Best Interests of the Child and the Expanding Family

Stephanie L. Tang*

"Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home."

—Moore v. City of East Cleveland[1]

All fifty states have adopted the "best interests of the child" standard governing initial child custody determinations. However, the wide judicial discretion accompanying this broad standard has resulted in disparate application across custody cases nationwide. These disparities are particularly prevalent in cases where children have a significant connection with extended family members or nonparent caregivers.

As of 2017, a third of American households with children relied on extended family for childcare assistance. This percentage is likely even higher given the uptick in multigenerational households during the COVID-19 pandemic. Multigenerational family living, once viewed primarily as a cultural niche, is growing across all racial groups. Now, nearly one-quarter of Americans aged twenty-five to thirty-four reside with parents or older relatives. Among those living in multigenerational households, over 70% report they reside with a child under eighteen. These statistics reflect the overall reality that today, less than half of all children live in a traditional two-married-parents nuclear family. Recent legislative proposals recognize the expansion of the nuclear family, granting legal rights and status to new categories of individuals. Despite this shift away from the traditional parent-child family structure, almost all statutory and judicially determined factors that govern state courts' determination of the "best interests of the child" in custody cases only consider the relationship

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1. Moore v. City of East Cleveland, 431 U.S. 494, 505 (1977).

between biological parents and children.

This Article conducts a fifty-state survey of the current statutes and cases applying the "best interests of the child" standard in custody determinations. The survey results indicate that although every state and D.C. have adopted the "best interests of the child" standard, its application across cases is inconsistent, particularly in cases where a parent resides with extended family members or regularly seeks childcare assistance from extended family members. Based on the survey findings, this Article advances a three-pronged recommendation to increase consistency in these cases to meet the realities of expanding family structures: (1) adoption of mandatory, delineated statutory factors; (2) a requirement to make specific findings of fact as to each statutory factor; and (3) the addition of a factor considering the history and nature of the child's relationship with any extended family members and nonparent caregivers.

INTRODUCTION

The "family unit" in America has evolved substantially over the past fifty years, with an increased diversity of living arrangements in which children are raised.[2] Part of this increased diversity includes expanding the household beyond the traditional nuclear family such that living with extended family is now commonplace.[3] From 2016 to 2021, the percentage of Americans living in multigenerational households increased from 20% to 26%.[4] This is nearly double

2. *See generally* Courtney G. Joslin, *The Evolution of the American Family*, A.B.A. (July 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_evolution_of_the_american_family/ [https://perma.cc/38L5-J7SA].

3. *See Family Matters: Multigenerational Living Is on the Rise and Here to Stay*, GENERATIONS UNITED 1 (Apr. 21, 2021), https://www.gu.org/app/uploads/2021/04/21-MG-Family-Report-WEB.pdf [https://perma.cc/QSW5-392R]. [hereinafter *Family Matters*]; Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 881 (1984); David Brooks, *The Nuclear Family Was a Mistake*, ATLANTIC (Mar. 2020), https://www.theatlantic.com/magazine/archive/2020/03/the-nuclear-family-was-a-mistake/605536/ [https://perma.cc/XD2S-ASPZ]; Camille Workman, *The 2017 Uniform Parentage Act: A Response to the Changing Definition of Family?*, 32 J. AM. ACAD. MATRIM. LAWS. 233, 239–40 (2019).

4. *See* Oyin Adedoyin, *More Parents Are Moving in with Adult Children—at Younger Ages*, WALL ST. J. (Feb. 22, 2023, 2:44 PM), https://www.wsj.com/articles/more-parents-are-moving-in-with-adult-childrenat-younger-ages-a931f3d7 [https://perma.cc/ZQR7-GA6X]; D'vera Cohn & Jeffrey S. Passel, *A Record 64 Million Americans Live in Multigenerational Households*, PEW RSCH. CTR. (Apr. 15, 2018), https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/ [https://perma.cc/U3S5-AJSR] (defining "multigenerational household" as two or more adult generations, or including grandparents and grandchildren younger than twenty-five); GENERATIONS UNITED, FACT SHEET: MULTIGENERATIONAL HOUSEHOLDS (2021), https://www.gu.org/app/uploads/2021/04/21-MG-Family-Report-FactSheet.pdf

the amount of multigenerational households that existed in 1990.[5] Inherent in these multigenerational household structures is the reality of multiple adult caregivers helping to raise and take responsibility for minor children.[6] A 2017 study found nearly a third of households with children rely on extended family for childcare.[7] Moreover, in the wake of the COVID-19 pandemic, economic hardships and the need for childcare pushed many to rely on extended family, both inside and outside of the home, to assist with parenting responsibilities while parents were at work.[8] Family courts have been slow to recognize this shift in family structure and vary significantly as to whether and to what extent they consider the roles of extended family members (and other significant third parties in child care) when deciding custody[9] cases.[10] Rather, family courts largely make custody decisions as though parents alone care for their children and ignore any nonparent caretakers who lack biological or legal ties to a child.[11]

[https://perma.cc/G7S7-2WW8] (defining "multigenerational household" as "a household with 3 or more generations").

5. *See* Madison Hoff, *Social Distancing May Be Harder for Families Who Live with Elderly Relatives. Here Are the States with the Largest Share of Multigenerational Households*, BUS. INSIDER (Apr. 25, 2020), https://www.businessinsider.com/the-states-with-the-most-multigenerational-households-2020-4 [https://perma.cc/TUQ8-64UN] (finding 14% of Americans lived in multigenerational households in 1990).

6. *See Family Matters*, *supra* note 3, at 2.

7. *See Upper-Middle Class Most Likely to Rely on Family for Childcare*, ZILLOW (June 16, 2017), https://zillow.mediaroom.com/2017-06-16-Upper-Middle-Class-Most-Likely-to-Rely-on-Family-for-Childcare [https://perma.cc/R9N2-5CEG].

8. *See* Beth Ann Mayer, *The Changing Face of the American Family*, PARENTS (Apr. 9, 2023), https://www.parents.com/parenting/dynamics/the-changing-face-of-the-american-family/ [https://perma.cc/K2JV-RK6G]; Adedoyin, *supra* note 4.

9. The Author recognizes the term "custody" is becoming increasingly disfavored in the context of claims regarding parenting time and decision-making. *See, e.g.*, 750 ILL. COMP. STAT. ANN. §§ 5/602.5, .7 (West 2016) ("[a]llocation of parental decision-making responsibilities" and "[a]llocation of parenting time"); TEX. FAM. CODE ANN. §§ 153.132–33 (West 2023) ("[s]ole managing conservator" and "[j]oint managing conservators"). However, the majority of states still use "custody" in their underlying statutes and case law governing disputes between parents. For purposes of this Article, "custody" refers to requests for extended physical parenting time and decision-making responsibilities.

10. *See, e.g.*, Florida, FLA. STAT. ANN. § 61.13 (West 2021) ("The anticipated division of parental responsibilities after the litigation, including the extent to which parental responsibilities will be delegated to third parties. . . . The particular parenting tasks customarily performed by each parent and the division of parental responsibilities before the institution of litigation and during the pending litigation, including the extent to which parental responsibilities were undertaken by third parties."); Hawaii, HAW. REV. STAT. ANN. § 571-46 (West 2022) ("[e]ach parent's actions demonstrating that they allow the child to maintain family connections through family events and activities"); Minnesota, MINN. STAT. ANN. § 518.17 (West 2022) ("a child's physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development"; "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"); Oregon, OR. REV. STAT. ANN. § 107.137 (West 2021) ("the emotional ties between the child and other family members"); Pennsylvania, PA. CONS. STAT. § 5328 (2014) ("the availability of extended family"); South Carolina, S.C. CODE ANN. § 63-15-240 (2012) ("the child's cultural and spiritual background").

11. *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving*

All fifty states and the District of Columbia have adopted statutes directing courts to make custody determinations based on what is in the "best interests of the child."[12] However, the "best interests of the child" standard is applied rigidly in contemplation of a two-parent household, ignoring the reality of our current society.[13] As a result, custody decisions are often made to the exclusion of outside relationships.[14] Segregating a child from anyone who is not a child's parent impedes stability and continuity in the child's life and aggravates feelings of grief and depression they feel as a result of their parents' separation.[15] Further exacerbating this problem is the wide discretion judges have to make these determinations, which opens cases up to judges' personal feelings about litigants regardless of whether they are consciously aware of them.[16] These personal feelings are often driven in part by assumptions and implicit biases, including what they believe is an "appropriate" family structure.[17]

Analysis regarding the degree to which judges are held accountable for how their personal feelings guide their "best interests" analysis depends in part on three considerations: (1) whether the jurisdiction has adopted factors governing "best interests of the child" in a relevant statute or case law,[18] (2) whether the jurisdiction has made consideration of those factors mandatory,[19] and (3) whether the jurisdiction requires written findings of fact for each factor.[20] Adopting specific statutory factors within a state's custody statute or judicial precedent governing "best interests of the child" promotes uniformity and predictability amongst state court judges and streamlines appellate review.[21] However, even if all of the three elements above are met by a state's statute, the extent to which a judge will consider the role of an extended family member still varies in practice depending on one final consideration: whether the state has adopted a specific statutory factor on point. Without specific direction, judges have wide discretion to disregard the role of extended family members in a child's upbringing.

This Article challenges family law courts to reframe the "best interests of the

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and Caregivers, 94 VA. L. REV. 385, 387–88 (2008).

12. *See* Janet L. Dolgin, *Why Has the Best Interest Standard Survived? The Historic and Social Context*, 16 CHILD. LEGAL RTS. J. 2, 8 n.1 (1996).

13. *See* Bartlett, *supra* note 3, at 918.

14. *See id.*

15. *See id.* at 907–09.

16. *See* Solangel Maldonado, *Bias in the Family: Race, Ethnicity, and Culture in Custody Disputes*, 55 FAM. CT. REV. 213, 214 (2017).

17. *See id.*

18. *See infra* Section III.A.

19. *See infra* Section III.B.

20. *See infra* Section III.C.

21. *See generally* Michael P. Boulette, *A Practitioner's Guide to Minnesota's New Best Interest Factors*, 9 J.L. & PRAC., no. 3, 2016, at 1, https://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1027&context=lawandpractice [https://perma.cc/NPG2-TARC]; STARK & STARK, *Child Custody in Pennsylvania: "Best Interests" Enumerated Under New Law* (Mar. 8, 2011), https://palawblog.stark-stark.com/2011/03/articles/divorce/child-custody-in-pennsylvania-best-interests-enumerated-under-new-law/ [https://perma.cc/W878-6Y8G].

child" analysis and stop ignoring nonparent caregivers who do not exclusively function as parents but who do help parents provide care for their children.[22] Part I of this Article first discusses a brief history and criticisms of the proverbial "best interests of the child," followed by an overview of statutory-factors-based approaches as superior to judicially determined factors. It then outlines the limited constitutional protections of multigenerational households and provides a legal framework for expanding laws beyond the nuclear family in custody determinations. Part II presents a fifty-state survey of case law analyzing the "best interests of the child" as well as what (if any) statutory and judicial factors[23] are considered by courts when engaging in this analysis. This survey exposes existing statutes and delineated factors as insufficient to address the expanding family because they yield inconsistent application. Part III advances a legislative proposal to increase uniformity in application of the "best interests of the child" standard by courts: (1) the adoption of mandatory, delineated statutory factors; (2) a requirement to make specific findings of fact as to each statutory factor; and (3) the addition of a factor considering the history and nature of the child's relationship with any extended family members or other significant third-party caregivers.

I. BACKGROUND

"The [best interests of the child] standard has provided the illusion of consistency for the law in the regulation of family matters . . . ." —Janet Dolgin[24]

Legal scholarship regarding the role of extended family members or other third-party parents primarily addresses situations in which the third party is seeking to exercise parenting time due to abandonment, abuse, or unfitness of a biological parent.[25] Under these circumstances, third parties face a heightened burden of proof when seeking parenting time to the exclusion of a nonparent.[26] This Article narrows its scope to examining families where there is no concern regarding parental fitness, abuse, or abandonment. Rather, it addresses the increasingly common scenario where one or both parents regularly need childcare assistance from an extended

22. *See* Murray, *supra* note 11, at 388.

23. Several states do not delineate a list of statutory factors in their statute governing custody determinations, but these states have a seminal case wherein the opinion delineates factors courts should consider to help them determine what is in the "best interests of the child." For purposes of this Article, the Author will refer to these as "judicial factors" or "judicially determined factors." *See, e.g.*, Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) (seminal case of Mississippi); Schrag v. Spear, 858 N.W.2d 865, 877 (Neb. Ct. App. 2015) (seminal case of Nebraska); Pettinato v. Pettinato, 582 A.2d 909, 913–14 (R.I. 1990) (seminal case of Rhode Island); Holley v. Adams, 544 S.W.2d 367, 372 (Tex. 1976) (seminal case of Texas).

24. *See* Dolgin, *supra* note 12, at 6.

25. *See, e.g.*, Barbara Atwood, *Third Party Custody, Parental Liberty, and Children's Interests*, 43 FAM. ADVOC. 48 (2021); Courtney G. Joslin & Doug NeJaime, *How Parenthood Functions*, COLUM. L. REV. 319, 325 (2023) (finding the overwhelming majority of cases studied apply the functional parent doctrine where the functional parent has been the child's primary caregiver); Sarah J.M. Cox, *Grandparent and Third-Party Visitation Rights: A 50 State Survey*, 40 CHILD. LEGAL RTS. J. 77 (2021).

26. *See* Atwood, *supra* note 25.

family member or third party on a regular basis within or outside the household.[27]

A. Custody Determinations Based on the Best Interests of the Child Standard

The struggle to find a universal standard for custody determinations is rooted in the competing goals of promoting certainty and predictability for families while leaving discretion for courts to recognize each family's unique circumstances.[28] This Section explores the approaches states adopted prior to the "best interests of the child" standard, as well as criticisms of the standard.

1. Brief History of the Best Interests of the Child Standard

Prior to the nineteenth century, courts largely rejected any consideration of what was in the best interests of the child, instead opting to treat them like chattel.[29] During the colonial period and the following two centuries after, parents frequently entered into contracts with caretaker bosses who hired children as indentured servants.[30] Children had no rights under these contracts.[31] Further, at common law, children fell to the custody of their fathers because they were viewed as property owned by their fathers.[32] Throughout the early- to mid-nineteenth century, courts shifted from a paternal custody preference to a maternal one.[33] This transition culminated in states adopting the "tender years presumption," under which mothers were granted custody of young children and older girls.[34] The "best interests of the child" standard became the standard across all states by the beginning of the twentieth century.[35] The "best interests of the child" standard is lauded for its flexibility to accommodate the shifting social preferences of judges without requiring sweeping legislative changes on a regular basis.[36] However, the praiseworthy and familiar aspects of the "best interests" standard are counterbalanced by criticisms regarding its inconsistent application, which severely undermines its goals of predictability and uniformity.[37]

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27. *See generally* Alicia Sasser Modestino, Jamie J. Ladge, Addie Swartz & Alisa Lincoln, *Childcare Is a Business Issue*, HARV. BUS. REV. (Apr. 29, 2021), https://hbr.org/2021/04/childcare-is-a-business-issue [https://perma.cc/H3MW-FBGN]; Sarah Gitlin, Ayushi Gummadi, Alexis Krivkovich & Kunai Modi, *The Childcare Conundrum: How Can Companies Ease Working Parents' Return to the Office?*, MCKINSEY (May 9, 2022), https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/the-childcare-conundrum-how-can-companies-ease-working-parents-return-to-the-office [https://perma.cc/8MDA-ZQHQ].

28. *See* Boulette, *supra* note 21, at 1.

29. *See* Dolgin, *supra* note 12, at 4; Boulette, *supra* note 21, at 2.

30. *See* Dolgin, *supra* note 12, at 4.

31. *See id.*

32. *See id.* ("English court gave custody of a baby to its father despite the mother's uncontested claims about the father's great cruelty.").

33. *See id.*

34. *See id.* at 5.

35. *See id.* at 6.

36. *See id.* at 7.

37. *See id.* at 3.

2. Criticisms of the Best Interests of the Child Standard

The best interests of the child standard is often criticized for being overly vague and subject to wide judicial discretion at the trial court level.[38] Judges often do not have sufficient time to analyze parents' underlying psychological, social, behavioral, or moral traits during the short pendency of the case.[39] At times, the judge who tries the case is not even the same judge who hears routine motions on the case, so they may have limited or no knowledge of a case prior to trial.[40]

The standard by itself hardly provides any guidance to courts in their hurried analysis, creating a purely subjective inquiry subject to a heightened appellate review.[41] On review, appellate courts will not set aside a trial court's ruling absent an abuse of discretion or where findings of fact are clearly erroneous.[42] Depending on the state, a trial court may abuse its discretion where it fails to consider any statutorily mandated factors (if any are adopted), gives disproportionate weight to certain statutory factors to the exclusion of others, or generally "disregard[s] rules or principles of law or practice to the substantial detriment of a party litigant and its decision clearly exceeded the bounds of reason."[43] A finding of fact is clearly erroneous where either "(1) the record lacks substantial evidence in support of the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made."[44] The rationale behind this wide discretion lies in the fact that trial court judges are able to directly observe all witnesses and their demeanors in the courtroom, and make credibility determinations about the parties and witnesses by watching and listening to them firsthand.[45] However, these determinations are often based upon the judge's personal perspectives on issues and are thus subject to wide degrees of variation.[46]

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38. *See id.* at 3.

39. *See id.*

40. *See, e.g.*, Rules of the Judicial District Courts of Harris County, Texas Family Trial Division, https://www.justex.net/info/21/9 [https://perma.cc/ZLE3-UART] (outlining ancillary docket versus trial docket procedures); *Assignment of Domestic Relations Division Cases*, CIR. CT. COOK CNTY., https://www.cookcountycourt.org/ABOUT-THE-COURT/County-Department/Domestic-Relations-Division/Assignment-of-Cases [https://perma.cc/L92R-ZX5M] (last visited Oct. 29, 2023). In Cook County, Illinois (where Chicago sits), cases are assigned to a preliminary judge or an individual calendar judge. If assigned to a preliminary judge, the preliminary judge only hears uncontested matters/ status hearings and assigns the case to a "trial judge" for any contested proceedings including trials.

41. *See* Dolgin, *supra* note 12, at 8 n.2.

42. *See, e.g.*, Smith v. Weekley, 73 P.3d 1219, 1222 (Alaska 2003); Samayamanthula v. Patchipulusu, 338 So. 3d 787, 793 (Ala. 2021); Reed v. Reed, 710 S.E.2d 138, 138 (Ga. 2011); Fisher v. Fisher, 137 P.3d 355, 360 (Haw. 2006); Smith v. McDonald, 941 N.E.2d 1, 9 (Mass. 2010).

43. *See Fisher*, 137 P.3d at 360; *see also Weekley*, 73 P.3d at 1222; *In re* Custody of Kali, 792 N.E.2d 635, 642 (Mass. 2003); Sadler v. Pulliam, 2022 Ill. App. (5th) 220213, ¶ 46.

44. *See Fisher*, 137 P.3d at 360.

45. *See Samayamanthula*, 338 So. 3d at 793–94.

46. *See* Maldonado, *supra* note 16, at 215.

B. Factors-Based Approaches to Family Law

To guide judicial decision-making in all areas of family law, the vast majority of states have adopted statutory factors in both financial and child-related family law cases.[47] Family courts commonly apply statutory factors when adjudicating decisions in three broad areas of family law: spousal maintenance eligibility, property distribution, and initial custody determinations.[48] Notably, the Uniform Marriage and Divorce Act advances a factors-based approach for these three categories.[49] Within each of these categories, state statutes vary in whether they include factors at all, whether they mandate the trial court's consideration of the delineated factors, whether they require findings of fact for each factor, and what factors to include.[50] Because the delineated statutory factors are designed to be non-exhaustive, these statutes provide that courts should consider "all relevant factors," including but not limited to those factors,[51] or adopt a "catchall" factor directing courts to consider "any other factor" it finds relevant, pertinent, or appropriate.[52] These factors achieve a balance between unfettered judicial discretion and promoting uniformity within and across the states to discourage forum shopping.[53] Only two states do not adopt any statutory factors to guide courts' analyses in any of these three areas.[54]

1. Factors-Based Approaches to Financial Issues in Family Law

Most states have adopted factors as part of their statutory scheme to determine both a spouse's eligibility for spousal maintenance or alimony and a spouse's equitable share of property upon divorce.[55] Forty-one states currently enumerate statutory factors for determining spousal maintenance or alimony, and thirty-six states enumerate statutory factors for determining equitable division of property.[56]

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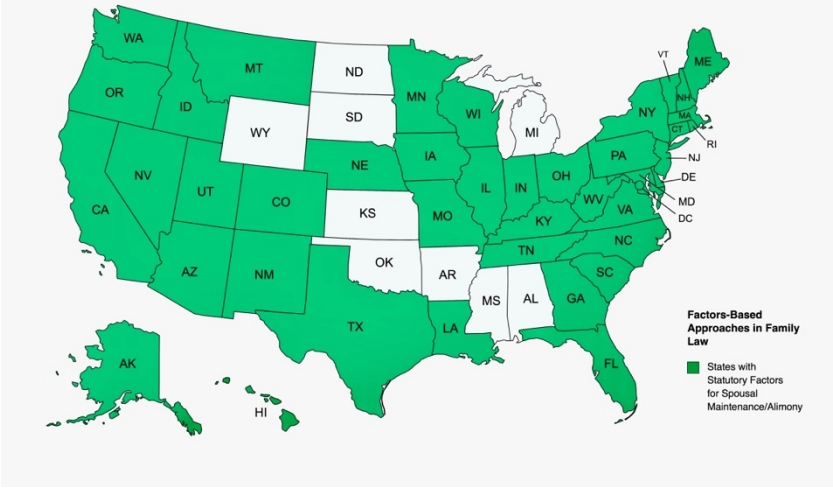
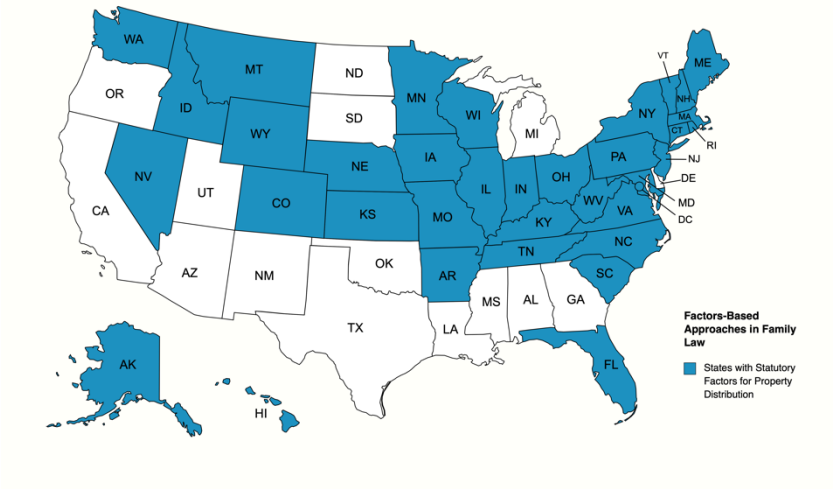
47. *See infra* Table A.
48. *See infra* Table A.
49. *See* UNIF. MARRIAGE & DIVORCE ACT §§ 307–08, 402 (UNIF. L. COMM'N 1974).
50. *See infra* Table A.
51. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-403(A) (2013) ("The court shall consider all factors that are relevant to the child's physical and emotional well-being . . . ."); CAL. FAM. CODE § 3011(a) (West 2023) ("[T]he court shall, among any other factors it finds relevant . . . consider all of the following . . . ."); COLO. REV. STAT. ANN. § 14-10-124(1.5)(a)(4) (West 2021) ("[T]he court shall consider all relevant factors . . . ."); DEL. CODE. ANN. tit. 13 § 722(a) (West 2023) ("[T]he Court shall consider all relevant factors . . . .").
52. *See, e.g.*, ALASKA STAT. ANN. § 25.24.150(c)(9) (West 2023) ("[O]ther factors that the court considers pertinent."); FLA. STAT. ANN. § 61.13(1)(t) (West 2021) ("Any other factor that is relevant to the determination of a specific parenting plan, including the time-sharing schedule."); 750 ILL. COMP. STAT. ANN. 5/602.7(b)(5) (West 2016) ("[A]ny other factor that the court expressly finds to be relevant."); MD. CODE ANN., FAM. LAW § 9-204.1(c)(16) (West 2020) ("Any other factor deemed appropriate by the parties."); MICH. COMP. LAWS ANN. § 722.23(l) (West 2016) ("Any other factor considered by the court to be relevant to a particular child custody dispute."); N.D. CENT. CODE ANN. § 14-09-06.2(1)(m) (West 2019) ("Any other factors considered by the court to be relevant to a particular parental rights and responsibilities dispute.").
53. *See infra* Table A.
54. *See infra* Table A (Mississippi and Oklahoma).
55. *See infra* Table A.
56. *See infra* Table A.





Courts have lauded the articulation of broad factors for them to apply as a middle ground between strict mathematical formulas that restrict family courts and complete judicial discretion.[57] Critics of the statutory-factors approach argue that imposing factors substantially limits judicial discretion.[58] However, in practice, family courts in jurisdictions without statutory factors largely have adopted their

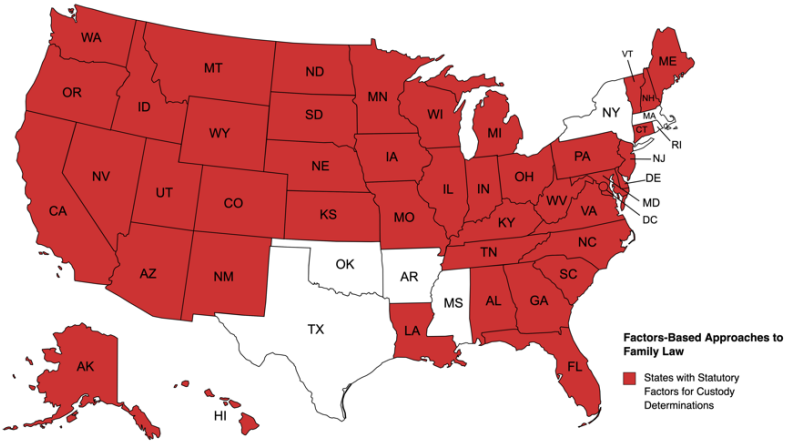
57. *See generally* Sparks v. Sparks, 485 N.W.2d 893, 901 (Mich. 1992) ("It is not desirable, or feasible, for us to establish a rigid framework for applying the relevant factors. The trial court is given broad discretion in fashioning its rulings and there can be no strict mathematical formulations.").

58. *See* Alison R. Smith, Note, *Tightening the Bridle: Guiding Judicial Discretion in Child Custody Decisions (Pending Massachusetts House Bill 1207)*, 50 SUFFOLK U. L. REV. 337, 353 (2020).

own judicially determined factors that subsequent courts in turn use to guide their analysis akin to statutory factors.[59] This suggests that even where state legislatures have not adopted factors, courts are longing for additional guidance and creating their own.

2. Factors-Based Approaches Guiding Best Interests of the Child Analyses

Similar to the financial issues in family law, forty-three states have adopted factors within their statutes to guide their analysis regarding best interests of the child when making custody determinations.[60]



This reflects a nationwide trend toward analyzing the child's needs rather than the parent's rights.[61] In recent years, multiple bills have been introduced and passed that add or overhaul statutory factors for state family courts' best interests of the child analyses.[62] Additionally, among the seven states that do not have delineated

59. *See, e.g.*, *Sparks*, 485 N.W.2d at 901 (discussing judicially determined property distribution factors in Michigan cited 250 times by subsequent decisions); Ferguson v. Ferguson, 639 So.2d 921, 928 (Miss. 1994) (describing judicially determined property distribution factors in Mississippi that would be cited 292 times by subsequent decisions); Ryken v. Ryken, 461 N.W.2d 122, 126 (S.D. 1990) (discussing judicially determined property distribution factors in South Dakota); *see also* Johnson v. Johnson, 471 N.W.2d 156, 159 (1991) (applying the *Ryken* factors).

60. *See infra* Table A (as of January 1, 2023).

61. *See* Smith, *supra* note 58, at 355.

62. *See, e.g.*, 23 PA. CONS. STAT. § 5328 (2014) (introducing sixteen new statutory factors for courts to consider when analyzing the "best interests of the child"); WASH. REV. CODE ANN. § 26.09.187 (West 2007) (introducing statutory residency factors for courts to consider); Boulette, *supra* note 21, at 1 (detailing the statutory overhaul of Minnesota's "best interests" factors in 2015); *see also* MD. CODE ANN., FAM. LAW ANN. § 9-204.1 (West 2020).

statutory factors, three have seminal cases delineating judicially determined factors that almost all courts apply in their rulings.[63] This parallels the same movement as the financial issues in family law, where courts are searching for a framework to use in their decision-making processes and following broad factors is not impeding their judicial discretion.[64]

Paralleling the push for adoption of factors-based approaches in family law is the overall push for expansion of the best interests of the child framework to consider circumstances under which parents, who are both otherwise fit,[65] solicit childcare assistance from extended family and community members both inside and outside the household. In 2009, a study group examining the Minnesota custody statute issued a recommendation that any statutory changes enacted by the Minnesota legislature should contemplate a child's "extended family members, friends, and community."[66] As a result, in 2015, Minnesota passed legislation overhauling its statutory factors and adding "the effect of the proposed [parenting arrangements] on the ongoing relationships between the child and . . . any other significant persons in the child's life."[67] Similarly, in 2011, the Pennsylvania legislature introduced factors for the first time into courts' best interests analysis and explicitly included "the availability of extended family." With the inclusion of Minnesota and Pennsylvania, there are currently eleven states that direct courts through their custody statutes to consider a child's relationship with a third-party caregiver, de facto custodian, extended family member, or other members of a household.[68] This shift mirrors the nationwide growth of extended family childcare both inside and outside the household.

3. The Statutory Alternative: Judicially Determined Factors

Where state legislatures choose not to adopt any statutory factors, the task falls on the state judiciaries to provide guidance through common law if they see fit.[69] For example, as mentioned above, among the seven states that have not adopted statutory factors for custody determinations, three states follow seminal cases that provide a list of judicially determined factors subsequent courts should consider

63. *See* Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983); Pettinato v. Pettinato, 582 A.2d 909, 913 (R.I. 1990); Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976).

64. *See supra* Section I.B.1.

65. For purposes of this Article, the Author is using "fitness" in the context of parental fitness. *See generally* Troxel v. Granville, 530 U.S. 57, 58 (2000).

66. *See* Boulette, *supra* note 21, at 8.

67. Act of May 11, 2015, ch. 30, art. 1, § 3, 2015 Minn. Laws (codified as amended at MINN. STAT. §§ 257.025, 518A.28 (2022).

68. *See infra* Table A.

69. *See infra* Table B (Arkansas, Massachusetts, Mississippi, New York, Oklahoma, Rhode Island, Texas); *see*, *e.g.*, *In re* Custody of Zia, 736 N.E.2d 449, 455 (Mass. Ct. App. 2000); Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983); Esterle v. Dellay, 721 N.Y.S.2d 695, 697 (N.Y. App. Div. 2001); Pettinato v. Pettinato, 582 A.2d 909, 913 (R.I. 1990); Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976).

when analyzing whether a custody arrangement is in the best interests of a child.[70] Subsequent court opinions in turn heavily rely upon this list of factors.[71]

Judicially determined factors serve a similar purpose to the statutory factors, but they are inferior because they are (1) reactive, not proactive; (2) not necessarily reflective of the state's public policy; and (3) in practice, have been discretionary for subsequent courts to follow. First, a family court's adoption of certain best interest factors is reactive to the set of facts presented before the court in that particular case.[72] Second, there are more checks on whether proposed legislation is aligned with the state's public policy in legislative proposals than when courts decide what factors may be relevant. Finally, in practice, courts largely have discretion to consider none, some, or all judicially determined factors, and lower courts' opinions have not been reversed if they do not apply all of the specific listed factors.[73]

C. Beyond the Nuclear Family

Today, less than half of the children in the United States live in a household with a married mother and father.[74] Courts and legislatures are increasingly embracing this reality, including recognizing and equalizing rights of unmarried and married individuals, and recognizing that a child may have more than two parents.[75] This movement toward recognition of multigenerational households arguably stemmed from two seminal Supreme Court cases in the 1970s, which still provide a constitutional framework for analyzing restrictions on them today.[76]

The Supreme Court first considered the constitutionality of an ordinance

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70. *See, e.g.*, *Albright*, 437 So. 2d at 1005; *Pettinato*, 582 A.2d at 913-14; *Holley*, 544 S.W.2d at 371–72. Notably, the *Holley* factors were adopted into the Texas Family Code under section 263.307 in 2015. However, that section of the code is specifically tailored to "Review of Placement of Children Under Care of Department of Family and Protective Services." Texas family courts have extended the application of the *Holley* factors to initial custody determinations and modifications as well. *See, e.g.*, *In re* Marriage of Bertram, 981 S.W.2d 820, 822 (Tex. App. 1998).

71. *See* Long v. Long, 144 S.W.3d 64, 68 (Tex. App. 2004) (applying the *Holley* factors); Divers v. Divers, 856 So. 2d 370, 376 (Miss. Ct. App. 2003) (finding a court is instructed to consider each *Albright* factor); Valkoun v. Frizzle, 973 A.2d 566, 575 (R.I. 2009) (finding the trial court analyzed each *Pettinato* factor).

72. *See, e.g.*, *Albright*, 437 So. 2d at 1005; *Pettinato*, 582 A.2d at 913–14; *Holley*, 544 S.W.2d at 371–72.

73. *See In re* S.A.H., 420 S.W.3d 911, 926 (Tex. App. 2014) ("Proof of best interest is not limited to these factors, nor do all factors always apply in every case."); *Divers*, 856 So. 2d at 376 (applying only one factor that weighed heavily over the remaining).

74. *See* Gretchen Livingston, *Fewer than Half of U.S. Kids Today Live in a 'Traditional' Family*, PEW RSCH. CTR. (Sept. 22, 2014), https://www.pewresearch.org/short-reads/2014/12/22/less-than-half-of-u-s-kids-today-live-in-a-traditional-family/ [https://perma.cc/Y4LF-BMAB].

75. *See* Jessica Feinberg, *Multi-Parent Custody*, 108 MINN. L. REV. (forthcoming) (manuscript at 9) (on file with author) [hereinafter Feinberg, *Custody*]; Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. REV. 307, 329 (2022) [hereinafter Feinberg, *Boundaries*]; *see* CAL. FAM. CODE § 7612(c) (Deering 2019) (authorizing courts to find a child has more than two parents if not doing so would be detrimental to the child).

76. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 1 (1974); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

limiting who could reside in one household in *Village of Belle Terre v. Boraas*.[77] In *Village of Belle Terre*, the Supreme Court considered the propriety of an ordinance that limited individuals living in one household to those related by "blood, adoption or marriage."[78] In upholding the ordinance as constitutional but finding fundamental rights were unaffected, the Supreme Court found the ordinance was rationally related to the permissible state objectives of promoting "family needs" and "family values."[79]

The Supreme Court expanded on the parameters of this ruling in *Moore v. City of East Cleveland*.[80] The court again considered an ordinance regarding regulation of family members in one household.[81] The ordinance in *Moore*, unlike in *Village of Belle Terre*, arbitrarily distinguished between different types of blood relationships, prohibiting a grandmother from living in the same household as her two grandsons who were themselves cousins.[82] The Supreme Court found this ordinance was unconstitutional, finding the institution of family is a fundamental right protected on substantive due process grounds as it is "deeply rooted in this Nation's history and tradition."[83] In writing the plurality opinion, Justice Powell opined that the Nation's history and tradition "compel a larger conception of the family."[84] Justice Powell recognized that in addition to the nuclear family, multigenerational households where uncles, aunts, cousins, and grandparents all live together are "equally venerable and equally deserving of constitutional recognition."[85] These household structures, he opined, reflect the history where decisions concerning childrearing have been "long . . . shared with grandparents or relatives who occupy the same household—indeed who may take on major responsibility for the rearing of the children."[86] In so writing, Justice Powell recognized the longstanding existence of multigenerational households and the prominent roles family members

77. *See Boraas*, 416 U.S. at 1.
78. *See id.* at 9.
79. *See id.* at 9.
80. *See Moore*, 431 U.S. at 500.
81. *See id.* at n.2 ("'Family' means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following: (a) Husband or wife of the nominal head of the household. (b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided, however, that such unmarried children have no children residing with them. (c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household. (d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household. (e) A family may consist of one individual.").
82. *See id.* at 496.
83. *See id.* at 503.
84. *See id.* at 495.
85. *See id.* at 504.
86. *See id.* at 505.

play in helping to raise a child.[87]

Interestingly, Justice Powell's opinion lacked any reference to any racial or socioeconomic issues as they impact the rates of multigenerational living.[88] At its core, the challenged ordinance was drafted in an attempt to prevent "white flight" and limit the increased entry of Black residents coming to East Cleveland.[89] However, Justice Powell intentionally avoided any mention of race when he drafted the Court's judgment.[90] Instead, he normalized the multigenerational household as an beneficial model for all, with advantages for both parents and children.[91]

In contrast, Justice Brennan and Justice Marshall's concurrence touched upon both racial and socioeconomic factors in analyzing multigenerational households. As it relates to race, the concurrence referred to the "nuclear family"[92] as often found in "white suburbia," whereas the extended family as more common in Black families.[93] The concurrence attributed this increased frequency to the fact that Black citizens are typically "victims of economic and other disadvantages."[94] Rather than merely being rooted in the nation's history and tradition universally, the concurrence suggested multigenerational living is a result of "brutal economic necessity" resorted to as a "means of survival."[95] Thus, although the concurrence accepted the extended family model, it stigmatized it as a necessity rather than a choice.[96]

Justice Brennan and Justice Marshall's generalizations are only partially reflected in modern realities.[97] The growing racial and ethnic diversity of the United States population directly contributes to the increase in multigenerational households.[98] Asian, Black, and Hispanic households are more likely than white households to live in multigenerational households, with nearly 30% of each group residing in multigenerational households, compared to only 16% of white households.[99] Twenty-three percent of Americans reported that their cultural or family expectations were a factor in their family becoming a multigenerational

87. *See id.* at 505.

88. *See generally id.* at 495–506.

89. *See* R.A. Lenhardt & Clare Huntington, *Foreword:* Moore *Kinship*, 85 FORDHAM L. REV. 2551, 2252 (2017).

90. *See id.* at 2252.

91. *See generally Moore*, 431 U.S. at 495–506.

92. *See id.* at 507 (defining "nuclear family" as "parents and their own children").

93. *See id.* at 508.

94. *See id.* at 509.

95. *See id.* at 508.

96. Angela Onwuachi-Willig, *Extending the Normativity of the Extended Family: Reflections on* Moore v. City of East Cleveland, 85 FORDHAM L. REV. 2655, 2656 (2017).

97. *See Upper-Middle Class Most Likely to Rely on Family for Childcare*, *supra* note 7.

98. *See* Cohn & Passel, *supra* note 4 (defining "multigenerational household" as two or more adult generations, including grandchildren younger than twenty-five and grandparents).

99. *See id.*; D'vera Cohn, Juliana Nebasce Horowitz, Rachel Minkin, Richard Fry & Kiley Hurst, *The Demographics of Multigenerational Households*, PEW RSCH. CTR. (Mar. 24, 2022), https://www.pewresearch.org/social-trends/2022/03/24/the-demographics-of-multigenerational-households/ [https://perma.cc/G3HN-LEVN].

household.[100] However, recent reports find it is actually the upper-middle class that is most likely to rely on extended family for childcare over low-income parents.[101]

D. Current Treatment of Extended Family in Custody Proceedings with Fit Parents

Family courts generally fail to consider a child's role or relationship with nonparent caregivers unless the caregiver has completely assumed the parental roles and responsibilities.[102] Well-established case law holds that where a nonparent argues they should have superior parenting time rights in lieu of parents, the nonparent faces the burden of overcoming the presumption that the parent is "fit."[103] Where the line is less clear is whether biological parents should also be given an automatic preference over extended family or third-party childcare on a day-to-day basis when there is no challenge seeking to restrict their parental rights or parenting time. When a parent is required to attend a work event that conflicts with several hours of their parenting time, do they first need to give the other parent notice and the right to exercise parenting time with the children before asking a relative or third-party caregiver? Should parents be penalized for relying on extended family members for support when exercising their parenting time?

Family courts differ in articulating what the appropriate role of extended family members should be in the daily lives of children.[104] Multiple states have statutory or case authority supporting a "right of first refusal" requirement where, under the example above, the parent with a conflict must inform the other parent first before asking a family member or third party to watch a child.[105] On the other hand, in the relocation context, courts explicitly consider the existence of a network of extended family members who can assist with childcare as a positive factor in favor of the parent seeking relocation.[106] This seemingly sets up a paradox where extended family members are inferior caregivers when the parents reside close to each other, but when parents live in different states, the expectation is that extended family members would help assume childcare responsibilities and provide support.

1. Right of First Refusal: Prioritizing Caretaking of Biological Parents

Right of first refusal arises in situations where the parent with court-ordered parenting time intends to leave the minor children with a third-party caregiver during their time.[107] In these instances, a parent with the right of first refusal has the right to choose to personally care for the children before the possessory

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100. *See Fact Sheet*, *supra* note 4.
101. *See id.*
102. *See* Murray, *supra* note 11, at 388.
103. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000).
104. *See infra* Part III.
105. *See, e.g.*, 750 ILL. COMP. STAT. ANN. § 5/602.3(b) (West 2016).
106. *See, e.g.*, DEL. CODE ANN. tit. 13, § 734(1)–(8) (2021); FLA. STAT. ANN. § 61.13001(7)(a) (West 2009); 750 ILL. COMP. STAT. ANN. § 5/609.2(g)(5) (West 2022).
107. *See* 750 ILL. COMP. STAT. ANN. § 5/602.3(b) (West 2016).

parent.[108] The underlying assumption in right of first refusal cases is that parental care is superior to care by extended family members.[109]

States like Indiana and Utah have issued parenting time guidelines that provide for a preference or presumption that care by the child's parents is superior to care under a third party, including family members.[110] In application, both states' family courts have found exception to applying these guidelines under limited circumstances where distance, time, transportation, or circumstances of the other parent make right of first refusal inappropriate.[111]

These courts have still distinguished between extended family members living inside a parent's household and those who live outside.[112] Specifically, courts have found that a parent may properly allow another household member to watch the children during their parenting time without invoking the right of first refusal.[113] However, courts have found that a parent must give the right of first refusal to the other parent prior to a non-household family member, even if at no cost.[114]

2. Relocation: Extended Family as an Assumed Child Care Alternative

Relocation claims arise where one parent is seeking to move to another geographic area, typically another state, with the minor child.[115] Unlike cases analyzing whether right of first refusal is appropriate, when courts grant a parent's relocation request, they often consider whether close extended family members are available as a positive alternative to provide care and support for the minor child if

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108. *See id.*; *see, e.g.*, *In re* Marriage of Lauritsen, No. 13-1889, 2014 WL 3511899, at *4 (Iowa Ct. App. July 16, 2014).

109. *See* 750 ILL. COMP. STAT. ANN. § 5/602.3(b) (West 2016).

110. *See Indiana Parenting Time Guidelines*, IN.GOV, https://www.in.gov/courts/rules/parenting/index.html [https://perma.cc/PS4K-H6RJ] (last visited Oct. 29, 2023) ("When it becomes necessary that a child be cared for by a person other than a parent or a family member, the parent needing childcare shall first offer the other parent the opportunity for additional parenting time. The other parent is under no obligation to provide the childcare. If the other parent elects to provide this care, it shall be done at no cost."). *See also* UTAH CODE ANN. § 30-3-33(15) (West 2023) ("Parental care shall be presumed to be better care for the child than surrogate care and the court shall encourage the parties to cooperate in allowing the noncustodial parent, if willing and able to transport the children, to provide the child care.").

111. *See Indiana Parenting Time Guidelines*, *supra* note 110 ("Distance, transportation, or time may make the rule impractical."); Leisure v. Wheeler, 828 N.E.2d 409, 416 (Ind. Ct. App. 2005) (finding father's reliance on his mother for childcare was reasonable where asking the other parent to provide parenting time was impractical); Childs v. Childs, 967 P.2d 942, 944 (Utah Ct. App. 1998) (finding right of first refusal inappropriate where one parent was emotionally unstable); Vaughan v. Romander, 360 P.3d 761, 767 (Utah Ct. App. 2015) (affirming trial court's order triggering right of first refusal only under circumstances where a parent was unavailable overnight).

112. *See, e.g.*, Shelton v. Shelton, 835 N.E.2d 513, 518 (Ind. Ct. App. 2005).

113. *See id.*

114. *See id.*

115. *See generally* Rebecca E. Hatch, *Proof of Custodial Parents Relocation in Best Interests of Child*, AM. JUR. PROOF OF FACTS 3D 495, 495 (2022) ("Relocation" claims in some states are called "removal" claims.).

the relocating parent is unavailable.[116] Where extended family support is available in the state where the parent seeks to relocate, courts are more likely to grant a request for relocation.[117] Several states specifically consider the availability or extent of involvement (or both) of extended family members as a statutory factor considered when deciding to grant relocation.[118]

Taken together with right of refusal cases, it appears that where parents are geographically proximate to each other, courts favor care of a parent over care by extended family members on a short-term basis.[119] Once parents move apart, courts find the support of extended family members as alternative caregivers an important factor in determining whether to grant the relocation.[120] The courts' consideration of extended family members in other areas of custody proceedings establishes the weight already being afforded to their substantial connection with children. This sets the stage for the courts to consistently consider extended family when making other custody determinations as well.

II. FIFTY-STATE SURVEY OF JUDICIAL APPLICATIONS OF THE BEST INTERESTS OF THE CHILD STANDARD

"The best interest standard is an amorphous notion, varying with each individual case, and resulting in its being open to attack as little more than judicial prognostication . . . . At the bottom line, what is in the child's best interest equals the fact finder's best guess."

—Montgomery County Dept. of Social Services v. Sanders[121]

Despite the prevalence of extended family members involved in childcare, custody statutes across states largely are not structured to consider beyond the two-parent household.[122] While all states have adopted the "best interests of the child"

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116. *See, e.g.*, Aragon v. Aragon, 513 S.W.3d 447, 452 (Tenn. 2017) (describing a situation where a paternal grandfather testified that he could care for Daughter overnight while relocating Father worked); Vachon v. Pugliese, 931 P.2d 371, 378 (Alaska 1996) (recounting how relocating Mother testified that she arranged care for the child through Father's sister-in-law); *In re* Marriage of Kavchak, 107 N.E.3d 287 (Ill. App. Ct. 2018) (describing how a child's maternal grandmother testified she was willing to move to North Carolina where relocating Mother intended to move, to assist with child care). *But see* Colling v. Colling, 818 N.W.2d 637 (Neb. 2012) (exploring how existence of extended family weighed against relocation where extended family all lived in the state Mother was seeking to leave; request to relocate denied).

117. *See, e.g.*, *Aragon*, 513 S.W.3d at 449; *In re* Marriage of Kavchak, 107 N.E.3d 287 (Ill. App. Ct. 2018).

118. *See, e.g.*, FLA. STAT. ANN. § 61.13001(7)(a) (West 2009); 750 ILL. COMP. STAT. ANN. 5/609.2(g)(5) (West 2016); LA. STAT. ANN. § 9:355.14(A)(1) (2012); MINN. STAT. ANN. § 518.175 subdiv. 3(b)(1) (West 2018).

119. *In re* Marriage of Lauritsen, 854 N.W.2d 74, at *4 (Iowa Ct. App. 2014); *In re* Marriage of Whitehead and Newcomb-Whitehead, 97 N.E.3d 566, 567 (Ill. App. Ct. 2018) (affirming an eight-hour right of first refusal).

120. *See, e.g.*, Backstrand v. Backstrand, 479 P.3d 846, 853 (Ariz. Ct. App. 2020); *In re* Marriage of Graham and Swim, 121 P.3d 279, 282 (Colo. App. 2005); Estopina v. O'Brien, 68 A.3d 790, 791 (D.C. Ct. App. 2013); D.M.G. v. G.E.M, 32 So. 3d 750, 756 (Fla. Dist. Ct. App. 2010); Searle v. Searle, 405 P.2d 1180 (Idaho 2017).

121. *See* Montgomery Cnty. Dep't of Soc. Servs. v. Sanders, 38 Md. App. 406, 419 (1978).

122. *See* Morgan Lewis and Bockius LLP, *Best Interests of the Child – Child's Family*

standard for determining custody of a child, they vary drastically in application of this standard.[123] Further, the influence of relatives, or even stepparents or other third-party caregivers, is often left to the courts to consider (or not) as another "relevant factor."[124] Statutes often do not even address any indirect contributing factors, such as a parent's or child's cultural background, that may impact whether they reside in a multigenerational household.[125]

This fifty-state survey analyzes how courts apply the "best interests of the child" standard and exposes vast inconsistencies in how the standard is applied, particularly when considering extended family. The survey focuses on four identified areas where there are substantial discrepancies in judicial application: (1) jurisdictions with statutory "best interests" factors versus those with none; (2) jurisdictions that mandate versus those that merely suggest consideration of statutory factors; (3) jurisdictions that require courts to make written findings of fact as to each factor versus those that do not; and (4) jurisdictions that adopt a factor considering extended family versus those that do not.

A. Discrepancies in Jurisdictions Without Statutory Factors

In the seven states that do not list any statutory factors, three states (Arkansas, Massachusetts, and Oklahoma) encourage a case-by-case approach, which gives courts the widest latitude in making custody determinations.[126] New York historically followed a totality of the circumstances approach, but in the past twenty years, many of its family courts have adopted a factors-based approach to analyzing the best interests of the child.[127] The remaining states (Mississippi, Rhode Island, and Texas) have a seminal case that provides a list of factors courts should consider when making custody determinations.[128]

Relationships Factor (Dec. 29, 2017), https://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-Q3-Best-Interests-Child_s-Family-Relationships.pdf [https://perma.cc/B8V8-ETAF].

123. *See infra* Sections III.1–III.3.

124. *See, e.g.*, ALASKA STAT. ANN. § 25.24.150(c)(9) (West 2022) (discussing "other factors that the court considers pertinent"); FLA. STAT. ANN. § 61.13(1)(t) (West 2021) ("Any other factor that is relevant to the determination of a specific parenting plan, including the time-sharing schedule."); 750 ILL. COMP. STAT. ANN. 5/602.7(a)(5) (West 2016) ("Any other factor that the court expressly finds to be relevant."); MD. CODE ANN., RULES § 9-204.1(c)(4) (West 2023) ("Any other factor deemed appropriate by the parties."); MICH. COMP. LAWS ANN. § 722.23(l) (West 2016) ("Any other factor considered by the court to be relevant to a particular child custody dispute."); N.D. CENT. CODE § 14-09-06.2(1)(m) (2023) ("Any other factors considered by the court to be relevant to a particular parental rights and responsibility dispute.").

125. *See* Maldonado, *supra* note 16, at 214.

126. *See* Cunningham v. Cunningham, 588 S.W.3d 38, 40 (Ark. Ct. App. 2019); *In re* Custody of Zia, 736 N.E.2d 449, 455 (Mass. App. Ct. 2000); Ynclan v. Woodward, 237 P.3d 145, 152 (Okla. 2010) (finding the limited statutory considerations in the Oklahoma statutes were limited to determining the child's preference if applicable and reviewing the parties for a history of domestic violence).

127. *See* Esterle v. Dellay, 281 A.D.2d 722, 723 (N.Y. App. Div. 2001); Smith v. Miller, 4 A.D.3d 697, 698 (N.Y. App. Div. 2004); Opalka v. Skinner, 81 A.D.3d 1005, 1006 (N.Y. App. Div. 2011).

128. *See, e.g.*, Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983); Pettinato v. Pettinato, 582 A.2d 909, 913–14 (R.I. 1990); Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976). Notably, statutory

1. Case-by-Case Analysis

In Arkansas, Massachusetts, and Oklahoma, the onus is on the judges to identify and weigh factors pertinent to each individual case.[129] Within the three states, court opinions range from citing one factor that the court should consider to citing a plethora of factors courts have considered previously.[130] The only common thread in these approaches is that the "best interests of the child" analysis should be a "child-centered" one.[131] However, appellate cases from each of these states demonstrate the issues with a lack of factors guiding the courts' analysis.

The Supreme Judicial Court of Massachusetts highlighted the inherent subjectivity of the no-factors approach in *In re Custody of Kali*.[132] Although the court affirmed the trial court's decision, it included dicta critical of the amount of judicial discretion exercised in the case.[133] The court found that the decision regarding which parent was awarded custody inappropriately lay squarely with the trial judge's "subjective value judgments" and assessments.[134] Citing section 2.08 of the American Law Institute's Principles of the Law of Family Dissolution, the court agreed that allowing courts to determine a child's best interests "draws the court into comparisons between parenting styles and values that are matters of parental autonomy not appropriate for judicial resolution."[135] The court suggested that if the parties had been assigned to a trial judge with different personal views on the appropriate levels of parental involvement in the child's physical and medical needs,

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factors were adopted into the Texas Family Code under section 263.307 in 2015. However, that section of the code is specifically tailored to "Review of Placement of Children Under Care of Department of Family and Protective Services." Texas family courts have extended the application of the *Holley* factors to initial custody determinations and modifications as well. *See, e.g.*, Matter of Marriage of Bertram, 981 S.W.2d 820, 822 (Tex. App. – Texarkana 1998). Further, Texas has adopted statutory factors in considering whether parents should be named "joint managing conservators," but the scope of this statute is concerning rights and duties of parents, rather than possession and access (physical parenting time). The "best interests" statute does not provide statutory factors. TEX. FAM. CODE ANN. § 153.002 (West 2023).

129. *See In re* Custody of Zia, 736 N.E.2d 449, 455 (Mass. App. Ct. 2000) ("[A] judge is to identify and weigh those factors pertinent to the child's best interests."); Smith v. McDonald, 941 N.E.2d 1, 9 (Mass. 2010) ("The judge is afforded considerable freedom to identify pertinent factors in assessing the welfare of the child and weigh them as she sees fit.").

130. *See* James v. James, 780 S.W.2d 346, 347 (Ark. Ct. App. 1989) ("The morality of a parent is relevant to the best interests of the children."); Charara v. Yatim, 937 N.E.2d 490, 498–99 (Mass App. Ct. 2010) (providing a broad overview of factors courts have considered when analyzing the best interests of a child in Massachusetts); Acox v. Acox, 18 P.3d 363, 364 (Okla. Civ. App. 2000) (affirming a trial court's ruling where the trial court judge appeared to make its determination solely on who was the "most available" parent during the week where "both parents care about the child and would be a proper home for the child").

131. *See* Charara v. Yatim, 937 N.E.2d 490, 498–99 (Mass. App. Ct. 2010); Marriage of Bilyeu v. Bilyeu, 352 P.3d 56, 60 (Okla. Civ. App. 2015).

132. *See In re* Custody of Kali, 792 N.E.2d 635, 645 (Mass. 2003).

133. *See id.*

134. *See id.*

135. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 208 (AM. L. INST. 2002).

the case at bar may have been decided differently.[136]

As it relates specifically to extended family, without statutory factors, trial courts in these three states have failed to make "sufficient findings" as to what is in the best interests of the child to permit meaningful appellate review.[137] Cases get remanded back to the trial court for additional proceedings, costing the parties additional attorneys' fees and time, as well as delaying resolution for the minor child.[138] In *Fitzgerald v. Fitzgerald*, an Arkansas case, the minor child was primarily cared for by extended family members in his first few years of life.[139] The record indicated the maternal grandmother primarily watched the child for the first two years of his life from early morning until evening, when Father would pick the child up.[140] Then during Father's parenting time, Father's sister and brother-in-law would primarily watch the child.[141] The appellate court reversed and remanded, finding that despite laying out this evidence surrounding extended family care, the court failed to make a finding as to how the evidence specifically informed determination of the child's best interests.[142] Thus, despite all the time spent soliciting testimony of the parties and witnesses in the case, the case was remanded back to the trial court for more specific findings as to the weight of the evidence in the court's best interests analysis.[143]

Finally, although Oklahoma courts view children's involvement with extended family as a positive consideration overall, courts take vastly different approaches in their analyses.[144] In *Lowry v. Lewis*, the appellate court affirmed a ruling to modify custody to a father seemingly only because the twelve-year old child expressed an "intelligent preference" that she wanted to live with him to be closer to her extended family.[145] In contrast, in *Hoedebeck v. Hoedebeck,* although the children were eleven and thirteen years old, respectively, at the time of the ruling, there was no mention of considering the child's preference.[146] Instead, the court generally considered it detrimental to the children when Mother denied the children's grandparents the ability to visit when they previously had cared for the children "at least one-half of the time" prior to the parties' separation.[147] The court heard testimony from the children's grandparents and aunt in support of custody ultimately being modified in favor of Father.[148] In reconciling the two cases, it is clear both courts found

136. *See In re* Custody of Kali, 792 N.E.2d 635, n.13 (Mass. 2003).
137. *See, e.g.,* Fitzgerald v. Fitzgerald, 976 S.W.2d 956, 959 (Ark. Ct. App. 1998).
138. *See id.* at 959.
139. *See id.*
140. *See id.* at 957.
141. *See id.*
142. *See id.*
143. *See id.*
144. *See* Hoedebeck v. Hoedebeck, 948 P.2d 1240, 1242 (Okla. Civ. App. 1997); Lowry v. Lewis, 317 P.3d 230, 231 (Okla. Civ. App. 2013).
145. *See Lowry*, 317 P.3d at 231.
146. *See Hoedebeck*, 948 P.2d at 1240, n.1.
147. *See id.* at 1242.
148. *See id.*

extended family was a relevant consideration, but the burden was on the attorneys who presented the case to cater their arguments to the subjective views and approaches of the trial court judges.[149]

Interestingly, in comparison, Oklahoma follows statutorily defined factors guiding cases concerning one parent's proposed relocation to another state.[150] In this context, the courts consistently compartmentalize their findings as to extended family within the relevant factor framework.[151] In *Harrison v. Morgan*, the court made specific findings that Father's proposed relocation would allow the child to enjoy the emotional benefit of being close to both parties' extended family members.[152] The court's findings within the factors framework help both the appellate court's review and guide future litigants seeking the court's consideration of the role of extended family members.[153]

2. The Shift Toward a Factors Approach

New York family courts are slowly moving away from the case-by-case approach in favor of a factors-based approach.[154] The 1982 cases of *Eschbach v. Eschbach* and *Friederwitzer v. Friederwitzer* established the traditional "totality of the circumstances" approach of what was in the best interests of the child.[155] Under this approach, rather than considering any particular factor, courts would weigh the "totality of the circumstances" in making and modifying custody determinations.[156] As in the case-by-case analyses above, this approach greatly deferred to the judges' assessment of the credibility and character of witnesses at trial.[157] However, in the past twenty years, appellate courts have started moving away from the "totality of the circumstances" approach toward listing common factors that trial courts should analyze.[158] These factors in turn have been included in the *Family Court Law and Practice in New York* manuals to guide attorneys in their arguments before family court judges.[159] Many courts in fact are taking the adoption of judicial factors one step further to find the consideration of certain factors is in fact "required."[160] This

149. *See id.*; *Lowry*, 317 P.3d at 231.

150. *See* OKLA. STAT. ANN. tit. 43, § 112.3(J)(1) (West 2022).

151. *See* Harrison v. Morgan, 191 P.3d 617, 628 (Okla. Civ. App. 2008).

152. *See id.* at 629.

153. *See id.*

154. *See* Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 95 (1982); Eschbach v. Eschbach, 436 N.E.2d 1260, 1264 (N.Y. 1982).

155. *See Friederwitzer*, 55 N.Y.2d at 95; *Eschbach*, 436 N.E.2d at 1264; Joel R. Brandes, *Judging the 'Best Interests of the Child,'* N.Y. L.J. 1, 2 (1999).

156. *See* Eschbach v. Eschbach, 436 N.E.2d 1260, 1264 (N.Y. 1982).

157. *See* Blakeney v. Blakeney, 99 A.D.3d 898, 899 (N.Y. App. Div. 2012).

158. *See* Esterle v. Dellay, 281 A.D.2d 722, 725 (N.Y. App. Div. 2001); Smith v. Miller, 4 A.D.3d 697, 698 (N.Y. App. Div. 2004); Opalka v. Skinner, 81 A.D.3d 1005, 1006 (N.Y. App. Div. 2011).

159. *See* CALLAGHAN'S FAMILY COURT LAW & PRACTICE § 16:41.

160. *See Esterle*, 281 A.D.2d at 725 ("[The best interests analysis] requires consideration of a number of factors, including the quality of the parents' respective home environments, the length of time of the custodial arrangement sought to be modified, each parent's past performance and relative fitness, and their ability to guide and provide for the child's intellectual and emotional development.");

shifts New York's approach to parallel Rhode Island's, discussed below.[161] Indeed, in reviewing cases decided across New York from 2021 and 2022, many opinions omit the phrase "totality of the circumstances" altogether.[162]

With over 6.5% of New York residents reporting they reside in a multigenerational household,[163] it is unsurprising that courts already frequently consider the role of extended family members when determining what is in the best interests of the child.[164] Most commonly, extended family is analyzed within the factor of a parent's ability to provide a stable environment for the child, considered in a list of other factors.[165] However, the Second Department of the Supreme Court of New York has issued three opinions since 2008 after it reversed a trial court's visitation schedule that awarded all significant holiday time to one parent to the detriment of the child's relationship with their extended family during times "usually reserved for family gatherings and recreation."[166] The same court has considered extended family as beneficial where the children were raised in a Hasidic Jewish community and the extended family could facilitate the children's upbringing.[167]

3. Judicially Determined Factors

Rhode Island, Mississippi and Texas, the remaining three states that have not adopted statutory factors, primarily base their "best interests" analyses on seminal cases where courts have determined factors through case law.[168] Subsequent court decisions heavily rely upon these listed factors but face no recourse if they consider one, all, or none of the judicially determined factors.[169] Although judicial and

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Smith v. Miller, 4 A.D.3d 697, 698 (N.Y. App. Div. 2004) ("The court was required to determine the best interests of the child by considering various factors, such as maintaining stability for the child, the child's wishes, the home environment with each parent, each parent's past performance, relative fitness, ability to guide and provide for the child's overall well-being, and the willingness of each parent to foster a relationship with the other parent.").

161. *See infra* Part III.

162. *See, e.g.*, Erick R.R. v. Victoria S.S., 2016 A.D.3d 1523, 1524 (N.Y. App. Div. 2022); Theodore P. v. Debra P., 209 A.D.3d 1146, 1148 (N.Y. App. Div. 2022).

163. Compared to the national average of 5.6%. *See* DAPHNE A. LOFQUIST, MULTIGENERATIONAL HOUSEHOLDS: 2009–2011 (2012), https://www2.census.gov/library/publications/2012/acs/acsbr11-03.pdf [https://perma.cc/2N6F-Z8PH].

164. *See generally* Felty v. Felty, 108 A.D.3d 705, 709 (N.Y. App. Div. 2013).

165. *See* Blakeney v. Blakeney, 99 A.D.3d 898, 899 (N.Y. App. Div. 2012); Defayette v. Defayette, 28 A.D.3d 820, 821 (N.Y. App. Div. 2006); *In re* McGivney, 298 A.D.2d 642, 643 (N.Y. App. Div. 2002).

166. *See* Nikolic v. Ingrassia, 47 A.D.3d 819, 821 (N.Y. App. Div. 2008); Felty v. Felty, 108 A.D.3d 705, 709 (N.Y. App. Div. 2013); Cuccia-Terranova v. Terranova, 174 A.D.3d 528, 530 (N.Y. App. Div. 2019).

167. *See* Weisberger v. Weisberger, 154 A.D.3d 41, 46 (N.Y. App. Div. 2017).

168. *See* Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983); Pettinato v. Pettinato, 582 A.2d 909, 913 (R.I. 1990); Holley v. Adams, 544 S.W.2d 367, 372 (Tex. 1976). Texas Family Code section 153.134 provides a list of statutory factors, but only in determining whether parents should be named as joint managing conservators of a minor child. *See* discussion *infra* Section II.A.3.

169. *See* Long v. Long, 144 S.W.3d 64, 68 (Tex. App. – El Paso 2004) (applying the *Holley* factors); Divers v. Divers, 856 So.2d 370, 376 (Miss. Ct. App. 2003) (finding that a court should have

statutory factors are similar in purpose, state courts vary widely as to whether they consider these judicially determined factors as mere guidance or mandatory[170] and whether a trial court may selectively consider a limited number of factors as a basis for a custody determination.[171] Further, as discussed above, judicial factors lack the benefit of the legislative process.[172] Whereas statutory factors are adopted following constituent-driven efforts by elected officials and generally reflective of state policies and values, judicial factors are determined solely by judges based on their prior experiences.[173]

In Rhode Island, courts apply factors first articulated in the case of *Pettinato v. Pettinato* when making an initial custody determination.[174] In applying the *Pettinato* factors, the courts not only have trended toward treating consideration of each factor as mandatory but also toward requiring specific findings of fact regarding each one.[175] In *Ayriyan v. Ayriyan*, the Rhode Island Supreme Court gave direction to trial courts making initial custody determinations, lauding the trial court's methodology of discussing each of the factors outlined in *Pettinato v. Pettinato* in detail.[176] In *Saltzman v. Saltzman*, the Rhode Island Supreme Court found that while the trial court justice had deference in assessing and weighing the factors, a trial justice "must consider" the *Pettinato* factors.[177]

Conversely, family courts in Mississippi and Texas view the highest court's judicially determined factors as mere guidance.[178] The seminal cases establishing judicially determined factors in Mississippi and Texas are *Albright v. Albright* and *Holley v. Adams*, respectively.[179] In both states, appellate courts have affirmed decisions where the trial court only considered one or a select few of the factors when making an initial custody determination.[180] This effectively undermines the

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considered each *Albright* factor); Valkoun v. Frizzle, 973 A.2d 566, 575 (R.I. 2009) (finding the trial court analyzed each *Pettinato* factor).

170. *See* Saltzman v. Saltzman, 218 A.3d 551, 556 (R.I. 2020) ("The trial justice . . . must consider the eight factors articulated in *Pettinato*."); *Contra* Divers v. Divers, 856 So. 2d 370, 376 (Miss. Ct. App. 2003) ("A single [*Albright*] factor can weigh so heavily in favor of one party that equity would require granting custody to that parent.").

171. *See* Divers v. Divers, 856 So. 2d 370, 376 (Miss. Ct. App. 2003); *In re* E.A.D.P., 2016 WL 7449369, at *2 (Tex. App. – Dallas Dec. 28, 2016).

172. *See generally Legislative Process*, STATESCAPE, https://www.statescape.com/resources/legislative/legislative-process/ [https://perma.cc/62KL-DFVX] (last visited Oct. 29, 2023).

173. *See generally id*; Timothy J. Capurso, *How Judges Judge: Theories on Judicial Decision Making*, 29 U. BALT. L.F. 5, 7 (1999).

174. *See* Pettinato v. Pettinato, 582 A.2d 909, 913 (R.I. 1990).

175. *See* Ayriyan v. Ayriyan, 994 A.2d 1207, 1214 (R.I. 2010); Saltzman v. Saltzman, 218 A.3d 551, 556 (R.I. 2020).

176. *See Ayriyan*, 994 A.2d at 1214.

177. *See Saltzman*, 218 A.3d at 556.

178. *See* Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983); Holley v. Adams, 544 S.W.2d 367, 372 (Tex. 1976).

179. *See Albright*, 437 So.2d at 1005; *Holley*, 544 S.W.2d at 372.

180. *See In re* E.A.D.P., 2016 WL 7449369, at *2 (Tex. App. – Dallas 2016); Divers v. Divers, 856 So.2d 370, 376 (Miss. Ct. App. 2003) (applying only one factor that weighed heavily over the remaining).

factors framework by suggesting that if a party's strategy is to place all their focus on one factor, they could prevail on their custody claim.[181]

The problem with judicially determined factors as it pertains to considering the role of extended family is highlighted through a review of the Texas case law. First, the burden is on the parties to present testimony regarding extended family involvement, but the court opinions provide little guidance as to how that testimony is weighed or analyzed in practice when determining the best interests of the child.[182] The majority of cases referencing the role of extended family in Texas are in the context of testimony by a party or an appointed guardian ad litem on behalf of the child.[183] However, Texas trial courts do not provide any guidance as to whether the testimony was given any weight in their final best interests determination or whether the court analyzed the role of extended family as positive or negative.[184] Indeed, some of these cases do not mention the *Holley* factors at all, leaving courts no guidance of how these factors will be analyzed in the future.[185]

Even where Texas courts have specifically indicated where the extended family evidence would fit within the *Holley* factors, courts have varied in what factor the evidence was analyzed under. For the courts that take the time to discuss the various *Holley* factors, courts commonly analyze the role of extended family under "the stability of the home or proposed placement."[186] In *Interest of T.I.* and *Interest of L.G.K.S.*, the court considered extended family members that lived in the same household as a parent and supported the parent as positive factors in favor of a "stable environment."[187] Alternatively, courts have stuck evidence regarding extended family under "programs available to assist person seeking custody."[188] In *In re D.B.W.*, the court went through each *Holley* factor and highlighted that Father had extended family who would assist in taking care of the children as a positive "program available."[189] This inconsistent treatment shows Texas courts are unsure about whether, how, and to what extent to consider the role of extended families in custody determinations.

Like Oklahoma, Texas does not seem opposed to a factors-based approach,

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181. *See In re E.A.D.P.*, 2016 WL 7449369, at *2; *Divers*, 856 So.2d at 376 (applying only one factor that weighed heavily over the remaining).

182. *See, e.g.*, *In re* A.A.E., 2005 WL 1364084, at *4 (Tex. App. – Corpus Christi-Edinburg 2005); Hebert v. Kokel, 2006 WL 2309581, at *4 (Tex. App. – Austin 2006); Buckingham v. Buckingham, 2006 WL 2560810, at *7 (Tex. App. – Austin 2006); *In re* Z.K.S., 2020 WL 103864 (Tex. App. – Corpus Christi-Edinburg 2020).

183. *See, e.g.*, *In re A.A.E.*, 2005 WL 1364084, at *4; *Hebert*, 2006 WL 2309581, at *4.

184. *See, e.g.*, *In re A.A.E.*, 2005 WL 1364084, at *4; *Hebert*, 2006 WL 2309581, at *4; *Buckingham*, 2006 WL 2560810, at *7; *In re Z.K.S.*, 2020 WL 103864.

185. *See Hebert*, 2006 WL 2309581, at *4; *Buckingham*, 2006 WL 2560810, at *7; *In re Z.K.S.*, 2020 WL 103864.

186. *See In re* T.I., 2021 WL3669339, at *10 (Tex. App. Aug. 19, 2021); *In re* L.G.K.S., 2019 WL 4462693, at *7 (Tex. App. Sept. 18, 2019).

187. *See In re T.I.*, 2021 WL3669339, at *10; *In re L.G.K.S.*, 2019 WL 4462693, at *7.

188. *See In re* D.B.W., 2007 WL 603409, at *4 (Tex. App. Feb. 21, 2007).

189. *See id.*

as it has also adopted statutory factors in other areas of family law to help guide the analysis regarding involvement of extended family.[190] Specifically, section 263.307 of the Texas Family Code delineates factors a court may consider when determining whether a proposed placement in a child welfare proceeding is in the best interests of the child.[191] One of the factors is "whether an adequate social support system consisting of an extended family and friends is available to the child."[192] Child welfare cases in Texas follow the statutory direction to make findings explicitly as to the existence of extended family.[193] Moreover, section 153.134 of the Texas Family Code sets forth a list of factors for courts to consider when determining whether it is in the best interests of the child to appoint both parents as joint managing conservators.[194] However, this inquiry is centered on the parents' decision-making rights and duties as opposed to possession and access of the children.[195] Additionally, Texas also has judicially determined relocation factors that are frequently followed by lower courts.[196] One of these factors is "the effect [of the relocation] on extended family relationships."[197] Similarly, the inclusion of this specific factor creates additional consistency in relocation rulings to explicitly consider the presence and role of extended family members in the lives of the minor children subject to the suit.[198]

B. Discretionary Versus Mandatory Consideration of Statutory Best Interests Factors

Among the forty-three states that have adopted statutory factors to guide custody determinations, thirty-eight states and District of Columbia instruct courts that they "shall" or "must" consider these factors.[199] The remaining five leave it up to the court's discretion to decide whether the court will consider these factors in making a custody determination.[200] The detrimental impact of allowing lower courts

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190. *See* TEX. FAM. CODE ANN. § 153.254(a) (West 2017) (discussing custody determinations for children under three years old); TEX. FAM. CODE ANN. § 263.307 (West 2015) (governing permanent placement for Department of Family and Protective Services cases).

191. TEX. FAM. CODE ANN. § 263.307(b) (West 2015).

192. TEX. FAM. CODE ANN. § 263.307(b) (West 2015).

193. *See, e.g.*, *In re* A.R.R., 2017 WL 2791318, at *5 (Tex. App. June 28, 2017); *In re* JHG, 313 S.W.3d 894, 898 (Tex. 2010).

194. "Managing Conservatorship" designates parents' rights and responsibilities as to decision-making responsibilities for the child as distinct from "possession and access" (parenting time). *See Child Custody and Conservatorship* (Jan. 16, 2023), TEXASLAWHELP.ORG (Jan. 16, 2023), https://texaslawhelp.org/article/child-custody-and-conservatorship#:~:text=Texas%20law%20says%20that%20parents,duties%20during%20their%20possession%20time [https://perma.cc/6DR7-7AWJ]; TEX. FAM. CODE ANN. § 153.134(a) (West 2005).

195. *See* TEX. FAM. CODE ANN. § 153.002 (West 2022). *Contra* TEX. FAM. CODE § 153.134 (2005).

196. *See* Lenz v. Lenz, 79 S.W.3d 10, 13 (Tex. 2002).

197. *See id.*

198. *See* Fox v. Fox, 2006 WL 66473, at *4 (Tex. App. Jan. 13, 2006); *In re* A.M., 604 S.W.3d 192, 198 (Tex. App. 2020).

199. *See infra* Table B.

200. *See infra* Table B. (Connecticut, Georgia, Maryland, South Carolina, Utah).

to consider statutory factors at their discretion is twofold: courts (1) arbitrarily assign disproportionate weight to certain factors or only consider select factors or (2) ignore the factors altogether.[201]

Cases from Connecticut, South Carolina, and Utah exemplify these issues.[202] In *Brown v. Brown*, a Connecticut case, Mother argued the trial court abused its discretion when it failed to consider the factors listed in the underlying statutory "best interests" factors, particularly "the informed preferences of the child."[203] The court disagreed, finding the trial court seriously considered the child's preference before deciding against it.[204] However, the court went on to opine that this would not have automatically been an error regardless, because the Connecticut statute provides factors as discretionary guidance.[205] Similarly, in the Utah case of *Allen v. Allen*, the Utah Court of Appeals affirmed an order where the trial court only considered six out of eighteen of the state's statutory "best interests" factors.[206] In both jurisdictions, a trial court's determination seemingly may be affirmed if it only considers a few, or even none, of the factors in its analysis.[207]

In South Carolina, courts often cite a list of factors first delineated in *Patel v. Patel* and *Woodall v. Woodall* when articulating the factors courts should consider when determining the best interests of a child rather than the statutory factors themselves.[208] The issue with this approach is that the language from *Patel* and *Woodall* only reference a total of six factors, whereas the statute itself cites seventeen separate factors courts should consider, including a child's relationship with "any other person including a grandparent who may significantly affect the best interests of a child" and "the child's cultural and spiritual background."[209] These statutory factors are left unanalyzed in application because only a handful of decisions cite the statute at all and courts selectively choose factors to analyze.[210]

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201. *See, e.g.*, Brown v. Brown, 132 Conn. App. 30, 37, 31 A.3d 55, 60 (2011).

202. *See, e.g.*, *id.*

203. *See id.* at 38.

204. *See id.*

205. *See id.*

206. *See* Allen v. Allen, 483 P.3d 730, 732 (2021), *cert. denied*, 496 P.3d 714 (Utah Ct. App. 2021).

207. *See id.* ("The record reflects that the court considered the entirety of the evidence before it and, weighing *many* of the [statutory] factors, made a determination consistent with the best interests of the children.") (emphasis added).

208. *See* Patel v. Patel, 555 S.E.2d 386, 388 (2001) ("The family court considers several factors in determining the best interest of the child [in a custody dispute], including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties, (including GAL [guardian ad litem], expert witnesses, and the children); and the age, health, and sex of the children."); Woodall v. Woodall, 471 S.E.2d 154, 157 (S.C. 1996) (noting factors to consider include "character, fitness, attitude, and inclinations on the part of each parent as they impact the child;" "psychological, physical, environmental, spiritual, educational, medical, family, emotional[,] and recreational aspects of the child's life").

209. *See id.*

210. *See, e.g.*, Clark v. Clark, 815 S.E.2d 772, 777 (S.C. Ct. App. 2018) (citing *Patel*, 555 S.E.2d); Aldie v. Grossman, No. 2019-UP-080, 2019 LEXIS 73, at *19 (S.C. Ct. App. Feb. 13, 2019); Klein v. Barrett, 828 S.E.2d 773, 775 (S.C. Ct. App. 2019); Daily v. Daily, 854 S.E.2d 856, 862 (S.C. Ct. App. 2021) (citing *Woodall*, 471 S.E.2d).

Finally, Maryland is the most recent case study of the ineffectiveness of adopting discretionary (rather than mandatory) factors.[211] Like Mississippi, Texas, and Rhode Island, up until 2020, Maryland courts historically applied judicially determined factors, jointly referred to as the "*Taylor-Sanders* factors" (from two seminal cases) when determining the best interests of the child.[212] On January 1, 2020, Maryland adopted discretionary statutory factors for parents to consider when developing a parenting plan in the best interests of the child.[213] Recent court opinions expose that courts already disagree on what extent these factors should be considered.[214]

In *West v. West* and *Shenglin Wang v. Sui Wai Mak*, the Maryland Court of Special Appeals rejected consideration of the factors altogether, finding they only apply to guide parties in developing a parenting plan and that courts should instead still consider the *Taylor-Sanders* factors.[215] Alternatively, in *Soltani v. Soltani*, the same court found that courts should consider the new statutory factors but also still analyze the *Taylor-Sanders* factors.[216] Effectively, the courts are largely rejecting application of these statutory factors in practice, instead reverting to consideration of the judicially determined factors. This leaves future litigants with little guidance as to when a court will or will not consider statutory factors when determining the best interests of a child.

C. Requisite Findings of Fact

States that apply statutory "best interests" factors vary as to whether they require written findings of fact pursuant to statute as to each factor, certain factors, or no factors.[217] There are four primary purposes for requiring courts to make findings of fact: (1) to help the trial court's analysis when making custody determinations; (2) to help the appellate court conduct an effective and meaningful appellate review; (3) to help the "defeated party to determine whether the case presents a question worthy of consideration by the appellate court;" and (4) because they "may be relevant for collateral estoppel purposes."[218]

In states that require written findings of fact, courts reverse and remand cases back to the trial court when the trial court fails to make findings for each factor and

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211. *See* MD. CODE. ANN. FAM. LAW § 9-204.1 (West 2020).

212. *See* Taylor v. Taylor, 508 A.2d 964, 973 (Md. 1986); Montgomery Cnty. v. Sanders, 381 A.2d 1154, 1163 (Md. Ct. Spec. App. 1977).

213. *See* MD. CODE. ANN., FAM. LAW § 9-204.1(c) (West 2020). Maryland has also introduced H.B. 1168 to codify additional statutory factors for decision-making responsibilities.

214. *See, e.g.*, West v. West, No. 0558, 2022 WL 819030, at *3 (Md. Ct. Spec. App. Mar. 18, 2022); Shenglin Wang v. Sui Wai Mak, No. 1387, 2022 LEXIS 461, at *34 n.7 (Md. Ct. Spec. App. June 27, 2022); Soltani v. Soltani, No. 255, 2020 LEXIS 1155, at *1 (Md. Ct. Spec. App. Dec. 7, 2020).

215. *See West*, No. 0558, 2022 WL 819030, at *3; *Shenglin Wang*, No. 1387, 2022 LEXIS 461, at *34 n.7.

216. *See Soltani*, No. 255, 2020 LEXIS 1155, at *1.

217. *See infra* Table B.

218. *See* Borchgrevink v. Borchgrevink, 941 P.2d 132, 142 (Alaska 1997); Tatum v. Yost, 931 A.2d 438 (Del. 2007); Dishmon v. Dishmon, 292 S.E.2d 293, 295 (N.C. Ct. App. 1982).

describe how it weighed that factor in reaching its conclusion.[219] However, recently courts in practice have relaxed the extent to which the court has to write a detailed explanation as to each father.[220] In Virginia, appellate courts advise courts to provide more than "boilerplate" or "form" language saying they considered all of the factors, but do not require lower courts to quantify the weight given to each factor.[221] Rather, the courts have required a "case-specific explanation . . . of the fundamental, predominating reason or reasons for the decision."[222] Moreover, in these states, courts allow for grouping of multiple factors at a time, further alleviating any perceived burden on the judiciary.[223] For example, in Michigan, appellate courts have upheld orders where the lower courts found that certain statutory factors were neutral, certain statutory factors favored the plaintiff, and other factors favored the defendant.[224]

Case law in the states that do not require findings of fact for each factor almost universally suggests it would be "better practices" or "preferred" for lower courts to incorporate such findings into their final rulings.[225] In fact, even where states do not require written findings of fact, appellate courts have remanded cases back to trial court to make those specific findings if they were unable to discern which factors the trial court considered relevant or which factors influenced its decision in the record on appeal.[226] Similarly, appellate courts have also reversed and remanded cases back to the trial court where the court's opinion seemingly placed disproportionate weight on a statutory factor to the exclusion of others.[227] Courts

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219. *See* Nickerson v. Nickerson, 605 A.2d 1331, 1333 (Vt. 1992); Pigeon v. Pigeon, 782 A.2d 1236, 1237 (Vt. 2001); Lee v. Ogilbee, 198 A.3d 1277, 1278 (Vt. 2018).

220. *See* Rainey v. Rainey, 869 S.E.2d 66, 76 (Va. Ct. App. 2022).

221. *See* Lanzalotti v. Lanzalotti, 586 S.E.2d 881, 885 (Va. Ct. App. 2003).

222. *See id.*; Rainey, 869 S.E.2d at 76.

223. *See* Kenneally v. Goulet, No. 343744, 2019 Mich. App. LEXIS 2799, at *10 (Mich. Ct. App. June 4, 2019); Crews v. Crews, No. 346440, 2019 LEXIS 6232, at *16 (Mich. Ct. App. Oct. 10, 2019).

224. *See Kenneally*, 2019 Mich. App. LEXIS 2799, at *10; *Crews*, No. 346440, 2019 Mich. App. LEXIS 6232, at *16.

225. *See* McGough v. McGough, 710 So. 2d 452, 454 (Ala. Civ. App. 1997); Borchgrevink v. Borchgrevink, 941 P.2d 132, 139–40 (Alaska 1997) ("We prefer that superior courts specifically address the statutory factors detailed in AS § 25.14.150(c), and make explicit 'ultimate' findings that the best interests of the children require the custodial disposition reached."); Jones v. Lang, 591 A.2d 185, 188 (Del. 1991) ("[I]t would have been clearly preferable for the court to explicitly refer to [DEL. CODE] section 722's statutory factors . . . ."); Schwieterman v. Schwieterman, 114 So. 3d 984, 988 (Fla. Dist. Ct. App. 2012) ("There is no statutory requirement that a trial court engage in a discussion as to each of the factors, although a discussion of the relevant factors can be helpful in determining whether the trial court's judgment is supported by competent substantial evidence."); Hammeren v. Hammeren, 823 N.W.2D 482, 487 (N.D. 2012) (explaining that the court "prefer[red] that the court set forth specific factual findings as an explanation").

226. *See, e.g.*, Smith v. Weekley, 73 P.3d 1219, 1226–627 (Alaska 2003); Fisher v. Fisher, 691 A.2d 619, 620 (Del. 1997); Dumas v. Woods, 914 A.2d 676, 679 (D.C. Cir. 2007); Ysla v. Lopez, 684 A.2d 775, 777 (D.C. Cir. 1996); Searle v. Searle, 405 P.3d 1180, 1187 (Idaho 2017); Sadler v. Pulliam, 2022 Ill. App. (5th) 220213, ¶ 46; *In re* Marriage of Lawrence, 112 P.3d 1036, 1039 (Mont. 2005); McDougall v. McDougall, 464 N.W.2d 189, 192 (Neb. 1991); Henretty v. Lewis, 509 P.3d 701, 703 (Or. Ct. App. 2022); K.P.S. v. E.J.P., 2018 Utah Ct. App. 5, ¶ 43, 414 P.3d 933.

227. *See, e.g.*, Park v. Park, 986 P.2d 205, 211 (Alaska 1999); Fisher v. Fisher, 691 A.2d 619, 620

reason that without findings addressing each statutory factor, appellate courts are unable to conduct a meaningful appellate review if the judgment is appealed.[228] As a result, trial courts are often required to schedule new proceedings on their docket to allow parties to present updated evidence in court, costing litigants additional fees and attorneys and judges additional time and effort.[229]

In practice, even where states do not require findings of fact, lower courts are structuring their rulings by going through each factor and explicitly finding it favors or disfavors one parent over the other (or is neutral).[230] This suggests that requiring courts to make findings of fact on the record would merely be codifying the current practices of many family court judges.

D. Judicial Discrepancies in Applying Best Interests Factors to Extended Family Members

Commentators and the courts recognize the importance of considering the role of extended family members in a child's life when determining the best interests of a child.[231] They generally believe that the child's best interest is served if their "accustomed mode of living or home environment is not abruptly changed."[232] This includes maintaining connections with extended family care members both inside and outside the home.[233]

However, it appears that the role of a parent residing with or seeking regular care from a relative is underreported or not considered by the courts. This section outlines how other state courts have attempted to find a fit for the square peg of extended family care into the round holes of vaguely related statutory factors. This has resulted in inconsistent application and an overall lack of predictability across jurisdictions.[234] Conversely, in states that have adopted factors regarding availability or a child's relationship with extended family members (a square hole), there is a notable increase in reporting and consideration of the role of extended family members in courts' "best interests" analysis.[235]

1. Square Pegs in Round Holes: Attempts to Fit Extended Family Analysis into Related

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(Del. 1997); *In re* Marriage of Branning and Branning, 2019 WL 6611613, at *3 (Wash. Ct. App. Dec. 5, 2019).

228. *See, e.g.*, Fisher v. Fisher, 691 A.2d 619, 620 (Del. 1997).

229. *See* Smith v. Weekley, 73 P.3d 1219, 1227 (Alaska 2003); Sadler v. Pulliam, 2022 Ill. App. (5th) 220213, ¶ 46 (reversing and remanding the case back to the trial court with directions for the court to consider evidence and the statutory factors in determining parenting time and decision-making for the child).

230. *See, e.g.*, Irwin v. Shelby, 210 A.3d 705, 712 (Del. 2019); *In re* Marriage of D.T.W. and S.L.W., 2011 Ill. App. (1st) 111225, ¶ 127; Grissom v. Grissom, 586 S.W.3d 387, 389 (Tenn. Ct. App. 2019).

231. *See* Schmidt v. Schmidt, 660 N.W.2d 196, 202 (N.D. 2003) (citing SANDRA MORGAN LITTLE, 1 CHILD CUSTODY AND VISITATION, § 10.09[1] (2002)).

232. *See id.*

233. *See id.*

234. *See infra* Section III.D.1.

235. *See infra* Section III.D.2.

Factors

Even where state statutes adopt broad factors, courts struggle to find how the role of an extended family member within or outside the household should be considered within this statutory framework. Several states have recognized the role of extended family connections as part of a "stable environment" factor.[236] More commonly however, the court rulings largely reflect confusion by the courts as to how to consider extended family members within the "best interests" framework. The majority of rulings that reference extended family members mention their presence in passing without any guidance on whether the courts consider their availability positively or negatively.[237]

a. Promotion of Stability for the Minor Child

A handful of states analyze the presence and relationship with extended family under the factor of promoting stability for the minor child.[238] In *I.J.D. v. D.R.D.*, an Alaska court affirmed a lower court's custodial determination in favor of Father where evidence introduced showed Father's grandparents had been actively involved in the minor child's care and, along with the child's extended family, would likely continue to provide a support network to the child.[239] In the context of stability, courts in Alaska have identified unsupported assumptions made by trial courts when analyzing grandparent involvement in a child's life.[240] In *Weathers v. Weathers*, the Supreme Court of Alaska found the superior court abused its discretion when it found the paternal grandparents' involvement in the child's life was the factor that "tipped the scales" in favor of awarding custody to Father.[241] The appellate court noted it was improper to assume that they had to award the majority of parenting time to Father in order to ensure continued involvement and support of the grandparents.[242] Rather, the evidence supported that Mother arranged childcare and involvement in activities with the grandparents during her parenting time.[243] In *West v. West*, the court found the trial court abused its discretion where it awarded primary physical custody to Father solely based on its assumption that Father's anticipated marriage (into a two-parent household) would provide the child with a more stable environment than Mother's single-parent

236. *See, e.g.*, I.J.D. v. D.R.D., 961 P.2d 425, 430 (Alaska 1998); Weathers v. Weathers, 425 P.3d 131, 140 (Alaska 2018); Myers v. Myers, 561 So. 2d 875, 878 (La. Ct. App. 1990).

237. *See generally* DP v. JP, 400 P.3d 615 (Haw. Ct. App. 2017); *In re* B.A.L. and A.E.L., No. W2004-00826-COA-R3-JV, 2004 WL 3008810, at *3 (Tenn. Ct. App. Dec. 23, 2004).

238. *See, e.g.*, Rego v. Rego, 259 P.3d 447, 460 (Alaska 2011) (explaining that contact with extended family showed due consideration for the statutory "stability" factor); *Myers*, 561 So. 2d at 878.

239. *See I.J.D.*, 961 P.2d at 430.

240. *See Weathers*, 425 P.3d 131, 140 (Alaska 2018). *But see* West v. West, 21 P.3d 838, 843 (Alaska 2001).

241. *See Weathers*, 425 P.3d at 141.

242. *See id.*

243. *See id.*

extended-family setting where Mother relied on her parents to watch the child.[244] The court rejected the unsupported assumption that extended family was less desirable than stepparents, noting the "vital emotional benefits" the child may receive by maintaining his close relationship with his grandparents.[245]

Likewise, Louisiana and Maryland courts generally view extended family as a positive factor in assessing stability of the child's environment.[246] In multiple opinions, the court found parents provided stable environments for the children where they relied on the child's grandparents for childcare while they were at work.[247] These opinions highlight that the stability of a child's environment extends beyond where they are physically present to the extent to which they are able to maintain a stable routine after the court proceeding is complete.

Even in states where the statute does not contain a factor referencing stability of environment, courts generally view the availability of extended family as a positive indication of stability.[248] Illinois provides a good example, where the statute directs courts to consider "the interaction and interrelationship of the child with his or her parents and siblings *and with any other persons who may significantly affect the child's best interests*" (emphasis added).[249] However, in application, courts have not applied that factor when analyzing availability of extended family members, instead merely finding the availability of extended family aids in the stability and cohesiveness of a child's home.[250] Similarly, while California has not adopted a "stability" factor into its statutory scheme, courts have articulated that "[w]hen custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role."[251] As applied to a case where a third party has played a large role in child care, the stability of continuing that care would be in the child's best interests.[252] California courts have further argued that

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244. *See West*, 21 P.3d at 843.

245. *See id.*

246. *See* LA. CIV. CODE ANN. art. 134(A)(5) (2018) (allowing "[t]he length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment" to be considered by the court); Myers v. Myers, 561 So. 2d 875, 878 (La. Ct. App. 1990); Waits v. Waits, 556 So. 2d 215, 218 (La. Ct. App. 1990); MD. CODE. ANN. FAM. LAW § 9-204.1 (West 2020) ("[s]tability and the foreseeable health and welfare of the child"); Robinson v. Robinson, 615 A.2d 1190, 1192–93 (Md. Ct. Spec. App. 1992).

247. *See Myers*, 561 So. 2d at 878 (describing how Father testified that his mother picks his daughter up from school and stays with her at home for two hours); Waits 556 So. 2d at 218 (relaying Father's testimony that his mother was available to watch the children from the time Father left for work until their bedtime or whenever he came home); Atkins v. Atkins, 106 So. 3d 614, 616 (La. Ct. App. 2012); LeBlanc v. Welch, 240 So. 3d 291, 296 (La. Ct. App. 2018); *Robinson*, 615 A.2d at 1192–93.

248. *See generally* 750 ILL. COMP. STAT. ANN. 5/602.7(b)(5) (West 2016); *In re* Marriage of Drummond, 509 N.E.2d 707, 715 (Ill. App. Ct. 1987); Burchard v. Garay, 724 P.2d 486, 491 (Cal. 1986).

249. *See* 750 ILL. COMP. STAT. ANN. 5/602.7(b)(5) (West 2016).

250. *See In re Marriage of Drummond*, 509 N.E.2d at 711; Prince v. Herrera, 633 N.E.2d 970, 975 (Ill. App. Ct. 1994) (applying a prior iteration of 750 ILL. COMP. STAT. 5/602.7 with identical "best interests" factors).

251. *Burchard*, 724 P.2d at 490–091.

252. *See id.* at 491.

the reliance on third-party care should not be automatically viewed as a "negative" against a parent.[253]

b. Confusion Regarding Applicability of Existing Factors

The Michigan case of *Ireland v. Smith* exemplifies the issue of when a court's decision is reversed for failing to understand how to apply existing factors to multigenerational households.[254] In *Ireland v. Smith*, the trial court found that all of Michigan's statutory "best interests of the child" factors weighed evenly in favor of both parties except "permanence, as a family unit, of the existing or proposed custodial home."[255] Based primarily on that factor, the trial court awarded custody to Father, finding that he resided with his two parents who could assist with child care.[256] The Mother, on the other hand, relied heavily on daycare on weekdays and lived in University of Michigan student housing.[257] The Supreme Court of Michigan affirmed and remanded back to the trial court, finding the court's analysis was inappropriate under the permanence factor.[258] The court reasoned this factor was intended for courts to analyze the stability of a child's home, not the acceptability of and reliance on third-party care.[259] However, the court opined, "[M]any children spend a significant amount of time in such settings and no reasonable person would doubt the importance of child care decisions."[260] Sixty-one amici curiae agreed, each filing briefs in the case asking the court for guidance on "*How* are such arrangements to be considered? Does a parent seeking custody lose ground by proposing to place a child in daycare while the parent works or goes to school? Is in-home care from parents and other relatives better than daycare with other children under the supervision of licensed caregivers?"[261]

The Supreme Court failed to provide much clarification to these important questions in its opinion.[262] Instead, it directed trial courts to consider each case as unique, but also pointed future courts to other existing statutory factors under which it believed were more appropriate in the future to analyze alternative childcare. These included "(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care . . . (h) The home, school, and community record of the child . . . [and] (l) [A]ny other factor considered by the court to be relevant to a particular child custody dispute."[263] This case emphasizes that where the statute does not provide explicit

253. *See id* at 494.; *In re* Marriage of Loyd, 106 Cal. App. 4th 754, 760 (2003).
254. *See* Ireland v. Smith, 547 N.W.2d 686, 689 (Mich. 1996).
255. *See id.* at 688 (citing MICH. COMP. LAWS § 722.23 (2022)).
256. *See id.*
257. *See id.*
258. *See id.* at 689.
259. *See id.* at 688.
260. *See id.* at 691.
261. *See id.*
262. *See id.* at 691–92.
263. *See id.* at 691.

guidance for trial courts, they are trying to guess how a square peg (third-party and extended family caregivers) fits into a round hole (existing statutory factors). The state's highest courts are then left with the task of trying to provide clarity and guidance, even resorting to remanding a case, when trial courts select the "wrong" factor.

2. Square Pegs in Square Holes: The Extended Family Factor

Eleven states explicitly reference a third-party caregiver, de facto custodian, extended family member, relatives, or household member within their statutory best interests framework.[264] Of these states, Maryland and Utah leave consideration of the factors completely within the discretion of the court.[265] As discussed above, this

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264. *See* DEL. CODE ANN. tit. 13, § 722 (West 2023) (adopting a statutory factor in determining the best interests of the child of "[t]he interaction and interrelationship of the child with his or her parents, *grandparents, siblings, persons cohabiting in the relationship of husband and wife* with a parent of the child, *any other residents of the household or persons who may significantly affect the child's best interests*") (emphasis added); FLA. STAT. ANN. § 61.13(3)(b) (West 2021) (adopting a statutory factor in determining the best interests of the child of "[t]he anticipated division of parental responsibilities after the litigation, *including the extent to which parental responsibilities will be delegated to third parties*") (emphasis added); HAW. REV. STAT. ANN. § 571-46(b)(11) (West 2022) (adopting a statutory factor in determining the best interests of the child of "*[e]ach parent's actions demonstrating that they allow the child to maintain family connections through family events and activities*; provided that this factor shall not be considered in any case where the court has determined that family violence has been committed by a parent.") (emphasis added); MD. CODE ANN. FAM. LAW § 9-204.1(c)(4) (West 2020) (adopting a statutory factor in determining the best interests of the child of "[t]he child's relationship with each party, any siblings, *other relatives*, and individuals who are or may become important in the child's life.") (emphasis added); NEB. REV. STAT. ANN. § 43-2923(3) (West 2022) (adopting a statutory factor in determining the best interests of the child of "[t]hat the child's families and those serving in parenting roles remain appropriately active and involved in parenting with safe, appropriate, continuing quality contact between children and their families when they have shown the ability to act in the best interests of the child and have shared in the responsibilities of raising the child"); N.D. CENT. CODE ANN. § 14-09-06.2(1)(d), (k) (West 2019) (adopting a statutory factor in determining the best interests of the child of "[t]he sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community . . . . The interaction and inter-relationship, or the potential for interaction and inter-relationship, of the child with any person who resides in, is *present, or frequents the household* of a parent and who may significantly affect the child's best interests . . . .") (emphasis added); OR. REV. STAT. ANN. § 107.137(a) (West 2022) (adopting a statutory factor in determining the best interests of the child of "[t]he emotional ties between the child and other family members"); PA. CONS. STAT. § 5328(a)(5) (2022) (adopting a statutory factor in determining the best interests of the child of [t]he availability of extended family"); S.D. CODIFIED LAWS § 25-4A-24(20) (2018) (adopting a statutory factor in determining the best interests of the child of "[w]hether a parent provides a stable and consistent home environment including the relationship and interaction of the child with the parents, stepparents, siblings, and extended families"); TENN. CODE ANN. § 36-6-106(a)(9) (West 2022) (adopting a statutory factor in determining the best interests of the child of "[t]he child's interaction and interrelationships with siblings, other relatives and step-relatives, and mentors, as well as the child's involvement with the child's physical surroundings, school, or other significant activities."); UTAH CODE ANN. § 30-3-10(2)(l) (West 2019) (adopting a statutory factor in determining the best interests of the child of "the child's interaction and relationship with step-parents, extended family members of other individuals who may significantly affect the child's best interests.").

265. *See infra* Table B (Maryland, Utah).

effectively provides for no requisite consideration of any of the factors.[266] Seventeen other states and the District of Columbia have adopted the broader factor of "the interaction and interrelationship of the child with parents, siblings *and any other person who may significantly affect the child's best interests*" (emphasis added) or equivalent language.[267] In application, states adopting this broader factor have not yielded substantial case law discussing the role of extended family members under this factor.[268] Rather, the additional specificity of the narrower factor language appears necessary to guide both attorneys and courts to consistently introduce and address evidence on the important role of extended family members.[269]

This Section highlights a few states that have adopted these narrower factors and how they have been applied by the courts.

a. The Interrelationship/Interaction of the Child and Relatives

The mere addition of the statutory language directing courts to consider a child's interrelationship and interaction *with other relatives* has yielded a larger number of cases where family courts directly reference extended family members in their "best interests" analysis.[270] Both Delaware and Tennessee serve as prime

266. *See infra* Section III.B.

267. *See* ARIZ. REV. STAT. ANN. § 25-403 (2013); COLO. REV. STAT. § 14-10-124 (2021); CONN. GEN. STAT. § 46b-55 (2021), D.C. CODE ANN. § 16-914 (West 2021); 750 ILL. COMP. STAT. ANN. 5/602.7(b)(5) (West 2022); IND. CODE ANN. § 31-14-13-2 (West 2022); KAN. STAT. ANN. § 23-3203 (2022); KY. REV. STAT. ANN. § 403.270(2)(c) (West 2021); ME. REV. STAT. ANN. tit. 19-A, § 1653 (2022).; MINN. STAT. ANN. § 518.17(a)(9) (West 2022) (adopting a statutory factor in determining the best interests of the child of "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"); MO. REV. STAT. § 452.375 (2021); MONT. CODE. ANN. § 40-4-212 (2022); N.H. REV. STAT. ANN. § 461-A:6 (2023); N.M. STAT. ANN. § 40-4-9.1 (2022); OHIO REV. CODE ANN. § 3109.04 (2011); S.C. CODE ANN. § 63-15-240(B)(5) (2012) (adopting a statutory factor in determining the best interests of the child of "the past and current interaction and relationship of the child with each parent, the child's siblings, and any other person, including a *grandparent,* who may significantly affect the best interest of the child") (emphasis added); VT. STAT. ANN. tit. 15, § 665 (2018) (adopting a statutory factor in determining the best interests of the child of "the relationship of the child with any other person who may significantly affect the child"); WIS. STAT. § 767.41(5) (2021).

268. *See, e.g.*, Prince v. Herrera, 633 N.E.2d 970, 975 (Ill. App. Ct. 1994); C.D. v. D.L., 2007-Ohio-2559, ¶ 3 (Ohio Ct. App. 2007); Pope v. Pope, 2017 UT App 24, ¶ 12, 392 P.3d 886, 890 (highlighting that Father resided with the child's grandmother). *Contra* Bratton v. Holland, 2018 VT 54, ¶ 21, 192 A.3d 1257, 1263.

269. *See, e.g.*, Williams v. Williams, No. 94-06871, 1996 WL 259736, at *16 (Del. Fam. Ct. Jan. 18, 1996) (discussing testimony from extended family members as to their relationship with the minor children); P.P. v. C.P., No. 20-16711, 2020 WL 6696012, at *1 (Del. Fam. Ct. Oct. 1, 2020) (applying the narrower "interaction/interrelationship" factor and discussing parties' competing testimony about their respective relationships with their extended family members); Hinds v. Hinds-Holm, 2022 UT App 13, 505 P.3d 1136, ¶ 22 (holding that the interaction factor weighed in favor of Mother where the child had a "strong relationship" with grandmother).

270. *See* DEL. CODE ANN. tit. 13, § 722 (adopting a statutory factor in determining the best interests of the child of "[t]he interaction and interrelationship of the child with his or her parents, grandparents, siblings, persons cohabiting in the relationship of husband and wife with a parent of the child, any other residents of the household or persons who may significantly affect the child's best interests"); TENN. CODE ANN. § 36-6-106 (West 2022) (adopting a statutory factor in determining the

examples of this small wording change having a significant effect on the court's analysis.[271] In the Delaware case of *Irwin v. Shelby*, the court found this factor weighed in favor of Mother where the children were "very familiar" with their maternal grandmother who helped with childcare, and had a "good relationship" with the maternal grandfather.[272] Similarly, in two recent opinions in Tennessee, the court has weighed the factor equally between two parties or in one party's favor where parties introduced evidence of the children's interactions with relatives.[273] The same abundance of case law discussing extended family members and nonparent caretakers is not seen in states where courts are merely directed to consider the interaction of the child "and any other person who may significantly affect the child's best interests."[274]

b. North Dakota: Two Extended Family Factors[275]

The North Dakota statutory "best interests" factors contain two factors under which a court shall expressly consider third-party members of a child's household and extended family members generally.[276] First, the factors explicitly direct courts to consider "[t]he sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community."[277] Second, as referenced above, North Dakota is one of four states that has extended the "interaction/interrelationship" factor to members of the child's household.[278] But rather than limiting it to any other members of the household, North Dakota extends this factor to "any person who resides in, is

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best interests of the child of "[t]he child's interaction and interrelationships with siblings, other relatives and step-relatives, and mentors"); *see*, *e.g.*, *Williams*, No. 94-06871, 1996 WL 259736, at *16 (discussing testimony from extended family members as to their relationship with the minor children); *P.P.*, No. 20-16711, 2020 WL 6696012, at *3 (applying the narrower "interaction/interrelationship" factor and discussing parties' competing testimony about their respective relationships with their extended family members); *In re* McKenzie Z., 2018 WL 1508574, at *1 (Tenn. Ct. App. Mar. 27, 2018).

271. *See id.*

272. *See* Irwin v. Shelby, 210 A.3d 705, 712 (Del. 2019).

273. *See In re McKenzie Z.*, 2018 WL 1508574, at *1 (finding the "interrelationship" factor weighed equally for both parents where both parents maintained positive connections between family members and the minor child); *In re* Lennon R., 2019 WL 2226007, at *10 (Tenn. Ct. App. May 23, 2019) (finding the "interrelationship" factor weighed in favor of father where the child had more positive interactions with father's side of the family).

274. *See, e.g.*, Prince v. Herrera, 633 N.E.2d 970, 975 (Ill. App. Ct. 1994); C.D. v. D.L., 2007-Ohio-2559, ¶ 3.

275. N.D. CENT. CODE ANN. § 14-09-06.2 (West 2019).

276. *See* N.D. CENT. CODE ANN. § 14-09-06.2(d), (k) (West 2019).

277. N.D. CENT. CODE ANN. § 14-09-06.2(d) (West 2019).

278. The other three states that extend the "interaction/interrelationship factor" broadly to other members of a child's household are Delaware, Kansas, and South Dakota. DEL. CODE ANN. tit. 13, § 722(a)(3) (2022); KAN. STAT. ANN. § 23-3203(a)(6) (West 2022); S.D. CODIFIED LAWS § 25-4A-24(20) (2018). In application, North Dakota courts have found this factor "addresses the negative influence of third parties, not the positive influence of extended family." Deyle v. Deyle, 825 N.W.2d 245, 251 (N.D. 2012).

present, or frequents the household of a parent and who may significantly affect the child's best interests."[279] Although North Dakota does not require written findings of fact, its case law consistently contains detailed analysis of each factor, indicating written findings have been informally adopted as best practices.[280] This helps litigants understand how courts are specifically applying these two factors.[281] Taken in conjunction with requiring courts to consider the factors, the statutory framework establishes a clear mechanism for courts to consider all relevant family involvement.[282]

North Dakota case law is replete with cases where, under the extended family factors, courts specifically considered the presence of extended family members for both parents a strong and positive indicator of stability for children after the proceedings concluded.[283] Courts have applied this factor neutrally and in favor of both Mother and Father, suggesting the factor by itself has not biased courts in one direction or another.[284] In *Fonder v. Fonder* and *P.A. v. A.H.O.*, the court weighed the extended family factor neutrally where the children's extended family on both parents' sides maintained a positive presence in their lives.[285] In *Cox v. Cox*, the court found this factor weighed in favor of Father where the evidence indicated he had a strong family support system nearby and his aunt and uncle were able and willing to assist him with parenting responsibilities.[286] In *Lindberg v. Lindberg*, the court found consideration of extended family favored Mother where she resided with her parents, had extended family including her sister, aunt, and uncle nearby, and Mother's parents had a positive relationship with the children and helped out with pickup from school and daycare.[287]

Schmidt v. Schmidt and *Marsden v. Koop* emphasize that the analysis of a child's support system should not be limited to extended family or to the delineated statutory factors. *Schmidt* highlights that, under the statute, courts need to expand their analysis beyond extended family members and clarifies that the statutory consideration is of any person "who may significantly affect the child's best interest."[288] The court found this is in line with the importance of maintaining a

279. N.D. CENT. CODE ANN. § 14-09-06.2(k) (West 2019).

280. *See, e.g.*, Marsden v. Koop, 789 N.W.2d 531, 535 (N.D. 2010).

281. *See generally* Fonder v. Fonder, 823 N.W. 2d 504, 504 (N.D. 2012); *Marsden*, 789 N.W.2d at 531 (N.D. 2010); Lindberg v. Lindberg, 770 N.W.2d 252, 252 (N.D. 2009).

282. *See generally Fonder*, 823 N.W. 2d at 504; *Marsden*, 789 N.W.2d at 531; *Lindberg*, 770 N.W.2d at 252.

283. *See Fonder*, 823 N.W.2d at 505; *Lindberg*, 770 N.W.2d at 261; P.A. v. A.H.O., 757 N.W.2d 58, 63 (N.D. 2008); Cox v. Cox, 613 N.W.2d 516, 522 (N.D. 2000).

284. *See Fonder*, 823 N.W.2d at 504–4–05; *P.A.*, 757 N.W.2d at 63; *Cox*, 613 N.W.2d at 522.

285. *See Fonder*, 823 N.W.2d at 506; *P.A.*, 757 N.W.2d at 6.

286. *See Cox*, 613 N.W.2d at 522; *see also* Bashus v. Bashus, 393 N.W.2d 748, 752 (N.D. 1986) (finding that the trial court did not place undue influence on Father's extended family in determining the best interest of children in divorce where the custody decision was between two fit parents, and Father's extended family provided care for the children and provided an opportunity for many family-oriented activities).

287. *See Lindberg*, 770 N.W.2d at 261.

288. *See* Schmidt v. Schmidt, 660 N.W.2d 196, 202 (N.D. 2003).

child's stability and may include "secondary caretakers, stepparents, and other relatives as well as nonrelatives."[289] This analysis paves the way for applying "best interests of the child" factors to multi-parent custody cases as well.[290]

Similarly, *Marsden v. Koop* illustrates that, even if there is a statutory factor addressing extended family members, this does not prevent a court from analyzing the impact of extended family members under other statutory factors as well.[291] In *Marsden*, the court also considered the involvement of Father's parents in the children's lives when finding the factor of the children's "home, school, and community" also weighed in favor of Father.[292] Specifically, the court found the children's stability was aided by the consistency of spending time with their paternal grandparents twice per month.[293]

Interestingly, the *Marsden* case also separated consideration of extended family from consideration of a child's cultural background as two distinct factors.[294] Here, the children were enrolled with the Canadian Indian Affairs as members of the Fairford First Nations.[295] The court cited to other statutes that do have a cultural background factor within their statute, but North Dakota does not.[296] Nevertheless, the court suggested that in this case, analysis under the factor would not focus on the family living situation but rather on whether Mother had visited the reservation and whether Father was open to teaching the children about their cultural background and taking them to cultural events.[297]

c. Oregon: "The Emotional Ties Between the Child and Other Family Members"

Oregon courts apply a similar approach to North Dakota's when analyzing the best interests of the child under its statutory factor addressing other family members: "[T]he emotional ties between the child and other family members."[298] First, this factor is treated just as every other statutory factor, with no greater weight given over the others.[299] Second, although the statutory factors help explicitly provide an avenue through which courts can consider a child's ties with an extended family member, courts have full discretion to consider the impact of extended family under other statutory factors as well.[300] In *In re Marriage of Bradburry*, the Oregon

289. *See id.*

290. *See* Feinberg, *Boundaries*, *supra* note 75, at 329.

291. *See* Marsden v. Koop, 789 N.W.2d 531, 543 (N.D. 2010); *see also* Vandal v. Leno, 843 N.W.2d 313, 315 (N.D. 2014) (finding the two extended family factors did not favor either parent when both parents had lived with the support of extended family).

292. *See, e.g.*, *Marsden*, 789 N.W.2d at 543.

293. *See, e.g.*, *id.*

294. *See id.* at 540.

295. *Id.*

296. *Id.* at 541 (citing MINN. STAT. ANN. § 518.17(1)(11) (West 2022); CONN. GEN. STAT. § 46b-56c) (2021).

297. *See Marsden*, 789 N.W.2d at 541.

298. OR. REV. STAT. ANN. § 107.137 (West 2021).

299. *See* Marriage of Sawyer, 564 P.2d 739, 740 (Or. Ct. App. 1977).

300. *See In re* Marriage of Bradburry, 238 P.3d 431, 436 (Or. Ct. App. 2010).

Court of Appeals began its opinion with analysis of the child's emotional ties with his grandfather, sisters, and stepfather in favor of Mother being awarded custody.[301] The court then also considered these ties under the statutory factor of "desirability of continuing existing relationships," finding it would be easier for the child to maintain his ties with family members if custody were awarded to Mother.[302] These cases offer additional support that introducing a specific statutory factor does not otherwise curb a court's discretion when determining a child's best interests.[303]

d. Pennsylvania: "The Availability of Extended Family"[304]

Pennsylvania provides another example of the difference adding factors to its statute makes, particularly one that directs courts to consider the role of extended family.[305] On January 24, 2011, Pennsylvania adopted substantial amendments to its child custody statute, most notably by adopting sixteen statutory factors state courts must consider when making custody determinations.[306] One of these factors was "the availability of extended family."[307] The appellate case law entered since the enactment of these factors imposes an affirmative obligation to not merely generally state that it has considered the enumerated factors in reaching its ruling.[308] Rather, the court must actually apply the factors to the relevant facts of the case.[309] Prior to the enactment of Pennsylvania's statutory factors, much like the many "factor-less" jurisdictions discussed above, Pennsylvania courts analyzed custody cases on a case-by-case basis, identifying whatever factors the individual court found relevant.[310]

Prior to 2011, the Pennsylvania case law that mentioned extended family, multigenerational households, or even third-party caregivers in general was scarce.[311] The limited case law focused on parents who relied on care from a third-party babysitter and generally held that a trial court could not divest a parent of physical custody if that parent makes suitable arrangements for the child's care in their absence.[312] These cases skirted around the factors by generally providing that a third-party caregiver could be an integral member of the child's stable and continuing environment.[313]

Since 2011, there has been a significant increase in appellate case law explicitly

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301. *See id.*
302. *See id.*
303. *See id.*; *Marriage of Sawyer*, 564 P.2d at 740.
304. PA. CONS. STAT. § 5328 (2014).
305. *See* Pub. L. no. 1106, No. 112, § 2, PA. CONS. STAT. § 5328 (effective January 24, 2011), https://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2010/0/0112..HTM [https://perma.cc/G3YP-MBUF].
306. *See* PA. CONS. STAT. § 5328 (2014).
307. *Id.*
308. *See* M.E.V. v. F.P.W. 100 A.3d 670, 672 (Pa. Super. Ct. 2014).
309. *See id.* (citing S.W.D. v. S.A.R., 96 A.3d 396, 401 (Pa. Super. Ct. 2014)).
310. *See, e.g.*, Santz v. Rinker, 902 A.2d 509, 512 (Pa. Super. Ct. 2006).
311. *See, e.g.*, Gerber v. Gerber, 487 A.2d 413 (Pa. Super. Ct. 1985).
312. *See, e.g.*, *id.*; *In re* Custody of Temos, 450 A.2d 111, 125 (Pa. Super. Ct. 1982).
313. *See, e.g.*, *Gerber*, 487 A.2d at 416; *In re Custody of Temos*, 450 A.2d at 125.

addressing the availability of extended family and their role in caring for a child, suggesting increased evidence is being introduced at the trial court level as well.[314] This increase in case law has in turn guided courts facing cases where a child lives in one or more multigenerational households or receives substantial care from extended family members.[315] In *T.L.G. v. H.L.*, Father argued the trial court's ruling awarding Mother primary custody was in error because if affirmed, his child would have no "real contact" with his paternal grandparents.[316] The appellate court rejected this argument, finding the child would be able to continue his relationship with paternal grandparents because they lived with Father.[317]

In the unpublished decision of *Gross v. Gross*, the appellate court emphasized that even where a court provides detailed factual findings as to each factor, including the availability of extended family, the court still needed to assign the factors the appropriate weight and explain how a factor explicitly favored one parent over the other.[318] The court found the child's maternal grandparents lived with and were available to him on a daily basis, while paternal grandmother previously provided childcare for the child prior to Mother's termination from employment.[319] The appellate court expressed it believed the child's relationships with his grandparents should be viewed positively, opining that it was in the child's best interest to arrange a parenting schedule in a way that could continue his close relationship with both sets of grandparents.[320] Both of these opinions, taken in conjunction with cases decided since 2011, support the idea that care from extended families should be viewed positively but should not be a single determinative factor in a court's custody analysis.[321]

The case studies of North Dakota, Oregon, and Pennsylvania exemplify the benefits of adopting a mandatory statutory factor regarding the availability and support of extended family members and other third parties outside of the child's biological parents. The case law highlights that reliance on general "catchall

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314. *See, e.g.*, Gross v. Gross, No. 722, 2021 WL 6110239, at *5 (Pa. Super. Ct. Dec. 27, 2021); H.S. v. T.S., No. 561, 2018 WL 4090163, at *5 (Pa. Super. Aug. 28, 2018) (noting Mother lived with her in-laws and maternal grandparents lived close by, where Father's family also lived in Pennsylvania); E.S.K. v. J.L.K., No. 1473 WDA 2015, 2016 WL 1546103 (Pa. Super. Ct. Apr. 15, 2016) (considering that Mother lived with her father and two brothers in addition to her children); A.S-M. v. J.M., No. 2096, 2015 WL 6675384, at *1 (Pa. Super. Ct. Aug 21, 2015) (considering that Father lived with paternal grandmother and Mother lives in parent's home); T.L.G. v. H.L., No. 1829, 2014 WL 10987101, at *8 (Pa. Super. Ct. Mar. 14, 2014).

315. *See generally T.L.G.*, 2014 WL 10987101, at *8; *Gross*, 2021 WL 6110239, at *7.

316. *See T.L.G.*, 2014 WL 10987101, at *8.

317. *See id.*

318. *See Gross*, 2021 WL 6110239, at *7.

319. *See id.* at *5.

320. *See id.* at *4.

321. *See T.L.G.*, 2014 WL 10987101, at *8; *Gross*, 2021 WL 6110239, at *7.

factors,"[322] no factors,[323] or discretionary factors[324] leads courts to inconsistently exercise their discretion in considering this outside support system. This lack of recognition ultimately fails to serve the child's interests as the court ignores the reality of the child's available care and support by narrowing its focus on the child and their parents. Specific guidance is needed to ensure courts are consistently considering all care and support a child will receive once the court is no longer involved.

III. RECOMMENDATION

To best achieve the goals of balancing predictability for litigants with meaningful appellate review, while allowing judicial discretion to consider individual cases, states should amend their "best interests" framework as follows: (1) adopting mandatory statutory "best interests" factors, (2) requiring findings of fact as to each factor, and (3) explicitly addressing the availability and support of extended family caregivers as a factor in their "best interests" analysis. This Section details the scope and potential expansion of this proposed framework, expands upon the necessity for each prong of the proposed framework, and addresses limitations and potential criticisms.

A. Scope and Potential Expansion of Recommendations

The three-pronged framework set forth below is primarily intended to address cases where extended family members regularly assist in childcare or otherwise have a significant connection to a minor child but do not assume the role of a functional or de facto parent to the exclusion of a legal parent.[325] However,

322. *See, e.g.*, ALASKA STAT. ANN. § 25.24.150(c)(9) (West 2022) (allowing "other factors that the court considers pertinent"); FLA. STAT. ANN. § 61.13(3)(t) (West 2021) (allowing "[a]ny other factor that is relevant to the determination of a specific parenting plan, including the time-sharing schedule"); 750 ILL. COMP. STAT. ANN. 5/602.7(b)(17) (West 2016) (allowing "any other factor that the court expressly finds to be relevant"); MD. CODE ANN., FAM. LAW § 9-204.1 (West 2020) (allowing "[a]ny other factor deemed appropriate by the parties."); MICH. COMP. LAWS ANN. § 722.23(l) (West 2016) (allowing "[a]ny other factor considered by the court to be relevant to a particular child custody dispute"); N.D. CENT. CODE § 14-09-06.2(1)(m) (2019) (allowing "[a]ny other factors considered by the court to be relevant to a particular parental rights and responsibilities dispute").

323. *See infra* Section III.A.

324. *See infra* Section III.B.

325. *See* Joslin & NeJaime, *supra* note 25, at 389 (finding in their empirical study of the functional parent doctrine that "in all but four of the seventy-two cases in which the court recognized a grandparent as a functional parent, the grandparent was serving as the child's primary caregiver at the time of the proceeding, and the legal parents were not"); Jacqueline V. Gaines, *The Legal Quicksand 2+ Parents: The Need for a National Definition of a Legal Parent*, 46 U. DAYTON L. REV. 105, 107 (2021) (defining "de facto parent" as an individual who "functioned as a parent either by (a) having performed the majority share of caretaking functions for the child, or (b) having performed a share of caretaking functions that is equal to or greater than the share assumed by the legal parent with whom the child primarily lives"). Other legal scholarship focuses on stepparent visitation and third-party caregivers generally. *See generally* Jeffrey A. Parness, *Third Party Stepparent Childcare*, 67 MERCER L. REV. 383, 383 (2016).

incorporating the first two prongs of the proposed framework in all states would provide the uniformity needed to set up (and expand) the "best interests" framework for success beyond the traditional nuclear family to contemplate a potential "tri-custodial arrangement."[326] This type of arrangement may be achieved where courts recognize the possibility of "nonexclusive parenthood" wherein courts recognize de facto parenting relationships without terminating the child's relationship with their natural or legal parents.[327]

Currently, thirteen states have expanded the definition of parenthood to recognize more than two parents simultaneously.[328] Recent legal scholarship argues this recognition means that a child's time will need to be allocated between more houses.[329] The limited case law analyzing the appropriateness of a tri-custodial arrangement has followed the same "best interests of the child" inquiry, suggesting courts will try to utilize and expand existing frameworks to these modern family scenarios.[330] To prepare courts for this expanded inquiry with additional litigants, courts must be equipped with a more consistent and predictable framework to assist litigants, their attorneys, and family court judges.

B. Inclusion of Statutory Factors that Courts Shall Consider

All states should adopt delineated statutory factors to determine the best interests of the child. As detailed above, where states have not adopted any statutory best interests factors, family courts are either approaching cases on an individual basis or using judicially determined factors.[331] While a case-by-case approach allows for nearly unchecked judicial discretion, the appellate courts largely criticize this approach as highly subjective.[332] Alternatively, where courts commonly follow judicially determined factors, they are discretionary and not selectively considered by lower courts, with some courts even awarding best interests based on determination of only one factor.[333] Moreover, the judicially determined factors are primarily determined by one judge as opposed to legislative factors that result from democratic input with backing from state elected officials.

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326. *See, e.g.*, Dawn M. v. Michael M., 47 N.Y.S.3d 898, 902 (2017) (finding that a "tri-custodial arrangement" between the child's biological parents and biological father's wife was in the child's best interests because the child understood both women to be his mother and the biological father encouraged that bond); *see* Feinberg, *Boundaries*, *supra* note 75, at 329.

327. *See* Bartlett, *supra* note 3, at 944; Feinberg, *Boundaries*, *supra* note 75, at 329.

328. *See* Gaines, *supra* note 325; *see generally* Feinberg, *Custody*, *supra* note 75, at 3.

329. *See* Gaines, *supra* note 325, at 122; *see generally* Feinberg, *Custody*, *supra* note 75.

330. *See* Dawn M. v. Michael M., 47 N.Y.S.3d 898, 902 (N.Y. 2017); T.H. v. J.R., 84 N.Y.S.3d 676, 685 (N.Y. Fam. Ct. 2018); McAllister v. McAllister, 779 N.W.2d 652, 661 (N.D. 2010) ("The best interests of a [young] child . . . may not be well served by having him stay in three different homes with three different 'parents' each week.").

331. *See infra* Section III.A.

332. *See, e.g.*, *In re* Custody of Kali, 439 Mass. 834, 847 n. 13 (2003).

333. *See In re* E.A.D.P., No. 05–15—01210–0CV, 2016 WL 7449369, at *2 Tex. App. 2016; Divers v. Divers, 856 So.2d 370, 376 (Miss. Ct. App. 2003) (applying only one factor that weighed heavily over the remaining).

Similarly, the survey of case law exposes a comparable lack of inconsistency and lack of consideration of factors where states merely make consideration of statutory factors discretionary rather than mandatory.[334] Again, courts are largely given wide discretion to consider some, all, or none of the factors, leaving litigants and attorneys with no guidance as to how a court may analyze the facts of a particular case.

C. Requiring Findings of Fact for Factors

In addition to mandating statutory factors, statutes should be amended to require courts to make findings of fact as to each factor. The parameters for these findings of fact could be similar to the states that already require findings of fact. First, the court would not be required to enter findings of fact as to each factor in the majority of cases where parties are able to reach an agreement regarding custody determinations. Rather, the findings of fact would only be required in the small percentage of cases that require a family court ruling following a contested trial.

Further, a court may have the option of entering findings of fact in a written ruling or orally transcribing them within the court record. Both options preserve the goal of meaningful appellate review. Finally, courts can consider multiple factors at a time if similar evidence is relevant more than once.

D. Explicitly Addressing Extended Family Caregiving as a Factor

State statutes should explicitly adopt a factor directing courts to consider the history and nature of a child's relationship with extended family members. As an additional factor in a list, courts will still have discretion as to how much weight to afford the factor. However, inclusion of this factor alleviates the burden from the representing attorney to prove as a threshold matter that this should be a "relevant factor" in the court's analysis and answers the question for the trial court as to whether evidence relating to this factor should be considered.

In the seventeen states that already direct courts to consider interaction and relationships between children and any other person who may significantly affect the child's best interests, this may not require another separate factor but rather more clearly expanding the preexisting factor to clarify that it should include a consideration of other household members and extended family specifically.

E. Limitations

The addition of such a factor for the court's consideration would still be subject to the same fact-based inquiry and judicial discretion as to how much weight it should be afforded. Keeping with the purpose of the current factors across family law, the factors-based approach serves to guide, not limit, judicial discretion. This factor should not be automatically weighted any heavier or automatically considered

334. *See infra* Section III.B.

a "positive."[335] Further, considering the involvement of extended family in a child's upbringing and day-to-day needs should not replace the traditional inquiry of whether the parent is independently able to provide for the child's needs.[336]

Likewise, the addition of a factor directing courts to consider extended family-member or other household-member involvement should not, and in practice has not, precluded courts from considering the role of third parties in its analysis under other factors as well.[337] The role of extended family members likely would direct and inform analysis of other factors including stability of a child's home environment, a child's "home, school, and community"[338] or a child's physical and emotional health.[339]

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335. *See* Mongerson v. Mongerson, 678 S.E.2d 891, 894 (Ga. 2009) (affirming an order providing neither parent could exercise parenting time in the presence of the paternal grandparents, where they had been physically and emotionally abusive of the children, and Husband did not keep his oral promise that he would not leave the children alone with them); *see generally* Monacelli v. Monacelli, 296 A.2d 445 (D.C. 1972) (finding that extended family was a negative influence where extended family members would "instill fear in the children of their father").

336. *See, e.g.*, Marsden v. Koop, 789 N.W.2d 531, 537 (N.D. 2010) (describing how a lower court found that the presence of extended family added stability to the minor children's lives, but also found that Father was "very capable of providing the necessary care for his children without the assistance of his parents or others"); B.J.H. v. L.H., 779 S.W.2d 777, 780 (Mo. Ct. App. 1989) (considering the fact that Father resided with his father and sister, who could assist with care of the children, as a positive factor weighed against negative evidence against father).

337. *See, e.g.*, *Marsden*, 789 N.W.2d at 543.

338. As of January 1, 2023, twenty-six states and D.C. list a child's adjustment to their home, school, and community, as a statutory factor for courts to consider when determining best interests of the child. ARIZ. REV. STAT. ANN. § 25-403 (2011); COLO. REV. STAT. ANN. § 14-10-124 (West 2021); CONN. GEN. STAT. ANN. § 46b-55 (West 2021); D.C. CODE ANN. § 16-914 (West 2021); DEL. CODE ANN. tit. 13, § 722 (West 2022); FLA. STAT. ANN. § 61.13 (West 2021); GA. CODE ANN. § 19-9-3 (West 2022); IDAHO CODE ANN. § 32-717 (West 2022); 750 ILL. COMP. STAT. ANN. 5/602.7 (West 2022); IND. CODE ANN. § 31-14-13-2 (West 2022); KAN. STAT. ANN. § 23-3203 (West 2022); KY. REV. STAT. ANN. § 403.270 (West 2021); LA. CIV. CODE ANN. art. 134 (2018); ME. REV. STAT. ANN. tit. 19-A, § 1653 (2022); MINN. STAT. ANN. § 518.17 (West 2022); MICH. COMP. LAWS ANN. § 722.23 (West 2016); MO. REV. STAT. § 452.375 (2021); MONT. CODE. ANN. § 40-4-212 (West 2022); N.H. REV. STAT. ANN. § 461-A:6 (2022); N.D. CENT. CODE ANN. § 14-09-06.2(1)(d) (West 2023); N.M. STAT. ANN. § 40-4-9.1 (West 2022); OHIO REV. CODE ANN. § 3109.04 (West 2011); S.C. CODE ANN. § 63-15-240 (2012); S.D. CODIFIED LAWS § 25-4A-24 (2018); UTAH CODE ANN. § 30-3-10 (West 2019); VT. STAT. ANN. tit. 15, § 665 (West 2018); WIS. STAT. ANN. § 767.41(5) (West 2021).

339. As of January 1, 2023, twenty-nine states and D.C. list a child's physical or emotional health or needs of the children as a "best interests" factor. See ALASKA STAT. ANN. § 25.24.150 (West 2022); ARIZ. REV. STAT. ANN. § 25-403 (2011); CAL. FAM. CODE § 3011 (West 2023); COLO. REV. STAT. ANN. § 14-10-124 (West 2021); CONN. GEN. STAT. ANN. § 46B-55 (West 2021); D.C. CODE ANN. § 16-914 (West 2021); DEL. CODE ANN. tit. 13, § 722 (West 2022); HAW. REV. STAT. ANN. § 571-46 (West 2022); ILL. COMP. STAT. ANN. 5/602.7 (West 2022); IND. CODE ANN. § 31-14-13-2 (West 2022); IOWA CODE ANN. § 598.41 (West 2022); KAN. STAT. ANN. § 23-3203 (West 2022); KY. REV. STAT. ANN. § 403.270 (West 2021); ME. REV. STAT. ANN. tit. 19-A, § 1653 (2022); MD. CODE ANN., FAM. LAW § 9-204.1 (West 2020); MINN. STAT. ANN. § 518.17 (West 2022); MO. REV. STAT. § 452.375 (2021); MONT. CODE. ANN. § 40-4-212 (West 2022); NEB. REV. STAT. ANN. § 43-2923 (West 2022); NEV. REV. STAT. ANN. § 125C.0035 (West 2022); N.H. REV. STAT. ANN. § 461-A:6 (2022); N.J. STAT. ANN. § 9:2–4 (West 2022); N.D. CENT. CODE ANN. § 14-09-06.2(1)(k) (West 2023); S.C. CODE ANN. § 63-15-240 (2012); S.D. CODIFIED LAWS § 25-4A-24 (2018); TENN. CODE ANN. § 36-6-106 (2022); UTAH CODE ANN. § 30-3-10 (West 2019); VT. STAT. ANN. tit. 15, § 665 (West 2018); WASH. REV.

Further, there should be flexibility where a court does explicitly indicate it considered the factors in depth as outlined in a document outside of the judgment. In the Illinois case of *In re Marriage of Whitehead*, the appellate court affirmed the trial court's decision despite it not containing written findings of fact as to each factor where the court indicated in a letter to the parties that it considered all evidence, including a lengthy report of the guardian ad litem that analyzed the factors in depth.[340] Under these circumstances, the policy concerns are met by requiring the court to undergo the analysis of each statutory factor even if it is not explicitly contained within the final divorce decree.[341]

F. Addressing Potential Criticisms

1. Burden on the Judiciary

One potential criticism of mandating statutory factors and adding of another statutory factor is that this places too great of a burden on an already bogged-down family court system. However, in many of these circumstances, the court is already hearing a substantial amount, if not all, of the same testimony once the case is before a judge or jury for trial. Further, the discussion above highlights multiple cases where the court reversed and remanded cases that went up on appeal because of the court's failure to articulate the evidence and factors in factual findings precluded appellate review.[342] Even in states like Washington, where the legislature enacted its statutory factors in 2007, recent appellate court decisions have begun remanding cases back to the trial courts when they fail to provide written findings or an oral ruling on the record behind each statutory factor.[343] This places a substantial burden on the trial court judge, attorneys, and litigants on remand. Further, mandating findings of fact as to each factor provides greater guidance to litigants and their respective attorneys when weighing the potential option of appealing the trial court's decision. Since the trial court's findings of fact and conclusions of law are afforded substantial deference on appeal, providing specific information as to the evidence considered will disincentivize litigants who would otherwise appeal vague judgments. In states that do not require consideration of factors or findings of fact, trial courts nevertheless consistently apply factors in their analysis and hear evidence regarding each factor.[344] Likewise, appellate courts uniformly are imploring trial

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CODE ANN. § 26.09.002 (West 2007); WIS. STAT. ANN. § 767.41(5) (West 2021).

340. *See In re* Marriage of Whitehead and Newcomb-Whitehead, 97 N.E.3d 566, 570 (Ill. App. Ct. 2018).

341. *See id.*

342. *See* Sadler v. Pulliam, 2022 Ill. App. (5th) 22021; Fitzgerald v. Fitzgerald, 976 S.W.2d 956, 957 (Ark. Ct. App. 1998). *In re* Marriage of Lawrence, 112 P.3d 1036, 1039 (Mont. 2005); Weems v. Winn, 358 P.3d 322, 324 (Or. Ct. App. 2015).

343. *See In re* Matter of the Marriage of Branning, No. 35735-0-III, 2019 WL 6611613, at *1 (Wash. App. Dec. 5, 2019).

344. *See* Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983); Eschbach v. Eschbach, 436 N.E.2d 1260 (N.Y. 1982); Krebsbach v. Gallagher, 181 A.D.2d 363, 364 (N.Y. 1992); Pettinato v.

courts to make findings of fact to aid in their review of cases.[345]

2. Disadvantaging Parents Without Extended Family

Courts should consider the availability of extended family under the particular case's circumstances, which may be positive or negative. Likewise, a court's consideration of the availability of additional family support should not be weaponized against a parent who does not have available family members.

New York courts have highlighted circumstances under which extended family could be viewed as a negative factor against a parent, including where the extended family member had bad prior conduct, such as, in an extreme example, "assisting . . . these [minor] children to curse their mother, make fun of her, and degrade her in vile and inappropriate ways that no parent or anyone should ever be subjected to."[346]

Further, a parent should not be placed at a disadvantage where they rely on other childcare options like daycare instead of an extended family member's care. In application, courts have reversed rulings where a trial court denied a parent custody solely due to lack of extended family care. In *W.C.F. v. M.G.*, a Pennsylvania case, the trial court denied a request to modify primary custody because it found it would be "disruptive to a child" if Father would have to rely upon third-party childcare and Mother could continue to rely upon her own mother to assist.[347] On appeal, the majority rejected this analysis, finding the grandmother had not supported Father's involvement with the child and it would "be beneficial for the child to be in contact with other children on a regular basis and to be among adults other than Mother's family members."[348]

Rather, courts should just consider a child's connection with an extended family member as one factor among the other "best interests" factors. As an example, in Delaware, one of the states that mandate consideration of extended family members discussed above, the state's family court weighs and analyzes the evidence in favor of extended family among its analysis of all the other statutory factors.[349]

3. "Conditional" Custody

Courts should avoid "conditional" awards of custody, wherein one parent is granted more parenting time than another conditioned on that parent continuing to reside with a family member. Conversely, courts also should not enter orders speculating whether granting one parent custody is in a child's best interests if a

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Pettinato, 582 A.2d 909, 913 (R.I. 1990); Holley v. Adams, 544 S.W.2d 367, 372 (Tex. 1976).

345. *See* Jones v. Lang, 591 A.2d 185, 188 (Del. 1991); Schwieterman v. Schwieterman, 114 So. 3d 984, 988 (Fla. 2012).

346. *See* G.K. v. L.K., 872 N.Y.S.2d 690 (Sup. Ct. 2008).

347. *See* W.C.F. v. M.G., 115 A.3d 323, 329–30 (Pa. Super. 2015).

348. *See id.* at 331.

349. *See, e.g.*, Irwin v. Shelby, 210 A.3d 705, 712 (Del. 2019).

parent stopped having available extended family care. In *Deyle v. Deyle*, the Supreme Court of North Dakota found such an order by a trial court was clearly erroneous where the trial court awarded Father custody based on the fact that Mother may move away and stop residing with her parents.[350] Courts should continue to base their "best interests" determinations on the facts before the court rather than making assumptions on what the best interests of the child may be in the event the extended family support or connections were no longer available.

Similarly, in *Bratton v. Holland*, the Supreme Court of Vermont reversed a trial court's ruling awarding primary custody to Mother where it found the trial court "improperly allowed grandfather's relationship with the child to permeate other best interests factors."[351] The Supreme Court of Vermont found that the trial court improperly compared Father to Mother by assuming the maternal grandfather would continue to have significant childcare responsibilities.[352] The court found that without the maternal grandfather in the picture, the factors that the court found weighed in favor of Mother "would quickly evaporate."[353] This opinion suggests that courts should avoid awarding custody to one parent solely conditioned on a relative's continued involvement in child care.[354]

4. The Interplay of Joint Custody Presumptions

Twenty-three states and the District of Columbia have statutory presumptions that awarding joint custody is in the best interests of the child.[355] Inherent in this presumption is an underlying assumption that the joint custody arrangement is between a child's two legal parents. The court's analysis of a statutory factor to consider extended family members should be separate from the joint custody presumption, just as current analysis of "best interests" factors is separate from the presumption. Instead, following application of the presumption, courts should analyze the totality of circumstances after weighing each statutory factor in

350. *See* Deyle v. Deyle, 825 N.W.2d 245, 255 (N.D. 2012).

351. *See* Bratton v. Holland, 192 A.3d 1257, 1263 (Vt. 2018).

352. *See id.*

353. *See id.* at 1261.

354. *See id.* at 1263 (finding that Mother "alone" would not do as well as Father in providing for the minor child's needs because she "delegated" her parental responsibilities to maternal grandfather).

355. As of January 1, 2023. *See* Ala. Code § 30-3-131 (2022); Ala. Code § 30-3-133 (2022); ALASKA STAT. § 25.24.150(h) (West 2022); ARIZ. REV. STAT. ANN. § 25-403.03(D) (2022); Ark. Code Ann. § 9-13-101(c)(2) (2009); CAL. FAM. CODE § 3044(a) (West 2004); DEL. CODE ANN. TIT. 13, § 705A (West 2007); D.C. CODE § 16-914(a)(2) (West 2016); FLA. STAT. ANN. § 61.13(2)(c)(2) (West 2021); HAW. REV. STAT. ANN. § 571-46(9) (West 2022); IDAHO CODE ANN. § 32-717B(5) (West 2022); IOWA CODE ANN. § 598.41(1)(b) (West 2019); LA. STAT. ANN. § 9:364(A) (2018); MASS. GEN. LAWS CH. 208, § 31A (West 2012); MINN. STAT. ANN. § 518.17 (West 2022); MISS. CODE ANN. § 93-5-24(9)(a)(i) (West 2022); MO. REV. STAT. § 455.050(5) (2022); NEV. REV. STAT. ANN. § 125C.230(1) (West 2020); N.D. CENT. CODE § 14-09-06.2(j) (West 2021); OKLA. STAT. ANN. tit. 43, § 112.2 (West 2021); OR. REV. STAT. § 107.137(2) (West 2022); S.D. CODIFIED LAWS § 25-4-45.5 (2018); TENN. CODE ANN. § 36-6-101(a)(4) (West 2021); TEX. FAM. CODE ANN. § 153.004(d) (West 2017); WIS. STAT. ANN. § 767.41(2)(d)(1) (West 2022).

determining whether the presumption is rebutted.

5. No Impact on Child Support

Finally, consideration of the role and connection extended family members and any childcare should generally not have any impact on calculation of a parent's child support obligation. In the minority of states where courts do not consider parenting time in their child support calculations, this is automatically a nonissue.[356] In the remaining states, the majority only adjusts child support calculations due to parenting time depending on the number of overnights a parent exercises.[357] In these states, under the rare circumstances where an extended family member provides regular childcare on an overnight basis at their own expense, courts may consider this as a possible reason to deviate from the presumptive guideline child support amount.[358] However, courts would still have discretion to decide the amount of deviation, if any.

CONCLUSION

The mid-twentieth century signaled a triumph for all states with the universal adoption of the "best interests of the child" standard. However, in the decades since, what was lauded as a universally adopted standard has failed in practice to adequately adapt to the evolving and expanding family. More importantly, the standard is failing to serve children's best interests by largely excluding non-nuclear family members from courts' consideration. This negatively impacts children's stability and exacerbates their depression and grief post-separation.[359] Rather than eliminate the "best interests" standard altogether, it is still possible to fine-tune the standard based on the best practices from all fifty states to achieve the balance between predictability and flexibility that was originally contemplated. By codifying the factors-based approaches courts are already following in practice, we can set family courts up for success not only when analyzing custody cases involving extended family members, but also additional third parties and parents.

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356. *See, e.g.*, HAW. REV. STAT. ANN. § 576D-7 (West 2022); TEX. FAM. CODE ANN. § 154.125 (West 2021).

357. *See* ARK. CODE ANN. § 9-12-312 (West 2020); FLA. STAT. ANN. § 61.30 (West 2021); 750 ILL. COMP. STAT. ANN. 5/505 (West 2022); OKLA. STAT. ANN. tit. 43, § 118 (West 2023).

358. *See generally* Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 16 NEV. L.J. 743, 754 (2016); Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J.L. & GENDER 217, 225–26 (2010).

359. *See* Bartlett*, supra* note 3, at 907.

TABLE A:
TABLE OF STATES THAT ADOPT STATUTORY FACTORS-BASED APPROACHES FOR SPOUSAL MAINTENANCE/ALIMONY, PROPERTY DISTRIBUTION, AND CUSTODY (AS OF JANUARY 1, 2023)

State	Statutory Factors for Spousal Maintenance/Alimony?	Statutory Factors for Property Distribution?	Statutory Factors for Custody?
Alabama			X[360]
Alaska	X[361]	X[362]	X[363]
Arizona	X[364]		X[365]
Arkansas		X[366]	
California	X[367]		X[368]
Colorado	X[369]	X[370]	X[371]
Connecticut	X[372]	X[373]	X[374]
D.C.	X[375]	X[376]	X[377]
Delaware	X[378]	X[379]	X[380]
Florida	X[381]	X[382]	X[383]
Georgia	X[384]		X[385]

360. ALA. CODE § 30-3-152 (2022). Notably, Alabama has very limited factors for courts to consider when making custody determinations.
361. ALASKA STAT. ANN. § 25.24.160 (West 2022).
362. ALASKA STAT. ANN. § 25.24.160 (West 2022).
363. ALASKA STAT. ANN. § 25.24.150 (West 2022).
364. ARIZ. REV. STAT. ANN. § 25-319 (2022).
365. ARIZ. REV. STAT. ANN. § 25-403 (2013).
366. ARK. CODE ANN. § 9-12-315 (West 2022).
367. CAL. FAM. CODE § 4320 (West 2019).
368. CAL. FAM. CODE § 3011 (West 2023).
369. COLO. REV. STAT. ANN. § 14-10-114 (West 2018).
370. COLO. REV. STAT. ANN. § 14-10-113 (West 2023).
371. COLO. REV. STAT. ANN. § 14-10-124 (West 2021).
372. CONN. GEN. STAT. ANN. § 46B-82(A) (West 2013).
373. CONN. GEN. STAT. ANN. § 46B-81 (West 2013).
374. CONN. GEN. STAT. ANN. § 46b-56 (West 2022).
375. D.C. CODE ANN. § 16-913 (West 2016).
376. D.C. CODE ANN. § 16-910 (West 2016).
377. D.C. CODE ANN. § 16-914 (West 2021).
378. DEL. CODE ANN. tit. 13 § 1512 (West 2022).
379. DEL. CODE ANN. tit. 13 § 1513 (West 2016).
380. DEL. CODE ANN. tit. 13 § 722 (West 2004).
381. FLA. STAT. ANN. § 61.08 (West 2011).
382. FLA. STAT. ANN. § 61.075(1) (West 2018).
383. FLA. STAT. ANN. § 61.13 (West 2021).
384. GA. CODE ANN. § 19-6-5 (West 2022).
385. GA. CODE ANN. § 19-9-3 (West 2022).

State	Statutory Factors for Spousal Maintenance/Alimony?	Statutory Factors for Property Distribution?	Statutory Factors for Custody?
Hawaii	X[386]	X[387]	X[388]
Idaho	X[389]	X[390]	X[391]
Illinois	X[392]	X[393]	X[394]
Indiana	X[395]	X[396]	X[397]
Iowa	X[398]	X[399]	X[400]
Kansas		X[401]	X[402]
Kentucky	X[403]	X[404]	X[405]
Louisiana	X[406]		X[407]
Maine	X[408]	X[409]	X[410]
Maryland	X[411]	X[412]	X[413]
Massachusetts	X[414]	X[415]	
Michigan[416]			X[417]

386. HAW. REV. STAT. ANN. § 580-47 (West 2022).
387. HAW. REV. STAT. ANN. § 580-47 (West 2022).
388. HAW. REV. STAT. ANN. § 571-46 (West 2022).
389. IDAHO CODE ANN. § 32-705 (West 2022).
390. IDAHO CODE ANN. § 32-712 (West 2022).
391. IDAHO CODE ANN. § 32-717 (West 2022).
392. 750 ILL. COMP. STAT. ANN. § 5/504 (West 2019).
393. 750 ILL. COMP. STAT. ANN. § 5/503 (West 2019).
394. 750 ILL. COMP. STAT. ANN. §§ 5/602.5, 5/602.7 (West 2016).
395. IND. CODE ANN. § 31-15-7-2 (West 2022).
396. IND. CODE ANN. §§ 31-15-7-4, 31-15-7-5 (West 2022).
397. IND. CODE ANN. § 31-14-13-2 (West 2022).
398. IOWA CODE § 598.21A (West 2022).
399. IOWA CODE § 598.21 (West 2009).
400. IOWA CODE § 598.41 (West 2019).
401. KAN. STAT. ANN. § 23-2802 (West 2022).
402. KAN. STAT. ANN. § 23-3203 (West 2022).
403. KY. REV. STAT. ANN. § 403.200 (West 2022).
404. KY. REV. STAT. ANN. § 403.190 (West 2022).
405. KY. REV. STAT. ANN. § 403.270 (West 2021).
406. LA. CIV. CODE ANN. art. 112 (2018).
407. LA. CIV. CODE ANN. art. 134 (2022).
408. ME. REV. STAT. ANN. tit. 19-A § 951-A (2021).
409. ME. REV. STAT. ANN. tit. 19-A § 953 (2021).
410. ME. REV. STAT. ANN. tit. 19-A § 1653 (2022).
411. MD. CODE ANN., FAM. LAW § 11-106 (West 2022).
412. MD. CODE ANN., FAM. LAW § 8-205 (West 2022).
413. MD. R. FAM. LAWS. ACT. R. § 9-204.1 (West 2022).
414. MASS. GEN. LAWS. ANN. ch. 208 § 53 (West 2012).
415. MASS. GEN. LAWS. ANN. ch. 208 § 34 (West 2012).
416. Instead of statutory factors for property distribution, Michigan courts primarily follow judicially determined factors set forth in case law, specifically, *Sparks v. Sparks*, 485 N.W.2d 893, 901 (Mich. 1992).
417. MICH. COMP. LAWS ANN. § 722.23 (West 2016).

State	Statutory Factors for Spousal Maintenance/Alimony?	Statutory Factors for Property Distribution?	Statutory Factors for Custody?
Minnesota	X[418]	X[419]	X[420]
Mississippi[421]			
Missouri	X[422]	X[423]	X[424]
Montana	X[425]	X[426]	X[427]
Nebraska	X[428]	X[429]	X[430]
Nevada	X[431]	X[432]	X[433]
New Hampshire	X[434]	X[435]	X[436]
New Jersey	X[437]	X[438]	X[439]
New Mexico	X[440]		X[441]
New York	X[442]	X[443]	
North Carolina	X[444]	X[445]	X[446]
North			X[448]

418. MINN. STAT. ANN. § 518.552 (West 2016).
419. MINN. STAT. ANN. § 518.58 (West 2010).
420. MINN. STAT. ANN. § 518.17 (West 2022).
421. Instead of factors for custody determination, Mississippi courts primarily follow judicially determined factors set forth in case law, specifically, *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983).
422. MO. REV. STAT. § 452.335 (2022).
423. MO. REV. STAT. § 452.330 (2022).
424. MO. REV. STAT. § 452.375 (2022).
425. MONT. CODE. ANN. § 40-4-203 (West 2022).
426. MONT. CODE. ANN. § 40-4-202 (West 2022).
427. MONT. CODE. ANN. § 40-4-212 (West 2022).
428. NEB. REV. STAT. ANN. § 42-365 (West 2022).
429. NEB. REV. STAT. ANN. § 42-365 (West 2022).
430. NEB. REV. STAT. ANN. § 43-2923 (West 2022).
431. NEV. REV. STAT. ANN. § 125.150 (West 2020).
432. NEV. REV. STAT. ANN. § 125.150 (West 2020).
433. NEV. REV. STAT. ANN. § 125C.0035 (West 2015).
434. N.H. REV. STAT. ANN. § 458:19-A (2021).
435. N.H. REV. STAT. ANN. § 458:16-A (2023).
436. N.H. REV. STAT. ANN. § 461-A:6 (2023).
437. N.J. STAT. ANN. § 2A:34-23 (West 2014).
438. N.J. STAT. ANN. §§ 2A:34-23, 2A:34-23.1 (West 2009).
439. N.J. STAT. ANN. § 9:2-4 (West 2022).
440. N.M. STAT. ANN. § 40-4-7 (West 2022).
441. N.M. STAT. ANN. § 40-4-9.1 (West 2022).
442. N.Y. DOM. REL. LAW § 236B(6) (McKinney 2021).
443. N.Y. DOM. REL. LAW § 236B(5) (McKinney 2021).
444. N.C. GEN. STAT. ANN. § 50-16.3A (West 2022).
445. N.C. GEN. STAT. ANN. § 50-20 (West 2013).
446. N.C. GEN. STAT. ANN. § 50-13.2 (West 2022).
448. N.D. CENT. CODE ANN. § 14-09-06.2 (West 2022).

State	Statutory Factors for Spousal Maintenance/Alimony?	Statutory Factors for Property Distribution?	Statutory Factors for Custody?
Dakota[447]			
Ohio	X[449]	X[450]	X[451]
Oklahoma[452]			
Oregon	X[453]		X[454]
Pennsylvania	X[455]	X[456]	X[457]
Rhode Island[458]	X[459]	X[460]	
South Carolina	X[461]	X[462]	X[463]
South Dakota			X[464]
Tennessee	X[465]	X[466]	X[467]

447. North Dakota Century Code Annotated section 14-05-24 (West 2021) provides a court shall equitably distribute property but does not set forth factors. Rather, North Dakota courts primarily follow judicially determined factors set forth in two North Dakota Supreme Court cases, *Ruff v. Ruff*, 52 N.W.2d 107, 111 (N.D. 1952) and *Fischer v. Fischer*, 139 N.W.2d 845, 852 (N.D. 1966) (creating "the Ruff-Fischer guidelines").

449. OHIO REV. CODE ANN. § 3105.18 (West 2013).

450. OHIO REV. CODE ANN. § 3105.171 (West 2015).

451. OHIO REV. CODE ANN. § 3109.04 (West 2011).

452. Instead of statutory factors for property distribution, Oklahoma courts primarily follow judicially determined factors set forth in case law, specifically, *Stansberry v. Stansberry*, 580 P.2d 147, 149 (1978). For custody determinations, although Oklahoma does not have a delineated list of statutory factors, it does consider in separate statutes the preference of the child (43 OKLA. STAT. ANN. tit. 43, § 113 (West 2023)), prior domestic abuse (43 OKLA. STAT. ANN. tit. 43, § 110.1 (West 2021)), whether the parents suffer from alcohol and drug dependency (43 OKLA. STAT. ANN tit. 43, § 112.5 (West 2023)), and whether either of the parties is a convicted sex offender or convicted of a crime against children (43 OKLA. STAT. ANN tit. 43, § 112.5 (West 2023)).

453. OR. REV. STAT. ANN. § 107.105 (West 2022).

454. OR. REV. STAT. ANN. § 107.137 (West 2022).

455. 23 PA. STAT. AND CONS. STAT. ANN. § 3701 (West 2022).

456. 23 PA. STAT. AND CONS. STAT. ANN. § 3502 (West 2005).

457. 23 PA. STAT. AND CONS. STAT. ANN. § 5328 (West 2014).

458. Instead of factors for custody determination, Texas courts primarily follow judicially determined factors set forth in case law, specifically, *Pettinato v. Pettinato*, 582 A.2d 909, 913 (R.I. 1990).

459. 15 R.I. GEN. LAWS ANN. § 15-5-16 (West 2023).

460. 15 R.I. GEN. LAWS ANN. § 15-5-16.1 (West 2023).

461. S.C. CODE ANN. § 20-3-130 (2023).

462. S.C. CODE ANN. § 20-3-620 (2008).

463. S.C. CODE ANN. § 63-15-240 (2012).

464. S.D. CODIFIED LAWS § 25-4A-24 (2018).

465. TENN. CODE ANN. § 36-5-121 (West 2022).

466. TENN. CODE ANN. § 36-4-121 (West 2022).

467. TENN. CODE ANN. § 36-6-106 (West 2022).

State	Statutory Factors for Spousal Maintenance/Alimony?	Statutory Factors for Property Distribution?	Statutory Factors for Custody?
Texas[468]	X[469]		
Utah	X[470]		X[471]
Vermont	X[472]	X[473]	X[474]
Virginia	X[475]	X[476]	X[477]
Washington	X[478]	X[479]	X[480]
West Virginia	X[481]	X[482]	X[483]
Wisconsin	X[484]	X[485]	X[486]
Wyoming		X[487]	X[488]
TOTAL	**41 + D.C.**	**36 + D.C.**	**43 + D.C.**

468. Instead of statutory factors for property distribution, Texas courts primarily follow judicially determined factors set forth in case law, specifically, *Murff v. Murff*, 615 S.W.2d 696 (1981). Instead of statutory factors for custody determination, Texas courts primarily follow judicially determined factors set forth in case law, specifically, *Holley v. Adams,* 544 S.W.2d 367, 372 (Tex. 1976).

469. TEX. FAM. CODE ANN. § 8.052 (West 2011).

470. UTAH CODE ANN. § 30-3-5 (West 2022).

471. UTAH CODE ANN. § 30-3-10 (West 2019).

472. VT. STAT. ANN. tit. 15 § 752 (West 2019).

473. VT. STAT. ANN. tit. 15 § 751 (West 2022).

474. VT. STAT. ANN. tit. 15 § 665 (West 2018).

475. VA. CODE ANN. § 20-107.1 (West 2021).

476. VA. CODE ANN. § 20-107.3 (West 2022).

477. VA. CODE ANN. § 20-124.3 (West 2020).

478. WASH. REV. CODE ANN. § 26.09.090 (West 2008).

479. WASH. REV. CODE ANN. § 26.09.080 (West 2008).

480. WASH. REV. CODE ANN. § 26.09.187 (West 2007).

481. W. VA. CODE ANN. § 48-6-301; 48-6-104 (West 2022).

482. W. VA. CODE ANN. § 48-7-103 (West 2023).

483. W. VA. CODE ANN. § 48-9-102 (West 2022).

484. WIS. STAT. ANN. § 767.56 (West 2022).

485. WIS. STAT. ANN. § 767.61 (West 2022).

486. WIS. STAT. ANN. § 767.41(5) (West 2022).

487. WYO. STAT. ANN. § 20-2-114 (West 2023).

488. WYO. STAT. ANN. § 20-2-201 (West 2023).

TABLE B:

TABLE OF STATES THAT MANDATE CONSIDERATION OF STATUTORY "BEST INTERESTS OF THE CHILD" FACTORS VS. DISCRETIONARY CONSIDERATION AND REQUIRE FINDINGS OF FACT AS TO EACH FACTOR

(AS OF JANUARY 1, 2023)

State	Requires Consideration of Statutory Best Interests of the Child Factors[489]	Discretionary Consideration of Statutory Best Interests of the Child Factors (May)[490]	No Statutory Best Interests of the Child Factors[491]	Requires Findings of Fact as to Each Factor[492]	Requires Findings of Fact on Limited Factor(s)[493]
Alabama[494]	X				
Alaska[495]	X				
Arizona[496]	X			X	
Arkansas[497]			X		
California[498]	X			X[499]	
Colorado[500]	X				
Connecticut[501]		X			
Delaware[502]	X				

489. Statutes governing "best interests of the child" provide courts *shall* consider all delineated "best interests of the child" factors.

490. Statutes governing "best interests of the child" provide courts *may* consider all delineated "best interests of the child" factors.

491. Statutes do not have delineated statutory "best interests" factors.

492. Statutes setting forth "best interests of the child" require findings of fact as to each delineated factor, often absent an agreement of the parties. Alternatively, statute requires findings of fact only when requested by the parties.

493. Statutes require specific findings of fact on some, but not all of the "best interests" factors.

494. ALA. CODE § 30-3-152 (2022).

495. ALASKA STAT. ANN. § 25.24.150 (West 2022).

496. ARIZ. REV. STAT. ANN. § 25-403 (2013).

497. ARK. CODE ANN. § 9-13-101 (2023).

498. CAL. FAM. CODE § 3044 (West 2022).

499. *See* Jaime G. v. H.L., 25 Cal. Rptr. 3d 209 (2018) ("'This 'in writing or on the record' requirement [in section 3044] is most reasonably interpreted to require specific mention of each of the seven section 3044 factors.").

500. COLO. REV. STAT. ANN. § 14-10-124 (West 2021).

501. CONN. GEN. STAT. ANN. § 46b-55 (West 2022).

502. DEL. CODE ANN. tit. 13, § 722 (West 2022). However, the Supreme Court of Delaware has established a preference that lower courts explicitly reference each factor in determining what is in the best interests of the child. *See* Tatum v. Yost, 931 A.2d 438 (Del. 2007) ("It is generally preferable for the Family Court to explicitly refer to the statutory factors of Section 722 when determining the best interests of a child.").

State	Requires Consideration of Statutory Best Interests of the Child Factors[489]	Discretionary Consideration of Statutory Best Interests of the Child Factors (May)[490]	No Statutory Best Interests of the Child Factors[491]	Requires Findings of Fact as to Each Factor[492]	Requires Findings of Fact on Limited Factor(s)[493]
District of Columbia[503]	X			X[504]	
Florida[505]	X				X[506]
Georgia[507]		X		[508]	
Hawaii[509]	X				X[510]
Idaho[511]	X				
Illinois[512]	X				
Indiana[513]	X				
Iowa[514]	X			X	
Kansas[515]	X			X	
Kentucky[516]	X			X[517]	
Louisiana[518]	X				

503. D.C. CODE ANN. § 16-914 (West 2021).

504. D.C. CODE ANN. § 16-914(j) (West 2021) ("The Court shall place on the record the specific factors and findings which justify any custody arrangement not agreed to by both parents.").

505. FLA. STAT. STAT. ANN. § 61.13 (West 2021).

506. Trial courts are required to make a specific finding of detriment to the child before awarding sole parental responsibility. FLA. STAT. ANN. § 61.13 (West 2021).

507. GA. CODE ANN. § 19-9-3 (West 2022).

508. Written findings of fact only required if requested by parties. Wilson v. Wilson, 792 S.E.2d 139 (Ga. Ct. App. 2016).

509. HAW. REV. STAT. ANN. § 571-46 (West 2022).

510. HAW. REV. STAT. ANN. § 571-46(a)(16) (West 2022).

511. IDAHO CODE ANN. § 32-717 (West 2022).

512. 750 ILL. COMP. STAT. ANN. 5/602.7 (West 2016).

513. IND. CODE ANN. § 31-14-13-2 (West 2022).

514. IOWA CODE ANN. § 598.41 (West 2019).

515. KAN. STAT. ANN. § 23-3203 (West 2022).

516. KY. REV. STAT. ANN. § 403.270 (West 2021).

517. Statute requires written findings of fact. "CR 52.01 requires that the judge engage in at least a good faith effort at fact-finding and that the found facts be included in a written order. Failure to do so allows an appellate court to remand the case for findings, even where the complaining party failed to bring the lack of specific findings to the trial court's attention." Anderson v. Johnson, 350 S.W.3d 453, 458 (Ky. 2011).

518. LA. CIV. CODE ANN. art. 134 (2018). In practice, some courts read the statutory language as only requiring courts to consider whatever factors they find "relevant," rather than considering all of the factors. *See, e.g.*, Council v. Livingston, 2019-CA-1049, p. 10 (La. App. 4 Cir. 3/13/20), 10, writ denied, 2020-CJ-00753 (La. 7/10/20), 298 So. 3d 178 (quoting Braud v. Braud, 18-CA-0874, p. 5 (La. App. 4 Cir. 12/12/18), 261 So. 3d 950, 954).

State	Requires Consideration of Statutory Best Interests of the Child Factors[489]	Discretionary Consideration of Statutory Best Interests of the Child Factors (May)[490]	No Statutory Best Interests of the Child Factors[491]	Requires Findings of Fact as to Each Factor[492]	Requires Findings of Fact on Limited Factor(s)[493]
Maine[519]	X			[520]	X[521]
Maryland[522]		X			
Massachusetts[523]			X		
Michigan[524]	X			X	
Minnesota[525]	X			X	
Mississippi[526]			X		
Missouri[527]	X				X
Montana[528]	X				
Nebraska[529]	X				
Nevada[530]	X				
New Hampshire[531]	X				
New Jersey[532]	X			X[533]	

519. ME. REV. STAT. ANN. tit. 19-A, § 1653 (2022).

520. Burden is on the parties to file motions for findings of fact and conclusions of law pursuant to MONT. R. CIV. P. 52(a). In the absence of such a motion, the court assumes there was competent evidence to support the order. *See* Powell v. Powell, 645 A.2d 622, 623–24 (Me. 1994).

521. ME. REV. STAT. ANN. tit. 19-A § 1653.2 (O) (2023) ("A parent's prior willful misuse of the protection from abuse process . . . in order to gain a tactical advantage in a proceeding involving the determination of parental rights and responsibilities of a minor child . . . The court shall articulate findings of fact whenever relying upon this factor as part of its determination of a child's best interest.").

522. MD. CODE ANN., FAM. LAW § 9-204.1 (West 2023).

523. MASS. GEN. LAWS ANN. ch. 208 § 31 (West 2022); MASS. GEN. LAWS ANN. ch. 209C, § 10 (West 2014).

524. MICH. COMP. LAWS. ANN. § 722.23 (West 2016).

525. MINN. STAT. ANN. § 518.17 (West 2022).

526. MISS. CODE. ANN. § 93-5-24 (2023).

527. MO. REV. STAT. § 452.375 (2021).

528. MONT. CODE ANN. § 40-4-212 (West 2023).

529. NEB. REV. STAT. ANN. § 43-2923 (West 2022).

530. NEV. REV. STAT. ANN. § 125C.0035 (West 2015).

531. N.H. REV. STAT. ANN. § 461-A:6 (2023).

532. N.J. STAT. ANN. § 9:2-4 (West 2023).

533. N.J. STAT. ANN. § 9:2-4 (West 2023) ("[T]he court shall specifically place on the record the factors which justify any custody arrangement not agreed to by both parents.").

State	Requires Consideration of Statutory Best Interests of the Child Factors[489]	Discretionary Consideration of Statutory Best Interests of the Child Factors (May)[490]	No Statutory Best Interests of the Child Factors[491]	Requires Findings of Fact as to Each Factor[492]	Requires Findings of Fact on Limited Factor(s)[493]
New Mexico[534]	X				X[535]
New York[536]			X		
North Carolina[537]	X			X[538]	
North Dakota[539]	X				
Ohio[540]	X				X
Oklahoma[541]			X		
Oregon[542]	X				
Pennsylvania[543]	X				
Rhode Island[544]			X		
South Carolina[545]		X			
South Dakota[546]	X			X	
Tennessee[547]	X				

534. N.M. STAT. ANN. § 40-4-9; § 40-4-9.1 (West 2023).

535. N.M. STAT. ANN. § 40-4-9.1(B)(9) (West 2023) ("Whether a judicial adjudication has been made in a prior or the present proceeding that either parent or other person seeking custody has engaged in one or more acts of domestic abuse against the child, a parent of the child or other household member. If a determination is made that domestic abuse has occurred, the court shall set forth findings that the custody or visitation ordered by the court adequately protects the child, the abused parent or other household member.").

536. N.Y. DOM. REL. LAW § 240 (McKinney 2020).

537. N.C. GEN. STAT. ANN. § 50-13.2 (West 2023).

538. N.C. GEN. STAT. ANN. § 50-13.2 (West 2023). ("An order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child.").

539. N.D. CENT. CODE ANN. § 14-09-06.2 (West 2023).

540. OHIO REV. CODE ANN. § 3109.04 (West 2011).

541. OKL. STAT. ANN. tit. 43, § 112 (West 2023).

542. OR. REV. STAT. ANN. § 107.137 (West 2022).

543. PA. CONS. STAT. § 5328 (2022).

544. 14 R.I. GEN. LAWS ANN. § 14-1-37 (West 2023).

545. S.C. CODE ANN. § 63-15-240 (2012).

546. S.D. CODIFIED LAWS § 25-4A-24 (2018).

547. TENN. CODE ANN. § 36-6-106 (West 2022).

State	Requires Consideration of Statutory Best Interests of the Child Factors[489]	Discretionary Consideration of Statutory Best Interests of the Child Factors (May)[490]	No Statutory Best Interests of the Child Factors[491]	Requires Findings of Fact as to Each Factor[492]	Requires Findings of Fact on Limited Factor(s)[493]
Texas[548]			X		
Utah[549]		X			
Vermont[550]	X			X	
Virginia[551]	X			X	
Washington[552]	X				X[553]
West Virginia[554]	X				
Wisconsin[555]	X			X	
Wyoming[556]	X				

548. TEX. FAM. CODE ANN. § 153.002 (West 2021). Texas has codified statutory best interests factors for courts to specifically consider when appointing parents joint managing conservators of a child, but not as to domicile, possession and access. TEX. FAM. CODE ANN. § 153.134 (West 2005). *In re* Matter of Marriage of Christensen, 570 S.W.3d 933, 938 n. 7 (Tex. App. 2019).

549. UTAH CODE ANN. § 30-3-10 (West 2019).

550. 15 VT. STAT. ANN. tit. 15, § 665 (West 2018).

551. VA. CODE ANN. § 20-124.3 (West 2020).

552. WASH. REV. CODE ANN. § 26.09.002 (West 2007).

553. Courts have found the trial court must articulate and consider any disputed residential factors either in its written findings or in its oral comments. *In re* Marriage of Branning & Branning, 11 Wash. App. 1038 (2019).

554. W. VA. CODE ANN. § 48-9-102 (West 2022).

555. WIS. STAT. ANN. § 767.41(5) (West 2022).

556. WYO. STAT. ANN. § 20-2-201 (West 2018).