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EMERGING TOPICS IN FAMILY LAW

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Journal of the American Academy of
Matrimonial Lawyers

Volume 39 2026 Number 1

This issue is devoted to:

EMERGING TOPICS IN FAMILY LAW

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About This Issue

This issue features emerging topics in family law and contains articles on valuing goodwill and discovering cryptocurrency assets at divorce. There are two internationally focused articles, one a comparative piece on child custody standards and another on marital agreements in France and Spain. There are also articles on delegating judicial authority and one related to the division of military pay at divorce. Student authored articles focus on estate planning for non-traditional families, valuing trusts at divorce, the use of non-disparagement clauses in custody orders and resolving attorney fee disputes thought mediation. It concludes with a book review of a resource for preparing parenting plan evaluations.

Our Issue editors are Drew Soshnick and David Griffin. Drew is nationally recognized as a leader in family law. He is a Diplomate of the American College of Family Trial Lawyers, an invitation-only organization limited to the top 100 family trial lawyers in the country. Drew is a Fellow of both the American Academy of Matrimonial Lawyers and the International Academy of Family Lawyers. Chambers USA has ranked Drew in Band 1 in Matrimonial & Family Law in Indiana, and Best Lawyers in America recognizes him in Family Law. David Griffin is a recently-retired Family Law Attorney from Connecticut. David is a Fellow of the American Academy of Matrimonial Lawyers (AAML) and of the International Academy of Family Lawyers (IAFL), having actively practiced for over 40 years. He is a former National Fellow of the Year of the AAML and is widely recognized as a skilled and versatile litigator who is equally adept at trying and settling cases. David focused his practice on complex financial and custody cases throughout the State of Connecticut, and consulted on cases throughout the country for high net worth and ultra-high net worth clients. David has held multiple leadership positions in the AAML and in the Family Law Section of the Connecticut Bar Association. He is a frequent lecturer at national family law conferences, having addressed topics as diverse as Artificial Intelligence, Valuing Complex Organizational and Capital Structures, Valuation of Healthcare Interests, and the Valuation of Venture Capital and Private Equity Interests. David has extensive experience in International Law as well, having litigated issues under both the Hague and UCCJEA regimes, and represented clients in multi-national prenuptial agreements and dissolutions. David has been recognized by the most prestigious attorney rating organizations, including Best Lawyers, SuperLawyers and Lawyers of Distinction, and in multiple successive years was voted by his peers in SuperLawyers as one of Connecticut's Top 50 Lawyers in all practice areas.

In *Delegation of Power to Non-Judges in Child Custody Litigation: Informed Consent is Not-Negotiable,* Dana E. Prescott and India A. Butler

examine the growing use of alternative dispute resolution across jurisdictions, particularly with respect to the delegation of judicial authority to determine child custody matters. The article discusses the tension between the judicial efficiency of such delegation and the resulting consequences, risks, and limitations. They ultimately conclude by highlighting the importance of meaningful, informed consent which provides clients with a comprehensive understanding of the legal consequences of any judicial delegation. Dana Prescott is a licensed attorney in Maine, Massachusetts, and Connecticut, and a Fellow of the International Academy of Family Lawyers and the American Academy of Matrimonial Lawyers. A member of the Journal Board, he holds an MSW and a PhD in social work and serves as an adjunct faculty member in social work at Boston College. Ms. Butler is an attorney with Rutkin Oldham Contratto in Westport, Connecticut. In her role she represents clients in divorce, high-conflict custody related matters, and various post-judgment cases, in which issues related to asset valuation and division, alimony and child support arise from complicated compensation structures and high net worth families.

Our second article is entitled *Protecting the Former Spouses' Share of the Military Pension: Strategic Solutions After* Howell by Bradly A. Carlson and Natasha M. DeLeon. The article addresses the legal and practical consequences of post-divorce reductions in military retired pay caused by VA waivers, with particular emphasis on elections under the Combat-Related Special Compensation act. Specifically, it examines the extent to which federal law preempts state courts from remedying those reductions and the narrow circumstances in which former spouses may still protect their awarded interests. This analysis centers on the distinction between judicially imposed remedies, which are prohibited under *Howell v. Howell,* and remedies arising from agreed upon indemnification and judgment enforcement principles. Bradly Carlson is the founder of Carlson Law Group, LLC, and is licensed to practice law in Alaska and Washington. His practice focuses substantially on family law, including complex divorce, child custody, and military divorce matters. A veteran of both the United States Army and Air Force, Brad served as an Army armor officer, including two deployments to Iraq and command of a tank company, before attending Texas Tech University for law and business school. He later returned to military service as an Air Force attorney, where he gained significant litigation experience as a criminal prosecutor and advised servicemembers and their families on a broad range of legal matters. Brad completed his active-duty service in 2018 and retired from the reserve component in May 2024. Brad's military background informs a significant portion of his family law practice, particularly matters involving servicemembers, veterans, military retirement benefits, and the unique issues that arise when military service intersects with divorce and child custody. He has also represented servicemembers and their dependents in matters involving the Servicemembers Civil Relief Act, unfair trade

practices, and predatory lending. Natasha DeLeon is a litigation attorney with Carlson Law Group, LLC, in Anchorage, Alaska, where she primary practices family law, including divorce, child custody, and domestic violence matters. She also practices in military and veterans' law, drawing on her own experience as a United States Marine Corps veteran. Natasha served five years on active duty, including a deployment to Afghanistan in support of Operation Enduring Freedom. Prior to entering the legal profession, Natasha spent seven years working in the field of social work, including within the foster care system. She holds a Master of Social Work from the University of Southern California and a B.A. in Psychology from American Military University. Her professional experience also includes work with the U.S. Department of State at the U.S. Embassy in Lomé, Togo, where she contributed to reporting on human trafficking, human rights, financial policy, and international religious freedom.

Our first international piece is *De Facto Maternal Preference in Italian Family Courts: A Comparative Study with U.S. Custody Law and Implications for Transnational Practice* authored by Rosa Di Caprio. It examines the persistent divergence between the statutory model of shared custody, formally grounded in the principle of bi-parentality, and its practical implementation in courtrooms. The study compares judicial practices and empirical patterns observed in Italian and U.S. family courts, highlighting structural differences in procedural organization, allocation of parenting time, and management of family conflict. Drawing on qualitative forensic observation developed over two decades of practice in high-conflict family litigation (approximately 2005–2025) before major Italian family courts, this article offers a qualitative case-based analysis of judicial patterns, further relying on a comparative review of U.S. appellate decisions, statutory best-interests factors, and mandatory parenting plans to identify recurring procedural patterns affecting custody determinations, parenting time allocation, housing decisions, and financial obligations. The author advocates for a shift away from discretion susceptible to bias toward objective, interdisciplinary, and technology-assisted decision-making models capable of safeguarding the child's best interests and ensuring genuine bi-parental participation. Rosa Di Caprio is an Italian attorney specializing in family law, with more than twenty years of professional experience. She is a member of the Naples Bar and has been admitted to practice before the Italian Supreme Court of Cassation since 2016. Her practice focuses on complex family and matrimonial matters, including divorce, child custody, parental responsibility, and the protection of children in family proceedings. In addition to her legal practice, Di Caprio is an author and legal scholar whose work focuses on contemporary developments in family law, children's rights, and the intersection between law, technology, and the administration of justice. She serves as Dean of the Faculty of Family and Minors Law at AuGe University in Rome and contributes to professional and academic discussions in Italy and internationally.

The Status of Marriage Contracts and Foreign Nuptial Agreements in France and in Spain: A Comparative Study by Delphine Eskenazi and Maria Valentin is our other internationally focused article. The authors identify the pitfalls for binational couples, whose lives are intertwined between France or Spain and a common law country such as the United States when they fail to anticipate the ramifications of these agreements made in different countries. Moreover, they point out that while France and Spain are neighbors and civil law countries, the applicable rules are actually very different on these issues and could lead to very surprisingly different results. Indeed, many couples in France and Spain are unaware that in the absence of a duly executed prenuptial agreement, the rules that determine how property will be distributed if the marriage is dissolved due to divorce or death will be those of the first country of residence after their marriage becomes official. Delphine Eskenazi is a French and New York-qualified attorney, founding Partner of the French Firm Libra Avocats (Paris). She holds a master's in law, with a specialization in "French and US law" at Université Paris I - Panthéon Sorbonne and a Juris Doctor from Cornell Law School (*summa cum laude)*. She currently specializes in international family law in order to advise private clients on their complex family issues. She has developed a specific expertise in complex international family litigation. She also acts as an expert on French legal questions before foreign courts and in particular in Anglo-Saxon countries. She is an active member of the International Academy of Family Lawyers and the Family Law Section of the New York State Bar Association. She is also the President for the French Chapter of the French-American Bar Association. She has written many articles published in law journals in the area of international family law. She has also been invited to be a lecturer in many international conferences on family law, and she is a speaker every year for the session relating to international family law at the French Etats-Généraux du Droit de la Famille (a yearly national conference for all lawyers practicing family law in France). Maria Valentin Acedo is a French and Spanish-qualified attorney practicing as Of Counsel at Libra Avocats (Paris), a firm ranked Band 1 in Family/Matrimonial: High Net Worth by Chambers. Her practice focuses mostly on international family law. notably cross-border prenuptial agreements, marital property regimes. and spousal support planning across civil and common law systems. A former Co-Chair of the ABA International Law Section's International Family Law Committee, she is a member of the Paris and Barcelona Bars and advises clients in Spanish, French, and English.

Drew Soshnick and Joshua Shilts contribute *The Transferability Trap: Binary Thinking V. Nuance in Goodwill Valuation*. They begin by acknowledging that historically divorce courts throughout the United States have viewed goodwill through a binary prism–categorized as either personal goodwill or enterprise goodwill. They argue that while binary framing is administratively simple, it omits value that originated with individuals and later became pooled, protected, institutionalized, or saleable as part

of an entity. The article considers three different analytical frameworks: the traditional personal goodwill versus enterprise-goodwill classification, a spectrum approach that distinguishes transferable personal goodwill from non-transferable and pure personal goodwill, and a salability/marketability inquiry that asks whether the value can be sold, retained, or transferred apart from an individual's future labor. They conclude that the salability/marketability analysis best captures value that is economically salable while still excluding value that remains inseparable from an individual's future earning capacity. Changing the focus to the transferability of goodwill from simple category labeling allows for a more equitable asset division by divorce courts. Drew Soshnick, a partner at Faegre Drinker in Indianapolis, offers steady and effective counsel to individuals and companies facing complex financial issues in both divorce and business disputes. He is a trial lawyer with extensive experience representing high net worth business owners, executives, professionals, athletes, celebrities, public figures, or their spouses in divorce and other disputes involving sophisticated valuation issues. Drew co-chairs the firm's trial practice and innovation team. Drew also frequently represents companies, officers, directors and owners in high-stakes, sophisticated business valuation disputes. Drew routinely analyzes business and professional practice valuations and examines financial experts at trial. He writes, lectures, and teaches frequently on the financial topics and trial skills in divorce. He is on the editorial board of Business Valuation Resources' Business Valuation Update and has authored multiple articles on business valuation, tax considerations and trial skills which have been published in the Journal of the American Academy of Matrimonial Lawyers, the American Bar Association's Family Advocate magazine, Chambers and Partners' Global Practice Guide on Indiana Family Law, and numerous other publications. Drew also teaches trial skills at the National Family Law Trial Institute and for various other state and national programs. Since 1999, Drew has presented the family law update at the annual meetings of the Judicial Conference of Indiana. Josh Shilts, CPA/ABV/CFF, CVA, CFE, is a nationally recognized forensic accountant, business valuation expert, and leader within Dean Dorton's Forensic & Valuation Services practice. A two-time Forbes honoree and experienced expert witness, he advises attorneys, business owners, executives, and boards on complex financial disputes, including marital dissolution matters, business valuation, economic damages, fraud investigations, and shareholder disputes. Josh has served as an expert witness in courts and arbitrations across the United States and is known for translating complex financial evidence into clear, credible, and defensible conclusions. He is also a frequent speaker and author on valuation, financial disputes, fraud, and expert testimony.

Our final article focuses on the expanding use of cryptocurrency and how to prepare for cases involving digital assets. The article is entitled, *Building the Record for Cryptocurrency in Divorce: Digital Assets in Classification, Discovery, Valuation, and Distribution* and is written

by Shuxiang Zhuang. Drawing on her interdisciplinary background in cross-border corporate transactions and strategic advisory for early-stage blockchain founders, her article explores the complex evidentiary hurdles of tracing digital assets in dissolution proceedings. The piece proposes a practical, six-stage record-building protocol to guide courts and practitioners through the preservation, valuation, and equitable distribution of cryptocurrency. Shuxiang Zhuang is a PRC-qualified lawyer holding a J.D. and an M.B.A. from the University of Minnesota, as well as an LL.B. from the University of International Business and Economics.

Student authored Comments include *Family Law Gaps and Inheritance Rights in Nontraditional Families* by Rebekah Arwood (UMKC Law), *Valuing Trusts During Divorce Proceedings* by McKenzie Carson (UMKC Law), *Resolving the Bill: Attorney-Fee Disputes and Limits of State-Based Mediation* by Doug Grace (UMKC Law) and *Strict Scrutiny: When Child Welfare is Compelling* by Joseph Romano (Penn State Law).

Our issue concludes with a review of Jonathan W. Gould & Christopher M. Mulchay, Parenting Plan Evaluations: An Evidence-Informed Approach to Child Custody by Dana E. Prescott.

Mary Kay Kisthardt
Executive Editor
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Delegation of Power to Non-Judges in Child Custody Litigation: Informed Consent Is Not-Negotiable

by
India A. Butler* & Dana E. Prescott**

Introduction

For decades now, family law attorneys, scholars, researchers, and judicial reformers have been searching for ways to limit the intensity of child custody[1] conflict thorough various forms of alternative dispute resolution (ADR).[2] Unfortunately, and reflective of a certain level of zip code, race, and socio-economic biases, these solutions are often co-extensive with marriage and divorce despite demographics in the United States concerning hundreds

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* India A. Butler is an attorney with the law firm of Rutkin Oldham Contratto, LLC, Westport, CT.

** Dana E. Prescott, PhD, MSW, JD, is a partner with Prescott, Jamieson, & Murphy Law Group LLC, Saco, ME. Attorney Prescott is also co-editor of the AAML Journal. The views expressed in this article are his only and not those of the Journal or the AAML.

1 The phrase "child custody" will be used even though the nomenclature may differ state-to-state. Child custody may include both physical (residence and access) and legal (major decision-making). This article will not explore all the various forms of family, which may include de facto parenting, guardianships, adoption, or other matters concerning non-biological or legal parents. A delegation of authority to determine parentage, for example, may raise other complex constitutional and statutory issues for arbitration. *See* American Academy of Matrimonial Lawyers, *A Report on the Uniform Parentage Act (UPA 2017): Developments in State Law Regarding the Rights of Children*, 37 J. Am. Acad. Matrim. Law. 1 (2024); Douglas NeJaime & Courtney G. Joslin, *The Legal Recognition of Multiparent Families: Findings from an Empirical Study*, 38 J. Am. Acad. Matrim. Law. 457 (2026).

2 *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 Yale L.J. 2804, 2806 (2015) ("Yet the two practices—adjudication and arbitration—are coming to be styled as fungible options on a 'dispute resolution' (DR) spectrum.").

of thousands of children whose parents never married but who are exposed to equivalent risks.[3] While much of the list of ADR mechanisms described in this article may be imposed on nonmarried parents and their children, the language of divorce is too limiting and, to the extent possible, will be avoided here.

Forms of ADR that are not an adversarial trial in a courtroom before a constitutionally-appointed or elected trial judge exist on a long and varied continuum from mediation to arbitration.[4] As intended by policymakers, scholars, and advocates, ADR is generally *not* the *delegation* with the power to sanction or reward parents—it is the very opposite of being a judge.[5] This does not mean an

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[3] For a compilation of demographic data, see *America's Families and Living Arrangements: 2023*, U.S. Census Bureau (Nov. 2023); *Number of Children Living in a Single Mother or Father Family in the United States from 1970 to 2025*, Statista (Mar. 27, 2026), https://www.statista.com/statistics/252847/number-of-children-living-with-a-single-mother-or-single-father/.

[4] Parent Coordination (PC) is not included within the definition here for an arbitrator, which may include, for example, various professional disciplines such as forensic psychologists. *See* American Psychological Association, *Guidelines for the Practice of Parenting Coordination*, 67 Am. Psychol. 63, 64 (2011) ("Parenting coordination is a non-adversarial dispute resolution process that is court ordered or agreed on by divorced and separated parents who have an ongoing pattern of high conflict and/or litigation about their children."). The hybrid nature of a PC may be viewed in the context of a quote a few sentences later in the same article: "Arbitration is a central component of the practice of parenting coordination, where permitted under state law, local rule, or by court order." *Id*. An interesting recent article collecting research is Asunción Tejedor Huerta et al., *Scoping Review of the Scientific Production on Parenting Coordination*, 35 Anuario de Psicología Jurídica 53, 54 (2025) ("In addition to the psychosocial damage to those involved, all this causes great frustration for the professionals who attend to them, and for this reason various methods have been sought to help them, with parental coordination being described as the most appropriate in these circumstances.").

[5] These delegated ADR responsibilities may not differentiate among guild-specific codes of ethics or state laws for lawyers, psychologists, and social workers, which define the scope of authority when acting as an agent of ADR. These distinctions are discussed too little in the law and social science literature when seeking to design and implement what are argued as neutral interventions. *See* Bernard C K Choi & Anita W P Pak, *Multidisciplinary, Interdisciplinarity and Transdisciplinary in Health Research, Services, Education and Policy: 1. Definitions, Objectives, and Evidence of Effectiveness*, 29 Clinical & Investigative Med. 351, 359 (2006); *but see* Anna Gercas, *The Universal Declaration on Bioethics and Human Rights: Promoting International Discussion on the Morality of Non-Therapeutic Research on Children*, 27 Mich. J. Int'l L. 629, 645 (2005)

arbitrator or referee[6] is without ADR skills, but the presumptive role is that of a trial judge bound, even if more flexibly, by the judicial canons.[7] To the contrary, most forms of ADR are intended, and often mandated by state law or rule, to empower parents to control the process and outcome (mediation, co-parenting therapy, parent education).[8]

From that perspective, child custody ADR also includes observations and opinions by specially qualified child custody evaluators or guardians *ad litem* (GALs), who are court-required by

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("Non-therapeutic research involving children should be prohibited for two main reasons. First, individuals who lack the capacity to consent should not be treated as instruments for the service of society. Second, parental consent, "minimal risk" limitations, and ethics committee discretion do not provide adequate protections for children.").

6 State nomenclature uses different terms. For purposes of this article, the terms are interchangeable if the delegation transfers the power to make decisions regarding legal or physical custody of a child.

7 For an excellent article for lawyers considering arbitration and the use of hybrid models, see Richard Fullerton, *The Ethics of Mediation-Arbitration*, 38 Colo. Law. 31, 39 (May 2009) ("Traditional mediation and arbitration processes, each with its proven history and ethical standards, have long been accepted. The risks of combining these practices into mediation-arbitration, however, are several, both to the parties and to the neutrals. Med-arb sometimes has been misunderstood to offer the best of both practices with little downside, but their combination challenges the integrity of each in ways that are mutually exclusive. Although practice variations may allow greater ethical protection, none does so without ethical or procedural obstacles.").

8 An excellent treatise is Mediation: Law, Policy, & Practice (vols. 1-3) § 2:2 at 9 (Sarah R. Cole et al., eds. 2024) ("With some exceptions, the evolving definition of 'fairness' in legal choices toward and commentaries about mediation is the preservation of party choice. That is, a mediation process is fair if it preserves choice, and an outcome is fair if the parties freely select it. The notion of free choice or knowing consent has come to be known as party self-determination."); *but see* Boston Coll. Legal Servs. Lab: Fam. Just. Litig. Clinic, Boston Coll. L. Sch., Court Ordered Parenting Classes in Massachusetts Probate and Family Court 32 (2024), White-Paper-Parenting-Classes-in-Probate-and-Family-Court.pdf ("As courts continue to focus their 'regulatory' energy and emphasis on parenting, they must show care in the interventions they deploy. Given that parenting programs lack clear evidence of efficacy, and given the worrisome procedural and substantive blindspots the use of the classes can create, it is critical that the Probate & Family Court develop an understanding of what courses their judges are relying on and then think critically about if, how, and when, being ordered into such programs to help litigants navigate their co-parenting relationships.").

design, desperation, or a blend of both, to share information concerning individual traits of the parents and family dynamics under complex-system stress.[9] One of the themes as well is that many interventions, which may be remedial, are perceived as "sanctions" by parents and occur too late in the process. As one of the authors has stated as a mantra in many legal and mental health environments: "prevention, not intervention" should be the aspiration for any form of ADR. What is addressed in this article, however, is *judicially-delegated* decision making power and authority to a third party licensed lawyer and what that may mean for a lawyer who encourages that choice of trial structure for clients.[10]

The Journal of the American Academy of Matrimonial Lawyers (AAML) has recently published articles by Carolyn Zack and Amy Amundson proposing important reforms concerning the

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9 In the interests of full disclosure, one of the authors of this article is a co-author of Benjamin D. Garber et al., A Family Law Professional's Field Guide to High Conflict Litigation: Dynamics, not Diagnoses (2022). The Journal of the AAML has welcomed scholarship concerning the debate over child custody evaluations. *See* Benjamin D. Garber & Premela Deck, *Advance Orientation: Preparing Parents to Participate in a Court-Ordered Parenting Plan Evaluation*, 38 J. Am. Acad. Matrim. Law. 39, 40 (2024) ("Given the simplicity of this logic, it is startling to realize that the legal and mental health professionals who work in the family courts have seldom addressed the question of the ecological validity of PPE, that is, the degree to which an artificially engineered observation is representative of natural behaviors."); Benjamin D. Garber & Robert A. Simon, *Individual Adult Psychometric Testing and Child Custody Evaluations: If the Shoe Doesn't Fit, Don't Wear It*, 30 J. Am. Acad. Matrim. Law. 325, 327 (2018) ("We submit that a CCE report that includes intimidating and invalid means, percentile ranks, and alpha coefficients risks mis leading consumers and harming the children whom we intend to serve. This risk is compounded when evaluators blindly rely exclusively on computer-generated scoring and interpretations."); Sol R. Rappaport et al., *Psychological Testing Can Be of Significant Value in Child Custody Evaluations: Don't Buy the Anti-Testing, Anti-Individual, Pro-Family Systems Woozle*, 30 J. Am. Acad. Matrim. Law. 405, 415 (2018) ("In the context of child custody evaluations, the ideographic interpretation of psychological test data entails the integration of information from multiple sources that describe the parents, the children, and parent-child interactions.").

10 In some states, parents must agree to the delegation and, in other states, the judge may impose over objection or applying a test such as "exceptional circumstances." *See, e.g.*, Me. Rev. Stat. tit. 19-A § 252 (1), (A), (B) ("The court may appoint a referee in any proceeding for paternity, divorce, judicial separation or modification of existing judgments brought under this Title: A. When the parties agree the case may be tried before a referee; or B. Upon motion demonstrating exceptional circumstances that require a referee.").

Uniform Family Law Arbitration Act ("UFLAA"),[11] to the more radical argument employing "hot tub" trials with experts asking questions of each other.[12] These ADR designs, broadly considered, mean that child custody litigation is addressed in private, non-courtroom settings. In an arbitration environment, conventional adversarial methods may become more inquisitorial,[13] such that the delegated "judge" is less umpire and more, well, inquisitive ("find out what they want to know") and, thereby, less reliant on lawyers and parties to produce and transform information that is relevant or admissible under procedures that are technical or arcane. [14]

This article concerns a framework for advising parents of what it means to leave a judicial system familiar mostly through television, movies, and social media. Clients who are surprised by the delegation and arbitration process, much less an outcome that they may

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11 *See* Amy J. Amundsen & Carolyn Moran Zack, *Family Law Arbitration—A Guide for Providing Sound Counsel to Litigants*, 37 J. Am. Acad. Matrim. Law. 49, 49 (2024) ("Achieving resolution of family law disputes privately, more quickly, more cheaply, and with less adversarial posturing, are goals shared by family lawyers and their clients. Family law arbitration, which is the process by which parties voluntarily submit their claims for adjudication to a third-party neutral, allows parties to effectuate these goals.'"). For a reminder of that scholarship, see Rebecca Aviel, *Why Civil* Gideon *Won't Fix Family Law*, 122 Yale L.J. 2106, 2120 (2012) ("This is a painfully glancing treatment of the fact that the adversarial model fits poorly with most pressing goals of family court, but the truth is that this disconnect is not news to scholars and reformers who study private custody disputes.").

12 Dana E. Prescott & Tim Fadgen, *Adversarial Systems and Forensic Experts in Child Custody: How About Adding a Hot Tub*?, 32 J. Am. Acad. Matrim. Law. 117 (2019).

13 Brian M. Barry, How Judges Judge: Empirical Insights into Judicial Decision-Making 208 (2020). The search by legal scholars to find an empirical and rule-based system for judicial decision-making is many generations old but worth a reminder. *See* Jerome Frank, *Mr. Justice Holmes and Non Euclidean Legal Thinking*, 17 Cornell L.Q. 568, 571 (1931) ("[T]raditional jurisprudence is founded upon the erroneous notion—sometimes expressed but more often implicit—that there are self evident truths about the judicial process which must not and cannot be questioned, from which self evident truths a legal system can be worked out logically as the ancient geometers had worked out their system from self-evident geometrical axioms.").

14 *See* Sandra Fredman, *Allies or Subversives—The Judiciary and Democracy*, 32 Isr. L. Rev. 407, 426 (1998) ("[N]o attempt has been made to adapt the traditional adversarial bipolar litigation to one more suited to human rights litigation.").

reject, may create a risk for the lawyers who advise them and the arbitrators performing those functions.[15] And, of primacy with any discussion of any form of ADR, the potential exists for supporting and exacerbating exploitation and risk to a parent and child from interpersonal violence that is physical, emotional, and economic.[16]

Part I explores delegation of judicial authority in the context of custody disputes, focusing on the common forms of delegation, the players frequently involved, and how those factors impact the validity of the delegation. In Part II, the article examines

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15 A discussion of case and statutory law will only be summarized as there are many excellent articles providing analysis, some of which are cited in the footnotes. Whether immunity is qualified, absolute, or quasi-judicial for arbitrators should be answered clearly by any lawyer embarking on that role or a recommendation for a client to proceed. For a policy discussion generally, see Jenny Brown, *The Expansion of Arbitral Immunity: Is Absolute Immunity a Foregone Conclusion*, 2009 J. Disp. Resol. 225, 236 ("In essence, the current policy of granting absolute immunity to arbitrators is not fair to arbitration participants and should be reexamined. It is irrational for states and organizations to continue to support policies such as arbitral immunity if those policies are not equally concerned with maintaining the integrity of the process."); *see also* Feichtinger v. Conant, 893 P.2d 1266, 1267 (Alaska 1995) ("Arbitral immunity encourages the settlement of disputes by arbitrators. It protects the integrity of the arbitration process from reprisals by dissatisfied parties. It enhances the impartiality and independence of arbitrators. It lends finality to decisions of arbitrators. And it makes it easier to recruit arbitrators. Exposing arbitrators to personal liability would weaken the effectiveness and attractiveness of arbitration as an alternative to litigation.") (footnotes and citations omitted).

16 *See* Ben Barlow, *Divorce Child Custody Mediation: In Order to Form a More Perfect Disunion*, 52 Clev. St. L. Rev. 499, 511 (2004) ("A primary concern of opponents of divorce and custody mediation is that it does not adequately deal with imbalances of power that are often immersed throughout the domestic dispute."); Holly Huber Gifford et al., *Intimate Partner Violence Predicting Outcomes in Specialized Mediation and Traditional Litigation*, 40 J. Fam. Violence 283 (2025) (investigating intimate personal violence (IPV) victimization level ever in the relationship, as reported by parents, as a predictor of outcomes within each of three different dispute resolution processes: traditional litigation, shuttle mediation, and videoconferencing mediation; within all three dispute resolution types, higher baseline IPV predicted higher levels of ongoing IPV and harassment at follow-up); Amy Holtzworth-Munroe, *Controversies in Divorce Mediation and Intimate Partner Violence: A Focus on the Children*, 16 Aggression & Violent Behav. 319, 323 (2011) ("Criticism of conducting mediation with cases involving IPV ignores a larger issue of who should make such decisions. For example, would families with a history of IPV fare any better if they went to court rather than mediation? Do traditional procedures and court decrees provide any greater protection to violent families?").

arbitration as a form of judicial delegation and its applicability to child custody determinations. It highlights the importance of informed consent in those instances and gives guidance on the appropriate scope of informed consent. Finally, we conclude in Part III that delegation to an arbitrator may offer a legally permissible and responsible means of improving the efficiency and efficacy within, and as part of, the judicial process to more securely protect the rights and needs of children. This support, however, requires more than a cursory explanation of consequences from lawyers and judges before clients walk through that portal.

I. Any Judicial Delegation Has Limits

In a manner that continues to foster intense debate depending upon the issue and political bent, the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution provides parents with a fundamental right to direct the care, custody, and control of their children as a family.[17] Accordingly, a state's power to affect, limit, terminate, and further control those rights is limited. One hundred years ago, the U.S. Supreme Court held that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[18] Through the date of this article, the Supreme Court has repeatedly affirmed and upheld the fundamental rights of parents to care for and control their children.[19] It is in this context that courts have

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17 The decisions cited here are from the past and pre-date recent U.S. Supreme Court jurisprudence. It is not clear if these procedural and substantive due process arguments concerning parental rights will survive or expand to diminish the rights of children concomitantly so the footnotes that follow may be moot soon. *See* Nan D. Hunter, *Family, Religion and the Constitution: Penumbras of Sovereignty*, 35 J. Am. Acad. Matrim. Law. 571, 580 (2023) ("The story of how family law was reconceptualized often begins and ends with this run of famous individual rights cases, most involving liberty and equality protections under the Fourteenth Amendment."); Martha Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. Am. Hist. 959, 983 (1987) ("The sudden explosion of constitutional adjudication about the family that started in the 1960s has borrowed, as lawyers always do, from the past but reinvented the past's meanings in the process.").

18 Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

19 Stanley v. Illinois, 405 U.S. 645 (1972) (holding that an Illinois law that presumed unwed fathers to be unfit parents violated the Due Process and Equal

interpreted judicial delegation of those powers as potentially violating parents' otherwise sacrosanct rights.[20]

In all child custody matters across the United States, whether *pendente lite*, post-judgment, or at the time of a final determination on custody, the court must issue orders based upon the "best interests of the child standard."[21] Most jurisdictions provide a series, some much longer than others, of statutory "factors" or criteria that the court must consider when determining what custodial arrangement serves the best interests of the minor child(ren), though the court has the authority to weigh which factors, or matrix of factors, are specifically relevant to a given case.[22] As thoughtfully summarized

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Protection Clauses of the Fourteenth Amendment); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (affirming the notion that parents have a fundamental liberty interest in their children which is derived from the Due Process Clause of the Fourteenth Amendment where the Court held that states must use at least a "clear and convincing standard" when permanently terminating parental rights); Troxel v. Granville, 530 U.S. 57 (2000) (finding that a Washington statute, which permitted "any person" to petition for visitation of a child "at any time" infringed on the rights of natural parents as granted to them by the Fourteenth Amendment's Due Process Clause).

20 This statement requires thoughtful consideration today given recent U.S. Supreme Court decisions retrenching individual rights of privacy for some groups while encouraging weaponization by other protected groups. *See* Jonathan L. Marshfield, *State Constitutional Rights, State Courts, and the Future of Substantive Due Process Protections*, 76 SMU L. Rev. 519, 540 (2023) ("Despite the limited success of the new judicial federalism, it is a mistake to conclude that state constitutions have not advanced greater individual rights protections. There are at least two scenarios where this has occurred. First, some state court rulings expanding rights have gone unaltered by amendment or other political response. Second, states have adopted various amendments that affirmatively enlarge rights beyond those in the Federal Constitution.").

21 *See* Dale Margolin Cecka, *Don't Just Ask the Kids: Toward a More Deliberate Approach to Child Advocacy*, 85 Md. L. Rev. 696 (2026) [hereinafter, Cecka, *Don't Just Ask*]; Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 St. Louis U. L.J. 5 (2009).

22 *See* Dale Margolin Cecka, *Improper Delegation of Judicial Authority in Child Custody Cases: Finally Overturned*, 52 U. Rich. L. Rev. 181, 195 (2017) [hereinafter, Cecka, *Delegation*]; *see also* Brazzel v. Brazzel, 789 S.E.2d 626, 630 (Ga. Ct. App. 2016) ("Pursuant to OCGA § 19-9-1.1, the court's confirmation order incorporated the arbitrator's custody-related decisions and showed that the court considered the circumstances of the parents and children (as set forth in the arbitration decision's detailed factual findings) and found no basis to conclude that the decisions would not be in the best interests of the children."); Riemann v. Toland, 269 A.3d 229, 235 (Me. 2022) ("The referee articulated the specific best

in many treatises over the past half century, the "best interest of the child" (BIC) standard gained traction during the mid-twentieth century as a mechanism for addressing custody disputes.[23]

Though the BIC test attempts to provide defensible guidelines for evaluating very fact specific issues, this requires a great deal of subjective interpretation by the judge in each case. Accordingly, non-arbitrator delegation to assess the BIC factors may have the appearance, to the parent, of authority and power in some roles but that is not the same as an actual constitutional delegation of judicial authority. A few common and frequently appealed and public examples make this distinction clear.

Common forms of ADR with third parties include the child's therapist or an alternative mental health professional, who may be one and the same given the various licenses that professionals may hold.[24] Orders delegating authority to mental health professionals often are at risk of overbreadth because they frequently bind the parties to follow "all recommendations" of the professionals without sufficiently limiting the scope.[25] Across jurisdictions, authority varies depending on whether it is to a parent versus an "other," such as a mental health professional, family relations counselor, guardians *ad litem*, and parenting coordinators.[26]

The power to decide whether a parent has access to a child may be permissible because the BIC analysis is (in and of itself) a judicial determination that the parties were subject to

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interest factors that were important to this case, see 19-A M.R.S. § 1653(3)(A)-(B), (E)-(F), (H), (N), and made findings as to each that are supported by substantial record evidence, including expert testimony assessed and weighed carefully by the referee.") (citations omitted).

23 *Id*.

24 *See* Benjamin D. Garber, *The Dynamics of Enmeshed Family System Ten Years Later: Family Court and Contemporary Understanding of Adultification, Parentification, and Infantilization*, 34 J. Am. Acad. Matrim. Law. 97, 98 (2021) ("The field of family law is still in its infancy. Born of the awkward union between the legal system and mental health practice, its professionals have only just begun to recognize the blessings and burdens associated with its lineage. In fact, neither the adversarial courts nor the medical model of individual diagnosis and treatment fit the needs of the conflicted family system or the best interests of the child standard.").

25 *See* Cecka, *Delegation*, *supra* note 22, at 187.

26 *See generally Brief of the Connecticut Bar Associated as Amicus Curiae in* R.H. v. M.H., Connecticut Bar Association Family Law Section (Dec. 6, 2023) (on file with authors).

the scrutiny of the court, the court applied the statutory criteria, and thereafter found that it was in the children's best interests if one parent had the discretion to make certain post-judgment decisions.[27] The more cautious view is that the risk of improper motives by the parent awarded authority or unrestricted delegation to a third party such as a therapist must be restrained in most cases.

One common means of injecting a third-party is the appointment of a guardian *ad Litem* ("GAL"), whose task is to investigate the applicable custody factors and make recommendations to the court regarding the best interest of the child.[28] The presentation of the GAL's findings differ between jurisdictions with some states allowing live testimony from the GAL while others requiring the GAL to author written reports.[29] In either instance, the GAL's ul-

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27 *See, e.g.,* R.H. v. M.H., 324 A.3d 720, 724 (Conn. 2024) ("We conclude that the trial court's order authorizing the plaintiff to exercise unilateral control over the defendant's visitation with R was an improper delegation of judicial authority because the court delegated to the plaintiff, in consultation with the child's therapist, the authority to suspend or terminate the defendant's visitation with R. Unlike the order in Zilkha, in which the trial court concluded that the defendant did not have any right to visitation; the order in the present case granted the defendant a specific right to visitation after the defendant engaged in at least four sessions with her mental health professional.") (citation omitted); *In re* Children of Richard E., 227 A.3d 159, 169 (Me. 2020) ("Here, the court required that contact between the father and the older child shall resume 'as therapeutically recommended.' Similarly, the court required that contact between the father and the younger child take place in the presence of a professional supervisor for a period of six weeks, but after that time, contact could be extended 'upon recommendation of the child's therapist.' The court erred by requiring that future contact, and any extension of such contact, between the father and each child be dependent upon the recommendation of the child's therapist, because this 'transfer[red] the court's responsibility for determining the best interest[s] of the child[ren].' As we made clear in Knight, although the court can consider a therapist's opinion in its determination of a parent's right to have contact with a child, "the court cannot make the visitation outcome dependent upon that opinion.") (citations omitted).

28 *See* Cecka, *Don't Just Ask*, *supra* note 21.

29 *See* Dana E. Prescott & Diane A. Tennies, *The Lawyer as Guardian ad Litem: Should Status Make Expert Opinions All-In and Trump Gatekeeping Functions by Family Courts*, 30 J. Am. Acad. Matrim. Law. 379, 393-94 (2017) ("The GAL role is intended by policy makers to fill this gap by acquiring information through investigation and inquiry outside the courtroom and then transferring that knowledge, by report and testimony, to judicial fact finding and decision making.").

timate task is to present the court with facts applicable to each of the statutory criteria and make formal *recommendations* to the court. What is—or at least should be—clear is that due process requires the GAL's report and opinions to be subject to cross-examination.[30] This is not, however, a benign power of suggestion when the testimony of the GAL and recommendations are more likely (but not always) adopted by the judge. The hybrid role of the GAL as court-appointed neutral and third-party mediator for the parties, makes them tempting "stand-ins" for the court to resolve custodial disagreements.

Although role confusion is a risk in child custody delegations, another widely-studied approach to chronic conflict is a parenting coordinator ("PC"), who may be authorized, with or without specific state statutes or local rules, to mediate or decide future child

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30 *See, e.g.*, Banks v. Leary, 209 A.3d 109, 114 (Me. 2019) ("First, as we have held, 'the most effective challenge to the quality, completeness, or competence of a guardian ad litem's work will be accomplished through cross-examination of the GAL at trial." Consequently, for there to be a full explication of the GAL's opinions and recommendation, which would be important for the court to determine how much weight to assign to that information, the opportunity for cross-examination of the GAL is necessary. Second, the right to cross-examine the GAL about the report has constitutional significance because it is part of the process that serves to protect parents' 'fundamental liberty interest to direct the care, custody, and control of their children.'") (citations omitted); *In re* Hoffman, 776 N.E.2d 485, 489 (Ohio 2002) ("Due process necessitates that appellee should have had the right to cross-examine the guardian ad litem, since the trial court relied upon the report. As such, notwithstanding R.C. 2151.414(C), we hold that in a permanent custody proceeding in which the guardian ad litem's report will be a factor in the trial court's decision, parties to the proceeding have the right to cross-examine the guardian ad litem concerning the contents of the report and the basis for a custody recommendation. Without these safeguards, there are no measures to ensure the accuracy of the information provided and the credibility of those who made statements."); Kelley v. Kelley, 175 P.3d 400, 406 (Okla. 2007) ("The legislative act removing the guardian ad litem from the discovery process cannot be construed so as to deny due process which includes the right to be heard in open court and to have a determination of issues based upon competent evidence offered by persons who submit themselves to cross-examination. Therefore, to the extent that 43 O.S. Supp. 2006 §107.3 (A)(2)(e), barring discovery of the guardian ad litem, negates the right of a parent to cross-examine the guardian concerning the contents of the report and the basis for a custody recommendation, it is an unconstitutional restraint on the parent's fundamental rights to the care, custody, companionship and management of his or her child. The trial court's order barring the father from calling the guardian ad litem from testifying in the cause suffers from the same constitutional infirmity.").

custody disputes. As scholars note, the "specific nature of the role of a parent coordinator varies significantly both within and among jurisdictions that permit such appointments. In certain circumstances, the role of parent coordinator may be analogous to that of a mediator, in others to that of a master, and still in others, the parent coordinator's role combines multiple functions."[31] binding on the parties unless modified by the court.[32] In this setting, PCs are encouraged to provide parents with a setting to present their disagreements to each other and the PC, work towards common ground, and in the absence of an organic agreement, comply in good faith.

There is, however, much debate about the authority of the trial court to delegate to PCs absent enabling legislation.[33] As the Nevada Supreme Court held with a legitimate warning:

> Here, the district court granted the parenting coordinator temporary decision-making authority to resolve minor disputes between Bautista and Picone, which included both substantive and nonsubstantive changes to their parenting plan. The district court's order defined a substantive change "as a modification to the parenting plan that (a) significantly changes the timeshare of the child with either parent; or (b) modifies the timeshare such that it amounts to a change in the designation of primary physical custody or a shared physical custodial arrangement." Because the parenting coordinator's authority was not limited in scope to nonsubstantive issues, we conclude that the district court improperly delegated its decision-making authority.[34]

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31 Milford D. Dale et al., *Parenting Coordination Law in the US and Canada: A Review of the Sources and Scope of the PC's Authority*, 58 Fam. Ct. Rev. 673, 673-74 (2020).

32 *Id*. at 688 ("In the twenty-one states that have a parenting coordination statute or rule, only five require the consent of both parents for the appointment. In most states, the court has authority to order parenting coordination on its own motion as well as upon agreement of the parents or upon motion by a party.").

33 In *Bower v. Bournay-Bowe*r, 15 N.E.3d 745, 753-54 (Mass. 2014), the Massachusetts Supreme Judicial Court examined various jurisdictions and the role and authority of PCs, and concluded: "Therefore, probate court judges possess the inherent authority to refer parties to a parent coordinator in appropriate circumstances in order to conserve limited judicial resources and aid in the probate court's functioning and capacity to decide cases, or if in the judge's discretion such referral is necessary to ensure the best interests of the children in a divorce- or custody-related proceeding. However, this authority is not without limit." (citations omitted).

34 Bautista v. Picone, 419 P.3d 157, 159-60 (Nev. 2018).

The challenge is that states have been irregular as to consequences, including sanctions, for ignoring the PC or engaging in more litigation with the PC process as just a new sandbox.[35]

An excellent example of tensions may be found in the matter of *R.H. v. M.H.*,[36] in which the Supreme Court of Connecticut decided whether an order permitting one parent to "suspend" the other parent's access with the minor children was an improper delegation of judicial authority despite a continuous and demonstrated pattern over a period of years in which the other parent had generated the vast majority of the family's problems and posed a significant risk of psychological harm to the children as a result of her substance abuse issues. There, the court held that such an order was an improper delegation of judicial authority, since it effectively granted one parent the sole authority, in consultation with the child's therapist, to suspend the other parent's parenting time, a task strictly reserved for the courts.[37]

The Supreme Court in *R.H. v. M.H.* supported an inconsistent and prior ruling in *Lehane v. Murray*[38] and drew factual distinctions between the two cases. In *Lehane v. Murray*, the Connecticut Court of Appeals upheld an order that provided the father discretion to "alter, change, or modify" the mother's access schedule with the minor child since the discretion was limited in scope and did not permit a reduction or elimination of the mother's access. Read together, *R.H v. M.H.* and *Lehane v. Murray* suggest that determining whether a trial court has delegated its authority, whether any such delegation is proper, and the extent of any delegation, is a delicate and fact-driven inquiry that will be reviewed for any abuse of discretion.

One important consideration is to "whom" judicial authority has been delegated. The Supreme Court of Connecticut opined

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35 *See, e.g.*, Estape v. Seidman, 269 So. 3d 565, 569 (Fla. Dist. Ct. App. 2019) ("Furthermore, section 61.125, Florida Statutes (2012), authorizes the appointment of a parenting coordinator, whose purpose is to assist parents in dispute resolution over parenting plans. Section 61.125(7) contains an express confidentiality provision for communications between the parenting coordinator, who could be a licensed therapist, and the parties. However, section 61.125(9) provides for a limitation of liability for a coordinator, unless the coordinator acts in bad faith or reckless disregard for the rights of the parties.").

36 324 A.3d 720 (Conn. 2024).

37 *Id*. at 724.

38 283 A.3d 62 (Conn. App. Ct. 2022).

that "given the inherent tensions between the parties in visitation cases, we conclude that a trial court shall not delegate to a parent its judicial authority to suspend visitation with the other parent."[39] Given the emotionality of custodial disputes clear risks exist that one party may weaponize its delegated authority in order to exert power over or undermine the other parent's relationship with the child. To that point, Justices Robinson and Mullins authored a concurrence in the matter of *R.H. v. M.H.,* focusing largely on whether the order delegating some judicial authority over custody-related matters allowed for a temporary and finite suspension or modification of rights as compared to a permanent change.[40]

Almost exactly one year after the decision in *R.H. v. M.H.,* the Connecticut Appellate Court affirmed this concept in the matter of *Milot v. Milot.*[41] There, the court found a delegation to be improper in so far as it placed the decision-making authority in the hands of a party to the litigation.[42] Most recently, the Connecticut Appellate Court found that in circumstances where a parent is

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39 R. H. v. M. H., 324 A.3d 720, 729-30 (Conn. 2024).

40 *Id.* at 731. The original order read:

> If at any time the defendant reasonably determines, after consultation with [the child's] therapist, that the unsupervised visits with the plaintiff are causing negative behavioral or emotional consequences for [the child], then the defendant may either suspend the plaintiff's visitation or reinstate the requirement of supervision of the visits by a third party of his choice, with defendant responsible for the cost of supervision if any, until further order of the court or written agreement of the parties.

Id. at 723.

41 344 A.3d 320 (Conn. App. Ct. 2025).

42 *Id.* at 325 ("We conclude that the court in the present case impermissibly delegated its authority to the custodial parent in ordering that '[v]isits between the children and the defendant shall be at the sole [discretion] of the plaintiff with all arrangements approved by the plaintiff.'"); Kamil v. Kamil, 242 A.3d 801 (N.H. 2020) ("It is the trial court's responsibility to determine parental rights and responsibilities in cases of divorce and legal separation. The court may not delegate that responsibility to a third party."); Kosciusko v. Parham, 836 S.E.2d 362 (S.C. Ct. App. 2019), *rehearing denied* 2019 S.C. App. LEXIS 196 (S.C. Ct. App. 2019) ("The family court did not have subject-matter jurisdiction to sanction binding arbitration of issues involving custody and visitation or to confirm the arbitrator's award" such that any order thus generated was void and unenforceable."); Pearson v. Wendell, 125 A.3d 1149 (Me. 2015) ("Although the court can consider the expression of such an expert opinion by a therapist, the court cannot make the visitation outcome dependent upon that opinion.").

afforded *zero* custodial rights, the other parent's award of *sole* legal and physical custody creates a permissible delegation that allows the custodial parent to dictate and determine the visitation rights of the non-custodial parent.[43] It is no surprise why these forms of delegation occur so frequently (whether or not the delegation is lawful). Family law attorneys and the court system are always looking for ways in which to increase judicial economy, reduce the financial and emotional toll of litigation, and provide informed and supportable results.

By ordering parents to engage in some judicially-sanctioned process, the hope is that parties are (a) more likely to attain quicker resolution on issues; (b) those resolutions have a single-judge case management process that is faster and more responsive than a court system may allow; and (c) parents are less likely to return to court if they are heard and structure is consistently put in place. This delegation, however, is bounded by a long tradition of indeterminate laws concerning children and good intentions that may be disconnected from research or effective policy.[44] What matters here is that none of these roles are the same as delegating power and authority to an arbitrator who can hold a trial and render a judgement that may impose legal or physical custody arrangements on parents. Accordingly, the duties of informed consent for lawyers in the latter instance is of paramount importance.

II. The (Real) Delegation Doctrine and Informed Consent

Evolving statutory frameworks require, historically, that custody determinations be made by the court and are inherently nondelegable. But that is not the trend in practice. The shift is, in part, a response to the desperation of overwhelmed court dockets,

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43 D. K. v. D. F., 344 A.3d 564 (Conn. App. Ct. 2025).

44 *See* Sharvit Or et al., *Parenting Coordination–Outcome Measurement and Prediction: Implications for Research and Practice*, 61 Fam. Ct. Rev. 135, 153 (2023) ("Five desired final outcome indicators were specified for the program. The study findings show that on the whole, parents in high conflict experienced a significant improvement in the desired outcome indicators following participation in the parenting coordination pilot program. Given that most of the participants in the parenting coordination pilot program finished their participation in the program ahead of schedule, these findings are especially noteworthy.").

family systems and children in complex crisis, and an interdisciplinary array of professionals trying to mitigate the harm of an adversarial trial. Common delegations to an arbitrator, without much controversy, include economic issues of alimony and equitable distribution of assets and debts, with a mutually agreed upon professional just like many other economic civil lawsuits in the courts.[45]

There is, however, legitimate scholarly and legal opposition to the delegation of power to non-judges concerning child custody matters.[46] Unlike other forms of civil litigation, child custody is subject to iterations of litigation until a minor is no longer a minor as defined by each state (no final judgments as with other litigation), and the state has a special obligation to children beyond the allocation of net worth and income (the ancient *parens patriae* doctrine).[47] Professor Dale Margolin Cecka summarized this argument quite well:

> This practice, whereby the best interests of the child are decided outside of a courtroom, should have been dispensed with long ago. The Virginia

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45 *See, e.g.,* Taylor v. Taylor, 517 P.3d 380 (Utah 2022) (holding that submitting issues of alimony, property division, child support, and custody to binding arbitration was a permissible delegation and that the express provisions of the Utah Uniform Arbitration Act authorized the private arbitration of these issues.).

46 Bridgette Woodford, *Leave It to the Courts: Why Child Custody Arbitration Is Improper*, 14 Arb. L. Rev. 1, 16 (2023) ("Despite Americans' distrust in the judicial process and disdain towards litigious proceedings, arbitration does not provide an effective alternative in determining child custody issues."). The author cites Christine Albano, Comment, *Binding Arbitration: A Proper Forum for Child Custody*?, 14 J. Am. Acad. Matrim. Law. 419 (1997) (stating that an arbitrator may not secure the legal rights of children if the arbitrator is unfamiliar with family law).

47 When on the New York Court of Appeals before becoming a U.S. Supreme Court Justice, Judge Benjamin Cardozo, in 1925, wrote the test later adopted by many states:

> He acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate and careful parent" and make provision for the child accordingly. He is not adjudicating a controversy between adversary parties, to compose their private differences. He is not determining rights "as between a parent and a child" or as between one parent and another. He "interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the [state] as *parens patriae.*"

Finlay v. Finla*y*, 148 N.E. 624, 626 (N.Y. 1925).

> Code makes this clear. Delegation orders also run afoul of the United States Constitution. Delegation violates the fundamental right to parent and can violate an individual's physical liberty when that individual is held in contempt of court orders made by a non-judicial decision maker. Other states have banned the practice for years. Delegation is simply a cultural relic of the Virginia trial courts that has never had any legal basis.[48]

Whatever form a judicial delegation may take, the intent is to reduce the emotional and financial toll associated with iterations of chronic or emergent child custody disputes.[49]

This section, however, is concerned with a lawful delegation to a judicially-empowered lawyer with authority to decide legal or physical custody litigation between parents. The section also addresses what that means for lawyers advising clients of their rights, waiver of those rights to court, and risk and benefits of the arbitration process. The scaffolding for best practices begins with adapting decades of state law from the medical field. The doctrine of informed consent originated in the context of surgical and psychiatric treatment. The goal was to ensure that patients could make informed choices about whether to undergo proposed procedures, surgeries, or other medical treatments after having been made well-aware of all the attendant risks and potential array of outcomes.[50]

The parallel question in the context of child custody arbitrations is whether there is a comparable duty to explain the benefit/risk of arbitration and the delegation doctrine in a particular state to a client who may be vulnerable or lack the capacity to consent, or may be a sophisticated litigant with years of suing and being sued? Relatively little case law exists addressing this issue. After all, the legal profession is rather active when demanding that other

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48 Cecka, *Delegation*, *supra* note 22, at 182.

49 For purposes of this article, the phrase "child custody" will be used, acknowledging that some states have changed their laws to *shared*, *allocated,* and *sole parental rights and responsibilities*. The debate concerning the best interests' standards, the bargaining between parents, and the efficacy of parenting plans and presumptions for children is beyond the scope of this article. *See* Dana E. Prescott, *The AAML and a New Paradigm for Thinking about Child Custody Litigation: The Next Half Century*, 24 J. Am. Acad. Matrim. Law. 107, 127 (2011) ("In child custody litigation, parents who prefer litigation rather than collaboration may incur no marginal costs for that choice and thereby impose those costs upon society by creating a higher probability of chronic conflict litigation, excessive use of scarce judicial resources, more children-at-risk, and economic deprivation for the family system").

50 Felder v. Children's Hosp. Corp., 150 N.E.3d 1, 7 (Mass. App. Ct. 2020).

professionals with licensure obtain informed consent before commencing human experimentation or treatment. This is not to say that lawyers should have clients sign informed consent releases. But what it does mean is that lawyers are obligated to explicitly explain processes, risks, and potential outcomes to their clients before permitting the client to engage in a process that would delegate the court's authority to hear evidence and impose binding custody arrangements to someone other than the court.

Professor Mark Spiegel suggested, in 1979, that "informed consent is not meaningful unless a person understands what he is consenting to; understanding requires information, and it is the doctor who must supply the necessary information because the patient lacks the expertise to procure and translate it himself."[51] This test derives from the ABA Code of Professional Responsibility as it then existed, which is adapted here with more current language:

- A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations.
- A lawyer ought to initiate this informed decision-making process if the client does not do so before a court order is contemplated much less signed.
- A lawyer should bring to bear upon this decision-making process the fullness of their experience as well as that objective viewpoint of risk and benefit.
- In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not the lawyer.
- A lawyer's obligation to protect the right of informed consent clearly places the obligation on the lawyer to initiate discussion.[52]

This is a practical, albeit incomplete, test for AAML Fellows and any family law practitioner. Lawyers are often the bearers of bad news. Because the legal profession is inherently risk averse for

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51 Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. Pa. L. Rev. 41, 45 (1979).

52 *Id*. at 71 (*quoting* ABA Code of Professional Responsibility, Ethical Consideration 7-8).

clients, attorneys are trained to anticipate and communicate potential adverse outcomes. While "no clear rule exists for whether such delegations are permissible . . . there is a permissibility spectrum: the more authority and discretion delegated to a third party, the more likely the delegation is to be struck down."[53]

Thus, the challenges are conveying to the client-parent the reality that a court trial may be worse than a delegation to an arbitrator who has one case (theirs), can schedule times that may work better for their family, and can render decisions that are more consistent than a randomly-assigned judge in a trial. In some states, judges are appointed from many different specialties (criminal prosecution or defense, personal injury, real estate) with no experience in family law. The choice of an arbitrator can fit the unique facts and legal issues that confront a family bounded by iterations of litigation.

From the perspective argued in this article, the starting point for discussion with a client, and documenting that discussion later, is a principle of waiver familiar to any lawyer and typically illuminated in the Sixth Amendment context of waiving the right to assistance of counsel: "Constitutional rights, including the right to counsel, may be waived as long as the waiver is voluntary, knowing, and intelligent. However, because it is a fundamental constitutional right, the right to representation by counsel requires that every reasonable presumption must be indulged against waiver."[54] Before consenting to a waiver of these rights, clients should have sufficient information to clearly answer, within their capacity to understand, the following questions:

- What does the delegation order provide as the precise scope of the arbitrator's authority to enter judgment (e.g., holidays, sole custody, relocation) because avoiding arguments that the judgment was ultra vires is a major concern?[55]

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53 Jason Iuliano, *The Judicial Nondelegation Doctrine*, 75 Ala. L. Rev. 51, 70 (2023) ("Far and away, however, the most common subset of custody cases involves visitation rights. In these cases, the object of delegation is tasked with determining how often, and under what conditions, a parent may visit a child. Despite there being nearly three hundred cases on this issue, no clear rule exists for whether such delegations are permissible. Instead, there is a permissibility spectrum: the more authority and discretion delegated to a third party, the more likely the delegation is to be struck down.").

54 State v. Watson, 900 A.2d 702, 707 (Me. 2006).

55 *See* Brinckerhoff v. Brinckerhoff, 889 A.2d 701, 705 (Vt. 2005) ("As the trial court here cogently observed, however, these issues were sharply contested

- Is participation voluntary or mandated?
- Is participation confidential?[56]
- Is there a mandated reporting requirement?[57]
- May the delegated surrogate speak with parents, children, or professionals privately?
- Do lawyers participate with clients in the forum or do clients attend alone?
- Are the forum events and conferences recorded or informal?
- Will the arbitrator engage in any form of so-called "med-arb" which means meeting with parties and lawyers *ex parte* or conducting an informal hearing?

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at the arbitration hearing, and the fact that the panel declined to adopt husband's characterization of the inheritance and investment accounts 'does not constitute an evident miscalculation or evident mistake to be modified under 12 V.S.A. § 5678(b), nor is the panel's determination ultra vires so as to warrant vacation of the award under 12 V.S.A. § 5677.'").

56 *See* Jacqueline E. Akhurst & Mark M. Leach, *Confidentiality, Informed Consent, and Multiple Relationships in Four Emerging Regions*, 33 Ethics & Behav. 175, 179 (2023) ("Respectful discussions of people's expectations and psychoeducation about the processes that might unfold are thus fundamental to gaining informed consent."); Lindy Marie Fields & James Douglas Calvert, *Informed Consent Procedures with Cognitively Impaired Patients: A Review of Ethics and Best Practices*, 69 Psychiatry & Clinical Neuroscience 462 (2015) ("Cognitively impaired patients may be unable to appropriately make educated treatment decisions because they lack the cognitive ability or capacity to adequately understand the situation and possible decisions. Cognitive capacity is a complex construct consisting of three global domains: conceptual, inferential and mnemonic competency.").

57 *See* Talia Gruber*, Beyond Mandated Reporting: Debunking Assumptions to Support Children and Families*, 1 Abolitionist Persp. in Soc. Work 1, 9 (2023) ("Though MR is positioned as, at worst, a neutral tool that exists to support the identification, prevention, and treatment of child abuse and neglect, in practice, MR exacerbates and directly causes harm to children and families. This is clear in the ways that MR mirrors the punitive nature of the criminal legal system, policing and surveilling Black, Indigenous, and Latinx families and allowing for caregivers' civil rights to be violated through invasive, traumatic, and harmful investigative practices."); Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 Harv. Negot. L. Rev. 81, 114 (2003) ("Mediators who fail to uphold the requirements of mandatory reporting face a range of sanctions.").

- What impact and consequences to them and their children may the judge in that jurisdiction consider when reviewing an arbitration "opinion?"[58]
- What are the rules for creating and maintaining a record or is the process just "informal"?[59]
- What are the roles of the other professionals like therapists or GALs?
- Will children testify and, if so, how and with what record?[60]

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58 Adapting the wise advice from Richard Fullerton, *supra* note 7, at 33-34:

> The med-arb process has no governing ethical code of its own. Because claims of ethical violations are based on the standards for its component practices, the Mediator Standards and Arbitrator Code act as controls. Med-arb also does not have universally accepted procedures; instead, it relies on common practices that can be modified by the parties. To provide a consistent comparison, this article will consider med-arb to include the following: Before committing to med-arb, parties agree on a protocol de tailing both the mediation and arbitration phases. The result ant procedures are detailed in a med-arb agreement. By signing this document, parties commit to the process until either a mediated resolution is executed or a binding arbitration award is issued. The sequential process begins with the mediation phase to address all mutually recognized issues. If mediation results in full agreement, the med-arb is terminated without the need for an arbitration phase. Lacking full agreement, the same neutral closes the mediation and commences the arbitration phase that will result in a binding award. During both phases, the neutral is allowed to communicate with parties the same as in the traditional practices, engaging in ex parte conversation during mediation but not during arbitration.

59 Johnson v. Johnson, 9 A.3d 1003, 1014 (N.J. 2014) ("In the final analysis, whether an arbitration is conducted under the Arbitration Act or APDRA is not the issue of consequence. What matters is the state of the record. Obviously, a verbatim transcript of a trial-type hearing will satisfy Fawzy, assuming the other requirements of that case are met. However, where, as here, the arbitrator creates a detailed record for review, the award can be confirmed without verbatim transcription. It goes without saying that it would behoove any arbitrator tasked with resolving a child custody or parenting-time issue to prepare a record, at least as detailed as the one we have approved today. Such preparation will avoid a judicial replay of the entire matter in the event of a substantial claim of harm.").

60 *See* Hutchinson v. Cobb, 90 A.3d 438, 442-43 (Me. 2014) ("Further, the record provides no indication that Hutchinson had prior notice that his child's testimony would be taken off the record, and we will not infer that he acquiesced in or otherwise consented to the same. Because the court relied heavily on the in-chambers testimony in its findings and its ultimate decision to

- Are judicial surrogates (including parenting coordinators, arbitrators, and referees) subject to subpoena and thereby deposition and/or trial testimony?
- What are the procedures and standard of review for confirmation of the arbitration decision?[61]
- In which of these forums are agreements binding without a court order (or is there a waiver of appeal)? What are the rights of appeal and what does that mean for enforcement in the interim after the award?

The practice of delegating judicial authority to qualified, impartial professionals are for the purpose of improving efficiency, effectiveness, and satisfaction. The value of incorporating professionals vested with this authority is sufficiently clear. Unfortunately, so too are the legal challenges, which heightens the duty of lawyers to assure clients make informed and intelligent decisions consistent with their capacity to consent.

III. Conclusion

Decades of research show that damage is done to children when their parents engage in protracted litigation and fail to co-parent civilly over the long term. IPV and child abuse and neglect may influence the litigation and autonomy of the parents; especially if child protective services are involved. Of critical importance as well, not all forms of ADR or court-appointees like PCs or GALs are more efficient or benign pathways but may embed their own unique forms of flawed, biased, time-consuming, and less safe mechanisms. [62] One of the reasons for adding brakes or guardrails to policy is that the law and social science can get caught up in fads and fixes that may lack an empirical basis. This does not mean, by any measure, that such efforts are not worthy of policy design to try to better protect parents and children. It just means that caution and modest expectations are encouraged.

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modify. Hutchinson's rights of contact, we cannot say that the error resulting from the absence of a record was harmless.").

61 *See* Nix v. Scarbrough, 894 S.E.2d 658, 663 (Ga. Ct. App. 2023) ("Scarbrough filed a motion to confirm arbitration award, and Nix objected to the confirmation and asserted that the Arbitrator manifestly disregarded the law, and was not impartial, but rather was biased toward Scarbrough.").

62 Cecka, *Don't Just Ask*, *supra* note 21, at 699.

No matter its jurisprudential challenges and jurisdiction-specific precedents, the broad and recurrent pressure to delegate judicial authority persists in response to the pressures deeply embedded in family courts. Court calendars are bursting at the seams. Inequities associated with physical, intellectual, emotional (particularly trauma-based) needs, language, culture, religion, and identity run rampant. Litigation is often an extraordinarily time-consuming, expensive, stressful, and unpredictable process. Children linger in a sort of purgatory, often caught in the midst of their parents' simmering conflicts, while the wheels of justice turn (if turning at all) slowly forward.

These are among the many powerful reasons why child custody professionals, litigants, and family court systems are always looking for ways to increase judicial economy, reduce the financial and emotional toll of litigation, provide informed and supportable results, and reduce harm to children.[63] Recidivist litigation is permissible but not desirable. Given that no parenting plan can anticipate every possible future contingency, it is enticing for courts to empower impartial, disinterested players as decision-makers or "tiebreakers" rather than require parties to queue up for another round of litigation.

Family law attorneys need to know and explain precisely how delegation is treated by statute and case law to adequately inform clients about the scope of relief that can be sought and delegated by a court, impact and risk associated when electing a mechanism that is on unresolved footing, and the ways in which enforcement and appeal of an arbitration award work when there are objections. Clients should be informed that even to the extent that the prevailing law favors (or at least does not explicitly reject) delegation, that delegation carries the risk of more litigation and unenforceability (or delayed and expensive enforceability). The resulting inefficiencies, inefficacies, and dissatisfaction work against all involved and particularly against the best interests of the children.[64] Nevertheless, it is wise to finish with a reminder of where

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63 *See Brief of the Connecticut Bar Associated as Amicus Curiae*, *supra* note 26, at 13.

64 The political spectrum, and separation of powers as it may still exist, also facilitates or impedes solutions. *See* Albert W. Alschuler, Law Without Values: The Life, Work, and Legacy of Justice Holmes 63 (2000) ("Skeptics tend to view any profession of judicial restraint only when it produces outcomes

any child custody article is rooted: a parent or parents have the constitutional and legal right of autonomy and self-determination, over the time that litigation occurs and reoccurs, to avoid asking a court to decide or a tribunal delegated that authority to decide, privately, their own lives.[65]

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they like."); Marsha Garrison, Family Life, Family Law, and Family Justice: Tying the Knot 168 (2023) ("Well-functioning families promote a well-functioning society. Poorly functioning families promote devastating social problems and national disintegration. Family law can, and does, make a difference in the likelihood that our families will succeed.").

65 This is not a new policy argument. *See* Dana E. Prescott, *The Constitutional Right to Parent: Does the Doctrine of Waiver Apply to Guardianships*, 33 Me. B.J. 13, 16 (Fall 2018) ("As a measure of judicial restraint in family matters, federal and state courts have historically acknowledged a presumptive right of parental autonomy 'except in the context of neglect, abuse, or other emergencies.' In Prince v. Massachusetts, for example, the Supreme Court, in the context of a parent's religious beliefs, wrote that 'parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they make that choice for themselves.'").

Protecting the Former Spouses' Share of the Military Pension: Strategic Solutions After *Howell*

by
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I. Introduction

For many military families, the decision to retire marks the end of decades of shared sacrifice. A service member's career is rarely an individual pursuit; it is a familial undertaking shaped by frequent relocations, unpredictable deployments, and the trailing career constraints placed on the non-military spouse. The policy rationale behind federal protections for military spouses recognizes these unique burdens. Specifically, due to the frequent moves of military members, spouses face additional challenges in establishing traditional careers and are thus limited in their earning capacities. Additionally, as military members are required to be away from home for long periods of time, military spouses must bear a larger share of the homemaker and childcare duties. "Former spouses of service members certainly make greater sacrifices for our country than former spouses of civilians."[1]

The profound interdependence of military marriage is one reason why state courts treat military retired pay as community property upon divorce. Congress ultimately endorsed this principle in the Uniformed Services Former Spouses' Protection Act ("USFSPA"), which authorizes States to classify "disposable

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1 Johnson v. Johnson, 214 P.3d 369, 373 (Alaska 2009) (quoting Brett R. Turner, Equitable Distribution of Property § 6:3, at 21–22 (Thomas Reuters, 3d ed., 2005)).

retired pay" as marital property.[2] However, the USFSPA's definition of disposable retired pay is narrow.[3] It excludes, among other things, amounts waived for disability compensation under Title 38, amounts replaced by Combat-Related Special Compensation ("CRSC"), and Survivor Benefit Plan ("SBP") premiums.[4] In *Mansell v. Mansell*,[5] the U.S. Supreme Court confirmed that States may divide only disposable retired pay and are not authorized "to treat *total* retired pay as community property."[6] These exclusions, rooted in federal disability policy, create significant gaps in protection for former spouses whose economic lives were shaped by the demands of military service.

Military retired pay frequently represents the largest single marital asset accumulated during a long-term military marriage. Its characterization and division are therefore central to achieving equity at dissolution. The problem addressed by this article arises when federal disability compensation schemes operate to reduce, after divorce, the amount of military retired pay previously awarded to a former spouse. When a retired service member elects to receive certain forms of disability compensation, federal law requires a dollar-for-dollar waiver of military retired pay, directly reducing the amount of divisible retired pay.[7] Because the former spouse has no control over this post-divorce election, the economic consequences fall unilaterally on the former spouse.

Historically, this reduction applied uniformly across all military divorce cases involving retired pay waived for disability compensation.[8] Before 2004, any veteran who received disability compensation through the Department of Veterans' Affairs ("VA") was required to waive an equivalent portion of military

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2 *See* 10 U.S.C. § 1408(c)(1).

3 *See id.* at § 1408(a)(4).

4 *See id.* In addition, disposable retired pay does not include specific portions of retired pay owed to members that are entitled to retired pay under Chapter 61.

5 490 U.S. 581 (1989).

6 *Id.* at 589 (emphasis added).

7 *See* 38 U.S.C. § 5305.

8 *See* 38 U.S.C. § 5305. The language "[e]xcept as provided in section 1414 of title 10" was added in 2004. Prior to the enactment of 10 U.S.C. § 1414, all retirees receiving disability compensation were subject to a dollar-for-dollar reduction in their retired pay.

retired pay,[9] and that waived amount permanently reduced the former spouse's share, regardless of disability percentage or combat status. Congress partially altered this landscape with the enactment of Concurrent Retirement and Disability Pay ("CRDP").[10] CRDP restores waived retired pay for retirees with a VA disability rating of fifty percent or higher and who are not receiving CRSC.[11]

As a result, the post-2004 framework divides military retirees into three materially distinct categories. First, retirees with a VA disability rating below fifty percent remain subject to a full VA waiver, resulting in a permanent reduction of divisible retired pay.[12] Second, retirees with a disability rating of fifty percent or higher who receive CRDP experience restoration of the waived retired pay, preserving the former spouse's share.[13] Third, retirees who elect CRSC receive a tax-free special compensation payment in lieu of waived retired pay,[14] but CRSC is statutorily excluded from disposable retired pay and is not divisible as marital property.[15] This third category presents the most severe risk to former spouses, because a unilateral post-divorce CRSC election by the service member can entirely eliminate the stream of retired pay previously awarded to the spouse.

The practical impact of these distinctions is best illustrated numerically. Assume a service member retires with gross monthly retired pay of $5,000 after a long-term marriage, and the divorce decree awards the former spouse fifty percent of the marital share. The former spouse will then receive $2,500 per month. If the retiree later receives a VA disability rating below fifty percent that results in a $1,500 monthly VA benefit, federal law requires a corresponding waiver of $1,500 in retired pay, reducing the divisible retired pay to $3,500. The former spouse's fifty percent share

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9 *Id.*

10 *See* 10 U.S.C. § 1414.

11 *Id.* §§ 1414(a)(1)-(2), (d)(1).

12 *Id.*

13 *Id.*

14 *See* 10 U.S.C. § 1413a. Retirees are eligible if they are receiving retired pay and have at least one combat-related disability. A combat-related disability is a disability that was incurred during armed conflict or hazardous service, "under conditions simulating war," or "through an instrumentality of war." *Id.* § 1413a(e).

15 *Id.* § 1413a(g).

is reduced to $1,750 per month, resulting in a $750 monthly loss. If the retiree instead receives a VA disability rating above fifty percent and qualifies for CRDP, the waived $1,500 is restored to retired pay and the former spouse continues to receive the full $2,500 awarded at divorce. By contrast, if the retiree elects CRSC in full, the $5,000 is replaced with non-divisible CRSC and remains permanently reduced, and the former spouse's share is eliminated. Over time, this reduction compounds into a substantial loss of retirement income for the former spouse, despite no change in the underlying divorce decree.

This article addresses the legal and practical consequences of post-divorce reductions in military retired pay caused by VA waivers, with particular emphasis on CRSC elections. Specifically, it examines the extent to which federal law preempts state courts from remedying those reductions and the narrow circumstances in which former spouses may still protect their awarded interests. This analysis centers on the distinction between judicially imposed remedies, which are prohibited under *Howell v. Howell*,[16] and remedies arising from agreed upon indemnification and judgment enforcement principles.

Part II examines indemnification as a remedial concept and explains why courts lack authority to impose indemnification for waived retired pay following *Howell*. It further surveys jurisdictions that nevertheless permit indemnification when it arises from a voluntary agreement and analyzes enforcement through *res judicata* principles. Additionally, this section clarifies what remedies remain legally viable when a former spouse's share of retired pay is reduced by a VA waiver or CRSC election.

Next, this article addresses cases in which indemnification is unavailable or ineffective and introduces the net present value ("NPV") approach as an alternative means of protecting the former spouse's interest. This approach requires valuing the marital portion of the military pension before the VA waiver takes effect and reallocating that value through property division, offsets, or installment payments rather than through direct garnishment of retired pay. Finally, the article concludes by providing practical guidance for practitioners on valuation timing, expert use, enforcement mechanisms, and strategic considerations necessary to

16 581 U.S. 214 (2017).

safeguard the former spouse's economic interest within the constraints of federal preemption.

II. Remedies and the Limits of Indemnification

Courts confronting post-divorce reduction in military retired pay have long struggled to reconcile equitable property division principles with the limits imposed by federal preemption. Before the Supreme Court's decision in *Howell*,[17] many state courts attempted to mitigate the economic harm caused by VA disability waivers by ordering reimbursement or indemnification to former spouses.[18] These remedies were often framed as enforcement of vested property rights rather than as new divisions of military benefits.[19] Courts reasoned that because a former spouse's share of retired pay was awarded at divorce, a unilateral post-divorce VA waiver should not be permitted to defeat that award.[20]

This approach, however, conflicted with the USFSPA, which grants state courts only limited authority over military retired pay.[21] Although the USFSPA permits states to treat "disposable retired pay" as marital or community property, it expressly excludes amounts waived to receive VA disability compensation.[22] As a result, any judicial effort to restore waived retired pay risks encroaching upon an area Congress deliberately removed from state control.[23] The Supreme Court's decision in *Howell* represents the Court's most direct effort to resolve that tension and delineate the limits of indemnification as a judicial remedy.

A. *Federal Preemption Under* Howell v. Howell

The Supreme Court's analysis in *Howell* begins with the premise that state authority over military retired pay is purely

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17 *Id.*

18 *Id.* at 221–22.

19 *Id.* at 222.

20 *Id.*

21 *See* 10 U.S.C. § 1408(a)(4).

22 *Id.* at § 1408(a)(4)(ii).

23 *Howell*, 581 U.S. at 221 (citing 38 U.S.C. § 5301(a)(1)) (stating "[s]tate courts cannot 'vest' that which (under governing federal law) they lack the authority to give").

statutory.[24] Congress enacted the USFSPA in response to *McCarty v. McCarty*,[25] granting states limited power to divide military retired pay in divorce proceedings.[26] This grant of authority is confined to "disposable retired pay," a term Congress defined to exclude retired pay waived in order to receive VA disability benefits.[27]

In *Howell*, the parties divorced in Arizona, and the decree awarded the former spouse, Sandra, fifty percent of the service member's, John's, military retired pay.[28] At the time of divorce, John had not waived any portion of his retired pay.[29] More than a decade later, John elected to receive VA disability compensation, which required a corresponding waiver of retired pay under federal law.[30] That waiver reduced Sandra's monthly share of retired pay by approximately $125.[31] Sandra sought remedial action, and the trial court ordered John to indemnify her for the reduction by increasing her monthly payment to the amount she had received before the waiver.[32] The Arizona Supreme Court affirmed, reasoning that Sandra's interest in the retired pay vested at divorce and could not be diminished by a unilateral post-divorce election.[33]

The U.S. Supreme Court reversed, and held that state courts "cannot 'vest' that which (under governing federal law) they lack the authority to give."[34] Although a divorce decree may award a percentage of retired pay, the Court explained that the amount ultimately payable remains contingent on future events permitted by federal law, including a lawful VA waiver.[35] The Court rejected the argument that indemnification merely enforces an existing property right, and held that reimbursement and indemnification orders are functionally indistinguishable from direct divisions of retired pay.[36] The Court expressly dismissed semantic distinctions

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24 *Id.* at 215–16.
25 *See* 453 U.S. 210 (1981).
26 Cox v. Cox, 479 U.S. 970 (1986).
27 10 U.S.C.§ 1408(a)(4)(ii).
28 *Howell*, 581 U.S. at 218–19.
29 *Id.* at 219.
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.* at 219–20.
34 *Id.* at 221 (citing 38 U.S.C. § 5301(a)(1)).
35 *Id.* at 221–22.
36 *Id.* at 222.

between "reimbursement" and "indemnification," concluding that "[r]egardless of their form," such orders "displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress."[37] Because court-ordered indemnification restores to the former spouses the very portion of retired pay Congress excluded from division, such orders are pre-empted under the Supremacy Clause of the U.S. Constitution.[38]

The Supreme Court's decision in *Howell* therefore establishes a bright-line rule that state courts may not order indemnification to offset reductions in retired pay caused by a lawful VA disability waiver.[39] At the same time, *Howell* carefully circumscribes the scope of its holding.[40] State courts remain free, at the time of divorce, to consider the contingency that military retired pay may later be waived.[41] Spousal support determinations may account for changes in income resulting from a VA waiver, provided that support is not used as a substitute for property division.[42] Finally, *Howell* did not involve a contractual agreement between the parties allocating the risk of future waivers, nor did it address the enforceability of indemnification provisions contained in final, un-appealed judgments.[43] Those unresolved questions have driven much of the post-*Howell* litigation in state courts.[44]

In the wake of *Howell*, state courts have consistently interpreted the decision as a categorical prohibition on judicial remedies that function to restore a former spouse's lost share of military retired pay following a VA disability waiver. Courts applying *Howell* have emphasized that the dispositive inquiry is not the label affixed to the remedy, but whether the effect of the order requires the service member to compensate the former spouse for waived retired pay.

The California Court of Appeals decision in *In re Marriage of Cassinelli* illustrates the strict application of *Howell*'s functional approach.[45] In *Cassinelli*, the former spouse's, Janice's, share of the

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37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *Id.* at 220–21.

44 Kristopher J. Hilscher, *Military Pension Division: A Review of Cases Following* Howell v. Howell*,* 36 J. Am. Acad. Matrim. Law. 89, 92 (2023).

45 20 Cal. App. 5th 1267 (2018).

service member's, Robert's, military retired pay was eliminated after Robert elected to receive both VA disability compensation and CRSC.[46] The trial court ordered Robert to pay Janice an equivalent amount in permanent spousal support.[47] Although the trial court characterized the award as support rather than reimbursement for lost property or indemnification, the Court of Appeal reversed, holding that the order impermissibly compensated Janice for the loss of her share of retired pay.[48]

There, the court relied heavily on *Howell*'s rejection of semantic distinctions in holding that the categorization of the trial court's award as "spousal support" did not defeat *Howell*.[49] Because the support award was calculated to match the precise amount of retired pay lost due to the waiver, it functioned as an indemnification or reimbursement order in substance.[50] At the same time, the court carefully distinguished between prohibited compensation and permissible consideration of disability benefits as part of the parties' overall financial circumstances.[51] The court acknowledged that *Howell* does not prohibit state courts from modifying spousal support based on statutory factors, so long as the modification is not used as a substitute for restoring waived retired pay.[52] This distinction underscores *Howell*'s principle that courts may consider the economic consequences of a VA waiver, but may not attempt to neutralize those consequences through dollar-for-dollar replacement.[53]

The Alaska Supreme Court's decision in *Jordan v. Jordan* provides a cautionary example of how courts may err when attempting to balance equity and preemption.[54] In *Jordan*, the trial court awarded the former spouse, Cheryl, approximately fifty-seven

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46 *Id.* at 1271.

47 *Id.* at 1272.

48 *Id.* at 1275.

49 *Id.* at 1274–75.

50 *Id.*

51 *Id.*

52 *Id.* (citing *Howell*, 581 U.S. at 222).

53 *See Howell*, 581 U.S. at 222.

54 480 P.3d 626 (Alaska 2021). *Jordan* does not deal with a VA waiver, but the Alaska Supreme Court specifically noted that this "factual distinction is not material. Whether the disability pay is received concurrently or through waiver, *Howell* preempts divided military disability pay in either form or effect, particularly with a 'dollar-for-dollar' offset." *Id.* at 636.

percent of the marital estate based in part on the service member's, Thomas', receipt of VA disability benefits.[55] Although the Alaska Supreme Court agreed that disability benefits may be considered as part of the parties' overall financial condition, it vacated the property division because the trial court's calculations directly offset non-divisible disability pay dollar-for-dollar.[56] The court held that such an offset violated federal law by accomplishing indirectly what *Howell* expressly forbids.[57]

Jordan illustrates the fine but critical distinction *Howell* requires courts to observe—courts may account for the economic reality created by a VA waiver when evaluating statutory factors for an equitable division of marital assets, but they must not use valuation or offset mechanisms that replicate the effect of dividing disability benefits.[58] Where the remedy tracks the amount of waived retired pay with mathematical precision, it crosses the line into preempted territory.

Read together, these post-*Howell* decisions reflect a consistent judicial understanding of the scope of federal preemption. State courts may not impose indemnification or equivalent remedies that restore a former spouse's lost share of military retired pay following a VA waiver or CRSC election. While *Howell* forecloses court-ordered indemnification, it expressly does not address whether a service member's promise to protect a former spouse's share of retirement benefits may be enforced as a contractual obligation.

B. *Contractual Indemnification by Agreement*

Although *Howell* categorically prohibits courts from imposing indemnification to offset reductions in retired pay caused by VA disability waivers, the decision does not purport to invalidate voluntary agreements in which divorcing spouses allocate the economic risk of such waivers. The Supreme Court's analysis in *Howell* is expressly concerned with the scope of judicial authority under the USFSPA and does not address the enforceability of private contractual obligations undertaken by divorcing spouses. As

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55 *Id.* at 630.
56 *Id.* at 634–38.
57 *Id.* at 636.
58 *Id.* at 636–37.

a result, a distinct doctrinal framework governs cases in which a former spouse seeks enforcement of an indemnification provision expressly contained in a settlement agreement rather than through a judicially crafted remedy.

Post-*Howell* courts addressing contractual indemnification have emphasized that an analysis of federal preemption turns on the nature of the relief ordered, not the underlying military benefits that may have informed the parties' agreement.[59] Where enforcement requires a court to divide, assign, or garnish disability benefits, federal law preempts the remedy.[60] In contrast, where enforcement merely holds a party to a personal obligation voluntarily assumed at divorce, several courts have concluded that federal law poses no barrier.[61] This distinction reflects a fundamental difference between judicial redistribution of federally protected benefits and enforcement of private promises governed by state contract law.[62]

The Supreme Court of Virginia's decision in *Yourko v. Yourko* provides the most comprehensive and explicit articulation of this distinction.[63] In *Yourko*, the parties negotiated a detailed property settlement agreement and corresponding Military Pension Division Order that guaranteed the former spouse, Lee Ann, a fixed monthly payment derived from the service member's, Michael's, military retirement.[64] The agreement included a broad indemnification provision requiring Michael to maintain the agreed payment even if any action, including a waiver for disability compensation, reduced Lee Ann's share.[65] When the Defense Finance and Accounting System ("DFAS") later determined that a substantial portion of Michael's retirement was non-divisible disability pay, Michael argued that enforcement of the indemnification provision violated federal law.[66]

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59 Yourko v. Yourko, 844 S.E.2d 799, 803–04 (Va. 2023).

60 *Howell*, 581 U.S. at 221–22.

61 *See Yourko*, 844 S.E.2d at 805–06; *see also* Martin v. Martin, 520 P.3d 813 (Nev. 2022); Gross v. Wilson, 424 P.3d 390 (Alaska 2018); Jones v. Jones, 505 P.3d 224 (Alaska 2022).

62 *See Yourko*, 844 S.E.2d at 805–06.

63 *Id*.

64 *Id.* at 800–01.

65 *Id.* at 801.

66 *Id.* at 801-02.

The Virginia Supreme Court rejected that argument based upon both the doctrine of federal preemption and basic principles of contract law.[67] The court held that the indemnification provision did not require Michael to use disability benefits as the source of the payments to Lee Ann and did not direct assignment or garnishment of protected funds.[68] Instead, the agreement imposed a personal obligation that could be satisfied from any available income or assets.[69] Because federal law regulates only the divisibility and assignment of military disability benefits, not how a veteran may spend money once received, enforcement of the agreement did not conflict with the USFSPA.[70]

Critically, the *Yourko* court distinguished *Howell* on the ground that *Howell* involved a judicially imposed reimbursement ordered years after divorce, not enforcement of a bargained-for promise.[71] The court ultimately held that

> "[F]ederal law does not prevent a husband and wife from entering into an agreement to provide a set level of payments, the amount of which is determined by considering disability benefits as well as retirement benefits." Along these same lines, federal law does not bar courts from upholding such agreements or from enforcing indemnification provisions that may be included to ensure that payments are maintained as intended by the parties.[72]

The Nevada Supreme Court adopted a similar analytical framework in *Martin v. Martin*.[73] There, the court confronted a post-*Howell* challenge to enforcement of a divorce decree requiring the service member, Erich, to compensate the former spouse, Raina, for reductions in his retirement benefits.[74] Erich argued that enforcement violated federal law by effectively dividing his disability benefits but the Nevada Supreme Court disagreed, holding that *Howell* does not prohibit enforcement of private agreements that were made in consideration of waiver as an economic risk.[75] Like in *Yourko*, the court in *Martin* focused on the

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67 *Id.* at 804.
68 *Id.* at 804–05.
69 *Id.* at 805.
70 *Id.* at 805.
71 *Id.*
72 *Id.* at 805–06 (quoting Owen v. Owen, 14 Va. App. 623, 628 (1992)).
73 520 P.3d 813 (Nev. 2022).
74 *Id.*
75 *Id.* at 816, 818.

distinction between what courts may order and what parties may promise.[76] While acknowledging that federal law limits judicial authority to divide military benefits, the court held that indemnification provisions "may be enforced through contract principles," in part because the service member "may satisfy [their] contractual obligations with whatever monies [they] wish[]," and therefore, enforcement of a contractual obligation does not compel the division of protected benefits.[77]

The Alaska Supreme Court's decisions in *Gross v. Wilson*[78] and *Jones v. Jones*[79] further reinforce the distinction between judicial remedies and private contracts. In *Gross*, the Alaska Supreme Court recognized that *Howell* bars courts from imposing indemnification as a matter of equity but declined to interpret *Howell* as nullifying indemnification provisions incorporated into divorce decrees by agreement.[80] As in *Yourko* and *Martin*, the Alaska Supreme Court similarly treated the obligation at issue in *Gross* as arising from the parties' negotiated settlement rather than from an attempt by the court to divide non-disposable benefits.[81] The court affirmed the trial court's enforcement of the parties' settlement agreement and order granting the former spouse's request for arrearages, holding that "*Howell* does not hold that a state court cannot enforce a property division by ordering a service member who unilaterally stops making payments the service member was legally obligated to make to resume those payments and pay arrearages."[82]

In *Jones*, the Alaska Supreme Court addressed an indemnification provision that expressly allocated the risk of future reductions in military retired pay.[83] There, the parties specifically agreed that the service member, Kendre, would indemnify the

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76 *Id.* at 817–18.

77 *Id.* at 820.

78 424 P.3d 390 (Alaska 2018).

79 505 P.3d 224 (Alaska 2022).

80 *Gross*, 424 P.3d at 401.

81 *Id.*

82 *Id.* The Alaska Supreme Court characterized the relief as enforcement of the parties' divorce decree incorporating their settlement agreement, rather than contractual indemnification, notwithstanding that the settlement agreement itself contained a "reimbursement" provision. The distinction was not material, as the practical effect was the same as in *Yourko* and *Martin*.

83 *Jones*, 505 P.3d at 226.

former spouse, Vieanna, if he took "any action that prevent[ed], decrease[d], or limit[ed] the collection by [Vieanna]" of her share of the military retired pay, "by application for or award of disability compensation, combination of benefits with any other retired pay, [or] waiver for any reason."[84] Kendre ultimately began receiving disability pay in lieu of retired pay and did not indemnify Vieanna, which prompted her to seek relief.[85] The court affirmed enforcement, holding that:

> [a]n indemnity provision . . . [in a] negotiated property settlement agreement is a bargained-for term that takes account of the contingency that some military retirement pay might be waived, which is a proper consideration in arriving at an overall division of marital property. Neither federal law nor [Alaska law] precludes the superior court from enforcing this contract term.[86]

The court based its holding on the same principle as the courts in *Yourko*, *Martin*, and *Gross* did: enforcing the parties' promises to each other does not equate to an impermissible division of disability benefits because the retiree is not required to use their disability benefits to comply with the terms of their promise.[87]

Across jurisdictions, courts enforcing contractual indemnification consistently emphasize source-of-payment neutrality as the critical safeguard against federal preemption. Agreements that guarantee payments without specifying disability benefits as the source avoid conflict with federal law because they do not assign, garnish, or divide federally protected funds. Instead, they operate as personal obligations akin to any other financial commitment arising from divorce and contract law.

These decisions collectively demonstrate that *Howell*'s prohibition on indemnification is limited to court-ordered remedies and does not extend to voluntary agreements allocating economic risk. When parties knowingly bargain for protection against future VA waivers, and when enforcement does not require division or assignment of disability benefits, federal law does not bar enforcement of those promises. The enforceability of such agreements turns

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84 *Id.* at 227 Vieanna initially sought relief from the final order through Rule 60(b); however, the trial court ordered that the agreement's indemnity provision was enforceable and did not need to be set aside.

85 *Id.*

86 *Id.* at 230–31 (internal citations and quotation marks removed).

87 *Id.* at 230.

not on military benefits law, but on ordinary principles of contract interpretation. This distinction provides practical guidance for practitioners representing former spouses in military divorce cases, particularly where post-divorce VA waivers threaten the value of an awarded pension share, and highlights the importance of intentionally drafting indemnification provisions to protect the former spouse's economic interest.

C. *Enforcement of Agreed Remedies Through* Res Judicata

Res judicata is a foundational doctrine of judicial finality that precludes parties from relitigating claims or issues that have already been definitively resolved by a court of competent jurisdiction.[88] In its modern formulation, the doctrine operates as an affirmative defense barring subsequent litigation between the same parties, on the same claim or any other claim arising from the same transaction or series of transactions that could have been raised in the earlier action.[89] The doctrine requires three essential elements: (1) a prior decision on the issue; (2) a final judgment on the merits; and (3) the same parties, or parties standing in privity with the original litigants.[90]

In the family law context, *res judicata* plays an especially critical role. Divorce decrees distribute property, allocate future financial expectations, and allow parties to structure their post-marital lives with a level of certainty. Final property divisions are entitled to significant deference and, once a divorce decree becomes final, it may not be reopened merely because the division later appears legally incorrect, so long as the issuing court possessed jurisdiction over the parties and the subject matter.[91] Finality prevents the disruption of settled property distributions and ensures the preservation of the "surviving family structure."[92]

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88 *Res Judicata*, Black's Law Dictionary (Bryan A. Garner ed., 12th ed. 2024).

89 *Id.*

90 *Id.* (internal citations and quotation marks omitted).

91 *See* Foster v. Foster, 983 N.W.2d 373, 379 (Mich. 2022) (stating "a divorce decree which has become final may not have its property settlement provisions modified except for fraud or for other such causes as any other final decree may be modified.") (quoting Pierson v. Pierson, 88 N.W.2d 500, 504 (1958)).

92 *Id.* at 379-80 (internal citations omitted).

Consider a divorce judgment that becomes final after allocating a former spouse a fixed percentage of "disposable retired pay," and the decree also assigns the retiree the economic risk of any future election that reduces that stream. Years later, the retiree elects a benefit that reduces the divisible retired pay and argues that federal law would have barred the trial court from approving the risk-allocation language in the original decree. Even if the retiree's federal-law argument is correct on the merits, the question for collateral review is different: whether the original judgment is void (and therefore subject to attack at any time) or merely erroneous (and therefore binding absent a timely direct appeal). In most jurisdictions, the latter controls when the divorce court had authority over the parties and the marital estate, because legal error does not strip the court of jurisdiction.[93]

Res judicata operates as a critical enforcement mechanism when a divorce decree incorporates a negotiated indemnification or reimbursement provision addressing future reductions in military retired pay. In the military pension context, this principle has particular significance, as service members frequently attempt to relitigate property divisions after electing disability-related benefits that reduce divisible retired pay.

The Michigan Supreme Court's decision in *Foster v. Foster* (*Foster III*) provides a comprehensive modern framework for applying *res judicata* to agreements involving military retired pay and disability benefits.[94] In *Foster III*, the parties entered a consent judgment of divorce awarding the former spouse, Deborah, fifty percent of Ray's, the service member's, disposable retired pay and included an offset provision requiring Ray to personally compensate her for any reduction caused by a future election of disability benefits, including CRSC.[95] The provision expressly required payment from Ray's own earnings and preserved cost-of-living adjustments that would have accrued absent the waiver.[96]

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93 *Foster*, 983 N.W.2d at 379 ("the doctrine of *res judicata* applies even if the prior judgment rested on an invalid legal principal"); *see also* United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 270 (2010) ("[a] judgment is not void, for example, simply because it is or may have been erroneous.").

94 *Foster*, 983 N.W.2d at 375–85.

95 *Id.* at 376.

96 *Id.* at 376, n.1.

When Ray later elected to receive CRSC in lieu of retired pay, Deborah's monthly share dropped substantially and she sought enforcement through contempt proceedings.[97] Although *Foster III* ultimately rested on principles of *res judicata* and subject-matter jurisdiction, the case reached that conclusion only after an unusually long appellate path that obscured the legal questions presented.[98] The trial court held Ray in contempt and ordered payment of arrearages and attorney's fees.[99] Ray appealed, and the Michigan Court of Appeals affirmed.[100] Ray appealed to the Michigan Supreme Court, and the court vacated the court of appeals' decision and remanded for reconsideration in light of *Howell*.[101] On remand, the court of appeals again affirmed enforcement of the offset provision.[102] Ray appealed a second time, and in *Foster I*,[103] the Michigan Supreme Court resolved the question left unanswered by *Howell*, holding that federal law preempts state courts from enforcing an offset provision to the extent it requires reimbursement for reductions in retired pay caused by a CRSC election.[104] Importantly, however, the court noted that the court of appeals failed to address "the effect of federal preemption on the trial court's subject-matter jurisdiction or defendant's ability to challenge the terms of the consent judgment outside of direct appeal" and remanded the case back to the court of appeals for consideration of that unresolved issue.[105]

On second remand, the court of appeals reversed in *Foster II*, holding that Ray "did not engage in an improper collateral attack on the consent judgment and the trial court lacked subject-matter jurisdiction to enforce the consent judgment with respect to the offset provision due to the principle of federal preemption."[106] Under that rationale, the consent judgment was treated as void rather than merely erroneous.[107]

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97 *Id.* at 376–77.
98 *Id.* at 377–78.
99 *Id.* at 377.
100 *Id.*
101 *Id.* at 377–78.
102 *Id.* at 378.
103 949 N.W.2d 102 (2020).
104 *Foster*, 983 N.W.2d at 378.
105 *Id.* (*quoting Foster I*, 949 N.W.2d at 104).
106 *Id.* at 378 (internal citations omitted).
107 *Id.*

Deborah then sought leave to appeal, and the Michigan Supreme Court granted review to resolve the narrow but consequential question left unresolved after *Foster I*: whether federal preemption under the USFSPA and *Howell* deprives state courts of subject-matter jurisdiction over divorce judgments that divide or account for military retirement and disability benefits.[108] The court answered that question in the negative, holding that federal preemption does not deprive state courts of subject-matter jurisdiction over divorce actions or property division.[109]

Central to the court's reasoning was the distinction between a court's lack of jurisdiction and an erroneous exercise of jurisdiction.[110] A judgment entered by a court with jurisdiction over the parties and the marital estate is not void merely because it misapplies federal law.[111] Such an error renders the judgment voidable on direct appeal, not subject to attack years later.[112] The court cautioned that destroying this distinction would undermine finality in divorce cases and destabilize settled property distributions.[113]

Applying settled *res judicata* principles, the Michigan Supreme Court reaffirmed that final divorce judgments dividing marital property remain binding even if they rest on an invalid or subsequently overruled legal principle.[114] *Res judicata* essentially provides courts with broad authority to enforce their judgments, as "[o]nly judgments entered without personal jurisdiction or subject-matter jurisdiction are void and subject to collateral attack."[115] Because state courts unquestionably have jurisdiction over divorce and property division, the offset provision in *Foster III* constituted, at most, a mistake in the exercise "undoubted jurisdiction."[116]

The court also rejected the argument that federal veterans' benefits statutes confer exclusive federal jurisdiction over disputes

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108 *Id.*

109 *Id.* at 379–83.

110 *Id.* at 380–83.

111 *Id.* at 379 (holding that "the doctrine of *res judicata* applies even if the prior judgment rested on an invalid legal principle.") (internal citations and quotation marks omitted).

112 *Id.* at 382 (citing *In re* Ferranti, 934 N.W.2d 610, 620 (2019)).

113 *Id.* at 380 (internal citations omitted).

114 *Id.* at 379 (citing Colestock v. Colestock, 354 N.W.2d 354, 356 (1984)).

115 *Id.* at 382 (quoting *Ferranti*, 934 N.W.2d at 620).

116 *Id.* at 381-84.

involving the division of military disability benefits in divorce proceedings.[117] While federal law limits the substantive remedies state courts may impose, it does not strip them of authority to adjudicate and enforce divorce judgments.[118] Accordingly, Ray's post-judgment challenge was barred as an improper collateral attack on a final judgment.[119]

For practitioners, *Foster III* highlights that the strongest protection for a former spouse may lie not in post-divorce remedies, but in the finality of the original judgment itself. Ensuring that negotiated indemnification or reimbursement provisions are expressly incorporated into a final decree can shift the battleground from federal preemption to *res judicata*, where service members face significantly higher barriers to post-judgment relief. In post-divorce litigation, practitioners should preserve *res judicata* as an affirmative defense when a service member attempts to collaterally attack a final decree.

III. A Modern Alternative Remedy

After *Howell*, the range of viable remedies available to former spouses whose awarded share of military retired pay is later reduced has narrowed considerably. State courts are no longer permitted to impose new indemnification provisions post-judgment, nor may they infer indemnity obligations into silent decrees.[120] While *Howell* acknowledged the hardship imposed by federal preemption, it made clear that courts lack authority to retroactively cure that harm through judicially imposed reimbursement once a final property division is in place.[121]

In theory, a small number of alternative post-judgment remedies remain available, including reopening a decree for redistribution of marital property or modification of spousal support.[122] Those avenues, however, raise distinct concerns, vary significantly by jurisdiction, and often depend on statutory standards that fall

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117 *Id.*

118 *Id.* at 381-82.

119 *Id.* at 376.

120 Brett R. Turner, Equitable Distribution of Property § 6:10 (Thomas Reuters, 4th ed., 2021).

121 *Id*.

122 *Id*.

outside the scope of this article.[123] Accordingly, this article does not attempt to evaluate those remedies. Instead, it focuses on a single property-based strategy that operates prospectively and within the limits articulated by *Howell*: the net present value ("NPV") approach.

The NPV approach derives from *Howell*'s recognition that courts retain discretion "when [they] first determine[] the value of a family's assets" to account for the contingency that military retired pay may later be waived.[124] While the Supreme Court's articulation of this principle left substantial ambiguity as to its precise application, the Court affirmed that property division at the time of divorce remains the critical moment for protecting a former spouse's economic interest.[125] The NPV approach does not attempt to restore waived retired pay after the fact, but instead values the marital portion of the military pension before any waiver occurs and reallocates that value through a fixed award rather than a percentage-based pension division.

Conceptually, the NPV approach treats the military pension like any other deferred marital asset. Rather than awarding a percentage of future retired pay subject to unilateral reduction, the court determines the present value of the former spouse's marital share and converts that amount into a present value payable through property offsets or structured payments. Because the award is fixed and unconditional on its face, it is not reduced by subsequent elections of disability benefits and is not tied to the continued existence of divisible retired pay.[126]

This approach is not without tradeoffs. A fixed award generally sacrifices future cost-of-living increases and requires careful valuation, predominantly with expert assistance. But by severing the former spouse's entitlement from the pension itself, the NPV approach offers a potential means of preserving economic equity while respecting federal preemption. As one commentator has

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123 *See, e.g.,* Eliza Grace Lynch, *A Change in Military Pension Division: The End of Court-Adjudicated Indemnification*—Howell v. Howell, 44 Mitchell Hamline L. Rev. 1064, 1084-85 (2018) ("although property division is generally fixed and final, a court may have discretion to reopen a division of marital/community property when extraordinary circumstances arise.").

124 Turner, *supra* note 120, at § 6:10 (quoting *Howell*, 581 U.S. at 222).

125 *Id.* at n.29 (quoting *Howell*, 581 U.S. at 222).

126 *Id.*

observed, a monetary award "further removed from division of the pension" is more likely to survive post-*Howell* scrutiny than an award defined as a percentage of retired pay.[127]

Part III therefore examines the NPV approach as a modern alternative remedy that operates before the VA waiver occurs.

A. *Net Present Value as a Pre-Waiver Protective Strategy*

"If military retirement pay is marital property, it need not be actually divided. The court is free to assign it entirely to the owner and award offsetting property to the other spouse."[128] This principle serves as a protective strategy for military spouses because the pension itself is not actually divided. If a court applies the NPV approach, it values the marital portion of the retirement pay, "award[s] the pension interest to the employee spouse," and then offsets the resulting disparity through other means of property division or equalization payments.[129]

A practical comparison illustrates how the NPV approach differs from traditional deferred distribution of military retired pay. For purposes of this example, assume a military pension is determined to be marital property in its entirety. Under the traditional deferred distribution method, the court typically enters a Military Division of Retired Pay Order ("MDRO") directing DFAS to pay each spouse their equitable share directly. If the service member's retired pay is $3,000 per month and the court orders an equal division, each spouse would receive $1,500 per month, paid directly by DFAS, for as long as the pension remains payable. That arrangement preserves cost-of-living adjustments and requires no expert valuation, but it leaves the former spouse's interest contingent on the continued existence of disposable retired pay.

By contrast, under the NPV approach, the pension is not divided for future payment. Instead, an expert values the total present value of the marital portion at the time of divorce. Using the same example, assume the service member is fifty years old

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127 *Id.*

128 *Id.* at § 6:42 (citing Schado v. Schado, 648 So. 2d 1169 (Ala. Civ. App. 1994); Parr v. Parr, 773 S.W.2d 135 (Mo. Ct. App. 1989); Johnson v. Johnson, 652 N.W.2d 315 (N.D. 2002); Matter of Marriage of Maidel, 816 P.2d 1206 (Or. Ct. App. 1991)).

129 *See* Laing v. Laing, 741 P.2d 649, 657 (Alaska 1987) (this case did not involve a military pension, but the principle is nonetheless the same).

and the expert's analysis indicates a life expectancy of age eighty-five. The expert calculates the expected duration of payments and determines the present value of receiving $3,000 per month over that period. The court then awards the pension in its entirety to the service member and offsets the former spouse's marital share through other components of the property division. That offset may take the form of a greater share of non-pension marital assets, a lump-sum equalization payment, or structured installment payments designed to equalize the overall distribution of the marital estate.[130]

Under this structure, the former spouse does not receive monthly payments tied to the pension itself and does not rely on DFAS for enforcement. Instead, the former spouse's entitlement is satisfied through a fixed property award determined at divorce. While the NPV approach requires valuation, it converts a contingent future interest into a defined property right and removes the risk that a post-divorce waiver by the service member will later reduce or eliminate the former spouse's awarded share.[131]

An instructive illustration of a property division using the NPV approach appears in *Brady-Kinsella v. Kinsella*, where the Connecticut Appellate Court affirmed a trial court's decision to award the pension entirely to the employee spouse while equalizing the marital estate through other property.[132] In *Brady-Kinsella*, the trial court determined that former service member Kayleigh's[133] pension constituted marital property subject to equitable distribution, but exercised its discretion to distribute the pension exclusively to her rather than dividing it for future payment.[134] Instead of ordering a deferred distribution of the pension, the trial court used the NPV approach by assigning the pension a present value, awarding it in full to Kayleigh, and awarding Nancy, the former spouse, (1) $125,851 in equalization payments; (2) her own deferred compensation accounts; and (3) the marital vehicles.[135]

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130 Regarding enforcement of installment payments, *see, e.g.,* Kobold v. Kobold, 121 N.E.3d 564, 573-74 (Ind. Ct. App. 2019).

131 Turner, *supra* note 120, at § 6:40.

132 106 A.3d 956 (Conn. App. Ct. 2014).

133 *Id*. at n.1 (at trial, Kayleigh's name was Stephen; she has since transitioned from male to female and will be referred to as Kayleigh herein).

134 *Id.* at 959.

135 *Id.* at 963.

On appeal, Nancy argued that it was inequitable for Kayleigh to retain the entirety of the pension, particularly given the length of the marriage and because the pension was one of the most valuable marital assets.[136] The appellate court rejected that argument, emphasizing that trial courts are not required to divide pensions through future payments and retain broad discretion to assign a pension entirely to one spouse while achieving overall equity through other components of property distribution.[137] In affirming the trial court's order on property division, the appellate court reiterated that financial orders in divorce cases are "entirely interwoven" and must be evaluated as a whole rather than in isolation.[138] Ultimately, the appellate court held that the overall distribution of property fell well within the trial court's broad equitable discretion.[139]

Although *Brady-Kinsella* did not involve a military pension, it illustrates the practical operation of present-value, offset-based distribution and demonstrates how the NPV approach can equitably balance the parties' respective interests. The trial court's method in *Brady-Kinsella* avoided creating a contingent future entitlement tied to the pension itself and instead converted the non-employee spouse's interest into a present property right satisfied through equalization payments. This structure mirrors the protective logic of the NPV approach in military pension cases, where awarding the pension outright to the service member and offsetting the former spouse's share through other marital assets can preserve equity while avoiding the vulnerabilities inherent in deferred distribution.

B. *Practical Considerations for Courts and Practitioners*

While the NPV approach offers a viable means of protecting a former spouse's economic interest in military retired pay, its effectiveness depends on careful execution at the divorce stage. Courts and practitioners must account for timing, valuation costs, payment structure, and enforcement mechanisms to ensure that an NPV-based division both complies with federal law and functions equitably in practice.

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136 *Id.* at 961.
137 *Id.* at 963.
138 *Id.* at 959.
139 *Id.* at 963.

First, the NPV approach must be implemented before any waiver of retired pay occurs. That timing requirement stems directly from federal law: once retired pay is waived in favor of disability benefits, the waived portion no longer constitutes "disposable retired pay" and therefore falls outside the category of marital property subject to division.[140] As a result, if a divorce occurs after retired pay has already been waived, the former spouse cannot rely on the NPV approach to capture the value of the waived portion, because there is no divisible asset to value or reallocate.[141] The NPV approach is therefore only viable when disposable retired pay exists in full at the time of divorce, or when only a portion of the pension has been waived and the remaining disposable retired pay can still serve as the basis for valuation.[142]

In practice, this means the NPV approach is most appropriate where there is a substantial likelihood that a future waiver will occur, even though it has not yet been elected.[143] For example, where a service member is already retired, served in a combat role, and is receiving VA compensation, there is a realistic possibility that the service member may later elect to receive CRSC.[144] CRSC is available only for disabilities that are "combat-related," meaning disabilities that are attributable to armed conflict, hazardous service, an instrumentality of war, or conditions simulating war.[145] Because receipt of CRSC requires a corresponding waiver of an equivalent portion of retired pay, the risk of future reduction is significant in such cases. Similarly, where a retired service member is actively pursuing a VA disability claim, but has not yet received a final rating, the former spouse faces the risk that a future award below fifty percent could require a waiver of disposable retired pay, making pre-waiver valuation particularly important.[146]

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140 *See* 10 U.S.C. § 1408(a)(4)(ii).

141 *See Howell*, 581 U.S. at 222 (any inequities caused by this hypothetical situation may be addressed through an award of spousal support based on principles of equity; although spousal support cannot be awarded as a dollar-for-dollar offset of waived retired pay, courts may consider one spouse's disability benefits as income for the purposes of determining the parties' relative financial circumstances and necessities).

142 *See* Turner, *supra* note 120, at § 6:10.

143 *Id.*

144 *See* 10 U.S.C. § 1413a.

145 *Id.* § 1413a(e).

146 *See* 10 U.S.C. § 1414.

By contrast, where the service member has no combat-related disabilities as defined by statute and no plausible basis for establishing that a current condition resulted from combat, the likelihood of future CRSC eligibility may be remote.[147] In those circumstances, the cost of retaining an expert to perform a present-value calculation may outweigh the protective benefit of converting the pension into a fixed property award. Likewise, if a service member is already rated at or above fifty percent disabled and receives VA compensation without any identified combat-related conditions, the risk calculus may differ unless there is a realistic possibility that the disability rating could later be reduced below the statutory threshold for receipt of CRDP, thereby triggering a waiver requirement.

Because the determinations are highly fact-specific, practitioners must obtain sufficient information through discovery to assess waiver risk before advising a client to pursue the NPV approach. Relevant discovery typically includes the service member's VA decision letters, current disability ratings, pending disability applications, and DD-214 Certificate of Release or Discharge from Active Duty,[148] which together provide critical insight into the nature of the claimed disabilities, combat exposure, service history, and the likelihood of future waivers.

Second, the NPV approach necessarily shifts enforcement away from DFAS and pension-based payments. Unlike deferred distribution, an NPV award is not paid through monthly garnishments or direct payments from DFAS, but instead is satisfied through property offsets or monetary payments ordered as part of the divorce judgment. Federal law authorizes DFAS to make direct payments to a former spouse only when the court order awards a portion of the service member's disposable retired pay as a percentage or fixed dollar amount payable from the pension itself.[149] The very nature of the NPV approach eliminates this possibility because the pension in its entirety is specifically awarded to the service member spouse;

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147 For example, a veteran may have service-connected disabilities but no history of combat deployments, therefore reducing the likelihood that the disabilities will qualify as "combat-related" for purposes of CRSC eligibility.

148 Samantha Mountford, *Mental Illness and Military Discharge Upgrades: American Veterans' Unseen Wounds*, 9 Veterans L. Rev. 84, 85-86 (2023) (noting that the DD-214 "long form also includes the characterization of service, reason for discharge, and a re-enlistment code").

149 *See* 10 U.S.C. § 1408(d)(1).

thus, there is no actual division of the pension.[150] DFAS has no authority to disburse payments that stem from an award of non-pension property, equalization payments, or other monetary awards that are unassociated with disposable retired pay.[151] Accordingly, when a court employs the NPV approach and awards the pension outright to the service member while offsetting the former spouse's interest through other property or equalization payments, DFAS cannot serve as the payment mechanism. Instead, enforcement must occur through traditional collection methods applicable to property judgments, such as electronic fund transfers, allotments, or other direct payment arrangements as ordered by the court.[152]

Third, the structure of the offset requires careful attention to the overall property division. An NPV award may be implemented by awarding the former spouse a greater share of non-pension marital assets rather than dividing the pension itself, but that approach requires courts to carefully distinguish between valuation and division at the time of divorce.[153] When this approach is used, the marital portion of the pension is valued at divorce, the pension itself is awarded to the employee spouse, and the non-employee spouse's interest is satisfied through other marital property.[154]

Courts are not required to divide retirement benefits at all, and may properly award them in full to one spouse.[155] After determining the marital share of a pension, allocation of that share is a pure division-stage inquiry, and a court may award the non-employee spouse a greater share of other marital assets instead of a direct interest in the pension.[156] Indeed, a court may award the non-employee spouse no portion of the pension itself so long as the overall division of marital property remains equitable.[157] Courts have repeatedly affirmed this principle.

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150 TURNER, *supra* note 120, at § 6:10.

151 *See* 10 U.S.C. § 1408(d)(1) (DFAS may also pay former spouse's for spousal support, but spousal support awards in lieu of a division of the pension are outside the scope of this article).

152 *See* TURNER, *supra* note 120, § 6:10 (explaining that present-value awards are enforced as property judgments rather than through pension administrators).

153 *Id.* at § 6:37.

154 *Id.* at § 6:10.

155 *Id.* at § 6:37.

156 *Id.*

157 *Id.*

In *Martin v. Martin*,[158] the Connecticut Appellate Court affirmed a classic NPV offset structure: the trial court awarded the pensions entirely to Francis, the employee spouse, and equalized the marital estate by awarding the former spouse Marie "the total interest in the residence, which was subject to a mortgage."[159] The parties stipulated that Francis' pensions had a NPV of $363,000,[160] and that the marital residence had $172,777 in equity.[161] The trial court ordered Francis to quitclaim his interest in the residence to Marie (who assumed the mortgage and expenses), awarded no spousal support, and confirmed that Francis would retain his pensions free of any claim by Marie.[162]

On appeal, Francis argued that it was inequitable to award Marie 100% of the equity in the residence, effectively challenging the use of the residence as an offset for allowing him to keep the pensions intact.[163] The appellate court affirmed the property division, holding that it was reasonable for the trial court to award Francis the undivided monthly pension income stream while balancing Marie's economic position through an award of the total interest in the encumbered residence, thereby sustaining the offset-based distribution as an equitable whole.[164] The court reasoned that no required formula exists for dividing assets, including pensions, and that the goal of property division is to "unscramble" the parties' ownership interests in a manner that supports equity rather than a rigid blueprint.[165]

Similarly, the Indiana Court of Appeals' decision in *DeSalle v. Gentry*[166] further illustrates how equity may be achieved in this context. In *DeSalle*, the trial court dissolved a twelve-year marriage and divided a complex marital estate consisting primarily of business interests, valuable personal property, and retirement assets.[167] As part of its final decree, the court awarded the employee spouse, Barbara,

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158 920 A.2d 340 (Conn. App. Ct. 2007).

159 *Id.* at 348.

160 *Id.* at 346.

161 *Id.* at 343.

162 *Id.*

163 *Id.* at 344–45.

164 *Id.* at 348.

165 *Id.* at 345 (citing Casey v. Casey, 844 A.2d 250 (Conn. App. Ct. 2004); Lawler v. Lawler, 547 A.2d 89 (Conn. App. Ct. 1988)).

166 818 N.E.2d 40 (Ind. Ct. App. 2004).

167 *Id.* at 43, 45–46.

full ownership of her pension, while allocating other substantial assets and liabilities to the parties in a manner designed to achieve an equitable overall division.[168] On appeal, former spouse Donald challenged the pension award, arguing that it was inequitable to award the pension exclusively to Barbara because he lacked comparable retirement benefits and devoted his labor to the family business rather than accumulating his own pension.[169]

The Indiana Court of Appeals rejected that argument, holding that marital property division must be evaluated as a whole, not item by item, and that trial courts are entitled to allocate particular assets to one spouse precisely because of how other assets and debts are distributed.[170] The court concluded that Donald had been compensated through other components of the property division, and therefore the award of the pension to Barbara did not constitute an abuse of discretion.[171] For purposes of the NPV framework, *DeSalle* confirms that assigning a pension entirely to the employee spouse does not amount to ignoring the other spouse's interest, so long as the court accounts for that interest through offsetting allocations of other property.

These cases collectively demonstrate that awarding a pension outright to the employee spouse while offsetting the non-employee spouse's interest through other marital assets is a well-established and judicially endorsed method of equitable distribution. Importantly, this approach does not ignore the pension or deny the former spouse any interest in it; rather, it recognizes that interest through property awards other than the pension itself.[172]

By resolving the former spouse's interest at the division stage through property offsets, courts avoid the need for post-judgment remedies that *Howell* places beyond the scope of judicial authority, while remaining fully within the traditional bounds of state law and federal preemption. The effectiveness of an NPV-based offset depends on the availability of sufficient non-pension assets.[173] Where such assets are inadequate to absorb the pension's value, courts must look beyond traditional property allocation and

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168 *Id.* at 45–47.
169 *Id.* at 44–45, 48.
170 *Id.* at 45 (citing Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2000)).
171 *Id.* at 47.
172 Turner, *supra* note 120, at § 6:37.
173 *Id.* at § 6:10.

consider equalization payments to effectuate an equitable distribution. This raises distinct structural and enforceability concerns.

When an equalization payment is awarded because there is insufficient non-pension property to divide, courts and practitioners must account for the loss of future cost-of-living adjustments. Because an NPV award fixes the former spouse's interest at the time of divorce, future cost of living adjustments ("COLAs") are generally forfeited and must be addressed, if at all, through assumptions built into the valuation rather than through ongoing pension-based adjustments. Under *Howell*, awards that rise or fall in tandem with military retired pay increasingly resemble percentage-based pension divisions and therefore risk the same preemption concerns that render court-ordered indemnification impermissible.[174] An equalization payment that does not fluctuate with the pension is more clearly distinguishable from a division of retired pay and is therefore more likely to withstand scrutiny.[175] Although the pension at issue in *Brady-Kinsella* was not a military pension, the case properly illustrates how a fixed equalization payment, untethered from future pension growth, can be crafted to maximize enforceability.[176]

This approach comes at a cost, since removing the former spouse's interest from the pension also requires relinquishing the actual future increases tied to pension growth.[177] Speculative increases should be accounted for by the expert during the valuation process, but there is no concrete avenue for determining the true value of future COLAs.[178] In effect, protecting the award from future decreases may require giving up future increases as well.[179]

The structure of the award further affects its enforceability if retired pay later decreases or is eliminated entirely. Where an equalization payment is framed as payable from the pension itself, its enforceability becomes uncertain if the pension is later reduced

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174 *Id.*; *see also Howell*, 581 U.S. at 216.

175 Turner, *supra* note 120, at § 6:10.

176 *See Brady-Kinsella*, 106 A.3d at 962–63.

177 *Id.*

178 Turner, *supra* note 120, at § 6:31 ("[t]he ultimate fairness of immediate offset depends heavily upon the accuracy of the actuarial assumptions used to value the benefits—but actuarial assumptions are almost never completely accurate."); *see e.g.,* Mark E. Sullivan & Kristopher J. Hilscher, *Avoiding Mines: What Counsel Should Know When Handling a Military Divorce Case*, 53 Fam. L.Q. 143, 150 (2019).

179 Turner, *supra* note 120, at § 6:10.

to zero, because there is no longer a divisible benefit from which to pay it.[180] By contrast, an award structured as a general equalization payment, unassociated with any specific asset, has a higher chance of survival even if retired pay is eliminated.[181] The more closely an award tracks the pension in form or function, particularly by incorporating COLAs, the more vulnerable it becomes to characterization as a *de facto* pension division subject to federal preemption.[182]

Conversely, an equalization payment paid via lump sum or that remains fixed over time is less susceptible to risk, even though it requires the former spouse to accept the loss of future pension growth.[183] Whether and to what extent courts will enforce different variations of NPV-based awards after *Howell* remains an open question, but existing literature suggests that the further an award is removed from the pension itself, the stronger its prospects for enforcement.[184]

Finally, accurate valuation requires expert involvement and practitioner competency. NPV calculations typically rely on actuarial expertise, including application of the coverture fraction, mortality assumptions, and projected COLAs. Practitioners should expect both the financial cost of expert valuation and the need for substantive education to competently advise clients in military pension cases.

Under the deferred distribution framework, the court need not determine the present value of the pension because the former spouse's interest is expressed as a percentage of the benefit itself, allowing the award to rise and fall with the pension over time. By

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180 *Id.*

181 *Id.*; *see also, e.g.*, Boston v. Boston, [2001] 2 S.C.R. 413, 415 (holding that "the pension-holding spouse must transfer real assets to the payee spouse in order to equalize matrimonial property," when the pension itself is not divided upon divorce); *In re* Marriage of Kimbro, 826 N.W.2d 696, 704 (Iowa 2013) (affirming the trial court's award of an equalization payment to the wife when the husband received $57,000 more in marital assets at property division because "[s]uch disparity leads to inequity, unless the court imposes some form of equalization."); Morrison v. Rubio, 504 P.3d 251, 256-57 (Wyo. 2022) (holding "it is not unusual for courts to require a cash equity payment from one spouse to the other even though there is insufficient cash in the marital estate to cover it," when the paying spouse was awarded a higher value of the parties' marital property).

182 Turner, *supra* note 120, at § 6:10.

183 *Id.*

184 *Id.*

contrast, an NPV-based distribution requires the court to estimate the total value of benefits the service member is expected to receive over a lifetime and reduce it to present value, a process that depends on actuarial assumptions and expert-derived projections rather than known outcomes.[185]

The first step "is to determine the amount of retirement benefits" the service member spouse will receive.[186] When the service member is already retired at the time of divorce, this inquiry is relatively straightforward, since courts may rely on the actual benefit being paid.[187] Greater complexity arises when the service member remains on active duty, because future retired pay must be calculated rather than observed.[188] For an active-duty service member, gross retired pay is determined using two components. The first is the retired base pay, defined as the average of the member's highest thirty-six months of basic pay.[189] The second is the service percentage multiplier, which is calculated by multiplying the total years of creditable service by 2.5%.[190] Gross monthly retired pay is then determined by applying that multiplier to the retired base pay.[191]

By way of illustration, a service member with twenty years of service would have a multiplier of fifty percent. If the average of the highest thirty-six months of basic pay was $5,000 per month, the resulting gross monthly retired pay would be $2,500. When the service member has not yet made the decision to retire, the calculation necessarily depends on assumptions about continued service, future pay increases, and the anticipated retirement date.[192] Those assumptions directly affect the projected benefit and, in turn, the present value assigned to the pension.[193]

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185 *Id.* at § 6:40.

186 *Id.*

187 *Id.* (internal citations omitted).

188 Note that some states disfavor the NPV approach to dividing non-vested pensions; *see, e.g., Laing*, 741 P.2d 649.

189 Defense Finance and Accounting Service, *Estimating Your Retirement Pay*, https://www.dfas.mil/retiredmilitary/plan/estimate (last visited Feb. 15, 2026) (for service members that entered the military prior to September 8, 1980, the retired pay is equivalent to their final basic pay).

190 *Id.*

191 *Id.*

192 Turner, *supra* note 120, at § 6:40.

193 *Id.*

This forward-thinking valuation carries inherent risk—if the court assumes a later retirement date that ultimately does not occur, the projected retired pay may be overstated.[194] Conversely, assuming an earlier retirement may undervalue the benefit.[195] For that reason, when a future retirement date is used in valuation, it must be grounded in evidence rather than speculation, as courts have cautioned that projected retirement assumptions "should be based upon evidence and not upon blind assumptions."[196]

Once the projected amount of retired pay is established, the next step in the NPV analysis is to determine the duration over which those benefits are likely to be paid.[197] Military retired pay is paid from retirement until the service member's death. Accordingly, valuation requires an estimate of how long the service member is expected to live.[198] Courts rely on actuarial life expectancy data to make this determination.[199] That period becomes a critical input in determining the total value of the pension.

This step highlights why NPV valuation is fundamentally different from deferred distribution. Rather than dividing whatever benefits ultimately materialize, the court must translate a future stream of contingent payments into a present-day value. That process necessarily depends on assumptions about longevity and retirement timing, both of which directly influence the total benefit expected to be received. The longer the projected payout period, the greater the present value of the pension, and vice versa.

Next, the expert must account for cost-of-living adjustments by examining historical COLA data and determining an average annual rate of increase. Because military retired pay is generally subject to periodic COLAs, failure to account for those adjustments would materially understate the value of the benefit stream. Using historical data, the expert can estimate a reasonable annual growth rate and apply that increase prospectively to the projected

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194 *Id.*

195 *Id.* (basing the retirement date on the date of valuation is erroneous because it "deprives the marital estate of appreciation earned on the marital interest between the divorce and the date of distribution.").

196 *Id.*

197 *Id.*

198 *Id.*

199 *Id.* ("[t]hrough use of actuarial statistics, it is possible to determine the average life expectancy of any given person.").

pension payments. For example, if retirees have received an average COLA of 2.5% per year over the past twenty years, the expert would incorporate that rate by adjusting the projected benefit upward each year.

Once the future benefit value has been projected, the final step in the NPV analysis is to discount those future payments to their present value.[200] This step converts a series of future pension payments into a single lump-sum value as of the date of divorce. Because the money received in the future is worth less than money received today, each projected payment must be adjusted to reflect the time value of money (the value of investing a lump sum now) before the time value of the pension can be determined.[201] Assume, for example, that the service member's projected gross retired pay has been calculated based on the anticipated retired base pay and years of creditable service at retirement. The court must then determine the NPV of that projected stream of monthly payments by applying a discount rate to reflect the principle that a dollar received in the future does not carry the same value as a dollar received at the time of divorce.[202] Using that rate, each expected monthly payment is reduced to its equivalent value in present dollars, taking into account both the timing and duration of the anticipated benefit, resulting in a single present-value figure that represents the current worth of the service member's future retired pay as of the date of divorce.[203]

After the NPV is fully determined, courts will then determine the marital portion using the coverture fraction, which is the total number of years of service while married, divided by the total number of years of service overall.[204] The marital portion of the pension represents the value subject to division, and under the NPV approach, that value is awarded to the service member spouse in full.

The process of determining the NPV of a pension illustrates, on its own, why expert valuation is required and why the analysis cannot be reliably performed through lay testimony alone.

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200 *Id.*

201 *See* Corporate Finance Institute, *Time Value of Money*, https://corporatefinanceinstitute.com/resources/valuation/time-value-of-money (last visited Feb. 15, 2026).

202 *See id.*; *see also* Turner, *supra* note 120, at § 6:40.

203 *See* Turner, *supra* note 120, at § 6:40.

204 Wiegers v. Richards-Wiegers, 420 P.3d 1180, 1186 (Alaska 2018).

Accurate valuation demands an understanding of actuarial assumptions, economics, and pension mechanics that extend beyond the ordinary knowledge of courts and practitioners. Meaningful advocacy therefore requires practitioners to become competent in the valuation process itself, often through direct collaboration with valuation experts, in order to meaningfully counsel clients in military pension cases.

The NPV approach is not a "plug-and-play" alternative to deferred distribution, but a strategic tool that demands early risk assessment, careful structuring, and expert-driven valuation. Practitioners must evaluate waiver risk at the outset, ensure that sufficient non-pension assets exist to support an offset or ensure that an equalization payment is structured properly, and recognize that enforcement will proceed through traditional property remedies rather than through DFAS. Most critically, effective use of the NPV approach requires close collaboration with qualified valuation experts and a working understanding of military pensions and valuation methods, so practitioners can manage client expectations, make informed strategic choices, and craft property divisions that remain both enforceable and equitable.

IV. Conclusion

Federal law draws a hard line around military disability compensation and the retired pay waived to obtain it. The USFSPA authorizes state courts to divide only "disposable" retired pay, and the Supreme Court's decisions in *Mansell* and *Howell* make clear that courts cannot use indemnification or reimbursement awards to restore a former spouse's lost share of waived retired pay. In the CRSC context, that preemption problem is not theoretical. A post-divorce CRSC election can strip a former spouse of the very income stream the divorce judgment was designed to secure.

But the post-*Howell* landscape is not without remedy. The most durable protection is built at the time of divorce, not after. First, when parties bargain for risk allocation and memorialize it in a settlement agreement, many courts have enforced those promises as ordinary contract obligations so long as enforcement does not assign, garnish, or otherwise target protected benefits as the source of payment. Second, when the bargain is incorporated into a final judgment, *res judicata* may provide an additional layer of

stability by shifting later litigation away from the merits of federal preemption and toward the finality of a decree entered by a court with competent jurisdiction. Together, these doctrines create a narrow but meaningful path for former spouses to preserve the benefit of their bargain within the constraints of federal law.

Where agreement-based indemnification is unavailable, *Howell* points to a critical alternative: address waiver risk at the valuation and division stage. The net present value approach effectuates that alternative. By valuing a marital share of the pension before a waiver occurs and converting that interest into a fixed property award, courts can protect the former spouse's economic stake without ordering any post-judgment "make-whole" payment tied to waived retired pay. Done correctly, NPV-based division awards the service member spouse the entirety of the pension and awards the other a higher percentage of non-pension assets or an equalization payment to ensure an overall equitable distribution. The NPV should only be used when there is a foreseeable risk of future waiver, as it requires additional costs for expert valuation, testimony, and collaboration between the expert and the practitioner.

The practical takeaway for practitioners is straightforward. In a military divorce where disability compensation is present or foreseeable, counsel must treat waiver risk as a core property-division issue. That requires early, targeted discovery of VA ratings and claims status, a realistic assessment of CRDP and CRSC eligibility, and early consultation with valuation experts when an NPV strategy is on the table. If deferred distribution is used, careful drafting matters: parties should expressly address waiver contingencies and, where appropriate, allocate that risk through agreements structured to avoid any "source-of-payment" problem. If NPV is used, the payment structure must be fixed and independent from the pension's future fluctuations to minimize preemption vulnerability, even if that means foregoing future COLAs in exchange for certainty.

Ultimately, the goal of equitable distribution in military divorces remains the same: to fairly allocate the value of a marital asset built through shared sacrifice. Federal preemption limits how state courts can reach that result, especially after *Howell*. But with intentional drafting, informed valuation, and careful strategy, practitioners can still meaningfully protect the former spouses' share of the military pension while staying on the right side of federal law.

De Facto Maternal Preference in Italian Family Courts: A Comparative Study with U.S. Custody Law and Implications for Transnational Practice

By
Rosa Di Caprio*

Introduction

This article examines the persistent divergence between the statutory model of shared custody, formally grounded in the principle of bi-parentality, and its practical implementation in courtrooms. The study compares judicial practices and empirical patterns observed in Italian and U.S. family courts, highlighting structural differences in procedural organization, allocation of parenting time, and management of family conflict.

The analysis is particularly relevant for Italian-American transnational couples, who are frequently involved in disputes characterized by issues of international jurisdiction, recognition of judgments, and coordination between distinct legal systems. From this perspective, the article offers a comparative framework aimed at identifying more balanced procedural models consistent with the child's best interests.

Despite legislative commitments to parental equality in both Italy and the United States (from Italy's codified principle of bi-parentality to U.S. protections of parental neutrality in constitutional case law and state statutes) judicial practice often results in a de facto maternal preference, producing asymmetrical parenting arrangements that marginalize the paternal role. Drawing on qualitative forensic observation developed over two decades of practice

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in high-conflict family litigation (approximately 2005–2025) before major Italian family courts, this article offers a qualitative case-based analysis of judicial patterns. It further relies on a comparative review of U.S. appellate decisions, statutory best-interests factors, and mandatory parenting plans to identify recurring procedural patterns affecting custody determinations, parenting time allocation, housing decisions, and financial obligations.

The article further explores the psychological and systemic consequences of such practices on children, emphasizing the risk of relational disruption and procedural escalation. A comparative analysis with U.S. family law highlights alternative structural approaches designed to preserve parental balance and reduce conflict. The article further examines the Cartabia Reform of 2023 and its practical limitations, the structural role of court-appointed experts in consolidating maternal preference, and the implications of recent U.S. state-level legislative innovations in Florida, Wisconsin, and Idaho, where lawmakers have moved toward presumptions of joint or substantially shared physical custody, detailed parenting-plan requirements, and enhanced protections of parental rights aimed at constraining ad hoc judicial decision-making.

A comparative perspective with U.S. family law shows that certain jurisdictions have introduced statutory presumptions or more structured parenting time guidelines in an effort to reduce decisional uncertainty and limit the influence of implicit bias.

This article proceeds as follows. Part II sets forth the empirical foundation of the analysis, drawing on over twenty years of forensic practice in high-conflict Italian family litigation and a comparative review of U.S. appellate decisions and statutory frameworks. Part III identifies the recurrent judicial patterns through which de facto maternal preference manifests in practice in both systems. Part IV offers a comparative synthesis of the structural differences between the Italian and U.S. approaches. Part V analyzes the psychological and relational consequences of parenting time asymmetry for children. Part VI examines Italian and U.S. approaches to parenting plans, enforceability, and judicial accountability. Part VII argues for a structural reform model grounded in objective, interdisciplinary, and technology-assisted decision-making. Part VIII concludes that bi-parentality must be understood as a fundamental right of the child, and that its most effective safeguard lies in procedural transparency and institutional accountability.

The article concludes by advocating a shift away from discretion susceptible to bias toward objective, interdisciplinary, and technology-assisted decision-making models capable of safeguarding the child's best interests and ensuring genuine bi-parental participation.

I. The Gap Between Law and Judicial Practice

A. *The Statutory Framework of Shared Custody in Italy*

The Italian legal system has formally embraced the principle of bi-parentality as a cornerstone of child custody regulation. Beginning with Law No. 54/2006, subsequently incorporated into Article 337-ter and the related provisions of the Italian Civil Code governing parental responsibility and custody, the legislature established that a minor has the right to maintain a balanced and continuous relationship with both parents, to receive care, education, instruction, and moral support from each of them, and to preserve meaningful relationships with grandparents and relatives on both parental sides.

Shared custody constitutes, at the statutory level, the general rule, while sole custody represents an exception, permissible only when joint custody would be contrary to the child's best interests. The system rests on three fundamental pillars. Joint parental responsibility requires both parents to participate in major decisions concerning the child, including health, education, upbringing, and residence. Legal equality between parents reflects the mandate of Article 30 of the Italian Constitution and the principles of the United Nations Convention on the Rights of the Child, even though the statutory framework has historically been built around a heterosexual parental model.[1] The primacy of the child's best

[1] While Italian statutory law has not yet established a comprehensive framework for same-sex parentage, recent constitutional jurisprudence has progressively extended recognition to non-traditional family structures. The present analysis focuses on the dominant statutory model as applied in the overwhelming majority of contested custody proceedings, which continues to operate around a maternal-paternal dyad. *See* Corte Costituzionale [Corte cost.], sentenza 22 maggio 2025, n. 68 (It.) (holding unconstitutional the statutory framework insofar as it prevented a child born in Italy following heterologous assisted reproduction undertaken abroad by a female couple from acquiring the status of child also with respect to the intentional mother who had consented

interests serves as the overarching criterion guiding all judicial determinations.

The reform enacted through Legislative Decree No. 154/2013 further strengthened the unity of the child's legal status by eliminating the remaining distinctions between children born inside and outside marriage, and reinforced the neutrality of the custody model with respect to the parents' marital status, extending the same framework to all proceedings concerning children, regardless of whether the parents were married. From a theoretical perspective, the Italian model is thus designed as a system oriented toward parental cooperation, shared responsibility, and relational continuity with both parents. However, as will be demonstrated in the following sections, the practical judicial application of the shared custody principle often diverges from its normative framework, producing arrangements that, while formally labeled as "joint," do not always ensure effective parental equality.

B. *The Persistence of Informal Judicial Automatism*

Although the statutory framework outlines a model grounded in parental equality and case-by-case assessment of the child's best interests, judicial practice reveals the persistence of informal decision-making automatism that significantly affects procedural outcomes.

These unreflective defaults are not expressly grounded in statutory law, but rather consolidate through recurring judicial practices, implicit orientations, and standardized formulas that tend to be reproduced serially.

Italian judicial practice reveals at least four recurring automatisms.

The first is the predominant placement of the child with the mother as a default solution, even in the absence of objective elements justifying an unequal allocation of parenting time. The second is the attribution to the mother of routine management of the child's daily life, which progressively marginalizes the father's role in practical decision-making. A third pattern is the standardized allocation of parenting time (typically alternating weekends

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to the reproductive procedure); *see also* Corte Costituzionale [Corte cost.], sentenza 9 marzo 2021, n. 32 (It.) (previously identifying the lack of adequate legal protection for children born within such parental projects and calling upon the legislature to intervene).

and one or two midweek afternoons), applied irrespective of the child's age, geographic proximity, or the parents' actual availability. Finally, courts tend to implicitly associate the maternal figure with the "residential parent," which carries automatic consequences for financial determinations, including child support and assignment of the family home. These mechanisms generate a structural effect: shared custody remains formally declared, yet the practical organization of the child's life often approximates a substantially mono-parental model. Judicial discretion, rather than resulting in an individualized and interdisciplinary analysis of the case, tends to be exercised through predefined decision-making templates.

From a systemic perspective, the persistence of such implicit mechanisms fuels litigation, because the parent perceived as "secondary" is incentivized to initiate complaints, modification proceedings, and appeals. At a psychological level, the quality and continuity of children's relationships with their caregivers may influence attachment patterns and relational development. In high-conflict post-separation families, relational dynamics may also contribute to polarization, loyalty conflicts, and alignment with one parent.[2]

Overcoming these practices requires a more structured approach, based on objective criteria for the allocation of parenting time, interdisciplinary protocols, and transparent and verifiable decision-making tools capable of reducing the influence of cultural stereotypes and implicit bias in judicial determinations.

The Italian Supreme Court recently confirmed this interpretive direction: Cass. civ., ord. No. 6078/2026 held that any presumption that the mother is more suitable for the custody of young children is unfounded and that the determination of placement arrangements and parenting time requires a concrete assessment of the specific family circumstances in order to protect the child's best interests.[3]

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2 *See* John Bowlby, 1 Attachment and Loss: Attachment 177 (2d ed. 1982); Mary D. Ainsworth et al., Patterns of Attachment: A Psychological Study of the Strange Situation 149 (1978); Michael E. Lamb, The Role of the Father in Child Development 8 (5th ed. 2010); Salvador Minuchin, Families and Family Therapy 102 (1974); Janet R. Johnston, *Children of Divorce Who Refuse Visitation, in* Non-Residential Parenting 109, 114 (Charlene E. Depner & James H. Bray eds., 1993).

3 Corte di Cassazione [Cass.], sez. I civ., ord. 17 marzo 2026, n. 6078 (It.).

C. *Conceptual Definition of "De Facto Maternal Preference" and Its Origins*

The term "de facto maternal preference" is used here descriptively to identify a recurring divergence between formally gender-neutral custody rules and decisional patterns that may favor maternal placement in practice. Such a preference, when operating as a gender-based decisional presumption, has been held constitutionally impermissible in U.S. custody law.[4] Such preference is not articulated in normative terms, nor declared as an autonomous legal criterion, but emerges indirectly through the allocation of parenting time, the assignment of the family home, the determination of child support, and the designation of the "residential" or "primary" parent.

It is therefore a descriptive rather than a normative category: an analytical construct intended to identify a divergence between the formal principle of bi-parentality and the concrete configuration of post-separation parental relationships.

D. *Historical and Cultural Origins*

The roots of maternal preference lie in a long historical and legal evolution. In nineteenth-century European law, the father held exclusive parental authority, reflecting an authoritarian and patrimonial conception of the parental relationship. With social evolution and the affirmation of the "best interest of the child" principle in Anglo-American systems, the so-called "tender years doctrine" gradually emerged, according to which, during the early years of life, the child was presumed to benefit preferentially from maternal care.[5]

Although the tender years doctrine was formally abandoned during the twentieth century, assumptions favoring the mother as the child's primary caregiver continued to influence custody decision-making.[6]

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4 *See, e.g.,* Watts v. Watts, 350 N.Y.S.2d 285, 291 (N.Y. Fam. Ct. 1973) (rejecting a de facto maternal preference as inconsistent with the Equal Protection Clause).

5 Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States 45 (1994); J.H. DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in the Wake of the American Law Institute's Principles of the Law of Family Dissolution*, 11 Duke J. Gender L. & Pol'y 1 (2001); *Ex parte* Devine, 398 So. 2d 686, 696 (Ala. 1981).

6 *See, e.g.,* Jessica Feinberg, *Multi-Parent Custody*, 108 Minn. L. Rev. 1489, 1522 (2024) ("Presumptions in favor of one parent over the other, however, continued to play a core role in courts' determinations of which custody arrangement

In Italy, the transition toward parental equality has been relatively recent. Only with the 2006 reform was shared custody established as the general rule. However, judicial culture developed over decades in a context in which sole custody awarded to the mother represented the ordinary solution. Such historical sedimentation has produced a form of institutional inertia: even in the presence of a formally egalitarian rule, practice tends to reproduce consolidated patterns.

De facto maternal preference may also be influenced by sociological factors, including persistent asymmetries in the distribution of family roles during cohabitation and greater female involvement in domestic and caregiving responsibilities.[7] These caregiving patterns may also shape broader social perceptions concerning custody and parental roles. Public-perception studies have reported a widespread belief that custody decision-making is biased in favor of mothers.[8]

From a psychological perspective, recourse to traditional family patterns may function as a mechanism for reducing decisional uncertainty in high-conflict contexts: assigning predominant placement to the mother may be perceived as a "prudential" or "stabilizing" choice, even in the absence of a thorough comparative analysis of parental competencies.

De facto maternal preference does not coincide with an individualized assessment of the mother's greater suitability in a particular case—which remains fully legitimate when grounded in concrete elements—but rather takes the form of a structural, repetitive, and not explicitly reasoned tendency.

Although the law affirms gender neutrality, practice sometimes continues to operate according to implicitly differentiated logics. Understanding this phenomenon is essential in

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would promote the child's best interests. Specifically, in determining what custody arrangement would further the best interests of the child, courts relied heavily on considerations relating to which party served in the role of the child's primary caretaker prior to dissolution.").

7 *See* Judith Treas & Sonja Drobnič, Dividing the Domestic: Men, Women, and Household Work in Cross-National Perspective (2010).

8 Sanford L. Braver et al, *Lay Judgments About Child Custody After Divorce*, 17 Psychol. Pub. Pol'y & L. 212, 214 (2011) ("Whatever the objective truth about judicial decision-making, several studies have shown that the public has the widespread perception that the custody process is heavily biased in favor of mothers.").

order to evaluate the effective implementation of the principle of bi-parentality and to question the need for more objective, transparent, and verifiable decision-making instruments.

E. *Research Question: Why Does Equality on Paper Fail in Practice?*

The central research question may be formulated as follows: why does a statutory model formally grounded in parental equality produce structurally asymmetrical outcomes in judicial practice?

Although the Italian legislature has established shared custody as the general rule and affirmed the child's right to maintain a balanced and continuous relationship with both parents under Article 337-ter of the Italian Civil Code, the concrete organization of parenting time and parental responsibilities may nevertheless reflect a non-equal distribution.[9] Formal equality does not automatically translate into substantive equality.

The research hypothesis operates on four levels. At the first level, institutional inertia and cultural continuity explain why normative reforms do not immediately transform judicial practice, which develops within consolidated interpretive traditions. The transition from a historically maternal-centered custody model to a genuinely shared one requires cultural change in addition to legislative reform. At the second level, the breadth of judicial discretion under the best interests standard—conceptually elastic and open to subjective assessment—creates space for implicit stereotypes and standardized solutions in the absence of objective parameters. A third explanatory factor is the persistence of pre-separation social asymmetries: the greater maternal involvement in daily caregiving during cohabitation is sometimes automatically projected into the post-separation phase, without a forward-looking evaluation of future parental capacities. Finally, the conflict-oriented procedural structure of high-conflict litigation tends to privilege solutions perceived as stabilizing or conservative, even at the cost of reducing one parent's effective participation.

The failure of "equality on paper" may therefore be understood as the outcome of a tension between a formally egalitarian

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[9] Arts. 337-ter (It.), introduced by Legge 8 febbraio 2006, n. 54 (It.), as amended by D.lgs. 28 dicembre 2013, n. 154 (It.)

norm and a decision-making system still characterized by significant discretion.[10] The issue is not the legitimacy of differentiated assessments in individual cases, but the potential existence of recurring patterns that, cumulatively, produce systemic effects.

F. *Counter-Arguments and Their Limits*

Some attachment-based scholarship has expressed concern that extended or overnight separations from a primary caregiver during very early childhood may affect attachment security, particularly in separated or divorced families.[11] Accordingly, some courts have reasoned that maintaining post-separation continuity with the primary caregiver minimizes disruption to the child's attachment bonds. This reasoning, however, conflates the identity of the primary caregiver during cohabitation with suitability for post-separation care, without conducting the forward-looking assessment required by the best interests standard. As Joan Kelly and Michael Lamb have demonstrated, young children are capable of forming and maintaining secure attachments with multiple caregivers simultaneously, and paternal involvement from an early age is independently associated with positive developmental outcomes.[12] The more recent scientific consensus, reflected in Richard Warshak's 2014 consensus report, concludes that shared parenting arrangements, including regular overnight care with both parents, are not inherently harmful to very young children and may support the development and maintenance of meaningful relationships with both parents.[13]

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10 Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226 (1975); Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 Law & Contemp. Probs. 69 (2014).

11 See Judith Solomon & Carol George, *The Effects on Attachment of Overnight Visitation in Divorced and Separated Families*, 38 Fam. & Conciliation Cts. Rev. 136 (1999); Marsha Kline Pruett & J. Hermes, *Protective Factors for Children of Divorce*, 53 Fam. Ct. Rev. 26, 31 (2015).

12 Joan B. Kelly & Michael E. Lamb, *Using Child Development Research To Make Appropriate Custody and Access Decisions for Young Children*, 38 Fam. & Conciliation Cts. Rev. 297 (2000).

13 Richard A. Warshak, *Social Science and Parenting Plans for Young Children: A Consensus Report*, 20(1) Psychol., Pub. Pol'y & L. 46 (2014).

II. Empirical Observations from Forensic Practice

A. *Methodological Note: Qualitative Professional Observation*

The present analysis is not based on quantitative statistical research, but rather on qualitative professional observation developed through more than twenty years of legal practice in high-conflict family litigation. The empirical data derive from the direct examination of judicial decisions, including preliminary judicial orders issued under the pre-Cartabia framework (*decreti presidenziali*)[14], as well as procedural decrees, court-appointed expert reports (CTUs), transcripts of hearings involving the child, and panel decisions issued on appeal.

With regard to the U.S. system, the comparative analysis is grounded in the review of state case law, statutory best interests of the child factors, mandatory parenting plans adopted in many jurisdictions, and appellate decisions concerning custody and parenting time. Unlike the Italian system—characterized by a unified statutory framework and broad judicial discretion—the U.S. system reflects significant normative fragmentation and wide variation across states. Nevertheless, many states provide a greater statutory specification of decisional criteria and, in some cases, the introduction of legal presumptions favoring joint custody or equal parenting time, with potential effects of reducing decisional indeterminacy.

B. *Nature of the Observation in the Italian System*

Within the Italian context, the qualitative observation draws on several categories of primary material. Judicial decisions issued pursuant to Article 337-ter and the related provisions of the Civil Code governing parental responsibility and custody provide the primary evidentiary base, supplemented by procedural decrees

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[14] Before the Cartabia Reform, the decreto presidenziale referred to a provisional order issued at the outset of separation or divorce proceedings to regulate, on an interim basis, matters including the child's residential arrangements, parenting time, and financial obligations. The present Article uses the term only in this historical sense. Current family proceedings are governed by the unified procedural framework introduced by Legislative Decree No. 149/2022, including temporary and urgent measures under Article 473-bis.22 of the Code of Civil Procedure.

and panel decisions rendered on appeal. Particular attention has been devoted to the judicial reasoning concerning predominant placement, the impact of psychological court-appointed expert reports on the final custody arrangement, and the divergence between the parties' claims and the actual allocation of parenting time ultimately ordered by the court.

The observation reveals, in numerous cases, a tendency toward the standardization of parenting schedules (alternating weekends plus one or two midweek afternoons), even where objective conditions would permit a more balanced distribution.

This practice contrasts with Supreme Court jurisprudence which, at a theoretical level, clearly affirms the principle of bi-parentality. The gap between principle and practice is confirmed by a consistent line of Supreme Court authority. Italian Supreme Court jurisprudence has consistently emphasized that shared custody must preserve a meaningful relationship between the child and both parents. In particular, the Court has described bi-parentality as requiring the common presence of both parents in the child's life and has further recognized the child's right to a significant and full relationship with each parent.[15] The Court subsequently clarified that the allocation of parenting time need not be arithmetically equal, but must instead result from a reasoned judicial assessment that takes into account the child's welfare and the child's right to a significant and full relationship with both parents.[16] In 2022, the Court further clarified that the protection of bi-parentality does not automatically justify measures restricting or removing a parent's parental responsibility, but requires a concrete assessment of whether such measures are necessary and consistent with the child's best interests.[17] The Court further emphasized that bi-parentality requires a stable and continuous relationship with both parents, even if arithmetical equality of parenting time is not

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15 *See* Corte di Cassazione [Cass.], sez. I civ., ord. 8 aprile 2019, n. 9764 (It.) (describing bi-parentality as the common presence of both parents in the child's life, capable of ensuring stable and meaningful relationships with each parent); Corte di Cassazione [Cass.], sez. I civ., ord. 13 febbraio 2020, n. 3652 (It.) (emphasizing the child's right to a significant and full relationship with both parents); see also Corte di Cassazione [Cass.], sez. I civ., ord. 14 febbraio 2022, n. 4796 (It.) (recognizing the principle of bi-parentality under Article 337-ter of the Civil Code and Article 8 ECHR).

16 Corte di Cassazione [Cass.], sez. I civ., ord. 13 febbraio 2020, n. 3652 (It.).

17 Corte di Cassazione [Cass.], sez. I civ., 24 marzo 2022, n. 9691 (It.).

mandatory.[18] Most recently, in its landmark March 2026 ruling, the Court held that equal parenting time cannot be excluded solely on the basis of the child's young age, including children of pre-school age, expressly rejecting maternal preference as an inadmissible presumptive criterion and mandating concrete, individualized assessment of each parent's actual capacities.[19]

The European Court of Human Rights, in *Strand Lobben and Others v. Norway* (Grand Chamber, Sept. 10, 2019),[20] strengthened the obligation of states to preserve family bonds except in exceptional circumstances.

The qualitative observation therefore highlights the potential gap between principled judicial affirmations and the concrete allocation of parenting time in practice.

C. *Nature of the Observation in the U.S. System*

The qualitative analysis of the U.S. system draws on four principal categories of material. The primary sources are appellate decisions concerning custody and parenting time, together with a review of statutory best interests of the child factors across different states. These are supplemented by an analysis of mandatory parenting plans and an assessment of the role of custody evaluators and guardians ad litem. Finally, the study examines statutory presumptions favoring joint custody or equal parenting time in select jurisdictions, with particular attention to their practical effects on decisional consistency.

Unlike the Italian system—characterized by a unified statutory framework and broad judicial discretion—the U.S. system reflects significant normative fragmentation due to state-level legislative authority. However, in many states it offers a greater statutory specification of decisional criteria.

In the United States, the judicial presumption favoring maternal custody was formally overcome through decisions such as

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18 Corte di Cassazione [Cass.], sez. I civ., ord. 10 dicembre 2018, n. 31902 (It.) (holding that the principle of bi-parentality does not require a mathematically equal division of parenting time, but rather each parent's right to a meaningful presence in the child's life).

19 Corte di Cassazione [Cass.], sez. I civ., ord. 17 marzo 2026, n. 6078 (It.).

20 Strand Lobben & Others v. Norway, App. No. 37283/13, ¶ 207 (Eur. Ct. H.R. Sept. 10, 2019).

Ex parte Devine,[21] in which the Alabama Supreme Court held that gender-based presumptions violate the Equal Protection Clause of the Fourteenth Amendment.

Although there is no uniform federal custody model, several states have subsequently introduced legislative presumptions in favor of joint custody or, in some cases, equal parenting time. For example, the Kentucky Revised Statutes § 403.270 established a presumption of joint custody and equal parenting time, rebuttable upon specific findings.[22]

The constitutional protection of parental rights has deep roots in U.S. jurisprudence. The Supreme Court recognized parental autonomy as a liberty interest protected by the Due Process Clause in *Meyer v. Nebraska*,[23] and subsequently extended this protection to the parent-child relationship in *Stanley v. Illinois*,[24] holding that a parent's interest in the companionship and custody of their children is cognizable under the Constitution. This line of authority culminated in *Troxel v. Granville,*[25] which reaffirmed the fundamental liberty interest of fit parents in the care, custody, and control of their children and the presumption that fit parents act in their children's best interests.

The Alabama Supreme Court in *Devine*[26] specifically declared the automatic tender years presumption unconstitutional, finding it incompatible with the Equal Protection Clause of the Fourteenth Amendment. The court held that custody may not be determined on the basis of a parent's gender, but must instead rest on neutral factors relating to the best interests of the child. At the federal level, the Supreme Court had already established in *Orr v. Orr*,[27] that gender-based classifications are subject to heightened scrutiny under the Equal Protection Clause, providing a broader constitutional framework for later challenges to sex-based presumptions in family law.

Qualitative observation further indicates that in systems adopting structured presumptions or detailed parenting time

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21 398 So. 2d 686 (Ala. 1981).

22 Ky. Rev. Stat. § 403.270 (2018) as amended.

23 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

24 Stanley v. Illinois, 405 U.S. 645, 651 (1972).

25 Troxel v. Granville, 530 U.S. 57, 65 (2000).

26 *Devine*, 398 So. 2d at 690.

27 Orr v. Orr, 440 U.S. 268, 279 (1979).

guidelines, the allocation of time tends to be less dependent on implicit patterns and more closely anchored to predefined statutory criteria.

III. Recurrent Judicial Patterns

A. *The Italian System*

An analysis of Italian judicial practice reveals, in numerous cases, the recurrence of decision-making patterns which, although formally framed within shared custody, result in substantially asymmetrical arrangements.

1. *Designation of a "Prevalent Parent"*

Although the legal framework does not formally recognize the category of a "prevalent parent," the figure of the residential parent often assumes a functional centrality that exceeds mere logistical organization. Predominant placement with one parent, frequently the mother, produces a cascade of practical consequences that reinforce the residential parent's centrality. That parent acquires greater day-to-day decisional influence, assumes primary management of the child's schooling and healthcare, and consolidates a primary reference role in the child's relational life. Over time, these functional advantages tend to entrench the asymmetry rather than correct it. The Italian Supreme Court has repeatedly emphasized that residential arrangements must preserve each parent's meaningful presence in the child's life, consistently with the principle of bi-parentality.[28] Nonetheless, in trial-level practice, the residential parent often assumes a substantially dominant role.

2. *The Role of Court-Appointed Experts and the Crystallization of Maternal Preference*

A structural element of Italian custody proceedings is the role of the court-appointed psychological expert, known as the

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28 See Corte di Cassazione [Cass.], sez. I civ., ord. 10 dicembre 2018, n. 31902 (It.) (explaining that bi-parentality entails each parent's meaningful presence in the child's life, rather than an arithmetically equal division of parenting time); *see also* Corte di Cassazione [Cass.], sez. I civ., ord. 8 aprile 2019, n. 9764 (It.) (describing bi-parentality as the common presence of both parents in the child's life, capable of ensuring stable and meaningful relationships with each parent).

consulente tecnico d'ufficio (CTU), who is appointed by the judge to provide technical expertise relevant to the court's assessment. In the author's professional observation, the practical operation of this expert-centered structure may contribute, in some cases, to the consolidation of pre-existing asymmetries in parenting arrangements.

In the author's professional observation, CTU reports may carry substantial practical weight in some proceedings, while observations submitted by party-appointed experts may have limited practical influence. The extent to which courts rely on CTU reports, however, varies by case, court, and evidentiary record.

Unlike the U.S. adversarial model, in which both parties may retain independent custody evaluators and subject the court-appointed expert to cross-examination, the Italian system provides only a limited procedural equivalent. Each party may appoint a privately retained expert (consulente tecnico di parte, or CTP) to monitor the CTU's methodology, submit written observations, and, in theory, challenge the CTU's conclusions before the court. In the author's professional observation, however, CTP objections are rarely dispositive: courts overwhelmingly defer to the CTU's findings, and the CTP's role is more often supervisory than genuinely adversarial. The absence of cross-examination rights and the structural centrality of the CTU's mandate render the Italian system substantially less contestable than its U.S. counterpart. More broadly, forensic experience reveals a systemic tendency toward the uncritical adoption of CTU conclusions by the judiciary—a pattern that, in its most pronounced form, can amount to a functional abdication of the adjudicative role itself: rather than exercising independent judgment, the court effectively delegates its decision-making authority to the technical expert, reducing the judicial function to the mere ratification of the CTU's findings.[29]

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[29] See Antonio Iudici, Francesca Rainieri & Tania Fiorini, *Court-Appointed Expert Consultation in Italy: An Ethnographic Study of Parents' Beliefs, Expectations, and Experiences*, 16 Front. Psychol. 1668693 (2025) (describing the CTU as a court-commissioned psychological assessment intended to provide judges with information relevant to custody decisions and describing the monitoring role of party-appointed consultants); *see also* Tribunale di Milano, *Indicazioni operative per la CTU su famiglia e minori* (2023) (setting out procedural and methodological guidelines governing court-appointed expert evaluations in family and minor proceedings). The observations concerning the practical degree of judicial reliance on CTU conclusions and the relative influence of CTP

This dynamic raises a critical concern that forensic experience confirms repeatedly: rather than challenging or correcting the informal maternal preference embedded in preliminary judicial orders, CTU reports tend to ratify and consolidate it. The assessment methodology frequently focuses on the child's existing attachment patterns and current relational equilibrium—factors that, by the time the expert evaluation commences, already reflect months or years of predominantly maternal placement ordered through interim measures. The CTU thus photographs a situation that the proceeding itself has created, transforming a provisional and contingent arrangement into an apparently objective finding of the child's best interests.

This circularity is structurally invisible: the interim custody orders place the child predominantly with the mother; the CTU evaluates the child in that consolidated arrangement; the final order confirms it on the basis of the CTU's conclusions. The father's reduced presence, which the system has itself produced, becomes evidence of his lesser centrality in the child's life. The result is a self-reinforcing mechanism that the formal principle of bi-parentality is unable to interrupt.

In the U.S. system, several procedural safeguards mitigate this risk. The adversarial structure allows both parties to retain independent custody evaluators, to depose the court-appointed expert, and to challenge the methodology underlying the evaluation. Some states have introduced statutory requirements specifying the criteria that evaluators must apply, reducing the evaluator's discretion and rendering the assessment more transparent and reviewable. The contrast with the Italian model is striking: where the U.S. system treats the expert evaluation as one input into a judicial decision that remains fully the judge's responsibility, the Italian system tends toward a form of functional delegation in which the CTU effectively predetermines the outcome.

Addressing this dynamic requires both procedural reform—including the introduction of adversarial expert procedures and clearer methodological standards for CTU evaluations—and a cultural shift in judicial practice toward maintaining autonomous decisional responsibility rather than deferring wholesale to technical expertise.

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objections reflect the author's qualitative professional experience in Italian family litigation.

3. *Marginal Allocation of Paternal Parenting Time*

A frequently observed pattern consists in assigning the father alternating weekends (from Friday afternoon or Saturday morning until Sunday evening), one or two midweek afternoons, and summer periods divided into segments not exceeding fifteen days, even if non-consecutive.

Although formally compatible with shared custody, this model produces a significantly asymmetrical temporal distribution, which may affect the quality and depth of the parental relationship. The Italian Supreme Court has clarified that bi-parentality does not necessarily entail arithmetical equality of parenting time, but requires a meaningful and stable presence of both parents.[30] From an empirical standpoint, however, concerns arise when such allocation becomes crystallized into standardized patterns, applied irrespective of the specific circumstances of the case or the parents' prior caregiving roles before the family breakdown. Most recently, Cass. civ., ord. No. 6078/2026[31] clarified that equal placement cannot be ruled out on the presumption of the child's young age, reinforcing the requirement for individualized judicial assessment over standardized patterns.

4. *Systematic Exclusion from the Family Home*

Assignment of the family home to the residential parent frequently produces consequences that extend well beyond housing. The non-residential parent is definitively excluded from the property, often generating a significant and lasting economic imbalance between the parties. At the same time, the assignment operates as a symbolic and material reinforcement of the prevalent parent's position, further consolidating the mono-residential dynamic that shared custody was designed to prevent.

Italian jurisprudence has consistently treated the assignment of the family home as a measure primarily directed toward protecting the child's interest in preserving the domestic environment in which family life has developed, rather than as an instrument for addressing the purely economic interests of either parent.[32]

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30 Corte di Cassazione [Cass.], sez. I civ., ord. 10 dicembre 2018, n. 31902.

31 Corte di Cassazione [Cass.], sez. I civ., ord. 17 marzo 2026, n. 6078 (It.).

32 *See* Corte di Cassazione [Cass.], sez. I civ., 22 luglio 2015, n. 15367 (It.); Corte di Cassazione [Cass.], sez. I civ., 12 ottobre 2018, n. 25604 (It.); *see also*

Nevertheless, in concrete application, it often contributes to the consolidation of a mono-residential model.

B. *The U.S. System*

In the United States, the landscape is more heterogeneous, yet distinct dynamics emerge.

1. *Designation of the "Primary Residential Parent"*

In many states, the figure of the primary residential parent exists alongside joint legal custody. Although there is no uniform federal custody model, several states have adopted statutory frameworks that structure custody determinations through presumptions favoring joint legal custody, equal time-sharing, or meaningful shared parenting, subject to exceptions based on the child's best interests and circumstances such as domestic violence.[33]

The best interests standard, illustrated in landmark decisions such as *Painter v. Bannister*, has evolved from a broad discretionary principle into an increasingly structured analytical framework, as successive state legislatures have introduced specific statutory factors to guide judicial evaluation.[34]

In certain jurisdictions, lawmakers have adopted different statutory mechanisms designed to promote shared parenting. Kentucky establishes a rebuttable presumption in favor of joint custody and equally shared parenting time, while Arizona directs courts, consistently with the child's best interests, to adopt parenting plans that provide for shared legal decision-making and

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Corte di Cassazione [Cass.], sez. I civ., 18 settembre 2013, n. 21334 (It.) (holding that the assignment of the family home cannot constitute a form of financial assistance to the economically weaker spouse, but presupposes custody of minor children or cohabitation with financially dependent adult children)

33 *See, e.g.*, Ky. Rev. Stat. Ann. § 403.270(2) (West 2018), as amended (establishing a rebuttable presumption of joint custody and equally shared parenting time); Fla. Stat. Ann. § 61.13(2)(c)1 (West 2023) (creating a rebuttable presumption of equal time-sharing); Wis. Stat. Ann. § 767.41(2)(am), (4)(a)2 (West 2023) (presuming joint legal custody and directing courts to maximize each parent's time with the child consistent with the child's best interests); Idaho Code Ann. § 32-717B(2)–(5) (West 2024) (providing for joint custody while creating a presumption against joint custody where a parent is a habitual perpetrator of domestic violence).

34 Painter v. Bannister, 140 N.W.2d 152, 158 (Iowa 1966).

maximize each parent's parenting time.[35] These presumptions do not mandate automatic arithmetical equality; rather, they establish a normative starting point that directs judicial analysis toward effective sharing of parental responsibility.

In other states, even in the absence of a presumption of equal time, the allocation of parenting time is guided by detailed statutory factors that judges are required to evaluate and expressly address in their reasoning. This framework produces a dual systemic effect: on the one hand, it limits the risk of standardized outcomes based on implicit assumptions or gender stereotypes; on the other, it enhances the transparency and reviewability of judicial reasoning, as decisions must engage with normatively defined criteria.

2. *Allocation of Parenting Time*

In states that have introduced a presumption of equal parenting time,[36] equal or substantially shared parenting time operates as the statutory starting point unless the presumption is rebutted based on the child's best interests. In these jurisdictions, temporal parity is therefore not a rigid automatism, but an initial legal presumption that shifts the burden to the party seeking a different allocation.

In other states, a model based on the distinction between a primary residential parent and scheduled parenting time continues to operate. Some jurisdictions, such as Wisconsin, use the terminology of legal custody and periods of physical placement rather than traditional visitation terminology.[37]

The most significant difference from the Italian system lies in the fact that, in many U.S. jurisdictions, parenting time regulation is guided by structured parenting time guidelines and mandatory parenting plans. This normative architecture tends to render the decision-making process more transparent and verifiable, as

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35 Ariz. Rev. Stat. Ann. § 25-403.02 (West 2023); Ky. Rev. Stat. Ann. § 403.270 (West 2018) as amended.

36 *See, e.g.,* Ky. Rev. Stat. Ann. § 403.270(2), as amended (establishing a rebuttable presumption of joint custody and equally shared parenting time); Fla. Stat. Ann. § 61.13(2)(c)1 (establishing a rebuttable presumption that equal time-sharing is in the child's best interests).

37 *See* Wis. Stat. Ann. § 767.41; *see generally* Joan B. Kelly, *Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce*, 19 J. Am. Acad. Matrim. Law. 237 (2005).

judges must engage with predefined criteria and a concrete organizational framework for the child's life.

The complexity of parenting time allocation is further illustrated by relocation cases, where courts may be required to balance the custodial parent's interest in relocation against the child's continuing relationship with the other parent. In *In re Marriage of Burgess*,[38] the California Supreme Court recognized the custodial parent's presumptive right to relocate with the child, subject to the noncustodial parent's burden of demonstrating detriment to the child, a ruling that exemplifies the tension between parental autonomy and bi-parental continuity that characterizes many U.S. jurisdictions.

The diversity of state-level approaches extends well beyond the Kentucky and Arizona models. Several additional jurisdictions have developed legislative frameworks that merit attention for their structural implications. In Florida, the legislature amended its custody statute in 2023 to establish a rebuttable presumption of equal time-sharing,[39] reflecting a legislative judgment that fifty-fifty parenting arrangements serve the child's best interests absent specific findings to the contrary. The Florida model is particularly significant because it shifts the burden of proof: rather than requiring a parent to affirmatively demonstrate the benefits of equal time-sharing, it requires the party seeking a deviation to prove, by a preponderance of the evidence, that equal time-sharing is not in the child's best interests. This inversion of the burden of proof may be understood as a structural effort to translate parental equality from a general principle into an operative statutory presumption.

Wisconsin has adopted a similarly structured approach through its statutory presumption of joint legal custody, accompanied by detailed judicial standards governing the allocation of physical placement. Wisconsin courts are directed to establish physical-placement schedules that provide regularly occurring, meaningful periods with each parent and maximize the amount of time the child spends with each parent, consistent with the child's best interests.[40]

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38 913 P.2d 473 (Cal. 1996).

39 Fla. Stat. Ann. § 61.13(2)(c)1; 2023 Fla. Laws ch. 2023-301.

40 Wis. Stat. Ann. § 767.41(4)(a)2.

Idaho similarly establishes a statutory presumption favoring joint custody, subject to exceptions including cases involving a habitual perpetrator of domestic violence.[41] This statutory structure may help constrain standardized asymmetrical arrangements by anchoring the judicial starting point in a presumption favoring joint custody rather than leaving the allocation entirely to case-by-case discretion.

Taken together, these state-level innovations illustrate a broader legislative trend in U.S. family law toward the structural reduction of judicial discretion in parenting time determinations. The underlying policy rationale is consistent across jurisdictions: unconstrained discretion, however well-intentioned, creates conditions favorable to implicit bias and standardized outcomes that may not reflect the child's actual best interests or the realities of each family's specific circumstances.

3. *Family Home*

In the United States, there is no automatic mechanism comparable to the assignment of the family home provided for in the Italian system as a function of the child's residential placement. The residence generally falls within the scope of property division between spouses, according to the criteria of equitable distribution in states that adopt that model, or under the regime of community property in the relevant jurisdictions.[42] The possible continued occupancy of the residence by one of the parents may be ordered through a temporary occupancy order; however, this is normally a provisional measure, linked to the immediate needs arising during the pendency of the proceedings, and not a stable right automatically connected to the child's predominant residence.

This framework reduces the risk that ownership or exclusive use of the residence becomes a structural factor consolidating one parent's position as the dominant figure, since the housing issue is treated primarily as a patrimonial and temporary matter rather than as a permanent element of the parental arrangement.

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41 Idaho Code Ann. § 32-717B(2)-(5).

42 *See* Mark Strasser, *Dividing Up the Marital Home*, 49 S. Ill. U. L.J. 17 (2024).

IV. Comparative Synthesis

A. *Functional Differences in Italian and U.S. Shared Custody Regimes*

In the Italian system, the combination of predominant placement with one parent, assignment of the family home, and asymmetrical allocation of parenting time may, in substantive terms, result in a de facto mono-parental arrangement, despite the formal framework of shared custody. Although parental responsibility remains legally joint, the concentration of the child's habitual residence, domestic environment, and daily management with one parent produces a cumulative effect that strengthens that parent's position as the primary reference figure.

This configuration does not derive from an express statutory presumption, but from the interaction between distinct legal mechanisms which, in their coordinated application, end up significantly affecting the relational balance between parents. As a result, shared custody may assume a predominantly formal dimension, while the concrete organization of the child's life tends to gravitate steadily around a single residential and decision-making center.

In the U.S. system, although there is marked variability among the different states, the introduction in certain jurisdictions of presumptions in favor of joint custody, the adoption of detailed parenting time guidelines, and the reduced centrality of permanent assignment of the family home contribute to limiting the automatic structuring of a dominant parent. In such contexts, the normative starting point oriented toward effective sharing and the greater statutory specification of decisional criteria render the judge's reasoning process more transparent and reduce the risk of implicitly hierarchical solutions.

B. *Structural, and Not Merely Anecdotal, Nature of the Phenomenon*

The phenomenon described cannot be reduced to a mere aggregation of isolated cases or to occasional deviations from the statutory model of shared custody. Its relevance emerges, rather, from the recurrence of decision-making patterns that are systematically reproduced across different judicial contexts, suggesting

the existence of structural dynamics embedded in the architecture of the system.

The structural dimension of the phenomenon manifests itself through three principal indicators. First, the repetition of analogous reasoning formulas in different judicial decisions, often grounded in generic references to stability or environmental continuity, without an in-depth comparative assessment of parental competencies. Second, the predictability of outcomes in the presence of certain factual conditions, suggesting the operation of implicit decision-making models. Third, the internal coherence among different legal institutions—placement, assignment of the family home, calculation of child support—which, although normatively autonomous, interact in a way that produces a cumulative effect reinforcing one parent's position relative to the other.

From this perspective, the gap between "law in books" and "law in action" does not appear as an episodic dysfunction, but rather as the outcome of a systemic equilibrium among judicial discretion, interpretive traditions, and procedural configuration. Only by recognizing its systemic dimension does it become possible to assess the appropriateness of corrective interventions—whether normative, organizational, or methodological—aimed at ensuring a more effective implementation of the principle of bi-parentality.

V. Impact on Children and on the Stability of the Family System

A. *Disruption of Daily Relational Continuity*

The stability and quality of primary relationships constitute important factors in a child's development and adjustment. Psychological research indicates that children benefit from developing and maintaining meaningful relationships with both parents, and that adjustment is associated with qualities such as parental affection, consistency, reliability, responsiveness, and emotional commitment.[43]

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[43] Bowlby, *supra* note 2, at 210; Kelly & Lamb, *supra* note 12, at 303; Michael E. Lamb, *Mothers, Fathers, Families, and Circumstances: Factors Affecting Children's Adjustment*, 16 Applied Developmental Sci. 98, 102 (2012).

When the post-separation arrangement results in a stable concentration of the child's daily life with only one parent, while the other parent's involvement is limited to fragmented and discontinuous periods of time, a progressive thinning of shared ordinary experiences may occur. School routines, extracurricular activities, and informal moments of domestic life, which together constitute the relational fabric through which emotional bonds are consolidated, risk becoming the exclusive domain of one parent alone.

Italian jurisprudence has repeatedly emphasized the need to ensure an "effective and meaningful" presence of both parents in the child's life,[44] implicitly recognizing that the mere formal attribution of parental responsibility is insufficient to preserve relational continuity.

B. *Effects on Emotional Security and Identity Formation*

International scientific literature indicates that the quality and stability of children's relationships with both parents are associated with important aspects of psychological adjustment and well-being.[45] A substantial reduction in the presence of one parent may therefore affect the continuity and quality of the parent-child relationship.

From a legal standpoint, the child's right to bi-parentality extends beyond the protection of the emotional bond and encompasses the safeguarding of his or her harmonious development and relational identity, as also recognized by Article 8 of the European Convention on Human Rights and the case law of the European Court of Human Rights.

C. *Escalation of Conflict and Litigation*

A further systemic effect concerns the increase of conflict and the multiplication of judicial proceedings. Arrangements perceived as unbalanced may generate a sense of exclusion or

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44 *See* Corte di Cassazione [Cass.], sez. I civ., ord. 10 dicembre 2018, n. 31902 (It.); Corte di Cassazione [Cass.], sez. I civ., ord. 8 aprile 2019, n. 9764 (It.).

45 Lamb, *supra* note 43, at 102; Linda Nielsen, *Joint Versus Sole Physical Custody: Children's Outcomes Independent of Family Income or Parental Conflict*, 62 J. Divorce & Remarriage 1, 5 (2021); Warshak, *supra* note 13, at 52.

marginalization in the parent with less presence, thereby encouraging appeals, requests for modification of conditions, complaints, and enforcement actions for non-compliance.

Comparative scholarship has emphasized the substantial indeterminacy inherent in the best-interests standard used in child-custody adjudication.[46]

The child is not a party to the proceedings in a technical sense, yet he or she is the subject directly affected by the consequences of judicial decisions and conflictual dynamics. When proceedings are prolonged over time or structured as a permanent adversarial confrontation, the child may become an indirect victim of procedural imbalance, exposed to tensions, pressures, and conflicting loyalty dynamics.

The United Nations Convention on the Rights of the Child (Arts. 3 and 12) and the case law of the European Court of Human Rights reiterate that the child's best interests must constitute a primary consideration in every decision affecting him or her. The structural dimension of the phenomenon therefore assumes relevance not only in terms of balancing parental rights, but above all in relation to the stability of the family system and the protection of the child's psycho-emotional development.

D. *The Role of Social Services, Supervision, and Neutral Settings*

When signs of deterioration in the parental bond emerge, judicial intervention may be structured through progressive and proportionate measures. In the Italian system, referral to social services, activation of parental support programs, and the provision of meetings in neutral settings constitute tools frequently used to monitor and reconstruct a compromised relationship.

The system at times reveals inefficient functioning and, above all, a tendency toward excessive delegation of the decision-making function. When supervisory or monitoring measures extend over time without rigorous verification of their necessity, the precautionary intervention ultimately crystallizes the relational arrangement rather than re-envisioning it. The judge, by contrast, is called upon to exercise a fully decisional, proportionate, and reasoned

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46 Mnookin, *supra* note 10, at 255–56, 262 (critiquing the indeterminacy of the best-interests standard).

function, using services as auxiliary tools rather than as substitutes for his or her jurisdictional responsibility.

In the United States, family courts resort to supervised visitation, therapeutic reunification programs, and guardians ad litem to ensure a protected and controlled context in which to restore or rebuild the parent–child relationship. A further problematic aspect concerns the duration of these ostensibly temporary measures: supervision orders or therapeutic programs originally conceived as precautionary interventions may persist over time in the absence of strict verification of their proportionality and continuing necessity. These patterns suggest that tools formally designed as short-term safeguards may, in practice, evolve into de facto long-term arrangements that reshape the parent–child relationship and partially shift effective decision-making power from the judge to auxiliary services, without the level of individualized judicial scrutiny and transparent reasoning that constitutional standards of parental rights would require.

This tendency raises an issue of institutional balance: the U.S. system, grounded in high evidentiary standards and constitutional protection of parental rights, requires that any significant limitation of the relationship be supported by rigorous findings and autonomous reasoning. When the technical component prevails over legal evaluation, the system risks a form of "functional delegation" that attenuates the judge's direct responsibility and renders the process less transparent and more dependent on local variables.

E. *Long-Term Effects of Relational Interruption*

The scientific literature indicates that children who are deprived of a meaningful relationship with one parent may face increased psychosocial risks, even when they maintain a relationship with the other parent.[47] Research on children following parental separation indicates that child adjustment is associated with the quality of the parent-child relationship, parental involvement, parenting time, and the level of interparental conflict.[48]

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47 Kelly & Lamb, *supra* note 12, at 303; Warshak, *supra* note 13, at 52.

48 *See* Marsha Kline Pruett et al., *Family and Legal Indicators of Child Adjustment to Divorce Among Families With Young Children*, 17 J. Fam. Psychol. 169, 169–80 (2003); Karey L. O'Hara et al., *Parenting Time, Parenting Quality,*

From a legal perspective, this entails that any suspension or compression of the parental relationship must be assessed with the utmost caution and must be subject to constant re-examination in light of the evolution of the concrete circumstances. Within this framework, moving beyond diagnostic labels in favor of a rigorous evaluation of conduct and of its effects allows the judge to maintain focus on the child's best interests.

VI. Comparative Perspective: Italy and the United States

A. *Overview of U.S. Approaches to Parenting Plans*

In many U.S. jurisdictions, parenting plans are required to address detailed aspects of parenting time and parental decision-making, including regular schedules, holidays and school vacations, education and health-care decisions, transportation and exchange arrangements, communication and information-sharing arrangements, and procedures for resolving future disputes.[49] This framework is operational rather than merely declaratory: parenting plans translate parental responsibility and parenting time into specific arrangements governing the child's day-to-day life.

In the Italian system, on the contrary, there is no uniform model of mandatory parenting plan with standardized content at the national level. Moreover, the concept of a parenting plan was only introduced with the Cartabia Reform in 2023. The timing and terms of the relationship are mainly defined in the court order,

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Interparental Conflict, and Mental Health Problems of Children in High-Conflict Divorce, 33 J. Fam. Psychol. 690, 690–703 (2019).

[49] *See, e.g.*, Ariz. Rev. Stat. Ann. § 25-403.02(C) (requiring parenting plans to address legal decision-making, education and health-care responsibilities, parenting-time schedules including holidays and school vacations, child exchanges and transportation, dispute-resolution procedures, and parental communication); Wash. Rev. Code § 26.09.184(2), (4)–(6) (requiring permanent parenting plans to address future dispute resolution, decision-making authority, including education and health care, and residential schedules including holidays and vacations); Fla. Stat. §§ 61.13(2)(b), 61.046(14), (23) (2025) (requiring court-approved parenting plans in time-sharing proceedings and defining parenting plans and time-sharing schedules to include parental decision-making and specified parenting time, including holidays).

often in summary terms. The lack of a standardized tool can leave more room for discretion and subsequent interpretative conflict.

B. *Emphasis on Enforceability and Accountability*

In several U.S. jurisdictions, court-approved parenting plans are enforceable through statutory mechanisms. Depending on the jurisdiction and circumstances, a parent's unjustified noncompliance with a residential or time-sharing provision may result in contempt proceedings, compensatory parenting time, attorneys' fees, costs, or monetary penalties and, where statutory modification standards are met, modification of the plan.[50] Violation of provisions relating to parenting time may result in civil sanctions, modification of the custodial arrangement, compensatory time, or, in more serious cases, contempt of court. The judicial order is conceived as binding and immediately enforceable, with expedited procedural mechanisms available to address noncompliance.

In Italy, remedies for violations of parental-responsibility and parenting arrangements are now governed within the unified family-procedure framework, including Article 473-bis.39 of the Code of Civil Procedure. The difference does not concern only the statutory provision, but also the culture of enforcement: in the United States system, responsibility for compliance with the plan is more explicitly structured, whereas in the Italian system effectiveness depends to a significant extent on the initiative of the parties and on the subsequent intervention of the judge.

C. *Judicial Tools Aimed at Minimizing Discretionary Bias*

In several American states, the legislature has introduced mechanisms aimed at reducing excessive judicial discretion, such

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50 *See, e.g.*, WASH. REV. CODE § 26.09.160(2)–(3) (authorizing contempt proceedings for noncompliance with residential provisions of a parenting plan and providing for additional residential time, attorneys' fees, costs, and monetary penalties); FLA. STAT. § 61.13(4)(c)–(d) (2025) (requiring compensatory time-sharing when a parent unjustifiably refuses to honor a time-sharing schedule and authorizing related remedies); TEX. FAM. CODE ANN. § 153.007(c) (providing that agreed-parenting-plan terms incorporated into an order may be enforced through remedies available for enforcement of a judgment, including contempt); *see also* WASH. REV. CODE § 26.09.260(2)(d) (permitting modification in specified circumstances where a parent has been found in contempt at least twice within three years for failure to comply with residential-time provisions).

as presumptions of joint custody, equal parenting time, or detailed lists of statutory factors that must be mandatorily evaluated. Such mechanisms do not eliminate discretion, but they delimit its scope, imposing a structured and reviewable reasoning process.

In the Italian system, notwithstanding the existence of a general principle of bi-parentality, the absence of binding national guidelines concerning parenting time leaves broad space for case-by-case evaluation. This allows for flexibility that is theoretically positive, but it may also foster heterogeneous outcomes dependent on local practices. In comparative terms, the United States system tends to favor a preventive structuring of conflict through detailed normative instruments and incisive enforcement mechanisms, whereas the Italian system relies more heavily on judicial discretion and on subsequent corrective interventions.

D. *The Cartabia Reform and Its Practical Limits*

The Italian legislature's most recent structural intervention in family proceedings—Legislative Decree No. 149 of October 10, 2022, commonly referred to as the Cartabia Reform and effective as of March 1, 2023, introduced a series of procedural innovations that, at least at the normative level, move the Italian system closer to the structured approaches characteristic of U.S. jurisdictions. The reform's most significant contributions include the formal introduction of the parenting plan (*piano genitoriale*) as a mandatory element of separation and divorce proceedings, the enhanced procedural role of family mediation, and the expansion of sanctioning mechanisms available under Article 473-bis.39 of the Code of Civil Procedure for non-compliance with custody orders.

The parenting plan, in particular, represents a conceptual shift of genuine importance. For the first time in Italian procedural law, the legislature has required parties to articulate—in concrete and detailed terms—the organizational arrangements for the child's daily life, including school routines, healthcare management, holiday schedules, and communication between households. The explicit purpose is to reduce the vagueness of court orders and to minimize subsequent interpretive conflict between parents. In this respect, the reform reflects the same programmatic logic that has long characterized mandatory parenting plans in U.S. jurisdictions:

predictability, specificity, and enforceability as preconditions for genuine shared parenting.

However, forensic experience in the three years since the reform's entry into force suggests that its practical impact remains substantially limited. Several structural factors explain this gap between normative aspiration and judicial reality. First, the parenting plan submitted by the parties is rarely the product of genuine cooperative negotiation; in high-conflict proceedings, it is typically drafted unilaterally by each party's counsel and reflects adversarial positions rather than agreed arrangements. Second, courts retain broad discretion in modifying or disregarding the parties' proposed plans, and the absence of national guidelines on minimum parenting time standards means that judicial practice continues to reproduce the standardized asymmetrical arrangements documented in this article. Third, the mediation framework introduced by the reform appears to have had limited practical uptake in high-conflict cases, based on the author's professional observation.

The Cartabia Reform thus confirms a pattern that comparative analysis consistently reveals: legislative reform, even when well-designed, does not automatically modify entrenched judicial culture. The structural inertia of a system accustomed to discretionary, expert-delegated decision-making resists normative innovation unless accompanied by binding operational criteria, mandatory training for judicial officers, and robust mechanisms for appellate review of parenting time allocations. Until these complementary elements are in place, the gap between the reform's stated objectives and its concrete outcomes is likely to persist.

VII. Structural Reform and the Role of Technology

A. *Limits of a Merely Normative Reform*

U.S. child-custody law has progressively moved away from relatively specific categorical rules toward more open-ended best-interests standards, leaving courts substantial discretion in individual cases.[51] The proclamation of the principle of bi-parentality

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[51] *See* Mnookin, *supra* note 10, at 231 (describing the historical shift from relatively specific custody rules toward less determinate, child-centered legal standards); Elizabeth S. Scott & Robert E. Emery, *Gender Politics and*

or the affirmation of parental equality criteria, although essential at the level of values, risk remaining statements of principle when they do not affect the concrete modalities through which decisions are formed. From this perspective, purely normative reform reveals its limits: without a change in decision-making processes, the system may continue to generate heterogeneous and scarcely predictable outcomes.

B. *Need for Objective and Interdisciplinary Decision-Making Models*

The complexity of family disputes requires instruments capable of integrating legal, psychological, and social expertise within a clear methodological framework. An objective decision-making model does not entail the elimination of judicial evaluation, but rather its structuring around explicit, graded, and reasoned criteria. Interdisciplinarity must translate into shared protocols, verifiable indicators, and transparent evaluation parameters capable of reducing arbitrariness and strengthening consistency across analogous cases. These tools are intended to guide judges, court-appointed experts, and social services in structuring their assessments within a common, reviewable framework, and can be embedded in technology-assisted decision-support systems. The objective is not to standardize families, but to standardize the method of analysis, ensuring that evaluative criteria remain transparent and subject to appellate review.

C. *Potential of Technology-Assisted Dispute Resolution*

Digital decision-support tools may improve the consistency, documentation, and transparency of structured decision-making processes. Any use of such tools, however, should remain subject to clear design, meaningful human oversight, and rigorous auditing for disparate effects.[52] In family-court proceedings, digital

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Child Custody: The Puzzling Persistence of the Best-Interests Standard, 77 Law & Contemp. Probs. 69, 75 (2014) (explaining that legislatures have retained the best-interests standard rather than adopting a rule favoring joint physical custody).

52 See Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 Calif. L. Rev. 671, 671–73, 694–714 (2016) (discussing both the potential of data-driven systems to formalize decision-making and limit opportunities for

case-management systems and structured parenting-plan platforms may serve as supplementary tools for organizing information and promoting the consistent application of transparent, predefined criteria, without displacing individualized judicial assessment.

Technology offers three distinct contributions to the reform of family adjudication. First, structured decision-support tools may assist courts in systematically identifying and documenting factors relevant to parenting arrangements, while preserving the individualized assessment required because the significance of those factors varies across children and families.[53] Second, traceable reasoning pathways may enhance transparency by making the relationship between relevant inputs and decisional outputs more intelligible and open to scrutiny by affected parties and human decision-makers.[54] Third, structured decision-support systems may make evaluative criteria more explicit and can facilitate the identification of potential disparate effects. They do not, however, eliminate the risk that biases embedded in data, model design, or fairness assumptions will affect decision-making.[55]

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individual bias and the risk that such systems may reproduce or generate discriminatory effects); Sorelle A. Friedler et al., *A Comparative Study of Fairness-Enhancing Interventions in Machine Learning*, *in* Proceedings of the 2019 Conference on Fairness, Accountability, and Transparency 329, 329–30 (2019) (examining different approaches to fairness-enhancing interventions and emphasizing that assessments of algorithmic fairness depend on methodological choices and assumptions).

53 *See* Dep't of Justice Can., Considerations for Determining Parenting Arrangements: Factors That Contribute to Positive Outcomes for Children (2017) (explaining that parenting arrangements should take account of multiple factors relevant to children's adjustment and that the significance of those factors varies with the characteristics and circumstances of individual children and families).

54 *See* Finale Doshi-Velez & Been Kim, *Towards a Rigorous Science of Interpretable Machine Learning*, arXiv:1702.08608, at 1–2 (2017) (discussing interpretability as the ability to explain or present a system's reasoning in terms understandable to humans and explaining its role in assessing safety and nondiscrimination); Sandra Wachter, Brent Mittelstadt & Chris Russell, *Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR*, 31 Harv. J.L. & Tech. 841, 842–45, 860–62 (2018) (arguing that explanations can help affected persons understand automated decisions and provide grounds to contest undesirable outcomes).

55 *See* Sina Fazelpour & David Danks, *Algorithmic Bias: Senses, Sources, Solutions*, 16 Phil. Compass e12760, at 1–7 (2021) (explaining that algorithmic

None of this implies delegation to the machine: the objective is to use technology as a methodological support to human judicial decision-making, not as a substitute for it.

D. *From Reactive Litigation to Preventive Justice Models*

Early family-dispute-resolution processes may help parents address parenting and support issues outside court proceedings.[56] A preventive approach to family justice would seek to identify and address foreseeable sources of conflict at an early stage, through clear parenting arrangements and appropriate dispute-resolution mechanisms, while preserving individualized safeguards for cases involving violence, coercion, or severe conflict. This entails the adoption of instruments that promote predictability of decisions, standardization of evaluative criteria, and early activation of mediation or parenting coordination pathways.

In the United States, some jurisdictions use parent-education programs, parenting coordination, mediation, and other family-dispute-resolution mechanisms to address parenting conflict and facilitate post-separation arrangements.[57] In Italy, the reform of family procedure and the enhanced role attributed to mediation represent an initial step, but the system remains predominantly

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bias may arise from problem specification, data, modeling, validation, and deployment, and that data-driven systems can preserve or exacerbate existing inequities); Sahil Verma & Julia Rubin, *Fairness Definitions Explained*, *in* Proceedings of the 2018 IEEE/ACM International Workshop on Software Fairness 1, 1–3 (2018) (explaining that multiple fairness definitions rest on different assumptions, can yield divergent results, and may be mutually incompatible).

56 *See* Dep't of Justice Can., Family Dispute Resolution: Resolving Family Law Issues Out of Court (May 17, 2024) (describing negotiation, mediation, collaborative law, arbitration, and other family-dispute-resolution processes as means of resolving parenting and support disputes outside court proceedings).

57 *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 22, §§ 144.1–.3 (establishing a parent-education program addressing the effects of parental breakup and conflict on children and providing for court-ordered participation in specified family matters); Fla. Stat. § 61.21(2), (4) (2025) (requiring parents in specified proceedings involving minor children to complete a Parent Education and Family Stabilization Course); Fla. Stat. § 61.125(2)–(3) (2025) (providing for a child-focused alternative-dispute-resolution process through which a parenting coordinator assists parents in creating or implementing a parenting plan and resolving parenting-plan disputes); N.Y. Unified Ct. Sys., *Custody & Visitation Mediation* (describing mediation as a voluntary process through which parents may create a parenting plan and avoid going to court).

centered on judicial intervention following the emergence of conflict.

The transition toward a preventive model requires a cultural as well as a normative shift: from crisis management to the design of relational arrangements; from episodic response to the construction of stable and transparent decision-making systems.

E. *Practical Implications for U.S. Family Law Practitioners*

U.S. family law practitioners representing clients in Italian-American transnational disputes face a legal landscape that differs substantially from domestic custody frameworks. Several practical considerations deserve particular attention.

First, Italian shared custody orders, even those formally labeled *affidamento condiviso*, frequently result in arrangements that U.S. practitioners would characterize as primary physical custody with limited visitation. When seeking recognition or enforcement of an Italian custody order in a U.S. court, practitioners should carefully analyze the actual parenting time allocation embedded in the order, not merely its formal denomination, as the practical asymmetry documented in this article may affect the child's best interests analysis under applicable state law.

Second, disputes involving the wrongful removal or retention of a child between Italy and the United States fall within the framework of the Hague Convention on the Civil Aspects of International Child Abduction, which focuses on the child's habitual residence immediately before the alleged wrongful removal or retention.[58] The Convention establishes a return mechanism designed to secure the prompt return of children wrongfully removed to or retained in a Contracting State. Practitioners should also account for jurisdiction-specific procedural rules and protective measures available in Hague return proceedings. The HCCH Country Profiles for Italy and the United States identify distinct domestic mechanisms for interim protection during such proceedings.[59]

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58 *See* Hague Convention on the Civil Aspects of International Child Abduction arts. 3–4, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89; 22 U.S.C. §§ 9001–9003; Monasky v. Taglieri, 589 U.S. 68, 72–73 (2020).

59 *See* Hague Convention on the Civil Aspects of International Child Abduction, *supra* note 58, at art. 1, (providing that the Convention seeks to secure the prompt return of children wrongfully removed to or retained in a Contracting State); Hague Conference on Private International Law, *1980 Child*

Third, the maternal preference patterns documented in this article have direct evidentiary relevance in relocation disputes. A U.S. practitioner seeking to demonstrate that an Italian custody arrangement fails to ensure meaningful paternal involvement may find support in the structural analysis developed here, particularly in light of the Italian Supreme Court's 2026 ruling expressly rejecting maternal preference as a legitimate decisional criterion.

Finally, practitioners negotiating parenting agreements for Italian-American couples at the outset of a separation should consider incorporating the structural elements associated with more balanced outcomes in U.S. jurisdictions—detailed parenting plans, defined holiday schedules, dispute resolution mechanisms, and explicit provisions addressing relocation—rather than relying on the more summary dispositional style typical of Italian court orders. Proactive planning at this stage can significantly reduce the risk of subsequent cross-border enforcement conflicts.

A further structural feature of Italian family proceedings that U.S. practitioners should understand, not to intervene directly but to advise their clients effectively and coordinate with Italian counsel, is the system of temporary and urgent measures that the judge may issue at an early stage of the proceeding.[60] These measures may provisionally regulate the child's residential arrangements, parenting schedule, and financial provisions pending further adjudication. In the author's qualitative professional observation, however, these interim arrangements are rarely modified. Italian courts are strongly disinclined to disturb a functioning status quo, and the CTU evaluation, when ordered, typically assesses the

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Abduction Convention—Country Profile: Italy § 10.5 (last updated Mar. 2016) (describing available protective measures before and during return proceedings); Hague Conference on Private International Law, *1980 Child Abduction Convention—Country Profile: United States of America* § 10.5 (last updated 2024) (describing protective authority under 22 U.S.C. § 9004, including measures to protect the child and prevent further removal or concealment).

60 *See* Codice di Procedura Civile [C.p.c.] art. 473-bis.22 (It.) (providing that, if conciliation is unsuccessful, the judge, after hearing the parties and their counsel and gathering summary information where necessary, may issue temporary and urgent measures deemed appropriate in the interests of the parties and the children); *see also* Decreto Legislativo 10 ottobre 2022, n. 149 (It.) (introducing the unified procedural framework for family proceedings as part of the Cartabia Reform).

child's situation as configured by the preliminary judicial order rather than against a neutral baseline. The first judicial act in the proceeding therefore tends to determine its outcome: in the author's professional observation, in many cases, the parent granted predominant placement under the interim order retains that arrangement in the final judgment. This dynamic is particularly acute in high-conflict proceedings, where the child's residential arrangement is effectively determined before the substantive hearing has even commenced.

For U.S. practitioners, this dynamic has immediate practical consequences. When a client reports that an Italian court has just issued a preliminary order granting the other parent predominant placement, that should not necessarily be treated as a merely temporary setback pending a fuller hearing; in practice, it may substantially shape the subsequent custody determination. Communicating this reality to the client, and coordinating promptly with Italian counsel to assess whether the preliminary temporary and urgent order under Article 473-bis.22 can be challenged or supplemented at the earliest procedural stage, is far more valuable than waiting for the full hearing. Understanding when the critical window has opened, and when it has already closed, is the kind of cross-system literacy that transnational family law practice demands.

VIII. Conclusions—Bi-Parentality as a Fundamental Right of the Child

A. *Moving Beyond Gender-Based Polarization*

The debate on custody and the organization of parenting time has often been polarized by gender-based narratives, which tend to frame the conflict as a confrontation between maternal rights and paternal rights. Such an approach, in addition to being reductive, risks obscuring the constitutional and conventional core of the issue: the child's right to maintain meaningful, stable, and continuous relationships with both parents, absent proven circumstances of harm. Bi-parentality does not constitute an identity-based claim of one party, but rather a systemic principle oriented toward safeguarding the harmonious development of the person during childhood. The most recent pronouncement of the Italian Supreme

Court, *Cass. civ.*, ord. No. 6078/2026,[61] represents a significant step in this direction, expressly rejecting the maternal preference as an inadmissible presumptive criterion and mandating concrete, individualized assessment of parenting capacities—a doctrinal development fully consistent with the structural reform advocated in this article.

B. *Bi-Parentality as a Systemic Safeguard*

Bi-parentality assumes relevance not only as an ethical or programmatic principle, but as a structural safeguard of balance within the post-separation family system. It operates as a mechanism for preventing dynamics of exclusion, marginalization, or unilateral concentration of decision-making power.

Constitutional and supranational case law has recognized that the child's right to maintain relationships with both parents falls within the sphere of fundamental protections of family life, pursuant to Article 8 of the European Convention on Human Rights and the provisions of the United Nations Convention on the Rights of the Child.

C. *Cultural and Institutional Responsibility of the Judicial System*

The family justice system is not merely a mechanism for dispute resolution, but an institutional actor with a cultural function. Judicial decisions contribute to defining models of parental responsibility, shaping social expectations, and influencing the perception of fairness within the system. Institutional responsibility entails the adoption of transparent, coherent, and verifiable decision-making criteria capable of reducing the risk of disparate applications and implicit bias.

The comparative analysis developed in this article suggests a broader lesson for family law systems on both sides of the Atlantic: the effective implementation of shared parenting requires not only normative commitment but operational architecture. Legislative presumptions and structured parenting time guidelines, where introduced—as in Florida, Wisconsin, and several other U.S.

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61 *See* Cass. civ., sez. I, ord. 17 marzo 2026, n. 6078 (It.) (holding that, in proceedings concerning separating spouses, no presumption exists that a mother is inherently more suitable for placement of young children; requiring a case-specific assessment of the family circumstances and the child's best interests).

jurisdictions—may help narrow the gap between formal equality and substantive equality. The Italian experience, and in particular the landmark ruling in Cass. civ., ord. No. 6078/2026, expressly rejecting maternal preference as a legitimate decisional criterion, confirms that judicial culture can shift, but that shift is most durable when anchored in procedural frameworks that constrain discretion and require explicit justification for departures from a baseline of meaningful shared parenting. For U.S. practitioners advising clients in transnational disputes, this convergence of Italian and American doctrine offers a shared argumentative foundation: bi-parentality is not a partisan claim but a structural safeguard, and its effective protection depends less on the good intentions of individual judges than on the design of the systems within which they operate.

D. *Protecting Children from the Risk of "Procedural Collateral Damage"*

The child is not a party to the conflict, yet bears its consequences. When proceedings are prolonged, fragmented, or structured in an excessively reactive manner, the child risks becoming a form of "procedural collateral damage": a passive recipient of delayed decisions, repeated temporary measures, or serial judicial conflicts. Effective protection of the child requires that the judicial system maintain a perspective oriented toward relational stability and the prevention of deterioration of family bonds. Bi-parentality, understood as a fundamental right of the child rather than as a partisan claim, represents the point of balance between protection, responsibility, and proportionality of public intervention.

The Status of Marriage Contracts and Foreign Nuptial Agreements in France and in Spain: A Comparative Study

by
Delphine Eskenazi and Maria Valentin*

While common law countries do not have the concept of "matrimonial property regimes," this notion is pivotal in civil law countries like France and Spain. Despite these differences, even more complex in an international environment, many couples marry without a marriage contract or a pre-nuptial agreement.[1] The purpose of this article is to identify and understand the pitfalls of the absence of such anticipation for binational couples, whose lives are intertwined between France or Spain and a common law country such as the United States.

Moreover, while France and Spain are neighbors and civil law countries, the applicable rules are actually very different on these issues and could lead to very surprisingly different results. Indeed, many couples in France and Spain are unaware that in the absence of a duly executed prenuptial agreement, the rules that determine how property will be distributed if the marriage is dissolved due to divorce or death will be those of the first country of residence after their marriage becomes official.[2]

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1 Statistics published in 2017 by IPSOS showed that 25% of married couples only had entered into a marriage contract before the wedding and generally, this would be the case primarily for individuals coming from wealthier background. See IPSOS, *Un contrat qui n'est pasencore entrédans les habitudes des français*, https://www.ipsos.com/fr-fr/contrat-de-mariage-31-des-francais-pensent-quil-est-surtout-destine-aux-personnes-riches (last visited Mar. 18, 2026).

2 Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes. Council Regulation (EU) 2016/1103, 2016 O.J. (L 183) 1, art. 26. This Regulation applies in France and in Spain.

Conversely, other couples living in the United States believe that they are protected by the provisions of a civil law marriage contract signed in France or in Spain, when certain requirements may impede its recognition in common law countries.

In Section I this article will analyze first the law applicable to the spouses' matrimonial property regime in the absence of a choice of law provision. Section II will then describe how domestic marriage contracts are regulated in France and in Spain. Finally, in Section III, the article will explore how foreign nuptial agreements, in particular from common law countries, are recognized and enforced in France and in Spain.

I. Conflicts of Law Rules Applicable to the Spousal Matrimonial Property Regime in the Absence of a Prenuptial Agreement

If the spouses do not have a prenuptial agreement, they will be subject to a matrimonial property regime defined according to certain rules, which are rather complex in an international context. The concept of a matrimonial property regime can be defined as: The set of rules concerning property relations between spouses and with respect to third parties, which result from a marriage or its dissolution.[3]

A. *French Conflict of Law Rules Applicable to the Spousal Matrimonial Property Regime in the Absence of a Prenuptial Agreement in France*

Historically, the backdrop legal matrimonial property regime is the law implicitly chosen by the spouses. This is often referred to as the law of autonomy by international family law practitioners. The origin of this rule goes back to an opinion given to the de Ganay spouses in 1525 by Charles Dumoulin, a lawyer who practiced before the Parliament of Paris. He interpreted the legal matrimonial regime as a sort of tacit contract that is subject to the law chosen by the parties. By choosing their domicile, the de Ganay spouses

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[3] *Id.* art. 3(1)(a).

were considered to have expressed their wish to be subject to the customs of their domicile.[4]

This conflict of laws rule based on autonomy of will is still in effect in France for spouses married prior to September 1, 1992.[5] It assumes that, in the absence of a prenuptial agreement and express designation of the applicable law, the judge will investigate the will of the spouses. In this respect, the first marital domicile plays a dominant role. It is the basis of a presumption of an intent to connect the matrimonial regime to the law of the country in which the spouses established their first residence after marriage. This conclusion has been reaffirmed many times in court opinions.[6]

For spouses married after September 1, 1992, the principle is generally that, when there is no prenuptial agreement, the applicable law is the law of the country on whose territory the spouses established their first habitual residence after getting married. This is based on (1) Article 4 of The Hague Convention of 1978 on the Law Applicable to Matrimonial Property Regimes[7] and (2) Article 26 of the European Matrimonial Property Regimes

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4 This rule dates to the famous consultation by Parisian lawyer Charles Dumoulin in 1525, when he was asked to determine the matrimonial regime of the de Ganay spouses, who were married without a contract. They lived in Paris and owned property both in Paris and in the Lyonnais region. At the time, several rules were applicable: real estate was subject to the customs of the place where it was located (the Lyonnais region and Paris), and personal property was subject to the customs of the marital home (Paris). Mr. Dumoulin analyzed the matrimonial regime as a tacit contract: in the absence of a marriage contract, the spouses had tacitly chosen to submit to the custom of their domicile. This solution was enshrined by the Parliament of Paris in 1529. *See* Symeon C. Symeonides, *Party Autonomy Then and Now*, 26 German L.J. 703, 706 (2025) ("For marriages, the then applicable rule of *lex loci celebrationis* required the application of the law of the place of celebration of the marriage, which usually coincided with the wife's domicile. Dissatisfied with this rule, Dumoulin argued that the applicable law should be the law of the husband's domicile, again because of the assumption that this would be *his* intention.").

5 For spouses married before September 1, 1992, the principle is applicable as the general conflict of law rules, since the spouses are not subject to the Hague Convention on the Law Applicable to Matrimonial Property Regimes.

6 *See, e.g.,* Cass. 1e civ. 19-9-2007 n° 06-15.295; Cass. 1e civ. 22-10-2008 n° 07-16.385 F-D; Cass. 1e civ. 26-9-2012 n° 11-20.463; Cass. 1e civ. 3-10-2019 n° 18-22.945.

7 Hague Convention on the Law Applicable to Matrimonial Property Regimes, Mar. 14, 1978 (entered into force Sept. 1, 1992). This Convention relates only to property relations between spouses, to the exclusion of spousal support,

Regulation ("Article 26"), applicable to spouses married after January 29, 2019.[8]

The application of the national law of the spouses' first "habitual" residence after marriage is thus based on the French system of private international law, which uses the criterion of the first marital domicile as the main indicator of the spouses' implicit intention. But the principle used by the Convention – that the competent law is that of the spouses' first habitual residence – is not open to interpretation. It is the spouses' first habitual residence and no investigation is needed to ascertain any minimum duration in order to determine the spouses' common habitual residence.

Once the law is determined, the spouses' matrimonial property regime will once again be the legal matrimonial regime of that country. For example, if French law applies, the default matrimonial property regime in France is the regime of community of assets.[9]

In addition to the complexity of designating the matrimonial property regime that applies to the spouses after their marriage is the fact that it will sometimes be necessary to apply the law of several countries. This might occur if, for example, the couple then lived for over ten years in a foreign country or if the couple moved to the country of their common nationality. Indeed, the Hague Convention provides for certain situations in which the matrimonial property regime is automatically mutable.[10]

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surviving spouses' right to inherit, and the spouses' capacity. All issues related to personal relations between the spouses are, of course, excluded.

[8] *Id.*

[9] Katharine K. Baker, *What Is Nonmarriage?*, 73 SMU L. Rev. 201, 231 (2020)("In France, couples can marry and opt into the traditional community property regime to govern the disposition of their property at dissolution, they can allocate property rights as they wish, or they can just use the PAC default which requires no sharing of property at dissolution.").

[10] The Convention of The Hague also provides for certain cases of automatic mutability of the spouses' matrimonial property regime: Nonetheless, if the spouses have neither designated the applicable law nor concluded a marriage contract, the internal law of the State in which they both have their habitual residence shall become applicable, in place of the law previously applicable:

> (1) when that habitual residence is established in that State, if the nationality of that State is their common nationality, or otherwise from the moment they become nationals of that State, or (2) when, after the marriage, that habitual residence has endured for a period of not less than

For spouses married after January 29, 2019, and in the absence of a first common habitual residence, Article 26 will apply. In pertinent part, it provides as follows:

> [The law] of (b) the spouses' common nationality at the time of the conclusion of the marriage; or, failing that (c) with which the spouses jointly have the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances [will govern the spouses' matrimonial regime.][11]

Article 26(c) clearly provides unpredictable results as it is commonly difficult to determine the law having the closest connection with the spouses at the conclusion of a marriage when spouses live in different countries. Note that for this purpose, the term "conclusion of the marriage" refers to the time of the marriage.

B. *Spanish Conflict of Law Rules Applicable to Spousal Matrimonial Property Regime in the Absence of a Prenuptial Agreement*

In the absence of a marriage contract, the domestic territorial law applicable to the matrimonial property regime will need to be determined.[12] In Spain, the determination of the law applicable to the matrimonial property regime is governed by Regulation 2016/1103 establishing enhanced cooperation in the field of jurisdiction, applicable law, recognition, and enforcement of decisions in matters of matrimonial property regimes.[13] If the Regulation is not applicable,[14] the conflict of law rules provided for in Articles 9.2 and 9.3 of the Civil Code ("CC") apply.[15]

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ten years, or (3) when that habitual residence is established, in cases when the matrimonial property regime was subject to the law of the State of the common nationality solely by virtue of sub-paragraph 3 of the second paragraph of Article 4. Convention on the Law Applicable to Matrimonial Property Regimes art. 7(3), Mar. 14, 1978.

11 Council Regulation (EU) 2016/1103, art. 26(1)(b), 2016 O.J. (L183) 1.

12 For examples of the application of Article 9.2 of the CC in the domestic context, see Juliana Rodriguez Rodrigo, *Aplicación de la norma española de conflicto de leyes interno para determinar el régimen económico matrimonial*, 15 Cuadernos de Derecho Transnacional 1301 (2023).

13 *Id*.

14 It must be noted that the Hague Convention of 1978 on the Law Applicable to Matrimonial Property Regimes is not applicable in Spain.

15 For an example, see Juliana Rodriguez Rodrigo, *Ley aplicable al régimen económico matrimonial, a propósito del comentario de la sentencia de*

For this purpose, the provisions of Article 9.2 of the CC[16] establishes that the law applicable to the matrimonial property regime is determined by reference to the following criteria:

First, the common personal law of the spouses at the time of the marriage is applied.[17] If that is not determinative, the personal law of the habitual residence of either party may be chosen by both in a public document executed prior to the celebration of the marriage. If that is not determinative, the law of the common habitual residence immediately following the marriage is applied or, in the absence of common residence, the place of celebration of the marriage.

It must be noted that under Spanish national law, the applicable property regime is the community property regime.[18] Nevertheless, in the absence of a marriage contract, the application of the foregoing criteria may lead to the application of autonomous legislation when determining the matrimonial property regime. The term autonomous legislation relates to local law that is applicable in seventeen autonomous regions, including Andalusia, Catalonia, the Basque Country, Galicia, the Canary Islands, and the Valencian Community. In comparison, Spanish national civil law applies the community property regime, while some autonomous laws have adopted the separate property regime as the default regime. Catalonia is an example.

The default regime can be modified by marriage contract, after determining the law applicable to the matrimonial property regime. In the presence of a territorial multi-legislative country such as Spain, the conclusion of a marriage contract determining the applicable law to the matrimonial property regime may be of special relevance since the law applicable by default depending on

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la audiencia provincial de Madrid, de 30 Septiembre 2019, 12 Cuadernos de Derecho Transnacional 1137 (2020).

16 Código Civil ["CC"] [Civil Code], art. 9.2 (Spain). Article 16.3 of the CC establishes that the effects of marriage between Spaniards will be regulated by the Spanish law according to the criteria of article 9 and, in its absence, by the Civil Code.

17 Article 16.1 of the CC establishes that the personal law is determined by "vecindad civil." *Id.* art. 16.1. The vecindad civil is a civil status by which a person is considered a resident of a certain territory and determines the personal law applicable in certain matters, among which are the matrimonial regime and the inheritance law.

18 *Id.* art. 1316.

the territorial connection within Spanish territory may implicate a completely different result (separation of assets versus community property regime). In Spain, some autonomous regions have specific legislation distinct from national law. In those regions, national law is not applied.

II. The Domestic Status of Marriage Contracts and Pre/Post Nuptial Agreements

A. *Legal Validity of Domestic Marriage Contracts in France*

1. *Imperative Formal Requirements of "Notarial Deeds" for French Domestic Marriage Contracts*

Article 1387 of the Civil Code, the first Article of Title Fifth of the Civil Code entitled "Re the marital agreement and marital regimes," provides that: "The law does not regulate marital associations, as regards property, except in the absence of special agreements, which the spouses may enter into as they deem advisable, provided they are not contrary to good mores nor to the provisions below."[19]

If the parties wish to enter into a marriage contract, the agreement must be made in the form of a notarial deed. All marital property agreements shall be drawn up by deed in the presence of a *notaire*,[20] in the presence of and with the simultaneous consent of all those persons that are parties thereto or their attorneys-in-fact.

Indeed, article 1394 of the Civil Code provides that: "All marital agreements shall be drawn up by deed in the presence of a *notaire*, in the presence and with the consent simultaneously of all the persons that are parties thereto or their attorneys-in-fact."[21] According to this provision, a French contract of marriage is considered a "notarial deed" (*acte notarié*).

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19 Code civil [C. civ.] [Civil Code], art. 1387 (Fr.).

20 A *notaire* is a lawyer who, in addition to having had the obligation to complete a full law school curriculum, must specialize in specific areas of the law, notably family law. Before being admitted to practice, a *notaire* must successfully pass a special post-graduate exam to secure the *Notaire* Diploma (*Diplôme de Notaire*). A *notaire* is appointed by the government (Minister of Justice) and acts by delegation of sovereign power for the benefit of the general public. *Notaires* enjoy a monopoly in certain areas of the law, such as for the preparation of Marital Agreements as well as for other categories of agreements, such as real estate transfer.

21 C. civ., art. 1394.

It is important given that a notarial deed cannot be challenged as to (1) who the party or parties thereto are, (2) what the date of the deed is, or (3) what the parties agreed to, except by way of very specific proceedings involving an action directed against the *notaire* on the basis of falsification of a public document.[22] Under Article 1395 of the Civil Code: "Marital agreements must be written before the celebration of the marriage and come into effect only on the date of such celebration."[23]

Under Article 1397 of the Civil Code, after the celebration of the marriage, a marriage contract can be modified or replaced by a completely different marriage contract, but only by way of a notarial deed.[24] In summary, future spouses freely select a matrimonial property regime, either by abstaining from entering into a marital agreement or conversely by entering into one, but once the marital regime is adopted it can only be modified pursuant to the above rules.

Once a marriage contract is signed by the *notaire* and the parties, the *notaire* delivers a certificate to the future spouses certifying that a contract was entered into. That certificate must be handed over to the *officer d'état civil* (civil status officer) who makes a note of the existence of a contract (or, absent such a certificate, of the absence of a contract) in the *acte de marriage* (marriage deed), the official document which the spouses, the civil status officer, and the witnesses sign after the bride and bridegroom have exchanged their consent to be married.

If the marriage deed indicates that there was no agreement, the spouses shall be deemed, vis-à-vis third parties, to be married under the default regime, except in those cases where upon signing deeds with third parties, they declare that they entered into a marital property agreement.

2. *The Different Matrimonial Property Regimes Under French Law*

As explained above, a matrimonial property regime is the body of rules that the parties have chosen (or are deemed to have chosen if there is no contract), to govern the issues of ownership

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22 *Id.,* art. 1319.

23 *Id.*, art. 1395.

24 *Id.*, art. 1397.

of assets during the marriage and disposition of assets on the occasion of the dissolution of the marriage by divorce or death. A matrimonial property regime deals only with the above issues.

If there is no marriage contract, Article 1393 of the Civil Code provides that the default regime is regulated by Articles 1400 to 1491 of the Civil Code.[25] This default regime is referred to generally as the "*régime legal*" (legal regime), which is also referred to as the "*communauté légale*" (legal community). In other words, the marital regime is organized under the above Articles of the Civil Code, as opposed to the marital regime organized by contract.

Under this regime of legal community, assets acquired during the marriage are deemed to be jointly owned by the spouses on a 50-50 basis, irrespective of whether (1) they were acquired by both or by one of the spouses, (2) they were paid for by the income of one or both spouses, or (3) the origin of the income is the earned income or the savings on the income originating from either or both spouses' personal property.

Assets that a spouse owned before the marriage or acquired by way of gift of legacy during the marriage are and remain personal property unless the deed of gift or the will provides that the gift or legacy inures to both spouses. Assets that are acquired by one spouse by way of reinvestment of the proceeds of the sale of personal property are personal property.

Assets are deemed to be community property assets unless proven to be personal property. Investments of personal assets and reinvestments of the sales proceeds of personal assets must be noted in the purchase deed of the asset, otherwise the newly acquired asset becomes community property (unless the spouses agree otherwise among themselves, which agreement has no effect on third parties).

Debts generated during the marriage are community property debts. Debts in existence at the time of marriage and debts attached to legacies or gifts remain personal debts.

Community property assets may be managed by one spouse, except that the acts of management of disposition relating to the business of one spouse may only be performed by that spouse.

Community property assets may not be disposed of by one spouse acting alone, without consideration. Legacies of community

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25 *Id.*, arts. 1400–1491.

property assets by one spouse may not exceed that spouse's share in the community. Legacies in kind are generally limited. The sale or pledging of real estate assets or shares of shares of stock of unlisted companies may not, if they are community assets, be done by one spouse alone.

Articles 1497 to 1527 provide for extremely flexible rules whereby the spouses can vary the legal community. This is referred to as the "*communauté conventionnelle*" (conventional community), which can be an adaptation of the rules of legal community.[26] Articles 1536 to 1542 in turn are the rules which apply to *séparation de biens* (separation of property).[27]

Under a separation of assets regime, each spouse manages (administers, receives the income, leases, etc.) and performs all acts of disposition (purchases, sells, pledges, etc.) alone, with respect to all his or her personal assets. Each spouse remains responsible for his or her own debts. Increases and losses in value are to the benefit or the detriment of the owner of the asset. Thus, the proceeds of a sale or public offering of a personal asset is the property of the owner of the original asset.

Presumptions of ownership written into a marriage contract are effective as between the spouses and as against third parties. Otherwise, proof of ownership may be brought by any means. Assets over which neither spouse can establish exclusive property are deemed to be jointly owned, each owning half.

Each spouse contributes to the expenses of the marriage as specified in the marriage contract, failing which in proportion to the respective means of the parties.

The last marital regime is the *communité réduite aux acquêts* (community reduced to acquisitions), under which the spouses during the marriage retain title to their respective assets as in a separation of property regime, but on divorce or death each spouse is entitled to one half of the gains on the assets of the other (net assets at the time of divorce or death less net assets at the time of marriage).[28]

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26 *Id.*, arts. 1497–1527.

27 *Id.*, arts. 1536–1542.

28 *Id.*, arts. 1569–1581.

B. *Legal Validity of Domestic Marriage Contracts in Spain*

The situation in Spain regarding marriage contracts could be summarized as a hybrid[29] between the French position and the Anglo-Saxon tradition of prenuptial agreements. Traditionally,[30] Spanish law is similar to French law in the sense that the autonomy of will is limited to the matrimonial property regime of the spouses through the concept of the "*capitulaciones matrimoniales*," which translates to "matrimonial capitulations" (referred to below as "marriage contracts").

1. *The Object of Marriage Contracts*

Under Spanish national law,[31] couples can choose the matrimonial property regime by means of marriage contracts.[32] Marriage contracts may be entered into before or during the marriage. By definition, marriage contracts choose the matrimonial property regime, meaning the set of rules that govern the property relations between the spouses and with third parties during the marriage. The Spanish Civil Code establishes different matrimonial property regimes,[33] which include the community property regime ("*sociedad de garanciales*"),[34] the participation regime ("*regimen de participación*"),[35] and the separate property regime ("*separación de Bienes*").[36]

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29 Since the 1990s, the Spanish Supreme Court has progressively accepted the validity of agreements stipulating provisions applicable in the case of a breakup other than rules relating to the matrimonial property regime. See case law cited *infra* notes 54–56 in text.

30 Prior to 1975, spouses were not permitted to contract marital rights regarding divorce. Law 14/1975 acknowledged the possibility for women to have legal capacity allowing them to act without the representation of husbands. Law 14/1975 (May 2, 1975) (Spain). This law allowed spouses to conclude marriage contracts after the celebration of the marriage.

31 The term "Spanish common law" refers to the Spanish Civil Code ("CC") and other laws applicable in the national territory, when autonomous laws do not apply.

32 CC, arts. 1315, 1326.

33 The autonomous laws may contain their own legislation on matrimonial property regimes.

34 CC, arts. 1344–1410.

35 *Id.*, arts. 1411–1434.

36 *Id.*, arts. 1435–1444.

In addition to choosing one of these regimes, the marriage contract can modify or change the matrimonial property regime.[37] The modifications made cannot affect third parties acting in good faith.[38]

When a marriage contract exists and Spanish national law applies, the applicable domestic law for assessing validity of the marriage contract is Article 9.3 of the CC.[39] In turn, the validity of the marriage contract is governed by the general rules applicable to contracts.[40]

In addition, marriage contracts must respect laws, morality, and public order.[41] These precepts include constitutional principles, such as the principle of equality of rights of the parties.[42] Where the foregoing requirements are not wholly met, the marriage contract is not effective.[43]

As will be analyzed below, Spanish courts are progressively accepting the validity and enforceability of marriage contracts that go beyond the simple choice of a set of rules applicable to the matrimonial property regime.

2. *The Effectiveness of the Marriage Contract*

The requirements of a marriage contract may vary depending on whether Spanish national law or an autonomous law applies. Under Spanish national law, the marriage contract dealing with a matrimonial property regime needs to be drafted in a public document before a notary as a matter of validity.[44] Once a marriage contract is executed, the marriage must be celebrated within one year. If no marriage is celebrated within the one-year period, the marriage contract becomes null and void.[45] With marriage, the economic regime and all marriage contract covenants must be registered in the Civil Registry.[46]

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37 *Id.*, art. 1325.
38 *Id.*, art. 1217.
39 *Id.*, art. 9.3.
40 *Id.*, art. 1335.
41 *Id.*, art. 1255.
42 Article 32 of the Spanish Constitution.
43 CC, art. 1328.
44 *Id.,* art. 1327 and art. 1280 3°.
45 *Id.*, art. 1334.
46 *Id.*, art. 1333; Lcy 20/2011, de 21 de julio, del Registro Civil art. 60, B.O.E. No. 175, July 22, 2011 (Spain).

For a marriage contract executed outside of Spain, the scope of the document is limited to the choice of the matrimonial property regime and related provisions. A foreign agreement typically is recognized in Spain once it is assimilated to the traditional figure of a Spanish marriage contract.[47]

It is common for the parties to a marital contract to address matters that go beyond the matrimonial property regime, such as spousal support, the family home, or even matters relating to the children. Where that is done, questions arise as to the validity and enforceability of the terms of the contract in Spain.

III. Recognition of a Foreign Prenuptial and Postnuptial Agreement in France and in Spain

A. *Recognition in France of a Foreign Nuptial Agreement*

The next question is how prenuptial agreements from English-speaking countries are applied in France, which is not without difficulties when it comes to issues of classification.

1. *Provisions Dealing with the Division of Assets in the Event of Divorce*

The main difficulty here is that the concept of a matrimonial property regime does not exist in a strict sense even though common law countries have default rules for the division of spousal property in the absence of a prenuptial agreement. The first question on which a French court must rule when faced with petition to enforce a prenuptial agreement is whether a marital property regime exists in the relevant common law country.

Although the classification is determined under the concept of *lex fori*, the law of the forum, French courts generally consider definitions provided in European texts and relevant European jurisprudence. In its *Van den Boogaard* decision,[48] the European

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47 Council Regulation (EU) 2016/1103, arts. 22, 23, 2016 O.J. (L 183) 1.

48 Van den Boogaard c/ Laumen, Feb. 27, 1997 (Court of Justice of the European Union, case C-220/95), Recitals 21 and 22 ("21. Owing precisely to the fact that on divorce an English court may, by the same decision, regulate both the matrimonial relationships of the parties and matters of maintenance, the court from which leave to enforce is sought must distinguish between those aspects of the decision which relate to rights in property arising out of a matrimonial relationship and those which relate to maintenance, having regard in

Court of Justice clarified that an agreement relates to a support obligation in either of two circumstances. The first is that it provides for an allowance regarding the maintenance of a spouse in need. The second is that the needs and resources of each of the spouses are taken into consideration in determining the amount of the allowance. On the other hand, when an allowance is intended only to divide property between the spouses, the decision relates to a matrimonial property regime.

With this guideline in mind, and in the absence of more recent jurisprudence on these issues, it is imperative for spouses to specify in the agreement the obligations that relate to the matrimonial property regime and the obligations that relate to support obligations. A clear distinction in a prenuptial agreement will enable French courts to consider the provisions of the prenuptial agreement when liquidating the spouses' matrimonial property regime.

2. *Provisions Dealing with Spousal Support or Alimony*

In English-speaking countries, it is common for prenuptial agreements to provide for alimony to be paid in the event of divorce. It is often recommended to the parties to include clauses about financial compensation and spousal support during separation (known as "*prestation compensatoire*" under French law, or "spousal support" or "alimony" in common law countries).

The issue that arises is knowing to what extent such provisions will be applied by French courts ruling on divorce proceedings. If there is no election to apply foreign law, French law will be applied, making it impossible for a French court to determine the amount to be paid for spousal support or alimony in advance of a final decree of divorce.

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each particular case to the specific aim of the decision rendered. 22 It should be possible to deduce that aim from the reasoning of the decision in question. If this shows that a provision awarded is designed to enable one spouse to provide for himself or herself or if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand, where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights in property arising out of a matrimonial relationship and will not therefore be enforceable under the Brussels Convention. A decision which does both these things may, in accordance with Article 42 of the Brussels Convention, be enforced in part if it clearly shows the aims to which the different parts of the judicial provision correspond.").

The answer is different if there is an election of a foreign law to govern this issue. In principle, an election to apply foreign law would be followed by a French court if the parties (1) elect to apply The Hague Protocol of 2007 on the Law Applicable to Maintenance Obligations, (2) select a foreign law as the law to be applied to support obligations, and (3) the selected foreign law allows this type of provision.[49] That is the meaning of the new European text, even though the Court of Cassation has shown a certain reluctance to apply this type of clause in its decisions.

The court will undoubtedly be reluctant when the spouses have provided for a complete waiver of compensatory allowance or other form of spousal support. In fact, the Court of Cassation[50] recently stated that it was incumbent upon the Court to investigate, in a concrete manner, whether the effects of the foreign law designated in the contract were not manifestly contrary to French international public policy.

The question remains open in situations in which the prenuptial agreement provides for sufficient amounts to cover the needs of the spouse seeking spousal support. The question of the validity of such clauses of prenuptial agreements has, therefore, not yet been entirely decided under French law.

To avoid future complications in an international scenario, a couple should be informed of the option of entering into a French prenuptial agreement ("*contrat de marriage*").[51] The idea of such contracts is to offer the spouses predictability in the event of divorce by signing a document that can be recognized and applied even if residence outside of France is taken.

The international efficacy of such contracts assumes that they can be recognized in France, in other civil law countries, and in common law countries such as England or the United States.

Recognition assumes that the couple has complied with certain legal requirements that do not exist in French law. To this end, the contract can take the form of a French separation of property

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49 Protocol of the Hague on the Law Applicable to Maintenance Obligations, art. 8. This supposes that the substantive and procedural conditions provided by the Protocol for choosing the applicable law have been met.

50 Cass. 1st civ., July 8, 2015, no. 14-17.880.

51 *See, e.g.,* Peter M. Walzer, *A World of Agreements: Enforcing and Attacking Foreign Prenups in the United States*, Fam. Advoc., Winter 2011, at 30.

contract, provided that certain substantive and procedural rules have been considered so that it is enforceable outside of France.

The question of whether French prenuptial agreements will be recognized is thorniest in common law countries where the rules that apply to prenuptial agreements are very different from the rules that exist under French law. The policy position of American courts is generally to accept the validity of foreign prenuptial agreements, but this validity also assumes compliance with certain requirements in order to increase the chances that a French contract will be recognized and applied in most states in the United States. Consequently, the following common law concepts should be embodied in the French prenuptial agreement:

First, the contract must be just and equitable for both parties ("fairness"). Second, each party should receive advice from independent counsel ("independent advice"), and third, each party is informed about all elements of the assets of the other party ("full financial disclosure").

Financial disclosure requirements mean that the contract must include a detailed presentation of the assets and income of each party, most often attached as an appendix to the contract. Compliance with these requirements is an important condition for validating a French prenuptial agreement from an Anglo-Saxon perspective.

B. *Recognition in Spain of a Foreign Nuptial Agreement*

In Spain, it is perfectly possible for parties to have some control over the matrimonial property regime that will apply during the marriage. The validity granted to a prenuptial agreement executed under foreign law that calls for the matrimonial property regime to be governed by that law is recognized under Spanish law.[52]

Virtually no authoritative guidance exists concerning the legal treatment of Anglo-Saxon prenuptial and postnuptial agreements in Spain. Spanish national civil law provides no definition of prenuptial or postnuptial agreements.

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52 Terms that would not be incorporated in such covenants are terms not related to the civil law concept of matrimonial property regime. Examples include maintenance, compensation, children's arrangement, personal obligations during the marriage, and use of the family home.

Spanish courts are predisposed to recognize and enforce foreign prenuptial and postnuptial agreements the scope of which goes beyond the matrimonial property regime. This type of agreement can be looked at as an agreement to regulate the personal and economic consequences of a possible future marital breakdown, and the validity of these agreements has been affirmed in Spain.[53]

Among private client advisers, these agreements are referred to as agreements in anticipation of a breakup ("nuptial agreements"). Insofar as the Spanish Civil Code does not contain any regulation, the case law of the Spanish Supreme Court provides some guidance in this matter.

Nonetheless, several caveats should be remembered where the parties have connections with Spain, or a possibility exists for review of the agreement by Spanish courts.

1. *The Principle of Validity of Nuptial Agreements*

Since the late 1990's, the Spanish Supreme Court has been admitting the validity of such agreements by virtue of the principle of party autonomy.[54]

In a judgment of June 24, 2015, the Supreme Court ruled specifically on the conditions for the validity of a prenuptial agreement.[55] In this case, a married couple executed a marriage contract before a notary designating the matrimonial property regime and, in parallel, concluded a prenuptial agreement a few days before the wedding. In this agreement, they agreed on a monthly rent for life in favor of the wife. That arrangement was not part of the matrimonial property regime.

The Supreme Court considered that this prenuptial agreement fell within the scope of Article 1323 of the Civil Code, which establishes that spouses may transfer property and rights by any title and enter into all kinds of contracts with each other.

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53 A.J. Muñoz Navarro, *Los pactos prematrimoniales o en previsión de ruptura matrimonial*, en 25 La Ley Derecho de Familia: Revista Jurídica Sobre Familia y Menores 3 (2020).

54 STS 325/1997 of April 22nd 1997 (ROJ STS 2817/1997); STS 1053/2007 of October 17th 2007 (ROJ STS 6618/2007); STS 217/2011 of March 31st 2011 (ROJ STS 2158/2011).

55 STS 392/2015 of June 26th 2015 (ROJ STS 2828/2015).

To conclude that the prenuptial agreement was valid, the Supreme Court considered the following factors.

First, the court verified that the terms of the agreement and the conditions generating the obligations were clear so that compliance would not be left to the discretion of the spouses. Second, the court determined that the terms of the agreement did not promote the crisis, since neither spouse was in a compromised economic situation. Third, the court decided that the principle of equality was not violated, since there was no serious prejudice to the husband. Fourth, neither spouse abused a dominant position or was in a situation of precariousness. The Spanish Supreme Court concluded that the agreement was valid. It was negotiated by both parties, and the financial provisions were adequate.

In a judgment of May 30, 2018,[56] the Spanish Supreme Court ruled again on the validity of a prenuptial agreement. Prior to the wedding and in the presence of a notary, the individuals waived any possible indemnities or compensatory pensions that might arise in the event of a marital crisis.

At some point, the couple encountered difficulties, and the wife filed for divorce. The first instance judge granted a compensatory pension to the wife, considering the agreement null and void for being contrary to the principle of equality. On appeal, the court overturned the decision, ruling that the agreement was valid.

The wife filed an appeal in cassation before the Spanish Supreme Court, which was dismissed. In its decision, the Court referred to factual elements that established informed consent of the parties to the agreement.

The Court found that the woman was aware of what she signed because she received legal advice from the notary or lawyer. Furthermore, the Court considered that the agreement was not contrary to public policy because the woman's employment status and her limited knowledge of Spanish did not place her in a precarious situation even though she was a Russian national living in Spain. Finally, the Court established that the principle of equality was not violated because it was a waiver entered into by both parties in the context of a relationship of trust.

It follows from this judgment that, although there are no statutory criteria in Spanish national law, the effectiveness of

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56 STS 315/2018 of May 30th 2018 (ROJ STS 1925/2018).

prenuptial agreements is evidenced by the following factors: First, the parties to the marital agreement each obtained independent legal advice to ensure an understanding of the terms of the agreement. Second, the provisions of the marital agreement applied to both parties, and third, the terms of the marital agreement were sufficiently clear, so that at the time of their application, neither party was blindsided.

These judgments emphasize that, when dealing with family matters, effectiveness of the agreements will depend on the application of concepts that protect families.

2. *Mandatory Concepts That Apply to Nuptial Agreements*

As mentioned above for marriage contracts, important limitations exist in nuptial agreements that are based on public policy. When they apply, they may limit the effectiveness of the agreement. For a party to prevail, the nuptial agreement cannot violate concepts of (1) law, (2) public order, (3) morality, (4) constitutional principles such as the equality of spouses in marriage,[57] (5) integral protection of the family and children,[58] (6) rights and duties of the spouses,[59] (7) the principle of noncausal separation or divorce,[60] (8) the rules of the primary matrimonial property regime,[61] (9) the rules relating to the constitution of the marriage,[62] and (10) the limits of public order to the paternal-filial relations regarding inability to waive parental authority, custody of the common children, or alimony.

The effectiveness of a prenuptial or a postnuptial agreement will depend on the facts and circumstances presented to a court. Here are several:

Agreements affecting minor children. When a nuptial agreement is related to the use and attribution of the home, validity will depend on whether minor children live at home.[63] If there are minor children, the judge will give priority to the best interests of the child over any nuptial agreement. The best interests of the

57 Constitución Española, Dec. 27, 1978, art. 32.1 (Spain).
58 *Id.*, art. 39.
59 CC, arts. 66–71.
60 *Id.*, arts. 81, 86.
61 *Id.*, art. 1315.
62 *Id.*, arts. 44–58.
63 *Id.*, art. 96.

child will also guide the assessment of the agreements relating to custody and child support.[64] The right to child support cannot be waived.

Economic consequences between spouses: maintenance, indemnities, and compensatory pension. Article 151 of the CC establishes that the right to maintenance is unwaivable. However, the parties may agree on the amounts or forms of payment. A pension or compensation for housework differs from maintenance payments. The agreement should therefore clearly distinguish between the different forms of financial compensation.

Provisions concerning the personal relationships between the spouses. The drafter of the prenuptial agreement or post nuptial agreement must be mindful when including clauses that may deal with personal obligations of the spouses. Clauses that may be interpreted as obliging the spouses to have consensual relationships are not valid.[65] In the same vein, clauses sanctioning infidelity may be closely examined by the Spanish courts and should be avoided.

3. *The Form of Nuptial Agreements*

In comparison to marriage contracts, the absence of regulations applicable to nuptial agreements means that no standard forms exist. The form to be adopted will depend on the scope of the agreement. For example, if the nuptial agreement falls within the scope of a marriage contract because it relates to the choice of the matrimonial property regime, it must be executed in a public deed. In practice, resorting to a public deed is advisable since it will confer greater probative value to the nuptial agreement and will guarantee that the consent has been freely given.

When a foreign nuptial agreement deals with matters beyond marriage contracts, Spanish law applicable to international private law norms will determine whether it is valid. In other words, nuptial agreements are not regulated by the Spanish Civil Code. Consequently, the validity of the nuptial agreement in Spain will be addressed for the first time upon the breakup of the marriage. Until then, no certainty exists regarding its enforceability until a ruling is issued by a judge. If the parties reside in an autonomous region, surprises may be encountered, as discussed below.

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64 *Id.*, art. 1814.

65 Constitución Española, Dec. 27, 1978, art. 10.1 (Spain).

4. *Potential Application of Autonomous Laws*

Because the Spanish Civil Code does regulate nuptial agreements, autonomous laws will apply. The law in certain autonomous regions may provide different outcomes as to the enforceability of said agreements. To illustrate, the Catalan Civil Code ("CCCat") establishes clear and detailed regulation of nuptial agreements. Among other things, it distinguishes between marriage contracts regulated in Article 231-19 of the CCCat and agreements regarding a breakup regulated in Article 231-20 of the CCCat.[66] Regarding the latter, it establishes the conditions to enter these agreements:

Covenants in anticipation of the breakdown of the marriage may be granted in marital contracts or in a public deed.

Prenuptial agreements will be valid only if entered during the 30-day period before the celebration of the marriage.

The notary must inform each of the parties separately about the scope of the changes that are intended to be introduced with respect to the default legal regime. The notary must also ensure that each party has all necessary information about the default regime and the modified regime.

Covenants excluding or limiting rights must be reciprocal in nature and clearly specify the rights that are limited or waived.

The spouse who wishes to rely on a prenuptial agreement rather than the default treatment has the burden of proof as to whether the other party had sufficient information about assets, income, and financial expectations at the time of signing the agreement.

Covenants that are seriously detrimental to a spouse at the time of enforcement are not effective if circumstances change over time in a way that could not reasonably have been foreseen at the time the parties entered the agreement.

In addition, the Catalan Civil Code establishes substantive conditions for the effectiveness of the nuptial agreement. An example might be that in anticipation of marital breakdown, the parties may agree on the use of the home by each party.[67] Agreements that harm the interest of the children or that compromise the basic needs of one of the parties are not effective.

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66 Codi civil de Catalunya ["Codi civ. Cat."], arts. 231-19, 231-20.

67 *Id.*, art. 233-21.

Similarly, in anticipation of the breakdown of the marriage, the parties can agree on the compensatory pension and the economic compensation for work,[68] including amount, duration, and period of the compensation.

The example of Catalonian law illustrates that, in Spain, the question of recognition and validity of nuptial agreements is complex and may, among other things, depend on the law applicable to the substance and form of such agreements or which court (from a territorial standpoint) is seized of the enforcement of the agreement.

Conclusion

The purpose of this article is to identify, understand and anticipate the pitfalls of marriage contracts and pre-nuptial agreements in an international context, especially when the United States and civil law countries like France and Spain are involved.

Very often, divorce proceedings (if there is a divorce) or even estate proceedings will be split among several countries.

This mosaic of jurisdictions and applicable laws means that a practitioner working on a marriage contract or a pre-nuptial agreement in an international environment must be careful to choose, right at the outset of the drafting, the right jurisdiction for the contract and to ensure recognition in the other potential jurisdiction which may be involved in the event of divorce or death.

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68 *Id.*, arts. 232-7, 233-16.

The Transferability Trap: Binary Thinking v. Nuance in Goodwill Valuation

by
Andrew Z. Soshnick* and Joshua J. Shilts**

Recent high-profile divorce cases such as the Florida duo of *Rosenberg v. Rosenberg*[1] and *Conde-Berrocal v. Conde* (*Conde*)[2] have exposed a recurring trend in which family law courts increasingly default to "splitting" when addressing the value of goodwill. Historically, divorce courts throughout the United States have viewed goodwill through a binary prism—categorized as either personal goodwill or enterprise goodwill. That dualistic perspective fails to recognize that some personal goodwill can be transferred in certain transactions. Those outcomes reflect a shift away from a more economically grounded inquiry into whether goodwill is marketable, transferable, and distinct from future earning capacity. Instead of asking whether the value can be retained by the enterprise or conveyed to a buyer, personal goodwill is excluded and enterprise goodwill is included in marital estates.

While binary framing is administratively simple, it omits value that originated with individuals and later became pooled, protected, institutionalized, or saleable as part of an entity. This article considers three analytical frameworks: the traditional personal goodwill versus enterprise-goodwill classification, a spectrum approach that distinguishes transferable personal goodwill from non-transferable and pure personal goodwill, and a salability/marketability inquiry that asks whether the value can be sold, retained, or transferred apart from an individual's future labor. This article concludes that the salability/marketability analysis best captures value that is economically salable while still excluding value that remains inseparable from an individual's future earning capacity. Changing the

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1 391 So. 3d 975 (Fla. Dist. Ct. App. 2024).
2 391 So. 3d 518 (Fla. Dist. Ct. App. 2024).

focus to the transferability of goodwill from simple category labeling allows for a more equitable asset division by divorce courts.

The *Rosenberg* and *Conde* opinions apply a distinct line—splitting—between personal and enterprise goodwill in divorce cases. Splitting, also called binary, desktop, dichotomous, black-and-white, include or exclude, or all-or-nothing thinking, is a cognitive approach that considers two options without evaluating a wider range of possibilities.[3] Individuals commonly think in two extreme (*i.e.*, an individual's motivation and actions are *all* good or *all* bad with no middle ground) rather than acknowledging the existence and importance of nuance and other possibilities.

When evaluating goodwill, binary decision-making may not capture the realities of how personal goodwill is created, absorbed, and measured. By examining these two cases and other prior and recent authorities, the conclusion is that valuation analysts and courts should resist simplistic, dual frameworks and apply deeper rigor in all goodwill analyses. That rigor comes to the forefront through a critical assessment of the transferability of goodwill, which assessment critically analyzes whether a particular goodwill component adds value to the individual or the entity. That distinction correlates to marital property and non-marital property distinctions made by divorce courts.

Part I of this article defines personal goodwill and enterprise goodwill and explains the traditional binary approach used by many divorce courts. Part II proposes a more nuanced framework that focuses on transferability and distinguishes enterprise goodwill, transferable personal goodwill, non-transferable personal goodwill, and pure personal goodwill. Part III analyzes *Rosenberg* and *Conde* as recent examples of binary reasoning in multi-member professional-practice cases. Part IV contrasts those decisions with authorities that focus more directly on salability, transferability, and fact-specific proof. Part V concludes that goodwill should be classified based on whether it is economically transferable and salable and not merely by whether it originated with human effort. The takeaway is straightforward: for marital valuation purposes, the issue is whether goodwill can be transferred, retained, or sold, and not merely whether it began with a person.

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[3] *See, e.g.,* Takahiro Mieda, Kanako Taku, & Atsushi Oshio, *Dichotomous Thinking and Cognitive Ability*, 169 Personality & Individual Differences (2021).

I. Goodwill Defined

As a threshold matter, it is imperative to define what personal goodwill is, how it differs from enterprise goodwill, and why its treatment in legal and valuation contexts is so complex.

"Personal goodwill" is the value attributable to the reputation, skills, relationships, and unique attributes of a specific individual—often the owner or other key person."[4] Personal goodwill differs from enterprise goodwill in that personal goodwill represents the value stemming from an individual's personal importance to that business or professional practice, and is an asset owned by the individual rather than the business or professional practice.[5] This value encompasses an individual's professional reputation, personal relationships with customers or suppliers, technical expertise, or other distinct personal abilities which provide economic benefit to a business. This economic benefit exceeds any normal return earned on other tangible or intangible assets of the company.[6] This type of goodwill is not easily transferable; it may disappear if the individual leaves the business or professional practice. Many jurisdictions exclude personal goodwill from marital property because it is commonly viewed as future earning capacity rather than a marketable business asset.[7]

"Enterprise goodwill," in contrast, is the value that attaches to a business or professional practice itself, independent of any individual. It arises from factors such as the entity's name, location, reputation, systems, contracts, assembled workforce, and other attributes that would continue to generate income even if the current owner or key employees depart.[8] Enterprise goodwill is generally considered transferable and is in many jurisdictions included in the valuation of a business or professional practice for property division when part of the marital estate.[9]

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4 *See, e.g.,* Bruce L. Richman, *Personal Goodwill in Divorce What It Is and How One Can Value It*, Fam. Advoc., Winter 2025, at 30, 31.

5 *See, e.g.,* Moore v. Moore, 779 S.E.2d 533, 546 (S.C. 2015) (providing a chart of indicators that distinguish personal goodwill from enterprise goodwill).

6 Wendy S. Ingalls & Lucas M. Parris, *An Overview of Personal Goodwill*, 2005-11 Value Matters, at 1 (Mercer Capital Dec. 5, 2005).

7 BVR Guide to Personal and Enterprise Goodwill, 115 (5th ed. 2012).

8 *See* Brett R. Turner, *Distinguishing Enterprise and Individual Goodwill*, 23 Equitable Distrib. J. 121 (Nov. 2006).

9 BVR Guide to Personal and Enterprise Goodwill, *supra* note 7 at 9.

These definitions are consistent with the broader valuation principles reflected in IRS Revenue Ruling 59-60,[10] a foundational business valuation authority. Revenue Ruling 59-60 instructs valuation analysts to consider all relevant factors, including the nature and history of the business, the economic outlook, financial condition, earning capacity, and intangible assets such as goodwill. Although Revenue Ruling 59-60 does not resolve the divorce-law distinction between personal and enterprise goodwill, its fact-specific framework supports a transferability-focused inquiry.

The majority of divorce courts that distinguish personal goodwill from enterprise goodwill exhibit binary thinking. For example, in *Thompson v. Thompson,*[11] the Florida Supreme Court held that personal goodwill of a solo professional practice is not a marital asset, because it represents future earning capacity tied to the individual and not the business. Only enterprise goodwill, which is marketable and transferable, is includable in marital property division. Likewise, in *Gaskill v. Robbins,*[12] the Kentucky Supreme Court recognized the distinction between personal and enterprise goodwill, ruling that personal goodwill is non-marital property that cannot be sold or transferred to another practitioner. Recently, in *Rosenberg*[13] and *Conde,*[14] Florida cases decided the same day that involved the same multi-professional medical practice, the Florida District Court of Appeals defaulted to binary decision-making in determining whether goodwill is personal or enterprise.

Binary classification is not the most reliable way to segregate marital and nonmarital goodwill. A more detailed transferability analysis better captures the portion of goodwill attributable to the entity because it asks whether the value can be sold, retained, or conveyed apart from the individual's future labor. That approach harmonizes disparate authorities and aligns goodwill classification with the economic realities of professional practice transactions. A more exacting analysis that concentrates on transferability may harmonize disparate court opinions and bring about a better, more reasoned allocation of goodwill that comports with the language and intent of legal standards. The result of this higher level of scrutiny

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10 Rev. Rul. 59-60, 1959-1 C.B. 237.
11 576 So. 2d 267 (Fla. 1991).
12 282 S.W.3d 306 (Ky. 2009).
13 391 So. 3d 975 (Fla. Dist. Ct. App. 2024).
14 391 So. 3d 518 (Fla. Dist. Ct. App. 2024).

is a focus on a segment of personal goodwill—*transferable personal goodwill*—as differentiated from *non-transferable personal goodwill*.

II. Nuance Matters: Transferable, Non-Transferable, and Pure Personal Goodwill

"Transferable personal goodwill" refers to relationships, skills, or knowledge that, while personal in nature, can be transferred to another person or entity. Examples include personal client lists, referral networks, or specialized expertise that can be taught or institutionalized. In these instances, the value inherent in the goodwill may be realized by a buyer, especially if supported by enforceable non-compete agreements or structured transition plans.

"Non-transferable personal goodwill" is tied so closely to the individual that it cannot be transferred under any circumstance. It may be personal relationships or specialized skills that are unique to the individual and cannot be fully transferred to others, and effectively are only purchased by a buyer, if at all, at a dramatic discount. The classic example is professional reputation and client loyalty that are inseparable from an individual's personal involvement with clients or patients. A buyer recognizes that, while an individual is not irreplaceable, it will take extra effort to fill that individual's place in the business or professional practice. Non-transferable personal goodwill is tied so closely to an individual that it cannot be transferred in any meaningful economic sense. It may consist of relationships, reputation, specialized skills, or client loyalty that depend on an individual's continuing involvement. A buyer may discount this value substantially because additional effort, transition time, or replacement resources would be required to preserve revenue after the individual departs.

"Purely personal goodwill" is the most extreme form of non-transferable personal goodwill. It is entirely dependent on the individual's unique attributes—his or her "star" status—that cannot be replicated or transferred, even with contractual mechanisms. Buyers recognize that this goodwill value will disappear when the individual leaves, and that it could leave a gaping hole in the market value of the business.

The following table provides a schedule of the types of goodwill and their transferability:[15]

Types of Goodwill

Type of Goodwill	Definition	Transferability	Example
Enterprise Goodwill	Value attached to the business itself, independent of any individual	Fully transferable	Brand, contracts, location, assembled workforce
Transferable Personal Goodwill	Personal relationships, skills, or knowledge that can be transferred to buyer or entity	Partially transferable	Client lists, referral networks, teachible expertise
Non-Transferable Personal Goodwill	Value tied to an individual that cannot be transferred, even with contracts	Not transferable	Unique reputation, persona-type relationships
Pure Personal Goodwill	Extreme form of non-transferable goodwill; entirely dependent on the individual's unique attributes		

Transferable personal goodwill may have value in a transaction to the purchaser and, theoretically, should be considered in marital property division. Some courts have endorsed this salability-centered view in substance, as discussed in greater detail in Section IV, below. Non-transferable and purely personal goodwill, in contrast, should be excluded from marital property division since it has no value to the enterprise and can only be realized by the individual. The binary approach to valuation does not consider this second level of distinction and risks misallocating goodwill value in divorce cases.

With this backdrop, the compelling question is: What elements do valuation analysts consider when making personal and enterprise goodwill distinctions under either a binary or nuanced analysis?

A. *Size Matters (e.g., Maturity)*

One consideration is the size of the entity. In the abstract, the larger the entity, the lesser the existence of non-transferable personal goodwill and pure personal goodwill. The smaller the entity,

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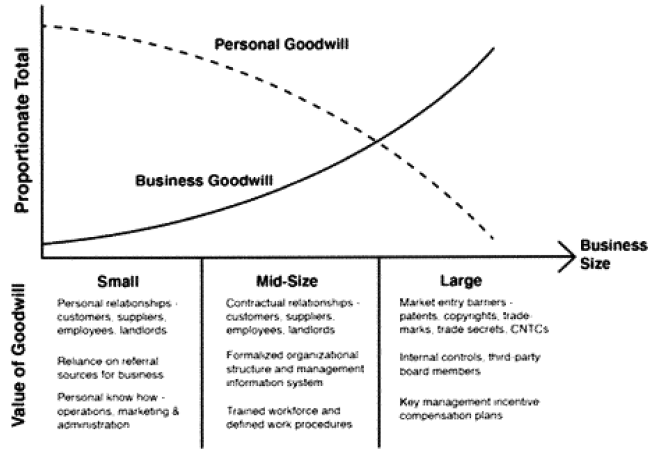
15 Adapted from James Alerding's commentary and analysis of *McReath*.

the greater the existence of non-transferable personal goodwill and pure personal attributes. Generally, as professional practices and businesses grow in size and institutional complexity, the relative weight of pure personal goodwill decline.

The Goodwill Transition from Personal to Enterprise, Relative to Business Size

The image below illustrates the relationship of changing attributes of business size relative to the proportion of personal versus business/enterprise goodwill.



Source: BVR's Guide to Personal v. Enterprise Goodwill

The inverse relationship between business size and percentage allocation makes intuitive sense. One person can only work so much, and their personal impact cannot be scaled like an enterprise, increasing the value attributable to the platform, i.e. the business itself.

Larger organizations are more likely to have entity-level contracts, centralized billing, shared workforce capacity, institutional referral channels, brand recognition, and governance structures that reduce dependence on any single professional. Size does not eliminate personal goodwill, but it changes the transferability inquiry by increasing the likelihood that some value has been absorbed by the enterprise.[16]

16 *Id.* at 372.

B. *Follow the Money*

Another method of determining which form of goodwill is being valued is to follow the money. How much entity revenue is related to an individual owner's or professional's reputation? How much of this goodwill is, or could be, transferred to other personnel in the entity? Does the entity experience excess earnings based on the "star" quality or productivity of a single owner or professional? What are the economic benefits attributable to each owner or professional? Do the economic benefits differ from one owner or professional to another? Will a prospective purchaser pay for this goodwill? All of these factors are considerations when evaluating the presence and type of goodwill.

Reasonable or replacement compensation may factor in a goodwill analysis.[17] If reasonable or replacement compensation is removed from a business or professional practice valuation, a question arises as to whether that removal fully accounts for future earnings and effectively removes personal goodwill from the equation. There are differing perspectives on this topic. One view is that reasonable or replacement compensation can only be a surrogate for post-divorce earnings, since to say otherwise would double count that value. Another view is that reasonable or replacement compensation covers both concepts.[18] In reality, reasonable or replacement compensation cannot be the default measure of calculating personal goodwill.

The standard of value may impact on this analysis. For example, if the standard of value is investment value (i.e., value to the holder) as opposed to fair market value, does the answer differ? It may. Likewise, under the income approach, the conclusion may differ depending on if the discounted cash flow method or capitalization of cash flow method is applied under the income approach. Standard of value, valuation approach, and valuation method choices may impact goodwill assessments and vary the impact of reasonable or replacement compensation as to ultimate valuation conclusions. Reasonable or replacement compensation

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17 Janani S. Rana & Robert O. Watts, *What Every Business Owner Should Know About Divorce in Orange County*, Orange Cnty. Law., June 2023, at 52, 54.

18 *See* AICPA, Statement on Standards for Valuation Services (VS Section 100) No. 1 (June 4, 2025), https://www.aicpa-cima.com/resources/download/statement-on-standards-for-valuation-services-vs-section-100.

is a significant variable in goodwill analysis because normalization of owner compensation affects the earnings stream being capitalized or discounted. Increasing replacement compensation generally reduces excess earnings and, therefore, may reduce measured goodwill; decreasing replacement compensation generally has the opposite effect. The analytical issue is not whether compensation mechanically eliminates personal goodwill, but whether the selected compensation adjustment adequately removes the value of the individual's future labor from the enterprise earnings stream.

C. *Contractual Relationships*

Another potential indicator of goodwill is whether the business or professional practice has contracts with third parties that would survive the departure of an owner. If survivable, that suggests the goodwill component of the contract is transferable and owned by the enterprise. If not survivable, that suggests that the value of the contract is not transferable and inherent to the owner.

D. *Legal Controls*

An additional way to determine goodwill attributes is to examine legal controls, such as non-compete and non-solicitation agreements, that are in place within the entity. The presence of legal controls can alter the economic reality of a business transaction or marital property division by providing enforceable boundaries on the actions of key individuals after the transaction or divorce.

Restrictive covenants do not create goodwill, but they can affect whether existing goodwill can be retained and transferred.[19] A noncompete provision may reduce the risk that patronage follows the departing professional and may support the conclusion that some otherwise personal-origin goodwill has become salable. The inquiry remains fact specific and depends on the scope, enforceability, and practical effect of the covenant in light of the entity's contracts, customer relationships, and operating structure.[20] A covenant not to compete may indicate that a buyer is concerned about goodwill leakage, but it does not by itself answer whether

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19 Reese v. Reese, 671 N.E.2d 189 (Ind. Ct. App. 1996).

20 *See* Martin Ice Cream Co. v. Comm'r, 110 T.C. 189, 207-08 (1998); Howard v. United States, 448 F. Appx. 752 (9th Cir. 2011); McReath v. McReath, 800 N.W.2d 399, 411-12 (Wis. 2011).

the goodwill is enterprise or personal. Its significance depends on whether, in combination with other contractual and operating controls, it preserves salable value within an entity.

Non-solicitation agreements prevent former owners or professionals from actively soliciting clients, customers, or employees of the entity after their departure. These controls further protect the entity's relationships and help ensure that the value attributed to personal goodwill remains with the entity, rather than walking out the door with the individual.

Legal controls can materially affect goodwill classification and valuation because they bear directly on whether relationship-based value can be retained by the entity. In *McReath v. McReath*, the salability of professional goodwill was supported by transaction features that included the seller's name, a noncompete clause, and an employment agreement requiring the seller to introduce the buyer to existing patients.[21] In the tax context, *Martin Ice Cream Co. v. Commissioner* and *Howard v. United States* similarly illustrate that employment agreements, covenants, and other legal controls may determine whether relationship-based goodwill remains personal to an individual or has been transferred to an entity.[22] Legal controls are not just formalities—they are essential tools for converting personal goodwill from a non-transferable, ephemeral asset into a marketable, enforceable component of business and professional practice value as enterprise goodwill. Their presence or absence should be a central consideration in any goodwill analysis, and should require careful assessment of their scope, enforceability, and practical impact.

III. Recent Decisions Regarding the Calculation of Personal Goodwill

Rosenberg involved the calculation of personal goodwill in the sale of a multi-member medical practice, North Florida Anesthesia Consultants ("NFAC") to a corporation.[23] At the outset, the court defined personal goodwill as "the value attributable to the reputation and skill of the physician-shareholders in providing medical

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21 *McReath*, 800 N.W.2d at 411-12.

22 *Martin Ice Cream Co.*, 110 T.C. at 207-08; *Howard* 448 F. Appx. at 753-54 (9th Cir. 2011).

23 *Rosenberg*, 391 So. 3d at 976.

services to their patients."[24] Conversely, the court defined enterprise goodwill as "value from ongoing referrals to and patronage of the medical practice that is separate and apart from personal goodwill."[25] The issue before the court was whether the personal goodwill of a medical practitioner in a multi-member practice, like the personal goodwill of a medical practitioner in a solo medical practice, was non-marital property.[26]

Around 1996, the husband became a shareholder in NFAC.[27] In January 2016, the parties agreed in a consent judgment that the husband would retain his interest in NFAC and its corporate affiliate, North Florida, Inc. ("MediBill"), for $122,800 and $26,557, respectively.[28] However, prior to the consent judgment, the husband failed to disclose to the wife, including in a deposition, the efforts to sell NFAC and MediBill.[29] In April 2016, the 35 physician-shareholders of NFAC sold NFAC and MediBill to Sheridan Healthcorp, Inc. ("Sheridan") for $99,450,000.[30] The husband received approximately $2,650,000 for his NFAC and MediBill interests, plus approximately $150,000 to be paid in 2017 and 2018 and an additional $56,000 for his shares in MediBill.[31] The wife later learned of this transaction and, upon the wife's motion, the trial court vacated the consent judgment.[32]

On remand, the trial court heard evidence to determine the value of the husband's interests in NFAC and MediBill.[33] The husband's expert, Alexander Rey, testified that the entire value of NFAC was composed of intangible assets in the form of personal goodwill and enterprise goodwill because the medical practice's balance sheet showed no meaningful tangible assets.[34] Based on his revenue model, Rey estimate that the total value of the sale to Sheridan was $71,660,000, consisting solely of personal goodwill

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24 *Id.*
25 *Id.*
26 *Id.* at 977.
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.* at 977-78.

and enterprise goodwill.[35] Rey calculated that there was 50% personal goodwill and 50% enterprise goodwill.[36] Rey concluded that the value of the husband's NFAC practice interest for marital estate purposes was $1,000,000.[37]

The wife's expert, Josh Shilts (co-author of this article), used Rey's formula and calculations generally but, excluded only the husband's personal goodwill from the transaction.[38] Shilts calculated that, due to the husband's greater productivity in the practice, the value of the husband's personal goodwill was 3.55% of the value of the transaction, or $2,544,000.[39] Shilts subtracted that amount from the $71,660,000 total transaction value to arrive at a value of $69,116,000 net of the husband's personal goodwill.[40] Shilts then divided that amount by the 35 physicians, resulting in his $1,977,000 estimate of value of the husband's NFAC practice interest for marital estate purposes.[41] This approach effectively treated all of the other physicians' personal goodwill or nonmarital property.[42]

The trial court, the same as in *Conde,* adopted Rey's methodology and valued the husband's marital property interest in NFAC at $1,000,000.[43] The wife appealed and the Florida District Court of Appeal affirmed. Noting that Florida case law did not address or adequately explain how personal goodwill is calculated in a multi-member professional practice, the court looked to *Thompson*[44] for guidance.[45] Crystallizing the issue as whether the personal goodwill of all physicians in a practice or only the personal goodwill of a physician party to a divorce is to be excluded from marital estates, the *Rosenberg* court assessed that *Thompson* did not address how to deal with personal goodwill in a multi-member professional practice context.[46] The court reviewed other Florida

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35 *Id.* at 978.
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.* at 979.
44 *Thompson*, 576 So. 2d 267.
45 *Rosenberg*, 391 So. 3d at 979.
46 *Id*.

precedent and concluded that it was evident "that personal goodwill of a professional simply is not a marital asset in Florida."[47]

The *Rosenberg* court went on to express that personal goodwill, whether of a divorce litigant or any other physician-shareholder in a medical practice, is "not a marketable asset distinct from the individual" who performs the services.[48] The court looked to the Missouri Supreme Court in *Hanson v. Hanson*,[49] which instructed that irrespective of the setting the meaning of goodwill does not change.[50] Since personal goodwill cannot be considered in the division of marital estates and is not part of enterprise goodwill, it must be excluded in calculating the value of a marital asset in a divorce case.[51] That principle required the exclusion of all 35 NFAC physician-shareholders' personal goodwill from the consideration of the market value of transaction in issue since it was collectively a nonmarital asset of each of the respective physicians.[52] To do otherwise, the court indicated, would allocate the entirety of the physicians' personal goodwill to former spouses and leave the 35 physicians with next to nothing.[53] In a case of first impression, the *Rosenberg* court held that the trial court was correct in adopting a valuation methodology that excluded the personal goodwill of all of the physicians from the net value of the sale of NFAC and certified the question to the Florida Supreme Court.[54] Subsequently, the Florida Supreme Court declined to address the certified question since *Rosenberg* settled while on appeal.[55]

Conde, a companion case to *Rosenberg,* also involved the calculation of NFAC personal goodwill.[56] In this case, the husband claimed that the trial court erred in accepting the personal goodwill and lost future income conclusion of his physician wife's expert.[57] In April 2016, the NFAC physician-shareholders sold their medical practice to Sheridan for $99,450,000, with each

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47 *Id.*
48 *Id.*
49 738 S.W.2d 429, 434 (Mo. 1987).
50 *Rosenberg*, 391 So. 3d at 980.
51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.*
55 *Id.*
56 *Conde*, 391 So. 3d at 519.
57 *Id.*

physician receiving approximately $2,650,000.[58] Additionally, each physician was required to work for NFAC for five years and sign a noncompete agreement for which each was paid $25,000.[59] The wife deposited the net buyout funds of $2,643,566 into a joint brokerage account of the parties.[60]

Each party had an expert testify as to whether any of the wife's NFAC net proceeds was non-marital personal goodwill or payment for lost future income—each of which was nonmarital property.[61] The wife's expert, Josh Shilts (co-author of this article) opined that the $25,000 value of the wife's noncompete payout was the entire value of her personal goodwill.[62] The husband's expert, Donald Wiggins, opined that the wife had personal goodwill and lost future earnings above the $25,000 noncompete payout because large transactions of this type are often structured to allocate taxes in a favorable way.[63] Wiggins indicated that the physicians in the NFAC transaction agreed to reduce future income for a lump-sum upfront payment that represented future earnings, and that the lump sum paid to the wife represented both personal goodwill and lost future earnings that were inseparable non-marital property.[64] At the time the husband filed his divorce petition, the wife had worked 51 of the 60 months under her noncompete agreement, leaving 9 months, or 15% of the total 60-month term post-petition.[65] Wiggins added in monies held in escrow for the wife and concluded that $408,159—the same amount assigned as nonmarital property in *Rosenberg* for post-petition work efforts—was nonmarital property of the wife.[66]

Noting that *Rosenberg* concluded that that the personal goodwill of all medical practitioners in a multi-member practice such as NFAC was nonmarital property, the Florida District Court of Appeal framed the issue differently due to a differing position

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58 *Id.*
59 *Id.* at 519-20.
60 *Id.* at 520.
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.*

taken by the non-physician spouse.[67] The husband in *Conde* did not claim an entitlement to a portion of personal goodwill of other former NFAC physicians; his claim was that error occurred in the award of a portion of the NFAC payment to the wife as nonmarital property personal goodwill or for lost future income.[68]

Neither party disagreed that at least $25,000 of the payments to the wife were nonmarital personal goodwill, as reflected in the husband's noncompete agreement.[69] But that noncompete agreement did not end the story. The NFAC-Sheridan transaction was structured to have a minimal noncompete payment of $25,000 for personal goodwill, which was deemed ordinary income for tax purposes, while the bulk of the personal goodwill and lost future earnings allocated in the NFAC payment was treated differently and more favorably under a capital gains analysis.[70] The *Conde* court, as did the *Rosenberg* court, concluded that personal goodwill and lost future income were "so closely intertwined, and difficult or impossible to separate" that it was not improper for the trial court to conclude that the entire value of the wife's NFAC buyout proceeds was personal goodwill and therefore nonmarital property personal goodwill.[71] Wiggins' allocation of 15% post-petition escrowed nonmarital property value also was affirmed on appeal.[72]

Rosenberg and *Conde* exemplify binary thinking. In each case, the trial court was affirmed based upon general assumptions about the nature of goodwill in a multi-member practice. The decisions recognized actual legal controls and contractual terms in place and attempts to place value on those restrictions. However, there is little scrutiny of how these legal controls and contractual terms (*i.e.*, noncompete agreements) may transform personal goodwill into transferable enterprise goodwill. A closer inspection of the non-transferable and transferable attributes and legal controls may result in valuations that understate the economic value of transactions. It also may reduce the risk of misallocation of enterprise and individual value. This closer inspection and risk

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67 *Id.*
68 *Id.*
69 *Id.* at 521.
70 *Id.*
71 *Id.* at 521-22.
72 *Id.*

reduction also minimizes the potential for misallocation of personal goodwill and enterprise goodwill, and misstatement of marital estate values.

IV. The Consequences of Binary Reasoning v. Its Alternatives

A. *Rosenberg: The Binary Trap in Multi-Member Practices*

Rosenberg demonstrates a binary, "all-or-nothing" approach to personal goodwill when considering a multi-member professional practice interest. Rather than looking at the transferability of goodwill, *Rosenberg* accepted the methodology of an expert who excluded the personal goodwill of all 35 physician-shareholders as nonmarital property. That approach may not have evaluated whether the husband-physician received value from his ownership in NFAC independent of his personal goodwill. If not considered, the husband-physician may have excluded from his divorce case the personal goodwill of other physician-shareholders that effectively to him was enterprise goodwill.

The *Rosenberg* court's criticism of a transferability analysis of goodwill (*i.e.*, excluding only the divorcing spouse's personal goodwill would result in "almost the entire net value" of the transaction being awarded to a former spouse) is based on a hypothetical that ignores how personal goodwill is absorbed and institutionalized in larger organizations. As professional practices grow and mature, individual reputations and relationships become part of the enterprise, and the value attributable to any one person diminishes. The binary exclusion of all personal goodwill may fail to recognize this absorption effect and undermines the integrity of the valuation process.

B. *Conde: Inseparability, Classification, and Valuation Evidence*

Conde also defaulted to binary decision-making in concluding that the entire value of the wife physician-shareholder buyout proceeds was non-marital because personal goodwill and lost future income were "so closely intertwined, and difficult or impossible to separate."[73] This approach does not recognize the spectrum of value that exists in real-world transactions and the need to parse

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73 391 So. 3d at 521-22.

out the components of goodwill value. The decision also accepted an allocation analysis that relied heavily on transaction-tax structure and expert judgment, rather than a direct transferability-based allocation of personal goodwill, enterprise goodwill, and future income.

C. *Brooksby v. Brooksby and May v. Petersen: The Start of Pleasant Contrasts*

Not all courts default to binary thinking when assessing personal and enterprise goodwill. The Arizona Court of Appeals decision in *Brooksby v. Brooksby*[74] provides an important contrast to the binary approaches to goodwill valuation exhibited in *Rosenberg* and *Conde* and focuses on the evidence presented. In 2016, the husband formed Focus Wealth Group, LLC ("FWG"), a business that sold life insurance.[75] The wife asked the trial court to appoint Derrick Doba to value FWG and the trial court granted that request.[76] Doba testified that as of January 31, 2023, the investment value of FWG applying the discounted cash flow method under the income approach was $1,973,000 and the fair market value of FWG applying the same method and approach with a 31.23% discount for lack of marketability was $1,357,000.[77] Doba attributed nearly all of FWG's value to personal goodwill arising from the husband's relationships with clients.[78] The husband contended FWG was worth only $240,000 and questioned how Doba could have valued FWG at more than its $140,000 asset value.[79] The husband argued that the business was worth only its tangible assets and asserted that any goodwill was solely the product of the husband's future earning capacity and thus not divisible.[80] The trial court valued FWG at the wife's expert's $1,973,000 conclusion of value.[81]

A majority of the Arizona Court of Appeals affirmed the trial court's acceptance of the wife's expert's investment value

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74 No. 1 CA-CV 24-0509-FC, 2025 WL 2078394 (Ariz. Ct. App. July 24, 2025).
75 *Id.* at *1.
76 *Id.* at *1-2.
77 *Id.* at *2-3.
78 *Id.* at *3-4.
79 *Id.* at *3.
80 *Id.* at *6-7.
81 *Id.* at *4.

approach, finding sufficient evidence that goodwill existed and was a divisible community asset.[82] Importantly, the majority recognized that goodwill is the value in excess of the business's tangible assets, often arising from reputation and relationships developed during the marriage.[83] The majority also emphasized that there is "no rigid and unvarying rule for determining the value of goodwill" and that "each case must be determined on its own facts and circumstances."[84] The majority reviewed the facts and determined that, while there was risk that an income approach to valuation leaves the potential to improperly divide a spouse's post-divorce work efforts, that did not occur here since the husband's future salary was excluded from FWG's projected cash flows in the business valuation.[85] The majority also noted that Doba's statement that all of FWG's goodwill resulted from the husband's efforts did not change the inclusion of the goodwill in the marital asset value because the husband's efforts occurred during the marriage.[86]

The dissent rejected this conclusion, noting that Doba did not attempt to determine whether any part of FWD's value was attributable to residual income from insurance policies sold during the marriage or to anticipated income from new clients referred by existing clients or professionals with whom the husband had built a relationship during the marriage.[87] In other words, the dissent opined that Doba made no effort to determine what portion of FWG's goodwill, if any, was attributable to the husband's labors during the marriage.[88] From the dissent's perspective, Doba conflated the business's goodwill with the earnings the Doba expected the husband to generate from his post-divorce work efforts.[89] The dissent concluded that the husband's $240,000 value of FWG should be adopted since the wife's expert's two conclusions of value were flawed.[90]

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82 *Id.* at *9.
83 *Id.* at *6.
84 *Id.*
85 *Id.* at *7-8.
86 *Id.* at *8.
87 *Id.* at *11.
88 *Id.*
89 *Id.* at *12.
90 *Id.* at *13.

May v. Petersen,[91] decided in the same general period but reaching a different outcome, is a useful companion to *Brooksby* because it also resisted a purely label-driven analysis. While *Brooksby* involved evidence supporting the existence of divisible goodwill, *May* centered on whether the law firm's goodwill was marketable and concluded that the record did not establish salability. The husband had a 50% ownership interest in Denali Law Group ("DLG").[92] The husband's expert valued DLG based on its tangible assets and determined it had no marketable goodwill.[93] A majority of the Alaska Supreme Court affirmed the trial court, observing that enterprise goodwill is marketable and can be sold and that personal goodwill is dependent upon the individual and is not marketable and cannot be sold.[94] The majority reasoned that, if a party to a divorce is awarded a business interest with marketable goodwill and ordered to pay half of the business value to the other party, the party who receives the business interest could sell the interest to satisfy the property settlement award.[95] Conversely, the majority observed that if personal goodwill were divisible, it would be marketable, would keep divorcing spouses from having a clean break, and could only be realized through future earnings.[96] No evidence existed that DLG could be sold and the firm's goodwill was not salable.[97] The majority also determined that there was no evidence to support the wife's claim that law firm contracts with third parties were marketable.[98]

The dissent quoted the dissent of Justice Rabinowitz in *Richmond v. Richmond,*[99] which argued that all goodwill of a business or professional practice should be divided at divorce since the value of the business or professional practice arose from efforts during the marriage, was consistent with the concept of equitable distribution, and was distinguishable from education, degrees, and licenses.[100]

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91 565 P.3d 194 (Alaska 2025).

92 *Id.* at 200.

93 *Id.*

94 *Id.* at 202-03.

95 *Id.* at 203.

96 *Id.*

97 *Id.* at 206.

98 *Id.* at 206-07.

99 *Id.* at 214 (quoting 779 P.2d 1211, 1218 (Alaska 1989) (Rabinowitz, J., dissenting)).

100 *Id.*

Brooksby reinforces the premise that goodwill is not simply present or absent, nor is it always entirely marital property or non-marital property. Instead, its value must be carefully analyzed, considering the facts, the nature of the business, and the timing of its development. It highlights the fact that only through nuanced, case-specific analysis can courts ensure fair and accurate division of marital property, a principle echoed in *May* with additional emphasis on a transferability analysis. At first glance, both opinions seem binary, the majority and dissenting opinions in each provoke a careful review as to whether goodwill is salable as the central criterion for determining inclusion or exclusion in marital estates.

D. *McReath v. McReath: Back to the Salability Beginning*

McReath[101] is the 2011 case that brought salability into the spotlight for goodwill analysis. In this case, the Wisconsin Supreme Court held that the salable professional goodwill of a professional practice is divisible marital property.[102] At the outset, the court defined professional goodwill as including both personal and enterprise goodwill.[103] The husband, a dentist, was the sole owner of Orthodontic Specialist, S.C. ("Orthodontic Specialists").[104] The wife's expert, Craig Billings, valued Orthodontic Specialists at $1,058,000.[105] The husband's expert, Dennis Kacinski, valued Orthodontic Specialists at $415,000.[106] The trial court adopted Billings' $1,058,000 valuation.[107] The husband appealed and the Wisconsin Court of Appeals affirmed.[108] The Court of Appeals noted that the husband had paid for the personal goodwill of the dentist from whom he purchased Orthodontics Specialist for approximately $930,000 in 1995, and observed that any hypothetical buyer would require a noncompete agreement as did the husband in this purchase.[109] Since no rule existed to exclude salable goodwill from divisible property, the trial court did not err when it

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101 800 N.W.2d 399.
102 *Id.* at 403.
103 *Id.* at 403 n.3.
104 *Id.* at 403-04.
105 *Id.* at 405.
106 *Id.*
107 *Id.*
108 McReath v. McReath, 789 N.W.2d 89 (Wis. Ct. App. 2010).
109 *McReath*, 800 N.W.2d at 406.

included personal goodwill in the marital estate.[110] The Wisconsin Supreme Court recounted prior Wisconsin case law and a current statute, and concluded that when valuing a business interest in divorce cases a trial court shall include the value of salable professional goodwill in the marital estate.[111]

The husband contended that trial courts should be required to first divide professional goodwill into personal goodwill and enterprise goodwill, and to create a presumption that personal goodwill was excluded from marital estates.[112] The *McReath* court noted that some courts presumed that enterprise goodwill was salable while personal goodwill was not, but chose not to require trial courts to draw a distinction between personal and enterprise goodwill because the premise that enterprise goodwill was salable and personal goodwill was not salable was mistaken.[113] In this case, nearly 90% of the husband's roughly $930,000 purchase price was for the professional goodwill.[114] Moreover, the husband testified that the purchased professional goodwill included elements of the seller's personal goodwill: "name, the noncompete clause, and the employment agreement that [the seller] would introduce [the husband] to his existing patients."[115] *McReath* demonstrates that, in some situations, personal goodwill is salable.[116]

V. Conclusion: Towards a Nuanced, Fact-Driven Goodwill Valuation

Rosenberg and Conde together illustrate the pitfalls of binary thinking, methodologies insufficiently tied to transferability evidence, and limited scrutiny of legal controls in the valuation of professional goodwill. In these cases, the courts defaulted to "all-or-nothing" decisions—excluding all personal goodwill from marital estates without analyzing the salability of each component of goodwill. Both decisions risk subordinating nuanced economic reality to a binary outcome.

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110 *Id.*
111 *Id.* at 407-12.
112 *Id.*at 411.
113 *Id.* at 411-12.
114 *Id.* at 412.
115 *Id.*
116 *Id.*

Brooksby demonstrates both the necessity, and the challenge, of distinguishing personal goodwill from future earning capacity. In that case, the majority recognized that goodwill is a divisible marital asset when properly supported by evidence and methodology, while the dissent cautioned against conflating goodwill with post-dissolution income-producing efforts. *May* supports the need for careful review as to whether personal goodwill is transferable. Both decisions start to articulate the need for a nuanced approach to the assessment of goodwill that looks at whether goodwill is salable or transferable rather than imposing a simple personal goodwill versus enterprise goodwill dichotomy. *McReath,* ahead of its time, remains the clearest reminder that salability, rather than label alone, should drive goodwill analysis.

The transferability inquiry ultimately asks whether value flows from the organization or from an individual. In a pooled, institutionalized practice, goodwill is supported by shared reputation, entity-level contracts, governance, systems, workforce depth, referral channels, and legal controls. That value is more likely to survive the departure of a professional and may be transferable. In a star-dependent practice, goodwill rests primarily on a professional's reputation, relationships, skill, and personal following. That value is less likely to survive that individual's departure and is more likely to constitute non-transferable personal goodwill.

Across these cases, a clear lesson emerges for valuation analysts, attorneys, and judges: personal goodwill needs a higher level of scrutiny than simply estimating its value. Its value exists on a spectrum, shaped by the facts, the nature of the business or professional practice, and the timing of its development. Relying on conjecture, unsupported methodologies, or simplistic frameworks can lead to outcomes that misrepresent reality, hinder fair, accurate, and equitable division of marital estates, and undermine the integrity of the legal process. This scrutiny must be performed in the context of the standard of value, valuation approaches, and valuation methods applied. The question should not be whether goodwill had a human origin—in professional services, it almost always does. The question is whether the goodwill was individually dependent, collectively pooled, institutionally controlled, and transferable. Boiled down to its

essence, the essential question is: Can goodwill, regardless of label, be sold?

Courts would be well advised to adopt this higher level of scrutiny when reviewing the existence and allocation of goodwill in divorce cases rather than defaulting to the simplistic dichotomy between personal and enterprise goodwill. Doing so provides a fundamentally different analytical lens, one that challenges how courts reconcile theoretical constructs with real-world transactions and leads to more accurate business valuations in divorce cases regardless of the applicable legal standard.

Building the Record for Cryptocurrency in Divorce: Digital Assets in Classification, Discovery, Valuation, and Distribution

by
Shuxiang Zhuang*

I. Introduction: Cryptocurrency and the Divorce Record

A New York housewife, whom CNBC identified by the pseudonym "Sarita," suspected during her divorce that her husband, who earned roughly three million dollars a year, had not disclosed everything the couple owned. After spending six months on discovery and enlisting the help of a forensic accountant, she tracked down twelve bitcoins, then worth about half a million dollars, in a wallet he had never listed.[1] The concealment problem is familiar in a divorce proceeding, but the hiding place in this case is not. The incentive to hide marital wealth has not changed; what has changed is who holds the records that would reveal it.[2]

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1 MacKenzie Sigalos, *A Husband Hid $500,000 in Bitcoin During a Divorce—and Got Busted by a Crypto Hunter*, CNBC (May 20, 2023), https://www.cnbc.com/2023/05/20/bitcoin-in-divorce-how-spouses-hide-assets-crypto-hunters-find-them.html (reporting that Sarita, who used a pseudonym, located twelve bitcoins in an undisclosed wallet after roughly six months of discovery assisted by a forensic accountant, and that her husband's reported assets did not match his approximately $3 million annual income). This Article uses the Sarita account as an introductory anecdote, not as legal authority.

2 *See* Stephanie L. Tang, *Cryptocurrency, NFTs, and the "Metaverse": Addressing the Expanding World of Virtual Assets in Divorce Proceedings*, 127 Penn St. L. Rev. 1, 6-8 (2022) (describing how a public blockchain, a pseudonymous wallet address, and a user-held private key replace the account records a bank or brokerage would otherwise keep).

Conventional dissolution practice often reconstructs marital wealth from financial records produced by the spouses or third parties. Bank records show deposits and transfers, brokerage statements show holdings and trades, payroll records show compensation, and tax returns provide an independent check on the other information.[3] Together, these sources create a financial record tied to the spouse's identity. When cryptocurrency is held through a centralized exchange, this process may still work because the exchange may keep account and transaction records linked to the holder's identity.[4] But self-custodied cryptocurrency breaks that chain. A holder who keeps her own private keys—the cryptographic credentials that authorize transfers from a blockchain address—can control and transfer the assets associated with that address without relying on a custodial intermediary. As a result, no intermediary necessarily maintains an authoritative account statement reflecting the holder's position, even though the relevant balances and transactions remain recorded on the blockchain. Rather than vanishing entirely, this financial evidence fragments across exchange logs, public ledger data, personal devices, and the cryptographic credentials necessary to establish control.[5]

Reported divorce disputes show why this fragmentation matters. They involve post-decree nondisclosure, equitable-distribution orders, fiduciary-duty claims, valuation fights, alleged

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[3] *See* Richard West & Jonathan Fields, *A Divorce Practitioner's Bitcoin Primer*, 33 J. Am. Acad. Matrim. Law. 177, 184, 189 (2020) (explaining that conventional discovery devices "simply need to be tailored to use the new terminology of Bitcoin," but that subpoenas to peer-to-peer platforms "would be ineffective in most cases since the website would have no information on the transacting spouse").

[4] *See* West & Fields, *supra* note 3, at 183 ("[M]any of these exchanges have 'know your customer' requirements requiring identity verification."); 31 C.F.R. § 1022.210(d)(1)(i)(A) (2025) (requiring a money services business's anti-money-laundering program to include procedures for "[v]erifying customer identification"); Fin. Crimes Enf't Network, Fin-2013-G001, Application of Fincen's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies 3 (Mar. 18, 2013), https://www.fincen.gov/system/files/guidance/FIN-2013-G001.pdf (treating an "exchanger" of convertible virtual currency as a money transmitter subject to those requirements).

[5] *See* West & Fields, *supra* note 3, at 185, 189 (explaining that a bitcoin holder controls the asset through a private address, so that where no exchange holds the records a court can order the spouse personally to produce it); Tang, *supra* note 2, at 8 (explaining that the private key, held by the user, "grants the user access to their funds").

violations of automatic orders, and sanctions requests.[6] The assets have appeared in exchange accounts, self-custodied wallets, business holdings, hard drives, post-filing purchases, and token conversions.[7] Resolving these disputes may require counsel to collect evidence from several different sources and assemble it into a coherent record capable of supporting the relevant family-law claim or remedy. Assembling that record can also expose the cost of retrieving self-custodied assets, such as forensic data recovery, which a court may then have to allocate between the spouses.[8]

A few terms explain this fragmentation. A public blockchain is an open, decentralized ledger that records transactions in a permanent sequence of blocks, maintained by independent nodes rather than a single institution.[9] A private key is a cryptographic credential that authorizes transfers of assets associated with a blockchain address.[10] Blockchain transactions are pseudonymous, meaning that the transactions are visible but the address does not identify

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6 *See In re* Marriage of DeSouza, 266 Cal. Rptr. 3d 890 (Cal. Ct. App. 2020); LaFond v. LaFond, 505 P.3d 406 (table), No. 82486-COA, 2022 WL 714430 (Nev. Ct. App. Mar. 9, 2022); Coe v. Rautenberg, 358 So. 3d 24 (Fla. Dist. Ct. App. 2023); Leonova v. Leonov, 242 A.3d 713 (Conn. App. Ct. 2020); Green v. Green, Nos. 3112 EDA 2024, 3239 EDA 2024, 3154 EDA 2024 & 3227 EDA 2024, 2026 WL 1309595 (Pa. Super. Ct. May 5, 2026) (non-precedential); *In re* Marriage of Seyl, 2026 IL App (2d) 240719-U (unpublished order under Ill. Sup. Ct. R. 23(b)); A.S. v. A.B., 88 Misc. 3d 1248(A), 2026 N.Y. Slip Op. 50471(U) (N.Y. Sup. Ct. Mar. 31, 2026).

7 *See DeSouza*, 266 Cal. Rptr. 3d at 892-94 (undisclosed bitcoin, fork-derived cryptocurrency, and wallet transfers); *Coe*, 358 So. 3d at 26 & n.1 (bitcoin stored on a damaged hard drive); *Leonova*, 242 A.3d at 732-37 (post-commencement purchase); *LaFond*, 2022 WL 714430, at *1-3 (concealed business entities and conversion of bitcoin into other tokens); *A.S.*, 2026 N.Y. Slip Op. 50471(U), at *7 (holdings across "US-based centralized exchanges, offshore centralized exchanges, decentralized exchanges, and various self-custody wallets").

8 *See Coe*, 358 So. 3d at 26 & n.1, 28 (reversing the trial court's failure to order the former husband to reimburse half of the $1,851.20 the former wife spent to recover data from the damaged hard drive holding the parties' bitcoin, a cost he had agreed at the final hearing to share).

9 Tang, *supra* note 2, at 6 (describing the blockchain as "an open, public, decentralized ledger that records transactions between parties in a permanent record" maintained by a network of nodes).

10 *Id.* at 7-8 (describing public-private key encryption and explaining that "[o]nly the user has access to their private key, which is similar to an account password or PIN and grants the user access to their funds").

the person behind it without additional evidence.[11] Once a transfer is confirmed on chain, no central authority can ordinarily reverse it.[12]

The same asset can generate several different kinds of proof, and no single subpoena collects them. Each source captures a different part of the record. A bank record shows fiat (traditional government-issued money) leaving a checking account for an exchange; the exchange's know-your-customer (KYC) records, the identity-verification records an exchange collects when it opens an account, tie the exchange account to a named person;[13] a blockchain transaction identifies the transfer to a self-custodied wallet, and a public explorer shows where the assets traveled next. A forensic examination of a phone may reveal the wallet application and sometimes a stored seed phrase.[14] Cluster analysis—a forensic

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11 *Id.* at 6 (explaining that although the ledger is public, "users transact under a pseudonym (their virtual wallet address) so it is nearly impossible to trace trades back to the actual individual or entity without using more complex chain analysis tools").

12 *See* Consumer Fin. Prot. Bureau, Consumer Advisory: Risks to Consumers Posed by Virtual Currencies 5-6 (2014), https://files.consumerfinance.gov/f/201408_cfpb_consumer-advisory_virtual-currencies.pdf ("If you're not using a hosted wallet provider…, there's no mechanism for stopping the payment or getting the money back."); *cf.* West & Fields, *supra* note 3, at 193 (explaining that a confirmed transaction "is highly unlikely to be reversed").

13 On the identity-verification requirements that generate these records, see *supra* note 4. For a court's account of how a spouse's choice of platform affects the records available, see *A.S.*, 2026 N.Y. Slip Op. 50471(U), at *6 (crediting expert testimony that some offshore exchanges "do not require the same level of identity verification or reporting," rely on "self-authentication," and serve as "the platform of choice for individuals seeking to avoid tying their identity to any cryptocurrency ownership"); *id.* at *18-22 (awarding $300,000 in additional counsel fees and $125,000 in expert fees to trace holdings the husband had not disclosed).

14 A seed phrase (also called a recovery phrase or mnemonic phrase) is a human-readable sequence of words from which a compatible deterministic wallet can derive the seed used to generate cryptographic keys. Under BIP 39, valid mnemonic lengths are twelve, fifteen, eighteen, twenty-one, or twenty-four words, and a user may additionally protect the mnemonic with a passphrase. *See* Marek Palatinus et al., *BIP 39: Mnemonic Code for Generating Deterministic Keys*, Bitcoin Improvement Proposals (Sept. 10, 2013) https://github.com/bitcoin/bips/blob/master/bip-0039.mediawiki; Ronald Koch, *Cryptocurrency Basics for Litigators*, Colo. Law., Sept./Oct. 2024, at 18, 21. Possession of a usable seed phrase may therefore provide evidence of access or control and, depending on wallet configuration, may permit the holder to recover and transact with

technique that groups blockchain addresses likely controlled by the same person or entity—may associate several addresses with a common controller, which other evidence must then connect to a particular person.[15] The record in a crypto case is assembled from fragments like these, and the practitioner's task is to fit them into a single, coherent chain of proof.[16]

Once assembled, those fragments must connect the cryptocurrency to the facts that matter in the divorce. Exchange records and other identity evidence may link an account to a spouse, while device evidence, transaction history, and other off-chain evidence may help connect that spouse to a self-custodied wallet or public address. From there, the timing of transactions and the source of funds may bear on classification and tracing, undisclosed transfers may support a claim of concealment or nondisclosure, and market data may determine the value assigned to the asset. The same evidence also creates a practical problem in discovery. Private keys and recovery credentials may provide evidence of access or control, but disclosure of those credentials can also give another person the ability to move the assets. Discovery therefore must develop the record without unnecessarily exposing the means of control.[17]

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the associated wallet; it does not, standing alone, establish legal ownership. *Cf.* Tang, *supra* note 2, at 8 (explaining that a private key grants the user access to funds).

15 *See* Sarah Meiklejohn et al., *A Fistful of Bitcoins: Characterizing Payments Among Men with No Names*, *in* Proc. 2013 Conf. on Internet Measurement 127 (2013) (developing heuristics for grouping bitcoin addresses under common control); Tang, *supra* note 2, at 7 (explaining that linking pseudonymous wallet addresses to individuals requires "more complex chain analysis tools"); Koch, *supra* note 14, at 21 (describing tools that visualize "clusters and connections between addresses"); *cf.* Ahlgren v. Ahlgren, 703 S.W.3d 378, 390-91 (Tex. App. 2023) (in a breach-of-trust action between father and son, describing a tracing expert's use of exchange records and the public blockchain to reconstruct one party's bitcoin holdings across hard forks and a CoinJoin mixer).

16 *See generally* Del Wright, Jr., A Short & Happy Guide to Bitcoin, Blockchain, and Crypto (2020); Koch, *supra* note 14.

17 *See* Koch, *supra* note 14, at 18 ("The cryptocurrency private keys (passwords) grant full control over one's wallet."); Tang, *supra* note 2, at 8; *A.S.*, 2026 N.Y. Slip Op. 50471(U), at *7 (noting expert testimony that for self-custody wallets there is no help desk or password recovery option, so the funds are inaccessible if the holder "refuse[s] to provide truthful statements regarding their

This Article proceeds in four Parts after this Introduction. Part II shows that courts already classify cryptocurrency under ordinary marital-property rules and explains why the difficulty lies not in the law but in the evidence, which is fragmented across exchanges, ledgers, devices, credentials, and human control. Part III sets out the six-stage record protocol. Part IV turns to what the record earns in court: sanctions where a spouse obstructs it, and a defensible valuation and distribution where the record holds. Part V collects drafting and litigation implications and concludes.

II. Ordinary Rules, Fragmented Evidence: Cryptocurrency as Divisible Property and the Record It Leaves

When courts reach the classification question, they generally treat cryptocurrency as property subject to the same marital-property rules that govern other assets.[18] The relevant questions therefore remain largely conventional: when the asset was acquired, what funds or property were used to acquire it, whether marital or separate property contributed to it, and how subsequent transactions affected its character or value. The introduction of digital assets leaves these core equitable inquiries intact, merely displacing the evidentiary trail required to satisfy them.

Unlike a conventional financial account, a cryptocurrency holding may leave relevant evidence across several sources. An exchange may preserve records identifying the purchaser and documenting deposits or trades, while the blockchain may record subsequent transfers without identifying the person behind an address. Assets moved into self-custody may require additional evidence from devices, wallet software, or other off-chain sources. Applying ordinary property rules to a cryptocurrency holding may therefore require reconstructing its acquisition and transaction history from these different parts of the record.

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ownership"); *see also* West & Fields, *supra* note 3, at 185 ("If the private address is lost, the bitcoins are gone forever.").

18 *See* Tang, *supra* note 2, at 18-19, 26-30 (surveying property-division models and reported divorce decisions addressing cryptocurrency under existing frameworks); West & Fields, *supra* note 3, at 182-83 (discussing classification and valuation of bitcoin).

A. *Courts Apply Ordinary Marital-Property Rules to Cryptocurrency*

Reported decisions generally treat cryptocurrency within the same marital-property framework that governs other forms of property. Courts have looked to the timing and source of acquisition, applicable presumptions concerning marital contributions, valuation dates, settlement terms, and the ordinary principles governing division of the marital estate.[19] Although the underlying blockchain architecture complicates the evidentiary burden, traditional property principles remain firmly controlling.

These cases show that the same property-law framework carries through classification, valuation, and distribution. *In re Marriage of DeSouza* treated bitcoin acquired during the marriage as community property and divided it, together with related derivative cryptocurrency, under California's ordinary community-property framework.[20] *In re Marriage of Fial* applied Oregon's existing rules concerning contribution and tracing to cryptocurrency purchased during the marriage with funds drawn almost entirely from the husband's premarital retirement accounts.[21] Other courts have likewise addressed cryptocurrency through ordinary rules governing valuation and distribution. *Hull v. Hull*, for example, turned on the proper valuation date and the proof of the cryptocurrency's value at that date, while *Shteiwi v. Abdelmassih* and *Green v. Green* addressed the manner in which identified cryptocurrency holdings should be divided.[22]

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19 *See* Tang, *supra* note 2, at 26-30; *see also* cases cited *infra* notes 20-22.

20 *DeSouza*, 266 Cal. Rptr. 3d at 892-94 (affirming a postjudgment order requiring the husband to transfer to the wife her share of community bitcoins, together with the bitcoin cash and bitcoin gold generated by forks, after the trial court had found the bitcoins purchased during the marriage to be community property and ordered them divided in kind).

21 *In re* Marriage of Fial, 591 P.3d 253, 255-57 (Or. Ct. App. 2026).

22 Hull v. Hull, No. 375462, 2026 WL 122187, at *5-7 (Mich. Ct. App. Jan. 15, 2026) (per curiam) (vacating the cryptocurrency award and remanding for proof of value as of the trial where the trial court had announced a trial-date valuation but used separation-date figures); Shteiwi v. Abdelmassih, 2025-Ohio-2901, ¶¶ 19, 61-64 (Ohio Ct. App.) (affirming equal division of the parties' cryptocurrency wallets by number of coins rather than by account value, where the parties submitted a joint stipulation identifying the wallets and their holdings); Green v. Green,

B. *Separate-Source Claims Survive When the Record Supports Them*

Difficulty of tracing does not relieve a court of the obligation to consider where the funds came from, and the same tools that expose concealment protect the spouse who supplied them. *In re Marriage of Fial* illustrates the point.[23] During the marriage the husband withdrew funds from premarital retirement accounts to buy cryptocurrency, which he held as a long-term investment and allowed to appreciate passively; the wife worked and served as primary homemaker and caretaker but played no role in the investment.[24] The trial court treated the cryptocurrency as a marital asset and, finding the husband had not rebutted Oregon's presumption of equal contribution, divided it equally. The Court of Appeals disagreed on the presumption. Because the account was nearly entirely traceable to the husband's premarital retirement funds and the appreciation had occurred passively, the husband had rebutted the presumption by a preponderance of evidence; the wife's contributions inside and outside the home, though real, did not equally contribute to the acquisition of that particular asset.[25] The court vacated and remanded for a "just and proper" division at the second step of the analysis, leaving room to weigh the parties' treatment of the funds as family money, and carved out a roughly $4,000 deposit possibly traceable to the wife's marital earnings.[26] The lesson runs both ways: whoever contends that cryptocurrency, like any other asset, was acquired with premarital or otherwise separately acquired funds must still put acquisition date, source of funds, marital contribution, and the active-or-passive character of appreciation into the record.

Nos. 3112 EDA 2024, 3239 EDA 2024, 3154 EDA 2024 & 3227 EDA 2024, 2026 WL 1309595, at *13 & n.22 (Pa. Super. Ct. May 5, 2026) (non-precedential) (finding the wife's challenge waived but noting that in-kind distribution of cryptocurrency was appropriate under 23 Pa. Cons. Stat. § 3502(a) where the trial court found the asset difficult to value).

23 *Fial,* 591 P.3d at 256-57 (describing the presumption of equal contribution and the "just and proper" inquiry under Or. Rev. Stat. § 107.105(1)(f)).

24 *Id.* at 254-56.

25 *Id.* at 256-57.

26 *Id.* at 257 & nn.1, 4; *see also Hull*, 2026 WL 122187, at *5 & n.3 (including in the marital estate a bitcoin that the husband claimed was premarital where he acknowledged he had no evidence to confirm premarital ownership).

C. *Classification Disputes Show That Discovery Cannot Stop at Account Ownership*

Classification disputes usually require transaction-level evidence. A wallet or exchange account may establish access, but the court still needs acquisition date, source of funds, marital or separate character, conversions into other assets, derivative coins or forks (units of a new cryptocurrency distributed to existing holders when a blockchain's protocol splits, as bitcoin cash and bitcoin gold were distributed to bitcoin holders in 2017), appreciation, and post-petition movement.[27] *DeSouza* illustrates why transfers and derivative cryptocurrency can matter to the remedy.[28] The same is true of tracing, conversions into other coins, missing coins, and valuation-date proof, each of which has been enough to move the classification or distribution analysis.[29]

For that reason, discovery must be directed to the facts needed for classification and distribution rather than to the existence of a particular account. Standard bank-and-broker discovery remains useful, especially where cryptocurrency was purchased through a centralized exchange, but it may capture only part of the relevant history. In a conventional portfolio case, a brokerage statement may identify the account holder, the assets held, the transaction history, and the value of the account in a single record. Cryptocurrency can separate those functions. An exchange may identify the purchaser and document the initial acquisition, while the blockchain records subsequent transfers, and evidence from a device or other off-chain source may be needed to connect those transfers to a particular spouse. No single source necessarily supplies the complete chronology.

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27 *See DeSouza*, 266 Cal. Rptr. 3d at 892 (describing a fork as "an automatic process that generates dividends from bitcoin holdings in the form of new currency," there "bitcoin cash" and "bitcoin gold"); *Ahlgren*, 703 S.W.3d at 390-91 (describing the Bitcoin Cash and Bitcoin Gold coins a holder received "for each Bitcoin he held due to 'hard forks' in 2017").

28 *DeSouza*, 266 Cal. Rptr. 3d at 892-94.

29 *See Fial*, 591 P.3d at 256-57 (tracing to premarital funds); *LaFond*, 2022 WL 714430, at *1-3 (conversion of bitcoin into other digital assets and misrepresentation of value); *Hull*, 2026 WL 122187, at *5, *7 (cryptocurrency withdrawn shortly after filing and identified as "missing"; valuation-date proof); *DeSouza*, 266 Cal. Rptr. 3d at 892-93 (bitcoins rendered inaccessible by exchange bankruptcy).

Discovery therefore has to follow the record across the sources in which different parts of that chronology appear. Exchange records may establish identity, funding, trades, and withdrawals. Public-ledger data may establish the timing and path of later transactions but generally requires additional evidence to attribute an address to a person. Devices and wallet software may provide evidence of access or control, while testimony and other off-chain records may explain matters that the transactional record alone cannot establish. The sections that follow examine these sources separately because each contributes a different part of the evidentiary record and presents a different discovery problem.

D. *Centralized-Exchange Records Remain Reachable Through Ordinary Process*

When the asset passes through a centralized exchange, much of the traditional model still works. The exchange may hold KYC records, account-opening documents, linked bank accounts, deposits and withdrawals, trade histories, and acquisition dates. *Zietzke v. United States* shows both the reach and the limits of compulsory process against an exchange. The IRS summons there sought the taxpayer's Bitstamp records so that the agency could determine the number of his transactions, which cryptocurrency he used, and when and how he acquired it. The court rejected his petition to quash. It held, however, that the summons was overbroad for lack of a temporal limitation and ordered it narrowed before it could be enforced.[30] In *A.S. v. A.B.*, subpoenaed discovery revealed previously undisclosed cryptocurrency activity, and the court awarded pendente lite counsel and expert fees to permit further tracing in the divorce case.[31]

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[30] Zietzke v. United States, 426 F. Supp. 3d 758, 764-66 (W.D. Wash. 2019) (denying the taxpayer's petition to quash an IRS summons served on the Bitstamp exchange, but holding the summons overbroad for lack of a temporal limitation and ordering it narrowed to the 2016 transactions under examination before it could be enforced). Like the *Coinbase* summons discussed below, *Zietzke* arose from a federal tax summons under 26 U.S.C. § 7602 rather than a matrimonial subpoena, so it illustrates what exchange records can contain more than what a family-law litigant can compel. *See infra* notes 32-34 and accompanying text.

[31] *A.S.*, 2026 N.Y. Slip Op. 50471(U), at *1.

One frequently cited authority deserves a caveat. *United States v. Coinbase, Inc.* is often invoked for the general proposition that exchange records are obtainable through legal process,[32] but the case involved an IRS "John Doe" summons under 26 U.S.C. § 7609(f), a federal tax-enforcement device rather than a matrimonial civil subpoena.[33] Even there, the summons was narrowed twice before enforcement.[34] The case therefore does not establish the scope of compulsory process available in a divorce proceeding. It is more useful in showing the kinds of records an exchange may possess and the need to tailor requests to the relevant period and transactions; the ordinary limits of possession, custody, control, relevance, proportionality, and privilege apply to those requests as they do to any other evidence.

E. *Public-Ledger Data Supports Tracing but Does Not Supply the Whole Record*

A public blockchain can preserve transaction history even when no intermediary maintains an account statement. It may show transfers between addresses, the timing and amount of transactions, forks, and other on-chain activity, but the ledger ordinarily does not identify the person behind an address.[35] Attribution therefore depends on evidence from outside the chain, such as exchange KYC records, platform logs, device evidence, admissions, tax records, or expert analysis.[36] *Ahlgren v. Ahlgren* illustrates

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32 *See, e.g.*, West & Fields, *supra* note 3, at 189 (describing *Coinbase* as a case in which "the IRS successfully enforced a summons (subpoena) to obtain the records of Coinbase customers"); Tang, *supra* note 2, at 23-24 (citing *Coinbase* for a party's ability to obtain transaction information by subpoena to an exchange).

33 United States v. Coinbase, Inc., No. 17-cv-01431-JSC, 2017 WL 5890052, at *1 (N.D. Cal. Nov. 28, 2017); *see also In re* Tax Liabilities of John Does, No. 3:16-cv-06658-JSC (N.D. Cal. Nov. 30, 2016) (order granting an ex parte petition to serve a "John Doe" summons under 26 U.S.C. § 7609(f), which governs summonses that do not identify the taxpayer under investigation).

34 *Coinbase*, 2017 WL 5890052, at *5-7 (recounting the IRS's narrowing of the summons after intervention and further narrowing the categories of records subject to enforcement).

35 West & Fields, *supra* note 3, at 188 ("Blockchain transactions are not strictly anonymous, but rather pseudonymous, since they can be linked to a public address."). On forks, see *supra* note 27 and accompanying text.

36 Hadar Y. Jabotinsky & Michal Lavi, *Speak Out: Verifying and Unmasking Cryptocurrency User Identity*, 32 Fordham Intell. Prop. Media & Ent. L.J. 518, 528, 554-55 (2022) (explaining that on the public ledger "ownership is represented

how different sources can contribute to the same tracing record.[37] Although the case arose from a trust dispute rather than a dissolution proceeding, the trust's expert used exchange records to identify the initial Bitcoin acquisitions and later transaction and hard-fork evidence to reconstruct the subsequent holdings.[38]

Ahlgren also illustrates the limits of ledger-based tracing. The defendant son, whom the jury found to have withheld bitcoin belonging to the trust, later ran the traced bitcoin through a CoinJoin mixer—a privacy technique in which many users combine their transfers into a single joint transaction so that an observer cannot readily match the inputs to the outputs—to obscure the path of the traced assets.[39] The court held that this concealment did not defeat recovery: once a trustee commingles trust property so that it can no longer be identified, the tracing requirement ceases, and the last reliable evidence of holdings controls; here that evidence was testimony that the son still held "a couple thousand" bitcoin months before the demand, with no evidence he had sold them.[40] Both the methodology (exchange records, public-ledger data, and fork accounting) and the burden-shifting principle (a party may not manufacture an evidentiary gap and then exploit it) can inform a dissolution record where a spouse mixes coins or moves them to another blockchain through a cross-chain bridge after filing.[41]

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by a set of letters and numbers indicating the user's public cryptocurrency address," and that de-anonymization depends on "operational and technical factors" external to the chain itself).

37 *Ahlgren*, 703 S.W.3d at 390-91.

38 *Id.* at 390-91 (testimony of asset-tracing expert Pamela Clegg identifying the initial purchases from exchange records and reconstructing later holdings from hard-fork distributions).

39 *Id.* at 391 (describing the trustee's use of a CoinJoin mixer to "wash" bitcoin and make it untraceable to its original source).

40 *Id.* (holding that the tracing requirement ceases once the trustee mingles trust property with his own so that it can no longer be identified, and relying on testimony that he still held "a couple thousand" bitcoin in the months before the demand, with no evidence of a sale).

41 Chainalysis, *Money Laundering Activity Spread Across More Service Deposit Addresses in 2023, Plus New Tactics from Lazarus Group*, Chainalysis Blog (Feb. 15, 2024), https://www.chainalysis.com/blog/2024-crypto-money-laundering/ ("Cross-chain bridges allow users to move funds from one blockchain to another."). Bridges are discussed further *infra* notes 54-55 and accompanying text.

These limitations become most consequential in civil discovery. Traditional discovery often assumes the existence of a third-party custodian—a bank, broker, or employer—whose identity-linked records can be obtained by subpoena. Cryptocurrency complicates that assumption because relevant evidence may be distributed across public ledgers, custodial platforms, personal devices, and multiple networks. The public ledger remains probative, but it may provide only one part of a record that must be reconstructed from both on-chain and off-chain evidence. Several features of the technology fragment the record further.

Self-custody. A holder who keeps the private keys in a software, hardware, or paper wallet can control the associated cryptocurrency without relying on a custodial intermediary; no institution necessarily maintains an account record to produce.[42] Possession of a usable private key can provide evidence of control and enables the holder to authorize transfers, but it does not by itself establish legal ownership.[43]

Fragmentation. Wallet evidence must be organized by network, not merely by address. On Ethereum and other EVM-compatible networks, one address can hold ETH and multiple tokens, and the same 0x address can appear across multiple EVM-compatible chains. A holder using bitcoin, ether, stablecoins, and Layer-2 networks may therefore require several network-specific queries rather than a single "wallet balance."[44]

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[42] West & Fields, *supra* note 3, at 184-86, 195 (describing software, hardware, and paper wallet arrangements under which the holder, not an institution, controls the private keys). A wallet that keeps the private keys offline, such as a hardware device or a printed key, is commonly called a "cold wallet"or "cold storage"; this Article uses the terms in that sense. *See Crypto Glossary*, Gemini Cryptopedia, https://www.gemini.com/cryptopedia/glossary (last visited Aug. 22, 2026) (entries for "cold storage" and "cold wallet").

[43] *See* Tang, *supra* note 2, at 8 (explaining that the private key grants the user access to the associated funds); Koch, *supra* note 14, at 18 (explaining that cryptocurrency private keys grant control over a wallet). The distinction between cryptographic control and legal ownership is important because evidence that a person can authorize transactions does not necessarily resolve beneficial or marital ownership.

[44] *See Accounts*, Ethereum.org, https://ethereum.org/developers/docs/accounts/ (last visited May 20, 2026) (explaining that Ethereum accounts can receive, hold, and send ETH and tokens); Fabian Vogelsteller & Vitalik Buterin, *ERC-20: Token Standard*, Ethereum Improvement Proposals (Nov. 19, 2015), https://eips.ethereum.org/EIPS/eip-20 (specifying a token-contract interface

Change addresses. When a bitcoin transaction spends a UTXO, the full value of that UTXO must be assigned to transaction outputs or fees. If the selected inputs exceed the payment plus transaction fee, the transaction typically includes a change output returning the surplus to an address controlled by the sender, often a newly generated address.[45] A zero balance at one address therefore does not by itself establish that the sender no longer controls bitcoin; value may remain in other UTXOs or may have moved to a change address.

Mixers and privacy coins. Mixing services pool funds from many users and redistribute them, breaking the traceable path between addresses.[46] Privacy-focused assets can obscure transaction details, though the degree varies: Monero does so by default, while Zcash depends on whether shielded features are used.[47]

Jurisdiction. Peer-to-peer marketplaces that match buyers and sellers without taking custody often have no transactional

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that returns the balance of an account address); Tao Yan et al., *Tracing Cross-Chain Transactions Between EVM-Based Blockchains: An Analysis of Ethereum-Polygon Bridges*, 10 Ledger 113, 115 (2025) (explaining that the same user address may be used on the source and target chains in EVM-based blockchain systems). A stablecoin is a token designed to hold a stable value, typically by being pegged to the U.S. dollar. *See Crypto Glossary*, *supra* note 42 (entry for "stablecoin").

45 John Tinkelenberg, *How Bitcoin Transactions Work: Addresses, UTXOs, and More*, Casa Blog (June 6, 2023), https://blog.casa.io/how-bitcoin-transactions-work/ (explaining that a UTXO cannot be partially spent and describing the use of a change address for remaining bitcoin).

46 West & Fields, *supra* note 3, at 189-90 (describing mixing services such as UltraMixer and CoinMixer as tools that "break the link between addresses"); *see also* Tang, *supra* note 2, at 47 (noting that Tornado.cash and Cashfusion have been used to obscure more than $8 billion in Bitcoin and Ethereum transactions).

47 West & Fields, *supra* note 3, at 189-90 (identifying Monero and Zcash as "private coins" that "make the trail hard to follow on the blockchain"); *About Monero*, Monero, https://www.getmonero.org/resources/about/ (last visited May 20, 2026) (describing ring signatures and RingCT and noting that all transactions are private by mandate); *Ring CT*, Moneropedia, https://www.getmonero.org/resources/moneropedia/ringCT.html (last visited May 20, 2026) (explaining that RingCT hides transaction amounts and became mandatory for all Monero transactions after September 2017); *Stealth Address*, Moneropedia, https://www.getmonero.org/resources/moneropedia/stealthaddress.html (last visited May 20, 2026) (explaining one-time stealth addresses and describing Monero as "private by default and optionally semi-transparent"); *What Is the Difference Between Shielded and Transparent Zcash?*, Zcash, https://z.cash/learn/what-is-the-difference-between-shielded-and-transparent-zcash/ (last visited May 20, 2026) (explaining that shielded addresses keep financial information private while transparent addresses make that information public).

record to produce; a subpoena returns nothing of value.[48] Offshore exchanges pose a related but distinct problem because obtaining records from a platform outside the United States may present additional enforcement obstacles, and some platforms may collect relatively little identity information to begin with.[49] Practitioners report that even domestic exchanges sometimes resist matrimonial discovery "as though they are a party to the case."[50]

Decentralized finance (DeFi) extends these problems. DeFi protocols run on smart contracts, code that executes automatically, and may lack the conventional customer records that discovery directed to a centralized intermediary would ordinarily seek.[51] Four mechanisms warrant attention.

Staking. In proof-of-stake networks, tokens are locked in a protocol in exchange for rewards, and many protocols impose lock-up or unbonding periods during which staked tokens cannot be transferred.[52] A spouse who asks only what tokens the other "holds" may miss a substantial position that is neither in a visible wallet nor presently liquid.

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48 West & Fields, *supra* note 3, at 184 (observing, with respect to peer-to-peer marketplaces such as LocalBitcoins.com, that "issuing subpoenas would be ineffective in most cases since the website would have no information on the transacting spouse").

49 *See id.* at 197 (reproducing a discovery template that asks whether any crypto assets are "held by overseas exchanges"); *A.S.*, 2026 N.Y. Slip Op. 50471(U), at *6 (crediting expert testimony that some offshore exchanges "do not require the same level of identity verification or reporting").

50 Richard D. West, *Cryptocurrency—An Expert's View*, 46 Fam. Advoc., Spring 2024, at 14, 17 (interview with forensic expert Dorothy Haraminac) (observing that U.S.-based exchanges "are getting arrogant in their responses to discovery requests" and that, unlike traditional banks, "[c]rypto exchanges . . . may offer objections as though they are a party to the case").

51 Tang, *supra* note 2, at 7 n.26 (defining smart contracts as "digital agreements using computer code that automatically executes when the terms of the contract are met"); *see also* Brian Sanya Mondoh, Sara Adami-Johnson & Palesa Roza Gwele, *When Harry Leaves Sally: Digital Assets in Divorce and Succession*, Barrister Grp. (Apr. 22, 2025), https://thebarristergroup.co.uk/blog/digital-assets-in-divorce-and-succession (identifying DeFi as a distinct category of disclosable asset).

52 Jason Wright & Michael Detzel, *Staking Cryptocurrency in Marital Dissolution*, Stout (Sept. 8, 2025), https://www.stout.com/en/insights/article/staking-cryptocurrency-marital-dissolution (distinguishing direct, pooled, custodial, and liquid staking and noting that "access to rewards may be delayed by network-imposed lock-up or unbonding periods").

Liquidity pools. A depositor into an automated market maker is exposed to impermanent loss, a divergence between the withdrawal value of the pooled position and the value of holding the underlying tokens, so the ratio and identity of tokens returned on withdrawal may differ materially from those deposited.[53]

Cross-chain bridges. Cross-chain bridges allow users to move funds from one blockchain to another.[54] A wallet trace on the origin chain can miss the real location of the value. Bridge protocols received more than $743 million from illicit addresses in 2023—more than double the prior year.[55]

Wrapped assets. Wrapped Bitcoin (WBTC) is an Ethereum ERC-20 token backed one-to-one by bitcoin held in custody.[56] Value follows bitcoin; tracing starts on Ethereum. A spouse may hold economic exposure to bitcoin, value that rises and falls with bitcoin's price, without ever holding bitcoin itself.

F. *Credentials Can Be Both Evidence and a Means of Control*

Public-ledger evidence may establish the movement of cryptocurrency without establishing who could authorize those transactions. Evidence of control may therefore require closer attention to the credentials or devices used to access a wallet. Private keys and seed phrases are especially sensitive because possession of usable credentials may both support an inference of access or control and permit the assets to be transferred. Passwords and

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53 Lioba Heimbach, Eric Schertenleib & Roger Wattenhofer, *Risks and Returns of Uniswap V3 Liquidity Providers*, *in* Proc. 4th ACM Conf. on Advances in Fin. Techs. 89, 92 (2022), https://doi.org/10.1145/3558535.3559772 (defining impermanent loss as "the loss in value of a liquidity position in comparison to holding the original assets as the price changes"). An "automated market maker" refers to a decentralized exchange mechanism that uses liquidity pools and a preset pricing formula, rather than matching buyers and sellers through a traditional order book. *See What Is an Automated Market Maker (AMM)?*, Coinbase Learn, https://www.coinbase.com/learn/advanced-trading/what-is-an-automated-market-maker-amm (last visited Apr. 17, 2026).

54 Chainalysis, *supra* note 41.

55 *Id.* (reporting that bridge protocols received $743.8 million from illicit addresses in 2023, up from $312.2 million in 2022).

56 *See* Coinbase, *Wrapped Bitcoin (WBTC) Price*, https://www.coinbase.com/price/wrapped-bitcoin (last visited Apr. 21, 2026) (describing WBTC as an ERC-20 token on Ethereum backed 1:1 by bitcoin held by custodians).

cold-storage devices may raise similar concerns depending on how the wallet is configured. Discovery of such material therefore implicates not only relevance and privacy, but also asset security.

The reported cases illustrate why discovery must distinguish between evidence of control and the credentials or devices that permit that control to be exercised. *Coe v. Rautenberg* shows that physical storage and recovery costs can become distribution issues when the asset depends on a hard drive.[57] *A.S.* describes the practical fragility of self-custody, where access may depend on a private key and no intermediary can restore lost credentials.[58] Compelled-decryption cases provide a further constitutional backdrop when discovery seeks passwords or comparable access information.[59] These concerns favor a staged approach to discovery: less intrusive records may establish ownership, transaction history, or control without disclosure of operational credentials, while requests for credentials can be reserved for circumstances in which those sources are insufficient. The aim is to develop the evidentiary record without unnecessarily exposing the means by which the assets can be moved.

III. The Record-Building Protocol: Preserve, Screen, Demand, Verify, Safeguard, Translate

A comprehensive record-building framework requires initial preservation and screening, followed by targeted discovery, verification of on-chain data, and the securing of private credentials. Existing treatments supply most of the individual components but leave them unordered. This Article organizes those tools into a

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57 *Coe*, 358 So. 3d at 26-28 & n.1.

58 *A.S.*, 2026 N.Y. Slip Op. 50471(U), at *7.

59 *Compare* Commonwealth v. Davis, 220 A.3d 534, 548-51 (Pa. 2019) (holding that compelled disclosure of a computer password is testimonial and construing the foregone-conclusion exception as "one of limited application" that does not reach compelled password disclosure), *with* Commonwealth v. Gelfgatt, 11 N.E.3d 605, 614-16 (Mass. 2014) (permitting compelled decryption where the defendant's ownership and control of the computers, the fact of encryption, and his knowledge of the encryption key were already known to the Commonwealth and thus a "foregone conclusion"), *and* State v. Andrews, 234 A.3d 1254, 1273-75 (N.J. 2020) (applying the foregone-conclusion exception to cellphone passcodes where the State had established their existence, the defendant's ownership and operation of the phones, and the passcodes' self-authenticating character).

staged protocol, beginning with lower-cost sources and escalating to subpoenas, forensic work, or credential safeguards only when the existing evidence justifies the added expense.

It is designed to keep forensic cost tied to the record and to the amount at stake. Lower-cost indicators come first; subpoenas, device work, analytics, and credential safeguards follow only as the evidence justifies them. The order matters. Preservation fixes the evidentiary baseline before records vanish or coins move; screening then decides whether crypto is even likely enough to justify targeted requests. From there, the demand stage converts the technology into concrete discovery categories, verification checks the responding party's account against independent records, and the safeguard stage keeps production from doubling as a transfer mechanism. The final stage translates the technical record into the findings a family court actually rules on: classification, value, control, dissipation, nondisclosure, and remedy.

A. *Preserve: Fix the Baseline Before It Moves*

Everything downstream depends on getting here first, because crypto evidence is unusually easy to delete, move, or lose. A preservation letter should reach exchange records and communications, wallet applications and their logs, transaction histories and CSV exports, public addresses, emails and texts discussing wallets or exchanges, tax records, device data, hardware wallets and cold-storage devices, recovery materials, and records relating to seed phrases.[60] At this stage, the goal is to prevent the deletion or loss of evidence and to preserve a record of any subsequent asset movement, and to foreclose a later claim that the relevant records no longer exist. Production of a private key or seed phrase belongs, if at all, in a more controlled phase. The letter should also distinguish between preserving access evidence and disclosing spend authority. A spouse can be told to preserve a hardware wallet, wallet app, export file, seed-storage location, and transaction records without being ordered immediately to reveal a seed phrase to the other party. That distinction reduces the risk that preservation

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60 *See* Tang, *supra* note 2, at 21 (recommending an early-case preservation letter); West & Fields, *supra* note 3, at 188.

itself creates a security incident. It also gives the court a cleaner record later: if a wallet app disappears, a device is wiped, or coins move after notice, the dispute is about conduct after a defined preservation obligation rather than about a vague duty to keep financial records.

Preservation has to come first because spoliation remedies often turn on whether a duty to preserve existed, whether relevant evidence was lost, and whether the responsible party had notice of that duty. *Seyl* illustrates what follows when assets move after filing and go undisclosed: one week after petitioning for divorce, the husband transferred roughly $840,000 in cryptocurrency to "cold wallet" storage and then omitted cryptocurrency from two financial affidavits and his interrogatory answers; the trial court awarded the wife an additional thirty-five percent of the cryptocurrency as a sanction, and the appellate court affirmed.[61] The nondisclosure, not cold storage by itself, supported the sanction.[62] *DeSouza* offers another example of undisclosed cryptocurrency information impairing the other spouse's community interest.[63] The general ESI cases support ordinary preservation consequences for electronic records.[64]

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61 *Seyl*, 2026 IL App (2d) 240719-U, ¶¶ 9, 45, 70-71 (recounting the transfer of approximately $840,000 in cryptocurrency to cold wallet storage one week after the husband petitioned for divorce, the omission of the cryptocurrency from two financial affidavits and interrogatory answers, and the trial court's award to the wife of an additional 35% of the cryptocurrency as a sanction under 750 Ill. Comp. Stat. 5/501(a)(1)).

62 *Id.* ¶¶ 9, 71 (quoting the trial court's finding that the husband's conduct "amount[ed] to an intentional act designed to mislead Sandra, her counsel, and ultimately the Court," and its observation that "[f]inancial affidavits are the foundation of every divorce and family case").

63 *DeSouza*, 266 Cal. Rptr. 3d at 892-94.

64 *See, e.g.*, Freeman v. Giuliani, 732 F. Supp. 3d 30, 37-38 (D.D.C. 2024) (describing the court's earlier entry of default judgment on liability, under Federal Rules of Civil Procedure 37(b)(2)(A)(vi) and 37(e)(2)(C), as a sanction for the defendant's repeated failure to comply with basic preservation and production obligations); DeCastro v. Kavadia, 309 F.R.D. 167, 180-84 (S.D.N.Y. 2015) (imposing an adverse-inference instruction and a fee award for spoliation and willful nonproduction of electronic records); VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 939 N.Y.S.2d 321, 328-33 (N.Y. App. Div. 2012) (holding that a party must implement a litigation hold once it reasonably anticipates litigation and affirming an adverse inference for gross negligence in failing to do so). Together these decisions confirm that failure to preserve electronic records can support fee awards, adverse-inference instructions, or case-dispositive sanctions.

B. *Screen: Let Cheap Indicators Justify Expensive Discovery*

Before a case incurs the cost of forensics, low-cost indicators can tell counsel whether digital assets are likely in play and can lay the factual groundwork for a later concealment finding. Bank and credit-card statements frequently show transfers to exchanges such as Coinbase, Kraken, and Gemini, along with unexplained cash withdrawals ahead of large purchases and wires to payment processors tied to crypto acquisition.[65] Tax returns are a strong second signal: a "yes" answer to the Form 1040 digital-asset question is evidence of digital-asset activity, not necessarily current ownership; crypto-related tax items may appear across Form 8949, Schedule D, Schedule 1, Schedule C, information returns, and supporting worksheets; Form 1099-MISC can show mining or rewards income; and, beginning with covered transactions effected in 2025, certain U.S. custodial brokers generally report gross proceeds on Forms 1099-DA furnished in 2026; the form does not capture all foreign, decentralized, or self-custodied activity.[66] Device review and party communications may add wallet or exchange apps, emails or texts about wallets, or seed-phrase materials.[67]

The purpose of this screening is to turn general suspicion into actionable leads. Uncovering exchange transfers, tax anomalies, or digital footprint evidence can expose undisclosed holdings, post-filing purchases, or outright gaps in a spouse's financial disclosures. Once a centralized-exchange lead appears, the exchange's

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65 West & Fields, *supra* note 3, at 189 ("[E]xamination of bank or credit card statements might reveal payments to Bitcoin exchanges . . . ."); *see also* Tang, *supra* note 2, at 46 (directing practitioners to review account statements for large, unexplained cash withdrawals and transfers to cryptocurrency-exchange sites).

66 Gross Proceeds and Basis Reporting by Brokers and Determination of Amount Realized and Basis for Digital Asset Transactions, 89 Fed. Reg. 56,480 (July 9, 2024) (to be codified at 26 C.F.R. pts. 1, 31, 301) (requiring custodial brokers to report gross proceeds on Form 1099-DA for digital-asset sales effected on or after January 1, 2025); IRS, *Digital Assets*, https://www.irs.gov/filing/digital-assets (last visited Sept. 1, 2026) (describing the Form 1040 digital-asset question and the forms on which digital-asset income and gains are reported); *see also* Tang, *supra* note 2, at 44-45 (describing IRS guidance on virtual currency and the Form 1040 virtual-currency question).

67 West & Fields, *supra* note 3, at 188-90; Tang, *supra* note 2, at 47-48 (discussing forensic protocols to identify use of wallet or exchange applications and, where possible, wallet addresses and keys).

own records can supply the count, type, dates, and manner of acquisition.[68]

C. *Demand: Ask for the Records Crypto Actually Generates*

Self-custodied cryptocurrency may leave no conventional monthly account statement, so a discovery request framed only in terms of "statements" may miss relevant records.[69] If "digital asset" is defined narrowly, a responding party can plausibly read the request to exclude altcoins, non-fungible tokens, governance tokens, staking rewards, lending and borrowing positions on DeFi protocols, mining proceeds, token swaps, and wrapped assets.[70] A definition that expressly reaches bitcoin, ether, and other altcoins, fungible and non-fungible tokens, and their DeFi analogues on any blockchain forecloses that move at the outset.[71]

Interrogatories should require the responding party to identify every exchange account opened, used, controlled, funded, or

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68 *Zietzke*, 426 F. Supp. 3d at 764-66; *see also A.S.*, 2026 N.Y. Slip Op. 50471(U), at *5-7 (subpoenaed exchange records revealing undisclosed cryptocurrency activity).

69 *See supra* notes 42-43 and accompanying text.

70 This Article uses these terms in their ordinary industry sense. An altcoin is a digital asset other than bitcoin. A non-fungible token is a unique token recorded on a blockchain that may be associated with a specific asset. A governance token confers voting rights over a protocol's direction. Staking rewards are paid to participants who lock up assets to help secure a network. DeFi lending and borrowing positions involve lending and borrowing arrangements executed through self-executing smart contracts. Mining proceeds consist of newly minted block rewards and transaction fees awarded for validating transactions on a proof-of-work network. A token swap is the exchange of one token for another, commonly effected through an automated market maker. A wrapped asset is a token on one blockchain that represents an asset native to another. *See Crypto Glossary*, *supra* note 42 (entries for "altcoin," "staking," "block reward," and wrapped assets); Tang, *supra* note 2, at 9-11 (non-fungible tokens); *What Is a Governance Token?*, Coinbase Learn, https://www.coinbase.com/learn/crypto-basics/what-is-a-governance-token (last visited Sept. 5, 2026); *What Is an Automated Market Maker (AMM)?*, *supra* note 53 (token swaps); Wright & Detzel, *supra* note 52 (staking); *see also supra* notes 52-56 and accompanying text (staking, liquidity pools, bridges, and wrapped bitcoin).

71 Tang, *supra* note 2, at 37-38 (recommending a definitional section that expressly includes bitcoin, ether, other altcoins, and fungible and non-fungible tokens).

closed during the relevant period, together with any earlier account reasonably connected to assets at issue; every custodial and noncustodial wallet and associated public address; every transfer involving an identified account, wallet, or digital asset during the relevant period by date, amount, sending and receiving address, and purpose; every conversion between digital assets and fiat, goods, services, or other tokens; every staking, lending, mining, or yield arrangement; and the full circumstances of any claimed lost or destroyed access.[72] Requests for production should seek complete transaction histories and CSV exports rather than summary statements, transaction hashes for transfers, dated screenshots or exports of wallet balances, linked bank and card records, tax returns and related tax records, including Forms 1040 and 8949, Schedule D, relevant worksheets, and copies of information returns such as Forms 1099-DA and 1099-MISC with worksheets, records of movement from exchange custody to self-custody, and records of purchases made with crypto.[73] The drafting should ask for native exports where possible. A screenshot may show a balance, but a CSV export or exchange transaction history can show dates, counterparties, fees, basis information, and withdrawals to outside addresses. The requests should also cover closed accounts, because a spouse can close an exchange account after moving coins to self-custody while leaving a useful audit trail behind. Requests for admission should fix threshold facts cheaply, including that the party held an account at a named exchange during identified dates, controlled a specified address, or reported crypto activity on a return; a later denial contradicted by subpoenaed or on-chain evidence may, depending on the surrounding evidence, support an inference of nondisclosure or concealment.[74] Third-party subpoenas to domestic exchanges and to the banks and payment processors that funded purchases round out the demand, subject to the

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72 *See* West & Fields, *supra* note 3, at 197 (App. B); Tang, *supra* note 2, at 40-42 (sample interrogatories addressing exchanges, wallet addresses, dates of acquisition, and transaction histories).

73 *See* West & Fields, *supra* note 3, at 197-98 (App. B); Tang, *supra* note 2, at 38-40 (listing recommended document requests, including complete transaction ledgers and records of linked bank and credit-card accounts).

74 *See* Tang, *supra* note 2, at 23 (noting that requests for admission in dissolution may seek admission or denial of whether a spouse has transacted in virtual currency or holds a wallet). The linkage between a denied request for admission and a later concealment finding reflects the author's analysis.

reachability limits already noted for offshore and decentralized venues.[75] The demand package should be written so each response can be checked against another source. A bank transfer to an exchange should correspond to an exchange deposit. An exchange withdrawal should correspond to a transaction hash or receiving address. A reported taxable event should correspond to account records or ledger movement. That cross-checking structure turns discovery responses into trial evidence.

One category should stay off the demand at this stage: seed phrases and private keys. Producing a key discloses credentials that confer spending authority and may enable activity outside the proper scope of the case, and a disclosed public address is ordinarily sufficient for a preliminary review of that address's public transaction history, although it may not reveal other addresses, chains, or assets controlled by the same person.[76] Compelled key production is an outer-boundary remedy, and it belongs in the safeguard analysis below, not in the first round of requests.

D. *Verify: Test the Disclosures Against Independent Records*

Party disclosures begin the verification work. Disclosed accounts can be reconciled against tax entries and bank records for internal consistency; free block explorers such as Etherscan and Blockchain.com can show activity on disclosed public addresses; subpoenaed exchange records can be laid against the party's own answers; and produced emails and texts may identify wallets or exchanges that did not appear in an interrogatory response. Counsel should build this baseline chronologically by first tracking fiat movements to and from centralized exchanges, and then matching subsequent trades and withdrawals to corresponding dates. Once specific public addresses are identified from the exchange records, on-chain movements can be cross-referenced against the

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75 *See* Tang, *supra* note 2, at 43; West & Fields, *supra* note 3, at 189.

76 *See* West & Fields, *supra* note 3, at 189 (explaining that a court with personal jurisdiction over the other spouse may order production of a private address); Tang, *supra* note 2, at 42 n.311 ("It is unlikely that a party will simply agree to the disclosure of a private key, as it is similar to requesting a bank account password"; "having the wallet address should be sufficient for the preliminary task of looking up the cryptocurrency transactions a holder has performed"). The recommendation to reserve compelled key production for a later step reflects the author's proportionality and security analysis.

party's formal disclosures, tax returns, and testimony. Any material discrepancy in that baseline warrants further inquiry and, if unexplained, may support an inference of nondisclosure or concealment, and unresolved gaps determine whether the added expense of specialized analytics, device forensics, or a motion to compel is justified. Where those steps surface gaps, escalation to forensics is warranted: commercial analytics platforms such as Chainalysis and TRM Labs use clustering analysis to identify possible associations among addresses, forensic accountants reconcile crypto activity against the marriage's overall cash flow, and device examiners may recover deleted wallet apps and key material.[77]

This step is not a hunt for every wallet a spouse might theoretically have opened. It is a way to make each inference testable. A bank transfer to an exchange, a KYC file, a withdrawal hash, and a later wallet balance each prove different points; none alone proves the whole case. When those pieces align, the court can make ordinary findings about ownership and control. When they do not, the gap itself identifies the next narrow request. *Ahlgren* shows how expert analysis can combine exchange records and public-ledger data to reconstruct an asset history that no single source reveals.[78] The same work appears in other postures: tracing across centralized, offshore, decentralized, and self-custody holdings,[79] identifying marital crypto to support post-decree relief,[80] and untangling missing coins and evasive testimony on the way to an equitable award and a remand for valuation proof.[81] In *DeSouza*, the wallet transfers and derivative assets themselves shaped the remedy.[82]

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77 TRM Labs, *Building Strong Cases with Blockchain Evidence: Admissibility, Chain of Custody, Experts, and Court-Ready Reporting*, TRM Insights (Feb. 27, 2026), https://www.trmlabs.com/resources/blog/building-strong-cases-with-blockchain-evidence-admissibility-chain-of-custody-experts-and-court-ready-reporting (describing clustering heuristics such as co-spend analysis and the corroboration of address attributions with independent records); *see also* Tang, *supra* note 2, at 24-25 (discussing retention of cryptocurrency-specialized experts and investigation providers).

78 *Ahlgren*, 703 S.W.3d at 390-91.

79 *A.S.*, 2026 N.Y. Slip Op. 50471(U), at *5-7, *18-22.

80 *LaFond*, 2022 WL 714430, at *1-3.

81 *Hull*, 2026 WL 122187, at *6-7.

82 *DeSouza*, 266 Cal. Rptr. 3d at 892-94.

Two cautions govern the verification stage. The first is proportionality. If the suspected concealed crypto is worth $50,000 and full forensics would cost $40,000, the investigation may consume the value it seeks to find. A tiered approach keeps cost tied to stakes: cheap review first, targeted subpoenas and focused device work next, and full forensics only where strong indicators justify them.[83] The second is legality. Counsel should not encourage self-help access to a spouse's accounts or devices. Depending on the source accessed, the existence and scope of authorization, and the method used, such access may implicate the Stored Communications Act, the Computer Fraud and Abuse Act, the Wiretap Act, state privacy law, or professional-responsibility rules. Civil liability, evidentiary consequences, and available remedies remain jurisdiction- and fact-specific.[84]

E. *Safeguard: Protect Credentials and Control*

Some forms of production hand over the ability to spend the asset, which is exactly why this stage has to preserve access to evidence without giving away control. Useful substitutes include public addresses, transaction hashes, read-only exports, exchange records, screenshots, neutral forensic inspection under a protective order, escrow, court-supervised transfer, and a small test transaction before any full in-kind transfer.[85] The physical-storage, self-custody, and compelled-decryption authorities point in the same practical direction: obtain verifiable access evidence first, and reserve credentials for a protective order or court-supervised process.[86] The

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83 Tang, *supra* note 2, at 25 (cautioning that, where holdings are minimal, there is no pattern of nondisclosure, detailed tax filings exist, and both clients are amicable, "it likely is not worth seeking the additional analysis").

84 18 U.S.C. § 2701 (Stored Communications Act); *id.* § 1030 (Computer Fraud and Abuse Act); *id.* § 2511 (Wiretap Act); *see also* West & Fields, *supra* note 3, at 190.

85 *See* West & Fields, *supra* note 3, at 189-90 (recommending a stipulated forensic protocol and noting that ordinary rules on scope and protective orders continue to apply); *cf. DeSouza*, 266 Cal. Rptr. 3d at 894 (order directing transfer of a specified number of bitcoins and fork-derived coins). The escrow, test-transaction, and court-supervised transfer procedures described in the text reflect the author's recommendation.

86 *See Coe*, 358 So. 3d at 26-28 & n.1; *A.S.*, 2026 N.Y. Slip Op. 50471(U), at *7; *Davis*, 220 A.3d at 548-51; *Andrews*, 234 A.3d at 1273-75; *Gelfgatt*, 11 N.E.3d at 614-16.

order should also say who may view credential material, where it will be stored, whether counsel may retain a copy, whether an expert may image or inspect the device, how any test transaction will be documented, who bears network fees, and what happens if the receiving address is wrong or the transaction fails. These details are mundane, but they prevent the discovery process from becoming the source of the next dispute. The same concern appears at enforcement. A decree that says only to transfer cryptocurrency may leave the parties arguing about network, address, fee, timing, and confirmation rather than entitlement. The safeguard step reduces that risk by turning access into a supervised procedure. A court-supervised transfer can be staged in small steps: verify the address, send a nominal test amount, wait for confirmation, document receipt, and then transfer the remaining amount. That procedure is slower than handing over a seed phrase, but it better matches the family court's task of preserving value while deciding ownership.

F. *Translate: Turn a Discovery Record into a Distribution Record*

The final job is turning all of this into something a family court can act on. The record should answer the questions that distribution turns on: who controlled the asset, when it was acquired, what funds bought it, where it moved, what it was worth, whether it was disclosed, and whether it can be divided safely. The translation stage should avoid technical shorthand. The finding should not merely say that a wallet existed; it should say what evidence links the wallet to the spouse, what transactions show acquisition or movement, what date and source support value, and what practical steps make the remedy executable. That format also helps appellate review because it ties technical evidence to familiar findings. Those questions are what shape the remedy in practice—whether it ends in a fiduciary-breach finding, a tracing order, an in-kind split, an offset, an access order, a missing-asset charge, or reimbursement.[87]

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87 *See DeSouza*, 266 Cal. Rptr. 3d at 892-94 (fiduciary-breach finding and in-kind transfer order); *Fial*, 591 P.3d at 255-57 (tracing to premarital funds and remand for a just and proper division); *Green*, 2026 WL 1309595, at *13 & n.22 (non-precedential) (in-kind distribution); *Coe*, 358 So. 3d at 27-28 (reimbursement of recovery costs); *LaFond*, 2022 WL 714430, at *1-3 (post-decree relief); *Hull*, 2026 WL 122187, at *6-7 (missing-asset charge and valuation remand); *Leonova*, 242 A.3d at 721-22, 732-37 (contempt for post-commencement

IV. From Record to Remedy: Concealment and Sanctions, Valuation and Distribution

Once the record exists, it does two kinds of work—it supports sanctions where a spouse has obstructed it, and it supports a defensible valuation and distribution where it holds. This Part takes each in turn. When a spouse hides crypto, courts draw on existing disclosure, fiduciary-duty, sanctions, dissipation, and fee-shifting doctrines. The remedy depends on the conduct and the record: omission, false disclosure, unauthorized transfer, deletion, refusal to comply, or violation of a court order. A sanctions record should identify the specific obligation in effect at the time of the misconduct (such as a statutory disclosure or fiduciary duty), the precise nature of the noncompliance (ranging from asset omission to the active deletion of records), and the resulting prejudice to the innocent spouse or the marital estate (such as inflated forensic costs or distorted settlement negotiations). Framed that way, the sanction rides on what the spouse did, not on a court's unease with the technology.

A. *Nondisclosure Can Breach Fiduciary or Statutory Disclosure Duties*

Nondisclosure can impair valuation, settlement, tracing, and trial preparation. *In re Marriage of DeSouza* illustrates how a crypto concealment record is built and why one asset can generate several distinct breaches.[88] Shortly after his wife Erica served him with a dissolution petition and California's automatic temporary restraining order in January 2013, Francis DeSouza used marital funds to acquire more than a thousand bitcoins through two proxies who bought on his behalf from the Mt. Gox exchange. He disclosed the aggregate holding — 1,062.21 bitcoins — on his preliminary and final schedules, but he did not disclose that he had used proxies, that roughly 499 of those coins remained trapped in Mt. Gox's bankruptcy, that the holding had generated bitcoin cash

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cryptocurrency purchase in violation of automatic orders, offset against the husband's bonus); *A.S.*, 2026 N.Y. Slip Op. 50471(U), at *18-22 (fee award to fund tracing); *Seyl*, 2026 IL App (2d) 240719-U, ¶¶ 45, 70-71 (sanction for nondisclosure).

88 *DeSouza*, 266 Cal. Rptr. 3d at 892-94.

and bitcoin gold through 2017 forks, or that he had moved coins between wallets. Only after judgment, when Erica sought her half, did he reveal he could produce just 613.53 coins.[89] The Court of Appeal affirmed findings that Francis both violated the restraining order and breached his fiduciary duty under Family Code sections 721 and 1100, and that the breach impaired Erica's community interest under section 1101, which entitles the wronged spouse to fifty percent of any asset undisclosed or transferred in breach, plus fees.[90] Two holdings carry beyond California. On materiality, the court rejected the argument that Erica's general disinterest in the couple's finances during the marriage showed she would have done nothing had she known: her conduct during the marriage "sheds little if any light" on what she would do after retaining counsel, filing, and serving restraining orders.[91] On impairment, the court held that the success of one undisclosed investment does not offset the harm from a separate undisclosed transaction, because the disclosure policy "contains no exception for debts and assets that offset each other."[92] A spouse cannot launder a concealment by pointing to gains elsewhere.

B. *Courts Impose Adverse Equitable Consequences on the Spouse Who Hides or Controls the Asset*

When control or concealment affects the record, courts may assign the asset to the controlling spouse, award a larger share to the other spouse, order account access, shift fees, or otherwise adjust the estate. The sanctions cases show courts treating crypto concealment as ordinary litigation misconduct once the record establishes the conduct. In *In re Marriage of Seyl*, the husband moved roughly $840,000 in cryptocurrency to storage wallets a week after filing for divorce, then omitted it from two financial affidavits and

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89 *Id.* at 891-93 (describing the January 2013 automatic temporary restraining order, the April 2013 proxy purchases through Mt. Gox, and Francis's post-judgment disclosure that only 613.53 of the 1,062.21 disclosed bitcoins remained available).

90 Cal. Fam. Code §§ 721, 1100, 1101; *DeSouza*, 266 Cal. Rptr. 3d at 894-95. Section 1101(g) authorizes an award of 50% of any asset undisclosed or transferred in breach of the fiduciary duty, plus attorney's fees and costs.

91 *DeSouza*, 266 Cal. Rptr. 3d at 896.

92 *Id.* at 897-98 (quoting *In re* Marriage of Feldman, 64 Cal. Rptr. 3d 29, 39 (Cal. Ct. App. 2007)).

his interrogatory answers; only after a court-appointed expert's team surfaced the accounts did he list more than $900,000 on a later affidavit.[93] The trial court rejected his claim that the omission was inadvertent and, invoking a statute requiring sanctions for an inaccurate or misleading financial affidavit, awarded the wife an additional thirty-five percent of the cryptocurrency, eighty-five percent in all, plus a $20,000 payment to charity as a sanction for perjury and discovery violations; the appellate court affirmed, quoting the trial court's explanation that the severity was deliberate because "[f]inancial affidavits are the foundation of every divorce and family case."[94] *Cohen v. Cohen* reaches dissipation on different conduct: there the husband bought $222,000 in cryptocurrency through concealed transactions funded with marital assets and loans, and the court found the losses a dissipation of marital assets which, together with his unpaid support, led it to award the wife the marital residence and any currency in his bitcoin or cryptocurrency accounts.[95] Together, *Seyl* and *Cohen* show the same limiting principle: the remedy follows the misconduct, not the fact that the property was digital.

C. *Automatic Orders, Post-filing Restraints, and the ESI Backdrop*

A purchase, sale, or transfer of crypto after the case begins can violate an automatic order or a restraint on disposing of marital property, and the asset's digital form does not make the transaction ordinary-course activity. The appellate court's reasoning in *Leonova* makes the point. The husband invested $39,000 in cryptocurrency after commencement and lost $22,000, and the Connecticut appellate court rejected his usual-course-of-business defense because he had never bought cryptocurrency before and had no accounts for doing so until after the action began;

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93 *Seyl*, 2026 IL App (2d) 240719-U, ¶ 9. As a Rule 23(b) order entered after January 1, 2021, *Seyl* is nonprecedential but may be cited for persuasive purposes under Rule 23(e)(1); it is cited here as illustration.

94 *Id.* ¶¶ 7, 71; *see* 750 Ill. Comp. Stat. 5/501(a)(1).

95 Cohen v. Cohen, No. FBT-FA18-6079812-S, 2021 WL 12151633, at *4, *7, *10-11 (Conn. Super. Ct. June 23, 2021) (finding a $222,000 dissipation of marital assets through concealed cryptocurrency transactions and awarding the wife 100% of the marital residence and all cryptocurrency accounts); *see* Conn. Practice Book § 25-5 (2026) (automatic orders).

the remedy was an order that he pay the wife, out of his share of the estate, one-half of the loss.[96] The case turns crypto's volatility into an ordinary problem of risk allocation.

The ordinary sanctions framework governs when digital evidence is deleted, withheld, or never preserved, and cases such as *Freeman*, *DeCastro*, *VOOM*, *Holme v. Global Minerals & Metals Corp.*, *United States v. Rapower-3, LLC*, and *In re Heinz* establish the consequences of lost or withheld electronic financial records.[97] These decisions reinforce the preservation and sanctions principles above without establishing anything crypto-specific; they backstop the family-law authority rather than stand in for it.

D. *A Limiting Principle: Complexity Alone Is Insufficient*

Sanctions require more than difficulty in tracing or calculating crypto-assets. What is sanctionable is nondisclosure, false disclosure, a misleading affidavit, a refusal to comply, deletion, a breach of the duty to preserve, a violation of a court order, dissipation, or concealment.[98] Crypto's complexity bears on burden, proof, valuation uncertainty, and proportionality, but complexity is not itself a ground for sanctions. A spouse may hold crypto in a genuinely complicated form without doing anything wrong. The

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[96] *Leonova*, 242 A.3d at 732-37 (rejecting a usual-course-of-business defense to a post-commencement cryptocurrency purchase where the husband had not previously purchased cryptocurrency or held accounts for doing so, and affirming an order that he pay the wife one-half of the $22,000 loss out of his share of the estate).

[97] *See* United States v. Rapower-3, LLC, 470 F. Supp. 3d 1232, 1237-38, 1251-53 (D. Utah 2020) (finding that contemnors discarded financial records responsive to a receivership order and barring them from relying on any document not produced by the court-ordered deadline); Lioce v. Heinz (*In re* Heinz), 501 B.R. 746, 758-59, 767-68 (Bankr. N.D. Ala. 2013) (drawing an adverse inference from the debtor's willful failure to preserve electronic accounting records and denying discharge under 11 U.S.C. § 727(a)(3) for failure to keep or preserve records); Holme v. Glob. Mins. & Metals Corp., 934 N.Y.S.2d 30, 31 (N.Y. App. Div. 2011) (affirming an adverse-inference charge for spoliation of electronic accounting and trading records); *see also* cases cited *supra* note 64.

[98] *See Seyl*, 2026 IL App (2d) 240719-U, ¶¶ 9, 68-72; *DeSouza*, 266 Cal. Rptr. 3d at 893-94; *Hull*, WL 122187, at *6-7; *Cohen*, 2021 WL 12151633, at *3-4, *10-11; *Leonova*, 242 A.3d at 732-37.

consequences attach when conduct obstructs the record or impairs the other spouse's rights. Keeping that line clear matters: sanctions should reach deceptive conduct, not the mere holding of a technically complex asset.

Once discovery produces the wallet and exchange records, the court still has to decide what the crypto is worth, when to value it, and how to divide it. The record built in Part III is what makes each of those choices defensible. Valuation and distribution should be treated as separate questions. A reliable value requires asset identity, quantity, valuation date, valuation time, price source, fees, and tax consequences. A workable distribution requires access, transfer mechanics, wallet competence, confirmation of receipt, allocation of failed-transfer risk, and a remedy if the asset has already moved. Those questions overlap, but they should not be collapsed. A court can accept a valuation while still choosing offset over transfer, or it can divide coins in kind while leaving tax-basis records and network-fee allocation to the order.

E. *Volatility Puts the Valuation Date and Method at the Center*

Crypto trades on multiple venues, and prices for the same asset can differ across platforms at the same time. The SEC has described investments in crypto asset securities as exceptionally volatile and speculative.[99] A valuation should disclose the date, time, source venue or index, quantity, and method. It should also identify whether the figure is a spot quote, a volume-weighted figure, an exchange-specific closing price, or a composite index, because those choices can matter in a fast-moving market. The valuation should also account for liquidity where the marital position may be too large to sell at the quoted price. For stablecoins, the valuation should identify any custody, redemption, or

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[99] Sec. & Exch. Comm'n, Off. of Inv. Educ. & Advocacy, *Exercise Caution with Crypto Asset Securities: Investor Alert* (Mar. 23, 2023), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-alerts/crypto-asset-securities (describing crypto asset securities as "exceptionally volatile and speculative"); *see also* Sec. & Exch. Comm'n, Div. of Corp. Fin., *Crypto Asset Exchange-Traded Products* (July 1, 2025), https://www.sec.gov/newsroom/speeches-statements/cf-crypto-asset-exchange-traded-products-070125 (identifying "price differentials across crypto asset trading platforms" as a required disclosure topic).

network-specific considerations that materially affect the position. The valuation record should therefore show both the arithmetic and the assumptions behind it. *LaFond* demonstrates the consequences of relying on a materially inaccurate cryptocurrency valuation: because the husband misrepresented the initial value of the bitcoin, the court set aside the original property settlement years later and ordered an equal division of the actual, newly discovered cryptocurrency accounts.[100] The case does not, standing alone, prescribe a particular valuation date, exchange, index, or methodology.[101]

F. *In-kind Division Answers Volatility but Raises Access and Competence Problems*

In-kind division can let both spouses share future gains and losses, but it requires reliable transfer instructions, wallet access, technical competence, fee allocation, and confirmation of receipt. The order should specify the asset, network, quantity, sending wallet or exchange account if known, receiving address, timing, responsibility for fees, test-transaction procedure, and proof of completion. It should also address what happens if the recipient supplies an incorrect address, if the sender claims the wallet is inaccessible, if network congestion changes the fee, or if the transfer triggers tax reporting. *Green* is limited but useful: the court deemed the challenge waived and, alternatively, found no abuse of discretion in an in-kind split where the trial court credited testimony that a sale would force market timing and that cryptocurrency was difficult to value;[102] *Coe* shows that coin-level allocation must be arithmetically correct.[103] *DeSouza* and *Shteiwi* show what in-kind or coin-count treatment looks like in practice: the court awards each spouse a share of the coins themselves rather than a dollar figure fixed on a valuation date.[104] In *DeSouza* the trial court divided the community bitcoins in kind and the Court of Appeal affirmed a postjudgment order requiring transfer of the wife's share of the coins together with the fork-derived bitcoin cash and

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100 *LaFond*, 2022 WL 714430, at *1-3.

101 *Id.*

102 *Green*, 2026 WL 1309595, at *13 & n.22 (non-precedential).

103 *Coe*, 358 So. 3d at 27-28.

104 *DeSouza*, 266 Cal. Rptr. 3d at 893-94; *Shteiwi*, 2025-Ohio-2901, ¶¶ 61-64.

bitcoin gold.[105] In *Shteiwi* the court affirmed an equal division of the parties' wallets by number of coins rather than by account value.[106] Because each spouse takes coins rather than cash, both share the risk of post-separation price movement.

G. *Offset and Equalization Work When One Spouse Controls the Asset or Transfer Is Unsafe*

Offset and equalization may be appropriate when one spouse controls the asset or direct transfer is unsafe. *Liu v. Chang* is an example: the trial court valued the bitcoin at $328,903, awarded that value to the husband, awarded the house to the wife because the court had no way to reach the coins, and produced a 55.41-to-44.59 property split.[107] Irreversibility supports the same caution around direct transfers.[108] *Coe v. Rautenberg*[109] supplies two concrete distribution points. The marital estate was primarily ten bitcoins; after the wife had already taken 1.2 of them from the husband's share to satisfy past-due child support, the trial court erroneously deducted that 1.2 from the whole estate before splitting the remainder, reducing her share. The appellate court corrected the arithmetic — the wife's share is computed from the original pool, the child-support conversion charged against the husband's half — and separately held the husband had to reimburse half the $1,851.20 the wife spent to recover the damaged hard drive that held the coins.[110] Coin-level allocation has to be done correctly, and the operational cost of reaching a self-custodied asset is itself a distribution item.

H. *Access Costs, Post-Decree Relief, and Tracing's Dual Role*

Crypto sometimes depends on a hard drive, a hardware wallet, forensic recovery, or expert help, and those costs are marital expenses, reimbursement claims, or allocation issues in their own right. *Coe,* discussed above, treated the hard-drive recovery cost

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105 *DeSouza*, 266 Cal. Rptr. 3d at 893-94.

106 *Shteiwi*, 2025-Ohio-2901, ¶¶ 61-64.

107 Liu v. Chang, No. 78999-6-I, 2020 WL 1921123, at *2-3 (Wash. Ct. App. Apr. 20, 2020) (per curiam) (unpublished).

108 West & Fields, *supra* note 3, at 193.

109 *Coe*, 358 So. 3d at 26-28.

110 *Id.* at 27-28 (correcting the equitable-distribution arithmetic and requiring the husband to reimburse half of the $1,851.20 hard-drive recovery cost).

in exactly that way.[111] Distribution, in other words, includes the operational cost of getting to the asset, not merely the asset's value.

Post-decree relief may be available when a spouse misstates value, converts coins, omits accounts, or hides post-decree gains, but the applicable standard and time limits depend on state law and the decree. *LaFond* supports post-decree relief where a spouse misrepresented the value of bitcoin and converted bitcoin into other cryptocurrency, and expert tracing identified the marital crypto accounts; the wife proceeded by motion under Nevada's Rule 60(b), and the opinion does not address timeliness.[112] *DeSouza* supports post-dissolution relief for nondisclosure and fiduciary breach on a motion filed within weeks of the judgment.[113] The time limits vary. Rules modeled on Federal Rule of Civil Procedure 60(b) generally require a motion based on fraud or misrepresentation within one year of judgment, and Nevada allows six months, while California measures its one-year period for setting aside a family-law judgment for fraud or nondisclosure from the date the complaining spouse discovered or should have discovered it, and permits a fiduciary-breach claim raised in the dissolution proceeding itself without regard to the three-year limit that otherwise runs from actual knowledge.[114]

Tracing protects both spouses. It can expose concealment, but it can also prevent an overinclusive marital award by proving a separate-property source, passive appreciation, or a limited marital contribution.[115] *DeSouza* illustrates the offensive use of the same record: rather than defending a separate-source claim, the wife used the transaction and fork history to show that undisclosed purchases, transfers, and derivative assets had impaired

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111 *Id.*

112 *LaFond*, 2022 WL 714430, at *1-3 (reviewing relief granted on a motion under Nevada Rule of Civil Procedure 60(b)(1) and (3)).

113 *DeSouza*, 266 Cal. Rptr. 3d at 893 (postjudgment motion filed in January 2018 following a December 2017 judgment).

114 *See* Fed. R. Civ. P. 60(c)(1) (one year for motions under Rule 60(b)(1)-(3)); Nev. R. Civ. P. 60(c)(1) (six months); Cal. Fam. Code § 2122(a), (f) (one year from the date the complaining party discovered or should have discovered the fraud or the failure to comply with disclosure requirements); *id.* § 1101(d)(1)-(2) (three years from actual knowledge, except that a claim may be brought in conjunction with a dissolution action without regard to that limit).

115 *Fial*, 591 P.3d at 255-57; *Ahlgren*, 703 S.W.3d at 390-91; *Hull*, 2026 WL 122187, at *6-7.

her community interest.[116] The tax treatment also matters: virtual currency is property for federal tax purposes, and section 1041 can carry basis consequences into divorce transfers.[117] Future tax consequences should be used only where the record gives a reasonable basis for estimating them.[118]

V. Drafting Implications and Conclusion

The framework also has practical consequences for settlement drafting, discovery definitions, valuation orders, and requests for expert or forensic fees. To reduce post-decree litigation, a settlement agreement should identify digital assets in detail. A schedule should cover exchange accounts, wallets, public addresses, asset types, quantities, valuation date and source, tax-basis records, forks, airdrops, staking rewards, wrapped assets, stablecoins, pending claims, lost-access claims, and post-valuation transfers. The agreement should also state what happens to later-discovered assets, derivative tokens, post-valuation rewards, and tax records needed by the recipient. Generic personal-property language may be too blunt for these issues. If one spouse keeps a business, the agreement should say whether business-held digital assets, exchange accounts, mining equipment, or wallet credentials are included. If the parties divide coins in kind, the agreement should include the transfer mechanics rather than leaving them to informal cooperation after judgment. *LaFond* and *DeSouza* show the need to address misrepresented value, converted assets, derivative coins, and wallet transfers in the decree or settlement record.[119]

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116 *DeSouza*, 266 Cal. Rptr. 3d at 893-94, 897-98.

117 I.R.S. Notice 2014-21, 2014-16 I.R.B. 938 (treating virtual currency as property for federal tax purposes); 26 U.S.C. § 1041(a)-(b) (no gain or loss recognized on a transfer of property between spouses or incident to divorce; the transferee takes the transferor's adjusted basis).

118 *Cf.* Maurer v. Maurer, 623 N.W.2d 604, 607-08 (Minn. 2001) (permitting consideration of future tax consequences where the record supplies a "reasonable and supportable basis for making an informed judgment as to [the] probable liability").

119 *LaFond*, 2022 WL 714430, at *1-3; *DeSouza*, 266 Cal. Rptr. 3d at 893-94. An airdrop is a distribution of tokens to existing wallet holders without charge, typically to promote a new project or following a fork. *See Crypto Glossary*, *supra* note 42 (entry for "airdrop").

Discovery requests should define digital assets broadly enough to capture the ways value can change form. The definition should reach bitcoin, ether, altcoins, stablecoins, tokens, NFTs, governance tokens, staking rewards, mining proceeds, forks, airdrops, wrapped assets, DeFi lending and borrowing positions, liquidity-pool interests, exchange accounts, self-custody wallets, cold storage, hardware wallets, public addresses, and transaction histories. It should also cover accounts or wallets opened, used, controlled, accessed, funded, closed, or transferred during the relevant period. The reason is practical. Crypto value often changes form without leaving the economic estate. Coins can be swapped for other tokens, bridged to another chain, wrapped, staked, loaned, deposited into a liquidity pool, or moved from an exchange to self-custody. A request limited to "cryptocurrency accounts" may invite a narrow response that omits the record needed for classification, tracing, valuation, and enforcement. The definition should be paired with production formats. A party may need native CSV exports, complete transaction histories, account statements, tax forms, screenshots only as a backup, and public addresses or transaction hashes sufficient for independent review. For self-custody, the request should separate proof of control from production of spend authority, so the responding spouse can identify wallets and preserve records without immediately exposing a seed phrase. Derivative assets, multiple wallets, converted coins, tracing across accounts, and physical storage have all tripped up definitions that did not anticipate them—reason enough to name each one up front.[120]

A crypto valuation order should fix the asset, quantity, date, time, price source, exchange or index, network, wallet or exchange location, transaction fees, tax-basis record, and treatment of forks and rewards. An in-kind order should specify the receiving address, a test transaction, confirmation procedure, timing, fee allocation, and failed-transfer risk. If the court uses offset, the order should state why direct transfer is impractical or unsafe and should identify the asset used to equalize the award. If the court uses a sale, the order should state who sells, on what platform, by what deadline, who bears fees and taxes, and how slippage or market movement will be handled. If the court reserves jurisdiction, it

120 *DeSouza*, 266 Cal. Rptr. 3d at 892-94; *A.S.*, 2026 N.Y. Slip Op. 50471(U), at *5-7; *LaFond*, 2022 WL 714430, at *1-3; *Fial*, 591 P.3d at 255-57; *Coe*, 358 So. 3d at 27-28.

should say what future event triggers a return to court. The cases point toward orders that do the operational work: they should specify the transfer mechanics, use arithmetic that matches the coin count, fix the valuation date, and address derivative assets expressly.[121]

Where a spouse's control or concealment renders conventional discovery inadequate, a shifting of expert and forensic fees may be warranted. The request should be framed around need, proportionality, and allocation. A party seeking fees should identify the suspected asset, the cheaper discovery already attempted, the remaining gap, the proposed expert work, and the amount at stake. A party resisting fees should be required to say whether the objection is cost, privacy, relevance, access, or lack of foundation. That structure helps the court distinguish a speculative fishing expedition from a targeted effort to complete the record. It also creates a basis for fee shifting when one spouse's nondisclosure, refusal, or exclusive control made the forensic work necessary. Courts have allocated fees and costs for exactly this kind of work, including expert tracing of undisclosed cryptocurrency and hard-drive recovery.[122]

The reported cases do not establish a separate body of cryptocurrency-specific divorce law. They show that ordinary rules of classification, disclosure, valuation, sanctions, and distribution remain workable when the record identifies the asset, attributes control, traces acquisition and transfers, and supplies a defensible valuation. What cryptocurrency changes is where that record lives: identity, transaction history, and control can sit separately on exchanges, public ledgers, devices, and private credentials. Once the record is built, the cost of reaching a self-custodied asset—data recovery, forensics, expert access—stops being overhead and becomes one more item the court can allocate between the spouses.

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121 *Green*, 2026 WL 1309595, at *13 & n.22 (non-precedential); *Coe*, 358 So. 3d at 27-28; *Hull*, 2026 WL 122187, at *6-7; *DeSouza*, 266 Cal. Rptr. 3d at 892-94; *Shteiwi*, 2025-Ohio-2901, ¶¶ 61-64.

122 *A.S.*, 2026 N.Y. Slip Op. 50471(U), at *18-22 (awarding pendente lite counsel and expert fees to fund tracing of allegedly undisclosed cryptocurrency); *Coe*, 358 So. 3d at 27-28 (requiring reimbursement of one-half of the cost of recovering the hard drive holding the parties' bitcoin). *LaFond* and *Ahlgren* illustrate the evidentiary value of expert tracing but did not address the allocation of expert fees in a dissolution proceeding.

For practitioners, the task is to build that record in a disciplined sequence.[123] Preservation comes before assets or records move; lower-cost indicators decide whether more intrusive discovery is warranted; party disclosures are checked against independent records; and access evidence is preserved without exposing spend authority. Followed in that order, the sequence leaves cryptocurrency presenting fewer new legal rules than new problems of proof.

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123 *See DeSouza*, 266 Cal. Rptr. 3d 890; *Leonova*, 242 A.3d 713; *Cohen*, 2021 WL 12151633; *Coe*, 358 So. 3d 24; *Seyl*, 2026 IL App (2d) 240719-U; *Hull*, 2026 WL 122187; *LaFond*, 2022 WL 714430; *A.S.*, 2026 N.Y. Slip Op. 50471(U); *Fial*, 591 P.3d 253; *Green*, 2026 WL 1309595.

Comment, Family Law Gaps and Inheritance Rights in Nontraditional Families

I. Introduction

American families have shape-shifted dramatically over recent decades[1]—unmarried partners, same-sex couples, blended households, and families built through assisted reproduction are now the norm, not the exception—yet state inheritance laws are still cosplaying like it's 1950, clutching their pearls at anyone who did not marry into a heterosexual union. The legal code received the cultural memo about modern families, crumpled it up, and tossed it in the recycling bin. What emerges is a dangerous crater between the actual families of today, and the ones lawmakers deign to acknowledge, creating vulnerabilities that are not bureaucratic nuisances but substantial threats to property rights, decision-making authority, and financial survival.

The consequences play out in brutal specificity: a partner of two decades inherits precisely nothing when their loved one dies intestate; a parent who changed diapers and attended every soccer game loses all rights because they lack biological connection; children conceived through sperm donors become legal orphans battling distant relatives in probate court. For millions living outside the law's narrow imagination of what counts as "real family," these are not cautionary tales—they are inheritance landmines with your name on them.

The American inheritance system, a fifty-state Frankenstein's monster, leaves nontraditional families with a greater amount of pressure. Those who marry are treated as though they have adhered to the nation's most sacred directive, whereas all others are treated as outcasts. Without explicit documentation, the law hands your life's assets to that cousin you have not spoken to since 2003

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[1] *The Modern American Family*, Pew Rsch. Ctr. (Sept. 14, 2023), https://www.pewresearch.org/social-trends/2023/09/14/the-modern-american-family/.

while ignoring the partner who held your hand through chemo. Traditional families get ironclad protections with one courthouse visit and a celebratory brunch; everyone else needs a law degree, a small fortune, and the foresight of Nostradamus to achieve the same security. This is not just administratively annoying—it is a fundamental equity crisis where the price of love comes with a mandatory estate planning surcharge, and the penalty for imperfect paperwork is not a deviation from the decedent's wishes but complete disinheritance. The message could not be clearer: marry or lawyer up because intestacy statutes were not written with all families in mind.

This Comment traces the landscape of legal gaps facing nontraditional families—unmarried cohabitants, LGBTQ+ families, and those created through assisted reproduction—examining how recognition varies wildly depending on whether a family resides in progressive California or in a jurisdiction still functioning in the 1950's. Next discussed are the concrete inheritance vulnerabilities that emerge when the law refuses to acknowledge a family exists, from intestacy statutes that treat life partners like strangers to probate procedures that hand authority to distant relatives. This Comment is not just a catalog of outdated laws—the final section explains the arsenal of estate planning tools that can actually protect nontraditional families, surveys the massive legal developments from *Obergefell* forward, and offers concrete recommendations for practitioners and families navigating this minefield, before concluding with a call for even greater systemic reform that would make all this elaborate planning unnecessary.

II. Legal Recognition Gaps: Understanding the Landscape

A. *Unmarried Cohabiting Partners*

1. *Historical Presumption Against Cohabitation Rights*

American inheritance law historically presumed that cohabitation outside marriage was morally suspect and unworthy of legal protection.[2] For most of American history, intestacy statutes

[2] Adam J. Hirsch, *American History of Inheritance Law*, *in* 3 Oxford International Encyclopedia of Legal History 235 (Apr. 26, 2007); Stanley N.

simply did not contemplate unmarried partners—the surviving spouse was the natural heir, and succession was organized around biological and marital kinship.[3] Unmarried partners appeared nowhere in this scheme, and that presumption continues to structure modern intestacy law in most states.[4]

2. *Absence of Intestacy Protections in Most Jurisdictions*

In the vast majority of states, if an unmarried cohabitant dies without a will, the surviving partner receives nothing.[5] Instead, the estate flows to children, parents, siblings, then distant relatives.[6] Only when no heirs exist does property escheat to the state.[7] Consider a long-term unmarried couple who shared finances and raised children together but never married. Upon death, the surviving partner may lose the family home, retirement savings, and life insurance proceeds—all passing to adult children from prior relationships, estranged parents, or relatives the deceased never knew. The survivor loses not only their partner but their economic security and often their means of supporting dependent children.

3. *Common Law Marriage Limited Protections*

Approximately eight states and the District of Columbia recognize common law marriage for couples meeting statutory requirements.[8] However, this provides only limited protection.[9] Proving common law marriage requires demonstrating cohabitation for a specified period, intent to marry, public recognition, and

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Katz, FSU College of Law, Public Law Research Paper No. 258 (Apr. 3, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=982428.

3 Vallera v. Vallera, 21 Cal. 2d 681, 684 (1943).

4 Cordelia S. Munroe, Marvin v. Marvin*: Five Years Later*, 65 Marq. L. Rev. 389 (1982).

5 Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49 (2015).

6 E. Garry Spitko, *Intestate Inheritance Rights for Unmarried Committed Partners: Lessons for U.S. Law Reform from the Scottish Experience*, 103 Iowa L. Rev. 2175 (2018).

7 Waggoner, *supra* note 5, at 68.

8 Kevin O'Flaherty, *Complete Guide to Which States Are Common Law Marriage States*, O'Flaherty Law (Mar. 28, 2024), https://www.oflaherty-law.com/learn-about-law/complete-guide-to-common-law-marriage-states.

9 Hirsch, *supra* note 2, at 237.

capacity[10]—disputes often arise only after death when one party, the decedent, cannot explain their intent.[11]

4. *State Variations of Domestic Partnership and Civil Union Frameworks*

Apart from recognizing common law marriages, beginning in the 1990s, progressive states started creating statutory alternatives to marriage. Vermont pioneered civil unions in 2000[12]; California expanded the rights of registered domestic partners with its Domestic Partnership Act in 2005.[13] These frameworks significantly improved unmarried couples' legal position, extending intestacy protections and spousal-like benefits. However, the patchwork approach created complications.[14] *Obergefell v. Hodges* rendered many frameworks obsolete,[15] though some states retain them for opposite-sex unmarried couples.[16]

5. Marvin v. Marvin *and Palimony Doctrine Limitations*

In *Marvin v. Marvin* in 1976, the California Supreme Court recognized that unmarried cohabitants could enforce explicit or implicit contracts regarding property division.[17] However, practical limitations proved substantial.[18] *Marvin* applies only to ongoing

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10 Deepti Singh, *Demystifying Common Law Marriage: Requirements You Need to Know and How It Is Different from Live-In Relationships*, Jus Corpus (2024), https://www.juscorpus.com/demystifying-common-law-marriage-requirements-you-need-to-know-and-how-it-is-different-from-live-in-relationships/.

11 Elizabeth Brake, *Marriage and Domestic Partnership*, Stanford Encyclopedia of Philosophy (Winter 2023 ed.), https://plato.stanford.edu/archives/win2023/entries/marriage/.

12 Barbara Cox, *But Why Not Marriage: Some Thoughts on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 Vt. L. Rev. 113-147 (2000).

13 Carol A. Docan & Richard F. Sperling, *California's Domestic Partnership Law: Incremental Progress or Dramatic Social Change?*, 14 Wm. & Mary J. Women & L. 153 (2007).

14 Inga Nelson, *Recognition of Civil Unions and Domestic Partnerships as Marriages in Same-Sex Marriage States*, 98 Minn. L. Rev. 1171 (2014).

15 Obergefell v. Hodges, 576 U.S. 644 (2015).

16 Engram Wilkinson, *Regulating Equality, Unequal Regulation: Life After* Obergefell, Yale J. on Reg. (May 27, 2018), https://www.yalejreg.com/bulletin/regulating-equality-unequal-regulation-life-after-obergefell/.

17 Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122 (1976).

18 Munroe, *supra* note 4.

relationships, requires proof of an agreement (difficult when that agreement is oral or implicit), and not all states embrace the doctrine.[19] Moreover, *Marvin* does not address intestacy—even if partners can prove contractual rights during a lifetime, this does not give surviving partners inheritance rights when the other dies without a will.[20]

B. LGBTQ+ Families*: Post-*Obergefell *Marriage Equality*

Obergefell v. Hodges fundamentally transformed the legal landscape by establishing constitutional marriage equality.[21] Same-sex married couples acquired full spousal inheritance rights, joint tax benefits, and comprehensive legal protections.[22]

However, *Obergefell* did not eliminate all vulnerabilities. Three categories of problems persist: (1) same-sex couples who have not married remain in positions similar to unmarried opposite-sex couples;[23] (2) marriage equality did not create full equality across all aspects of family law;[24] and (3) most significantly, *Obergefell* addressed only married couples, not inheritance and parentage issues facing non-married LGBTQ+ families, particularly involving non-biological parents or children born through assisted reproduction.[25]

C. *Assisted Reproduction Arrangements*

1. *Gestational Surrogacy: Parental Rights Establishment*

Approximately 18,400 infants were born through surrogacy in the United States in 2020, with the prevalence of surrogacy

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19 Anaya Nolan, *When Was Common Law Marriage Abolished?*, Lawshun (June 19, 2025), https://lawshun.com/article/when-was-common-law-marriage-abolished.

20 Patricia A. Cain, Marvin *Claims at Death*, 49 ACTEC L.J. 13 (Sept. 1, 2023).

21 *Obergefell*, 576 U.S. 644.

22 *Id.*

23 Lynn D. Wardle, *The Innocent Victims of* Obergefell, 14 Ave Maria L. Rev. 20 (2016).

24 Gregg Strauss, *What's Wrong with* Obergefell, 40 Cardozo L. Rev. 631 (2018).

25 Raymond C. O'Brien, Obergefell's *Impact on Functional Families*, 66 Cath. U. L. Rev. 363 (2017).

continuing to grow.[26] Gestational surrogacy creates profound legal uncertainties—at birth, the carrier is presumed to be the legal mother, and intended parents have no automatic legal status.[27] They must go through formal legal processes, often involving pre-birth parentage orders or post-birth adoption.[28]

Surrogacy laws vary dramatically across jurisdictions. Some states have comprehensive statutes streamlining intended parent status; others prohibit surrogacy or maintain limited frameworks; still others have no clear guidance.[29] These variations create substantial risks for families pursuing surrogacy in one jurisdiction and then relocating.[30]

2. *Sperm and Egg Donor Agreements: Intended vs. Biological Parents*

In standard practice, donors understand they will have no parental rights or obligations. This is supported by donor agreements and, in many states, statutory provisions.[31] However, protections are not uniform—donor agreements may not be enforceable in all contexts.[32] Questions arise whether donors might later claim parental rights or assert inheritance rights as biological parents. These issues have become more acute with proliferation of direct-to-consumer genetic testing, resulting in thousands of donor-conceived individuals discovering their biological origins.[33]

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26 Justo Aznar & Miriam Martínez Peris, *Gestational Surrogacy: Current View*, 86 Linacre Q. 56 (2019), https://doi.org/10.1177/0024363919830840.

27 Devon Quinn, *Her Belly, Their Baby: A Contract Solution for Surrogacy Agreements*, 26 J. L. & Pol'y 805, 806 (2018).

28 Taylor Paige Mutavdzic, *Legal Challenges Across State Lines: A Look into Surrogacy Law in the United States*, 16 J. Civ. L. Stud. 266, 271 (2024).

29 *Id*. at 266.

30 *Id*. at 267.

31 Maria E. Garcia, *In with New Families, out with Bad Law: Determining the Rights of Known Sperm Donors Through Intent-Based Written Agreements*, 21 Duke J. Gender L. & Pol'y 197 (2013).

32 *Id*. at 217 (illustrating that such agreements may be unenforceable where they conflict with state parentage statutes or public policy regarding child support obligations).

33 Maya Sabatello, *Regulating Gamete Donation in the U.S.: Ethical, Legal and Social Implications*, 4(3)Laws 352 (2015), https://doi.org/10.3390/laws4030352.

3. *Posthumous Reproduction and Inheritance Rights*

The use of a deceased person's frozen genetic material to create a child after death sparks novel questions regarding parentage and inheritance rights. The law governing posthumous reproduction is underdeveloped—most states have not explicitly addressed whether children born from deceased persons' genetic material are "children" under inheritance statutes, whether they have inheritance rights, and what consent requirements must be met.[34]

The Uniform Parentage Act (2017) includes provisions regarding posthumous reproduction, and several states have adopted them, but many jurisdictions have not addressed the issue, leaving it to case-by-case judicial determination.[35]

4. *Uniform Parentage Act (2017) Adoption Disparities*

The UPA (2017) aims to provide uniform rules regarding parentage, surrogacy, donor-conceived children, and related issues. However, state adoption has been inconsistent—only a handful of states had adopted the 2017 UPA in full as of the cutoff date.[36] This fragmentation perpetuates legal uncertainties and variations, leaving assisted reproduction families vulnerable to jurisdiction-dependent rules.

III. State-by-State Analysis: A Patchwork of Protections

A. *Progressive Jurisdictions*

California has long led in recognizing nontraditional families. The state enacted the first comprehensive domestic partnership statute in 1999, providing significant legal benefits.[37] California has comprehensive statutes addressing gestational surrogacy, donor-conceived children, and second-parent adoption.[38] The Family Code explicitly addresses parentage in surrogacy arrangements,

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34 Cassandra M. Ramey, *Inheritance Rights of Posthumously Conceived Children: A Plan for Nevada*, 17 Nev. L.J. 773 (2017).

35 *Id*. at 782.

36 *Id*. at 783.

37 Cal. Fam. Code §§ 297 - 299.6 (1999).

38 *Id*. at §§ 7960 – 7962 (2015).

allowing pre-birth parentage orders.[39] California has also moved toward recognizing multi-parent families—allowing children to have more than two legal parents in limited circumstances.[40]

New York has evolved significantly through statutory amendments. The state's adoption of the Domestic Relations Law permitting same-sex marriage in 2011 (pre-*Obergefell*) placed it at the vanguard of marriage equality.[41] More recently, New York has expanded assisted reproduction parentage recognition, adopted surrogacy protections, and broadened adoption law to be more inclusive.[42]

Massachusetts represents advancement through judicial decisions rather than comprehensive legislation. The Massachusetts Supreme Judicial Court pioneered marriage equality through *Goodridge v. Dept. of Public Health*, more than a decade before *Obergefell*.[43] While Massachusetts lacks a comprehensive statutory framework, its courts have consistently interpreted existing law expansively to recognize nontraditional families.[44]

B. *Restrictive Jurisdictions*

As previously stated, most states have constitutional amendments or statutory provisions explicitly limiting family recognition to married couples or biological relatives.[45] These restrictions were often adopted during same-sex marriage debates and framed as protecting traditional family definitions. These states maintain restrictive intestacy statutes providing no recognition for unmarried partners, often lack statutory surrogacy frameworks, and heavily restrict or prohibit second-parent adoption.[46]

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39 *Id*.

40 Kathy Minella, *Expanding Horizons: California Embraces Multi-Parent Families, Minella Law Group* (Aug. 29, 2024), https://minellalawgroup.com/blog/expanding-horizons-california-embraces-multi-parent-families/.

41 N.Y. Assembly Bill A08354, 2011-2012 Regular Session (2011).

42 *New York Passes the Marriage Equality Act, Allowing Same-Sex Couples to Marry*, Abrams Fensterman (June 24, 2011), https://www.abramslaw.com/media/announcements/new-york-passes-the-marriage-equality-act-allowing-same-sex-couples-to-marry/.

43 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

44 E.N.O. v. L.M.M., 711 N.E.2d 886, 892 (Mass. 1999), cert. denied, 528 U.S. 1005 (1999).

45 Munroe, *supra* note 4, at 390.

46 Craig Parker, *A Guide to Intestate Succession by State,* Trust & Will, https://trustandwill.com/learn/intestate-succession-by-state (last visited Nov. 20, 2025).

Several states maintain intestacy statutes that narrowly define "heirs" and "relatives" by requiring biological kinship or formal adoption.[47] They do not recognize functional family relationships—unmarried partners who raised children, stepparents who provided care but did not legally adopt, non-biological parents in same-sex relationships absent formal adoption. These jurisdictions typically lack statutory recognition of common law marriage, domestic partnerships, or civil unions.[48] These structural barriers in intestacy law create cascading practical problems for nontraditional families attempting to navigate probate administration and assert legal claims after a loved one's death.

IV. Inheritance Vulnerabilities in Nontraditional Families

A. *Intestate Succession Failures*

A significant gap in inheritance law involves the complete exclusion of unmarried partners from intestacy schemes. When an unmarried person dies without a will, the surviving partner receives nothing, regardless of relationship length or dependence.[49] A partner of twenty, thirty, or forty years has no greater inheritance right than a stranger.

Another critical vulnerability arises when non-biological parents lose custody and inheritance rights upon the death of their partner. If the biological parent dies without a will establishing the non-biological parent's rights, the non-biological parent may lose custody and have no inheritance rights. The child may be transferred to biological relatives, and the non-biological parent may have no legal standing to object.[50]

Children born through assisted reproductive technology face additional legal uncertainties regarding legitimacy and inheritance. Children born through assisted reproduction may face challenges to legitimacy or inheritance rights if parentage is not

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47 *Id.*

48 *Id.*

49 *Id.*

50 *See, e.g.,* Ray v. Ray, 83 S.W.3d 726, 732 (Tenn. Ct. App. 2001).

clearly established.[51] Without clear statutory protection, children's inheritance rights remain vulnerable to challenge.

The intersection of posthumous conception and pretermitted heir statutes creates further complications for modern families. Most states have pretermitted heir statutes for children born after will execution.[52] However, these typically apply only to children born to surviving parents—not children born through posthumous reproduction using deceased parents' genetic material.[53]

B. *Probate and Administration Complications*

State laws governing the priority of appointment for personal representatives create additional barriers for nontraditional families. If the deceased fails to name an executor, state law provides a priority list: spouse first, then children, parents, and lastly, siblings.[54] For nontraditional families, courts may appoint someone the deceased barely knew instead of the intended unmarried partner or non-biological family member.[55]

Unmarried partners and non-biological family members face further disadvantages in claims against estates, wrongful death actions, and survivor benefit eligibility. Spouses, children, parents, and siblings typically have standing to assert claims against estates.[56] However, unmarried partners and non-biological family members typically lack this standing, creating an imbalance.[57]

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51 Heather LaCount, *Dead Money: A Posthumously Conceived Child's Inheritance Rights Under the Social Security Act & State Intestacy Law*, 20 Suffolk J. Trial & App. Advoc. 11 (2015), https://dc.suffolk.edu/cgi/viewcontent.cgi?article=1362&context=jtaa-suffolk.

52 *See, e.g.,* N.H. Rev. Stat. § 551:10; 84 Okla. St. § 132; Tenn. Code Ann. § 32-3-103.

53 Kimberly E. Naguit, *Inadequacies of Missouri Intestacy Law: Addressing the Rights of Posthumously Conceived Children*, 74 Mo. L. Rev. (2009).

54 Mary Louise Fellows & Thomas P. Gallanis, *The Uniform Probate Code's New Intestacy and Class Gift Provisions*, 46 ACTEC L.J. 127 (2021).

55 *Who Has Priority in Appointment as Personal Representative if a Person Dies Without a Will?*, Bach, Jacobs & Byrne (Apr. 16, 2019), https://bach-elder-law.com/priority-appointment-personal-representative-person-dies-without-will/.

56 Marissa J. Holob, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 84 Cornell L. Rev. 1492 (1999).

57 *Id*. at 1505.

Similarly, workers' compensation death benefits typically apply only to spouses and children, leaving unmarried partners without recourse.[58]

V. Estate Planning Solutions: Mitigating Legal Risks

A. *Wills as Foundational Documents*

One of the primary advantages of a will is the ability to provide explicit identification of beneficiaries. A properly drafted will explicitly designates who will inherit and who will serve as executor.[59] For nontraditional families, wills should clearly identify intended beneficiaries and explain relationships—eliminating ambiguity, educating heirs and courts, and demonstrating knowledge and intention that helps defeat potential contests.[60]

Wills can also incorporate in terrorem, or no-contest, clauses as a deterrent against frivolous challenges. These provide that anyone challenging the will forfeits their inheritance.[61] While enforcement varies by state, properly drafted no-contest clauses can deter speculative challenges by disappointed heirs.[62]

Including explanation clauses within a will can further strengthen its validity against potential contests. Utilizing clauses that explicitly acknowledge a nontraditional family structure and explain testator choices demonstrate deliberate decision-making and provide powerful evidence supporting will validity in contests.[63]

Despite these advantages, wills have significant limitations that testators should understand. Although wills offer utility, they

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58 *Who Has Priority in Appointment as Personal Representative if a Person Dies Without a Will?*, *supra* note 55.

59 Stephen L. Ferszt, *Courts Reiterate: Beneficiary Designation Review Is Critical for Estate and Retirement Planning*, Olshan Frome Wolosky (Aug. 20, 2024), https://www.olshanlaw.com/media/news/1111_NYLJ%20-%20Courts%20Reiterate%20-%20Beneficiary%20Designation%20Review.pdf.

60 *Id*.

61 W. Harry Jack, *No-Contest or in Terrorem Clauses in Wills - Construction and Enforcement*, 19 Sw. L.J. 722 (1965).

62 Elizabeth Marcuccio, *In Terrorem Clauses: Under What Circumstances Are They Triggered*, 43 N.E. J. Legal Stud. 118, 123 (Aug. 1, 2023).

63 Karen J. Sneddon, *Dead Men (and Women) Should Tell Tales: Narrative, Intent, and the Construction of Wills*, 46 ACTEC L.J. 239, 254 (2021).

have significant limitations. They are subject to probate (expenses, time, and public viewing) and contest by interested persons, and provide no protection during the testator's lifetime or decision-making authority during incapacity.[64]

B. *Revocable Living Trusts*

Revocable trusts offer significant advantages in probate avoidance and enhanced privacy for estate planning. Revocable trusts avoid probate because property is held in trust at death and does not pass through probate.[65] The successor trustee takes control and distributes according to trust terms, dramatically reducing expenses and delays.[66] Additionally, trusts provide privacy—the document is not filed with courts or made public.[67]

Revocable trusts also serve as powerful tools for incapacity planning, particularly for nontraditional families. If the settlor becomes incapacitated, the successor trustee can immediately take control without need for conservatorship proceedings.[68] For nontraditional families, unmarried partners can be designated as successor trustees and immediately assume management without court proceedings or biological relatives' approval.[69]

Despite these advantages, revocable trusts are subject to critical funding requirements that settlors must understand. Trusts are effective only for property transferred into them.[70] Settlors must "fund" the trust by transferring property (real estate, bank accounts, brokerage accounts, etc.) into the trust's name.[71] Failure

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64 Robert Whitman, *Providing Information to Beneficiaries (with Sample Forms)*, Faculty Articles & Papers 55 (2009), https://opencommons.uconn.edu/law_papers/55.

65 David Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*. 24 Elder L.J. 1, 31 (2016).

66 *Id*. at 10.

67 *Id*. at 16.

68 *Id*. at 27.

69 Richard Ausness, *Keeping It in the Family: The Pitfalls of Naming a Family Member as a Trustee*, 34 J. Am. Acad. Matrim. Law. 1, 32 (2021).

70 Jennifer Zelvin McCloskey, *A Trust Without Funding Is Just Paper: Avoid These Common Mistakes*, Univ. of Del. (2025), https://www.udel.edu/alumni-friends/stories/2025/pitfalls-of-not-funding-trust/.

71 *Id*.

to fund defeats the purpose. "Pour-over wills" ensure overlooked or acquired property passes according to trust terms.[72]

C. *Beneficiary Designations*

Life insurance policies serve as valuable inheritance vehicles that can benefit nontraditional families. Life insurance passes directly to named beneficiaries outside probate.[73] Unmarried partners can be named as beneficiaries, ensuring they receive substantial assets even if intestacy would provide nothing.[74]

Retirement accounts offer similar benefits but require careful consideration of recent legislative changes and their tax implications. Retirement accounts pass directly to named beneficiaries.[75] However, the SECURE Act of 2020 significantly altered tax treatment for non-spouse beneficiaries—most must now distribute the entire account within ten years, losing tax benefits spousal beneficiaries retain.[76]

Transfer-on-death and payable-on-death accounts provide another mechanism for passing assets outside of probate to chosen beneficiaries. TOD and POD designations allow beneficiaries to receive accounts upon death without probate, providing surviving partners immediate access to liquid assets.[77] However, these designations must comply with formalities such as recording prior to death and naming beneficiaries explicitly.[78] Also, beneficiary designations supersede anything stated in a will; if there is inconsistency,

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72 Feder & Sitkoff, *supra* note 65, at 18.

73 Jill M. Bisco, Suzanne Gradisher & Jinjing Wang, *Life Insurance Beneficiaries – Per Capita vs. Per Stirpes: Is It Really That Clear?,* 50 J. Ins. Reg. 3, 8 (2023).

74 *Id*.

75 Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. Rev. 165, 203 (2014).

76 Sarah J. Brownlow & Scott W. Masselli, *Federal Tax Update: Final Regulations Bring Clarity and Continued Questions for the SECURE Act and Estate Property Basis Consistency Reporting*, 45 NAEPC J. 1 (Oct. 2024), https://www.naepcjournal.org/issue/45/federal-tax-update-secure-act-and-estate-property-basis-consistency-reporting/.

77 Natalie M. Perry & Rebecca Wallenfelsz, *Pitfalls of Pay on Death (POD) Accounts, ACTEC Estate Planning Essentials* (video)(2026), https://www.actec.org/resource-center/video/pitfalls-of-pay-on-death-accounts-pod/.

78 *Id*.

the named beneficiary on the TOD/POD will receive the property, even if it is not what the testator ultimately wanted.[79]

To maximize effectiveness, all beneficiary designation tools must be carefully coordinated with the overall estate plan. Beneficiary designation tools are most effective when coordinated with overall estate plans to ensure internal consistency and rational asset distribution.[80]

D. *Joint Ownership Strategies*

1. *Joint Tenancy with Right of Survivorship*

Joint tenancy with right of survivorship is a form of property ownership in which two or more people own property together, and when one owner dies, the other owner(s) automatically inherit(s) the deceased owner's share.[81] This occurs outside the probate process and overrides any contrary provisions in the deceased owner's will.[82]

Joint tenancy can be a valuable tool for ensuring that an unmarried partner inherits property.[83] For example, a real estate property can be titled in "Jo and Taylor as joint tenants with right of survivorship," ensuring that upon Jo's death, Taylor automatically owns the entire property.

However, joint tenancy has several disadvantages and risks. First, it creates gift tax implications—transferring property into joint tenancy is a taxable gift (though it may fall within annual gift tax exclusions).[84] Second, joint tenancy creates creditor exposure—creditors of either joint tenant can potentially attach or levy against jointly held property, even if the creditor's claim is against

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79 *Id*.

80 *Id*.

81 Jennifer Hendry, *'Leaving Nothing to Chance'?: Joint Tenancies, the 'Right' of Survivorship and Unilateral Severance,* 8 Oxford U. Commw. L.J. 45 (2008).

82 Timothy P. O'Sullivan, *Avoiding Probate*, CPA J. Online (Dec. 1994), http://archives.cpajournal.com/old/16531680.htm.

83 *Id*.

84 Sandra Sickler, *Use Joint Tenancy Only with Extreme Caution*, 1 Marquette Elder's Advisor 35 (2012), https://scholarship.law.marquette.edu/elders/vol1/iss2/8.

only one tenant.[85] Third, joint tenancy does not provide estate tax advantages—the deceased joint tenant's interest is included in the estate for federal and state estate tax purposes.[86] Lastly, joint ownership can create complications for Medicaid planning.[87] If an elderly or ill person is attempting to preserve assets for Medicaid eligibility (which has asset limits such as the five-year look back period),[88] placing assets in joint tenancy with a family member can disqualify the person from benefits because the joint tenant's presence makes the assets appear to be available to the Medicaid applicant.[89]

2. *Tenancy by the Entirety Alternatives for Unmarried Partners*

"Tenancy by the entirety" is a form of joint ownership available *only* to married couples in many states.[90] Tenancy by the entirety provides greater creditor protection and other benefits than joint tenancy.[91]

However, because tenancy by the entirety is generally limited to married couples, unmarried partners cannot use this form of ownership.[92] Some progressive states have created alternatives—such as "registered domestic partnership with tenancy by the entirety" rights—but these are available only in limited jurisdictions.[93]

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85 *Id*. at 36.

86 *Id*.

87 *Be Aware: Joint Tenancy Holds Risks and Medicaid Disadvantages*, Iowa Prob. Litig. (May 31, 2022), https://iowaprobatelitigation.com/be-aware-joint-tenancy-holds-risks-and-medicaid-disadvantages/.

88 *Understanding Look-Back Period for Medicaid*, Paying for Senior Care, https://www.payingforseniorcare.com/medicaid/look-back-period (last visited Nov. 30, 2025).

89 *Id*.

90 Julie M. Cheslik, *Tenancy by the Entirety Property and Transfers to Trusts*, 36 J. Am. Acad. Matrim. Law. 33, 36 (2023).

91 *Id*. at 37.

92 Damaris Rosich-Schwartz, *Tenancy by the Entirety: The Traditional Version of the Tenancy Is the Best Alternative for Married Couples, Common Law Marriages, and Same-Sex Partnerships*, 84 N.D. L. Rev. 23 (2008).

93 *Tenancy by the Entirety States*, Asset Protection Planners, https://www.assetprotectionplanners.com/tenancy-entirety-states/ (last visited Nov. 30, 2025).

E. *Advance Directives and Powers of Attorney*

Advance directive tools become essential for unmarried partners so they can make decisions that follow the wishes of their partner in the event they become incapacitated. Such tools include Healthcare Proxy Designations, Financial Powers of Attorney, HIPAA Authorizations, and Disposition of Remains Directives.

Healthcare proxy designations assign someone to make medical decisions if the creator becomes unable.[94] For nontraditional families, healthcare proxies are essential to ensure unmarried partners can make crucial medical decisions.[95] Financial Powers of Attorney grant financial authority to act on the creator's behalf, allowing unmarried partners to manage finances without conservatorship proceedings.[96] HIPAA authorizations explicitly authorize medical providers to disclose medical information to unmarried partners and allow participation in medical decisions.[97] Disposition of remains directives specify funeral arrangements, cremation, and disposition of remains wishes, ensuring unmarried partners can participate in funeral decisions.[98] Some states provide statutory requirements and suggested language to use when creating disposition of remains directives, which can be essential to avoid legal liability.[99]

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94 Sophie Trarieux-Signol, Stéphane Moreau, Marie-Pierre Gourin, Amélie Penot, Geoffroy Edoux de Lafont, Pierre-Marie Preux & Dominique Bordessoule, *Factors Associated with the Designation of a Health Care Proxy and Writing Advance Directives for Patients Suffering from Haematological Malignancies*, 13 BMC Palliative Care 57 (Dec. 11, 2014).

95 *Id*.

96 Anisa Mohanty, Comment, *Medical Rights for Same-Sex Couples and Rainbow Families*, 13 Rich. J. L. & Pub. Int. 367, 371 (2010).

97 *Id*. at 372.

98 Catherine Read, *How and Why to Direct Disposition of Your Last Remains*, EAELS Blog, https://www.eaels.com/blog/how-and-why-to-direct-disposition-of-your-last-remains (last visited Nov. 20, 2025).

99 *Id*. *See also* Paloma Holloman, *Overlooked but Inevitable: Thoroughly Planning for the Disposition of Remains*, Dallas County Bar Association, https://www.dcba.org/mpage/v38-Paloma-Holloman (last visited Nov. 20, 2025); Lawrence Kamin, LLC, *Over My Dead Body: The Role of the Illinois Disposition of Remains Act in Disputes over a Decedent's Remains* (2019), https://www.lawrencekaminlaw.com/wp-content/uploads/2019/11/Over-My-Dead-Body-Illinois-Disposition-of-Remains-Act.pdf.

VI. Recent Legal Developments and Their Impact

A. *Landmark Judicial Decisions (2015-2025)*

1. Obergefell v. Hodges *(2015): Marriage Equality Foundations*

Obergefell v. Hodges stands as the holy grail moment for LGBTQ+ families. The U.S. Supreme Court held that the constitutional right to liberty and due process includes the right to marry, and that states cannot deny this right based on the couple's sexual orientation.[100] As a result, same-sex marriage became legal nationwide.

The immediate impact was transformative. Millions of same-sex couples who had lived without the legal right to marry suddenly gained the ability to access to full marital status.[101] The inheritance implications were profound: unmarried same-sex couples could become married couples with all spousal rights, including intestacy protections, spousal elective share rights, and the bundle of tax and financial benefits that accompany marital status.[102]

However, *Obergefell*'s impact was not unlimited. The decision addressed the right to marry but did not address all family law questions.[103] Non-married LGBTQ+ families, families using assisted reproduction, and other nontraditional family forms continued to face vulnerabilities not addressed by Obergefell.[104]

Additionally, the Supreme Court recently declined to hear Kim Davis's petition asking the justices to overturn the 2015 *Obergefell v. Hodges* ruling, effectively disallowing clerks from undermining marriage equality by refusing to issue marriage licenses based on the clerk's personal religious beliefs.[105]

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100 *Obergefell*, 576 U.S. 681.

101 Angela K. Perone, *Health Implications of the Supreme Court's* Obergefell vs. Hodges *Marriage Equality Decision*, 2 LGBT Health 196 (2015).

102 *Id*.

103 Marisa S. Fein, *An Inequitable Means to an Equitable End: Why Current Legal Processes Available to Non-Biological, LGBTQ+ Parents Fail to Live up to* Obergefell v. Hodges, 14 Drexel L. Rev. 165, 175 (2022).

104 *Id*. at 168.

105 Evrim Ağaci, *Supreme Court Leaves Same-Sex Marriage Rights Intact*, (Nov. 10, 2025), https://evrimagaci.org/gpt/supreme-court-leaves-same-sex-marriage-rights-intact-515942.

2. Pavan v. Smith *(2017): Birth Certificate Equal Treatment*

Following *Obergefell*, a secondary question arose: must states list both same-sex spouses on birth certificates for children born to the marriage? In *Pavan v. Smith*, the Supreme Court held that the answer was yes.[106] States cannot limit birth certificate listing to opposite-sex parents; both parents in a same-sex marriage must be listed on the birth certificate if they are the legal parents.[107]

The practical implications are significant. Children born to same-sex married couples now have birth certificates that clearly identify both parents, facilitating inheritance rights, tax benefits, and other parentage-based rights.[108] This provides certainty regarding parentage and eliminates questions about whether children born to same-sex couples have the same inheritance status as children born to opposite-sex couples.[109]

3. Bostock v. Clayton County *(2020): Sexual Orientation and Gender Identity Discrimination*

The Supreme Court held that Title VII of the Civil Rights Act of 1964 protects employees against discrimination on the basis of sexual orientation or gender identity.[110] The Court ruled that an employer who fires an individual merely for being gay or transgender violates Title VII.[111] The Court's reasoning that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex" has implications for other civil rights statutes.[112]

The ruling provides federal employment discrimination protection for LGBTQ+ individuals in all fifty states and has had far-reaching effects beyond employment law, with more than 250 cases citing *Bostock* in the two years following the decision.[113] This

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106 Pavan v. Smith, 582 U.S. 563, 564 (2017).

107 *Id*.

108 Brad Aldridge, *A Constellation of Benefits and a Universe of Equal Protection: The Extension of the Right to Marry Under* Pavan v. Smith, 72 Ark. L. Rev. 245 (2019).

109 *Id*.

110 Bostock v. Clayton Cnty., 590 U.S. 644, 683 (2020).

111 *Id*. at 644.

112 *Id*. at 660.

113 Evan Parness & Abby Rickeman, *Where Anti-Discrimination Law Stands 4 Years After* Bostock, Covington (June 13, 2024), https://www.cov.com/-/media/

decision highlights how recognition of LGBTQ+ rights under federal employment law may influence closing family law gaps and expanding inheritance protections for nontraditional families by reinforcing broader principles of equality and nondiscrimination.

4. *State Supreme Court Decisions on Parentage and Inheritance*

Beyond the Supreme Court, many state supreme courts have issued important decisions regarding parentage and inheritance for nontraditional families.[114] These decisions have progressively expanded recognition of non-biological parents, children born through assisted reproduction, and other nontraditional family structures.[115]

B. *Statutory Reform: Uniform Parentage Act (2017)*

The Uniform Parentage Act (2017) represents the most comprehensive effort to modernize parentage law across jurisdictions.[116] The Act provides uniform rules regarding presumptions of parentage, assisted reproduction, recognition of multiple parents, parentage proceedings, and registration of parentage orders.[117] The 2017 Act incorporates contemporary family structures and modern reproductive technology in ways that earlier versions did not.[118] However, adoption has been limited. Eight states have adopted the 2017 UPA in full, while some states have applied portions of the Uniform Act, and many states have never adopted it at all.[119] This patchwork causes families to face continued uncertainty

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files/corporate/publications/2024/06/where-anti-discrimination-law-stands-4-years-after-bostock.pdf.

114 Ally Nicol, *The Newclear Family: The Broadening Recognition of Non-Traditional Families and Where to Draw the Line*, 5 J. Inequality Inquiry 1 (2018), https://scholarship.law.umn.edu/jii/5.

115 *Id*. *See also* Allison K. Dudley, *The Legal Stranger: Colorado's Two-Legal-Parent Limit Leaves Nontraditional Families Behind*, 94 Colo. L. Rev. 1 (2023).

116 AAML Legislation Committee, *A Report on the Uniform Parentage Act (UPA 2017): Developments in State Law Regarding the Rights of Children*, 37 J. Am. Acad. Matrim. Law. 1 (2024).

117 *Id*. at 5.

118 *Id*.

119 *Id*. at 4.

regarding parentage determinations, particularly in assisted reproduction cases.[120]

C. *Tax Law Changes: Estate and Gift Tax Exemption Levels*

Federal estate and gift taxes impose significant taxes on large estates.[121] However, a substantial exemption exists: estates smaller than the exemption threshold ($13.99 million for 2023) are not subject to federal estate tax.[122]

This exemption applies to married couples and unmarried partners.[123] However, married couples can benefit from "portability"—the ability to combine both spouses' exemptions, effectively doubling the exemption.[124] Unmarried partners cannot do this; each partner has only a single exemption.[125]

For high-net-worth unmarried couples, this creates a disadvantage.[126] Upon the first partner's death, their unused exemption is lost, not carried forward.[127] This can result in unnecessary estate taxes for surviving partners who inherit a large estate.

D. *Emerging Issues*

1. *Multi-Parent Recognition Statutes (California and Maine)*

California and Maine have enacted statutes permitting more than two legal parents in limited circumstances, representing a radical departure from traditional family law with significant inheritance implications.[128] However, these statutes remain available

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120 *Id*. at 10.

121 Kim D. Fetrow, *Estate and Trust Planning and Basic Death Tax Concepts*, Heckscher, Teillon, Terrill & Sager, P.C. (May 10, 2023), https://pasef.provost.upenn.edu/wp-content/uploads/Estate-Tax-and-Planning-Concepts-2023-outline-02314068-2x9CCE7-1.pdf.

122 *Id*. at 11.

123 Patricia A. Cain, *Taxation of Unmarried Partners*, 99 Wash. U. L. Rev. 1931 (2022).

124 Fetrow, *supra* note 121, at 10.

125 Cain, *supra* note 123, at 11.

126 *Id*. at 5.

127 *Id*. at 13.

128 Colleen M. Quinn, *Mom, Mommy & Daddy and Daddy, Dad & Mommy: Assisted Reproductive Technologies & the Evolving Legal Recognition of Tri-Parenting* 31 J. Am. Acad. Matrim. Law. 175, 180 (2018).

only in the few states that have enacted them, creating continued variation across jurisdictions.[129]

2. *Cryptocurrency and Digital Asset Inheritance*

The rise of cryptocurrency and other digital assets creates novel inheritance questions.[130] How are digital assets transferred at death? How does an executor gain access to cryptocurrency held by the deceased? What if the deceased's private keys are lost?

Almost all states have enacted a version of the Revised Uniform Fiduciary Access to Digital Assets Law, developed by the National Conference of Commissioners on Uniform State Laws,[131] in order to address uncertainties for families with significant digital assets to avoid substantial losses when digital assets cannot be recovered or transferred at death. This uniform law permits executors and trustees to access the decedent's (or an incapacitated person's) digital assets.

3. *Gestational Carrier Compensation and Inheritance Rights*

As gestational surrogacy has become more common, questions have arisen regarding the legal status of gestational carriers and their potential rights or obligations regarding children born through surrogacy.[132] Additionally, questions arise regarding compensation to carriers—whether payments to gestational carriers constitute illegal payment for "lending" their womb or legitimate compensation for services rendered.[133] These questions remain contested in some jurisdictions and continue to evolve as more states address surrogacy law.[134]

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129 Courtney G. Joslin & Douglas NeJaime, *Multiparenthood*, 99 N.Y.U. L. Rev. 1242 (2024).

130 Ágnes Juhász, *Inheriting Digital Assets – A Glimpse into the Future*, 14 Jurid. Tribune – Rev. Comp. & Int'l L. 547 (Dec. 2024), https://www.tribunajuridica.eu/arhiva/y14v4/2.pdf.

131 Victoria J. Haneman, *The Law of Digital Resurrection*, 66 B.C. L. Rev. 1569, 1592–93 (2025).

132 Mutavdzic, *supra* note 28, at 268.

133 Evelina Manvelyan, Abha Rajendra Sathe, David Paul Lindars & Lusine Aghajanova, *Navigating the Gestational Surrogacy Seas: The Legalities and Complexities of Gestational Carrier Services*, J. Assisted Reprod. & Genetics (Oct. 23, 2024), https://pmc.ncbi.nlm.nih.gov/articles/PMC11621256/.

134 Mutavdzic, *supra* note 28, at 273.

VII. Best Practices and Recommendations

A. *For Practitioners*

1. *Comprehensive Client Intake Addressing Family Structure*

Estate planning attorneys should implement intake procedures that explicitly address the client's family structure.[135] Rather than assuming traditional family arrangements, the intake should ask:

a. Are you married? If not, are you in a committed partnership?
b. Do you have children? Are they biological children, adopted children, or stepchildren?
c. Have you used assisted reproduction technologies?
d. Who do you consider your "family"—people to whom you wish to leave property or who should make decisions on your behalf?
e. Who are your blood relatives, and do you wish to leave property to them or to exclude them?

This comprehensive intake ensures that the attorney understands the client's actual family structure and can provide appropriate planning.[136]

2. *Other Regular Practices to Implement*

For families with members living in multiple states, it is important to include choice of law provisions and consider the potential for relocation.[137] Estate planning documents should be reviewed every three to five years and after major life events, and collaboration with family law attorneys is essential for matters involving adoption, assisted reproduction parentage, and other complex family issues.[138]

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135 *Planning for Blended Families: From Intake to Administration*, WealthCounsel (Nov. 11, 2025), https://info.wealthcounsel.com/blog/planning-for-blended-families-from-intake-to-administration.

136 *Id.*

137 *Id.*

138 *Id.*

B. *For Nontraditional Families*

Since relationships are not always automatically recognized, marriage can provide many protections. However, marriage is not the preferred option for all nontraditional families, so families should take proactive steps through clear estate planning documents, legal recognition where available, and explicit agreements.

Comprehensive planning involves using multiple instruments such as wills or trusts, healthcare proxies, powers of attorney, disposition directives, beneficiary designations, and other legal recognition documents.[139] Also, open communication with family members can help reduce conflict and misunderstanding after death.[140] Estate plans should also be reviewed regularly—particularly after major life events such as forming or ending a partnership, adopting or having a child, significant financial changes, relocation, or major legal developments.[141]

VIII. Conclusion

Families today are endlessly creative, but the law is stuck clutching their 1950s pearls—shocked by love's bold new forms. Nontraditional families face legal uncertainty, navigating a patchwork of state laws that favor biology and marriage while ignoring bonds built on choice, care, and shared life. Because intestacy laws still echo mid-century ideals, these families must plan carefully to build their own legal protections. Estate planning becomes both practical and rebellious, using wills, trusts, healthcare proxies, and beneficiary designations to secure futures.

But this planning is not without costs. Nontraditional families invest time, money, and emotional energy crafting protections that married couples get automatically. They wrestle with confusing, inconsistent laws and must constantly keep their plans updated as the legal landscape shifts. Still, planning provides stability when

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139 Bill O'Leary, *Planning for Blended Families: From Intake to Administration*, Legacy Planning Law Group (Mar. 13, 2024), https://legacyplanninglawgroup.com/estate-planning-for-non-traditional-families/.

140 Daniel Rodríguez, *Estate Planning for Non-Traditional Families*, Legal Norcal, https://legalnorcal.com/estate-planning-non-traditional-families/" \t "_blank (last visited Feb. 2, 2026).

141 *Id*.

the law falls short, turning uncertainty into security—making sure intentions drive outcomes.

Even the best planning cannot erase structural unfairness. When family legitimacy depends on legal documents instead of recognition, the message is clear: family status remains conditional. True equality requires reforms—laws and court rulings that grant automatic rights to diverse family types. Updated adoption laws, modern intestacy rules, and universal parentage recognition would replace patchwork fixes with consistent justice so families are not forced to prove their worthiness to the system that should protect them.

Right now, nontraditional families face two futures: one of complex legal workarounds and one shaped by meaningful reform. The wisest path is a blend of both—planning while pushing for laws that make those plans unnecessary. After all, family law should protect relationships grounded in love and care, not just those fitting old molds. Until the law drops those pearls and looks ahead, careful planning is both a shield and a statement—a testament to families whose legitimacy lasts, even if the laws do not catch up.

Rebekah Arwood

Comment, Valuing Trusts During Divorce Proceedings

Arguably, the most tedious part of a divorce proceedings is the division of assets. When two people get married, they economically become one unit.[1] In most states, assets and income obtained during marriage are generally presumed to be marital property, regardless of whose name appears on the account or title.[2] This means that family attorneys spend enormous amounts of time scavenging through bank accounts, retirement accounts, debts, investments, and other financial records, to piece together all assets and debts a couple possesses.

Another layer of challenge can be added when one or both of the parties have property inside a trust. This could be a trust that the parties entered into together, a trust one of the parties made during or before marriage, or a trust in which one of the parties is a beneficiary. The trusts must be valued, then a determination must be made whether the property inside the trust is marital, nonmarital, or a combination of the two. The courts take into consideration the type of trust, who the grantor and beneficiaries are, the method of distributions, and the amount of marital property, in order to divide the assets inside of the trust.[3] Trusts are becoming increasingly common, especially as "gray divorces" (spouses sixty five and older) have significantly increased in the past decade (meaning more divorces will involve parties who have estate plans).[4] Therefore family attorneys are going to need to pay particular attention to how trusts are divided during divorces.

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1 *See* Nicole K. Levy, *Nine Ways Marriage Changes Your Legal Rights and Responsibilities*, Lynch & Owens P.C. (Jan. 21, 2019) https://www.lynchowens.com/blog/2019/january/nine-ways-marriage-changes-your-legal-rights-and/.

2 *See Who Gets What? Dividing Property and Sharing Debts,* 42 Fam. Advoc. 19 (2019), https://advance.lexis.com/api/permalink/267ce0ee-afd9-4c00-89b2-c2904f160ce1/?context=1000516.

3 Deborah Rysso, *Know Thy Trust: A Plain English Guide to Orchestrating Assets in Divorce Cases* 38 Fam. Advoc. 6 (2015). This presumption is subject to exceptions, such as property acquired by gift or inheritance, depending on the state's marital property laws.

4 Catherine Pearson, *Older Adults Are No Longer Staying in 'Empty Shell' Marriages*, N.Y. Times (June 22, 2026), https://www.nytimes.com/2026/06/22/well/family/gray-divorce-empty-shell-marriage.html.

Part I of this Comment will discuss the basics of property division including the methods and determinations of property. Part II then addresses the basics of trusts, including the actors involved and the different types of common trusts. Part III of this Comment will examine the different methods courts use to value trusts and apply those values to property division. In Part IV, the Comment will explain how courts determine marital and non-marital property when it comes to trust division.

I. Property Division Methods

A. *Equitable Distribution and Community Property*

The method of property division is typically established by statute.[5] The most common type of property division is equitable distribution, used by forty-one of the states and the District of Columbia.[6] In equitable distribution states, the goal is to ensure that the division of property is equitable, not necessarily equal; however, most states start with a rebuttable presumption of a 50/50 divide.[7] For example, in determinations of whether to depart from the presumed equal division, in Arkansas courts may consider the following factors:

> The length of the marriage; Age, health, and station in life of the parties; Occupations . . .; Amount and sources of income; Vocation skills; Employability; Estate, liabilities, and needs of each party . . .; Contribution of each party in acquisition preservation; [and t]he federal income tax consequences of the court's division of property.[8]

The other type of property distribution is termed community property. Community property views marriage as a "joint

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5 Margaret Ryznar, *All's Fair in Love and War: But What About in Divorce?; The Fairness of Property Division in American and English Big Money Divorce Cases,* 86 N.D.L. Rev. 115, 119 (2010), https://advance.lexis.com/api/permalink/c24e8f08-3692-4f69-b253-578c6e5b05d7/?context=1000516

6 *Community Property vs. Equitable Distribution: A State-by-State Guide for Advisors*, Institute of Business & Finance (Mar. 22, 2026), https://icfs.com/specialists-desk/community-property-equitable-distribution. *See also* Ryznar, *supra* note 5, at 119.

7 Ryznar, s*upra* note 5, at 119*; see, e.g.,* Ark. Code § 9-12-315 (a)(1)(A)(i)–(ix).

8 Ark. Code § 9-12-315(a)(1)(A)(i)–(ix).

undertaking in which both spouses are equal partners."[9] This means that all property obtained during the marriage belongs to the marital community. [10] In community property states, all of the marital community property will be divided evenly during a divorce proceeding.[11]

Five states, including Alaska, Florida, Kentucky, South Dakota, and Tennessee, allow couples to opt-in to community property ownership of marital assets, and, if they do, those couples' property will be divided using community property distribution rules instead of the state's presumed equitable distribution.[12]

B. *Marital and Non-Marital Assets*

During property division, the spouses' assets will be classified as either marital or non-marital. Marital property is every asset or income the parties have obtained since they entered into marriage.[13] However, the presumption that said property is marital is rebuttable.[14] Property that is considered non-marital is all the assets the individuial owned prior to entering the marriage, as well as all gifts, bequests, devises, descents, and inheritance obtained after the marriage.[15] Classifying certain assets as marital or separate property can involve complex legal determinations. Categorizing specific property types is not always a straightforward process.

Property that was once non-marital can become, at least partially, marital due to commingling or transmutation.[16] Commingling happens when property of one characteristic is combined with property of another characteristics.[17] For example, if one spouse

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9 *Community Proper vs. Equitable Distribution in Property Division Law,* Justia (Sept. 2025), https://www.justia.com/family/divorce/dividing-money-and-property/community-property-vs-equitable-distribution-divorce/.

10 Anthony J. Pagano, Valuations and Distribution of Marital Property ch. 20 (Grace Ganz Blumberg ed., 1996) (1998), https://advance.lexis.com/api/permalink/48bea798-12ca-4752-825f-99616b9c0550/?context=1000516.

11 *See Who Gets What? Dividing Property and Sharing Debts*, *supra* note 2.

12 Ryznar, *supra* note 5, at 141.

13 *Marital Property*, Legal Information Institute, https://www.law.cornell.edu/wex/marital_property (last visited Sept. 14, 2026).

14 *See* Keith Herman, *How to Protect Trust Assets From a Beneficiary's Divorce,* 63 J. Mo. B. 228, 229 (2007).

15 *See id.*

16 *See Who Gets What? Dividing Property and Sharing debts, supra* note 2.

17 *See* Herman, *supra* note 14, at 229.

purchases a home prior to marriage, but uses marital income to pay the mortgage, then the asset has become commingled.[18] Courts have different methods that can be used to determine the marital and non-marital amounts of the property and divide them accordingly.[19] Transmutation happens when one of the spouses changes the character of their non-marital property.[20] For example, the spouse adds the other spouse to the deed of their non-marital property.[21] This act would change the property from non-marital to marital. The assets that are determined to be non-marital will be left out of the division of property process, and only those determined marital will be taken into account for the asset and debt equalization.[22]

II. Trusts

Trusts can cause another level of difficulty when it comes to dividing property. This could be a trust that one party created either prior to or during marriage, a trust that both parties created together, or a trust made by a third party, where only one of the spouses is a beneficiary. The type of trust may also have an effect on its ability to be determined as marital property or its divisibility.[23] Thus, it is important that family attorneys clearly read all provisions of the trusts to determine how, if at all, the property can be dividing during a divorce proceeding, and if necessary, reach out to an estate law attorney.[24]

A trust is a part of a greater estate plan that can accomplish many different goals.[25] Divorcing spouses' roles in a trust are important to how the trusts are classified as marital vs. non-marital,

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18 *See* Anita Ventrelli & Michele Jochner, *Home Is Where the Heart Is? Legal and Practical Strategies for Navigating Real Property in Divorce,* 48 Fam. Advoc. 9 (2026).

19 *See Who Gets What? Dividing Property and Sharing debts, supra* note 2.

20 *See* Herman, *supra* note 14, at 229.

21 *See Separate vs. Marital Assets Under Property Division Law*, Justia (Aug. 2026), https://www.justia.com/family/divorce/dividing-money-and-property/separate-vs-marital-property-in-divorce/ (last visited----)

22 *See* Mark Strasser, *Dividing Up the Marital Home,* 49 S. Ill. U.L.J. 17, 18 (2024).

23 *See* Herman, *supra* note 14, at 229.

24 *Id.*

25 Rysso, *supra* note 3, at 6–7.

as well as how they are divided.[26] The grantor is the person who makes the trust.[27] The grantor will determine who the trustee and successor trustee are, as well as designate who the beneficiaries will be.[28] The grantor then has to fund the trust by transferring assets into the trust, such as deeding real property to the trust.[29] Once the grantor creates the trust and funds it, the grantor conveys the property to a trustee who is a fiduciary to the beneficiaries.[30] A trustee is someone who takes legal title of the assets within the trust, which allows the trustee to communicate with third parties about the assets held in trust.[31] The trustee has a duty to manage the terms of the trust including distributions.[32] Beneficiaries hold equitable title to the assets inside the trust, and therefore they have the ability to hold the trustee liable for lack of performance of their duties.[33] Beneficiaries can be lifetime, meaning people who receive distributions during the lifetime of the grantor, or at-death, meaning they receive distributions after the death of the grantor.[34] A person, or even spouses acting together, may be hold three roles in a trust; the grantor, trustee, and beneficiary, or any two combination of the roles. One spouse may also be a trustee and/or beneficiary of a third party's trust. The role that the spouse or spouses hold in a trust is critical in determining the interest they have in the trust for property division purposes.

Trusts may be living trusts, meaning they are created and operated during the grantor's lifetime.[35] Trusts can also be testamentary, meaning they are part of the grantor's will and testament.[36] Living trusts are revocable, meaning that the grantor can change or

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26 *Id.* at 7.

27 *Glossary of Estate Planning Terms,* ABA, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate-planning/glossary/ (last visited Sept. 1, 2026).

28 Rysso, *supra* note 3, at 6.

29 *Id.* at 7.

30 Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts, and Estates 395 (11th ed. 2022).

31 *Id.*

32 *Glossary of Estate Planning Terms, supra* note 27.

33 Sitkoff & Dukeminier, *supra* note 30, at 395.

34 Rysso, *supra* note 3, at 6.

35 *Id.* at 7.

36 *Id.*

revoke the trust whenever they wish.[37] This is possible because the grantor retains the control of the property even after it is placed into the trust; once the grantor dies, however, the trust will become irrevocable.[38] Testamentary trusts are irrevocable as the grantor releases control of the assets permanently once they are placed into the trust.[39] Irrevocable trusts created greater obstacles in determining property division, because often the spouse has a future interest in the trust rather than a present interest.[40] More specific types of trusts within the big three categories of living testamentary, irrevocable, and revocable, can add a level of complication for divorce purposes. Specifically, asset protection trusts with spendthrift clauses may bar a spouse from taking a claim to the trust assets.[41] These are trusts where the grantor and the beneficiary are the same person, or the grantor retains the right to enjoy the property, even when not the beneficiary, through their power to remove the trustee at any time.[42] The spendthrift clause of these trusts allows assets to be beyond the reach of creditors.[43] In a divorce proceeding, the grantor's spouse would become a creditor to the assets, and may be barred from having a marital interest in the trust assets, even if the assets were once marital.[44] Attorneys will need to pay close attention to the class of trust and specific trust terms when determining what type of interest the parties may have, and may need to join the trustee as a third party defendant to the divorce in order to obtain a claim to a trust with complex provisions.[45]

III. Valuing Trusts

Courts use multiple methods to determine the value of trusts. The four most common types include fair market value, present

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37 *Revocable and Irrevocable Trusts*, Fidelity (June 8, 2026), https://www.fidelity.com/viewpoints/wealth-management/insights/revocable-and-irrevocable-trusts.

38 *Id.*

39 *Id.*

40 *See infra* notes 110–123, and accompanying text.

41 *See infra* notes 117–123, and accompanying text.

42 James J. White, *Fraudulent Conveyances Masquerading as Asset Protection Trusts*, 47(4) UCC L.J. 1, 1 (Jan. 2018).

43 *Id.*

44 *Id.* at 4; *See infra* discussion at notes 117–123.

45 Rysso, *supra* note 3, at 6; *See infra* discussion at notes 117–123.

value, reserve jurisdiction, and intent based. Each of these types of valuations serves a different purpose for different types of assets spouses may have as well as to accommodate the varying circumstances of the parties.

Fair market value is defined as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts."[46] States take into consideration the assets, debts, and liabilities when considering the fair market value.[47] The best evidence of fair market value is the actual sale of the assets, however, recent evidence of the purchase value of a similar asset can suffice and if no market exists then a hypothetical market will be created.[48] This hypothetical market is based on the "viewpoint of a hypothetical buyer whose only goal is to maximize his advantage."[49]

When calculating fair market value, states have varying requirements for what date should be used to determine such value.[50] For example, in Arkansas the valuation must be completed at the time a divorce decree is entered; however, courts interpret this as the first day of trial.[51] Other states may set the date, or give the trial court the discretion to set the date as the day the petition for divorce was filed, or the date of the separation.[52]

Another method of valuing trust assets is present value. Present value is based on the principle that money available today is worth more than the same amount of money received in the future, because if the money was received in the present it could be invested and would earn interest.[53] The concept of present value is often used in family law to determine the current value of future payments such as pensions or interests in businesses or trusts, to

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46 26 C.F.R. § 20.2031-1(b).

47 Dew v. Dew, 390 S.W.3d 764 (Ark. Ct. App. 2012).

48 Adriane Berg, *2 Valuation and Distribution of Marital Property*, Matthew Bender & Co., Inc. (Eleanora DiLorenzo ed.) (last visited Aug. 30, 2026), https://plus.lexis.com/api/permalink/39ebb18d-ae87-4caf-aad9-370355411d4e/?context=1530671.

49 Estate of Curry v. United States, 706 F.2d 1424, 1428 (7th Cir. 1983).

50 Berg, *supra* note 48.

51 Ark. Code § 9-12-315(a).

52 Berg, *supra* note 48.

53 *Accounting for Lawyers; 7.4 Present Value,* Boise State University, https://boisestate.pressbooks.pub/accountingforlawyers/chapter/present-value/ (last visited Sept. 14, 2026).

ensure that each spouse receives an equitable share of the marital estate at the time of distribution.[54] Present value uses a mathematical equation where present value (PV) is equal to the future value (FV) divided by the annual interest rate (r) to the power of the number of compounding periods per year (n), or PV=FV/(1+r)^n.[55] This calculation is used to determine the present value: the "current worth of future payments."[56]

In some circumstances, such as irrevocable trusts, courts may need to use a "case-by-case approach based upon the intent and conduct of the relevant parties with regard to the formation and the operation of the trust."[57] Courts, however, have found that a present vested interest in an irrevocable trust is marital due to the beneficiary spouse receiving income from their trust interest, and may be distributed using the present value valuation method.[58]

Courts may also use reserve jurisdiction to value trust assets. This is often used to determine the worth of hard-to-value assets such as pensions.[59] Reserve jurisdiction allows courts to avoid putting a fair market value or present value price on trust assets or interests.[60] It instead allows the court to retain jurisdiction for when the future payment from the asset begins.[61] This means that once the distributions begin, the receiving ex-spouse will then have to pay a portion of the distribution to the ex-spouse.[62] This method, however, runs counter to the public policy approach that assets are typically divided at the time of divorce, and it is a method that keeps the spouses tied together financially. Due to this continuing entanglement, legislatures may prescribe that courts should use this method as a last resort.[63]

States may have other statutory requirements for how the trial courts should proceed with the evaluation; however, the

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54 *In re* Marriage of Sadecki, 825 P.2d 108 (Kan.1992).

55 *Accounting for Lawyers; 7.4 Present Value, supra* note 53.

56 *Id.*

57 Kim v. Kim, 150 N.E.3d 1229 (Ohio Ct. App. 2020); Oakes v. Oakes & Leadwise, Inc., 261 N.E.3d 434, 463 (Ohio Ct. App. 2024).

58 Hotle v. Hotle, 837 N.W.2d 849 (N.D. 2013).

59 Bender v. Bender 785 A.2d 197, 208, 215–16 (Conn. 2001); *In re* Marriage of Harrison, 769 P.2d 678 (Kan. Ct. App. 1989); *Sadecki,* 825 P.2d at 108.

60 *Bender,* 785 A.2d at 202; *Harrison*, 769 P.2d 678; *Sadecki*, 825 P.2d 108.

61 *Bender*, 785 A.2d at 202.

62 W. Va. Code § 48-7-104 ("Determination of worth of marital property").

63 *Id.*

majority of states leave the discretion on how to value a trust to the trial courts. For example, the West Virginia statute on assessing the value of marital property requires courts to determine the net value of marital property at the date of separation, unless another date would be more equitable. The statute then goes on to say that when valuing the marital portion of a spouses "entitlement to future payments, "if the receipt is contingent or not reasonably assured, or other equitable circumstances indicate the value cannot be determined at the time of the final judgement, the court may decline to find the value and instead either fix the spouses' respective shares in such future payments or reserve jurisdiction to make an appropriate order at a future date."[64]

IV. Dividing Trust During a Divorce Proceeding

Like most lawsuits today, divorces are usually settled outside of a courtroom.[65] More than 95% of divorces are settled though settlement offers or mediation, with an estimated only 2–5% of cases going to trial.[66] This means that in the vast majority of cases, the parties are the ones determining the method to value the trust, and if they reach an agreement, that valuation will control the property settlement. Out of the few cases that do go to trial, even fewer will be appealed. Thus it is primarily the trial court judges who are determining the appropriate way to divide a trust during a court proceeding, if that is an issue in the case. Research is limited on how appellate or supreme courts determine trust divisions. In fact, many states give their trial courts the discretion to determine the value of property, vaguely stating that the method of valuation has to be equitable under the circumnutates and fair to all parties involved.[67] If the method for determining the value does not seem unfair to the higher courts, then they will not investigate the

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64 *Id.*

65 *See* Jacqueline Newman, *Separation and Marital Settlement Agreements (Drafting the Agreement)(NY)*, Berkman Bottger Newman & Rod, LLP (Practical Guidance Attorney Team eds., July 2025) https://plus.lexis.com/api/permalink/4b398142-d237-4c36-9a88-154aea94454f/?context=1530671.

66 *Id.*

67 Ark. Code § 9-12-315(a); W. Va. Code § 48-7-104; *In re* Marriage of Finby 166 Cal. Rptr. 3d 305 (Cal. Ct. App. 2013); *In re* Marriage of Mohrlang, 85 P.3d 561, 563 (Colo. Ct. App. 2003); *Bender*, 785 A.2d at 202; *Harrison*, 769 P.2d 678; Fox v. Fox, 592 N.W.2d 541, 546-47 (N.D. 1999).

issue.[68] This makes it hard for practicing attorneys to know which method to use to value their clients' trust or interest in a trust in any state or circumstance.

A. *Fair Market Value*

Courts do, however, have a standard valuation method that is used in estate planning. For tax purposes, estates are valued using fair market value, for all the decedent's assets at the time of death.[69] This method requires an inventory of all assets, getting appraisals for the fair market value of real estate, and specialized valuations by experts for the fair market value of hard-to-value assets (such as business, private equity, collectables, etc.).[70] Here, instead of finding the fair market value at the time of death, the parties are expected to agree to a date upon which to value the trust, if a date is not required by state statute.[71]

Since this method is used for tax purposes, after the person has died and no longer holding future interests in a property, this method should primarily be used for assets held in trust in which spouses presently have an interest. The parallel treatment makes sense because these assets can be presently sold, spent, or transferred.

Another method family attorneys can utilize as a tool in trust valuation is the trustee's report.[72] The Uniform Trust Code has been enacted by 36 states and lays out provisions that require trustees to file an annual report of the trust accounting.[73] U.T.C § 813 (c) requires trustees to

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68 *See Fox*, 592 N.W.2d at 546-47.

69 26 U.S.C. § 1014 (addressing the basics of property acquired from a decedent); 26 U.S.C. § 2031 (a); *Estate of Curry,* 706 F.2d at 1431.

70 *See 2 California Probate Practice § 11.06,* Matthew Bender & Co., Inc. (Robert Blaylock et al. eds., Mar. 2026) https://plus.lexis.com/api/permalink/d1cbdf70-7ecd-4003-93f3-8e71978289dd/?context=1530671; *See also, e.g.*, Janis v. Comm'r, T.C. Memo 2004-117, 2004 Tax Ct. Memo LEXIS 116 (May 12, 2004). (showing the use of appraisers during fair market value determinations for trust tax purposes).

71 *Compare 2 California Probate Practice § 11.06, supra* note 70*, with* Berg, *supra* note 48.

72 *See, e.g.,* Kaladic v. Kaladic 589 P.2d 502, 502 (Colo. Ct. App. 1978) (evidencing the use of a trustee's report, testimony, and accounting in a divorce proceeding).

73 Connie Eyster, *The Uniform Trust Code Turns 25*, ACTEC (Jan. 2025), https://actecfoundation.org/podcasts/uniform-trust-code-utc/.

> send to the distributees or permissible distributees of trust income or principal, and to other qualified or nonqualified beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets and, if feasible, their respective market values.[74]

If applicable, family law attorneys can advise their clients to request such reports from the trust's trustee to find the values of the trust at issue. The U.T.C., however, only requires the trustee to find the market value if it is feasible to do so; therefore, the client may not receive the value of the trust assets, but the report will give both parties some clarity regarding the assets.[75] In addition, having the list of assets and debts provided by the report will then afford attorneys a starting place to hire appraisers and experts to determine the value of such assets, similar to the method of valuation used for tax purposes.[76]

Using either of these methods to determine the fair market value of the trust assets could provide the clients with a clear value of the trust assets and would likely be an agreeable method of valuation based on the widespread use of fair market value in estate planning.[77] In addition, it would be helpful to have the parties agree to appraisers or experts prior to the value determination.[78] This could be done by the party seeking the appraisal offering a list of possible appraisers or experts and allowing the other party to pick from that list. If the parties agree to the values assigned, then the attorneys would need to find an agreed way to distribute such property. If this process is successful, the case likely will not see a courtroom for this issue. If the parties cannot agree to a distribution method of the assets, it is likely that a trial court would accept the agreed upon values found using the fair market value

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74 Unif. Tr. Code § 813(c) (Unif. L. Comm'n 2000), amended 2010.

75 *See id.*

76 *See id.*

77 *See* 26 U.S.C. § 2031(a); *See* First Nat'l Bank v. United States, 763 F.2d 891, 893–94 (7th Cir. 1985)*; See, e.g., Kaladic*, 589 P.2d at 502.

78 *See generally* Wood v. Wood 361 S.W.3d 36, 40 (Mo. Ct. App. 2011) (showing the rejection of an expert who failed to find the fair market value of a business interest); Schorer v. Schorer, 501 N.W.2d 916, 920 (Wis. Ct. App. 1993) (demonstrating the use of experts and appraisers in determining the marital value of stock options).

method and/or trust report.[79] The court would then only be tasked with how to distribute the already valued property.

If the court must determine the appropriate valuation method and concludes that neither the fair market value nor the present value approach would produce an equitable result, it may instead employ the reverse jurisdiction or the intent-and-conduct method.[80] However, fair market value cannot be used to determine other types of trust interests, such as future or contingent interests, since the parties do not currently have those interests available to divide.[81]

B. *Present Value Method*

For contingencies or future interests, the court will likely use the present value method. This method is widely used for pensions and retirement plans, though courts have acknowledged the similarities to future or contingent interests in a trust, and value them similarly.[82] For pensions, the equation described above uses accepted actuarial principles to factor in "mortality, interest, and the possibility of the employee remaining with the employer until retirement age," which in estates would instead factor in the likelihood of actually receiving a present interest in the trust.[83]

To find the present value of a future or contingent interest, courts typically use the equation to find the present value of the benefit, determine what percent of that value is marital and that the other spouse is entitled to, then award the property to the non-beneficiary spouse.[84] The court would then have the option to distribute the value at the time of divorce, referred to as the "present division method" or distribute the property as the beneficiary-spouse receives it, called the "deferred distribution method.[85]

The present division method allows a court to distribute the asset at the time of the divorce, even though the beneficiary-spouse

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79 *See Harrison*, 769 P.2d 678; *Finby,* 166 Cal. Rptr. 3d at 305; *Mohrlang,* 85 P.3d at 563; *Bender*, 785 A.2d at 202; *See Fox*, 592 N.W.2d at 546-47.

80 *Mohrlang,* 85 P.3d at 563; *Sadecki,* 825 P.2d at 108.

81 *Mohrlang,* 85 P.3d at 563; *Sadecki,* 825 P.2d at 108.

82 *Bender*, 785 A.2d at 202; Paulson v. Paulson, 783 N.W.2d 262, 271 (N.D. 2010).

83 *Bender*, 785 A.2d at 202; Bloomer v. Bloomer 267 N.W.2d 235, 241 (Wis. 1978); Ohn v. Ohm, 431 A.2d 1371. 1379 (Md. Ct. Spec. App. 1981).

84 *Ohm,* 431 A.2d at 1379.

85 Lund v. Lund 779 S.E.2d 175, 178 (N.C. Ct. App. 2015).

has not yet received any distributions from the trust.[86] As a result, the beneficiary spouse retains the trust interests but receives a corresponding credit in the property equalization, while the non-beneficiary spouse is awarded other marital assets of equivalent value.[87] This sort of present division would offset the portion of the interest to which the non-beneficiary spouse is entitled, either by receiving cash or other assets equal to the amount of the interest instead of the interest itself.[88]

The disadvantage of the present distribution method is that the court is basing its division on contingent unvested interests that might happen, rather than actual events and distributions that have happened.[89] That means it is possible that the court could award the non-beneficiary spouse something that will never be received by the beneficiary-spouse.[90] This method, though, does allow the parties to use experts and witnesses that can attest to the likelihood of the interest vesting and the values of those distributions.[91] The present value method also may not feasible if there are no other assets that the beneficiary-spouse c an use to offset the value of the interest during the equalization portion of the division.[92] However, courts favor this method when the interest is able to be properly calculated and there are other assets to offset the interest.[93]

Under the deferred distribution method, the court will still value the trust interest and determine the percent of interest the non-beneficiary spouse is owed at the time of trial.[94] Then, instead of being awarded off-set property at the time of trial, the nonbeneficiary-spouse will be entitled to a fixed parentage of the interest as the beneficiary-spouse receives it.[95] This is accomplished

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86 *Bender*, 785 A.2d at 202; *Bloomer*, 267 N.W.2d at 241.

87 *Bender*, 785 A.2d at 202; *Bloomer*, 267 N.W.2d at 241; Burchfield v. Burchfield, 103 Va. Cir. 447, 476 (2019).

88 Meyer v. East, 205 N.E.3d 1066, 1074 (Ind. Ct. App. 2023); Chilkott v. Chilkott 158 Vt. 193, 198 (Vt. 1992).

89 *Bender*, 785 A.2d at 202.

90 *Id.*

91 *Chilkott,* 158 Vt. at 197–98; Liciardello v. Liciardello, 570 A.2d 1062, 1065 (Pa. Super. Ct. 1990); Dahl v. Dahl 459 P.3d 276, 327 (Utah 2015).

92 *See* Endy v. Endy 603 A.2d 641, 644 (Pa. 1992)

93 Hare v. Hodgins, 586 So. 2d 118, 125 (La. 1991); *In re* Marriage of Hoobler 519 P.3d 715, 723 (Ariz. Ct. App. 2022).

94 *Lund,* 779 S.E.2d at 178.

95 *Id.;* Baccanti v. Morton 752 N.E.2d 718, 731 (Mass. 2001).

by the court reserving its jurisdiction over the matter.[96] The reserve jurisdiction method is a favorable alternative when a present value or distribution method is inequitable due to the circumstances.[97]

C. *Reserve Jurisdiction Method*

The reserve jurisdiction method is often used during retirement or pension division but could similarly be used when the parties have a future interest in a trust.[98] This method is appropriate when the present value and/or distribution is unhelpful due to difficulties in finding the value, the parties' needs, "the inability to set off certain amounts of property," or if the trust interest has not yet vested.[99] The trial court has discretion to use this approach of reserving its jurisdiction by determining the "formula for division" during the divorce proceeding but delaying the actual dissolution until the distributions are received by the party.[100] In unvested interests, the court also may hold off determining the value at the time of divorce, and instead wait until the interest is vested to calculate the portion that is marital property based on the value of the interest during the marriage.[101] Under this approach, the court would retain jurisdiction over the parties in order to determine and award, or award the previously decided percentages of the marital interest as the distributions are received.[102] This method is beneficial because the party owning the interest is not having to pay the other spouse with monies not yet received.[103]

The benefit of using the reserve jurisdiction approach is that it illuminates the risk of an interest not vesting for the beneficiary-spouse, therefore, both parties are ensured to receive equal outcomes for the interest.[104] This method is favorable when there are not sufficient assets to offset the amount owed to the

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96 *In re* Marriage of Dill, 779 P.2d 468, 476 (Kan. Ct. App. 1989).

97 *See Ohm*, 431 A.2d at 1379.

98 *Harrison*, 769 P.2d 678; *Bender*, 785 A.2d at 202.

99 *Harrison*, 769 P.2d 678; *See Hotle,* 837 N.W.2d 849; Laing v. Laing, 741 P.2d 649, 657 (Alaska 1987).

100 *Hotle,* 837 N.W.2d 849.

101 *Laing,* 741 P.2d at 657.

102 *In re* Marriage of Brown, 544 P.2d 561, 567–68 (Cal. 1976).

103 *Laing,* 741 P.2d at 657.

104 Gemma v. Gemma, 778 P.2d 429, 431 (Nev. 1989); Damiano v. Damiano, 94 A.D.2d 132, 138 (N.Y. App. Div. 1983).

non-beneficiary spouse or when there is insufficient evidence to determine the percent of the interest and the amount that interest is worth at the time of decision.[105] The reserve jurisdiction method allows the money to be valued and distributed as the beneficiary-spouse receives the funds, which illuminates risks and ensures a more accurate understanding of the interest's worth.[106]

The major disadvantage is that the method prolongs the ex-spouses' entanglement with each other.[107] The court will likely have to continue its supervision over the matter for years.[108] Greater costs are associated with the reserve jurisdiction method, because the parties will need to go back to court, perhaps even multiple times, to determine the percentage of interest each is owed.[109] However, trial courts routinely use a similar retaining approach to monitor other property division devices, such as maintenance; therefore it is not too unusual or burdensome.[110]

D. *Intent-and-Conduct Method*

The intent-and-conduct method is primarily used for irrevocable trusts. Irrevocable trusts are, generally, not included in property distributions during divorce proceeding, primarily because they operate as their own entity instead of being the property of the divorcing spouses, and that third party entity is not a party to the trust.[111] This means that the court would not be able to direct the trustee to divide the marital property inside the irrevocable trust because they are not parties.[112] However, in some scenarios, the court may have to take the property of the irrevocable trust into consideration, despite the inability to divide its assets.[113] For example, in *Kim v. Kim*,[114] the Ohio Court of Appeals found it to be against public policy when a husband unilaterally created an irrevocable

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105 *Laing,* 741 P.2d at 657; Weir v. Weir 413 A.2d 638, 640–41 (N.J. 1980).

106 *Weir*, 413 A.2d at 640–41.

107 *See* Endy v. Endy, 603 A.2d at 641, 644 (Pa. 1992) (describing how present distribution is favorable in the aspect of avoiding contact between the parties).

108 *Harrison*, 769 P.2d 678.

109 *Id.*

110 Janssen v. Janssen 331 N.W.2d 752, 756 (Minn. 1983).

111 *See Oakes,* 261 N.E.3d at 463.

112 *See id.*

113 *See id.*

114 *Kim,* 150 N.E.3d 1229.

trust and placed marital life insurance policies inside the trust. The court reasoned that holding otherwise "would allow a spouse to unilaterally, and without the consent or knowledge of the other spouse, move marital money out of the reach of the other spouse by merely placing it in an irrevocable trust."[115] In that case the court credited a cash value of the marital life insurance policy to the husband during the equalization of the division of marital property.[116] The court was able to do this because it was within the court's discretion to try to reach equitable division of property and the court was not actually compelling the trust to do anything. Instead, the court simply determined the cash value of the husband's interest in the trust and applied it to the amount of assets the husband would receive for equalization reasons.[117] The court would not have been able to give the wife an interest in the life insurance policy, due to the structure of the trust.[118] For example, in a parallel case, *Oakes v. Oakes David C. Oakes & Leadwise, Inc.,*[119] the appellate court held that the trial court erred in assigning the wife real property held in trust, because it was held in an irrevocable trust.[120]

The court in *Oakes* analyzed the intent and conduct of the trust by looking at the trust language, the parties' actions, and the testimony for the parties.[121] The court recognized that despite the parties placing the property into an irrevocable trust, they operated as if the property in question was marital, such as by paying for the utilities or maintenance with marital assets.[122] The wife testified that the intent of the trust was to protect the trust assets from creditors and that she had no intentions of gifting the property to the husband.[123] While the court took this statement into consideration, it also acknowledged that the trust was not a party to the litigation, and therefore the court could not compel the trust to convey the marital residence to the wife.[124] Interestingly, the court mentioned that the wife could

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115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.*
119 *Oakes*, 261 N.E.3d 463.
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*

have named the husband as an individual and as a trustee in her initial complaint, or the husband could have moved to make himself as trustee a third-party defendant and interpleaded the trust in the proceeding.[125]

The methods attorneys should utilize, or expect courts to utilize, depends on the type of trust, assets, and interest the spouse holds. For assets inside the trust that are currently ascertainable, such as real and personal property that could be put on the market and sold, fair market value would give an equitable value of those types of assets.[126] For assets that have a future value, such as life insurance policies or future interests in a trust, attorneys should use the present value method.[127] If the parties are not agreeable to either method, then the trial courts will have the discretion to determine what method is the most appropriate.[128] When discussing the use of reverse jurisdiction, the Kansas Court of Appeals court aptly explained:

> The trial courts, of course, may consider other methods of valuation and other methods of making disposition of the marital assets of the parties which might better address the interests and needs of the parties. Diligent and innovative counsel may develop other methods of solving the problems inherent in this difficult issue. Our intent is not to create an inflexible rule of property valuation, but rather to provide trial courts with alternative methodologies that may prove effective. After all, a rule directed to the disposition of property in a divorce proceeding can only be as sound as the economic reality which it attempts to service. The key to an equitable distribution of marital assets is fairness, not mathematical precision.[129]

V. Future Interests and Contingent interests

Future and contingent interests are the most difficult interests in a trust to evaluate.[130] This is because the spouse who has the interest does not presently receive distributions or property

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125 *Oakes*, 261 N.E.3d 463.

126 *Dew,* 390 S.W.3d 764.

127 Marc Chorney, *Estate and Gift Tax Valuation of Temporal Interests*, 40 Univ. of Miami Law Center on Est. Planning 1604, 1604–5 (2026); *Mohrlang,* 85 P.3d at 563.

128 *Harrison*, 769 P.2d 678; *Finby,* 166 Cal. Rptr. 3d at 305; *Mohrlang,* 85 P.3d at 563; *Bender*, 785 A.2d at 202; *See Fox*, 592 N.W.2d at 546-47; Ark. Code § 9-12-315(a); W. Va. Code § 48-7-104 *Determination of worth of marital property*.

129 *Harrison*, 769 P.2d 678.

130 *Mohrlang,* 85 P.3d at 563.

rights that can be valued and divided in the present.[131] During the evaluation process, courts treat future interests similar to pensions. Trial courts are given the discretion to attempt a present value. [132]

VI. Conclusion

While trust divisions can seem daunting to family attorneys, there are fairly simple methods that attorneys can expect the courts to utilize to determine the marital portion and interest value of trusts. If the property that is to be divided in the trust is a vested interest and tangible, it is likely that the courts will use fair market value to determine the worth of the asset(s). If the asset is unvested or a vested future interest, the court has a few standard options they can utilizes to determine what percentage of the asset is marital and how it should be divided. Most likely, the court will utilize the present value method to value the asset. If there are sufficient funds or other assets to off-set the value of the interest, the courts will likely award 100% of the interest to the beneficiary-spouse while giving the other spouse other marital assets in return. If there are insufficient assets to make up for one spouse being awarded 100% of the interest, the court will reserve its judication to distribute the interest as the money becomes available to the beneficiary spouse. If the interest is too complicated to value at the time of the divorce, the court may also reserve jurisdiction to make this calculation at the time the interest becomes available to the beneficiary-spouse, then distributed it as equitable. In some scenarios, the court may have to use an intent-based approach due to the formation or actions of the party. After the final judgment for the divorce decree is entered, a grantor spouse, or both spouses, may want to amend their trust, if they entered the trust together, or if the trust lists the ex-spouse as a fiduciary and/or beneficiary.[133]

McKenzie Carson

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131 *Id.*

132 *Id.*

133 Rysso, *supra* note 3, at 7.

Comment, Resolving the Bill: Attorney-Fee Disputes and Limits of State-Based Mediation

I. Introduction

In May 2021, one of the most infamous defendants of the #MeToo era, Harvey Weinstein, did something few laypeople expect to see outside the pages of a dramatic movie script: he suited up not just for battle in court but for a second battle—this time over his own legal bill.[1] The convicted sex offender currently serving decades in prison filed a lawsuit against his own former lawyer, seeking the return of more than $1 million in legal fees paid in connection with his defense.[2] According to the complaint, the attorney was allegedly distracted by other matters,[3] delegated critical work to others without adequate disclosure,[4] refused to provide an accounting,[5] and may have even submitted fraudulent billing records[6]—leaving Weinstein demanding a refund of what he claimed were unjustified charges.[7]

This startling spectacle, a client, deeply enmeshed in historic criminal litigation, dragging his lawyer back into court over the cost of counsel itself, is more than a celebrity headline. It exposes a darker fault line in the legal profession: when fee disputes erupt, clients and lawyers alike can find themselves pushed into costly, acrimonious conflict with no clear path to resolution outside of formal litigation. The story of *Weinstein v. Baez* illustrates how disputes over legal fees can spiral into litigation that rivals the original underlying case in complexity, cost, and reputational risk,

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1 Compl., Weinstein v. Baez, No. 28306 (N.Y. App. Div. May 04, 2021), https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=TDjwdAzh0Nx6G8z2fXU6hQ==.

2 *Id.* at ¶ 39.

3 *Id.* at ¶ 13.

4 *Id.*

5 *Id.* at ¶ 14.

6 *Id.* at ¶ 27.

7 *Id.* at ¶ 46.

prompting urgent questions about whether existing mechanisms for resolving such disputes are adequate.[8]

Attorney-fee disputes rarely make headlines. When they do, it is usually because the underlying litigation is already extraordinary with high-stakes criminal prosecutions, complex civil litigation, or clients whose names alone command public attention.[9] An example of this would be *Campbell Harrison & Dagley L.L.P. v. Blue*, a high-profile case involving the estate of oiler and philanthropist, Margaret Hunt-Hill. The public watched as the court addressed the fee agreement dispute on top of a multitude of other complicated claims and counterclaims.[10] Similarly, the dispute between Harvey Weinstein and his former attorney over more than one million dollars in legal fees is not aberrational in kind, but in visibility. Beneath the sensational facts lies a conflict that plays out daily, quietly, and far from public scrutiny: a client claims to have been overbilled, inadequately informed, or financially exploited, while an attorney insists the fees charged reflect the true cost of professional judgment, labor, and risk.

For most clients, these disputes do not end in neatly framed complaints or judicial opinions.[11] Instead, they unfold in an opaque space where power imbalances are pronounced, information asymmetries are stark, and the cost of contesting a fee may exceed the amount at stake.[12] Clients may lack the technical knowledge to evaluate billing records, fear retaliation or reputational harm, or simply assume that challenging a lawyer's fee is futile. Attorneys, for their part, face ethical duties to charge reasonable fees while also protecting their livelihood, professional reputation, and, in some cases, outstanding balances essential to sustaining a practice.[13]

Taken together, these dynamics reveal a broader structural failure in how the legal system addresses disputes between attorneys and their clients. The result is a systemic tension: fee disputes

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8 *See, e.g.,* 1 Geoffrey C. Hazard, Jr., et al., The Law of Lawyering (CCH) § 9.02 (4th ed. updated Dec. 2025).

9 *See, e.g.,* Campbell Harrison & Dagley L.L.P. v. Blue, 843 F. Supp. 2d 673* (N.D. Tex. 2011).

10 *Id.*

11 Wittich Law Firm, P.C. v. O'Connell, 304 P.3d 375, 379 (Mont. 2013).

12 *Id.*

13 *See* Model Rules of Pro. Conduct r. 1.5 (A.B.A. 2023).

are common, consequential, and corrosive to public trust in the legal profession, yet they are frequently resolved through blunt instruments—adversarial litigation, misconduct-driven disciplinary proceedings, and unstructured informal negotiation—each ill-suited to disputes rooted in miscommunication, informational asymmetry, and contested valuation. Litigation escalates conflict and expense. Bar disciplinary systems are designed to police misconduct rather than adjudicate contested billing, and informal negotiations frequently collapse under the weight of mistrust, leaving in their wake a costly stalemate that disadvantages both parties.

In recognition of these structural weaknesses, some jurisdictions have adopted statutorily authorized dispute-resolution programs that provide a defined alternative to litigation and informal negotiation. California's Mandatory Fee Arbitration Act, for example, requires an attorney to offer the client the option of a bar-sponsored arbitration or mediation process before pursuing a fee recovery lawsuit, reflecting an effort to address bargaining imbalances and provide an expedited, low cost forum for resolving contested fees.[14]

Mediation occupies a unique and underexamined position in this landscape. Unlike litigation, this process offers a forum that is comparatively swift, confidential, and flexible, qualities particularly well-suited to disputes over legal fees, which frequently turn on misunderstandings, incomplete communication, or mismatched expectations rather than outright fraud. Properly structured, mediation allows clients to ask questions they may have felt uncomfortable raising during the representation itself, and it permits attorneys to contextualize their billing practices without the adversarial posture that litigation demands.

Recognizing these advantages, many states have developed attorney-fee dispute resolution programs that incorporate mediation, either as a standalone option or as a gateway to arbitration. For example, California, New York, North Carolina, and Texas each have established a comprehensive, standalone mediation program that authorizes parties to circumvent litigation.[15] These programs are often framed explicitly as consumer-protection mechanisms,

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14 Ron W. Makarem & Jared Walder, *Resolving Attorney Fee Disputes Under the Mandatory Fee Arbitration Act (MFAA)*, Advocate, Sept. 2022, at 1-3.

15 Cal. Bus. & Prof. Code § 6200 (2025); 22 N.Y. Comp. Codes R. & Regs. tit. 22 § 137.0 (2025); Cunningham v. Selman, 689 S.E.2d 517, 523 (N.C. Ct. App. 2009);

intended to promote confidence in the legal system and to resolve conflicts without further judicial involvement. Bar associations and courts alike have emphasized that alternative dispute resolution in this context can preserve professional relationships, reduce administrative burden, and enhance perceptions of fairness within the profession.

Yet the promise of mediation in attorney-fee disputes is unevenly realized. In some jurisdictions, mediation is readily available, low-cost, and strongly encouraged before a lawyer may sue a client for unpaid fees.[16] In others, mediation exists only where available, is administered at the local level with inconsistent coverage, or requires mutual consent that effectively allows the more powerful party to opt out.[17] As a result, access to mediation, and the protections it affords, often depends less on the nature of the dispute than on the happenstance of geography.

Although many jurisdictions recognize the value of mediation in principle, they diverge sharply in program design, accessibility, cost, procedural safeguards, and enforcement mechanisms. Some states mandate notice to clients before an attorney may initiate a fee-collection action; others impose no such obligation.[18] Some provide statewide, centralized mediation systems; others rely on local bar associations with varying resources and reach.[19] Still others fold into arbitration programs without clear guidance on when or how mediation should be used.[20]

These variations are not merely administrative. They shape whether clients ever learn that mediation is an option, whether they can afford to pursue it, and whether the process meaningfully addresses the power imbalance inherent in attorney-client relationships. The Weinstein dispute, tried not only through traditional but public litigation, illustrates what could happen if fees escalate unchecked: reputational damage, prolonged conflict, and

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1 Texas Attorneys' Fees § 8.02 (2025); Stuart v. Walker, 143 A.3d 761, 761-62 (D.C. 2016).

16 Kaufman, Litwin & Feinstein v. Edgar, 704 N.E.2d 756, 763 (Ill. App. Ct. 1998).

17 Jeld-Wen, Inc. v. Superior Ct., 146 Cal. App. 4th 536, 541 (Cal. Ct. App. 2007).

18 N.J. Court Rules, r. 1:20A-6.

19 N.C. Gen. Stat. § 7A-38.1 (2025).

20 Kernahan v. Home Warranty Adm'r of Florida, Inc., 199 A.3d 766, 780 (N.J. 2019).

a spectacle that erodes confidence in legal situations. Mediation has the potential to prevent attorney-fee disputes from metastasizing into costly and reputationally damaging litigation, yet inconsistent state program design frequently renders this protection illusory rather than effective. This current state-by-state approach to attorney-fee dispute mediation reflects a fragmented regulatory landscape that undermines both client protection and professional legitimacy.

This Comment proceeds in four parts. Part II situates attorney-fee disputes within their doctrinal and ethical foundations, examining the contract principle of quantum meruit recovery and professional responsibility rules that shape how conflicts over legal fees arise and are adjudicated. Part III then surveys the divergent state approach to attorney-fee dispute mediation, identifying significant variation in voluntariness, notice requirements, accessibility, administrative structure, and procedural safeguards. These differences are not merely structural; they determine whether mediation operates as a meaningful consumer-protection mechanism or as a discretionary alternative with uneven reach. Part IV builds on that comparative analysis to advance the case for uniform national standards—standards designed to preserve mediation's flexibility while establishing baseline protections that promote fairness, consistency, and professional legitimacy. Part V concludes by returning to the broader implications of fee-dispute resolution for public trust in the legal profession and the integrity of the attorney-client relationship.

II. Background: Attorney-Client Fee Disputes and the Turn to Mediation

Attorneys are frequently described as intermediaries and problem solvers.[21] They are professionals tasked with managing conflict on behalf of others. The dynamic changes fundamentally, however, when a dispute arises between attorney and client over legal fees. In such circumstances, the cooperative framework of representation gives way to direct adversity, placing lawyer and client on opposing sides of a disagreement over the value, fairness,

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[21] *In re* Amendment to Rules Regulating Fla. Bar, 605 So.2d 252, 346 (Fla. 1992).

and legitimacy of legal services rendered. These disputes strain professional relationships and often escalate quickly, transforming what began as a service relationship into a distinctly adversarial posture.

Unlike ordinary commercial disagreements, attorney-client disputes implicate ethical obligations, professional responsibility rules, and courts' supervisory authority over attorneys.[22] Clients may question whether fees accurately reflect the work performed or whether billing practices were transparent and justified. Attorneys, in turn, may view fee challenges as misunderstandings of the labor, expertise, and risk inherent in legal representation. When these competing perspectives harden, disputes become difficult to resolve through informal negotiation alone and increasingly prone to formal escalation.

Attorney-client fee disputes commonly arise from misunderstandings regarding the basis and calculation of attorney fees.[23] Clients often struggle to interpret billing statements, particularly when invoices lack detailed explanations or when fee structures are not clearly communicated at the outset of representation.[24] This difficulty is compounded by the technical nature of legal billing and the client's limited ability to independently assess the necessity or efficiency of legal work performed.

Disputes also arise over reasonableness of fees. Attorneys are ethically obligated to charge only reasonable fees, a determination that typically considers factors such as the time and labor required, the novelty and difficulty of the issues involved, the results obtained, and the experience and reputation of the attorney.[25] Fees may be deemed excessive when a reasonable lawyer would

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22 Rule 54(d)(2) of the Federal Rules of Civil Procedure governs motions for attorney's fees. Fed. R. Civ. P. 54(d)2). Most federal district courts then layer on local rules that can significantly change timing, evidentiary requirements, page limits, and mandatory meet-and-confer rules. *See, e.g.,* D. Kan. r. 54.2 (requiring consultation with opposing counsel about attorney's fees before a motion to the court). State courts vary even more, and specialized courts (e.g. family or probate) may have extra fee-specific rules. *See, e.g.,* Cal. Prob. Code 10810 (requiring court approval of attorney's fees in probate proceedings); Fla. Fam. L. R. P. 12.525 (imposing procedural requirements for fee motions in family law cases).

23 Anderson v. Elliott, 555 A.2d 1042, 1049 (Me. 1989).

24 *Id*.

25 Md. State & Federal Court Rules r. 19-301.5 (2026).

conclude that the amount charged exceeds what is justified under the circumstances.[26] Courts assessing the reasonableness of attorney fees often employ structured analytical frameworks that underscore the fact-intensive nature of fee disputes.[27] Under federal fee-shifting statutes, the Supreme Court has consistently endorsed the "lodestar" method, which calculates a presumptively reasonable fee by multiplying the number of hours reasonably expended by a reasonable hourly rate.[28] The lodestar figure may then be adjusted in rare circumstances, but only with "specific evidence" justifying the modification.[29] In determining both reasonable hours and rates, courts scrutinize billing records, evaluate prevailing market rates in the relevant community, and consider the degree of success achieved.[30] Although the lodestar framework arises most prominently in statutory fee-shifting contexts, its emphasis on documented time, market benchmarks, and proportionality reflects the broader judicial approach to assessing reasonableness.[31] Courts do not simply defer to billing statements; they examine whether the hours claimed were necessary, whether the rates reflect prevailing norms, and whether the results obtained justify the compensation sought. In civil litigation contexts, contingency fee arrangements commonly cluster around one-third of the recovery.[32]

Additional conflict may arise from the imposition of finance charges or interest calculations that clients perceive as improper or insufficiently disclosed, potentially implicating professional conduct rules and disciplinary scrutiny.[33] These disputes over perceived excess often intersect with formal ethical standards governing what attorneys may lawfully charge. *Florida Bar v. Fields* highlights the ethical violations that may arise from such improper calculations.[34] The attorney in question was found guilty of violating ethical rules by charging finance charges without client

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26 Mo. Sup. Ct. R. 4-1.5 (2025).

27 *See* Perdue v. Kenny A., 559 U.S. 542, 551-52 (U.S. 2010).

28 *Id*.

29 *Id*.

30 *See* Hensley v. Eckerhart, 461 U.S. 424, 433-37 (U.S. 1983).

31 *Id*.

32 1 LexisNexis Practice Guide: Illinois Personal Injury Litigation § 1.09 (2026).

33 Iowa Sup. Ct. Atty. Disciplinary Bd. v. Powell, 726 N.W.2d 397, 403-04 (Iowa 2007).

34 Florida Bar v. Fields, 482 So.2d 1354, 1356-57 (Fla. 1986).

agreement or proper disclosure.[35] Additionally, the fees were calculated in a manner that resulted in a usurious rate exceeding the statutory limit of 18% per year.[36] The court emphasized that such conduct adversely reflects on an attorney's fitness to practice law, even if the improper charges stemmed from lax office procedures rather than intentional wrongdoing.[37] Together, these disputes illustrate that conflicts over attorney fees arise not only from overtly improper charges, but also from the ordinary structure, documentation, and administration of the attorney-client financial relationship.

A. *How Attorney-Fee Disputes Arise*

Fee agreements themselves are a frequent source of dispute. Agreements that are unwritten, ambiguous, or inadequately detailed invite disagreement over the scope of representation, payment obligations, and termination rights.[38] Even written agreements may generate disputes in cases involving multiple attorneys, joint representations, or midstream termination. Courts and disciplinary authorities consistently emphasize the importance of clear and transparent fee agreements, placing the burden on attorneys to draft contracts that fully communicate financial terms and client obligations.[39]

The structure of an attorney's fee arrangement significantly influences the nature of fee disputes. Contingency fee agreements, common in civil litigation, tie compensation to the outcome of the case and therefore involve inherent uncertainty. While such arrangements expand access to legal representation for clients unable to afford hourly fees, they also create disputes when representation ends before the case concludes. In these circumstances, questions often arise regarding whether, and to what extent, the attorney is entitled to compensation for work already performed. For example, in *Francasse v. Brent*, the California Supreme Court held that a discharged attorney is entitled to recover the reasonable

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35 *Id.*
36 *Id.*
37 *Id.*
38 *In re* Davenport, 522 S.W.3d 452, 454-60 (Tex. 2017).
39 *Id.*

value of services rendered "up to the time of discharge."[40] This rule balances the client's right to discharge their attorney with the attorney's right to fair compensation.

When contingency arrangements unravel, courts are often left to determine how fairness should be measured once the original bargain no longer governs. Courts addressing disputes arising from terminated contingency fee agreements frequently apply principles of quantum meruit, permitting recovery of the reasonable value of services rendered where the agreement contemplates such recovery and fairness requires compensation. For instance, in *Faricy Law Firm. P.A., v. API, Inc. Asbestos Settlement Trust*, a law firm assisted with several asbestos cases under a contingent-fee arrangement over the course of ten years. Months before a settlement was reached, API Trust terminated Faricy's representation.[41] The Minnesota Supreme Court made clear that termination foreclosed recovery of the contractual contingent percentage: "Minnesota law prohibits a discharged contingent-fee lawyer from receiving the contingent fee as a contract remedy, instead allowing recovery only of the reasonable value of services under a theory of quantum meruit."[42] The court emphasized that quantum meruit is not a mere mechanical substitute for the contingency agreement, but "an equitable process by which the court determines the reasonable value of services."[43] In doing so, the court shifted the dispute from contractual enforcement to equitable valuation, requiring a context-sensitive assessment of what the attorney's services are reasonably worth.

In disputes over attorney fees involving breach of contract and quantum meruit claims, courts generally allow attorneys to recover the reasonable value of their services under quantum meruit when the fee agreement is invalid, unenforceable, or terminated. Quantum meruit serves as an equitable remedy to prevent unjust enrichment of the client or other parties benefiting from the attorney's services. For example, in *Olsen v. Harbison*, an attorney filed a complaint against an associated attorney, asserting claims for, among other things, quantum meruit, breach of contract, and fraud. Attorney Christopher Olsen was retained to represent a client in

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40 Francasse v. Brent, 494 P.2d 9, 14-15 (Cal. 1972).

41 Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Trust, 912 N.W.2d 652, 654-55 (Minn. 2018).

42 *Id*. at 654.

43 *Id*. at 661.

a personal injury claim.[44] Olsen subsequently decided to associate a more experienced trial counsel.[45] The two attorneys agreed on a fee-splitting arrangement.[46] Shortly after the agreement, the client terminated Olsen and entered into a new arrangement with the more experienced trial attorney.[47] The court held that quantum meruit allows attorneys to recover reasonable compensation for services rendered when a fee-sharing agreement or contract is invalid or unenforceable, such as when client consent to fee division is not obtained in writing.[48]

At the same time, professional conduct rules impose safeguards designed to protect clients, including prohibitions on attorneys withdrawing disputed client funds to satisfy fees until the dispute is resolved.[49] These protections reflect heightened concern about potential overreach in fee disputes and seek to preserve client funds while entitlement remains contested.

Hourly fee arrangements present a different set of challenges. Although the compensation structure is generally straightforward – hours worked multiplied by an agreed-upon rate – clients may dispute the accuracy of timekeeping, the necessity of billed tasks, or the efficiency of the attorney's work. In *Hensley v. Eckerhart*, the Supreme Court emphasized that the most critical factor in determining the reasonableness of attorney's fees is the degree of success obtained.[50] The Court noted that even where claims are "interrelated, nonfrivolous, and raised in good faith" the hours expended must be reasonable in relation to the success achieved.[51]

Hybrid fee arrangements, combining elements of contingency and hourly billing, introduce additional complexity, particularly when conversion provisions are unclear or when representation terminates before the contingency is realized. For example, in *Four Winds, LLC v. Smith & DeBonis, LLC*, the court held that the original fee agreement remained enforceable even though the

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44 Olsen v. Harbison, No. C058943, 2010 Cal. App. LEXIS 216,1 at *2-3 (Cal. Dist. Ct. App. Dec. 1, 2010).

45 *Id*.

46 *Id*.

47 *Id*. at *8-9.

48 *Id*. at *7, 31.

49 Model Rules of Pro. Conduct r. 1.15(c)(2) (2023).

50 *Hensley*, 461 U.S. at 435-36.

51 *Id*. at 36.

construction company pulled itself out of foreclosure after terminating its contracted attorney.[52] Courts have upheld provisions allowing attorneys to recover hourly fees upon termination, even if the original agreement was primarily contingent, emphasizing that termination does not extinguish an attorney's right to reasonable compensation.[53] The court noted, "[C]lients may not parlay the broad right to discharge a lawyer into a device to avoid the payment of legal fees legitimately incurred."[54] These conflicts do not unfold in a doctrinal vacuum. Once a fee dispute emerges, it becomes subject to overlapping bodies of law—contract doctrine, equitable remedies, and professional responsibility rules—that collectively define both the permissible scope of attorney compensation and the mechanisms through which contested fees may be challenged.

B. *Ethical and Doctrinal Frameworks Governing Fee Disputes*

Model Rule 1.5 of the Rules of Professional Conduct governs the reasonableness of attorney fees, emphasizing that fees must not be excessive or illegal. The rule prohibits an attorney from "charg[ing] or collect[ing] an unreasonable fee," outlining factors to determine reasonableness, such as time and labor required, the complexity of the matter, customary fees in the locality, and the results obtained.[55] Disciplinary cases often arise when attorneys charge fees deemed unreasonable, fail to perform the work claimed, or engage in unethical billing practices. Courts and disciplinary boards evaluate these cases based on the specific facts and circumstances, applying the factors outlined in Rule 1.5(a).

For example, in *Ligon*, a disbarment complaint arose as a result of attorney Bruce Bennett's handling of a criminal and domestic-relations case.[56] Bennett entered into an agreement with his learning-disabled client under which he would assist with the distribution of an inheritance.[57] Bennett counseled his learning-disabled client to engage in a $745,000 unsecured loan to Bennett's

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52 Four Winds, LLC v. Smith & Debonis, LLC, 854 N.E.2d 70, 72-73 (Ind. Ct. App. 2006).

53 *Id*. at 73-75.

54 *Id*. at 75.

55 Model Rules of Pro. Conduct r. 1.5(a)(1-8) (2023).

56 Ligon v. Bennett, 544 S.W.3d 27, 29-30 (Ark. 2018).

57 *Id*.

friend at a 2% interest rate.[58] Additionally, Bennett loaned substantial additional sums to the same friend against the client's express wishes.[59] The court found that Bennett violated Model Rule 8.4(c) and Arkansas Rule 3.3(a), both of which prohibit lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[60]As a result of this, the executive director of the Arkansas Supreme Court Committee of Professional Conduct sought and achieved Bennett's disbarment.[61] The court's reasoning centered on Bennett's violations of the rule, but also on the attorney himself admitting the evidence against him was sufficient.[62] The Arkansas Supreme Court accepted the findings of the special judge, who had been appointed to oversee the disbarment proceedings, and determined that disbarment was appropriate.[63]

Attorney-client fee disputes are traditionally resolved through litigation or alternative dispute resolution mechanisms such as arbitration or mediation, depending on the jurisdiction and the governing rules.[64] Courts often apply contract principles and ethical rules to interpret and enforce fee agreements, holding attorneys to high standards of conduct and fair dealing. In some jurisdictions, mandatory arbitration is required if requested by the client, as seen in California and New York, where arbitration awards may be binding unless de novo review is sought.[65] Mediation is also encouraged as a less adversarial and more cost-effective method to resolve disputes.[66]

Claims and defenses typically raised in fee disputes include challenges to the reasonableness of the fees, whether the attorney earned the fees, and whether the services provided were necessary or beneficial. Courts may evaluate the reasonableness of fees through expert testimony and evidentiary hearings. Clients may also raise defenses such as legal malpractice or breach of

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58 *Id*. at 35.

59 *Id*.

60 *Id.* at 35-36.

61 *Id*.

62 *Id*.

63 *Id*.

64 2 Commercial Damages: Remedies in Business Litigation ¶ 36.03 (2026).

65 Cal. St. Bar Fee Arb. & Enf't, r. 3.501 (2025), N.Y. Comp. Codes R. & Regs. tit. § 137.2 (2025).

66 *See, e.g.*, Cal Code Civ. Proc. § 1775 (2026).

fiduciary duty, which are often compulsory counterclaims in fee litigation.[67] Attorneys, on the other hand, may assert claims for unpaid fees or seek to enforce retainer agreements. Jurisdictions often implement specific rules to address the inherent power imbalance between attorneys and clients in fee disputes. For instance, Rule XIII in the District of Columbia mandates arbitration to ensure fairness and protect clients' ability to present meritorious claims and defenses.[68] Similarly, North Carolina and other states require attorneys to notify clients of fee dispute resolution programs and participate in good faith if requested.[69] These mechanisms aim to provide a faster resolution than protracted litigation.

State bar grievance and disciplinary procedures aim to resolve disputes effectively; however, their scope and limitations vary by jurisdiction. Rule 9 of the Maine Bar Rules establishes a binding arbitration process for attorney-client fee disputes, governed by the Maine Uniform Arbitration Act.[70] The rule allows for a "faster and procedurally less forbidding forum for fee disputes" while maintaining fairness and reliability.[71] This process ensures due process for both parties and provides judicial safeguards, such as the ability to confirm or vacate arbitration awards in court under specific circumstances. Similarly, in North Carolina, the State Bar Fee Dispute Resolution Program facilitates mediation or arbitration of fee disputes, often staying grievance proceedings until the fee dispute is resolved.[72] Lawyers are required to notify clients of this program before initiating legal action to collect fees, and participation in good faith is mandatory if the client elects to use the program.[73]

In some jurisdictions, such as California and Texas, local bar associations offer voluntary arbitration programs for fee disputes. These programs are encouraged by professional conduct rules and provide a less formal alternative to litigation.[74] However, they may

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67 *Id*.

68 Stuart v. Walker, 143 A.3d 761, 766 (D.C. 2016).

69 *See, e.g.*, Cunningham v. Selman, 689 S.E.2d 517, 522-23 (N.C. Ct. App. 2009).

70 Me. Bar R. 9(e)(1) (2025).

71 Harrington v. Lord, 704 A.2d 1211, 1214 (U.S. 1997).

72 N.C. Rules of Pro. Conduct r. 1.5(f) (2025).

73 *Id*. r. 1.5(f)(2).

74 Cal. St. Bar Mand. Fee Arb. Guidelines, Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs (2025), https://plus.lexis.com/api/permalink/3e1832b0-43da-4ad6-8c1f-b1a609b133f8/?context=1530671.

not be available if the client has pending claims of malpractice or professional misconduct against the attorney.[75] Despite their utility, these mechanisms have limitations. Disciplinary proceedings are not intended to serve as forums for litigating fee disputes, but rather focus on protecting the public and maintaining integrity. For instance, Michigan grievance administrators may decline to pursue fee disputes unless they involve serious misconduct, such as fraud or criminal violations.[76] Additionally, fee arbitration decisions are often binding and unappealable, which may limit recourse for dissatisfied parties.[77]

III. The Fragmented Landscape of Attorney-Fee Dispute Resolution

Attorney-fee arbitration programs exist in various jurisdictions across the United States, each with unique structures, functions, and associated advantages and drawbacks. The principal points of departure concern the scope of eligible disputes, whether arbitration is voluntary or compulsory, the selection and qualifications of arbitrators, confidentiality protections, procedural flexibility, cost allocation, and the scope of judicial review and appeal.

A. *Mandatory and Client-Initiated Fee Dispute Programs*

In California, under the Mandatory Fee Arbitration Act, and in New York, under the Fee Dispute Resolution Program, arbitration is mandatory for attorneys if initiated by a client, but voluntary for clients unless they have agreed otherwise in writing.[78] These programs aim to address the disparity in bargaining power between attorneys and clients by offering an effective, inexpensive remedy that does not require clients to hire additional counsel. Local bar associations administer these programs, and arbitration decisions are binding unless a trial de novo is requested.[79]

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75 1 Texas Attorneys' Fees § 8.02 (2026).

76 *In re* McWhorter, 284 N.W.2d 472, 477 (Mich.1979).

77 *See, e.g.*, *In re* Application of Li Volsi, 428 A.2d 1268, 1270-71 (N.J. 1981).

78 Cal. Bus. & Prof. Code § 6200 (2025); N.Y. Comp. Codes R. & Regs., tit. 22, § 1230.1 (2025).

79 *See* Cal. Bus. & Prof. Code § 6200 (2025); N.Y. Comp. Codes R. & Regs., tit. 22, § 1230.1.

In Alaska, the program mandates arbitration for attorneys when initiated by clients.[80] The program encourages amicable resolution and requires attorneys to cooperate, but they limit recourse for dissatisfied parties unless specific grounds are met. Under Alaska's Uniform Arbitration Act, judicial review is confined to narrowly defined procedural defects.[81] A court may vacate an award only where it was procured by fraud or undue means, where there was evident partiality or corruption, where the arbitrators exceeded their powers, or where the hearing was conducted in a manner that substantially prejudiced a party's rights.[82] Modification is similarly limited to evident miscalculations, clerical mistakes, or matters not submitted to arbitration.[83] Courts do not revisit the merits of the dispute, including factual findings or legal conclusions, absent fundamental flaws in the arbitral process.[84] Although these programs share similar goals across states, they vary considerably in their structure, scope, and implementation.

Against this doctrinal backdrop, jurisdictions have increasingly turned to alternative dispute resolution to manage attorney-fee conflicts. Alternative dispute resolution has gained prominence in resolving legal and professional disputes due to its efficiency, cost-effectiveness, and ability to foster amicable settlements. Courts and legislatures have increasingly recognized the benefits of mediation, specifically to alleviate docket burdens.[85] Mediation is often preferred because it allows parties to directly participate in crafting solutions that best serve their interests, which has the potential to foster mutual understanding and reduce the polarization associated with adversarial proceedings.[86] Confidentiality is a cornerstone of mediation, encouraging honest communication and promoting settlement discussions without fear of disclosure in subsequent litigation.[87] Public policy strongly favors settlement through mediation, as it spares parties the emotional and financial

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80 Alaska Bar R. 40 (2025).
81 Alaska Stat. § 09.43.120 (2025).
82 *Id*.
83 Alaska Stat. § 09.43.130 (2025).
84 *Id*.
85 State v. Williams, 877 A.2d 1258, 1266 (N.J. 2005).
86 *Id*.
87 *Id*.

toll of protracted litigation while providing a simplified and equitable resolution process.[88]

Legislative and judicial initiatives have further institutionalized mediation. For instance, the Alternative Dispute Resolution Act of 1998 mandates that federal district courts provide ADR processes, with many courts implementing mandatory mediation programs to expedite civil litigation and reduce costs.[89] These measures reflect a broader trend of integrating mediation into the judicial system to enhance access to justice.[90]

Further, the American Bar Association has provided significant guidance and encouragement regarding the mediation of disputes, emphasizing its role in fostering amicable resolutions and maintaining public confidence in the legal profession. The ABA strongly encourages mediation as a means to achieve informal and expeditious resolution, as reflected in the New York State Fee Dispute Resolution Program, which aligns with its principles.[91] It has also issued formal opinions and guidance under its Model Rules of Professional Conduct, which extend to attorney-client fee disputes. For instance, the ABA has stated that attorneys should conscientiously consider submitting to established procedures for resolving fee disputes, including mediation, even when participation is voluntary.[92] In addition, it has emphasized that attorneys have a fiduciary duty to fully inform clients about the advantages and disadvantages of alternative dispute resolution mechanisms.[93] This duty includes explaining the implications of such processes to ensure clients can make informed decisions.[94] The ABA highlights the importance of disclosing potential waiver of rights, such as the

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88 *Id*.

89 Laura K. Beasley, Mediation in Illinois Federal Court (Federal) (Nov. 13, 2025), https://plus.lexis.com/api/permalink/ba6e9ea1-257a-4ae0-b0c9-70c3f6d813f2/?context=1530671.

90 *See* Foxgate Homeowners' Ass'n. v. Bramalea Cal., Inc., 25 P.3d 1117, 1127 (Cal. 2001) (emphasizing the strong public policy favoring mediation and the importance of maintaining confidentiality to promote candid participation, thereby reflecting the judiciary's support for mediation as an integral component of modern dispute resolution).

91 N.Y. Comp. Codes R. & Regs. tit. 22, § 137.0 (2025).

92 Slater-Moore v. Goeldner, 113 So.3d 521, 530 (Miss. 2013).

93 Delaney v. Dickey, 242 A.3d 257, 269 (N.J. 2020).

94 *Id*.

right to a jury trial, and the procedural differences between litigation and alternative dispute resolution.[95]

Despite their similar goals, mediation and arbitration are distinct methods of ADR that differ significantly in their processes, outcomes, and implications. For instance, mediation and arbitration diverge most sharply in both process and consequence. Mediation is a voluntary, non-binding process where a neutral third party, the mediator, facilitates negotiations between the disputing parties to help them reach a mutually acceptable resolution.[96] The mediator does not impose a decision; instead, the parties retain full control over the outcome.[97] Mediation is often described as an extension of the negotiated settlement process, emphasizing collaboration and flexibility.[98] Arbitration, by contrast, can be a binding or non-binding adjudicative process where a neutral third party hears evidence and arguments from the parties and renders a decision.[99] Often, arbitration is binding, meaning the arbitrator's decision is final and enforceable, subject to limited judicial review.[100]

The methods also differ in voluntariness. Mediation is typically voluntary for both parties. For example, under California law, mediation of attorney-client fee disputes is entirely consensual, and neither party can be compelled to participate.[101] Arbitration, however, may be mandatory for attorneys and is initiated by the client, as seen in jurisdictions like California and Alaska. For instance, California's Mandatory Fee Arbitration program requires attorneys to submit to arbitration if the client elects it, unless the client has previously agreed in writing to binding arbitration.[102] Similarly, Alaska mandates arbitration for attorneys when clients initiate the process.[103] These distinctions are not merely procedural. Where mediation is entirely voluntary, a party resistant to compromise may decline to participate, effectively steering the dispute toward

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95 *Id*.
96 Cal. Bus. & Prof. Code § 6200(h) (2025).
97 Cal. Code Civ. P. § 1775.1(2026).
98 *Id*.
99 Ind. R. Alternative Disp. Resol. 1.3 (2025).
100 *Id*.
101 Cal. Bus. & Prof. Code § 6200(c) (2025).
102 *Id*.
103 Alaska Bar R. 34(b) (2025).

litigation. By contrast, client-triggered mandatory arbitration alters bargaining dynamics by compelling attorney participation and providing the client with a forum that does not require retaining additional counsel. The choice between voluntary mediation and mandatory arbitration therefore shapes leverage, cost exposure, and the timing of resolution. The divergence reflects fundamentally different regulatory judgments about how best to balance party autonomy, professional accountability, and consumer protection in the attorney-client relationship.

While no overarching federal framework governs attorney-fee mediation, most programs share core principles of fairness, impartiality, and confidentiality, reflecting a common policy goal: providing an accessible and efficient forum for resolving fee disputes without escalating conflict. Those shared values, however, do not translate into uniform procedural requirements; states diverge meaningfully in defining eligibility thresholds, participation mandates, mediator qualifications, administrative oversight, and the scope of jurisdiction. In California, attorney-fee mediation operates primarily under the Mandatory Fee Arbitration Act.[104] The structure emphasizes confidentiality, thus ensuring the settlement discussions cannot be used in later proceedings.[105] California also places significant weight on mediator qualifications, requiring formal training and disclosure of conflicts of interest, and allows local bar associations to manage programs and charge reasonable administrative fees.[106] Although arbitration may be mandatory in some contexts, mediation remains a consensual process focused on negotiated resolution.[107] States differ most sharply on a threshold question: whether mediation or arbitration is voluntary, mandatory for attorneys, or mandatory for both parties.

Some jurisdictions respond to fee disputes through centralized, statewide programs designed to promote uniformity, accessibility, and consumer protection. New York, for example, promotes the informal resolution of fee disputes through its Fee Dispute Resolution Program.[108] Mediation is strongly

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104 Cal. St. Bar Mand. Fee Arb. Guidelines, *supra* note 74.

105 *Id*.

106 Cal. Bus. & Prof. Code § 6086.14 (2025).

107 *Id*. § 6200(c).

108 N.Y. Comp. Codes R. & Regs. tit. 22, § 137.0 (2025).

encouraged as a complement to arbitration and is typically conducted by trained attorneys appointed by courts or bar associations.[109] Confidentiality protections are robust, shielding mediation communications from later disclosure.[110] Bar associations play an important administrative role, particularly in coordinating mediators and managing programs in regions with limited resources, reinforcing the states' emphasis on accessibility and efficiency.[111]

Other states adopt a more constrained approach, limiting mediation's availability based on subject matter, procedural posture, or institutional capacity. Florida's approach, governed by the Rules Regulating the Florida Bar, places clear jurisdictional limits on attorney-fee mediation programs.[112] The program's authority extends only to disputes between members of the Florida Bar or between a Florida Bar member and a client concerning fees or costs charged for legal services, and only where the parties consent through a written agreement compliant with Rule 4-1.5(i), a signed arbitration request, or a disciplinary referral.[113] The program lacks jurisdiction where a court has already assumed authority to determine reasonable fees, and it may not adjudicate disputes that themselves constitute alleged violations of the Rules Regulating the Florida Bar absent referral by the court or bar counsel.[114] Jurisdiction is further constrained by a practical limits as the dispute must be capable of resolution by an evidentiary hearing of eight hours or less.[115] The program may decline matters deemed excessively complex or requiring protracted proceedings, reflecting an institutional preference for streamlined adjudication.[116] Additionally, Florida statutes exclude certain categories of disputes—child custody, support, and indispensable third-party rights—from mediation

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109 *Id*. at § 1220.2.

110 *Id*. at § 137.12.

111 *Id*. at § 1220.2.

112 Fla. Bar Reg. R. 14-1.2(a) (2026).

113 *Id*.

114 *Id. See also In re*: Amendments to the Rules Regulating the Fla. Bar, 140 So.3d 541, 579 (U.S. 2014).

115 *Id*.

116 Fla. Bar Reg. R. 14-1.2(a) (2026).

jurisdiction.[117] These matters generally require extensive evidentiary hearings.[118]

Despite these limits, participation remains voluntary, and mediators often serve as authorized volunteers.[119] Florida also allows mediation of certain disciplinary or grievance-related issues when doing so serves both the public interest and the private rights of the parties, reflecting a broader but more carefully bounded scope.[120] Across jurisdictions, attorney-fee mediation programs share common structural elements: neutral and trained mediators, confidentiality of proceedings, local administration by bar associations or courts, and procedural safeguards to ensure fairness.

Court rules and case law play a critical role in shaping how these programs operate in practice.[121] In some jurisdictions, courts play the primary role in structuring fee dispute resolution, while in others, bar associations serve as the principal administrators.[122] Appellate decisions have clarified that bar-sponsored arbitration systems must exist not only on paper, but must function in a manner that is genuinely fair and impartial.[123] Courts have also delineated the scope of these programs—such as monetary thresholds and subject-matter limits—ensuring that fee arbitration does not overreach into disputes better suited for traditional litigation.[124]

Overlaying these state systems is the influence of the American Bar Association.[125] While the ABA does not regulate lawyers directly, its Model Rules of Professional Conduct strongly shape how jurisdictions and courts think about fee disputes.[126] The Model Rules encourage lawyers to use established fee dispute resolution mechanisms and stress the importance of informed client consent, particularly when arbitration provisions appear in engagement agreements.[127] Courts have echoed this guidance,

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117 Fla. Stat. § 44.104(14) (2026).
118 *Id*.
119 *Id*.
120 *Id*.
121 *See, e.g.,* Perez v. Grajales, 169 Cal. App. 4th 580 (Cal. Ct. App. 2008).
122 *Id.*
123 *Id*. at 598.
124 *Id*.
125 *Slater-Moore*, 113 So.3d at 530.
126 *Id*.
127 *Id*.

holding that attorneys must explain the practical consequences, benefits, and limitations before relying on such clauses.

At the federal level, mediation requirements tend to be narrower and more situational. For example, the U.S. Court of Appeals for the Third Circuit authorizes mediation in pro se matters, with courts at times appointing counsel on a limited, pro bono basis solely for mediation.[128] These appointments may terminate if mediation fails, reinforcing the view of mediation as a discrete settlement mechanism rather than a substitute for litigation.[129] Confidentiality is strictly maintained,[130] and any successful resolution must be memorialized in writing and filed with the court.[131]

A related set of jurisdictions emphasizes client protection through mandatory notice and client-initiated participation requirements. State bar-administrated systems reflect a more direct focus on attorney-client fee disputes. Alaska requires attorneys to notify clients of their right to pursue mediation or arbitration before filing suit to collect fees.[132] This notice requirement is substantive, not merely procedural: failure to comply can result in dismissal of the attorney's claims.[133] Clients are given a defined window to invoke mediation or arbitration—a signal toward strong client-protection orientation and an emphasis on informal dispute resolution.[134]

California's approach is among the most structured and comprehensive. Through its mandatory fee arbitration framework, the State Bar authorizes mediation as an alternative or complement to arbitration.[135] The system imposes detailed requirements governing mediator qualifications, disqualification procedures, and confidentiality protections.[136] These safeguards are designed to ensure

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128 U.S. Ct. App. 3d Cir. Loc. App. R. 33.2, 33.6.

129 *See id.* R. 33.6.

130 *See id.* R. 33.5(c).

131 *See id.* R. 33.5(d).

132 Alaska Bar R. 39(a) (2025).

133 *Id*.

134 *Id*. If a Petition for Arbitration for Arbitration of Fee Dispute or a Request for Mediation is not filed within twenty (20) days of receipt of notice, the right to pursue arbitration or mediation is waived.

135 Cal. St. Bar Mand. Fee Arb. Guidelines, *supra* note 74.

136 *Id*.

impartiality while promoting efficient resolution, a reflection of that state's broader regulatory posture toward attorney-client fee disputes.

New York similarly emphasizes early resolution and adopts a more flexible tone. Its statewide fee dispute resolution program strongly encourages mediation as the preferred method for resolving fee disagreements, reserving arbitration as a secondary option when mediation proves unsuccessful or impracticable.[137] Informality and speed are central features.[138] This reinforces the program's role as an alternative to prolonged litigation rather than a parallel adjudicative forum.

Other jurisdictions embed mandatory mediation obligations through professional conduct rules rather than standalone fee-dispute statutes. In North Carolina, attorneys must notify clients of the state bar's fee dispute resolution program before initiating a collection actions.[139] If a client requests mediation, the attorney's participation is mandatory and must be undertaken in good faith. This underscores the ethical dimension of fee disputes.

Some states extend mandatory mediation principles beyond attorney-fee disputes into broader domestic relations contexts, illustrating how mediation norms migrate across subject areas. Oregon and Washington, for example, require mediation in contested family law matters involving custody or parenting time, with court oversight of mediator selection, fee structures, and procedural compliance.[140] While these programs are not fee-specific, they reinforce common mediation features: good-faith participation, confidentiality, and limited judicial intervention unless necessary.

Further, appellate courts have also adopted mediation as a structural feature of dispute management. Wisconsin's Court of Appeals operates a mediation program that may require participation in presubmission conferences, with costs generally borne by

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137 22 N.Y. Comp. Codes R. & Regs. § 137.0 (2025).

138 *Id*.

139 *See* N.C. Rules of Pro. Conduct, r. 1.5(f) (2025) (requiring attorneys, at least thirty days before initiating legal proceedings, to collect a disputed fee, to notify the client in writing of the North Carolina State Bar's fee dispute resolution program and to participate in the process in good faith if the client timely elects to pursue it).

140 Grant Cnty. Super. Ct. LRMM 1 (Wash. 2025); Or. Linn Cir. SLR 12.005 (2025).

the parties unless waived.[141] The objective is not merely settlement, but the orderly and efficient administration of appellate caseloads.

Beyond purely voluntary or mandatory models, several jurisdictions employ hybrid systems that sequence mediation and arbitration.

B. *Hybrid Mediation-Arbitration Frameworks*

Across multiple U.S. jurisdictions, legislatures and courts have adopted hybrid mediation-arbitration frameworks to resolve disputes efficiently while preserving procedural fairness. These systems are designed to move disputes progressively toward resolution, typically beginning with mediation and transitioning to arbitration only if informal efforts fail. The hybrid structure reflects a policy preference for consensual settlement, backed by the availability of adjudicative finality through arbitration when agreement cannot be reached.

At the federal level, hybrid principles appear most clearly in the management of complex litigation rather than in attorney-fee disputes specifically. Federal Rule of Civil Procedure 23, which governs class actions, illustrates this approach by combining negotiated resolution with judicial oversight.[142] Although mediation is not mandated by the rule itself, class settlements, including those addressing attorney fees, must be approved by the court to ensure adequacy, equity, and transparency.[143] In practice, mediation often precedes approval, while the court functions as a final arbiter to safeguard absent parties' interests.[144]

State systems adopt more explicit mediation-to-arbitration pathways. California provides a structured example in its administrative and civil adjudication statutes.[145] Parties may attempt mediation or nonbinding arbitration as an initial step, with the option to request a de novo proceeding if they are dissatisfied.[146] This request carries strategic consequences: a party that seeks a new hearing and fails to obtain a more favorable result may bear additional

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141 Wis. Stat. § 809.17 (2025).
142 Fed. R. Civ. P. 23(e)(2) (2025).
143 *Id*.
144 *See, e.g.*, Cal Code Civ. P. § 1775 (2026).
145 Cal. Gov. Code § 11420.10 (2025).
146 Cal. Code Civ. P. § 1250.420 (2025).

costs.[147] The framework balances flexibility with accountability, encouraging meaningful participation in early dispute resolution while maintaining judicial oversight over binding outcomes.

Delaware's approach emphasizes party autonomy and procedural continuity.[148] With consent, disputes may shift seamlessly from mediation to arbitration, and mediators may serve as arbitrators if the parties agree.[149] Arbitrators are empowered to issue enforceable interim and final awards, allowing disputes to progress without unnecessary procedural duplication.[150] This model prioritizes efficiency while preserving enforceability.

Florida incorporates hybrid dispute resolution into both property and housing contexts, linking mediation outcomes to arbitration and cost recovery mechanisms.[151] For example, in condominium association disputes, parties may proceed to trial de novo following arbitration, with attorney fees and costs awarded based on the final outcome.[152] Under the same statutory framework, mediation is mandated but allows opt-out provisions, reflecting a balance between compulsory participation and party choice.[153] Cost-shifting provisions reinforce the seriousness of arbitration as a fallback mechanism rather than a procedural formality.

Minnesota adopts a more directive model, requiring unresolved disputes to proceed from mediation to binding arbitration within a defined timeframe.[154] The arbitration panel is granted broad authority, including the power to issue subpoenas and retain experts.[155] Importantly, mediation reports are excluded from arbitration proceedings, preserving confidentiality and preventing the informal phase from prejudicing the adjudicative outcome.[156] The separation reinforces the integrity of both proceedings within the hybrid system.

Pennsylvania's framework illustrates how hybrid models are used in regulated commercial relationships. Mediation is required

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147 *Id*.
148 Del. Super. Ct. Civ. R. 139 (2025).
149 *Id*.
150 Del. Bankr. Loc. Rules 9019-4(d) (2025).
151 Fla. Stat. § 718.1255 (2025).
152 *Id*.
153 *Id*.
154 Minn. Stat. § 572A.02 (2025).
155 *Id*.
156 *Id*. § 572A.01.

before formal complaints or protests may be filed, particularly in disputes between licensees.[157] Arbitration remains voluntary but is expressly contemplated as a next step if mediation fails.[158] To support candid participation, mediators and arbitrators are granted immunity for good-faith actions, reducing procedural risk and encouraging neutral decision-making.[159]

Not all states rely on centralized programs; many instead delegate fee dispute resolution to local or regional institutions.

C. *Localized and Bar-Administered Resolution Models*

In some areas, attorney-fee disputes and related civil conflicts are not resolved through centralized statewide systems, but through local or regional programs. These programs are frequently administered by local bar associations, courts, or contracted nonprofit organizations, and are tailored to the legal culture and practical needs of their jurisdictions. This decentralized structure reflects a deliberate policy choice: increasing access to mediation services while encouraging early, voluntary resolution of disputes. At the same time, it introduces a degree of variability in mediator qualifications, procedural rigor, and outcomes.

California exemplifies a robust local-bar-centered model for disputes. The state requires local bar associations to operate fee arbitration programs, many of which incorporate mediations as an initial or parallel option.[160] Mediators must satisfy defined training and qualification standards, and proceedings are governed by rules emphasizing neutrality and confidentiality.[161] Where no local program exists, the state bar steps in to ensure statewide coverage, blending local administration with centralized oversight.[162]

Other states rely on regional mediation infrastructures beyond the attorney-client context. Connecticut, for example, provides mediation services for landlord-tenant and other civil disputes through regional contracts with nonprofit organizations.[163]

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157 63 Pa. Cons. Stat. § 818.309 (2025).

158 *Id*.

159 *Id*.

160 Cal. St. Bar Mand. Fee Arb. Guidelines, *supra* note 74.

161 *Id*.

162 *Id*.

163 Conn. Gen. Stat. § 8-347a (2025).

These programs prioritize subject-matter expertise, particularly in housing law. This illustrates how regional mediation can be adapted to recurring local disputes rather than generalized civil litigation.

New York's approach combines statewide structure with other localized implementation.[164] Its Fee Dispute Resolution Program makes mediation a central feature of resolving attorney-client fee conflicts, with mediators appointed through courts or bar associations.[165] While the program is uniform in scope, mediator election and administration occur at the local level—a clear reinforcement of accessibility, baseline training, and experience requirements standards.

Oregon extends the local mediation model into public-service-related disputes, including those involving community mental health and developmental disability programs.[166] State law protects parties who request mediation from retaliation and mandates mediator impartiality and qualification, which underscores the role of mediation as a protective, rather than merely procedural, mechanism.[167]

Rhode Island applies a similar structure within professional licensing compacts, such as those governing dietitians and speech-language pathologists.[168] These programs provide mediation as an initial dispute resolution option, with binding mechanisms available if mediation fails.[169] Unlike purely voluntary systems, prevailing parties in subsequent litigation may recover costs and attorney fees, which integrates mediation into a broader enforcement framework.

Wisconsin represents one of the more comprehensive local-state hybrids. Disputes over attorney fees must be submitted to binding arbitration or mediation through the State Bar's Fee Arbitration Program, while the Court of Appeals operates a separate appellate mediation system.[170] In appellate mediation, parties

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164 N.Y. Comp. Codes R. & Regs. tit. 22, § 137.0 (2025).
165 *Id*.
166 Or. Rev. Stat. § 430.673 (2025).
167 *Id*.
168 R.I. Gen. Laws § 5-64.2-12 (2025).
169 *Id*.
170 Wis. Stat. § 809.17 (2025).

generally bear mediator costs unless waived.[171] This imposes a shared responsibility for dispute resolution while preserving judicial efficiency.[172]

Finally, some jurisdictions provide no specialized mediation framework for attorney-fee disputes at all. While some states have formal mediation, others rely primarily on court-based mechanisms, ethical rules, or general fee-shifting statutes, using litigation or arbitration as the default means of resolving disagreements when no specialized program exists. At the federal level, there is no standalone mediation framework for attorney-fee disputes. Instead, federal statutes such as the Equal Access to Justice Act and ERISA authorize courts to award reasonable attorney fees in defined categories of cases, leaving resolution to judicial discretion rather than alternative dispute resolution.[173] Several states follow a more structured bar-centered model. Alaska, the District of Columbia, Kentucky, Louisiana, New York, North Carolina, Ohio, and Utah all provide formal fee dispute resolution programs, typically involving mediation, arbitration, or both, operated by bar associations or court-appointed boards.[174] In many of these jurisdictions, attorneys are required to participate if a client requests arbitration, and some systems allow limited judicial review or de novo proceedings to safeguard fairness.

By contrast, states such as Florida, Texas, Virginia, and Washington do not maintain comprehensive attorney-fee mediation programs.[175] Instead, they address fee disputes through court proceedings, contractual enforcement, ethical rules, or discretionary fee awards in specific types of cases.[176] This wide variety underscores the absence of a uniform national approach: while bar-administered mediation and arbitration programs

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171 *Id*.

172 *Id*.

173 29 U.S.C. §§ 2412(b), 2412, 1132 (g)(1).

174 Alaska Bar R. 38 (2025); D.C. Bar Rule XIII (2025); Ky. SCR Rule 3.810 (2025); La. St. Bar Ass'n. Art. XIV § 1.5 (2025); N.Y. Comp. Codes R. & Regs., tit. 22, § 1230.1 (2025); N.C. Rules of Pro. Conduct, r. 1.5 (2025); Ohio Pro. Conduct Rules, r. 1.5 (2025); Utah R. Governing Utah State Bar 14-1112 (2025).

175 Fla. Stat. § 57.105 (2025); Tex. Civ. Prac. & Rem. Code § 38.002 (2025); Va. Code Ann. § 55.1-2169 (2025); Wash. Rev. Code § 28A.705.010 (2025).

176 Fla. Stat. § 57.105 (2025); Tex. Civ. Prac. & Rem. Code § 38.002 (2025); Va. Code Ann. § 55.1-2169 (2025); Wash. Rev. Code § 28A.705.010 (2025).

emphasize efficiency, confidentiality, and professional accountability, court-centered systems prioritize judicial control and statutory fee-shifting. Together, these models illustrate how jurisdictions tailor attorney-fee dispute resolution to local legal culture, regulatory philosophy, and institutional capacity.

IV. The Case for Uniform National Standards

Uniform national standards for attorney-fee mediation programs would offer the promise of greater consistency, fairness, and efficiency across jurisdictions that currently rely on widely varying models. Federal law already reflects a cautious version of this approach by encouraging alternative dispute resolution while allowing local courts broad discretion to tailor programs to their needs.[177] This structure illustrates both the opportunity and the challenge of national standards: a common baseline could promote reliability and public confidence, but excessive rigidity would risk undermining effective local practices that respond to regional legal cultures and case types.[178]

Drawing from existing federal and state frameworks, several core principles could anchor uniform standards without displacing local control. These include mediator impartiality and fairness, strong confidentiality protections, minimum training and qualification requirements, and respect for party self-determination.[179] Transparency around mediator fees and costs, meaningful access for parties with limited resources, and clear rules governing the enforceability of mediated agreements would further strengthen program integrity.[180] Oversight and periodic evaluation—already present in federal ADR systems—would help ensure that mediation programs remain effective, ethical, and responsive to changing needs.[181]

At the same time, any national framework must accommodate jurisdictional differences. Some states permit nonlawyers to serve as mediators, while others impose stricter professional requirements; some emphasize voluntary participation, while others

177 28 U.S.C. § 651 (2025).
178 *Id*. § 652.
179 Cal. St. Bar Mand. Fee Arb. Guidelines, *supra* note 74.
180 Ga. Alternate Disp. Resol., Appx. C (2025).
181 28 U.S.C. § 651 (2025).

mandate mediation under defined circumstances.[182] Uniform standards should therefore function as guiding principles rather than inflexible mandates, preserving the consensual nature of mediation and allowing procedural variation.[183] By balancing national consistency with local flexibility, uniform standards could enhance the resolution of attorney-fee disputes while respecting the diversity of existing mediation systems.

V. Conclusion

The spectacle of *Weinstein v. Baez* began as an anomaly—a convicted defendant turning his fire not on the prosecution, but on his own lawyer. The litigation did not yield the swift vindication Weinstein sought. In 2024, a New York Supreme Court justice denied his motion for summary judgment, concluding that Weinstein had failed to establish a prima facie entitlement to relief.[184] The court characterized his evidentiary showing as consisting of little more than a "self-serving affidavit" and a "haphazard printout" of a spreadsheet purporting to reflect time records.[185] The court further observed that even if the "nonrefundable" retainer provision was ultimately deemed unenforceable under New York law, the attorney would still be entitled to recover in quantum meruit for the reasonable value of services actually rendered.[186] Rather than resolving the dispute, the ruling ensured that the controversy over fees would continue, underscoring how attorney-client fee conflicts can persist long after the underlying representation has ended.[187]

Yet by tracing that dispute outward, this Comment has shown that the conflict was not aberrational in substance, only in scale and visibility. Beneath the celebrity headline lies a structural problem embedded in the attorney–client relationship itself: fee disputes arise at the intersection of trust, money, and professional

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182 Amendments to Rules Regulating the Fla. Bar—Florida Bar Griev. Mediation Program, 717 So.2d 498, 499-500 (Fla. 1998).

183 *Id*.

184 Craig Clough, *Harvey Weinstein Denied Win in $1M Fee Right with Jose Baez*, Law360, (May 3, 2024, 9:33 PM), https://www.law360.com/pulse/articles/1833638/harvey-weinstein-denied-win-in-1m-fee-fight-with-jose-baez.

185 *Id*.

186 *Id*.

187 *Id*.

power, and the legal system has yet to design a consistently fair and effective way to resolve this sort of dispute.

Attorney-fee disputes are uniquely corrosive. They transform lawyers from advocates into adversaries and clients from beneficiaries of professional judgment into skeptics of its value. Litigation, the profession's default tool for resolving conflict, often magnifies rather than resolves these harms—escalating costs, entrenching mistrust, and exposing both parties to reputational damage. Disciplinary systems, meanwhile, are ill-equipped to address the gray zone where disagreement over reasonableness falls short of complaints about ethical misconduct. What remains is a gap between the frequency of fee disputes and the adequacy of the mechanisms available to resolve them.

Mediation offers a principled way to close that gap. Properly structured—through mandatory pre-suit notice, client-triggered participation requirements, and trained neutral mediators—it aligns with the realities of fee disputes: their fact-intensive nature, their emotional undercurrents, and their sensitivity to power imbalance. Mediation allows clients to question, lawyers to explain, and both sides to recalibrate expectations without the zero-sum posture of litigation. It preserves confidentiality, lowers barriers to access, and advances the profession's stated commitment to fairness and transparency. For these reasons, states have increasingly turned to mediation as a consumer-protection tool in fee disputes—but they have done so unevenly, inconsistently, and without a shared baseline of standards.

This fragmentation matters. Whether a client learns of mediation, can afford it, or can compel meaningful participation often depends not on the merits of the dispute, but on geography and the individual state's particularized approach to attorney-client fee disputes. The absence of uniform guiding principles undermines both client protection and public confidence in the legal profession. It also leaves attorneys subject to divergent obligations and expectations that vary sharply across jurisdictions.

The path forward does not require federal preemption or rigid national mandates. It requires coherence. Drawing from existing state and federal models, this Comment has argued for uniform national standards that articulate core principles—impartiality, confidentiality, accessibility, informed consent, and procedural fairness—while preserving local flexibility in implementation. In

practical terms, coherence would require greater uniformity in trigger thresholds, disclosure obligations within engagement agreements, the sequencing of mediation and arbitration, and the scope of judicial review, as well as mechanisms for program oversight and data transparency. In particular, greater coherence would require standardizing the scope of judicial review across jurisdictions. As reflected in states such as Alaska, arbitration outcomes should be subject only to limited review for procedural integrity—such as fraud, evidence partiality, arbitral overreach, or conduct that substantially prejudices a party's rights—and courts should not revisit the merits of the dispute. By contrast, mediated agreements, once reduced to writing, should be enforceable absent traditional contract defenses. Clarifying these standards would promote both finality and fairness while reducing uncertainty about when judicial intervention is appropriate. Such standards would not displace successful state programs; they would strengthen them, ensuring that mediation's promise is realized not sporadically, but systematically.

The legal profession asks clients to trust its judgment, its billing, and its ethics. That trust is strained when disputes over fees are resolved through blunt, adversarial mechanisms that leave both sides diminished. Mediation cannot eliminate fee disputes, but it can prevent them from metastasizing into spectacles that damage lawyers, clients, and the profession as a whole. If the lesson of *Weinstein v. Baez* is that even the most powerful clients can find themselves trapped in costly fee litigation, the broader lesson is more urgent: a system that resolves ordinary fee disputes more wisely will rarely produce extraordinary disputes at all.

Doug Grace

Comment, Strict Scrutiny: When Child Welfare Is Compelling

Abstract

This Comment interrogates the First Amendment implications of non-disparagement clauses in custody orders when they operate as content-based prior restraints. First, it challenges the courts' superficial—and, at times, entirely absent—constitutional analysis of these clauses. Second, it traces an emerging trend that limits compelling interests to cases involving actual or threatened psychological harm. Third, the Comment outlines the trend's benefits, but cautions that, in the absence of a structured, concrete rule, its ambiguity can lead courts to reach unpredictable and overly broad results. Fourth, the Comment proposes a test courts may adopt to address these deficiencies, answers potential criticisms, and demonstrates its application.

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> "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."
>
> –John Stuart Mill, On Liberty 9 (1859)

Introduction

When parents with a history of intense, unresolved conflict separate, their hostility rarely ends. Instead, it often resurfaces in family court as a prolonged, high-conflict custody dispute.[1]

To shield children from the fallout, courts employ tools that facilitate coordination while minimizing conflict-triggering contact. These tools include co-parenting counseling, mediation, and most commonly, restricting parental communication to online platforms.[2]

At the most restrictive end of this spectrum, however, lie "non-disparagement clauses" (NDCs): custody order provisions that restrict a parent's ability to make negative statements about either the other parent, significant caregiver, or both.[3] These

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1 *See generally* Karey L. O'Hara & Bruce R. Cohen, *A Call for Early, Effective, and Scalable Parent Education Programs for High-conflict Separated/Divorcing Parents: A Synthesized Perspective from Prevention Science and Family Law*, 62 Fam. Ct. Rev. 160, 161 (2024) (discussing varying social science studies that conclude that "high-conflict" custody cases make up anywhere from 5-10% of divorce/parental separation cases) (citations removed).

2 For an overview of these tools, see: Shelly M. Ingram, *Using Technology to Find Answers to Common Child Custody Problems and Keep the Peace While Co-Parenting*, 44 Fam. Advoc. 21, 22-23 (2021) (discussing the uses of mediation, co-parenting counseling, and online platforms to facilitate efficient co-parenting while minimizing parental conflict); Aleksandra J. Kocelko, *Unpacking the High-Conflict Custody Toolbox: Tools to Minimize Stress on Children*, 21 Law. J. 15 (2019) (discussing mediums such as "Our Family Wizard," which incorporates behavioral design features—such as tone warnings—that prompt parents to revise emotionally charged messages before sending them).

3 Jacob Eisenman, Comment, *The Use of Non-Disparagement Clauses in Family Law Cases*, 33 J. Am. Acad. Matrim. Law. 593, 593-94 (2021). Courts usually include these clauses in custody arrangements where the parents are unable to agree on the terms. Hence, its common use in high conflict custody arrangements. Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 Alb. L. Rev. 345, 424 (1997). "This is usually done in a standing court order or temporary order that is put in place in the very preliminary stages of a custody suit, or some time later when it becomes clear that

restrictions may extend beyond speech directed at the child, reaching statements made to third parties or the public. Although courts lack a consensus definition for "disparagement," it generally refers to negative or derogatory remarks that are likely to harm a child's relationship with a parent or interfere with the child's emotional development.[4] Courts enforce NDCs through contempt proceedings[5] or custody modification motions premised on alleged violations of court-ordered speech restrictions.[6]

But in ordering and enforcing an NDC, courts effectively restrict a parent's speech before it is stated, imposing a content-based prior restraint subject to strict scrutiny. Yet, courts rarely address that First Amendment implication; and in the rare circumstances when they do, they commonly anchor the "compelling interest" requirement by noting that the state has an interest in child welfare without any further analysis as to whether child welfare is even at stake.[7]

That said, as courts increasingly tackle this issue, a growing number of jurisdictions have recently begun to only recognize child welfare as a compelling interest when the speech actually

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one or both parents may be saying inappropriate things to a child about the other parent." Bruce L. Beverly, *A Remedy to Fit the Crime: A Call for the Recognition of the Unreasonable Rejection of a Parent by a Child as Tortious Conduct*, 15 J. L. Fam. Stud. 153, 167 (2013).

4 *See, e.g.*, *In re* Marriage of Candiotti, 34 Cal. App. 4th 718 (1995); *In re* Marriage of Hartmann, 185 Cal. App. 4th 1247 (2010).

5 Eisenman, *supra* note 3, at 594; *see generally* Margaret M. Mahoney, *The Enforcement of Child Custody Orders by Contempt Remedies*, 68 U. Pitt. L. Rev. 835, 839-40, 869-74 (2007) (explaining how courts use both civil and criminal contempt to coerce parent compliance with parenting plans).

6 *See* Cornell v. Mecartney, 575 P.3d 349 (Wyo. 2025) (iterating that non-compliance with a custody arrangement (such as breaching an NDC) may constitute a change to warrant a modification if severe enough). Further, even if a court does not initially integrate an NDC within a custody arrangement, disparagement may constitute a change in circumstances sufficient to warrant modification. *See, e.g.*, Sulzle v. Sulzle, 14 N.W.3d 532, 549 (Neb. 2024) ("disparagement of the other parent to the children can be a material change of circumstances"); Haley v. Haley, 771 N.E.2d 743 (Ind. Ct. App. 2002) (same).

Although courts may enforce NDCs through either contempt or modification, they generally prefer contempt. *See* 3 Suzanne Reynolds, Lee's North Carolina Family Law § 13.52 (5th ed. 2002) ("ordinarily the proper response is a finding of contempt, not modification") (citation removed).

7 *See infra* Part I (explaining how the free speech issues in custody disputes go unaddressed or are subject to a superficial constitutional analysis).

harms—or threatens to harm—the child's well-being.[8] These courts effectively insist on a "smoke-and-fire" rule: no restriction unless there is real smoke, not just a judge's hunch that something might burn.

This Comment supports the emerging rule and outlines why it is preferable to treating a child's welfare as a per se compelling interest, but cautions that, in its current form, the absence of a structured, concrete rule risks adverse consequences. The Article situates those consequences within broader First Amendment concerns, asserts the need for a structured standard, and aims to refine the rule as it continues to develop by proposing a factor-balancing test for courts to use or model, based on whether a harmful, disparaging remark is reasonably likely to reach a child. Notably, this Comment does not address voluntary or non-court-ordered NDCs because they generally fall outside constitutional scrutiny.[9]

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[8] *See, e.g.*, Petition for a Writ of Certiorari to the Supreme Court at *15-18 for Clark v. Clark, 917 S.E.2d 917, 924 (S.C. App. 2025), *reh'g denied* (July 24, 2025), *cert. denied* (Dec. 16, 2025), 2026 U.S. S. Ct. Briefs LEXIS 952 [hereinafter after "*Clark, Supreme Court Writ*"] (identifying the trend; collecting cases); Petition for a Writ of Certiorari to the Supreme Court at *18-19 for S.B. v. S.S., 243 A.3d 90 (Pa. 2020), 2021 WL 2075790 (iterating that "[t]he new frontier for family court First Amendment intrusions are gag orders controlling what parents can say to their own children") (collecting recent cases on this issue).

For examples of jurisdictions recently following this trend, see: Shak v. Shak, 144 N.E.3d 274, 279-80 (Mass. 2020) ("as important as it is to protect a child from the emotional and psychological harm that might follow from one parent's use of vulgar or disparaging words about the other, merely reciting that interest is not enough to satisfy the heavy burden of justifying a prior restraint") (holding that an interest in child welfare is only compelling when the speech poses an "actual or threatened physical or emotional harm to a child"); Easterday v. Everhart, 201 N.E.3d 264, 269 (Ind. Ct. App. 2023) "[a] custody order that restrains speech is state action that triggers protection under the First Amendment") (citation removed); *see also* Yanez v. Sanchez, 548 P.3d 341, 346 (Ariz. Ct. App. 2024) ("[t]o prove a compelling government interest for a prior restraint on a parent's right to free speech, the record must offer evidence of actual or threatened physical or emotional harm to the child"); M. R. v. C. H., No. CN25-03807, 2026 WL 747062, at *3-4 (Del. Fam. Ct. Mar. 4, 2026) (same) (citing Wutzel-Frez v. Frez, No. HHDFA144072788S, 2015 WL 6557830, at *7 (Conn. Super. Ct. Oct. 1, 2015) (quoting Nash v. Nash, 307 P.3d 40, 49 (Ariz. Ct. App. 2013))).

[9] *See, e.g.*, Wallace v. Wallace, 561 P.3d 187, 195 (Utah Ct. App. 2024) (noting that a voluntary non-disparagement clause is not a prior restraint because it is waived); *see also Shak*, 144 N.E.3d at 280 ("our ruling does not impact nondisparagement agreements that parties enter into voluntarily."). *But see* Lowes v.

The Comment proceeds in two parts. Part I assesses the constitutionality of NDCs, how they may constitute content-based prior restraints subject to strict scrutiny, and why the emerging trend is preferable to simply treating a child's welfare as a per se compelling interest or not analyzing an NDC's constitutionality altogether.

Part II interrogates the ambiguity of the emerging trend, discusses the consequences of that ambiguity, and argues for a structured framework to combat them. It then aims to guide courts and practitioners by proposing a corresponding test for courts to adopt or adapt, offers considerations for courts to narrowly tailor their NDCs,[10] and applies the test to hypothetical fact patterns.

* * *

This Comment fills a gap in the growing scholarship on NDCs[11] by providing a reference for five separate, though related, audiences on how strict scrutiny functions within this context.

Thompson, 573 P.3d 377 (Or. 2025) (holding that a non-disparagement clause in a stipulated divorce judgment did not waive a party's rights under a state anti-SLAPP statute); Levy *ex rel.* B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 192 (3d Cir. 2020) ("[a]ll rights, including free speech rights, can be waived. But waivers must be voluntary, knowing, intelligent, and established by clear and compelling evidence.").

10 While narrow tailoring is not this Comment's focus, this Part still seeks to help courts and practitioners conduct a thorough strict scrutiny analysis of custody NDCs. Accordingly, the Comment warrants at least some examination of strict scrutiny's other half.

11 For the existing scholarship, see: Anna Hagg, *Comment, First Amendment Rights or the Best Interests of the Child: The Tension Between Parents' and Children's Rights in Non-Disparagement* Agreements, 56 New Eng. L. Rev. 79 ((2021) (discussing *Shak v Shak*, a recent and seminal case on this issue); Kelly Kanavy, Comment, *The State and the "Psycho Ex-Wife": Parents' Rights, Children's Interests, and the First Amendment*, 161 U. Pa. L. Rev. 1081, 1084 (2013) (contending that the traditional best interests of the child standard should not substitute for strict scrutiny); Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 Rev. 631((2006) (discussing speech restrictions with a focus on religious speech); Drew Gehman, *S.B. v. S.S.: Children's Best Interests and Parents' First Amendment Rights through a (Skeptically) Originalist Lens,* 44 Child. Legal Rts. J. 1 (2004) (discussing content-neutral vs. content-based restrictions for NDCs under an originalist lens); Laurel S. Banks, Notes, Schutz v. Schutz, 31 U. Louisville J. Fam. L. 105 (1992-93) (discussing an application of intermediate scrutiny regarding an NDC clause in a landmark Florida case that

1. Judges deciding when the First Amendment allows—or should allow—them to uphold or issue an NDC and practitioners arguing this matter to those judges.[12]
2. Judges deciding when their state constitutions allow such injunctions (and, again, lawyers who are arguing in such cases).
3. Judicial clerks making recommendations to judges on this issue.
4. Lawmakers and lobbyists tackling the issue and its broader implications.
5. Judges, scholars, practitioners, and law students researching the subject.

With these audiences in mind, the Comment starts with how courts currently handle (and mishandle) NDCs under the First Amendment.

I. Non-Disparagement Orders and the First Amendment

Because NDCs suppress speech, they raise a complex First Amendment issue at the intersection of free expression, parental rights, and child welfare. Still, family courts often leave an NDC's validity—let alone constitutionality—unaddressed because such orders are so standardized, routine, and rarely recorded;[13] and

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compelled speech); David L. Ferguson, Comment, Schutz v. Schutz*: More than a Mere "Incidental" Burden on First Amendment Rights*, 16 Nova L. Rev. 937 (1992) (discussing the same Florida case and arguing that the court's restriction was erroneous and unconstitutional).

12 These include state courts matters because the First Amendment applies to the states via the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Gitlow v. New York, 268 U.S. 652, 666 (1925).

13 *See, e.g.*, Stephanie L. v. Benjamin L.*,* 158 Misc. 2d 665, 667-68 (N.Y. Sup. Ct. 1993) (iterating that NDCs "appear to be so routine that they are rarely reported"); Volokh, *supra* note 11, at 660 ("[i]n some jurisdictions, orders not to criticize the other parent have seemingly become nearly boilerplate, on the theory that such criticism is always against the child's best interests"), 670 ("[t]he standard First Amendment doctrine was created in controversies far removed from child custody speech restrictions. The Court has never had to consider the special issues raised by parent-child speech, or by conflicts between parents"); Lyn R. Greenberg & Robert A. Schnider, *We're Still Taking X-Rays but the Patient Is Dying: What Keeps Us from Intervening More Quickly in Resist-Refuse Cases?*,

even when courts do address their validity, they simply justify the restriction on commonplace, leaving their constitutionality largely unexamined.[14] As commentator Kelly Kanavy describes, family courts therefore operate in a "constitutional 'twilight zone'"[15] because their decisions implicate constitutional concerns without any constitutional analysis. And as legal scholar Drew Gehman adds, that "twilight zone" has seemingly existed since the United States' inception.[16]

But no court has recognized a categorical First Amendment exception for child-related speech.[17] Indeed, the Court has repeatedly rejected restrictions on protected expression based on general or speculative fears of future harm to children.[18] As the Court

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58 Fam. Ct. Rev. 488, 501 (2020) ("[m]any courts have standard orders directing parents not to disparage one another in front of the child."); *cf. In re* Marriage of Olson, 850 P.2d 527, 532 (Wash. Ct. App. 1993) (noting that "[f]ew other cases around the country have dealt with this issue.").

14 *See, e.g.*, Watkins v. Watkins, 462 S.E.2d 687, 689 (N.C. Ct. App. 1995) (affirming an NDC—without any constitutional analysis—because "[p]rovisions directing the parties to cooperate with one another and to refrain from conduct that will be detrimental to the child are commonly included in custody orders"); *In re* Marriage of Hartmann, 185 Cal. App. 4th at 1251 (affirming an NDC simply because "courts routinely order the parties not to make disparaging comments about the other parent to their children or in their children's presence"); *Clark, Supreme Court Writ*, *supra* note 8, at *17 ("[a]nti-disparagement clauses and speech-restrictive orders appear in standard custody templates in many states . . . and are often imposed without individualized findings, without evidence of harm, without applying strict scrutiny, and without any temporal limitation.").

15 Kanavy, *supra* note 15, at 1084.

16 *See* Gehman, *supra* note 11, at 28 ("even at the time of the founding, family law appears to have been exceptional, and if not a constitutional twilight zone, at the very least, a father's rights twilight zone.").

17 *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 794-95 (2011) (although the government "possesses legitimate power to protect children from harm" in the context of the public dissemination of violent materials accessible to children, "that does not include a free-floating power to restrict the ideas to which children may be exposed."); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74-75 (1983) (holding that the government may not restrict the level of discourse (present in physical mail) to that which would be suitable for children).

18 *See* United States v. Playboy Ent. Group, 529 U.S. 803, 822 (2000) (holding that the government may not justify a speech restriction based on "mere speculation or conjecture" that a child may see potentially harmful content); *Brown*, 564 U.S. at 799 (2011) (iterating that "ambiguous proof will not suffice" for a harm to a child); Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002) (holding

put it in *Butler v. Michigan*, the state cannot "burn the house to roast the pig."[19]

Accordingly, an NDC's validity requires a determination of whether it comports with First Amendment principles. Otherwise, family courts risk imposing unreviewed constitutional violations.[20]

Some may reply that the Constitution does not even apply in the first place:[21] Because NDCs arise in custody disputes, the court is said to act under its *parens patriae* authority, where traditional constitutional limits supposedly do not reach.[22] But even under this approach, constitutional exceptionalism remains unjustifiable: an NDC regulates speech itself—not custody—and can restrict a parent's expressive rights in contexts far beyond the child. That distinction makes constitutional scrutiny necessary, as the following Section explains.

A. *Parens Patriae*

At its core, the state's *parens patriae* function (or "parent of the country"[23] function) allows it to act for non-autonomous individuals—such as children—by stepping into their shoes and making decisions on their behalf.[24] Unlike the state's "police power,"

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that "the Government may not suppress lawful speech as the means to suppress unlawful speech.").

19 352 U.S. 380, 383 (1957).

20 Kanavy, *supra* note 11, at 1112 ("[i]f judges were no longer bound by the restraints of the Constitution, their orders could violate several constitutional rights.").

21 *See* James G. Dwyer, *Parents' Self-Determination and Children's Custody: A New Analytical Framework for State Structuring of Children's Family Life,* 54 Ariz. L. Rev. 79, 105 (2012) [hereinafter "Dwyer, *Parents' Self-Determination*"] (noting how some "[s]cholars thus launch into an analysis of whether state decision-makers have sufficient justification in the child custody context for restricting the liberty of persons who happen to be parents by applying the same test they would apply in other contexts, without first asking whether adults' constitutional rights of self-determination are in fact relevant in this particular context.").

22 *See id.* at 110 (discussing how "the custody context is categorically different" than contexts in which the marketplace of ideas is implicated because it focuses on the child).

23 Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982).

24 James G. Dwyer, *Clarifying Parens Patriae*, 30 J. Ethics & Soc. Phil. 339, 339-40 (2025) [hereinafter "Dwyer, *Clarifying Parent Patriae*"]; *In re* Gault, 387 U.S. 1, 16 (1967); *see also* Michael J. Higdon, *Parens Patriae and the Disinherited Child*, 95 Wash. L. Rev. 619, 642–43 (2020) (characterizing *parens patriae* as "the

parens patriae functions outside of traditional constitutional principles.

This constitutional exceptionalism centers on the premise that courts act as the child's agent, making decisions on their behalf, rather than through direct regulations against a party under their traditional "police power."[25] For example, in cases of parental disparagement, a child—like an adult—has an independent right to dissociate from a disparaging parent or avoid being an audience to that speech, but cannot exercise that right without court intervention. Thus, if a court denied custody or visitation in response to disparagement, it did not restrict speech; it simply acted on the child's behalf. On this view, constitutional scrutiny would not apply.

But even if that exceptionalist logic applies to custody remedies, it cannot extend to NDCs. Unlike custody remedies—which regulate the parent-child relationship in response to harmful conduct—NDCs operate prospectively by restricting speech before it is uttered. That preventive quality creates First Amendment concerns that extend beyond child welfare and into broader speech regulation, where *parens patriae* exceptionalism is unwarranted.[26]

NDCs, even when imposed under *parens patriae* authority, may burden protected speech outside the familial sphere and

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right and the duty of the state" to make decisions in the best interests of vulnerable persons).

Such powers have existed since the United States' inception. *See* Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 57-58 (1890).

25 *See* Dwyer, *Clarifying Parens Patriae*, *supra* note 24, at 355-56, 359; *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1199 ("when the state acts as *parens patriae*, it should advance only the best interests of the incompetent individual and not attempt to further other objectives, deriving from its police power, that may conflict with the individual's welfare") (italics added), 1200–02 ("[g]iven the different premises and purposes of the police power and the *parens patriae* power, courts should apply different principles when they analyze laws based on these two powers. . . . [I]t should exercise the *parens patriae* power solely to further the best interests of the child") (italics added) (1980).

26 *Cf.* Dwyer, *Parents' Self Determination*, *supra* note 21, at 107 ("[a]s with individual interests and rights, though, the mere existence of societal interests does not mean they are morally relevant to any particular dispute over individual freedom. Child custody disputes might well be different from other kinds of disputes, because they entail the state's making a decision about an individual's family life rather than a decision about broad social regulations.").

inside the "marketplace of ideas,"[27] such as when a parent publicly advocates for family law reform,[28] expresses opinions related to their child's education,[29] or interacts with others outside of the

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27 The "marketplace of ideas," rooted in Justice Holmes's 1919 *Abrams v. United States* dissent, refers to protected speech that contributes to open discourse. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (because truth is often contestable, "the best test of truth is the power of the thought to get itself accepted in the competition of the market"); *see generally* David R. Dow, *Two Dogmas of Free Speech Doctrine*, 78 Okla. L. Rev. 209, 215 (2026) ("two distinct claims lie at the heart of Holmes's metaphor. One is that there is a functional marketplace, where individuals and entities articulate and advance competing ideas and where the "better" idea prevails. The second concept underlying the metaphor, however, is that there is such a thing as truth; indeed, the very impetus for referring to a "marketplace" of ideas where better ideas prevail requires us to assume that better equals true, and the market will filter out the falsity.").

Many courts and scholars view the absence of such a marketplace as a threat to democratic governance. *See, e.g.*, Frederick Schauer, Free Speech: A Philosophical Enquiry 16 (1982); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government.").

28 *See, e.g.*, *In re* Cassie S., 2026 ME 26, at *8 (vacating a gag order that restricted a parent from "speaking to the media, posting on any social media platform, or speaking about any issues involved in this litigation[]" because it "appears to preclude political speech such as advocacy for reform of the child protection system. It may also prevent the mother from speaking to the media and posting on social media in general"); *cf.* S.B. v. S.S., 243 A.3d 90, 97, 107 (Pa. 2020), *cert. denied*, 142 S. Ct. 313 (mem.) (2021) (upholding a gag order that restricted the parents from speaking to the media about the custody dispute, ordering them to remove all prior posts, but explicitly still allowing them to "provide public testimony in the State House and/or Senate and in the United States Congress and Senate about parent alienation, sexual abuse of children in general or as it relates to this case," as long as that speech kept the children's information confidential; reasoning that the order still afforded the parent an "ample opportunity to disseminate all of their thoughts into the marketplace of ideas without restriction on the content of their message. . . . allow[ing] [the parent] to voice all of their opinions regarding issues important to them, including parental alienation, child sexual abuse, and placement of children in the custody of sexually abusive parents, and to testify about these issues before governmental bodies in an effort to remedy these vital societal concerns.").

29 *See* Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. Chi. L. Rev. 937, 1016 (1996) (explaining how indirect communication from a parent through an intermediary related to the child may fall into the marketplace because "[p]arents are no less 'speakers' for First Amendment purposes when they communicate indirectly with their children through the speech of schools, teachers, home tutors, or other educational intermediaries.").

family.[30] In this respect, NDCs risk functioning as prior restraints on protected speech.

Of course, speech that harms a child—even when expressed outside the family—may fall outside the First Amendment's protection,[31] and, from a moralist perspective, yield to the child's welfare interests.[32] But absent constitutional scrutiny, an NDC risks capturing protected, non-harmful speech within its dragnet. Thus, the First Amendment must apply to filter out protected speech from restriction. Otherwise, *parens patriae* effectively acts as a backdoor to impose prior restraints on protected speech unrelated to the child's welfare, creating a free speech dead zone.[33]

Furthermore, and on the child welfare side, failing to conduct a First Amendment analysis risks harm to the child that the state seeks to protect in the first place. It can lead either to vacatur on appeal—allowing harmful disparagement to continue—or to

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30 *In re* Marriage of Eckersall, 12 N.E.3d 830, 839 (Ill. App. Ct. 2014), *appeal dismissed*, 28 N.E.3d 742 (Ill. 2015) (Mason, J., dissenting) (noting how an NDC should have been subject to constitutional scrutiny because it "significantly affects the relationship of the parties in their everyday activities apart from the litigation.").

31 *See, e.g.*, *In re* Paternity of G.R.G., 829 N.E.2d 114, 125 (Ind. Ct. App. 2005) (upholding an NDC that "prevent[ed] parents from discussing their disputes with their child" because the NDC "d[id] not restrain speech that is protected as a contribution to the 'marketplace of ideas.'"); Volokh, *supra* note 11 at 716 (disparaging statements "seem unlikely to materially interfere with public debate, and likely to protect both the children's best interests and the other parent's rights"); *see generally* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("certain well-defined and narrowly limited classes of speech . . . , are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

32 As Professor Dwyer notes, when an adult and a child's interests conflict, the correct moral solution is to place the child's above the adult's. James G. Dwyer, Moral Status and Human Life: The Case of Children's Superiority 192-97 (2010).

Parens patriae reflects this logic. *See, e.g.*, Borra v. Borra, 756 A.2d 647 (N.J. Super. Ct. Ch. Div. 2000) ("[t]he exercise of *parens patriae* jurisdiction is always foremost, such that when presented with a choice between parent's rights and children's rights, children's welfare and best interests will always be paramount.").

33 *See* Erwin, Chemerinsky, *Free Speech Dead Zones*, 2022 U. Ill. L. Rev. 1695, 1708 (within a "free speech dead zone," "[a]ll of the benefits of free speech—for the speaker, for the audience that would hear the message, and for society—are lost").

overinclusive orders that suppress speech beneficial to the child, such as a parent's involvement in a child's schooling,[34] therapy,[35] extracurriculars,[36] or scheduling related to parenting time.[37] For these reasons, courts must reject pure exceptionalism and either balance it with First Amendment principles or embrace constitutionalism altogether.[38]

As such, NDCs necessitate—at least some sort of—a constitutional analysis, for which the starting point is the prior restraint doctrine.

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34 *See, e.g.*, *In re* Marriage of Sukel v. Johnson, 2005 WL 1523951 (Cal. App. 4th Dist. 2005) (vacating an NDC for overbreadth because it meant that even if the mother had an independent friendship with the parent of another student, she was prohibited from making any negative comment about the father to her friend).

35 *See, e.g.*, *Eckersall*, 12 N.E.3d at 840 (Mason, J., dissenting) (explaining how an NDC was not only unconstitutionally overbroad but also detrimental to the children because it forces a parent to refer their child to a representative, a stranger, to talk about any emotional turmoils of the familial split, "assuag[es] any fear or anxiety her children may express regarding . . . whether a visitation schedule will conflict with a slumber party or sporting event," and prevents even saving childhood milestones by recording such as "a ballet recital, soccer game or school graduation"); Brief of Amicus for American Civil Liberties Union of Massachusetts at *23-24 for Shak v. Shak, 484 Mass. 658 (2020), 2019 MA S. Ct. Briefs LEXIS 1517 (discussing this consequence in an Amicus brief in *Shak v. Shak* (a seminal case on this issue that this Comment later discusses in Part I.C); noting that, "In the name of child protection, all sorts of free speech could be quelled, including discussions as to whether or why a child might want to seek mental health treatment related to parental conduct, as well as speech intended to teach children how to engage in and survive the inevitable disagreements and difficult discussions that present themselves throughout life.").

36 *See, e.g.*, Campbell v. Campbell, 250 N.E.3d 459, 478 (Ind. Ct. App. 2024) (vacating an NDC for overbreadth because it extended the restriction to disparagement in the presence of "medical professionals, school personnel, coaches, or other similar individuals.").

37 *See* Frank F. Furstenberg, Jr. & Andrew J. Cherlin, Divided Families: What Happens to Children When Parents Part 73 (1991) (iterating "that when parents are able to cooperate in childrearing after a divorce and when fathers are able to maintain an active and supportive role, children will be better off in the long run.").

38 For the sake of fairness, those who disagree should still consider a First Amendment analysis under the court's traditional police power *after* imposing an NDC through their *parens patriae* authority. *See* Dwyer, *Clarifying Parens Patriae*, *supra* note 24, at 363-64 (arguing that the state's *parens patriae* and police powers are mutually exclusive, but noting that a court may act under their police power *after* acting under their *parens patriae* power).

B. *Prior Restraints*

While prior restraints are a murky area and lack a settled definition,[39] most courts define them as restrictions on speech before it is uttered.[40] They carry a heavy presumption against their constitutionality, rebuttable only if they survive the applicable level of scrutiny.[41] The proper test turns on whether the restraint is "content-based," a restriction on the speech's substance, or "content-neutral," a restriction on the speech's time, place, or manner.[42] While an NDC may take either form depending on its scope, content-based restrictions are more common in high-conflict custody cases because they target the substance of communications[43]—preventing disparaging

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39 Michael I. Meyerson, *Rewriting* Near v. Minnesota: *Creating a Complete Definition of Prior Restraint*, 52 Mercer L. Rev. 1087, 1087-88, 1106 (2001).

40 *See* McCarthy v. Fuller, 810 F.3d 456 (7th Cir. 2015) ("'[p]rior restraint' is just a fancy term for censorship, which means prohibiting speech before the speech is uttered or otherwise disseminated."); *see generally* Alexander v. United States, 509 U.S. 544, 550 (1993) (a judicial order is a prior restraint when it forbids "certain communications . . . issued in advance of the time that such communications are to occur.").

Some scholars note that this definition only applies to circumstances in which the restriction is imposed as a court-ordered remedy. Meyerson, *supra* note 39, at 1107-08. Nonetheless, these nuances are likely irrelevant for NDCs because courts typically incorporate them in custody orders or order modifications that function as remedies. *See, e.g.*, Aberdeen Apartments v. Cary Campbell Realty All., Inc., 820 N.E.2d 158 (Ind. Ct. App. 2005) ("[r]estraining orders and injunctions that forbid future speech activities are classic examples of prior restraints") (citing Mishler v. MAC Sys., Inc., 771 N.E.2d 92, 95 (Ind. Ct. App. 2002)); *cf.* Hagg, *supra* note 11, at 86-87 (discussing how NDCs are prior restraints, though noting that the Massachusetts Supreme Court in *Shak*, should have explicitly said so).

41 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); *New York Times Co.*, 403 U.S. at 714; Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

42 *See* CAMP Leg. Def. Fund, Inc. v. City of Atlanta, 451 F.3d 1257 (11th Cir. 2006) ("[t]he first step to analyze whether a provision is an unconstitutional prior restraint is whether the challenged regulation is content-based. . . . If the regulation is content-based, it is subject to strict scrutiny; if the regulation is content-neutral, it is subject to intermediate scrutiny") (citing Solantic LLC v. City of Neptune Beach, 410 F.3d 1250, 1258 (11th Cir. 2005).

43 *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (discussing content-based discrimination); Baca v. Moreno Valley Unif. Sch. Dist., 936 F. Supp. 719, 730 (C.D. Cal. 1996) ("[i]t is difficult to imagine a more content-based prohibition on speech than [a] policy, which allows expression of two points of view

messages—rather than regulating the speech's time, place, or manner.[44] Accordingly, this Comment focuses on NDCs as content-based prior restraints.[45]

To rebut the presumption against a content-based prior restraint, the restriction must survive "strict scrutiny,"[46] meaning it is narrowly tailored to serve a compelling state interest.[47] Historically, sufficient compelling interests have been drawn from the hypotheticals in *Near v. Minnesota*,[48] which included national security,[49]

(laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter . . . .").

44 *See* Kanavy, *supra* note 15, at 1093 ("[f]irst, a custody order preemptively prohibiting a parent-litigant from saying certain things to his children or to the public is a prior restraint on speech. Second, a custody order forbidding a parent-litigant from expressing a certain message because of its substance is an impermissible content-based restriction on speech").

45 For an example of an intermediate scrutiny analysis on a content-neutral NDC, see: Schutz v. Schutz, 581 So. 2d 1290, 1292 (Fla. 1991) (finding a speech regulation was "incidental" and this subject to intermediate scrutiny; upholding a trial court's order for a mother "to do everything in her power to create in the minds of [the children] a loving, caring feeling toward the father . . . [and] to convince the children that it is the mother's desire that they see their father and love their father," because the order served both the best interests of the children and the state's *parens patriae* interest by facilitating a meaningful relationship with the children's father, and that the burden on the mother's speech was necessary to promote these interests); *see also* Gehman, *supra* note 11 (discussing how an NDC may be content-based or neutral under an originalist lens).

46 Sindi v. El-Moslimany, 896 F.3d 1, 32 (1st Cir. 2018) (quoting Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968)); CBS, Inc. v. Davis, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers); *In re* Goode, 821 F.3d 553, 559 (5th Cir. 2016); Cty. Sec. Agency v. Ohio Dep't of Commerce, 296 F.3d 477, 485 (6th Cir. 2002); Levine v. U.S. Dist. Ct., 764 F.2d 590, 595 (9th Cir. 1985); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Staub v. City of Baxley, 355 U.S. 313 (1958); Kunz v. New York, 340 U.S. 290 (1951); Schneider v. State, 308 U.S. 147 (1939); Lovell v. Griffin, 303 U.S. 444 (1938).

47 Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 655 (1990); Boos v. Barry, 485 U.S. 312, 334 (1988) (plurality).

48 283 U.S. 697, 716 (1931) (suggesting that threats to interests such as national security, military recruiting, and obscenity may be sufficiently compelling interests to justify a prior restraint).

49 *See* United States v. Progressive, 467 F. Supp. 990, 996 (W.D. Wis. 1979), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979) (finding that "that publication of the technical information on the hydrogen bomb contained in the article is analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint").

obscenity,[50] and which subsequently extended to other matters such as criminal gag orders.[51] But courts applying strict scrutiny to NDCs justify their prior restraints based on the compelling interest in protecting a child's "best interests," "welfare," or "well-being."[52]

Yet despite invoking this interest, courts frequently fail to articulate *why* the specific restriction on parental speech is necessary to prevent harm to a child's welfare.[53] When applying strict scrutiny, many courts simply cite to an authority that notes the state has a compelling interest in a child's well-being, and conduct no further inquiry into whether a child's interests are at stake from potential disparagement.[54] Others even declare that the state's

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50 *See, e.g.*, Kingsley v. Brown, 354 U.S. 436 (1957) (upholding a New York criminal provision that prevented the distribution of "obscene" rebutted the prior restraint presumption; finding that such prior restraint was constitutional, specifically for a party that distributed erotic fetish materials); Times Film Corp. v. Chicago, 365 U.S. 43, 47-50 (1961) (upholding a Chicago ordinance that prohibited a film's public exhibition unless the government approved it; finding that the prior restraint presumption applied because the plaintiff's film depicted a sexual relationship between an adult woman and a teenage boy).

51 *See, e.g.*, United States v. Brown, 218 F.3d 415 (5th Cir. 2000) (upholding a partial gag order restricting extrajudicial comments of trial participants in a capital police corruption case, finding that alternatives, including venue change, postponement, intensive voir dire, and jury sequestration, could not effectively guard the defendants' Sixth Amendment right to a fair trial).

52 *See, e.g.*, *In re* Paternity of G.R.G., 829 N.E.2d 114 (Ind. Ct. App. 2005) (finding that "[t]he trial court's prior restraint was also permissible to the extent it reasonably furthers G.R.G.'s best interests. The order in the case before us did not preclude Father and Mother from disagreeing with each other. Nor did it preclude Father from discussing with any other third party his disputes with Mother. Rather, it obviously reflects the trial court's reasonable belief that exposing G.R.G. to such matters would not be in the child's best interests.").

53 The Supreme Court has even done so when applying strict scrutiny to other contexts. *See* Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling and Important-Interest Inquiries*, 129 Harv. L. Rev. 1406, 1410 (2016) ("the Court has . . . found it 'evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling."'") (citing New York v. Ferber, 458 U.S. 747, 756–57 (1982) (quoting Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 607 (1982))).

54 *See, e.g.*, *Cassie S.*, 2026 ME 26, at *7 (citing to *Globe Newspaper Co.* (holding that a child's welfare was compelling in a public dissemination context and merely noting that protecting the physical and psychological well-being of a minor is a compelling interest); Williams v. Williams, 75 So. 3d 132 (Ala. Civ. App. 2011) (citing to state authorities that note a child's welfare is a compelling interest and conducting no further inquiry).

interests in a child's welfare are compelling with no cite or further inquiry.[55]

But as courts increasingly begin to tackle this issue, an emerging set of states have recently started to limit an interest in child welfare to be compelling only when speech poses harm to a child's welfare.[56]

Such a trend is preferable to treating a child's welfare as a per se compelling interest. First, the trend better serves a child's interests. As Professor Jim Dwyer notes, courts must rely on "good evidence" of harm before imposing a restriction because unsupported restrictions risk undermining a child's interest in the best parent-child relationship possible.[57] Without requiring a showing of harm, NDCs may evade meaningful scrutiny and unnecessarily foster fear of inadvertent violations, thereby inhibiting a parent's ability to comfortably and confidently interact with their child, limiting the development of a stronger parent-child relationship.[58] To add, a harm threshold also prevents parents from weaponizing NDCs and bringing frivolous claims upon the court because they would fail at the dismissal stage. Such a mechanism prevents exposing children to even more litigation.

Second, the trend comports with the principle that similarly situated speech should not receive different constitutional treatment based solely on family status. As Professor Eugene Volokh observes, courts must offer "something more" than the "best interests of the child" to restrict the disparaging speech after families become split because the same exact speech may remain protected

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55 *See, e.g.*, Wedding v. Harmon, 492 S.W.3d 150, 155 (Ky. Ct. App. 2016), *as modified* (Apr. 22, 2016) (simply iterating that "the Commonwealth has a compelling interest in protecting its youngest citizens.").

56 *See infra* Part I.C (discussing the specific states and organizing them into a chart).

57 James G. Dwyer, *Panel Discussion: Restricting Parental Speech*, at The Federalist Society for Law & Public Policy 2007 National Lawyers Convention (Nov. 16, 2007), *reprinted in* 6 Geo. J.L. & Pub. Pol'y 487, 497-98 (2008); *see also* Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (noting that "the relationship between parent and child is constitutionally protected.").

58 *Id.* For the foundational works on a child's interest in the best parent-child relationship possible, see: John Bowlby, Attachment and Loss: Attachment 27-30, 208-10 (2d. ed. 1969); 2 John Bowlby, Attachment and Loss: Separation: Anxiety and Anger 4-20 (1973).

within an intact family.[59] That "something more" can be a harm analysis.

Third, the trend reorients an NDC's strict scrutiny analysis with the traditional skepticism toward prior restraints by requiring a danger to a compelling interest before speech is suppressed.[60] While a child's best interests are undeniably important and likely compelling in most cases, they nevertheless remain a *non*-constitutional interest.[61] Thus, limiting a constitutional right based on a non-constitutional interest ought to require some form of weighing, as is required when two constitutional rights are in tension.[62]

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59 *See* Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. Rev. 631, 690 (2006); *see also* Quiner v. Quiner, 59 Cal. Rptr. 503, 514 (Cal. Ct. App. 1967) ("[w]e assume that if the parties had remained married, and the father refused to observe the principle of separation, or if each had continued in the identical faith and accepted as part of that faith the principle of separation as zealously espoused by appellant alone, there could be no doubt that intervention by the state in [the child]'s upbringing would not receive hospitable consideration in any court.").

60 *See, e.g.*, Neb. Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) ("the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger") (quotation marks removed; citations removed).

Such skepticism is even more pronounced when about an injunction or court order rather than a statute. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994) (noting that courts should apply a "somewhat more stringent application of general First Amendment principles" to speech-restrictive injunctions than to speech-restrictive statutes.").

61 McDermott v. Dougherty, 869 A.2d 751, 808 (Md. 2005); *accord In re* the Macomb Daily, No. 215744, 1999 Mich. App. LEXIS 2754, at *12-13 (Mich. Ct. App. Nov. 23, 1999) (Markman, J., dissenting); Weldon v. Ballow, 200 So. 3d 654, 671 (Ala. Civ. App. 2015).

62 *Macomb Daily*, 1999 Mich. App. LEXIS 2754, at *12-13 (Markman, J., dissenting). For cases that discuss this weighing, see: Barenblatt v. United States, 360 U.S. 109, 127 (1959) ("[w]here First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."); Konigsberg v. State B. of Cal., 366 U.S. 36, 50-51 (1961) ("laws limiting speech could be justified by 'valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved'"); Sweezy v. New Hampshire, 354 U.S. 234, 265-67 (1957) (Frankfurter, J., concurring) (noting that the "subordinating interest of the State must be compelling" to overcome an individual's constitutional rights); *see also In re* T.R., 556 N.E.2d 439 (Ohio 1990) (reasoning that given the juvenile court's history of confidentiality, it is possible to reasonably argue that public access is *never* in the child's best interests, but that the standards used by the trial

Fourth, the trend curbs the risk of overbroad speech restrictions by limiting NDCs to circumstances where harm is demonstrable rather than speculative.[63] Without a harm-based threshold, courts may impose sweeping prohibitions that suppress protected speech unrelated to any real risk to the child,[64] thereby burdening more "speech than necessary to serve a significant government interest."[65]

Fifth, by requiring the showing of harm, courts adhere to the requirement that the means chosen to satisfy the state's compelling interest be the "least restrictive" possible.[66] If a party advancing an NDC can show that the harm stems from a parent's disparagement and that the disparagement is likely to continue despite less speech-restrictive interventions (such as communication protocols limiting parental contact to online platforms), then a restriction on

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judge gave insufficient weight to the public's interest in access to workings of the juvenile court and in scrutinizing such), *abrogated by* State *ex rel.* Cincinnati Enquirer v. Bloom, 251 N.E.3d 79 (Ohio 2024).

63 *T.T.*, 779 N.W.2d at 615 (noting that a "prior restraint on speech cannot be predicated on 'surmise or conjecture that untoward consequence may result.'") (applying this rule in a child privacy context) (citing *New York Times Co.* 403 U.S. at 725-27 (Brennan, J., concurring)).

64 *See, e.g.*, Yntema v. Smith, 899 S.E.2d 543, 550 (Ga. Ct. App. 2024) (vacating an NDC "[b]ecause this is a facially overbroad restriction that is not calibrated with "the danger said to flow from the particular utterance," . . . to the extent that the restriction does not implicate harm to the children or their relationships with the parties"), *cert. denied*, 906 S.E.2d 748 (Ga. 2024); *see generally* Grayned v. Rockford, 408 U.S. 104, 114 (1972) (reaffirming that a speech restriction is facially invalid if it is overly broad, in that "in its reach it prohibits constitutionally protected conduct.").

65 *Madsen*, 512 U.S. at 765; *see, e.g.*, Israel v. Israel, 189 N.E.3d 170, 180 (Ind. Ct. App. 2022) (vacating an NDC because it went "far beyond furthering that compelling interest to the extent it prohibits the parents from 'making disparaging comments' about the other in the presence of 'anyone' even when Child is *not* present) (emphasis kept); *see generally* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968) ("[prior restraints] must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order.").

66 *See, e.g.*, Ashcroft v. Am. Civ. Liberties Union, 542 U.S. 656, 666 (2004) (reaffirming that a reviewing court must also ask "whether the challenged regulation is the least restrictive means" to achieve the compelling interest).

disparaging speech may constitute the least restrictive means to preventing harm.[67]

An opponent of the trend may raise the concern that imposing a burden to show harm risks allowing disparaging speech to slip through the cracks if an NDC's proponent cannot meet an evidentiary threshold, despite a real likelihood that the speech will occur or continue. Yet, a properly calibrated threshold avoids that tradeoff. Mere exposure to the speech is the "harm," not what effects will incur from it.[68] So, if courts only require a non-speculative showing that the speech will diffuse its way to the child, the evidentiary burden avoids risking slippage.

That concern about how courts should determine that burden, however, is not merely theoretical; it arises from how courts are already beginning to grapple with non-disparagement orders under strict scrutiny. Thus, having examined the trend's emergence and advantages, the following Section explores its growth and its presence within the current state of NDCs and their constitutionality.

C. *The Current Landscape*

Based on a survey across the fifty United States,[69] The vast majority of jurisdictions (thirty-two) lack any reported or

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67 *See* Brief of Appellant at *31-32 for Shak v. Shak, 484 Mass. 658 (2020), 2019 MA S. Ct. Briefs LEXIS 1282 (noting that there is "no other practical way, or available remedy at law [than an NDC], to protect the child from *hearing* . . . pejorative remarks about [their] mother than by restricting what [their] Father [(the parent who made disparaging remarks)] *says* about her in his presence, or curtailing Father's vitriolic posts that the child may subsequently *see*") (emphasis kept and changed to italics).

68 *See infra* Part I.D. (discussing how courts treat exposure to the disparagement as the "harm" and the child science behind the harms resulting from disparaging speech).

69 The survey was conducted on both Westlaw and Lexis during the summer of 2026. The survey included both state trial court and appellate opinions, whether published or unpublished, without regard to the date of decision. For purposes of the survey, a non-disparagement clause ("NDC") was defined as a court order prohibiting a parent from disparaging another parent, child, or third party, regardless of the forum in which the speech occurred. The survey excluded generalized "gag orders" prohibiting the public dissemination of custody matters because such orders do not explicitly prohibit disparaging content. The survey defined "an application of strict scrutiny" to include both express and functional applications of the doctrine, requiring a court to determine whether an NDC

unpublished decisions applying strict scrutiny to a content-based, court-ordered NDC;[70] though, some of these jurisdictions have applied intermediate scrutiny to content-neutral NDCs,[71] or have examined gag orders that restrict the public dissemination of information related to a custody matter.[72]

Uniquely, while Missouri and Illinois fall within this category, they are unusual in that they have considered the validity of an NDC without addressing its constitutionality. For Missouri, an appellate court in *Kessinger v. Kessinger* held (with no constitutional analysis) that NDCs are valid based on the state's public policy to assure "frequent and meaningful contact with both parents after dissolution," but noted that they cannot compel a parent to make speech.[73] And in Illinois, courts have uniformly treated an NDC as non-injunctive and, on that basis, have declined to apply constitutional scrutiny.[74]

On the other hand, eighteen jurisdictions have held that, in either a reported or unpublished decision, a child's "best interests," "welfare," or "well-being" is a compelling interest when applying strict scrutiny to a content-based NDC. Of these, six jurisdictions treat a child's "best interests," "welfare," or "well-being" as a per

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served a compelling interest in safeguarding a child's "best interests," "welfare," or "well-being," and whether the restriction was narrowly tailored.

70 *See* Chart: *States Addressing Child Welfare as a Compelling Interest Under Strict Scrutiny* (states listed in first row), *infra* notes 76-105.

71 *See, e.g.*, *Schutz*, 581 So. 2d at 1292 (Florida); Myronova v. Malhan, No. A-2156-21, 2025 WL 2405820, at *41-42 (N.J. Super. Ct. App. Div. Aug. 20, 2025) (upholding a gag order preventing a parent from publicly discussing "any custody information" after finding that the defendant's "relentless condemnation of plaintiff and the court system as well as his litigation against [the child]'s school demonstrated a strong justification"), *cert. denied*, 351 A.3d 621 (N.J. 2026).

72 *S.B.*, 243 A.3d at 97.

73 829 S.W.2d 658, 663 (Mo. Ct. App. 1992).

74 *See, e.g.*, *Eckersall*, 12 N.E.3d at 834, 837; *see also In re* Marriage of Girard, 2023 IL App (1st) 231361-U, at *20-25 (affirming *Eckersall*).

Illinois seemingly avoids addressing this issue and arguably embraces exceptionalism, as reflected in *Eckersall*'s dicta that "[f]or the sake of the children, precautions are preferable to remedial measures, prevention is preferable to punishment, and court-ordained protocol is preferable to parental anarchy," and that "[o]rders like the one here are a wise and often necessary tool that diligent and experienced child representatives or GALs, parents' attorneys, and judges will insist on." *Eckersall*, 12 N.E.3d at 834, 838.

se compelling interest, without engaging in any written analysis of the degree of harm involved.[75]

However, twelve jurisdictions have recently required proof of actual or prospective harm before deeming a child's welfare a compelling interest, rather than accepting it as a categorical justification. The following chart organizes the states into categories reflecting their approach to constitutional analysis of NDCs in child custody cases:

States Addressing Child Welfare as a Compelling Interest Under Strict Scrutiny

States that have yet to apply strict scrutiny to an NDC and determine whether a child's welfare is a compelling interest:	Alaska,[76] Arkansas, Florida,[77] Idaho, Illinois,[78] Kansas, Louisiana, Maine,[79] Maryland, Michigan,[80]

75 *See* Chart: *States Addressing Child Welfare As A Compelling Interest Under Strict Scrutiny* (states listed in second row), *infra* notes 76-105.

76 *But see* S.N.E. v. R.L.B., 699 P.2d 875, 880 (Alaska 1985) (applying strict scrutiny to a gag order).

77 While Florida has yet to apply strict scrutiny to a content-based restriction, it has vacated a gag order (which it recognized as a prior restraint) because "[n]either the trial court nor the general magistrate made findings of necessity, nor did they engage in any tailoring to narrow or limit the scope to those extrajudicial statements substantially likely to materially prejudice the trial." Delgado v. Miller, 314 So. 3d 515, 518 (Fla. Dist. Ct. App. 2020).

Additionally, Professor Volokh argues that the NDC in *Schutz* was content-based and should have been subject to strict scrutiny. *See* Volokh, *supra* note 11, at 655 n.109; *see also Olson*, 850 P.2d at 532 (treating restrictions such as those in *Schutz* as content-based and therefore unconstitutional); Ferguson, *supra* note 11, at 949 (arguing that the *Schutz* court should have stricken the NDC's language to compel speech (because it was erroneous) and simply remand and instruct the lower court to craft an order that reflected an affirmative duty for the disparaging parent to help facilitate a parent-child relationship with the other parent).

78 *But see supra* discussion at note 74 (discussing Illinois' seeming avoidance of this issue); In Interest of Summerville, 547 N.E.2d 513, 517 (Ill. App. 1989) (vacating a gag order for overbreadth that restricted comments made about a custody matter).

79 *But see Cassie S.*, 2026 ME 26, at *7 (applying strict scrutiny to a gag order for a custody proceeding to be closed from the public).

80 *But see Macomb Daily*, 1999 Mich. App. LEXIS 2754, at *9-11 (upholding a gag order that enjoined the parties, their counsel, the employees of the parties or their counsel, the parties' family members, and the guardian *ad litem*

	Minnesota,[81] Mississippi,[82] Missouri,[83] Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina,[84] North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania,[85] Rhode Island, South Dakota, Texas,[86] Utah, Vermont, Washington,[87] West Virginia,[88] Wisconsin, and Wyoming.

from: having contact with the media; commenting "upon the subject matter of the case"; and allowing the child to be photographed).

81 *But see* Marriage of Geske v. Marcolina, 642 N.W.2d 62, 70 (Minn. Ct. App. 2002) (applying strict scrutiny to a gag order that prevented publicizing the children's names); Peterson v. Peterson, No. A16-1588, 2017 Minn. App. Unpub. LEXIS 767, at *22-24 (Sep. 5, 2017) (same).

82 *But see* Harden v. Scarborough, 240 So.3d 1246, 1257-58 (Miss. Ct. App. 2018) (reversing the lower court's order enjoining parents from posting on social media about the child because "there is no evidence that [child] was ever harmed or threatened with harm.").

83 *But see Kessinger*, 829 S.W.2d at 663.

84 *But see Watkins*, 462 S.E.2d at 689 (not applying strict scrutiny but upholding an NDC because it was commonplace).

85 *But see* Gregro v. Gonzalez, 2026 PA Super 86, at *14-16 (Pa. Super. Apr. 27, 2026) (applying intermediate scrutiny) (vacating a gag order because the trial court made no finding that the child faced harm); Rogowski v. Kirven, 291 A.3d 50 (Pa. Super. Ct. 2023) (vacating an order prohibiting "the Child's use of the terms 'Dad' and 'Daddy' to refer to Stepfather" because no evidence demonstrated "a tangible risk of harm to the Child.").

86 *But see* Grossnickle v. Grossnickle, 935 S.W.2d 830, 851 (Tex. App. 1996) (vacating a gag order for overbreadth), *overruled on other grounds*, Quijano v. Quijano, 347 S.W.3d 345, 353 (Tex. App. 2011); Grigsby v. Coker, 904 S.W.2d 619 (Tex. 1995) (same).

87 *But see In re* Marriage of Suggs, 93 P.3d 161, 163-66 (Wash. 2004) (en banc) (vacating an anti-harassment order enjoining a wife from "knowingly and willfully making invalid and unsubstantiated allegations or complaints to third parties which are designed for the purpose of annoying, harassing, vexing, or otherwise harming [her ex-husband] and for no lawful purpose" because it lacked the specificity demanded to restrain unprotected speech) (applying an analysis of whether the restricted speech fell under First Amendment protection, but not applying both prongs of strict scrutiny); Asbach v. Couto, No. 60325-0-II, 2026 WL 1292170, at *6-10 (Wash. Ct. App. May 12, 2026) (applying strict scrutiny and remanding for the trial court to narrowly tailor a domestic violence civil protection order that prohibited a parent from "posting media 'which refers to the petitioner or the parties' children, whether by name or otherwise, in any manner whatsoever,'" because the restriction was overbroad and reached speech unrelated to domestic violence).

88 *But see* Mark V.H. v. Delores J.M., No. 18-0230, 2019 WL 4257183, at *12 (W. Va. Sept. 9, 2019) (mem.) (upholding a gag order's validity under the child's best interests because the dissemination of the restricted speech (court

States that treat a child's welfare as a per se compelling interest, without engaging in any written analysis of the degree of harm involved:	Alabama,[89] California,[90] Iowa,[91] Kentucky,[92] Montana,[93] Virginia.[94]
States that require an analysis of whether the child is subject to actual or prospective harm to treat a child's welfare as a compelling interest:	Arizona,[95] Colorado,[96] Connecticut,[97] Delaware,[98]

documents) may be used to "to harass, annoy, or intimidate respondent, judges, guardians ad litem, and others.").

89 Williams v. Williams, 75 So. 3d 132, 145-46 (Ala. Civ. App. 2011).

90 *In re* Marriage of Candiotti, 34 Cal. App. 4th 718, 726 (1995).

91 *In re* Marriage of Nimrick, 24 N.W.3d 781 (Table), 2025 WL 1824813, at *7-8 (Iowa Ct. App. 2025).

92 *Wedding*, 492 S.W.3d at 153, 155.

93 Marriage of Patterson, 403 P.3d 1255 (Table), 2017 WL 4141096, at *3 (Mont. 2017).

94 Forrest v. Ruhlin, No. 2256-94-4, 1995 WL 421416, at *2 (Va. Ct. App. July 18, 1995); *see also* D'Ambrosio v. D'Ambrosio, 610 S.E.2d 876, 886 (Va. Ct. App. 2005) (conducting no child welfare analysis, but concluding that an injunction prohibiting a husband from making any "defamatory comments" about his ex-wife to any "third parties" was too vague and overly broad for the husband to know what statements might subject him to contempt).

95 *Yanez*, 548 P.3d at 346.

96 *In re* Marriage of Javernick & Teruel De Torres, 585 P.3d 257, 268-70 (Colo. App. 2025) (vacating an NDC for overbreadth and because the trial court failed to articulate that the child faced harm from the restricted speech), *as modified on denial of reh'g* (Feb. 12, 2026); *see also In re* Marriage of Newell, 192 P.3d 529, 536 (Colo. App. 2008) ("a showing that father's exercise of his free speech rights threatened the child with physical or emotional harm, or had actually caused such harm, would establish a compelling state interest sufficient to justify a restriction on his First Amendment free speech rights"; reversing and remanding a magistrate's order that prohibited a father from objecting to matters related to his child's education or treatment because there was no proof that such objections harmed the child, let alone to the degree that was "substantial" and "demonstrated in detail").

97 *Wutzel-Frez*, 2015 WL 6557830, at *8 (concluding that arguing in front of a child is not preferable and may be harmful, but "general concern for the best interests of the child [] will not necessarily allow a court to broadly restrain a parent from making disparaging comments about the other to third parties.").

98 *M. R.*, 2026 WL 747062, at *3-4 ("[a]rguing in front of a child is not preferable and may be harmful, but 'general concern for the best interests of the child[ ] will not necessarily allow a court to broadly restrain a parent from making disparaging comments about the other to third parties'") (quoting *Wutzel-Frez*, 2015 WL 6557830, at *8).

	Georgia,[99] Hawaii,[100] Indiana,[101] Massachusetts,[102] New York,[103] South Carolina,[104] Tennessee.[105]

Nonetheless, while this trend is emerging, the jurisdictions that have applied it have yet to outline a clear definition of the relevant considerations. Thus, having mapped the jurisdictional landscape, this Part turns to how courts apply these principles in practice and discusses the future questions that courts will likely face when further flushing out the rule's bounds.

D. *The Emerging Trend's Considerations for When a Child's Welfare Is Compelling*

The current case law for when a child's welfare constitutes a compelling interest centers around three considerations: (1) whether the disparagement is likely to reach the child;

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99 Baskin v. Hale, 787 S.E.2d 785, 791 (Ga. Ct. App. 2016) (vacating an NDC injunction based on "the absence of any evidence of 'imminent danger to a compelling interest of such magnitude that the restraint on the parties' [and lawyers'] speech would be warranted,' as well as the superior court's failure to properly conduct the balancing test and narrowly tailor the restrictions") (brackets removed) (citing In the Interest of R.J.M.B., 133 So.3d 335, 346 (II) (Miss. 2013) (vacating a gag order that mentioned "the nature of these proceedings, the welfare, safety and the best interest of the child" because the trial court did not identify "any compelling interest that would be protected through the imposition of the gag order")).

100 In Interest of FG, 421 P.3d 1267 (Haw. 2018) (vacating an order prohibiting the dissemination of the children's names to the public because the child's welfare was not compelling) (reasoning that the ordering court failed to analyze a "clear and present danger or a serious and imminent threat to a protected competing interest.").

101 *G.R.G.*, 829 N.E.2d 114 (Ind. Ct. App. 2005) (finding that "[t]he trial court's prior restraint was also permissible to the extent it reasonably furthers [the child's]'s best interests," but providing no analysis as to whether the child's best interests were compelling).

102 *Shak*, 144 N.E.3d 274.

103 M.D.S. v. E.W., 214 N.Y.S.3d 671 (Table), at *6 (N.Y. Sup. Ct. 2024); *see also* K.C. v. S.J., 2021 NYLJ LEXIS 484, *6-12 (vacating a gag order because the restrained speech posed an insufficient danger of harm).

104 *Clark*, 917 S.E.2d at 924.

105 Gider v. Hubbell, No. M201600032COAR3JV, 2017 WL 1178260, *11 (Tenn. Ct. App. Mar. 29, 2017).

(2) whether a parent has previously made disparaging remarks; and (3) whether evidence suggests potential harm to a child's well-being.

1. *The Disparagement's Reach*

Courts generally infer harm when a child is likely to hear or read a disparaging comment. For instance, compare *Shak v. Shak* and *Clark v. Clark*.[106] In *Shak*, the Massachusetts Supreme Court addressed an NDC's constitutionality that prohibited both parents from disparaging the other parent online "when such disparagement consists of comments about the party's morality, parenting of or ability to parent any minor children" until the child is fourteen years old.[107] After a parent breached this NDC, the court held that the interest in protecting the child's welfare was not compelling because "[n]o showing was made linking communications by either parent to any grave, imminent harm to the child."[108] The court explained that because the child, a toddler, was "too young to be able either to read or to access social media," the harm was therefore too speculative to justify a prior restraint.[109]

But in *Clark*, the South Carolina Supreme Court reached the opposite conclusion under similar facts. There, the child's mother promoted a book about the intricacies of her divorce on her website, breaching an NDC.[110] The court distinguished this matter from *Shak* and found that the child was a "sophisticated eleven-year-old who has written and published a book of her own," and was thus "capable of accessing the Internet and is able to Google her own name, which inevitably leads to Mother's website promoting The Book."[111]

Taken together, *Shak* and *Clark* demonstrate that future "harm" turns on whether the parent's speech will reach the child.

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106 *Shak*, 144 N.E.3d 274; *Clark*, 917 S.E.2d at 924.

107 *Shak*, 144 N.E.3d at 277.

108 *Id.* at 279.

109 *Id.* at 280; *see also M. R.*, 2026 WL 747062, at *3-4 (finding that "an injunction against a parent's Instagram post "falls well short of showing grave harm to [the child] that is near-certain to occur" because the child "[was] not yet two years old and has no access to social media. Moreover, the video does not name Mother or specifically disparage her, and it may well be removed long before [the child] sees it.").

110 *Clark*, 917 S.E.2d at 924.

111 *Id.*

But that reach may not only extend from a parent to a child but also from a third party. To illustrate, in *M.D.S. v. E.W.*, the New York County Supreme Court upheld an NDC restricting disparaging internet posts because "given the Children's age, and . . . the title of [the] website and the fame of the paternal grandfather specifically among children, . . . th[e] disparaging information [is] more than likely to be accessible to the Children."[112]

Therefore, when taking *Shak* and *Clark* together with *M.D.S.*, the inquiry—depending on the verbiage of the NDCs—is clarified from whether the parent's speech may reach to the child to whether the disparagement itself may reach the child.

But when considering this factor in the future, it is important that courts refrain from making blanket assumptions about accessibility that overextend its breadth. Global assumptions can lead to erroneous conclusions because a child's ability to access disparaging speech depends on their individual sophistication and their immediate environment.

Such assumptions are particularly relevant for disparagement disseminated online. For instance, speech made solely to the other parent, to third parties outside the child's social environment, or through digital platforms may not reach the child, especially if the child is "too young." However, when the disparagement is repeated across multiple online platforms or communicated indirectly through third parties within the child's social environment, the likelihood of exposure increases,[113] even when the online content is private.[114]

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112 214 N.Y.S.3d 671 (Table), at *6.

113 Kanavy, *supra* note 15, at 1119 ("[w]riting nasty, disparaging comments on a blog where the children, ages ten and twelve, could easily find them is practically the same as saying it to them; it may also humiliate the children if their peers discover the blog and question them about it."); Lisa C.-R. v. William R., 635 N.Y.S.2d 449, 452 (N.Y. Sup. Ct. 1995) ("[w]hile adult parties in today's media-conscious world may be found to have no valid objection to having their dirty linen aired, the same cannot be said of the children who are the innocent victims of both their parents and the media"); Hagg, *supra* note 40, at 93-94 (discussing how the permanence of social media could have a parent's posts about a child come back to haunt the child and affect their development) (discussing how "[t]he nature of social media magnifies the amount of damage that speech can cause since online postings can be accessed by almost anyone, including children with smartphones.").

114 *See* Stacey B. Steinberg, Article, *Beyond Sharenting*, 99 S. Cal. L. Rev. 559, 581 (2026) ("[i]f a parent shares the information 'privately' with a limited

Commentator Anna Hagg explains how that may have been possible in *Shak*. Hagg observes that while the court reasoned that the child was too young to have accessed the disparaging online content, the world is trending toward allowing children to access phones earlier and earlier.[115] Thus, the child in *Shak* "was closer to using the internet and accessing disparaging content than the [Massachusetts Supreme Court] suggested."[116] On occasion, courts have enjoined indirect speech similar to this nature out of concern that the speech would create parental conflict and indirectly harm a child.[117] In the context of injunctive relief, courts have also found online dissemination that may indirectly reach the child to be a valid injury,[118] and within the broader ambit of First Amendment theory, online dissemination fits within the realm of growing calls for harm from speech's foreseeable dissemination.[119] Thus, courts

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audience, the parent may think they can control the spread of the information. But even when parents feel a sense of security by sharing on a 'friends only' account or with a limited audience, such a comforting feeling may not be warranted as information can be saved and shared in many ways-coming back to hurt the child years into the future.").

115 Hagg, *supra* note 40, at 93.

116 *Id.*

117 *In re* Eric Y., No. A118628, 2008 WL 1736058, at *12 (Cal. Ct. App. Apr. 16, 2008) (affirming custody award to a father after the mother made a baseless accusation that the father abused the child during overnights, which caused the child severe emotional injury); Dickson v. Dickson, 529 P.2d 476, 480 (Wash. Ct. App. 1974) (enjoining the father from making defamatory comments about the mother that "threatened her emotional health," which would "have a harmful effect upon [the minor children] and on [the mother]'s ability to raise them"); *see also* Handler v. Mayhew, 841 F. Supp. 2d 443, 445 (D. Me. 2012) ("the state has a recognized interest in protecting child victims from undue trauma and humiliation . . .") (quotation marks removed).

118 For instance, in *Marriage of Geske v. Marcolina*, the Minnesota Court of Appeals affirmed a finding that the father's dissemination of information on a news broadcast about his divorce created sufficient harm for an injunctive relief of "(1) the emotional damage to the children resulting from any future publication by [the father], and (2) the detrimental effect that such publication would have on the reunification process." 642 N.W.2d 62, 65, 67-68 (Minn. Ct. App. 2002). Given the similar context here, courts should consider the same harms for NDC breaches, including when the speech is digital and private.

119 David S. Han, *The Mechanics of First Amendment Audience Analysis*, 55 Wm. & Mary L. Rev. 1647, 1682-83 (2014) (arguing foreseeability of audience processing speech should be considered harm worthy of judicial remedy).

should consider the same risks for NDC breaches, even when the speech is digital and private.

2. *Past Disparaging Remarks*

Courts likewise treat a history of disparaging remarks as probative of future harm. To illustrate, in *V.C.T. v. J.W.T.*, the Pennsylvania Superior Court upheld an NDC that barred the father from discussing the alleged rape of his son and daughter in the daughter's presence or with any third parties who might come into contact with her. [120] The court reasoned that, given the father's "constant[]" reminder of the traumatic event, the "Father's speech is causing or will cause harm to Daughter's welfare."[121]

Courts have also applied this logic to orders that force a parent's interaction with their child to be recorded. In *Firmage v. Snow*, the Idaho Supreme Court upheld an order that required a father's phone calls with his children to be recorded, against his allegations that the order violated his right to privacy,[122] because "the children's psychological well-being and their relationships with their mother and siblings are at stake with respect to their phone calls with [the father]," based on the facts that the father openly spoke about the divorce, disparaged the children's mother, and pressured the children to side with him.[123]

The court based its holding on an expert witness's testimony that "concluded that a primary cause of the 'psychological and behavioral disturbances' the children are experiencing is their 'over-exposure to their parents' conflict with one another,' and that this over-exposure is primarily being created and maintained by [the father]." Collectively, *V.C.T.* and *Firmage* imply that a history

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120 253 A.3d 255, 2021 Pa. Super. Unpub. LEXIS 883, at *21 (Pa. Super. Ct. 2021).

121 *Id.* at 25-26.

122 While involving a right to privacy, one may reasonably consider this restriction also involving a right to free speech. *See, e.g.*, Reporters Comm. for Freedom of Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1058 (D.C. Cir. 1978) ("[m]onitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse a First Amendment value may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance.") (citing U.S. v. White, 401 U.S. 745, 762-65 (1971) (Douglas, J., dissenting)).

123 347 P.3d 191, 351 (Idaho 2015).

of past disparaging remarks may be relevant if it indicates that it is pervasive and may continue.

3. *Evidence Suggesting Harm*

Courts also consider whether evidence suggests that a parent's speech is even damaging and thus necessary for a restriction. For instance, in *Sanavage v. Chavis*, a Massachusetts Appellate Court vacated an NDC because no record evidence made any demonstration that any parental speech posed a harm to the child, despite the fact that "the judge clearly was attempting to reduce future conflict between the parties."[124] Likewise, in *Baskin*, a Georgia appellate court vacated an NDC that enjoined "any disparaging or derogatory comments about the opposite party" on any "social media, website, or other public medium" because the ordering court "point[ed] to no evidence regarding the negative effect that such speech had on the children."[125]

However, courts will inevitably confront the threshold question of what constitutes "harm," particularly as communication technologies and child psychology evolve. Luckily, existing legal scholarship and modern psychology shed some light on what issues may arise. Under Professor Frederick Schauer's "trilogy of harms," disparaging speech falls into the harm of "verbal assault," where the speech itself imposes the negative effect on the reader or listener.[126] In the context of disparaging speech made to or

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124 165 N.E.3d 164 (Table), 2021 WL 795202, at *4 (Mass. App. Ct. 2021).

125 *Baskin*, 787 S.E.2d at 788, 791.

The same rule also seems to apply to gag orders. *See In re* Paternity of K.D., 929 N.E.2d 863, 871 (Ind. Ct. App. 2010) (vacating a gag order because even though "[t]he publication of the articles regarding [the child]'s case in the Indianapolis Recorder may well have had a negative impact on [the child]," no evidence suggested "that [the child] suffered as a result or would suffer if Mother continued to talk to the media."); *In re* T.T., 779 N.W.2d 602, 620-21 (Neb. Ct. App. 2009) (vacating a gag order because "[n]o witness testified that further disclosure posed imminent physical or emotional harm or danger to [the child] of any magnitude. . . In the end, we must conclude that the evidence is simply insufficient, absent conjecture and speculation which we cannot engage in.").

126 *See* Frederick Schauer, *Harm(s) and the First Amendment*, 2011 Sup. Ct. Rev. 81, 97-100 (discussing this "trilogy" and "verbal assault"). To Schauer's trilogy of harms, Professor David Han adds "dissemination-based harms," as discussed earlier. Han, *supra* note 119, at 1650; *see* Part I.D.1 (discussing dissemination as a potential harm).

heard by the child, such negative effects can generally materialize in three (and possibly four) ways.

What is no stranger to courts and those familiar with child psychology is first, damage from a child's exposure to the disparagement and underlying parental conflict[127]; second, damage to the parent-child relationship; and third, damage from a child missing out on the benefits of a positive parent-child relationship.[128]

But fourth, and most controversially, damage may materialize from the effects of parental alienation:[129] a diagnosis that a child has an extremely damaged parent-child relationship to the extent that one parent has essentially turned the child against

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127 The development damages arise because most children at the time of divorce feel torn between loyalties to each parent. Robert E. Emery, Marriage, Divorce, and Children's Adjustment 3, 96-97 (2d ed. 1999). So, when a parent makes disparaging remarks towards the other parent, those effects are likely to exacerbate, leading to difficulties managing emotions, and "great guilt and anxiety," because a child may see themselves as the "glue" that holds the parents together. *Id.*

For an example of a court recognizing this as a valid harm in an NDC context, see: *Giderl*, 2017 WL 1178260, at *11 (upholding an NDC and finding sufficient harm where a child began frequently lashing out at peers only after the mother discussed her custody dispute with the child and posted details of the dispute on social media to communicate with the father).

128 Research concludes that a damaged parent-child relationship leads to an increased likelihood of symptoms of depression, higher levels of anxiety, and antisocial and aggressive behavior. Peter Fonagy, The American Psychiatric Association Publishing Textbook of Personality Disorders 167, 167 (2021) (early attachment to parents can minimize detrimental mental health effects); Jay Folberg & Marva Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. Rev. 523, 535 (1979) ("the key variable affecting satisfactory adjustment of children following divorce is the extent of continuing involvement by both parents in child rearing.").

129 *See* Edward Kruk, *Parental Alienation as a Form of Emotional Child Abuse: Current State of Knowledge and Future Directions for Research*, 22 Fam. Sci. Rev. 141, 144, 149 (2018) (discussing the effects on a parent-child relationship from disparagement). For an example of sufficient relational harm, see Opheim v. Opheim, No. A-20-821, 2021 WL 5066777, at *9-10 (Neb. Ct. App. Nov. 2, 2021) (finding a sufficient threat to the children's best interests when applying *Peterson* because "[the disparaging parent] has talked to the children about the court proceedings stoking conflict between the children and [the other parent]. [the disparaging parent] has called [the other parent] a liar and a hypocrite. . . . [and] believes that [the non-disparaging parent] is manipulating witnesses to testify against [them]").

the other.[130] While this diagnosis is hotly contested, and not recognized in the DSM-5,[131] such psychological effects can still include anxiety, depression, low self-esteem, impaired empathy, increased odds of substance abuse, and even suicidal ideation.[132] In some circumstances, the effects of alienation may be a relevant damage because it has a warning sign:[133] "alignment" with one parent over the other,[134] whether before, during, or after separation.[135] Over time, repeated alienating behaviors by the aligned parent—including

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130 Carissa Smith, *Current Issues in Family Law Policy and Practice Judicial Perceptions of Parental Alienation and Its Legal Remedies*, 57 Fam. L.Q. 75, 76-79 (2023-24).

131 *See, e.g.*, L.E.A. Walker, K.L. Brantley & J.A. Rigsbee, *A Critical Analysis of Parental Alienation Syndrome and Its Admissibility in the Family Court*, 1 J. Child Custody 47 (2004) (arguing that courts should deem parental alienation, as a concept, to be inadmissible because it is unreliable); Rebecca M. Thomas & James T. Richardson, *Parental Alienation Syndrome: 30 Years on and Still Junk Science*, Judges' J. (2015) (same). *But see* William Bernet, Parental Alienation, DSM-5, and ICD-11, at 3–7 (2010) (arguing that parental alienation should be included in the DSM-5 and the International Classification of Diseases (ICD-11)).

132 *See* Lalicker v. Hartkopf, 496 P.3d 967 (Mont. 2021) ("parental alienation teaches antisocial behavior and creates dysfunction that follows children into adulthood. . . . alienated children are at an increased risk for anxiety, depression, and substance abuse."); *In re* Marriage of Wollert, 464 P.3d 703 (Colo. 2020) ("problems with interpersonal relationships, substance abuse, . . . lack of empathy, low self-esteem, anxiety, depression, behavioral issues, . . . lack of impulse control, on-going anger issues, sleep and eating disorders, self-destructive behaviors and/or suicidal ideation.") (quotations omitted); *see also* Cheryl D. Wills, *Parental Alienation: The Handbook for Mental Health and Legal Professionals*, 43 J. Am. Acad. Psychiatry & L. 258 (2015) (same).

133 Early intervention with families tackling issues of potential alienation are key to resolving the dysfunction. Marissa Mallon, Comment, *Post-Separation Parent-Child Contact Problems: Understanding a Child's Rejection of a Parent and Interventions Beyond Custody Reversal*, 33 J. Am. Acad. Matrimonial Law. 609, 627; Philip Marcus, *Innovative Systemic Response: Innovative Programs in Israel for Prevention & Responding to Parental Alienation: Education, Early Identification and Timely, Effective Intervention*, 58 Fam. Ct. Rev. 544, 551 (2020).

134 Barbara Jo Fidler & Nicholas Bala, *Guest Editors' Introduction to the 2020 Special Issue on Parent-Child Contact Problems: Concepts, Controversies, & Conundrums*, 58 Fam. Ct. Rev. 265, 265 (2020) [hereinafter "Fidler & Bala, *Contact Problems*").

135 Barbara Jo Fidler & Nicholas Bala, *Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums*, 48 Fam. Ct. Rev. 10, 15 (2010) [hereinafter "Fidler & Bala, *Children Resisting*"].

disparaging the "alienated" parent[136]—can lead the child to become alienated, with potential adverse psychological effects emerging.[137] Thus, if a jurisdiction recognizes alienation and finds alignment near the time of the to-be-restricted speech, it may be likely to find evidence suggesting harm.

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Taken together, these considerations reflect an emerging principle: courts treat child welfare as a compelling interest only when the record demonstrates a concrete, non-speculative risk that disparaging speech will reach the child and cause identifiable harm.

Nevertheless, without a clearly defined standard for what constitutes a non-speculative risk, and the possible future considerations that courts have not yet examined, jurisdictions—and the judges within those jurisdictions—risk reaching different conclusions. The current standard operates much like the Rorschach test: the rule (or picture) remains identical to every decision-maker, but its application reflects the decision-maker's interpretive instincts. The same record may support different conclusions about when speech is deemed accessible or harmful, creating an unfair and unpredictable risk of constitutional deprivation and exposing a child to even more litigation. Thus, the lack of clarity in this emerging standard necessitates the development of a defined test for courts to apply.

II. Toward a Structured Standard

A. *The Need for Structure*

Given the lack of a defined standard for assessing a content-based NDC's constitutionality, courts are primed to reach

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136 Beverly, *supra* note 3, at 167 ("when a child hears disparaging comments from a trusted source like a parent, the child takes the statements as true, and thus begins to align with the alienating parent, who often presents themself as the party unworthy of the injuries to which they are being subjected"); *accord* Janet R. Johnston & Matthew J. Sullivan, *Parental Alienation: In Search of Common Ground for a More Differentiated Theory*, 58 Fam. Ct. Rev. 270, 283 (2020).

137 Fidler & Bala, *Children Resisting*, *supra* note 135, at 15.

vastly different conclusions as to what the proper rule is.[138] For example, reconsider *Shak*, which found a child was too young to read the disparaging online content, and *Clark*, which found that the child was old and sophisticated enough. The current lack of a structured standard invites courts to vary in how they interpret whether "imminent" harm is required—in the sense of whether a temporally immediate injury is required—or whether "foreseeability" is required. While similar, these standards are not interchangeable: "imminence" demands an injury close in time,[139] whereas "foreseeability" tolerates some temporal distance so long as the harm is both a predictable and concrete consequence of the speech.

This divergence is consequential. For instance, consider a parent who creates a public website accusing the other parent of misconduct and prominently uses the family name, but the child is currently too young to understand. Assume the website remains active throughout the child's development. The harm is likely too remote to be deemed imminent, but as the child matures, it is foreseeable that they will encounter material related to their family relationships that recounts familial conflict. When applying these interpretations under the strict scrutiny standard, both approaches may risk amounting to speculation, which may not constitute a compelling state interest,[140] leading to more litigation over the rule's bounds.

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138 Notably, state courts will be forced to settle these issues because they are unlikely to be brought in federal court unless upon a grant of certiorari from a state appellate court. *Ankenbrandt*, 504 U.S. at 692 (holding that federal diversity jurisdiction only allows the federal courts power to issue divorce, alimony, and child custody decrees); Palmore v. Sidoti, 466 U.S. 429, 431-32 (1984) (noting that the Supreme Court can hear state appellate cases upon certiorari).

139 Courts could easily interpret the loose case law to suggest imminence if they pull from the required harm showings for differing religions between parents. *See generally* R. Collin Mangrum, *Religious Constraints During Visitation: Under What Circumstances Are They Constitutional?*, 24 Creighton L. Rev. 445, 486 (1991) (noting that the majority of states "have required a clear[] demonstration of substantial and imminent threat to the child's emotional or physical well-being before legitimizing religious visitation restrictions.").

140 Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York, 447 U.S. 530 (1980) ("[m]ere speculation of harm does not constitute a compelling state interest") (citing Mine Workers v. Illinois Bar Assn., 389 U.S. 217, 222–223 (1967)).

Furthermore, that divergence not only extends across jurisdictions but also to the judges within them. For example, under the loosely defined rule from cases addressing the emerging trend, a purely prophylactic, preemptive NDC might still unfairly satisfy strict scrutiny.

To illustrate, consider a custody dispute between two (newly split) famous celebrity parents with broad media access, amid reports that one cheated on the other when they were still together. Even so, neither party has made disparaging statements about the other to the media, friends, the child (age ten), or anyone else. Yet, both parties are emotionally volatile and have disparaged each other in the past, although neither has cheated on the other before. Could an involuntary, judge-ordered NDC preemptively restrict the use of the parties' voices based solely on a prediction that disparagement will occur?

Under a judge's interpretation of the loose emerging principle, a "yes" is entirely possible. Given the parents' fame and platform access, the disparagement could easily reach the ten-year-old child, as in *Clark*. Further, it is plainly harmful to the child for their parents' disparagement of one another to be widely disseminated across media outlets. But as to whether such harm is likely, the fact that the parents have not disparaged each other in this particular instance cuts both ways, especially when neither party has cheated on the other before.

On the one hand, the lack of disparagement in this particular instance arguably warrants no restriction because, outside of the parties' past disparagement, no more facts move the needle from a mere possibility to an actual likelihood of injury. But on the other hand, one can argue that the parties' past disparagement suggests a reasonable likelihood of future disparagement, and that even if there is only a mere possibility, it is "better to be safe than sorry" because their fame would allow their statement to disseminate widely.

Given these facts, two judges in the same jurisdiction could easily reach different conclusions from these arguments, limiting a parent's ability to participate in the "marketplace" solely because of their public-figure status and past comments unrelated to their family. Therefore, because this subjectivity and ambiguity will remain without a structured standard, courts and the parties within them deserve clarity to prevent these divergent outcomes.

Such clarity aligns with the "procedural safeguards" given to First Amendment restrictions.[141]

But, to play devil's advocate, any effort to formalize this inquiry raises concerns that greater clarity may come at the expense of family courts' traditional flexibility, risking the exclusion of practically relevant considerations.[142] Nonetheless, a structured standard can still remain adaptable to encompass those considerations. For instance, courts may employ a non-exhaustive balancing test that guides discretion without eliminating it, such as conditioning judicial discretion on a written determination identifying the specific basis for each factor weighed.

One may respond that even if a structured standard is flexible, it still may not achieve the goal of ensuring First Amendment protections because "rules [still] do not necessarily produce 'correct' decisions while private [or judge-made] standards necessarily produce 'incorrect' decisions."[143]

That response, however, overlooks key constitutional and fairness implications. First, standardless discretion risks speech chilling. The mere fact that a judge can act on their sole discretion alone may produce an "incorrect" result because it risks self-censorship.[144] As the Court explained in *City of Lakewood v. Plain Dealer Publishing Co.*, when citizens cannot predict whether officials will permit their speech, they are more likely to suppress it

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141 Freedman v. Maryland, 380 U.S. 51, 58 (1965) (a system of prior restraint "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system"); *Conrad*, 420 U.S. at 560 ("a system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured") (italics in original).

142 Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 Mich. L. Rev. 2215, 2262 (1991) (discussing the advantages of flexibility in "taking into account all the errant but relevant facts in custody disputes.").

143 *Id.* at 2268; *see also id.* ("[s]ometimes - perhaps even often - a judge's "private" standards will be more 'correct' than those embodied in a rule.").

144 Frederick Schauer, *Fear, Risk, and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. Rev. 685, 690-93 (1978) (noting the chilling effect that occurs when a restriction inadvertently reaches protected activity beyond its intended scope, despite not being specifically directed at that activity).

themselves.[145] Without a clear line distinguishing between harmful and contributory speech, self-censorship remains likely. And that self-censorship may go as far as actually harming the child in addition to the parent, if the parent refrains from reporting actual abuse or a strong suspicion of it.[146]

Second, sole discretion over the interpretation of a rule poses a risk of bias.[147] As the now Justice Kagan observed, "A law conferring standardless discretion effectively delegates to administrators the power to make decisions about speech on the basis of content. Such administrative decisions raise the same constitutional concern as do content-based laws: the danger of improper motive."[148] Thus, as the Court suggested in *Grayned v. City of Rockford*, preventing arbitrary and discriminatory enforcement requires laws to "provide explicit standards for those who apply them."[149]

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145 486 U.S. 750, 757 (1988) (vacating licensing statutes that permit or prohibit expressive conduct (acting as a prior restraint) because "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused.").

146 *Clark, Supreme Court Writ*, *supra* note 8, at *18 ("[t]he chilling effect is profound: parents are deterred from writing books or memoirs, participating in support groups, reporting abuse, or criticizing judicial proceedings.").

147 Depending on the standard of review, such bias may also exist without a strong likelihood of recourse through appeal. *See, e.g.*, Lacy v. Lacy, 740 S.E. 2d 695, 702-03 (Ga. Ct. App. 2013) (affirming an NDC—under an abuse of discretion review—with no First Amendment analysis).

148 Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 457 (1996).

Justice Scalia also noted a similar concern with an improper motive where judges may suppress speech they disagree with. *See, e.g.*, *Madsen*, 512 U.S. at 794-95 (Scalia, J., dissenting); Lawson v. Murray, 515 U.S. 1110, 1114 (1995) (Scalia, J., dissenting from the denial of certiorari) (condemning injunctions under which "speech may be quashed, or not quashed, in the discretion of a single official, who necessarily knows the content and viewpoint of the speech subject to the injunction"); *accord* Thornhill v. Alabama, 310 U.S. 88, 97 (1940) ("[i]t is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.").

As practitioner Mark B. Baer notes, bias is intrinsic to judging both on the trial and appellate level. *See* Mark B. Baer, *The Amplification of Bias in Family Law and Its Impact*, 33 J. Am. Acad. Matrim. Law. 305, 328-34 (2020).

149 408 U.S. 104, 108-109 (1972).

Third, a structured standard would create "breathing space"[150] for more valuable speech, thus reducing the uncertainty for when speech is harmful for both courts and speaking parents.[151] On that same note, the certainty and predictability from that "breathing space" reduces the volume of constitutional challenges; and the challenges that courts do confront would also be easier to review because they would not be forced to evaluate discretionary judgments that are difficult to distinguish from subjective or inconsistent rule applications.[152]

Fourth, a standardless discretion is likely less efficient than a standardized rule. As Professor Carl E. Schneider points out, rules help to efficiently filter out what arguments are relevant and which ones are not, minimizing the thought needed to make a decision because they distill how a court should view a particular case.[153] Because family matters already comprise a substantial portion of trial court dockets,[154] a structured standard would likely reduce

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150 *See generally* Daker v. Jackson, 942 F.3d 1252, 1258 (11th Cir. 2019) ("[t]he 'breathing space' principle is the idea that, in order for the First Amendment to meaningfully protect the freedom of speech, individuals must have some margin for error, or the ability to advance insulting, outrageous, or inadvertently false speech, when discussing matters of public concern before they can be held liable.").

151 For examples of rule design and interpretations that create breathing space, see United States v. Alvarez, 567 U.S. 709, 733 (2012) (Breyer, J., concurring) (discussing how a mental state requirement reduces self-censorship because it creates breathing space for false speech); Counterman v. Colorado, 600 U.S. 66, 75 (2023) (following the same logic for "true threats"); Hustler Mag. v. Falwell, 485 U.S. 46, 56 (1988) (noting that satisfying the *New York Times* standard for actual malice was a prerequisite to the recovery of publication damages because it created proper breathing space).

152 The difficulty stems from the requirement that appellate courts must "conduct[] an independent review of the record" for this issue under *Bose Corp. v. Consumers Union* and its progeny. 466 U.S. 485, 505 (1984). When applying this standard without a guidepost for when speech is harmful, "*post hoc* rationalizations . . . are far too easy, making it difficult for courts to determine in any particular case whether the [restrictor] is permitting favorable, and suppressing unfavorable, expression." *Lakewood*, 486 U.S. at 758.

153 Schneider, *supra* note 142, at 2250; *see also id.* at 2251 (iterating that "rules give better warning than discretionary decisions" because they are more likely to "provide clear and complete information about what a court will do.").

154 *See, e.g.*, Douglas NeJaime et el., Family Law in a Changing America 326 (2020) ("[i]n some states, family law filings comprise 40 to 50 percent or more of all state trial court filings.").

litigation over an NDC's constitutionality as courts confront the issue more frequently.[155]

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Taken together, these considerations warrant a structured standard. However, in practical terms, an important question remains: what should that test be? The following Section aims to answer that question by offering a factor-based test that encapsulates current and future considerations for courts to use or model that aligns with already existing First Amendment principles.

B. *Tying It All Together: A Proposed Test to Determine When a Child's Welfare Is Compelling*

When encapsulating the considerations courts make regarding when a child's welfare is compelling, it is important that a test align with existing First Amendment rules. Otherwise, a test risks unnecessary facial challenges on its validity because it deviates from what already exists.

Because the question of when harm to a child's welfare is compelling, language that involves the proof of harm requirement under strict scrutiny becomes relevant. Generally, under *Brown* and *United States v. Alvarez*, a proof of harm requires (a) "a direct causal link" between speech and harm, for which "ambiguous proof will not suffice"[156] and (b) "a direct causal link between the restriction imposed and the injury to be prevented."[157]

However, because strict scrutiny for an NDC evaluates a child's psychological harm solely from disparagement—and not from the broader turmoil surrounding divorce or parental separation—that standard would, in practice, be so difficult to satisfy that it fails to serve its intended purpose. The effects of parental disparagement on a child are very similar to the effect of a divorce

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155 *Cf. Clark, Supreme Court Writ*, *supra* note 8, at *28 (noting how allowing speculative harms to suffice will cause "the South Carolina (and other) family court dockets [to] simply explode.").

156 *Brown*, 564 U.S. at 799-800.

157 United States v. Alvarez, 567 U.S. 709, 725 (2012).

or parental split,[158] and thus it is hard to discern between the two and show more than a mere "proof of a positive correlation,"[159] as required under the traditional standard.[160]

Furthermore, such a standard would waste both judicial time and party resources on unnecessary expert testimony. Outside of limited exceptions (such as parental alienation), family courts are already familiar with the harms of disparagement and parental conflict. They need only assess causation from the speech side, not from the harm side of the inquiry.

For this reason, the Court's language in other harm-from-speech assessments might be clearer, such as from *Tinker v. Des Moines Independent Community School District*, which requires "facts which might reasonably . . . forecast substantial disruption of or material [harm],"[161] or state supreme court language from cases like *Felton v. Felton*, which required some kind of "factual showing, not mere conclusions and speculations," of a substantial injury.[162] While technically a lower threshold, language that explicitly requires a reasonable showing above the level of speculation would make such a rule practical while preventing wholly predictive restrictions like in the hypothetical posed earlier about the cheating accusations between a famous celebrity couple.

When adopting this language and applying the above-mentioned current and future considerations to a case, courts could structure the inquiry around when a child faces sufficient

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158 *See supra* notes 127-128 and accompanying text (discussing how the psychological effects of a damaged parent child relationship mimics those of a divorce).

159 *See* Clay Calvert & Matthew D. Bunker, Article, *An "Actual Problem" in First Amendment Jurisprudence? Examining the Immediate Impact of* Brown's *Proof-of-Causation Doctrine on Free Speech and Its Compatibility with the Marketplace Theory*, 35 Hastings Comm. & Ent. L.J. 391, 395-98 (2013).

160 As Professor Volokh puts it, "deciding whether speech is likely to cause harm, even imminent harm, is a highly subjective matter;" and that subjectivity persists even when supported by psychiatric opinion, because they cannot reliably distinguish whether harm stems from disparaging speech or from the broader chaos of divorce or parental separation. Volokh, *supra* note 59, at 700-02; *see also* Calvert & Bunker, *supra* note 159, at 428 (noting how "[c]ourts might . . . ask whether the case at bar is one in which empirical causal data simply is difficult, if not impossible, to gather or generate.").

161 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

162 418 N.E. 2d 606, 610-11 (Mass. 1981).

harm to hinder their "best interests," "well-being," or "welfare" to be compelling under strict scrutiny:

A proponent of a custody-based order that restricts a parent's speech in making derogatory or negative characterizations about the other parent, the child, or both, satisfies strict scrutiny's "compelling interest" requirement in protecting a child's welfare only when the proponent shows that the record establishes a concrete, non-speculative risk of substantial and material emotional harm to the child, based on the following factors:

(a) Likelihood of child-directed exposure: Whether the child currently has or is reasonably likely to have direct access to the disparaging speech in its original form. Relevant considerations include the child's age, maturity, cognitive development, technological sophistication, and the medium of communication and its practical accessibility to the child.

(b) Probability and continued or expanded dissemination: Whether the speech is reasonably likely to reach the child indirectly through foreseeable transmission by third parties that rises above the level of a speculative prediction that disparaging speech will reach the child. Relevant considerations include repetition, reposting, or relay of the speech within the child's social, familial, educational, or digital environment. Purely speculative or attenuated transmission chains are insufficient.

(c) Evidence of harm: Whether the record contains reliable, case-specific evidence that exposure to the speech is likely to cause or has already caused substantial and material emotional harm to the child rather than a mere discomfort between the parties, child, or both. Such evidence may include qualified expert testimony grounded in the facts of the case, documented behavioral, emotional, or academic changes temporally associated with exposure, or other credible evidence demonstrating a sustained negative impact on the child's functioning.

If the record adduced at trial is sufficient to satisfy these factors, an NDC can pass strict scrutiny's prong premised on serving the child's best interest. Such a test synthesizes the factors courts have already considered, as well as the above-mentioned factors that may be relevant in the future.

An opponent of the above proposal may ask why this test or a similar one is preferable to simply requiring courts to apply the best interests of the child factors. The answer lies in ensuring

a constitutional safeguard: the best interests test overlooks the important question of whether a First Amendment restriction is necessary because, as Kanavy signals, it "focus[es] almost solely on the children," and thus "the standard allows parents' constitutional speech rights to be lost in the fray."[163] Therefore, to integrate that safeguard, the proposed test flips the inquiry from whether a restriction serves the best interests of the child to whether the child faces sufficient harm to warrant a restriction on speech.

An opponent may respond that a safeguard could still be achieved by simply balancing the child's best interests against the parent's First Amendment interests.[164] However, this assertion runs counter to settled law on the presumption *against* a prior restraint because it would impose an *even* burden on both parties rather than on the proponent. While such a standard may constitute some level of a constitutional safeguard, an infringement upon one's "First Amendment rights cannot be treated adequately or averted in the future by the simple application of a few procedural band-aids."[165]

Similarly, this assertion risks conflating the interest balancing associated with intermediate scrutiny with the more demanding standard of strict scrutiny. Although strict scrutiny still entails some implicit balancing, the assertion risks eroding the critical distinction between the two by suggesting that the state's interest in

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163 Kanavy, *supra* note 15, at 1103; *see also id.* at 1093 ("[a] court that refuses to recognize children's best interests as compelling is unlikely to restrict parental speech, thus increasing the risk that such speech will harm children. Conversely, a court that recognizes children's best interests as compelling could restrict parental speech without necessarily providing a correlative measure of protection for parental speech. This approach neither fully safeguards children nor thoroughly protects parents' constitutional rights and, thus, fails to provide an adequate solution"); *In re* Marriage of Tweeten, 563 P.2d 1141, 1143 (Mont. 1977) ("it is important to remember the best interest of the parent, or detriment to the parent, is not the test"), *overruled on other grounds by* Markegard v. Markegard, 616 P.2d 323 (Mont. 1980).

164 *See* Banks, *supra* note 11, at 116 (discussing Florida's *Schutz v. Schutz*, and arguing that balancing a parent's First Amendment right and a child's best interests because it is "fair" and "[n]o matter what the court holds, someone's constitutional right will be infringed).

165 *Conrad*, 420 U.S. at 558, 563 (Douglas, J., concurring in part and dissenting in part).

the child's welfare need only outweigh the parent's speech rights, rather than satisfy the higher requirement of being compelling.[166]

Finally, and in practical terms, such a rule would be harder to administer and apply. As professors Mark A. Lemly and Eugene Volokh note, interest balancing tests, even with explicit factors, are difficult to administer and are "essentially indeterminate in all but the easiest cases."[167]

Thus, the proposed framework offers a workable means to align with both the First Amendment and the best interests of the child. However, recognizing that compelling interest is only half the battle; to survive strict scrutiny, courts must still "narrowly tailor" their NDC to serve the child's welfare. Accordingly, the following Section turns to considerations for how courts may do so after applying the proposed test.

C. *A Narrow Tailoring*

When courts evaluate whether the ordering court narrowly tailored its NDC to serve the child's best interest, they rely on three main considerations:

1. *Whether the NDC precisely defines disparagement*

When courts fail to define the prohibited speech, they risk vacatur under vagueness and overbreadth challenges.[168] Thus, ordering courts should precisely define the restriction to where

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166 The Court's recent decisions have supported this notion when discussing how the Court can not just craft new exceptions by balancing the harm and value of speech. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 469–72 (2010); *Brown*, 564 U.S. at 791-92; *Alvarez*, 567 U.S. at 721-23 (2012) (plurality).

167 Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L. J. 147, 204 (1998); *accord* Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 Mich. L. Rev. 1502, 1509-18 (1985) (rejecting balancing tests in constitutional adjudications because they compare incommensurable values, arbitrariness in the way values are characterized, and difficulties in defining boundaries of side constraints on utilitarianism).

168 *See, e.g.*, *Ex parte* Slavin, 412 S.W.2d 43, 44 (Tex. 1967) (where an injunction is vague and subject to multiple interpretations, the court cannot hold the restrained party in contempt, because "the rights of the parties under a mandatory judgment whereby they may be subjected to punishment as contemnors for a violation of its provisions, should not rest upon implication or conjecture, but the language declaring such rights or imposing burdens should be clear, specific and

a reasonable person would understand what the NDC prohibits.[169] Here, commonly understood terms such as "derogatory" or "negative remarks" likely suffice if a court can point to specific instances in which a parent had uttered speech of that character.[170]

2. *Whether the NDC is not overinclusive*

An ordering court fails to narrowly tailor an NDC if it restricts a significant amount of speech that does not implicate the child's best interest. The underlying theory is that if the court can order an NDC while burdening less speech, it must.[171] Generally, NDCs fail scrutiny under this consideration when courts expand their restriction from when disparagement is likely to reach the child to

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unequivocal so that the parties may not be misled thereby") (citation removed; quotations removed).

169 *Grayned*, 408 U.S. at 108 (noting that, to be constitutional, a restriction must provide "people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.").

170 *Contrast Nimrick*, 24 N.W.3d 781 (Table), 2025 WL 1824813, at *8 (finding that "derogatory" sufficed because it "has a commonly understood definition, and there are easily identifiable examples of [the restricted parent]'s speech in this record that fall in the scope of that definition."), *with D'Ambrosio*, 610 S.E.2d at 881, 886 (vacating an NDC that prohibited a parent "'from making defamatory comments about [the other parent] to any third parties'" because it was "'so broad, so unreasonable, and so open ended' that the manner in which [the restrained parent] 'is supposed to comply with this order is difficult to know'") (reasoning that the NDC "fail[ed] to adequately delineate which of [the restricted parent's] potential comments might violate the injunction and, therefore, lead to a finding of contempt of court.").

171 *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 792-95 (1978); Eugene Volokh, *Freedom of Speech, Permissible Tailoring, and Transcending Strict Scrutiny*, 144 U. Pa. L. Rev. 2417 (1996) ("if the government can serve [an] interest while burdening less speech, it should.").

A court may also fail to narrowly tailor a speech restriction if its breadth is *under*inclusive, though this is very rare and unlikely in this context. *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118-20 (1991) (vacating a content-based speech restriction because it swept too narrowly and reasoning that the compelling interest was "ensuring that criminals do not profit from storytelling about their crimes before their victims have a meaningful opportunity to be compensated for their injuries," and accepting this interest but nonetheless vacating the restriction because the state could offer no "justification for a distinction" between profiting from speech about one's crime and profiting in other ways).

when the speech is stated outside of their presence[172] or includes content unrelated to disparagement.[173] Thus, to survive strict scrutiny, courts should refrain from verbiage such as restricting speech when made "in any fashion,"[174] and instead consider limiting their restriction to disparaging statements made only "in the children's presence or in the presence of those who have contact with the children,"[175] or to a specific person.[176]

Similarly, courts must also refrain from expanding the NDC's imposition indefinitely[177] or for an unreasonable time.[178] While a

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172 *See* Part I.B (explaining how "[w]ithout a harm-based threshold, courts may impose sweeping prohibitions that suppress protected speech unrelated to any real risk to the child.").

173 *See, e.g.*, Easterday v. Everhart, 201 N.E.3d 264, 270-71 (Ind. Ct. App. 2023) (vacating an order for overbreadth that restricted a parent from discussing religion with their child because the parent could likely discuss many topics related to religion with the child without causing them harm).

174 *K.D.*, 929 N.E.2d at 874 (vacating an NDC for this wording because the "prohibition encompasses more than just [the child]'s juvenile records."); Campbell v. Campbell, 250 N.E.3d 459, 478 (Ind. Ct. App. 2024) (vacating an NDC for overbreadth because it "does not prohibit each parent from disparaging the other in the presence of either of their children. Rather, the non-disparagement clause prohibits each parent from disparaging the other to medical professionals, school personnel, coaches, etc.").

175 Adams v. Tersillo, 666 N.Y.S.2d 203, 204 (N.Y. App. Div. 1997) (modifying an NDC that restricted speech made "to any other person" to instead only restrict "the parties from making derogatory statements concerning each other in the children's presence or in the presence of those who have contact with the children" because it would then be narrowly tailored). *Contrast Hartman*, 185 Cal. App. at 1251 (upholding an NDC *limited* to disparaging speech about the other parent to their children or in their children's actual presence), *with Candiotti*, 34 Cal. App. 4th at 718 (vacating an NDC when it encompassed speech about the other parents *outside* the presence of the children).

176 Tomic v. Vanduyne, No. 25A-DC-2458, 2026 WL 1205927, at *6 (Ind. Ct. App. May 4, 2026) (upholding an NDC because it was "narrowly tailored to prohibit each parent from disparaging the other to a single individual; Child's new counselor.").

177 FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 226 (1990) (vacating a prior restraint because it lacked a definite time limit), *modified by* City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774 (2004); *see, e.g.*, *Cassie S.*, 2026 ME 26, at *8 (vacating a gag order restricting speech made concerning a custody dispute for overbreadth because it lacked a definite time limit).

178 *FW/PBS, Inc.*, 493 U.S. at 227 ("[a] scheme that fails to set reasonable time limits on the decisionmaker creates the risk of indefinitely suppressing permissible speech"); *see also* Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 802 (1988) ("delay compels the speaker's silence.").

court has yet to determine what constitutes a "reasonable time," a trial court likely would sufficiently narrowly tailors the time constraints if it restricts the speech only until the child reaches an adequate age where the disparagement will be less likely to impair their development[179] (which a court can then reassess whether the NDC is necessary), and never after they reach the age of majority.[180]

3. *Whether the NDC is the least restrictive means to serve the child's best interests*

An ordering court fails to narrowly tailor an NDC if there are less speech-restrictive means available that would serve the interest essentially as well as the speech restriction.[181] But because the speech itself is the vehicle that harms the child, no other alternatives such as mediation, co-parenting counseling, or online communication mediums realistically prevent that harm.[182] Nor does counterspeech solve the problem because it increases the volume of disparagement. Thus, ordering courts likely survive this consideration given the surrounding circumstances.

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Assuming that a court employs the proposed test or a similar derivative and evaluates these considerations, an NDC is likely

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179 Such an age is child and case specific, though it is likely that a restriction up and until their teenage years suffices. *See, e.g.*, Kyndra C. Cleveland, Jodi A. Quas, & Thomas D. Lyon, *Valence, Implicated Actor, and Children's Acquiescence to False Suggestions*, 43 J. Applied Dev. Psychol. (2016) (explaining how children at around age 7-8 develop a stronger resistance to false suggestions about negative acts than when in their earlier years); Carmen Barajas, María-José Linero, & Rafael Alarcón, *Persuasion Ability in Children from 6 to 12 Years Old: Relations to Cognitive and Affective Theory of Mind*, 13 Front. Psychol. (2022) (finding that children aged 6–12 show increasing sophistication in evaluating persuasive arguments).

180 *Clark, Supreme Court Writ*, *supra* note 8, at *17, 23 (noting that NDCs and gag orders erroneously "operate indefinitely and extend beyond the child's majority" because, under *Troxel*, the "State's interest in the child ends at adulthood" and "[a] permanent gag order cannot be justified by a rationale that no longer exists.").

181 *See, e.g.*, Rutan v. Republican Party, 497 U.S. 62, 74 (1990) (discussing speech restrictions as a last resort); *Boos*, 485 U.S. at 329 (same). The state does not, however, need to choose an alternative that "falls short of serving [a] compelling interest[]." Burson v. Freeman, 504 U.S. 191, 206 (1992) (plurality).

182 *See* Introduction (discussing these alternatives).

to survive strict scrutiny, while serving a child's best interest and ensuring constitutional compliance with the consequent speech restriction. With this test and narrow tailoring considerations in mind, the following Section demonstrates how courts may apply it.

D. *A Test Drive*

The following hypotheticals illustrate how courts may apply the proposed framework in practice. Each example assumes the challenged NDC is content-based and therefore subject to strict scrutiny.

Hypothetical One: The Public Facebook Campaign.—Suppose after a contentious divorce, Mother repeatedly posts on Facebook that Father is a "deadbeat," "emotionally abusive," and "dangerous to children." Mother's profile is public, several posts include the child's surname, and mutual friends frequently comment and repost the content. The parties' son (age twelve) actively uses social media, attends school with classmates whose parents follow Mother online, and recently asked Father whether he "really abandoned the family." A therapist testifies that the child has begun exhibiting anxiety and reluctance to attend parenting time with Father following exposure to the online conflict. Father moves for an NDC prohibiting Mother from posting disparaging comments about him on publicly accessible social media platforms.

Here, under the proposed test, the court would likely conclude that the child's welfare constitutes a compelling interest. First, the likelihood of child-directed exposure is substantial. The child is old enough to access social media independently, understands the nature of the accusations, and has already demonstrated awareness of the posts. Unlike the toddler in *Shak*, the child here possesses both the technological sophistication and practical ability to encounter the speech directly.

Second, the probability of continued dissemination strongly favors restriction. The posts are public, repeatedly shared, and integrated into the child's educational and social environment. Exposure is not speculative because the child has already encountered the speech indirectly through peers and online access. Third, the evidence of harm is concrete and case-specific. The therapist's testimony links the child's anxiety and deterioration in the parent-child relationship to exposure to the disparagement. The

evidence, therefore, rises above generalized discomfort associated with divorce.

In sum, the court would likely find a compelling interest sufficient to satisfy strict scrutiny's first prong. A narrowly tailored order limited to publicly disseminated disparaging statements reasonably likely to reach the child would likely survive constitutional review.

Hypothetical Two: Private Text Messages.—Consider that Father sends several angry text messages to Mother, accusing her of infidelity and manipulation. None are sent to the child or third parties. The parties' daughter (age eight) does not possess a phone, does not have access to either parent's devices, and there is no evidence Mother shared the messages with anyone else whatsoever. Although the parties frequently argue, no expert testimony or evidence suggests that the child has been exposed to the messages or suffered emotional consequences from them. Mother seeks an NDC prohibiting Father from making any disparaging remarks about her "in any form whatsoever."

Here, the proposed test would likely not support a compelling interest sufficient to justify this restraint. First, the likelihood of child-directed exposure is minimal. The messages were privately transmitted between adults, and the child lacks practical access to them. Second, dissemination remains speculative. No evidence suggests Mother forwarded the messages, discussed them in the child's presence, or otherwise exposed the child to the content. Third, no evidence of harm suggests a causal connection to the speech itself. While the divorce may be stressful, the record lacks any showing that the disparaging communications caused or threatened substantial emotional harm to the child.

Therefore, the NDC would likely fail strict scrutiny because the asserted harm rests on speculation rather than a concrete risk. Moreover, the requested prohibition is facially overbroad because it bars all disparaging speech regardless of audience, context, or likelihood of child exposure.

Hypothetical Three: The Podcasting Father.—Suppose following separation, Father begins hosting a monetized podcast discussing "family court corruption." Although he never identifies Mother by her full name, he references specific facts about the custody dispute that make the family identifiable within their community. Several episodes accuse Mother of "brainwashing" the

children and engaging in parental alienation. The parties' daughter (age fifteen) listens to the podcast after classmates mention it at school. School counselors report increased emotional withdrawal and conflict between the child and Mother after the child began listening regularly. Mother seeks an order prohibiting Father from discussing the custody dispute publicly in a manner reasonably likely to identify the child or Mother.

Here, the court would likely find a compelling interest, but the narrow-tailoring inquiry becomes more difficult because the speech addresses matters of public concern. As to exposure, the child is sufficiently mature and technologically sophisticated to access the speech directly. The dissemination factor also favors restriction because the podcast is public, commercially distributed, and circulating within the child's social environment. The evidence of harm is stronger than mere speculation because counselors documented behavioral changes temporally associated with exposure to the podcast.

Still, the court must narrowly tailor any restriction to avoid burdening more speech than necessary. A blanket prohibition on discussing family court issues publicly would likely fail. However, an order narrowly limited to identifying or disparaging remarks reasonably likely to expose the child to emotionally harmful content may survive strict scrutiny.[183]

Hypothetical Four: Alienation Allegations.—Suppose Mother repeatedly tells the parties' son (age thirteen) that Father "never wanted children," "only cares about money," and "abandoned the family." Over several years, the child increasingly refuses contact with Father and expresses hostility mirroring Mother's language. A court-appointed psychologist testifies that the child exhibits signs consistent with parental alienation and that continued disparagement risks long-term emotional harm and permanent deterioration of the father-son relationship. Father seeks an NDC prohibiting Mother from making disparaging comments about him to or in the presence of the child.

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183 This hypothetical aims to show that speech involving broader public advocacy does not lose constitutional protection merely because it arises from a custody dispute under this test. Courts must therefore distinguish between protected public commentary and targeted disparagement foreseeably harmful to the child.

Here, the court would likely conclude that the NDC survives the compelling-interest requirement. The Mother directed her speech to the child, eliminating any question regarding exposure or dissemination. Additionally, the psychologist's testimony provides case-specific evidence linking the disparagement to emotional and relational harm. Although parental alienation remains controversial in some jurisdictions, the proposed framework does not require courts to formally recognize the diagnosis itself. Rather, the relevant inquiry is whether credible evidence demonstrates substantial emotional harm associated with repeated disparagement.

Thus, the evidence supports that conclusion independent of the label attached to the condition. The requested order would also likely satisfy narrow tailoring because it restricts only direct disparagement of or about the child, rather than all public discussion or criticism.

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Collectively, these hypotheticals demonstrate how the proposed framework distinguishes between speculative fears and constitutionally sufficient risks of harm to preserve a parent's First Amendment protection while still permitting courts to intervene when disparaging speech threatens a child's welfare.

Conclusion

Non-disparagement clauses in custody orders raise First Amendment concerns because courts often rely on the "best interests of the child" standard without a clear, strict-scrutiny framework for rulings that impinge on free speech interests. The emerging trend correctly requires more than a categorical appeal to child welfare and instead demands evidence of actual or threatened harm from parental disparaging speech before an NDC can be upheld. However, courts lack a consistent standard for determining when future harm is sufficiently concrete to justify a prior restraint on speech.

This Comment addresses that gap by synthesizing existing case law into a structured test focused on whether a child is likely to encounter disparaging speech and whether there is a non-speculative link between exposure and psychological or emotional harm.

The test requires record-based evidence of exposure, context, and resulting harm, while preserving limited judicial discretion. In doing so, it clarifies that only demonstrable, case-specific risks to a child's well-being can satisfy strict scrutiny, ensuring that child protection does not become a broad justification for restricting parental speech.

Joseph Romano

Book Review: Jonathan W. Gould & Christopher M. Mulchay, Parenting Plan Evaluations: An Evidence-Informed Approach to Child Custody (American Psychological Association, 2026)

by
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Introduction

In their book *Parenting Plan Evaluations: An Evidence Informed Approach to Child Custody* (2026),[1] Jonathan Gould and Christopher Mulchay, who are experienced forensic psychologists and published scholars in the field, provide a comprehensive resource for improving the forensic practice of lawyers, judges, and mental health professionals cohabitating the peculiar space where mental health sciences and adversarial systems co-exist. Interdisciplinary professionals can certainly gain from flipping to the table of contents and index to find pages relevant to their case-in-that-moment. That would be an unfortunate mistake. When child custody litigation and forensic expertise involve the triangulation of parental conflict, child suffering, and the juridical administration of custody litigation, such a book has

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[1] Jonathan W. Gould & Christopher M. Mulchay, Parenting Plan Evaluations: An Evidence-Informed Approach to Child Custody (2026).

a beneficial purpose beyond its insights into ethics, science, law, and policy.

It is not possible to write an "evidence-informed" book that applies to a diverse professional discipline like psychology and forensics and avoid the use of certain jargon and technical language. Indeed, the reason this book has such merit is that understanding that language is key to being an informed advocate for vulnerable clients. The chapters, and the subsections of each chapter, therefore, are arranged to provide a nuanced and sourced view of current research and best practices from intake to writing a parenting plan evaluation (PPE): *I. Conceptual Foundation for an Evidence-Informed Approach to Parenting Plan Evaluation; II. Using Scientific Knowledge and Process; III. Mitigating Bias in Your Evaluation; IV. Data Collection and Integration; and V. Common Issues in Parenting Plan Evaluations.*

Of critical importance, the authors encourage readers to consider all elements of a PPE through the lens of a conceptual framework, the ecological model. The legal profession may unwisely overlook the value of such a framework since it is not typically a part of legal education (or the examination of witnesses at a trial). Organizing data collection and minimizing biases are co-extensive with an explicitly transparent lens:

> Theoretical and conceptual frameworks are essential components of research design and analysis. While often used interchangeably, it is important to distinguish between them and understand their respective roles. Theoretical frameworks provide researchers with established theories or perspectives to guide their studies, hypothesis formulation, and data interpretation. On the other hand, conceptual frameworks serve as a conceptual map, organizing key concepts, variables, and their relationships within a specific study.[2]

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[2] Fodouop Kouam Arthur William, *Unveiling the Significance and Influence of Theoretical and Conceptual Frameworks in Social Science Research*, 142 Int'l J. Res. Publ'n 137, 138 (2024); *see* Elaine Toomey et al., *Addressing Fidelity Within Complex Health Behaviour Change Interventions: A Scoping Review of Fidelity Frameworks and Models*, 20 Health Psychol. Rev. 1, 2 (2026) ("The use of frameworks and models is critical to provide a better understanding of how and why behavioural interventions do or do not work. Frameworks and models give us a shared language to communicate with, help us build on what is already known and, for fidelity research, can facilitate us to address fidelity in a consistent way across studies.").

Although independent forensic experts may have their own preferences for organizing data collection, the absence of any evidence-informed framework may mean that data and opinions are tossed like a salad rather than integrated as a cohesive and transparent whole. Intentionality of design and planning for a PPEs drives more functional reports and reduces biases and errors. As the authors eloquently write, "To be a parenting evaluator is to embrace contradiction. It is to balance scientific rigor with human empathy, to work methodically in the face of intense emotional upheaval, to stand firm in expertise while remaining humble in the face of ever-expanding knowledge."[3]

The Ecological Model

As just mentioned above, the authors begin by sharing an *ecological model* initially developed by Urie Bronfenbrenner: "Families do not exist in isolation; they are embedded within broader societal, cultural, virtual, social media, and economic structures."[4] This statement is valid in many fields, including the biopsychosocial model in social work, and more recent research connecting individual trauma with community stressors to assess adverse childhood experiences (ACEs).[5]

In social science and policy, models matter as does fidelity to that model. How does the model help organize and predict

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[3] Gould & Mulchay, *supra* note 1, at 3.

[4] *Id.* at 7; *see* Figure 1, at 7 (Bronfenbrenner's Ecological Model), adapted from File: Bronfenbrenner's Ecological Model.png - Wikimedia Commons (2020).

[5] *See* Elizabeth Connon, et al., *Strengths-Based Resilience: The Biopsychosocial Factors that Differentiate 12-Year Mental Well-Being Trajectories Following Adverse Childhood Experiences*, 56 Psychol. Med. e185, at 2 (2026) ("Beyond biological influences, social and environmental factors play a critical role in shaping resilience following ACEs. While a broad range of ACEs have been associated with elevated psycho pathology evidence suggests that specific exposures – particularly abuse and interpersonal conflict – may confer disproportionately harmful effects and, therefore warrant heightened attention."). Divya Mehta, et al*., Child Maltreatment and Long-Term Physical and Mental Health Outcomes: An Exploration of Biopsychosocial Determinants and Implications for Prevention*, 54 Child Psychol. & Hum. Dev. 421, 424 (2023) ("Emphasising the pivotal roles of communities, families and schools in protecting children from maltreatment, we discuss systemic determinants of child maltreatment within Bronfenbrenner's social ecological framework.").

outcomes? Does the model reduce implicit biases or heuristics as a way of reducing eyeroll judgments by evaluators that are then transmuted into the speed and compression of family courts? The use of an ecological model, as against a vacuum, better assures that PPEs explain individual strengths and vulnerabilities which are not flat and linear (and boring) classroom problems on an exam, but a textured and multi-dimensional analysis of a life-in-being existing in an actual environment.

Conversely, continuing education programs are offered which attempt to teach lawyers and judges how to conduct a direct (too often the more important, yet more likely ignored, art and skill) and cross examination (too often overdone amid theatrics rather than substance) of forensic experts. A panel of forensic psychologists may talk about their experiences in court and exchange anecdotes about lawyers who misbehave and judges who are confused as to why evaluations are being offered in the first place. Lawyers proceed to tell their own war stories as they expound on a dazzling cross-examination that took six hours over one bump on a Minnesota Multiphasic Personality Inventory (electronic) scoresheet or an arcane statistical anomaly concerning *p* values or error rates.[6] Judges share their frustration with making tough decisions about the future best interests of children without agreed-upon data or diagnoses by amply qualified experts reading the same records and testing.

This comment is not intended to be cynical (well, maybe a little) but those discussions may have less to do with the reality of family court. A couple of premises may be useful even if they are not readily accepted or are jurisdictionally sensitive. First, PPEs are expensive and time-consuming: depending upon the jurisdiction and customs, from start to testimony can cost $2,500 to $25,000 per parent. In private custody cases, much of the expense depends on the capacity of parents to pay out-of-pocket because there are generally not public funds for this purpose and, if there are, these may be statutorily or rule-based and capped much lower than private pay.[7]

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6 *See generally* Dana E. Prescott, *Bending the Light of Social Science in Family Court: Epistemic Injustice and Epistemic Exceptionalism Matter*, 33 J. Am. Acad. Matrim. Law. 99 (2020).

7 *See* Aaron Robb, *Producing Quality Evaluations at a Reasonable Cost*, 61 Fam. Ct. Rev. 65, 71 (2023) ("Clearly there are myriad considerations in

Second, PPEs are often court-ordered after the professionals and the court are weary, reams of paper and fees have been expended and no one knows what else to do. Rather than take a prophylactic approach—helping the family system adapt to and recover from conflict through evidence-based, targeted interventions—the choice is to weaponize labels (borderline, narcissistic, depressive, anxiety, PTSD, OCD). In poverty cases, which are usually child protection cases involving state allegations of abuse or neglect, PPEs may have no connection to the cause (homelessness, IPV, addiction) while affixing a label that trails that parent through jeopardy or parental termination.[8]

Third, family courts across the country are under-funded and under-staffed. Judges are left to process speed and volume with younger and younger children (≤ 5 years old) living within more vulnerable and complex family systems. This is particularly true in child protection cases, which are generally poverty cases, with a complex history of discrimination and bias.[9] There is very little data, however, as to what percentage of cases actually have

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conducting high quality child custody evaluations while at the same time maintaining affordability of such services for the families that need them. These goals are not in conflict, and they are clearly achievable.").

[8] *See* Karen S. Budd, *Assessing Parenting Capacity in a Child Welfare Context*, 27 Child. & Youth Serv. Rev. 429, 436 (2005) ("Caseworkers and attorneys who request mental health evaluations on parents have differing reasons for referral and varying expectations about the report and its usefulness. Some referrals occur needlessly because prior evaluation reports have not been circulated or read, as a substitute for case planning, or as a fishing expedition with no specific questions in mind.").

[9] *See* Krissie Fernandez Smith et al., *Practice Tips for Managing Challenges in Parenting Capacity Assessments in Child Protection Court*, 61 Fam. Ct. Rev. 818, 826 (2023) ("A parent's unique background can influence various aspects of child protection cases, and evaluators working in this field should be aware of how different aspects of diversity can impact the progression of a child protection case and should inform the PCA. Diversity issues can affect how risk is perceived in a case and, in turn, affect the child welfare agency's management of a case and documentation of incidents in their records. Families of lower socioeconomic status and historically marginalized racial and ethnic groups are disproportionately represented in child welfare systems."). For a policy brief on this point, see Children's Rights Columbia Law School Human Rights Institute, Racial (In)Justice in the U.S. Child Welfare System: Response to the Combined Tenth to Twelfth Periodic Reports of the United States to the Committee on the Elimination of All Forms of Racial Discrimination (July 2022), Childrens-Rights-2022-UN-CERD-Report-FINAL.pdf.

parental capacity evaluations, or, as with private cases, the efficacy of those evaluations in the context of court-ordered reunification or parenting plans and the quality of life for children.

The point here is that there is a temptation for professionals to move to equivalency or "a pox on both houses" as if both parents are equally responsible for the conflict. This is a difficult assumption to research empirically because there are too many moderating, mediating, and confounding variables operating internally and externally on family systems.[10] PPEs, when properly done within this conceptual framework, may limit those forms of error by applying and "encouraging a holistic and interactive assessment."[11] From the book's inception, the authors encourage careful consideration of trends away from the "categorical to dimensional analyses" (or what may be considered rigid labeling and stigma) to standards of PPE practice that systematically draw data from multiple sources and employ evolving structured analytic techniques so as to more rigorously and transparently explain parent and child dynamics.[12]

Best Practices for Organizing the PPE

It is not just mental health professionals conducting PPEs who may not have sufficient training, insight, organization, or capacity to analyze data much less transform and transfer to a court. Lawyers and judges may be unfamiliar with behavioral science literature, the ethics of evaluation, the ethics of psychological testing and risk assessments (sampling, validity, reliability, relevance), and child development that is culturally

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10 These concepts are critical so as to avoid causation or association conclusions about A→B→C that may miss other factors. *See* Martin J.L. Bours, *A Nontechnical Explanation of the Counterfactual Definition of Confounding*, 121 J. Clinical Epidemiology 91, 93 (2020) ("In simple terms, the counterfactual theory of causation could be called the 'What if?' theory. When thinking in a counterfactual way about a causal, unconfounded effect of an expo sure on an outcome, the potential outcomes in two situations with contrasting states of exposure are compared (e.g., exposed vs. unexposed). One of these situations is real (factual) and can potentially be observed, whereas the other is unreal (counterfactual) and cannot be observed.").

11 Gould & Mulchay, *supra* note 1, at 8.

12 *Id*. at 9.

sensitive.[13] Preparation for PPEs occurs at the beginning of a case, not the end; before the report is written, not after the report is written; and with a much deeper understanding of psychological testing because it is the testing and diagnosis that risks distortion or disproportionate weight; especially when tests are novel or not recommended for a *child custody* analysis within a parenting dyadic and dynamics.[14]

The first section presents the argument that the legal test for expert opinions under the *Daubert* trilogy, as it is commonly grouped, for each jurisdiction are important for evaluators to understand because a report may be excluded when a court determines if expert testimony is unreliable and inadmissible based upon "flexible factors."[15] "Soft" and "hard" scientific testimony

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13 *Id.* at 49; *see* Commonwealth v. Hoose, 5 N.E.3d 843, 861 (Mass. 2014) ("The proponent of scientifically based expert testimony must establish, among several foundational requirements, that the expert's opinion will be based on principles and methods that are reliable. Reliability may be established either by demonstrating that the principles and methods generally are accepted in the relevant scientific community or by applying the factors set forth in the U.S. Supreme Court's decision in *Daubert* v. *Merrell Dow Pharms., Inc*., 509 U.S. 579, 592-94 (1993). The judge is the gatekeeper of the evidence and is responsible for making the threshold determination that the expert opinion is sufficiently reliable to go before the jury. The judge's gatekeeping function in the context of expert testimony applies in addition to the judge's general duty to exclude evidence that is irrelevant or for which the probative value is substantially outweighed by the risk of unfair prejudice, confusion, or waste of time.") (citations omitted).

14 *See* State v. Guise, 921 N.W.2d 26, 32 (Iowa 2018) (Appel, J. concurring specially) ("Guise's argument that due process requires accurate information about risk assessments beyond a mere conclusion, as demonstrated by *Malenchik* and *Loomis*, is certainly not frivolous. Certainly the *shiny legal penny* of a new risk assessment tool should be carefully scrutinized by the courts.…The relentless and potentially corrosive drive for efficiency and certainty in a resource-scarce public sector should not drive courts to use risk assessments in an unjustified 'off label' manner or in a fashion that otherwise lacks meaningful empirical support to drive sentencing.") (emphasis added); United States v. Birdsbill, 243 F. Supp. 2d 1128, 1131 (D. Mont. 2003) (excluding a psychological test intended for diagnosis and treatment that was not designed for the forensic purpose of determining when a person has sexually abused).

15 Gould & Mulchay, *supra* note 1, at 19; *see Daubert*, 509 U.S. 579; General Elec. Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999). The literature in this area of law and policy is vast and the differences between states more nuanced than is often considered. These readings by scholars may be helpful. *See* Francesca Ales et al., *Applying the* Daubert *Factors to IOP-29-Based Testimony*, 19 Psychol. Injury L. 3 (2026); David L. Faigman, *The*

is certainly relevant to this discussion in the judicial context.[16] A common reality associated with state family law practice is that the limited availability of economic resources and court time for preliminary hearings, as would occur in other federal and state jury and non-jury cases in which a judge acts as gatekeeper, may not happen before showing up for a family trial. The challenge is then debating, in real time in a courtroom with the parents present, all kinds of things from testability, peer review, error rate, standards and controls, and general acceptance of the methodology within the scientific community.[17]

An important case for practitioners is *General Electric Co. v. Joiner*[18] in which the U.S. Supreme Court adopted an anti-*ipse dixit* (it is what I say it is because I said it is true and I am who I am) posture and insisted that expert opinions must be grounded in sufficient relevant and admissible facts such that they do not meander into "unsupported or pseudoscientific opinions."[19] The authors share best practices, including established organizations like the AACAP, AAML, APA, and AFCC:

> A careful reading of psychologist's ethical responsibilities, best practice aspirations, and documents reflecting the current state of the art, and forensic mental health practice strongly suggests that evaluators need to conduct their assessments in a manner that employs the most current and well-established scientifically informed methods and procedures and interpret their findings in a manner consistent with the most highly respected professional and scientific literature in their fields.[20]

Too often overlooked when lawyers seek PPEs is the equivalent of hypotheses in scientific inquiry, the failure to generate specific questions to "guide the investigative process"[21] or, in other

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Daubert *Revolution and the Birth of Modernity: Managing Scientific Evidence in the Age of Science*, 46 U.C. Davis L. Rev. 893 (2012).

16 Gould & Mulchay, *supra* note 1, at 23.

17 *Id*.

18 522 U.S. 136, 146 (1997) ("[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert."). For an accessible analysis, see Edward J. Imwinkelried, *The Epistemological Trend in the Evolution of the Law of Expert Testimony: A Scrutiny at Once Broader, Narrower, and Deeper*, 47 Ga. L. Rev. 863 (2013).

19 Gould & Mulchay, *supra* note 1, at 23.

20 *Id.* at 35.

21 *Id.* at 77.

language, to explicitly frame "the problem to be addressed by the court [which] is a critical part of the scientific process."[22] In other language, these constitute what is critical to a sound and relevant evaluation: *referral questions*. Referral questions do not ask the evaluator to tell the court why "these people" hate each other, will not stop no matter how hard everybody else is working to help, or why one or both keep hurting their kids with chronic conflict. Referral questions are precisely crafted and relevant to the efficacy of PPEs as applied to the best interest factors in each jurisdiction. A general sample of such a list, which can be individualized and edited as needed for a court order are, as follows:

a. Are there any diagnoses or clinically recognized factors associated with each parent's mental or psychological health that impact, positively or negatively, his or her functional parental capacity
b. Are there any personality traits or diagnoses that impair or limit a parent's capacity to cooperate with parenting, and which may present risk to their child?
c. Are there any diagnoses or clinically recognized factors associated with each parent's mental or psychological health which impact, positively or negatively, the best interests of their child emotionally, or cognitively?
d. Are there any risk factors associated with substance use, addiction or interpersonal violence that may impair functional parenting capacity?
e. Are there any additional factors which may impair his or her parental capacity and function related to their child?
f. Are there evidence-based treatments or interventions that are appropriate for each parent?
g. Are there coping skills or resiliencies for each child, or the sibling relationships, that may reduce or increase the risk to the child?
h. Are there any other best interest factors under state law that are relevant to the evaluation data and which the court should know?[23]

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22 *Id.* at 39.

23 The phrase "functional parental capacity" is drawn by the author of this review from mental health literature because either or both parents could have a diagnosis, or a disability, and still function well as a parent. Other phrases may be required in your jurisdiction to correspond to what the evaluator is testing

In this context, forensic evaluators must "balance legal expectations with psychological expertise, ensuring that evaluations meet scientific and professional standards per admissibility as scientific evidence."[24] This is true because, experts "stand at the crossroads of law, psychology, and the evolving dynamics of family systems."[25] The structured analytic techniques, including the ecological model and the use of referral questions, curbs the risk that "judges fail to translate the issues into specific cycle legal questions that may be answered by evaluators, the handicap they are appointed expert."[26] The framework for the referral questions provides the court precisely with the data and responses needed to sharpen and shape the court's fact finding and ultimately application of the law.

Limiting PPE Errors

If there is one other underlying theme the authors intend to run through each chapter it is, "The explicit framing of the problem to be addressed by the court is a critical part of the scientific process."[27] So much social science research is grounded in

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or measuring for or against. *See* Corina Benjet et al., *Evaluating the Parental Fitness of Psychiatrically Diagnosed Individuals: Advocating a Functional-Contextual Analysis of Parenting*, 17 J. Fam. Psychol. 238, 246 (2003) ("First, these models need to define parenting competencies and skill areas and the thresholds that define minimally adequate parenting responses. Second, the models must also allow for cultural diversity. A third aspect of such models would be consideration of ecological factors."); Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 Yale J.L. & Feminism 37, 77 (2022) ("Further, the assessments are often inaccessible, fail to accommodate the needs of disabled parents, and rely on pseudoscientific measures, such as IQ scores, which do not accurately measure parenting capability. Nevertheless, judges and attorneys rarely challenge these experts, and judges often base their decisions on whether to terminate a parent's rights on these experts' testimony. In other words, parenting evaluations, which are critical in family policing system cases, can be tainted by ableism and often go unchecked.").

24 Gould & Mulchay, *supra* note 1, at 44.

25 *Id.* at 45.

26 *Id.* at 78.

27 *Id*. at 39. There is a school of perspectives that is concerned with referring to persons as having a "problem" rather than having strengths who are engaged in a shared and collaborative process. *See* Dennis Saleebey, *The*

the concept of human heuristics or the "rules of thumb" by which people navigate their daily lives. Much of the public's expectations concerning court is premised on television and movies and the idea that justice can be perfect, human beings are imperfect, but that there is a tidy ending to every narrative and story within an hour or two. Again, in the context of the vast majority of cases in the United States these are non-jury trials: one judge, one case. This form of adversarial dispute resolution vests tremendous amounts of power and authority in one person sitting as a judge with the authority to reward or sanction.

If I was recommending any chapters for reading, it would be chapters 2 and 3 because any forensic expert, lawyer thinking about hiring an expert, or a judge appointing a neutral expert, who had that chapter in hand before undertaking the evaluation, writing the report, and then testifying might provide a more relevant critical analysis then anyone without access to that chapter. Chapter 3, entitled "Common Errors in Child Custody Evaluations," addresses these issues early in the book, "we aim to provide leaders with a structured framework for interpreting the information presented in subsequent chapters."[28] The authors then offer sixteen common errors, offering brief descriptions of the first fifteen and from other researchers, with special attention to the final error related to the ongoing debate over the role of the judge and experienced forensic evaluations in the context of PPEs.

From that foundation, forensic evidence in the form of expert opinions is a process of *minimizing*, not eliminating, that error. Chapter 3 then outlines a punch list for both direct and cross examination in a courtroom. A forensic professional who can transparently explain each one of the elements will more likely provide the court with relevant and admissible evidence—and not

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Strengths Perspective in Social Work Practice: Extensions and Cautions, 41 Soc. Work 296, 303 (1996) ("In a strengths approach, how social workers encounter their fellow human beings is critical. They must engage individuals as equals. They must be Willing to meet them eye to eye and to engage in dialogue and a mutual sharing of knowledge, tools, concerns, aspirations, and respect. The process of coming to know is a mutual and collaborative one.").

28 *Id.* at 71.

guess, surmise, or bias—that assists the fact finder in reaching a conclusion based upon a valid foundation.

For example, an evaluator on cross examination is asked why they did not do a substance abuse evaluation but none of the referral questions suggested it, no one was charged with any kind of drunk driving or other drug offense, there was no indication of any mental health or substance abuse treatment, and no one particularly raised the issue. Thoughtful application of the referral questions at the outset of the case can prevent these kinds of gaps. This is also self-protection for the evaluator because the response of "I wasn't asked to do that" is a perfectly reasonable response on a conference panel but if there was collateral information that may point the arrow that way, a judge may not be as amused by the gap that failed to link a "transparent and methodological evaluation process that incorporates the principles of the ecological model."[29]

The authors proceed in chapter 4 to discuss "the role of clinical judgment" in an evaluation.[30] As the authors quite properly note: "playing in the law's sandbox" as a family law professional means there are rules about the importance of "evidentiary reliability," or what "mental health professionals label as reliability and validity."[31] The assumption is the notion that vigorous cross-examination, presentation of contrary evidence, and careful application of burdens of proof and rules of evidence will yield a truth in court.[32] The authors appropriately opine that in family matters "cross-examinations are most useful when they assist the court in evaluating the scientific quality of expert testimony."[33]

This is an important assumption since testing evidence in a meaningful way is crucial to the functioning of an adversarial system. It is, however, well-intended if unrealistic for anybody who has been a trial lawyer or a judge for an extended period of time to rely on that assumption. Unlike wealthy corporations, wealthy individuals, or those with the power to gain ATM access to the public purse, family court cases often consist of speed and volume with relatively little resources. The idea that all cross-examinations are equally revealing of a truth, that lawyers have the same skills

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29 *Id.* at 78.
30 *Id.* at 79.
31 *Id.* at 82.
32 *Id.* at 83.
33 *Id*.

or capacity for presentation of evidence, that experts of equal skill and ability will be hired and employed to provide independent and objective opinions using the same data, and the judges are of one mold without intrinsic biases and beliefs, misleads the public.[34]

This does not by any measure undermine the good faith and hard work of many people involved in the legal system. It is simply to say that there is a significant burden on the expert witness, linked to the referral questions, to be transparent about the strengths, weaknesses, and limitations of any data relied upon to provide the expert opinion. Relying upon cross-examination and becoming an expert who is an advocate for one side or the other by selecting or ignoring evidence is an inappropriate paradigm given the high stakes in family matters. The authors, in fact, provide a list of the application of system 1 and system 2 thinking from the intuitive to the slow, deliberate conscience sourced in many studies.[35]

Judges are required to write opinions and explain what data they relied upon and link back to the law. Trial lawyers are required to consider how to make arguments to a judge that link

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[34] For those who think that these types of discrepancies between experts drawing from the same data and treatises is limited to forensic psychology, I commend a reading of Judge Hornby's comment in a business valuation case:

> [T]he expert retained by the dissenting shareholder invariably concludes that the corporation has a very high fair value, while the corporation's expert determines that the fair value of the corporation is much lower. It is not unusual for the opinions of the experts to differ by a factor of ten. It is, therefore, not surprising that courts have evidenced frustration with this process.
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> *Accordingly, perhaps I should consider myself fortunate, since the experts in this case vary by a factor of only about five ($ 9 million at bottom; $ 48 million at top).* Guilliaem Aertsen, aggrieved shareholder Kaplan's expert, valued the business at $ 48.3 million. Nancy Fannon, First Hartford's expert, valued it at $ 9.3 million. Timothy Riddiough, First Hartford's other expert, valued it at $ 9.8 million (which, reversing his express or implied 25% minority discount, I correct to $ 13.1 million). *Although terminology varies, they calculated value in three basic categories--market, 10 investment (or income-based), and asset value. Then they weighed or ignored the results as they deemed appropriate. I summarize their respective credentials and analyses.*

Kaplan v. First Hartford Corp., 603 F. Supp. 2d 195, 198 (D. Me. 2009) (emphasis added and citation and footnotes omitted).

[35] *See* Gould & Mulchay, *supra* note 1, at 87-95; *see also* Daniel Kahneman, Thinking, Fast and Slow (2011).

facts that are admissible in court to the law (often the most difficult thing to explain to clients who think that anything should come into evidence). Evaluators have to provide connective tissue that judges can rely upon to render decisions that are as accurate as possible within the unique facts of each case. But it all folds into the most critical application of all the rules in the book for forensic evaluators: "show all of your work!"[36]

Scientific Knowledge and PPEs

In the second and third sections of this book, the authors address scientific evidence and specialized knowledge.[37] The evaluation process in a child custody case is already high stakes and highly emotional. But, again, transparency of process, data, and analysis probably will yield conclusions that a party (or both parties and lawyers) may not like. But the expert role, and the theme of this book, is that doing the most effective forensic evaluations means following transparent and accessible procedures and relying upon multiple sources of data. In fairness, as more than one forensic psychologist, lawyer, and GAL has commented at trainings or in an office, "everything is data." The refusal to accept any explanation, observations, or possible alternatives for the conflict that reflects rigid, black/white thinking, blame/shame language, or entitlement/righteousness has a special category of personality that is unlikely to change no matter the data.

In chapter 6, for example, the authors wrote about the challenge of applying group data in individual cases, which is also known as "the general-to-individual (G2i) challenge."[38] This can be a rather complicated analysis but the bottom line is that much of social science draws from data collected about groups and applied (accurately or not) to the individual:[39]

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36 *Id.* at 89.

37 *See id*. at 105-09.

38 *Id.* at 115.

39 One of my favorite books from my youth is Isaac Asimov's Foundation trilogy: Foundation (1951), Foundation and Empire (1952), and Second Foundation (1953), in which the prediction of group behavior from mathematical equations using psychohistory as a new and effective mathematics of sociology is the subject of his science fiction. Asimov would probably have found amusement in current betting sites as applying bulk data with bets that are aggregated and compared in nanoseconds, and with payouts based on insider knowledge (math

> Every case involving expert testimony based upon scientific research involves two choices. The first choice is whether the court will admit testimony about the general phenomena, i.e., overnights for young children (social framework testimony). The second choice is whether the court will admit testimony about the general phenomena on social framework testimony and allow its application to the specific case at hand (diagnostic testimony).[40]

The authors discuss various kinds of scientific reasoning because statistical and ethical traps relate to "the seduction of average data."[41] Again, expert testimony and evaluations should answer *relevant* referral questions with data points and expert conclusions that link to what the court may observe (not always as any trial layer knows) in the courtroom. The challenge for trial lawyers is that this kind of cross-examination can become buried in minutia or circular debates with the witness. Experienced experts will pause, look kindly on a party's ignorance without saying that, and then ask for clarification of the question as it connects to the court's decision-making.

Sociocultural and Systemic Inequities

An evaluation should encourage parenting plans that are safe, account for diversity and strengths and vulnerabilities, as well as IPV and various risk factors, and have specific categories of services required for the family (again when practical and available) but reduce the risk to children or iterations of more litigation. One of the positive aspects of this book is there is the continuous cycling through how experts and legal professionals should focus *on positive factors* in court as the key role of CCEs. Challenging the "ethical and scientific integrity of the evaluation process"[42] by noting various forms of biases, selection bias, overconfidence, overreliance, hindsight bias, fundamental attribution error, among other

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equations or insider grifting). There is an ongoing revolution to devise artificial intelligence by imputing data predictive of using the past to predict the future in ways that have some profound scientific and ethical concerns for forensic but that is for another day and for the next generation of lawyers and psychologists to unravel.

40 Gould & Mulchay, *supra* note 1, at 120.

41 *Id.* at 131.

42 *Id.* at 137.

types, is fair game and does matter in an adversarial system.[43] What this book does so well is make clear that there is an affirmative duty on the part of the evaluator to state any of these limitations and to test and re-test biases and hypotheses transparently for the reader.

Thus, chapter 8 concerns sociocultural identities and systemic inequities and chapter 9 extend this discussion to gender identity and sexual orientation and the challenges faced by LGBTQIA+ parents. Despite the emerging controversies that are beyond the scope of this book review, poverty, culture, race, zip codes, and various other demographic and socioeconomic disparities impact access to the court system, access to justice, and influence the outcome of cases. All mental health professionals, and lawyers and judges, are required to "develop cultural competence"[44] because the admixture of science and law requires that expert opinions be based on the generalizability and transferability of group data and testing to the actual parental dynamic in the courtroom.

From start to finish, the Western legal system is a cognitive process which requires iterations of informed rational judgment about risk and benefit.[45] If English is a second or third language or if there are cognitive, intellectual, or comprehension difficulties, or trauma from IPV causes emotional flooding during an interview, the legal system may not cater much to emotion despite its permeation of human behavior.[46] The examples are too numerous. Even by trying to list them would leave out important ones. Remember, however, the critical point for understanding forensics is that social science research is the process of translating group research and data to individual behavior and predictions.

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43 *Id.* at 151-54.

44 *Id.* at 161.

45 *See* Janet Weinstein & Ricardo Weinstein, *I Know Better Than That: The Role of Emotions and the Brain in Family Law Disputes*, 7 J.L. & Fam. Stud. 351, 377 (2005) ("The legal system expects that people will behave rationally. The lawyer's job is to help his/her client do so in the midst of emotional chaos, so that the case can be resolved. The task is onerous.").

46 *See* Carlton J. Patrick, *A New Synthesis for Law and Emotions: Insights from the Behavioral Sciences*, 47 Ariz. St. L.J. 1239, 1241 (2015) ("The ambiguity that typifies the law's approach to emotion is especially troubling given the ubiquity of emotions in law. Emotions permeate the legal system: explicitly in statutes, legal opinions, contracts and jury instructions, and implicitly in the minds of offenders, victims, judges, juries, lawyers and legislators.").

At this point, "integrating cultural competence into forensic psychology, evaluators can move beyond a one-sized-fits-all approach and recognize the deeply personal and varied nature of identity and family dynamics."[47] Lawyers in the compression of courtrooms are frequently drawn into a homogenous conveyor belt of people before the court. And, again, race or religion or socioeconomic status connects to the limitations of reliability and validity when applying research, testing, and clinical analysis, to any individual. In the case of CCEs, the connection between family dynamics and the ecological model occurs because "the evaluator is required to consider context, identity, and intersectionality at various layers, . . . including community and institutional" realities.[48]

Children's Roles and Rights in a PPE

Section IV concerns "story development" and special considerations for data collection, including special considerations for children.[49] The analysis and recommendations are intended to enhance the evaluator's ability to collect, integrate, and present information that is comprehensive and compelling to the fact finder.[50] The development of a cohesive narrative is especially relevant to describing the life of children influenced by, and immersed in, parental conflict. Thus, forensic interviewing and the implications of phone, Zoom, Google Meets, offices, or a child's natural environment are governed by a case by case assessment of risk, professional ethics codes, and state law.

The authors provide excellent bullet points for an interview structure around evidence-based scenarios and evidence-informed factors.[51] The authors also discuss the application of trauma-informed forensic interview techniques, which again, raises the complex notion of how to define trauma, how it individually affects one individual and not another, and then extending that interviewing process to not just the individual in isolation from all of the ecological factors. The authors do provide a summary of forensic

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47 Gould & Mulchay, *supra* note 1, at 164.
48 *Id.* at 183-84, Figure 8.2.
49 *See id*. at 213-95.
50 *Id.* at 221.
51 *Id.* at 226-27.

interviewing and memory of children, but that is a specialty of its own with established criteria to assure accuracy and avoid taint.[52]

The language used by children who have been prepared, rehearsed or practiced for an interview should be carefully heard and evaluated as data. On the other hand, and having interviewed children as a guardian *ad litem* in child custody cases as Maine, like many states, allows children to express preferences, some children have been so immersed in the language of their parents almost since birth that they may mimic and repeat the language of their parents. It is just part of their daily life and their existence, so it is not as much pressure on them to say it as much as it is their reality. There is an old Yiddish saying that "to a worm in horseradish, the world is horseradish."[53] For these children their horseradish is years of experiencing repetition and immersion.

What is critical is that the CCE connects to the best interests factors in a particular jurisdiction and to the referral questions because that ecological model is so helpful in terms of determining what the child experiences and what their day to day life is like.[54] What becomes important here is that children do not respond uniformly and there can be differences in age, gender, experiences, resiliencies, and coping skills, so throughout these chapters it is not enough to just ask about the children as if it is a collective living in a hive, but to recognize that each child has unique strengths and vulnerabilities that need exploration and explanation in any evaluation. Forensic interviewing of young children, if court-ordered as part of the referral questions, may reveal suggestive questions, repeated questions, interviewer bias, and external influences.[55]

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52 *Id.* at 243-252; *see* Chris Newlin, et al., Child Forensic Interviewing: Best Practices. United States: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (2015).

53 Howard Moskowitz Quotes, https://www.quoteslyfe.com/quote/To-a-worm-in-horseradish-the-world-659444 (last visited Sept. 4, 2026). A variation on that proverb is that, "When a worm sits in horseradish, it thinks there is nothing sweeter." World of Proverbs: When a Worm Sits in Horseradish, It Thinks There Is Nothing Sweeter. ~ Yiddish Proverb [19431].

54 *See* Gould & Mulchay, *supra* note 1, at 251-70 (information about each parent's description, variety of dimensions of each child, including the child's daily routine, friends, activities, social strengths and challenges, academic progress, and related areas of child development).

55 *Id.* at 292.

If children are to be interviewed, it is critically important that the evaluator have the skills to do so in the context of the referral questions. Most importantly, decisions need to be made about whether the interview should follow certain guidelines related to videotaping or recording interviews separate and apart from the interviews of the parents. The authors recommend what has been called the "parental meta-emotion philosophy (PMEP model)" for understanding how the parents process and respond to their own child's emotions and a process-oriented systemic observation protocol.[56] These models "illustrate a paradigm shift in how we conceptualize mental health, moving beyond rigid categories to a more flexible, scientifically grounded, and useful framework."[57] As the authors caution, and encourage, a central theme is to continue to apply and improve best practices by connecting research and practice.[58]

A Few Remaining Points

In chapter 18, collateral interviews and record reviews are discussed in the context of informed consent and releases. Lawyers are not terribly good at explaining or even exploring informed consent with clients, much less the consequences of releasing records. Clients often speak freely to their therapist without understanding what a waiver of that right may mean. Obtaining protective orders to prevent information from getting posted on social media, for example, may be important to avoid violations of privacy and confidentiality.

In chapter 19, the authors explore the conceptualization of parent-child contact.[59] The challenge for false narratives is not just one of a court system, but a scientific one. Some scholars have referred to this as the Winnie the Pooh Woozle challenge.[60] As already discussed, the forensic challenge in a trial may be feedback loops of *ipse dixit* that fit every piece of information to the conclusion of the evaluator.

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56 *Id.* at 311-15.
57 *Id.* at 366.
58 *Id.*
59 *Id.* at 398-400.
60 *See* Prescott, *supra* note 6, at 110 n.33.

There is no doubt that toxic parenting exists as well as, at times, efforts to amputate the role of the other parent. The challenge is that sometimes children have a very good reason from their own experiences to reduce, as adults do, contact with the other parent. The silly argument that this is not "normal" ignores thousands of years of human behavior. Nevertheless, there are challenges unique to child custody litigation. As the authors properly note, "there has been a growing emphasis on conducting ecologically valued evaluations, using precise and nonstigmatizing language, and developing a deeper appreciation for the complex dynamics that shape family functioning."[61] This shift is an intentional commitment to "both scientific rigor and clinical sensitivity."[62]

The modern conceptualization of parent-child contact is explored in Chapters 20 and 21, including domestic violence and research that suggests that evaluators do not properly consider those allegations in the context of the evaluation process. CCEs are one dimension of a multi-dimensional analysis of family dynamics at trial. Evaluator expertise means that without "evidence based or evidence-informed evaluation methods, there is a risk that courts may dismiss legitimate IPV allegations or, conversely, act on unsubstantiated claims, leading to unjust rulings."[63] Children, as the authors point out, are silent and suffering witnesses to various forms of IPV.[64]

The authors include in chapter 23 unique factors that may arise with parental requests to relocate. As true for much of this discussion, the evaluator must be careful not to tread on the court's legal authority by making or rendering legal judgments. Any referral questions related to the relocation may be tailored to "gatekeeping" and the potential that the other parent may support or not the other parent's relationship to the child. These cases are among the most complicated cases to assess because children often have no experience with where they are going and there are so many developmental and age-related variables.

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61 Gould & Mulchay, *supra* note 1.

62 *Id.*

63 *Id.* at 473.

64 *See id.* at 475-77.

Conclusion

Of necessity, a book review is a snapshot (and a selective one at that) by the writer which may miss what others may find more critical or valuable. As the authors conclude, "We caution against presenting expert opinions with undue certainty. Confidence should not be mistaken for credibility. Social science is inherently probabilistic. Findings are never absolute; they are provisional and context dependent."[65] A recurrent theme is that work involving human lives requires a level of humbleness when investigating the past and present emotional and psychological issues faced by children and each parent's awareness of those emotional and psychological concerns.[66]

One of the gaps in education for lawyers and judges is understanding that a PPE is too often imposed late as a sanction when parents have exhausted every form of mediation, co-parenting counseling, and parent coordinators, and now, out of desperation, send-in a forensic psychologist to evaluate, and tell "us" why, and please make "them stop." In this way, this book avoids the blame/shame///lawyer/mental health professional/judge paradigm in which cutting remarks and quibbles over what constitutes "science" blur what may be relevant explanations that link to the best interests' factors. For those professionals especially weary of reading reports copied and pasted from hired voices proselytizing one rigid explanation for all factual matrices, Gould and Mulchay help guide an informed decision as to whether the lawyer needs (or wants) a PPE and how to prepare your client and yourself for that process. As they wisely suggest for evaluators but relevant to all our professions, "Go forth as explorers. Be students of both science and humanity. And always, always, show your work."[67]

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65 *Id.* at 540.
66 *Id.* at 198.
67 *Id*. at 540.