445 (1990).

¹⁵⁴ *Dobrin v. Dobrin*, 569 N.W.2d 199, 201 (Minn. 1997).