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- The Journal wishes to thank Judge Edward Ginsburg for his continuing support and Attorney Matthew P. Barach and Allison R. Smith, J.D. Candidate for their contributions to this issue of the Journal.

EDITOR’S NOTE: Attorney Elizabeth J. Angeley is an associate with the Lynnfield firm of Godson Legal Group P.C. She is a graduate of New England School of Law and focuses on divorce and custody cases. As always, we encourage the readership to submit articles and decisions of interest for publication. Please forward articles or decisions to Elizabeth J. Angeley, Esq., at Godson Legal Group L.L.P. 210 Broadway, Suite 202, Lynnfield, MA 01940 or ehall@bostonllp.com.

A MISTRIAL IN THE PROBATE COURT

By
Matthew P. Barach*

A recent decision in the Norfolk County Probate Court granting a mistrial addressed a unique issue of what are appropriate grounds for declaration of a mistrial in the context of a custody modification action. The Single Justice upheld the ruling of the Lower Court.

At the commencement of trial, both parties and the children were represented by Counsel. On the first trial day, prior to the commencement of Father’s case-in-chief, Mother’s Counsel had sought to Withdraw. Mother’s Counsel stated during the hearing on her Motion to Withdraw that she had spent the entire week prior to trial preparing and that Mother failed to be available to discuss her case. Mother testified that she did not want to continue with her current Counsel and wanted a delay in the trial. There was also a dispute between Mother and Counsel regarding payment of fees. Mother’s Counsel had represented Mother since 2014.

Prior to issuing a ruling on the Motion to Withdraw, the Court gave the Mother and her Counsel an opportunity to confer. After a brief recess to allow an opportunity for the same, the Mother chose for her Counsel to continue to represent her and the trial commenced.

After the first two days of trial, where the Father had completed his case-in-chief, the Mother sought a mistrial based primarily on ineffective of assistance of Counsel. The next trial dates were not scheduled until several months later. In the interim, Mother obtained new Counsel who filed a Motion to Continue Trial. Mother’s Motion was granted over Father’s objection.

* Matthew Barach is the founder and managing attorney of Barach Law Group LLC, a family law firm in Framingham. He has tried numerous domestic relations matters in the Probate Court and handled many family appeals. He is presently working on his first book *the Family Lawyer’s Guide to Appellate Practice* to be published by the American Bar Association. Attorney Barach represented the father in this matter.

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The Mother’s Motion to Continue was primarily based upon a claim of “ineffective assistance.” In particular, Mother claimed that it was only after the first two (2) days of trial that she became aware of recommended bar discipline (to wit: a four year suspension) against her now former Counsel. The information Mother presented to the Court was publicly available, known to Counsel and predecessor Counsel, and did not concern the representation of the Mother. Mother’s former Counsel remains a licensed Massachusetts attorney, able to practice and complete the trial. Mother’s former Counsel was in the process of appealing the suspension to the Supreme Judicial Court and the recommended suspension had not taken effect.

After the Motion to Continue the Trial was granted, with some encouragement by the Lower Court, the Mother filed a Motion to Declare a Mistrial or Other Alternative Remedies based primarily upon ineffective assistance of Counsel at trial. In particular, inter alia, The Mother claimed that her counsel failed to disclose her pending suspension, did not file a motion in limine when she should have done so, and failed to amend and/or properly review the list of trial witnesses. The Father and Attorney for the youngest child both filed oppositions and a hearing on the Motion for Mistrial was held in December. The trial had started in August with next days scheduled originally for November.

At about the same time of the Motion, it was announced that the Judge was to be transferred and assigned to a different division of the Probate and Family Court effective February 1, 2016. Just days prior to the Judge’s transfer, she granted the Mother’s Motion for Mistrial.

The judge reasoned that the Mother’s former Counsel should have disclosed that she was facing disciplinary action in an unrelated matter and that her counsel’s failure to disclose tainted the judicial process, which required the declaration of a mistrial. The Court seemed to indicate that if Mother or the Court had be aware of her former attorney’s recommended suspension the Court may

have ruled differently on the Mother’s Counsel Motion to withdraw and might have continued the trial. Further, the Court rejected alternative remedies such as, allowing the Mother leave to amend her witness list and/or continuing the trial matter further, pending resolution of an ongoing criminal case against the Mother.

The Court acknowledged in its decision that Mother’s former Counsel was still an active attorney and that if her suspension was upheld the SJC grants attorneys facing discipline a 30-day wind up period to complete for clients all matters which are pending prior to entry date. The Court also conferred that there is no right to Counsel in a modification action within the Probate and Family Court.

The Father filed an interlocutory appeal relative to the allowance of a mistrial. In his petition to the Single Justice, Father’s counsel argued that the Court committed an error of law and abuse of discretion in granting a mistrial without making findings as to how the Mother’s Counsel was actually ineffective at trial sufficient to demonstrate that there was a “manifest necessity” that required granting a new trial. In addition, the Father argued that the Court did not give careful consideration to the alternatives to granting a mistrial and did not weigh all of the parties’ interests, including the children’s interest to have this matter adjudicated in a single proceeding before one judge.¹

Our courts have determined that a “manifest necessity” must be shown by a party in order to be successful in their request for a mistrial.² In determining whether a “manifest necessity” exists, a trial judge must (1) give Counsel a full opportunity to be heard as to their position on the propriety of a mistrial, and (2) give careful consideration to the alternative options to mistrial as well as the parties’ interest in concluding trial in a single proceeding.³

The Father also argued to the Single Justice that the salient issue should have been how the Mother’s former Counsel was actually ineffective during the first two days of trial and, further, that the proposed suspension of the Mother’s Counsel alone did not amount to ineffective assistance of Counsel.

¹ *Vakil v. Vakil*, 66 Mass. App. Ct. 526, 538, 539, 849 N.E.2d 233 (2006).

² *Jones v. Commonwealth*, 379 Mass. 607, 608, 616-617 (1980); *Arizona v. Washington*, 434 U.S. 497, 505-506 (1978); *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

³ *Arizona v. Washington*, 434 U.S. 497, 515-516 (1978); *Commonwealth v. Steward*, 396 Mass. 76, 79 (1985).

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Existing case law concerning circumstances where the allowance of a mistrial was upheld, present a stark contrast to this matter. In particular, the “manifest necessity” was found in the following circumstances: judicial retirement;⁴ the inability of a jury reach a verdict;⁵ juror misconduct;⁶ and prosecutorial misconduct.⁷

The Father argued to the Appeals Court that the Lower Court needed to point to case law, in part, from the state of Texas to justify her broad use of use of discretion. The Father argued that this is particularly distinguishable as the state of Texas is one of the few states that utilizes juries in family law matters rather than our single judge system. Mistrials are more common when a jury is present than a single fact finder setting.

The Father also argued to the Single Justice that the Lower Court failed to account for the interest of the children, the Father and the judiciary. This was demonstrated by failing to weigh the effect of further delay and costs against the Mother’s request and basis for a mistrial.⁸

Finally, the Father pointed out to the Single Justice that the Lower Court’s decision ignored the time standards found in Standing Order 1-06 of the Probate and Family Court. Standing Order 1-06 requires that all cases and actions before the court receive timely attention and action. Specifically, the time standard for a complaint for modification of child custody is eight months from the time of filing. At the time of hearing, this matter has been pending for thirty-four months and counting.

The Single Justice afforded the Father no relief to this unique decision in granting a mistrial, finding that the Father had not shown an abuse of discretion nor sufficient prejudice. The Single Justice referenced *Riley v. Davison Constr. Co., Inc.*,⁹ (“[t]he declaration of a mistrial is within the sound discretion of the trial judge.”)

**INCLUDING STATUTORY FACTORS: GUIDING
WITHOUT LIMITING JUDICIAL DISCRETION IN
CHILD CUSTODY CASES (PENDING MA HOUSE
BILL 1207)**

By

Allison R. Smith*

We recognize that “parents have a fundamental interest in their relationships with their children that is constitutionally protected.” However, the strong expression of public policy by our Legislature that a child’s welfare must be the paramount concern when a judge determines custody means that a judge is authorized to not only to order sole legal and physical custody with one parent when it serves the best interests of the child, but also that a judge is authorized to impose conditions and restrictions on and to suspend any visitation by the other parent when it is determined that visitation would not be in the best interests of the child. In cases such as this, our duty as a reviewing court is to ensure that the record reflects that all relevant

⁴ *Freidus v. Hartwell*, 80 Mass. App. Ct. 496, 499 (2011).

⁵ *Fuentes v. Commonwealth*, 448 Mass 1017, 1017-1019 (2007).

⁶ *Commonwealth v. Cassidy*, 410 Mass 174, 180 (1991).

⁷ *Commonwealth v. Lam Hue To*, 391 Mass 301, 312 (1984).

⁸ *Commonwealth v. Steward*, 396 Mass. 76, 79 (1985).

⁹ *Riley v. Davison Constr. Co., Inc.*, 381 Mass.432, 444 (1980).

* *Allison R. Smith, Suffolk University Law School, Candidate for J.D. 2017.*

*factors have been considered by the judge, and that the decision is based on a fair weighing of the factors.*¹

I. Introduction

The United States Supreme Court and the Massachusetts Supreme Judicial Court (SJC) have both determined that the right to parent one's children is a constitutionally protected right.² This right, however, is by no means absolute, and courts have been granted discretion in determining the best interest of a child (hereinafter "BIC") while making child custody decisions in divorce cases.³ In Massachusetts, a probate and family court judge will conduct a BIC analysis using "all of the relevant factors" and his or her discretion to reach child custody determinations.⁴

The BIC standard is not without criticism, and critics have argued that it promotes gender bias against fathers.⁵

Others have argued that there is overly broad judicial discretion in child custody cases, and that the BIC standard is much too arbitrary.⁶ Some of these critics, many of whom are involved in parents' rights groups, have introduced House Bill 1207 (Senate Bill 834).⁷ House Bill 1207 includes two different types of provisions: first, it includes a presumption of at least one-third parenting time for each parent; second, it delineates factors that judges should consider when determining the BIC.⁸

This article will focus on the inclusion of factors in the statutory scheme, and not the one-third parenting presumption. This article will first analyze the history and development of child custody law, and determine what the past can teach us today.⁹ This article will go on to examine what other jurisdictions have been working towards in the development of the BIC standard, and how they compare to Massachusetts.¹⁰ In Part IV, this article will analyze support and criticisms for the imposition of the statutory factors, especially those included in House 1207.¹¹ Finally, this article will conclude that adding guiding factors into the statutory scheme is an effective way to guide judicial discretion without limiting the judge's capacity to determine the best interest of a child.¹²

¹ *Schechter v. Schechter*, 37 N.E.3d 632, 640-641 (Mass. App. Ct. 2015) (internal citations omitted) (discussing court's role in determining child custody).

² *See Op. of the Justices*, 691 N.E.2d 911, 913 (Mass. 1998) (stating both SJC and Supreme Court have upheld parenting as fundamental right); *see also Custody of Two Minors*, 487 N.E. 1358, 1364 (Mass. 1986) (recognizing fundamental right to parent); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (emphasizing fundamental importance in parenting one's children).

³ *See In re Dep't of Pub. Welfare*, 421 N.E.2d 28, 36 (Mass. 1981) (noting parents' freedom from State's intrusion is not absolute); *Op. of the Justices to the Senate*, 427 Mass. at 1204 (reiterating no constitutional entitlement to any particular form of custody).

⁴ *See Mass. Gen. Laws ch. 208, § 31* (2015) (empowering judges to determine best interest of child); *Schechter v. Schechter*, 37 N.E.3d 632, 640-641 (Mass. App. Ct. 2015) (discussing judge's duty to evaluate relevant factors). There is currently no presumption in place either for or against shared legal or physical custody. *See Mass. Gen. Laws ch. 208, § 31* (2015); *but see Mass. Gen. Law ch. 208, § 31A* (2015) (discussing possible presumption against shared legal or physical custody in abusive relationships).

⁵ *See Erin Bajackson*, note, *Best Interests of the Child – a Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. L. 311, 323 (2013) (hereafter *Bajackson*; discussing movement in 1970s for presumption of joint physical custody, not just BIC standard); *Dugan Arnett*, *In Mass. and elsewhere, a push for custody reform*, *Boston Globe* (August 1, 2015), <https://www.bostonglobe.com/metro/2015/07/31/massachusetts-and-elsewhere-push-for-child-custody-reform/Xh4NOwx2qWyZ12VMuYPf9J/story.html> (hereafter *Arnett*; *last visited March 11, 2016*) (discussing views of critics that BIC standard ignores father's rights).

⁶ *See id.* (critiquing current Massachusetts child custody law); *see also Bajackson*, *supra* note 5 (discussing argument fathers still granted less parenting time than mothers). Fathers' interests groups are pushing for a legislative alternative that presumes shared physical custody to protect their constitutional right to parent. *See id.*

⁷ H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (outlining proposed changes); S.B. 834, 189 Gen. Assemb. (Mass. 2015) (outlining proposed changes); *see Arnett*, *supra* note 5 (discussing push for change in Massachusetts's child custody law).

⁸ *See H.B. 1207*, 189 Gen. Assemb. (Mass. 2015) (defining shared parenting). "Unless the parents agree or the court determines otherwise, a child shall reside one-third of the time or more with each parent." *Id.* The bill lists seven evaluative factors and 10 limiting factors that judges should use to determine shared parenting time in both temporary orders and judgment. *See id.*

⁹ *See infra*, Part II, III.

¹⁰ *See infra*, Part III.C-D.

¹¹ *See infra*, Part IV.

¹² *See infra*, Part V.

II. A Brief History of Child Custody

A. Paternal Presumption

In Ancient Rome, as well as other early civilizations, child custody determinations were highly biased towards fathers.¹³ Children were considered property, and thus the father had an absolute property right in his children.¹⁴ Under early English Common Law, although the father had a property right in his children, it was no longer absolute.¹⁵ In particular, cases involving abusive or unfit fathers were causes for exception to the paternal presumption.¹⁶ This progression away from the paternal presumption accelerated during the Industrial Revolution when it became clear that there was a need for a change in child custody determinations.¹⁷ When England enacted The Custody of Infants Act of 1839, this constituted an end of the paternal presumption and the beginning of a new era in child custody: the Tender Years Doctrine.¹⁸

¹³ See Bernardo Cuadra, Note, Family Law – Maternal and Joint Custody Presumption for Unmarried Parents: Constitutional and Policy Considerations in Massachusetts and Beyond, 32 W. NEW ENG. L. REV. 599, 601-02 (2010) (hereafter *Cuadra*; explaining paternal authority over children).

¹⁴ See *id.* (discussing absolute paternal property right in children). Roman law provided fathers with complete control over the life of their children, under the premise that they were responsible for the child's existence which created an ownership right. See *id.* Even upon the father's death, the mother could not become the legal guardian of her children. See *id.* Children had a relatively low social status, and their interests were not taken into account in ancient times. See Lynn Marie Kohm, Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence, 10 J. L. & FAM. STUD. 337, 340 (2008) (hereafter *Kohm*; explaining role of children in Ancient Rome).

¹⁵ See *Cuadra*, *supra* note 13, at 602 (2010) (recognizing exceptions to paternal authority).

¹⁶ See *id.* (discussing abuse and unfit exception to paternal presumption). Custody disputes during this time were rare, but a court of equity was able to consider the rebuttal of the paternal presumption. See *id.*

¹⁷ See *id.* at 603 (describing effect of Industrial Revolution on child custody determinations). The paternal presumption began to weaken as men left the home to work in factories, and their role changed from caregiver to provider. See *id.*

¹⁸ See *Kohm*, *supra* note 14, at 346 (2008) (describing England's movement away from paternal presumption). This is the act that brought the Tender Years Doctrine into the common law tradition. See *id.*

B. Tender Years Doctrine

The Tender Years Doctrine was introduced in the United States in the Early 19th Century during the Industrial Revolution.¹⁹ The Tender Years Doctrine represented a complete shift in custody determinations, by presuming that children under a certain age (often seven years old) needed parenting from their mothers, who, by virtue of their gender, were the more nurturing parent.²⁰ For children above the tender age, custody was typically granted to the father, who, even as late as the early 1900s, had a recognized property right in his children.²¹ This was a prelude to the BIC standard, as it is the first time in history that courts considered the interests of children in child custody determination.²² Towards the 1920s, the Tender Years Doctrine evolved into a firmly rooted belief

¹⁹ See *Cuadra*, *supra* note 13, at 603-604 (explaining impact of Industrial Revolution on shift in child custody). As the family culture changed to a father working outside the home while mothers stayed at home with the children, so did society's ideas about gender roles when it came to children. *Id.* Society also changed its views about children, shifting toward a view that they needed to be protected and nurtured; children who would have previously been sent to work on the farm were able to enjoy their childhood. See Mary Ann Mason, The Roller Coaster of Child Custody Over the Last Half Century, 25 J. AM. ACAD. MATRIM. L. 451, 452-453 (2012) (hereafter *Mason*; explaining cultural shift in favor of nurturing children).

²⁰ See Richard A. Warshak, Parenting By the Clock: The Best-Interest-Of-The-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule", 41 U. BALT. L. REV. 83, 93 (2011) (hereafter *Warshak*; discussing award of custody to mothers for children aged seven early on, then removing age restriction); see also *Mercein v. People ex rel. Barry*, 25 Wend. 64, 106 (N.Y. 1840) (arguing that mother is proper parent to care for children of tender age). In arguing in favor of the Tender Years Doctrine, Judge Bronson claimed that nature provides mothers with an attachment to their infant children that no other relative could possess in the same degree, and without sufficient reason, no judge should be able to violate this law of nature. See *id.*

²¹ See Bajackson, *supra* note 5, at 313-14 (explaining father's property interest in children still existed during Tender Years era). If a child was over the tender age, custody would normally be awarded to the father, sometimes on an automatic basis. See *id.*

²² See *Mason*, *supra* note 19, at 453 (arguing that Tender Years Doctrine foreshadowed BIC standard). The Tender Years Doctrine predicated, for the first time, the consideration of a child's interests in child custody determinations. See *id.*

that mothers were best suited to raise children.²³ The Tender Years Doctrine completed the full spectrum shift when it transformed into a maternal presumption in many jurisdictions during the mid 20th Century.²⁴ The maternal presumption, however, did not last, as women began to enter the workforce, and social science studies determined that children were better off when raised by both parents.²⁵ In 1973, the Tender Years Doctrine was invalidated in *State ex rel. Watts v. Watts*, and it introduced the idea that courts should give both parents equal consideration in custody determinations.²⁶

III. BIC Standard

A. Early BIC

The BIC Standard began to emerge in the late 19th Century, but did not become popularly supported until

the mid-1900s.²⁷ It began when scholars began exploring a gender-neutral standard for custody determination.²⁸ Once it was clear that both the Tender Years Doctrine and the maternal presumption were not the best solutions for an ever-changing society and, more importantly, for the development of children, jurisdictions began accepting the BIC standard.²⁹ In 1970, the Uniform Marriage and Divorce Act (UMDA) embodied the trend toward consideration of the BIC, and further elaborated on the BIC.³⁰ The UMDA included the five factors that family court judges were already considering in making custody decisions: (1) the wishes of the child's parents as to the child's custody; (2) the wishes of the child as to his or her custody; (3) the interactions and relationship with the child and his or her parents, siblings, or anyone else who may affect the child's best interests; (4) the child's adjustment to home, school, community, etc.; and (5) the mental and physical health of the child.³¹ The UMDA also included a provision that courts should not consider conduct of a proposed custodian that does not affect his or her relationship with the child.³²

B. Modern BIC

Though today there is no agreed-upon definition of BIC, it generally refers to the deliberation undertaken by courts when determining what form of child custody will best suit a child and who is best equipped to care for a child's best interests.³³ Judges make BIC determinations by evaluating relevant factors, which are either what the judge considers to be relevant or are explicitly included in a state's

²³ See *Cuadra*, *supra* note 13, at 603-604 (explaining presumption that mothers were best suited parents for permanent custody arrangements); see, e.g., *Jenkins v. Jenkins*, 181 N.W. 826, 827 (Wis. 1921) (opining mother love is essential for children of tender years with no substitute); *Freeland v. Freeland*, 159 P. 482, 483-84 (Wash. 1916) (holding that depriving mother of child custody should only happen in cases when it is clearly shown that mother is unfit). "Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than a father's." *Id.*

²⁴ See *Bajackson*, *supra* note 5, at 314 (discussing the full pendulum shift to maternal presumption). During the mid-1900's, the Industrial Revolution, the women's rights movement, and psychological studies all led to the idea that the mother was the best parent to raise a child. *See id.*

²⁵ See *Warshak*, *supra* note 20, at 91 (discussing the cultural change in women's rights and women's role outside home). Social science studies emphasized the important role of fathers in their children's lives. *See id.* This is the beginning of the idea of a joint custody presumption. *See id.*

²⁶ *See id.* at 93 (discussing impact of *State ex rel. Watts v. Watts*); *State ex rel. Watts v. Watts*, 77 Misc. 2d 178, 180 (N.Y. Fam. Ct. 1973) (invalidating tender years presumption). "The 'tender years presumption' is actually a blanket judicial finding of fact, a statement by a court that, until proven otherwise by the weight of substantial evidence, mothers are always better suited to care for young children than fathers. This flies in the face of the legislative finding of fact underlying the specific command of [the statute], that the best interests of the child are served by the court's approaching the facts of the particular case before it without sex preconceptions of any kind." *Id.*

²⁷ See *Bajackson*, *supra* note 5, at 314 (discussing the early studies of BIC). Various states began exploring the BIC standard between 1840 and 1870. *See id.* In early BIC decisions, the child's wishes were considered heavily, and the standard was gender-neutral. *See id.*

²⁸ *See id.* (discussing gender-neutral attributes to BIC standard).

²⁹ See *Cuadra*, *supra* note 13, at 604 (explaining changing society and adaption of BIC standard). The Tender Years Doctrine was no longer practical, and most states adapted the BIC standard as a result of cultural and constitutional considerations. *See id.*

³⁰ See UNIF. MARRIAGE & DIVORCE ACT § 402, U.L.A. (1970) (stipulating that courts should make custody determinations on the basis of BIC).

³¹ *Id.* (listing five factors that should be used in making BIC determinations).

³² *See id.* (prohibiting judges from considering custodial conduct not relevant to custody decisions).

³³ See *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY (2012), https://www.childwelfare.gov/pubPDFs/best_interest.pdf (last visited March 11, 2016) (defining BIC).

statutory scheme.³⁴ While many states have enumerated specific statutory factors, Massachusetts currently has not.³⁵ Statutory factors in some states include: the emotional ties and relationships between the child and his or her parents, siblings, etc.; the ability of the parents to provide a safe and healthy environment for their child; the mental and physical health of the parents; the mental and physical needs of the child; and the presence of domestic violence.³⁶ Some states also list limiting factors that will be counted against parents in child custody determinations, and some states leave open the opportunity for the judge to add any factor that he or she deems relevant.³⁷

C. BIC and Statutory Factors in Other Jurisdictions: Minnesota

As of August 1, 2015, Minnesota has implemented 12 statutory factors to guide judges in determining BIC, representing the state's most significant BIC statutory factors change since 1978.³⁸ Minnesota was one of the earliest states to implement specific BIC statutory factors in 1974.³⁹ The 2015 changes are meant to shift the focus more towards the needs of the child, rather than the rights of the parents.⁴⁰ The effects of the factors are thought to include advancement in the rights of fathers, modernization of outdated law, and a more workable set of factors for judges, evaluators, and families.⁴¹

The first factor in evaluating BIC used to be “the wishes of the child’s parents as to custody,” which is now completely replaced by a factor representing the needs of the child: “(1) a child’s physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child’s needs and development.”⁴² Minnesota now also requires that any special medical, mental health, or educational need of a child that may require a special parenting arrangement be weighed as a factor.⁴³ The reasonable preference of the child is still evaluated, depending on the child’s age, ability, and maturity to express an independent and reliable preference.⁴⁴ The next factor requires judges to consider domestic abuse, whether it has occurred in either parent’s household or relationships and how it impacts “the child’s safety, well-being, and developmental needs.”⁴⁵ The primary caretaker presumption has been taken away, and replaced with a weighing of the history and nature of each parent’s participation in caring for the child.⁴⁶ The remaining factors focus on the effect on the child’s well being, development, and the maintenance of significant relationships, while also evaluating the parents’ abilities and desires in

³⁴ See *id.* (explaining how judges make custody decisions).

³⁵ See Mass. Gen. Laws ch. 208, § 31 (2015) (requiring judges to consider all relevant factors). No statute currently in effect in Massachusetts lists specific factors that family court judges must weigh when making BIC determinations. See *id.*

³⁶ See Determining the Best Interests of the Child, CHILD WELFARE INFO. GATEWAY (2012), *supra* note 33 (listing factors that states have included in their legislation).

³⁷ See *id.* (discussing inclusion of limiting factors that would limit custody).

³⁸ See Min. Stat. § 518.17 (2015) (implementing new factors in BIC analysis); see also Michael Boulette, Unpacking Minnesota’s (New) Best Interest Factors, FAMILY IN LAW (July 31, 2015), <http://family-in-law.com/unpacking-minnesotas-new-best-interest-factors/> (hereafter *Boulette*; discussing impact of new BIC factors in Minnesota). Minnesota began using the BIC standard in 1969, and included statutory factors in 1974, which were rewritten in 1978. See *id.*

³⁹ See *id.* (outlining timeline of BIC in Minnesota).

⁴⁰ See *id.* (discussing purpose of new BIC factors).

⁴¹ See *id.* (discussing perceived effects of new BIC factors).

⁴² See Min. Stat. § 518.17 (2015) (stating first factor); Martin L. Swaden & Linda A. Olup, Temporary Custody Hearings—Best Interests of Child, 14 Minn. Prac., Family Law § 6:15 (3d ed.) (hereafter *Swaden & Olup*; outlining previous statutory factors); *Boulette*, *supra* note 38 (discussing change in Minnesota BIC factors) With this change to the first factor, the rights of the parents no longer merit consideration in Minnesota. See *id.*

⁴³ See Min. Stat. § 518.17 (2015) (listing new statutory factors in BIC analysis); see also *Boulette*, *supra* note 38 (discussing impact of new BIC factors in Minnesota).

⁴⁴ See Min. Stat. § 518.17 (2015) (listing new BIC statutory factors); *Swaden & Olup supra* note 42 (outlining previous statutory factors in Minnesota).

⁴⁵ See Min. Stat. § 518.17 (2015) (discussing impact of domestic violence on custody determinations). Domestic abuse is defined by § 518B.01, and the existence of domestic abuse between the parents creates a rebuttable presumption that joint legal custody or joint physical custody is not in the best interests of the child. See *id.*

⁴⁶ See Min. Stat. § 518.17 (2015) (listing historical roles of each parent in the care of the child as a factor); *Boulette*, *supra* note 38 (discussing elimination of primary caretaker factor). The determination as to which parent was the primary caretaker used to be a factor, and has been replaced by the new factor which looks at each parent’s role in providing care for the child. See *id.*

rearing their children and their ability to cooperate.⁴⁷ The new Minnesota statute also includes nine principles, which govern how the new BIC factors are applied.⁴⁸ Most notably, the statute requires that the court make detailed findings on each of the factors and explain how each factor led to its conclusions and to the determination of custody and parenting time.⁴⁹

D. Massachusetts Today

Currently, Massachusetts considers the rights of both parents equally, and there is no statutory presumption either in favor or against shared legal or physical custody.⁵⁰ Massachusetts does, however, include a provision that creates a rebuttable presumption that it is not in the best interest of a child to be placed in the custody of an

abusive parent.⁵¹ Presently, Massachusetts lacks statutorily-defined factors that guide a judge in BIC custody determinations, though pending legislation may soon change this.⁵²

Massachusetts has been criticized for its open-endedness, resulting in decisions that are far too subjective.⁵³ Father's rights groups, especially, have been working tirelessly for a change in child custody law, claiming that fathers are not given the same consideration as mothers in child custody determinations.⁵⁴ Some protections against what some claim is unbridled judicial discretion, however, are included in the requirement that judges make findings showing that they have weighed all the relevant factors pertaining to a child's best interest.⁵⁵ House Bill 1207 hopes to put an end to any claim of unlimited judicial discretion by implementing specific statutory factors into

⁴⁷ See Min. Stat. § 518.17 (2015) (listing new BIC statutory factors). Factors relating to the parents include: any physical, mental, or chemical health issue of a parent that could affect a child's safety or development; the willingness and ability of each parent to continuously provide care for the child; the disposition of each parent to support the child's relationship with the other parent; and the willingness of each parent to cooperate in the rearing of their child. See *id.* Factors relating to the well being of the child include: the effect on the child's well being and development of changes to home, community, and school; the effect of proposed arrangement on the continuation of significant relationships between the child and another, including each parent, siblings, and other significant persons; and the benefit to the child in maximizing parenting time with both parents and the detriment to the child in limiting parent time with either parent. See *id.*

⁴⁸ See Min. Stat. § 518.17 (2015) (listing clauses that govern application of BIC factors by court).

⁴⁹ See Min. Stat. § 518.17 (2015) (listing additional clauses). The court should also consider that it is in the best interest of the child "to promote the child's healthy growth and development through safe, stable, nurturing relationships between a child and both parents." See *id.* Minnesota does not include a presumption for or against joint physical custody, except upon the request of both parties to use a rebuttable presumption that joint legal custody is in the best interests of the child. See *id.* Joint physical custody does not mean that there will be an absolutely equal division of parenting time. See *id.*

⁵⁰ See Mass. Gen. Laws ch. 208, § 31 (2015) (announcing equal rights of parents in child custody determinations). "In making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody." *Id.* The statute declares that there is no presumption either for or against joint physical or legal custody, except as provided in § 31A. See *id.*

⁵¹ See Mass. Gen. Law ch. 208, § 31A (2015) (describing courts' actions in event of demonstrated abuse). "A probate and family court's finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child." *Id.*

⁵² See Mass. Gen. Laws ch. 208, § 31 (2015) (granting judges discretion to weigh all relevant factors in determining BIC); H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (proposing statutory factors to be used in BIC analysis).

⁵³ See 14A Summary of Basic Law § 8.185 (4th ed. 2014) (describing how Massachusetts has been criticized for being too subjective in custody decisions); see also Nicole Lapsatis, In the Best Interests of No One: How New York's "Best Interests of the Child" Violates Parents' Fundamental Right to the Care, Custody, and Control of their Children, 86 St. John's Law Rev. 673, 692 (2012) (hereafter *Lapsatis*; arguing BIC decisions far too subjective); but see Ann M. Funge, Articulated at Last: What Factors Constitute 'Best Interests of the Child', 33-Apr. PA. L. 24, 26 (2011) (hereafter *Funge*; discussing concept that judges need freedom to evaluate particularities of each case).

⁵⁴ See 14A Summary of Basic Law § 8.185 (4th ed. 2014) (describing protections against subjective decisions in requiring judges to weigh relevant factors).

⁵⁵ See Massachusetts Legislature Considers Controversial Changes to Child Custody Laws, RADIO BOSTON (Aug. 6, 2015), <http://radioboston.wbur.org/2015/08/06/shared-parenting> (*last visited March 11, 2016*) (hereafter *Radio Boston*; describing purpose and hoped-for result of House Bill 1207). Father's rights groups are hoping this bill will lead to more balanced custody decisions that equally consider the attributes of fathers and mothers. See *id.*

the child custody legislation.⁵⁶ House Bill 1207 includes seven factors with ten additional limiting factors.⁵⁷

House Bill 1207 requires that courts be guided by the best interests of the child, while also considering G. L. c. 208 § 31A1 and the included factors.⁵⁸ First, a court must consider the relationship of the child with each parent.⁵⁹ The reasonable wishes of the child would also be considered, while being cognizant of any undue influence on the part of one parent against the other.⁶⁰ Next, courts should look to the relationship of each parent with each other, and their ability to cooperate for the purposes of joint custody (shared parenting) determinations.⁶¹ The fourth factor requires judges to determine the present and expected physical, emotional, and geographical availability of the parents.⁶² The history of the caregiving functions of each parent and the present interest, desire, and ability of each parent to fulfill caregiving functions must then be evaluated.⁶³ The ability of the parent to foster a positive relationship with his or her child is another important included factor.⁶⁴ Finally, House Bill 1207 includes a provision that allows a judge to weigh additional factors that he or she deems to be relevant.⁶⁵

⁵⁶ *See id.* (discussing perceived subjective decisions by family court judges in Massachusetts).

⁵⁷ *See* H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing proposed statutory factors).

⁵⁸ *See id.* (describing context of when factors should be evaluated); *see also* Mass. Gen. Law ch. 208, § 31A (2015) (implementing presumption against custody for abusive parents).

⁵⁹ *See* H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing factors).

⁶⁰ *See id.* (listing factors). Massachusetts family court judges who decide that a child is mature enough to be able to voice a rational decision will typically conduct an “in camera” interview in chambers without the parents present. *See* Aaron Thomas, Can Children Express Preference in Massachusetts Custody Proceedings?, DIVORCENET (2016), <http://www.divorcenet.com/resources/a-childs-preference-massachusetts-custody-proceedings.html>. Currently, there is no requirement that judges deduce the wishes of the child in a child custody matter, especially if the court feels that the child is being unduly influence by one or both parents. *See id.* If the court uses a guardian ad litem, he or she can relay the wishes of the child to the court without the child having to appear in the courtroom. *See id.*

⁶¹ *See* H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing factors).

⁶² *See id.* (listing factors).

⁶³ *See id.* (listing factors).

⁶⁴ H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing factors).

⁶⁵ *See id.* (listing factors).

The limiting factors of House Bill 1207—factors that restrict parenting time—include: a parent’s emotional abuse of a child; a parent having inflicted abuse on a child or spouse in accordance with G. L. c. 208 § 31A; a parent’s abuse of drugs or alcohol; a parent’s incarceration; a parent attempting to involve the child in the conflict with the other parent, a parent attempting to interfere with the other parent’s access to the child; knowingly providing false information to the court; a parent’s conviction for a child-related sexual offense; and any other additional factors that interfere with a parent’s caregiving of a child.⁶⁶

IV. Benefits and Criticisms of Statutory Factors

A. Proposed Statutory Factors Are Not Meant to Stifle Judges

Many critics argue that the BIC standard is ineffective because judges can be as arbitrary as they desire because they have broad discretion in child custody cases.⁶⁷ Many judges argue that imposing statutory factors upon them limits their ability to decide the BIC on a case-by-case basis.⁶⁸ This argument is compelling to an extent, as it is especially necessary in child custody cases for a judge to evaluate based on the unique circumstances of each case; no family is the same, and no child’s best interests are exactly the same.⁶⁹ The proposed factors, however, are guidelines that can apply in any case, and include a specific provision that allows judges to add any factor that they deem relevant for any particular case.⁷⁰ The mandatory use of these guidelines will only ensure that each judge truly considers the BIC in each case.⁷¹ They should only result in more reasoned, less biased, and less likely to be appealed child custody determinations.⁷²

⁶⁶ *See id.* (listing limiting factors that will limit a parent’s custody).

⁶⁷ *Lapsatis, supra* note 53 at 692 (2012) (arguing that judges abuse their broad discretion in choosing arbitrary factors in BIC determinations).

⁶⁸ *See Radio Boston, supra* note 55 (arguing that judges do not need limits imposed upon their discretion).

⁶⁹ *See Funge, supra* note 53, at 26 (discussing well-established concept that judges must judge cases on a case-by-case basis).

⁷⁰ H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing last factor).

⁷¹ *See Funge, supra* note 53, at 29 (arguing that mandatory statutory factors will ensure judge does not make arbitrary decision).

⁷² *See id.* (discussing expected positive results of imposing mandatory statutory factors).

B. Proposed Statutory Factors are Those Judges Already Use

The factors included in House Bill 1207 are based on factors widely used in case law already.⁷³ In the *Schechter v. Schechter* case, Judge Agnes undergoes a long analysis of what factors should or should not be relevant in a child custody case.⁷⁴ He determines that examining whether or not the child's past or present living conditions adversely affect his or her physical, mental, or emotional well-being is extremely important.⁷⁵ This is very similar to a number House Bill 1207's factors, including the ability and desire for each parent to fulfill his or her care giving functions.⁷⁶ Judge Agnes goes on to discuss the limiting factor of abuse, which is already included in the statutory scheme, but is also reiterated in House Bill 1207.⁷⁷ Another factor that the Court deemed important was whether a parent is able to separate his or her needs or desires from those of his or her children, and whether a parent's actions will compromise the child's relationship with the other parent.⁷⁸ This determination is very similar to the factor requiring judges to weigh each parent's ability to cooperate with each other, and the limiting factor of one parent interfering with the other parent's right to see the child.⁷⁹ Judge Agnes discusses the domestic violence factor, which is included as a limiting factor by inference in House Bill 1207.⁸⁰ Finally, the Court discusses the factors to be considered

⁷³ See *id.* (discussing the use of these factors in case law).

⁷⁴ See *Schechter v. Schechter*, 37 N.E.3d 632, 641 (Mass. App. Ct. 2015) (discussing relevant factors that should be evaluated).

⁷⁵ See *Schechter v. Schechter*, 37 N.E.3d 632, 640 (Mass. App. Ct. 2015) (examining how a judge should determine BIC using relevant factors).

⁷⁶ See H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing factor requiring judge to determine each parent's caregiving functions).

⁷⁷ See *Schechter v. Schechter*, 37 N.E.3d 632, 640 (Mass. App. Ct. 2015) (discussing how abuse is factored into custody determinations); H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing abuse as a limiting factor according to G.L.c.208 §31A1).

⁷⁸ See *Schechter v. Schechter*, 37 N.E.3d at 641 (discussing the importance of a parent to be able to separate his or her needs from that of his or her child). The occurrence of parents attempting to come in between their child and the other parent will be considered as a factor. See *id.*

⁷⁹ See H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing cooperation as a factor and keeping child from another parent as a limiting factor).

⁸⁰ See *Schechter v. Schechter*, 37 N.E.3d at 641-642 (reiterating that domestic violence will be seen as a factor that limits a parent's custody determination); See also H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing verbal and physical abuse to child or other parent as limiting factors).

in the event of relocation, which are included in House Bill 1207 in that a judge must determine the present and expected physical and geographic availability of each parent.⁸¹ Clearly, these factors are based on the relevant factors that are, generally, already being used to make BIC determinations in Massachusetts courts.⁸²

C. Proposed Bill Compared to Minnesota

The proposed statutory factors in House Bill 1207 will modernize child custody law in Massachusetts, and bring it in line with where many states have been for decades.⁸³ Many of the factors are directly comparable to what is currently included in Minnesota law.⁸⁴ The relationship of the child with each parent would be evaluated in both states, though only the effect of the proposed custody arrangement on the parent-child relationship is weighed in Minnesota.⁸⁵ Massachusetts proposed legislation emulates Minnesota's attempt at bringing BIC determinations back to a child-centered analysis by requiring the reasonable wishes of the child to be evaluated, with House Bill 1207 including a provision for courts to consider any undue influence of either parent in the child's choice.⁸⁶ Massachusetts would also follow

⁸¹ See *Schechter v. Schechter*, 37 N.E.3d at 646 (discussing factors to be evaluated when a parent desires to relocate); H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing as a factor the present and expected physical and geographical availability of each parent).

⁸² See *Schechter v. Schechter*, 37 N.E.3d at 641 (Mass. App. Ct. Sept. 9, 2015) (discussing relevant factors that should be evaluated).

⁸³ See H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (discussing public policy involved in drafting bill); see also *Radio Boston*, *supra* note 55 (discussing need for change in Massachusetts child custody law).

⁸⁴ See Min. Stat. § 518.17 (2015) (listing factors judges must use in child custody determinations); H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing proposed factors to be used in BIC analysis). Many of the factors are directly comparable, and have word-for-word similarities, indicating that some of House Bill 1207 may have been modeled on Minnesota law. See Min. Stat. § 518.17 (2015); H.B. 1207, 189 Gen. Assemb. (Mass. 2015).

⁸⁵ See Min. Stat. § 518.17 (2015) (stating factor (9), requiring judges to weigh the effect of a proposed arrangement on ongoing significant relationships); H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing factor (1), requiring judges to evaluate the relationship between each parent and child).

⁸⁶ See Min. Stat. § 518.17 (2015) (stating factor (3), analyzing reasonable preference of the child if child is of sufficient ability, age, and maturity); H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing factor (2), requiring judges to evaluate reasonable wishes of child, if child is of sufficient, age, capacity, and understanding).

Minnesota's example by including factors that require judges to consider the ability of parents to cooperate with each other, to fulfill caregiving functions, and to foster a positive relationship between the child and the other parent.⁸⁷ Massachusetts currently includes statutory law that limits shared parenting for parents who have inflicted abuse on the other parent or child, while Minnesota takes it a step further by including abuse that the parent may have inflicted in other relationships as well.⁸⁸ If shared parenting (joint physical custody) is granted, equal time would not be a guarantee because the courts must decide what shared time would be in the child's best interest.⁸⁹

Minnesota is known as one of the frontrunners in promoting BIC, and continuing efforts to protect a parent's constitutional right to parent while not losing sight of what is most important, the best interest of the child.⁹⁰ With these changes, Massachusetts would be stepping out of the murky waters of broad judicial discretion by requiring judges to make a showing of how the weighing of the statutorily relevant factors aided them in making their BIC decisions.⁹¹ Adding statutory factors brings clarity

to judicial decision-making, and is a step in the right direction for Massachusetts.⁹²

V. Conclusion

Judges have always been our society's impartial referees when disputes arise. They are not chosen arbitrarily, and always have years of expertise and legal knowledge to support each decision they make. In a case of child custody determinations, a judge must weigh the relevant factors to assess what arrangement will be in the best interests of the child. Including guiding factors into the statutory scheme is a superior method to guide and instruct judges without limiting their rightly held discretion in child custody cases.

This article does not go so far as to suggest that including statutory factors will fix an overworked and overcrowded adversarial family court system. This article only suggests that introducing statutory factors is a step in the right direction of ensuring that the best interest of a child is actually determined in child custody cases. There are many other steps that can be taken to further ensure the protection of a child's interests, but they have yet to be suggested to the Massachusetts legislature. The development of child custody law is far from complete, and it will likely continue to adapt as society changes and the institution of the family is continuously transformed. Statutory factors are but one way of adapting to the ever-evolving concept of child custody and the best interests of the child.

⁸⁷ See Min. Stat. § 518.17 (2015) (stating factors (6), (7), (9), (12), and clause (3), discussing the ability of parents to provide for child's best interests); H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing factors (3), (5), (6), looking to parents' ability to provide for child's best interests).

⁸⁸ See H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (listing limiting factor (2)). A parent's having inflicted abuse on the other parent or child as provided for in G. L. c. 208, § 31A will be a factor used to limit shared parenting. See *id.*; see also Mass. Gen. Laws 208 § 31A (considering BIC in the event of abuse towards the other parent or child). Minnesota requires judges to evaluate the nature and context of the domestic abuse, as well as the implications of the domestic abuse on the child's safety, development, and well being if it has occurred in the parents' household or relationship. See Min. Stat. § 518.17 (2015).

⁸⁹ See Min. Stat. § 518.17 (2015) (listing clause (8) that there is no requirement for equal time in joint physical custody); H.B. 1207, 189 Gen. Assemb. (Mass. 2015) (discussing shared parenting does not mean equal time). House Bill 1207 does include a provision that, unless parents agree or the court determines otherwise, a child shall reside one-third of the time or more with each parent if shared parenting is granted by the court. See *id.*

⁹⁰ Boulette, *supra* note 38 (discussing timeline of Minnesota child custody law). Boulette also points out that Minnesota is making a pointed effort in ensuring that BIC determinations are more and more child-focused, while still protecting the constitutional right to parent. See *id.*

⁹¹ Arnett, *supra* note 5 (discussing how changes in Massachusetts custody law may be necessary to accommodate today's culture).

⁹² See Funge, *supra* note 53, at 29 (arguing statutory factors bring clarity to a judge's decision-making process).

