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The Empirics of Child Custody

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ABSTRACT

Child custody issues are as American as apple pie, with only a quarter of children seeing their parents married until the end. The legal standard for custody is the best interests of the child, but the greyness of this inquiry allows courts to make difficult judgments. In family law, such discretionary standards govern factually diverse cases and make it difficult to draw conclusions from individual cases. This Article offers an objective measurement in family law by empirically examining a sample of Indiana divorce cases filed during three months in 2008 that involved children. The resulting analysis of child custody and visitation awards reveals the current understanding of the child's best interests and the role of judicial discretion, illuminating both national and local trends in family law.

CONTENTS

I. INTRODUCTION

Child custody issues have become as American as apple pie. If demographic trends continue, only a quarter of children will see their parents married until the end. Almost half of all marriages will end in divorce,[1] and almost half of children will not be born within a marriage, with both scenarios presenting child custody questions.[2]

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[1] "[E]stimated divorce rates hover between 35% and 50%." Molly J. Walker Wilson, *Legal and Psychological Considerations in Adolescents' End-of-Life Choices*, 110 NW. U. L. REV. ONLINE 33, 44 n.67 (2015).

[2] *See, e.g.*, Margaret F. Brinig, *Substantive Parenting Arrangements in the USA: Unpacking the Policy Choices*, 27 CHILD & FAM. L. Q. 2, 2 (2015) ("Although the US divorce rate has continued to fall since its peak in 1981, to about what it was in 1970, as long as the birth rate remains constant, the rate of disputes involving children is likely to rise. The rate of

When parents seek custody and visitation, the protection of children is paramount.[3] Historically, courts and legislators encouraged parents to stay married for the sake of their children.[4] Since divorce has become commonplace, the discussion has moved onto protecting children in the event of their parents' divorce.

The child's best interests standard is the modern approach to many child-related matters. This standard allows for judicial discretion and individualized determinations as to which parent would best serve a child's needs.[5] The standard is flexible and consists of several factors that together represent the child's best interests.[6] While the factors themselves are clear, how judges piece them together to decide custody can be less so.

While judges originally had significant discretion over child-related matters, the trend has been to limit it. The national example is the child support guidelines, a formulaic approach to calculating child support prompted by Congress to protect children.[7] Another example is the visitation time guidelines adopted by a few states to determine not only how much visitation time a parent should receive, but even which parent should trick-or-treat with the children on Halloween.[8] Indiana is one of the states that has moved to such parenting time guidelines.[9]

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marriage has decreased while coupling has not, and the unwed birth rate has increased dramatically since 1960, so that in 2010 it was about 41%.") (internal footnotes omitted).

[3] In the United States alone, it is estimated that "one million children live with parents who are in the midst of a divorce each year." Rebecca Love Kourlis et al., *Special Feature: IAALS' Honoring Families Initiative: Courts and Communities Helping Families in Transition Arising from Separation or Divorce*, 51 FAM. CT. REV. 351, 356 (2013) (internal footnote omitted).

[4] Divorce has been viewed as harmful to the children impacted. *See, e.g.*, D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 689 (Erwin Chemerinsky et al. eds., 6th ed. 2016) ("Wallerstein's follow-up studies (after 10 and 25 years) find continued negative effects: one-third of the children had psychological problems (e.g., clinical depression), poor academic performance, and difficulties in maintaining intimate interpersonal relationships. A study by psychologist Mavis Hetherington and John Kelly confirms that divorce has long-term consequences for children. However, these authors have considerable more optimism about these effects based on the resiliency of children.").

[5] Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 466 (1984).

[6] Michael J. Waxman, *Children's Voices and Fathers' Hearts: Challenges Faced in Implementing the "Best Interests" Standard*, 26 ME. B.J. 71, 71-72 (2011) (noting the difficulties in applying the standard).

[7] The Child Support Enforcement Amendments of 1984, 42 U.S.C. §§ 651-69 (2000 & Supp. 2005), required states to establish numerical formulas to help judges set child support awards. If the states did not have the guidelines by 1987, they would have lost a percentage of federal welfare funds. The Family Support Act of 1988, 42 U.S.C. § 667, required states to use the guidelines as a rebuttable presumption for child support awards. ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 195 (Chemerinsky et. al, Aspen Publishers 6th ed. 2009). The Guidelines differ by state and also by income level.

[8] *See infra* Part III.

[9] *Id.*

Even given this legal framework, however, it is difficult to know what the courts are doing within it. An empirical analysis of child custody and visitation allows a glimpse into the landscape of family law today, important especially for litigants and lawmakers. Empirical data also enables confirmation of the trends in family law. Finally, an empirical analysis implicates the greater debate in family law regarding judicial discretion versus legislative mandate.

This Article contributes by using descriptive statistics to take an empirical look at how the family law framework is implemented in practice by analyzing three months of divorce cases involving children that were filed in 2008 in Marion County, Indiana. To place this data into context, Part II begins by examining the statutory framework regarding child custody in Indiana, while Part III analyzes visitation. Part IV presents the empirical data, extracting lessons on the court's practices in Indiana divorces in the context of the statutory framework. While this analysis involves only one set of data, it is useful to help illuminate the practices in the field of family law today.

II. CHILD CUSTODY

In order to put any empirical data into context, a brief analysis of Indiana law on child custody is useful. Indiana, like many states, has a statutory framework governing both legal and physical custody. While legal custody provides a parent with the power to make major decisions for the child, physical custody determines with which parent the child lives.[10]

A. Sole Custody

There have been various child custody standards in the United States throughout history.[11] Common law viewed children as property and presumed that the father was entitled to the control and custody of his legitimate minor children.[12] When a custody dispute arose, the father's rights received legal protection.[13]

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[10] Legal custody includes the "right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare." McCarty v. McCarty, 807 A.2d 1211, 1213 (Md. Ct. Spec. App. 2002) (quoting Taylor v. Taylor, 508 A.2d 964, 967 (Md. 1986)). Physical custody includes the "right and obligation to provide a home for the child and to make the day-to-day decisions required during the time the child is actually with the parent having such custody." *Id.* (quoting *Taylor*, 508 A.2d at 967). Custody may be awarded in differing combinations based on the circumstances of each case. *See, e.g.*, LaChapelle v. Mitten, 607 N.W.2d 151, 168 (Minn. Ct. App. 2000) (affirming one parent's sole physical custody and shared legal custody with another parent).

[11] *See generally* Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381 (2008).

[12] MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 50, 53 (1994); WILLIAM BLACKSTONE, COMMENTARIES 196 (Bernard C. Gavit ed., Wash. Law Book Co. 1941) (1892); Prather v. Prather, 4 S.C. Eq. (4 Des. Eq.) 33, 39 (1809) ("With respect to the children, I do not feel myself at liberty to take them out of the care and custody of the father. He is the natural guardian, invested by God and the law of the country, with reasonable power over them. Unless therefore his paternal power has been monstrously and cruelly abused, this court would be very cautious of interfering in the exercise of it.").

[13] *Prather*, 4 S.C. Eq. (4 Des. Eq.) at 39.

Throughout the course of the nineteenth century, a newfound concern for the interests of young children in divorce proceedings gave rise to a presumption that favored mothers.[14] This "tender years" doctrine viewed the mother as best able to care for children.[15]

Cultural changes in the twentieth century resulted in the primary caretaker presumption, which was facially gender-neutral in holding that the parent who did the majority of care for the child should receive custody.[16] Under this presumption, the parent receiving custody was often still the mother because traditional gender roles meant that mothers frequently were the primary caregivers.[17]

Finally, states moved to the current child's best interests standard, which is gender-neutral and has the additional benefit of being focused on the outcome that would benefit children the most.[18] The best interests standard promotes fairness and equality between the parents by acknowledging that both have rights regarding their children.[19] However, the child's best interests standard has not escaped criticism for being unpredictable and encouraging litigation.[20]

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[14] David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 35 HOFSTRA L. REV. 1461, 1468 (2006).

[15] *See, e.g.*, Sheehan v. Sheehan, 143 A.2d 874, 882 (N.J. Super. Ct. App. Div. 1958). *But see* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 707-08 (Chemerinsky et. al, Aspen Publisher 5th ed. 2013) ("The little boy is very cute and just as red-headed as his dad who has a pony-tail down to his waist. You know, when the father got temporary custody, that little boy was only about a few weeks old. The judge said to the father, 'Mr. Fulk, how do you know how to take care of such a tiny baby?' The father replied, 'I went to the library, ma'am, and read all about it.'").

[16] *See* MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 47 (3d ed. 2009).

[17] *Id.* at 46-47.

[18] The future of custody will likely continue to revolve around the child's best interests, but some have proposed new reforms in light of high levels of divorce and non-marital births. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 227 (2015) (suggesting that states should adopt default rules that assign legal and physical custody to both parents at birth rather than wait until custody disputes are brought to the court).

[19] Jo-Ellen Paradise, Note, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 532 (1998).

[20] Mary Jean Dolan & Daniel J. Hynan, Abstract, *Fighting Over Bedtime Stories: An Empirical Study of the Risks of Valuing Quantity Over Quality in Child Custody Decisions*, 38 L. & PSYCHOL. REV. 45, 45 (2013-2014).

> The well-established "best interest test," a multi-factor qualitative inquiry, has long been criticized for its indeterminacy. According to its many detractors, because outcomes are unpredictable, this test leads to increased parental conflict, expensive litigation, and unfair bargaining tactics. The proposed remedy is to allocate post-divorce custody shares based on the percentage of time that each parent spent on childcare tasks before separating.

Id.

Courts in the United States today determine child custody by relying on the child's best interests standard.[21] Each state has a list of factors, whether defined through legislation or case law, that together compose the child's best interests.[22]

Indiana's best interests statute is typical of those used in other states[23] in that it abandons a presumption in favor of either parent and instead requires the court to consider all relevant factors.[24] Such factors include the age and sex of the child; the wishes of the child's parents; the child's wishes, especially if the child is at least fourteen years of age; the interaction and interrelationship of the child with the parents and siblings; the child's adjustment to the home, school, and community; the mental and physical health of all people involved; evidence of a pattern of domestic or family violence by either parent; and evidence that a de facto custodian cared for the child.[25]

A parent may request modification of the custody arrangement based on a change in circumstances. Indiana code, like many other states, allows for a change of custody when (1) modification is in the best interests of the child, and (2) there is a substantial change in at least one of the factors that the court may consider in initially determining custody.[26] Thus, the best interests standard also governs modifications of custody.

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[21] For a background on the American best interests standard, *see* John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 64 n.23 (2006); Reno v. Flores, 507 U.S. 292, 303-04 (1993) ("The best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody."). However, "[t]he American Law Institute proposes that in contested physical custody cases, the court should allocate to each parent a proportion of the child's time that approximates the proportion of time each spent performing caretaking functions in the past." Richard A. Warshak, *Parenting by the Clock: The Best-Interests-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 U. BALT. L. REV. 83, 83 (2011); *see also* A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.08, 197-99 (2015).

[22] Robert F. Harris, *A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian Ad Litem Model*, 6 NEV. L.J. 1284, 1292 (2006).

> At this juncture all states and territories in the U.S. have adopted some form of best interests standard for their courts to employ in making decisions about custody, placement, and/or the termination of parental rights. However, states vary widely in the amount of guidance their statutes give when defining best interests. Some statutes list extensive best interest factors relating to the child-in-context that provide sufficient direction to prevent lawyers from exercising unbridled discretion. These statutes also leave lawyers enough flexibility to meet the unique needs of individual children.

Id.

[23] *See, e.g.*, VA. CODE ANN. § 20-124.3 (West 2014); MICH. COMP. LAWS ANN. § 722.23 (West 2011).

[24] IND. CODE ANN. § 31-17-2-8 (West 2016).

[25] *Id.*

[26] IND. CODE ANN. § 31-17-2-21 (West 2016).

Despite the shifts in the cultural and social assumptions underlying the various standards used to determine child custody, support for sole custody remained constant.[27] Sole custody allowed the court to designate a single custodial parent to legally determine the child's education, religious upbringing, and medical treatment in addition to attending to the child's day-to-day activities and care.[28] The noncustodial parent assumed a secondary position in the child's life, removed from decision-making authority and limited to visitation rights with the child. However, this paradigm shifted with the trend across the country toward joint custody.

B. Joint Custody

Joint custody allows both parents to share custody despite separation[29] and has been the trend across the United States since the late twentieth century.[30] Joint custody may be legal, physical, or both,[31] but does not necessarily require equal

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[27] Meyer, *supra* note 14, at 1469.

[28] *Id.*

[29] Joint custody has been emerging in other legal systems as well. *See, e.g.*, Robert Emery, *Special Issue: Global Family Law: Editorial Note*, 51 FAM. CT. REV. 520, 521 (2013) ("Joint custody is also on the rise in Italy, mostly joint legal custody, a relatively new concept in Italian law."). Further:

> The notion that parents could share custody had great appeal to a variety of parties. Judges could avoid the difficult task of choosing between two fit parents, family law could reduce or eliminate the acrimony inspired by the traditional winner/loser custody model, both parents would be respected and encouraged to spend significant time with their children, and children would benefit from the continuing involvement of both parents.

Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 222 (2012). *But see* Sol R. Rappaport, *Deconstructing the Impact of Divorce on Children*, 47 FAM. L.Q. 353, 377 (2013) (arguing for the rejection of "sole" and "joint" terminology because it means more to the parents than the decision makers).

[30] "[L]egislators tend to favor presumptions toward joint custody (not necessarily equal custody) in custody determinations absent evidence that joint custody would be detrimental to the child." Elizabeth A. Pfenson, Note, *Too Many Cooks in the Kitchen?: The Potential Concerns of Finding More Parents and Fewer Legal Strangers in California's Recently-Proposed Multiple-Parents Bill*, 88 NOTRE DAME L. REV. 2023, 2040 (2013). Additionally:

> [O]ver the past two decades, the prevailing custody paradigm in regards to decision making and parenting-time schedules has shifted from sole custody to postseparation co-parenting. Joint custody has become more prevalent, in part because recent findings in social science supported changes in legislation and, on other occasions, the testimony of expert witnesses in favor of joint custody assisted judges to find that joint custody was in the best interest of each child. A primary benefit of joint custody is that it provides a way of giving children access to both parents while allowing parents freedom of divorce.

Karen S. Adam & Stacey N. Brady, *Fifty Years of Judging in Family Law: The Cleavers Have Left the Building*, 51 FAM. CT. REV. 28, 31 (2013) (internal citations omitted).

[31] *See* LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE § 5:1 (2015) (providing an overview of the multiple possible arrangements for joint custody and examining the different meanings of the term "joint custody" in various states); 1 THOMAS A. JACOBS, CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS § 6:7 (2015) (listing key cases regarding joint custody from various states); Vitauts M. Gulbis, Annotation, *Propriety of Awarding Joint*

sharing.[32]Almost every state now permits joint custody or has a presumption of joint custody;[33] in 1975, only one state permitted joint custody.[34] Indeed, joint custody has not only become an available option, but also the favored option in many states.[35]

Joint custody garnered support because both parents could exercise their rights relating to their children,[36] and children benefited from both parents.[37] This paradigm

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Custody of Children, 17 A.L.R.4TH 1013 (1981 & Supp. 2015) (noting cases that have determined the propriety of awarding joint custody of children to both parents following the dissolution of a marriage).

[32] *See, e.g.*, IND. CODE ANN. § 31-17-2-14 (West 2016) ("An award of joint legal custody under section 13 of this chapter does not require an equal division of physical custody of the child.").

[33] Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Working Toward More Uniformity in Laws Relating to Families*, 44 FAM. L.Q. 469, 511 (2011); *see, e.g.*, IDAHO CODE § 32-717B(4) (2006) ("[A]bsent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interests of a minor child or children."); OR. REV. STAT. § 107.169(3) (2011) (presuming joint custody is preferable when "both parents agree to the terms and conditions of the order"). Critics have pointed out that this is undesirable in cases of domestic abuse. *See, e.g.*, Janet R. Johnston & Nancy Ver Steegh, *Historical Trends in Family Court Response to Intimate Partner Violence: Perspectives of Critics and Proponents of Current Practices*, 51 FAM. CT. REV. 63, 68 (2013).

[34] *But see* Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 518 (1988) (noting some issues concerning joint custody).

[35] J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 217 (2014) (noting that forty-seven states and the District of Columbia have statutory provisions authorizing courts to award joint custody in one form or another (legal or physical), with the remaining states permitting these orders through case law).

[36] Sole custody led to a gap in the noncustodial parent's relationship with the child, even though the U.S. Supreme Court has repeatedly recognized parental rights under the Constitution. Although visitation does not extinguish parental rights, it alters them. "Due to this fundamental liberty interest, advocates for fathers' rights began pushing for courts to award joint custody beginning in the late 1970s." Erin Bajackson, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. LAW. 311, 323 (2013); *see also* Troxel v. Granville, 530 U.S. 57, 65 (2000). *But see* Elizabeth Scott & Robert Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW. & CONTEMP. PROBS. 69, 76-78 (2014) (discussing political issues surrounding the push for joint custody and father advocacy groups).

[37] Some research may suggest that children in sole custody homes have a harder time developing intimate relationships and suffer from depression and anxiety at a higher rate than those living with both parents. Paradise, *supra* note 19, at 555. *But see* Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 419 (2008) ("The custody arrangement that children live in following parental divorce is not a strong or especially important predictor of children's subsequent mental, emotional, or behavioral well-being. . . . [C]hildren are more likely to thrive psychologically following divorce when they experience a family context characterized by . . . ongoing positive relationships with and effective parenting of at least one, preferably both, parents.").

furthers the child's best interests to the extent that such interests require significant contact with each parent.[38] However, it might not be a universal solution.[39]

In addition to the child's best interests,[40] there are further considerations in the Indiana family law code for joint legal custody.[41] The court should evaluate the fitness and suitability of those awarded joint custody; whether the parents can communicate and cooperate; the child's wishes, especially if the child is at least fourteen years of age; whether the child has established a close and beneficial relationship with both parents; whether the parents live in close proximity to each other and plan to continue doing so; and the nature of the physical and emotional environment in each home.[42]

Many joint legal custody decisions in Indiana, as across the United States, have turned on whether the parents can communicate with each other.[43] As one court

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[38] "Joint custody became the new standard of what was considered 'in the best interests' of the child." Mary Ann Mason, *The Roller Coaster of Child Custody Law Over the Last Half Century*, 24 J. AM. ACAD. MATRIM. LAW. 451, 453 (2012).

[39] *See, e.g.*, Jennifer E. McIntosh, Special Issue, *For the Sake of the Children: Collaborations Between Law and Social Science to Advance the Field of Family Dispute Resolution: Legislating for Shared Parenting: Exploring Some Underlying Assumptions*, 47 FAM. CT. REV. 389, 397 (2009) ("As researchers were concerned a decade ago about children growing up without substantive involvement of both parents, their questions now turn with the pendulum to children growing up in the 'shared care era.'").

[40] IND. CODE ANN. 31-17-2-13 (West 2016).

[41] For example, "the court shall consider it a matter of primary, but not determinative, importance that the persons awarded joint custody have agreed to an award of joint legal custody." IND. CODE ANN. 31-17-2-15 (West 2016).

[42] *Id.*

[43] *See, e.g.*, Arms v. Arms, 803 N.E.2d 1201, 1210 (Ind. Ct. App. 2004) ("In determining whether joint legal custody is appropriate, courts examine whether the parents have the ability to work together for the best interests of their children."); Aylward v. Aylward, 592 N.E.2d 1247, 1252 (Ind. Ct. App. 1992) ("The evidence overwhelmingly reveals a clear abuse of trial court discretion in that the joint custody award constitutes an imposition of an intolerable situation upon two persons who have made child rearing a battleground. We believe that the imposition of joint legal custody under the present circumstances is tantamount to the proverbial folly of cutting the baby in half in order to effect a fair distribution of the child to competing parents."); Stamm v. Stamm, No. 21A05–0607–CV–401, 2007 WL 1673799 *9-10 (Ind. Ct. App. June 12, 2007) (unpublished table decision) ("We have previously noted our reluctance to affirm a trial court's order of joint legal custody when one of the parties objects. The obvious rational [sic] for such reluctance is that parties who do not want to work together in making fundamental decisions regarding their children are less likely to successfully reach agreements. . . . [Parties'] relationship is inescapably one for which joint legal custody is inappropriate. Although our conclusion that remand is necessary will result in one of the parents losing his or her rights relating to legal custody, this result is far preferable to the current arrangement, under which two parties who clearly cannot communicate and work together are jointly responsible for making fundamental decisions relating to their children's upbringing. We reverse the trial court's order that [parties] share joint legal custody and remand with instructions that the trial court decide which party shall have legal custody."); Stutz v. Stutz, 556 N.E.2d 1346, 1351 (Ind. Ct. App. 1990) (illustrating that an award of joint legal custody was not an abuse of discretion based on a record that contained no evidence of parental disagreement relating to the upbringing of the daughter).

stated, "The issue in determining whether joint legal custody is appropriate is not the parties' respective parenting skills, but their ability to work together for the best interests of their children."[44] However, occasional or mild disagreements between the parents do not necessarily hurt their chances for joint legal custody.[45]

Much work has been dedicated to increasing both parents' role in parenting. For example, the Association of Family and Conciliation Courts (AFCC) convened a think tank of thirty-two family law experts—including legal experts, mental health practitioners, conflict resolution practitioners, educators, judges, court services administrators, and researchers—to examine the issues surrounding shared parenting.[46] Its report shows how research, policy, and practice on shared parenting can be more effectively integrated.[47] Illustrating the greyness in this area of family law, there have been various reactions to the report, with suggestions for other directions.[48]

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[44] Carmichael v. Siegel, 754 N.E.2d 619, 636 (Ind. Ct. App. 2001). "Even two parents who are exceptional on an individual basis when it comes to raising their children should not be granted, or allowed to maintain, joint legal custody over the children if it has been demonstrated, as here, that those parents cannot work and communicate together to raise the children. . . . The trial court here was placed in a position of choosing one parent over the other regarding legal custody, because of their inability to communicate and work together. . . ." *Id.*

[45] *See, e.g.*, Troyer v. Troyer, 987 N.E.2d 1130, 1147 (Ind. Ct. App. 2013) (stating that the trial court acted within its discretion in awarding the parents joint legal custody of a twelve-year-old child, even though the child suffered from anorexia nervosa and a major depressive disorder and the father's previous communications with the child had caused the child emotional distress; the court found that the parents had occasionally been able to cooperate for the child's benefit, such as in making joint decisions regarding the child's therapy and extracurricular activities); Swadner v. Swadner, 897 N.E.2d 966, 974 (Ind. Ct. App. 2008) (explaining that joint legal custody of a child was appropriate despite the parents' disagreements; while the parents disagreed on a few matters, they demonstrated their general ability to communicate and work together to raise their children, and each parent acknowledged the other's love for their children and ability to care for the children; in granting a mother and father joint custody, courts must consider whether the parties can work together for the best interests of their children).

[46] Marsha Kline Pruett & J. Herbie DiFonzo, *Closing the Gap: Research, Policy, Practice, and Shared Parenting*, 52 FAM. CT. REV. 152, 153 (2014).

[47] *Id.* at 171 (noting that after all potential issues are addressed, shared parenting ensures "that children continue to be nurtured by parents whose collaboration sets a path for a strong family future").

[48] *See, e.g.*, Elizabeth S. Scott, *Planning for Children and Resolving Custodial Disputes: A Comment on the Think Tank Report*, 52 FAM. CT. REV. 200, 200 (2014) (suggesting that the application of the best interests standard when parents do not agree on custody is in tension with the goals and values of the report because it encourages parents to highlight each other's deficiencies); Marsha Kline Pruett & J. Herbie DiFonzo, *Advancing the Shared Parenting Debate, One Step at a Time: Responses to the Commentaries*, 52 FAM. CT. REV. 207, 208 (2014) (summarizing the critiques that have been made regarding the AFCC Think Tank report); Maria Cognetti & Nadya Chmil, *Shared Parenting—Have We Really Closed the Gap? A Comment on AFCC's Think Tank Report*, 52 FAM. CT. REV. 181, 184-85 (2014) (questioning some of the consensus points of the Think Tank Report, particularly in regard to the term "custody").

In sum, the trend in U.S. family law has favored increased focus on children and the involvement of both parents. Part IV analyzes data from the Marion County, Indiana divorce cases filed in three months of 2008 that involved children to confirm whether this trend holds true in Indiana as well.

III. VISITATION

If the court awards sole custody, then the noncustodial parent may receive visitation rights. Thus, child custody may be only part of the child-related determinations.

A. The Visitation Legal Framework

When the parents of a child separate,[49] they might receive joint legal and physical custody of the child.[50] If only one parent receives physical custody of the child, however, the noncustodial parent is entitled to reasonable visitation.[51]

This arrangement is the natural result of the constitutional protection afforded to parents of the care, custody, and control of their children by the Fourteenth Amendment of the Constitution.[52] Although family law typically remains in the domain of the states,[53] the U.S. Supreme Court has held that the parent-child relationship is constitutionally protected[54] from certain state restrictions.[55]

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[49] The Indiana approach to visitation in the form of the Parenting Time Guidelines is "applicable to all child custody situations, including paternity cases and cases involving joint legal custody where one person has primary physical custody." IND. PARENTING TIME GUIDELINES, PREAMBLE (DOMESTIC RELATIONS COMM. 2013).

[50] *See supra* Part II.

[51] *See, e.g.*, Janousek v. Janousek, 485 N.Y.S.2d 305, 308 (N.Y App. Div. 1985) ("It is well-settled that a noncustodial parent should have reasonable rights of visitation, and that the denial of such rights is such a drastic remedy that an order doing so should be based on substantial evidence that visitation would be detrimental to the welfare of the child.").

[52] *See* Pierce v. Soc'y of the Sisters, 268 U.S. 510, 535 (1925) (determining that the parents' right to choose private over public education is a fundamental liberty interest protected by the Fourteenth Amendment); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (finding that the parents' decision to hire a foreign language teacher for their child is a fundamental liberty interest protected by the Fourteenth Amendment); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (noting that the freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment). Accordingly, the "parental liberty interest" permits parents to direct the upbringing of their children. *See, e.g.*, Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 425 (1998) (noting that the parent-child relationship creates a Fourteenth Amendment liberty interest that allows parents to direct the upbringing of their children).

[53] *See, e.g.*, Moore v. Sims, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern.").

[54] Quilloin v. Walcott, 434 U.S. 246, 255, *reh'g denied*, 435 U.S. 918 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

[55] *See* Margaret Ryznar, Note, *Adult Rights as the Achilles' Heel of the Best Interests Standard: Lessons in Family Law from Across the Pond*, 82 NOTRE DAME L. REV. 1649, 1677 (2007).

Just as in custody determinations, the child's best interests determine the child's visitation with the noncustodial parent.[56] Accordingly, courts have significant discretion in visitation orders, including the time, place, and circumstances of visitation.[57]

Eventually, the nomenclature changed in Indiana and a few other states because of the perception that the term "visitation" denied that noncustodial parents remained parents[58] and that the term focused on the adult, not the child.[59] Thus, the term for visitation in Indiana, along with many other states, became "parenting" time.[60]

There is a debate on how much parenting time is appropriate. To assist, psychologists have offered suggestions on how to best structure parenting time.[61] A minority of states, including Indiana, has moved toward instating guidelines to ensure a minimum amount of parenting time.[62]

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[56] *See, e.g.*, Morocho v. Jordan, 999 N.Y.S.2d 172, 173 (N.Y. App. Div. 2014).

[57] WEISBERG & APPLETON, *supra* note 4, at 732.

[58] The Parenting Time Guidelines use the words "parenting time" instead of the word "visitation" in order to "emphasize the importance of the time a parent spends with a child." IND. PARENTING TIME GUIDELINES, PREAMBLE CMT. (DOMESTIC RELATIONS COMM. 2013).

[59] Randall T. Shepard, *Elements of Modern Court Reform*, 45 IND. L. REV. 897, 900 n.17 (2012) ((citing 2005 Ind. Acts 1582) (concerning the rights of a noncustodial parent, to substitute "parenting time" for "visitation") (amending IND. CODE § 31-17-4-1 (2016))) [hereinafter Shepard, *Elements*].

[60] 2005 Ind. Acts 1582 (concerning the rights of a noncustodial parent, to replace "visitation" with "parenting time") (amending IND. CODE § 31-17-4-1 (2016)).

> [F]or many years it was common to speak of divorces, child custody proceedings, and visitation rights. Seeking even simple ways to mitigate the acrimony for which these disputes are famous, Indiana has been at the forefront of redefining these concepts as dissolutions of marriage and parenting time. Recognizing that children benefit from frequent, continuing, and meaningful contact with both parents, and that scheduling time is more difficult between separate households the heads of which may not be on good terms, the Indiana Supreme Court adopted Parenting Time Guidelines for resolving disputes over children and ensuring that both parents have time to be just that to their children. The shift in emphasis away from the rights of adults and toward the needs of children eventually led the Indiana General Assembly to abolish the idea of "visitation."

Shepard, *Elements*, *supra* note 59, at 900.

[61] "Child development and divorce research of the past twenty-five years provides ample evidence that the traditional alternating weekend visiting pattern failed to meet the psychosocial and emotional needs of many separated children in both the short and longer-term." Joan B. Kelly, *Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce*, 19 J. AM. ACAD. MATRIM. LAW. 237, 237 (2005).

[62] *See, e.g.*, MICHIGAN PARENTING TIME GUIDELINE, (PARENTING TIME ADVISORY COMM.); S.D. CODIFIED LAWS § 25-4A-9 (2012).

> Although a few states have adopted visitation or parenting time guidelines that offer presumptive or minimum amounts of visitation to a noncustodial parent when parents cannot agree on a caretaking arrangement, the majority of states require courts to engage in individual fact-finding and adjudication to resolve contested custody and visitation cases.

B. The Parenting Time Guidelines

The Indiana Supreme Court adopted the "Parenting Time Guidelines" in 2001.[63] The Guidelines represent the minimum recommended time a parent should have in order to maintain frequent, meaningful, and continuing contact with a child.[64] While the child's best interests influenced the Guidelines, children cannot set their own parenting plans.[65]

According to the Preamble to the Guidelines,

> The Indiana Parenting Time Guidelines are based on the premise that it is usually in a child's best interest to have frequent, meaningful and continuing contact with each parent. It is assumed that both parents nurture their child in important ways, significant to the development and well being of the child.[66]

Since going into effect in 2001, the Guidelines underwent several amendments that took effect for all orders starting on March 1, 2013.[67]

The amount of visitation provided by the Indiana Parenting Time Guidelines is presumptively correct.[68] However, courts can deviate from the Guidelines to award more parenting time, for example to allow both parents to have significant parenting time even though only one parent has sole custody.[69] Alternatively, the courts can

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Stacy Brustin & Lisa Vollendorf Martin, *Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803, 832 (2015).

[63] *See, e.g.*, Julie E. Artis & Andrew V. Krebs, *Family Law and Social Change: Judicial Views of Joint Custody, 1998-2011*, 40 LAW & SOC. INQUIRY 723, 728 (2015).

[64] INDIANA PARENTING TIME GUIDELINES § 2 (DOMESTIC RELATIONS COMM. 2013). "In 2008, the Division of State Court Administration printed 75,000 copies of the Indiana Parenting Time Guidelines in booklet format for distribution to trial courts with domestic relations jurisdiction." Randall T. Shepard, *The Self-Represented Litigant: Implications for the Bench and Bar*, 48 FAM. CT. REV. 607, 614 (2010).

[65] *See, e.g.*, McElvain v. Hite, 800 N.E.2d 947, 950 n.2 (Ind. Ct. App. 2003) (finding that a child's threat to run away from home was insufficient cause to depart from the Indiana Parenting Time Guidelines, as the guidelines place responsibility on the parents to ensure the child's compliance with the visitation guidelines and in no way allow for the child to make decisions on the parenting schedule).

[66] INDIANA PARENTING TIME GUIDELINES, PREAMBLE (DOMESTIC RELATIONS COMM. 2013).

[67] Order Amending Indiana Parenting Time Guidelines (Jan. 4, 2013), http://www.in.gov/judiciary/files/order-rules-2013-0107-parenting.pdf.

[68] INDIANA PARENTING TIME GUIDELINES (DOMESTIC RELATIONS COMM. 2013).

[69] *See, e.g.*, Tompa v. Tompa, 867 N.E.2d 158, 165 (Ind. Ct. App. 2007).

deviate from the Guidelines to protect the child[70] or if the child's best interests require it.[71]

Additionally, parents can depart from the Guidelines to set their own custody and visitation arrangement if they meet certain minimum requirements.[72] Indiana lawmakers encourage parents to create parenting plans for themselves,[73] but they must protect the best interests of the child.[74]

Since going into effect in 2001, the Indiana Parenting Time Guidelines have undergone amendments, with many of them being child-centered and requiring a spirit of cooperation between the parents.[75] A noteworthy modification regarded shared custody arrangements over holiday periods.[76] For example, amendments to the Holiday Parenting Time addressed the Christmas Break schedule and added President's Day, Martin Luther King Day, and Fall Break as new holidays to be split between the parents.[77] Furthermore, a parent could receive several consecutive weekends of custody in certain circumstances.[78]

Another amendment to the Parenting Time Guidelines introduced the concept of parallel parenting, a temporary deviation from the Parenting Time Guidelines when the court determines that the parents are high conflict, such as if they are litigious, chronically angry or distrustful, or unable to communicate.[79] In parallel parenting,

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[70] *See, e.g.*, Shady v. Shady, 858 N.E.2d 128, 137 (Ind. Ct. App. 2006) (finding a deviation from the Parenting Time Guidelines warranted given a risk of abduction and potential harm).

[71] *See, e.g.*, Clary-Ghosh v. Ghosh, 26 N.E.3d 986 (Ind. Ct. App. 2015), *transfer denied sub nom*; *see also In re* Marriage of Clary-Ghosh, 31 N.E.3d 975 (Ind. 2015) (determining that reducing the mother's parenting time was in the best interests of the child and did not amount to a restriction of parenting time, which would require a showing that the child's physical health would be endangered or the child's emotional development would be impaired). *But see In re* Paternity of W.C., 952 N.E.2d 810, 817 (Ind. Ct. App. 2011) (finding that the trial court's suspension of a mother's parenting time with her special needs child was an abuse of discretion because noncustodial parents are guaranteed a right to visitation unless it is against the best interests of the child, and there was no evidence to demonstrate that the mother was endangering the child's physical health or significantly impairing the child's emotional development).

[72] INDIANA PARENTING TIME GUIDELINES, PREAMBLE (DOMESTIC RELATIONS COMM. 2013).

[73] *Id.*

> Parents should consider these needs as they negotiate parenting time. They should be flexible and create a parenting time agreement which addresses the unique needs of the child and their circumstances. Parents and attorneys should always demonstrate a spirit of cooperation. The Indiana Parenting Time Guidelines are designed to assist parents and courts in the development of their own parenting plans.

Id.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 20-21.

[77] *Id.* at 20.

[78] *Id.* at 23.

[79] *Id.*

the parent with the child makes day-to-day decisions.[80] Additionally, communication between the parents is limited and often in writing, and it is recommended that counseling professionals assist the parents with parallel parenting arrangements.[81] Parallel parenting thus limits the amount of communication that is required between the parents[82] while preserving the child's relationship with each parent.

In September 2016, the Indiana Supreme Court issued an order further amending the Guidelines, which took effect on January 1, 2017.[83] The changes addressed parenting coordinators, clarifying their roles and responsibilities.[84] The Guidelines define the court-appointed parenting coordination process as:

> [A] court ordered, child-focused dispute resolution process in which a Parenting Coordinator . . . assist[s] high conflict parties by accessing and managing conflicts, redirecting the focus of the parties to the needs of the child, and educating the parties on how to make decisions that are in the best interest of the child.[85]

Parenting time guidelines do not necessarily take a nuanced approach to parenting time, and may fail to take into account "children's ages, gender, and developmental needs and achievements, the history and quality of the child's relationship with each parent, quality of parenting, and family situations requiring special attention."[86] However, the Indiana Parenting Time Guidelines endeavor to take a more nuanced approach to parenting time based on age.[87]

Under the Indiana Parenting Time Guidelines, there is also an adjustment to the child support obligation of noncustodial parents who have a significant amount of overnight parenting time with their children.[88] This credit offsets the money spent on children during parenting time. However, parents are not able to bargain custody or parenting time in exchange for child support.[89]

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[80] *Id.*

[81] *Id.*

[82] *Id.* at 25-32. *See, e.g.*, Bailey v. Bailey, 7 N.E.2d 340, 345 (Ind. Ct. App. 2014) (determining that an agreement to enter into a Parallel Parenting Order when there is conflict between the parents was not a concession to modify child custody, and that the trial court erred in modifying child custody when there was no request from either parent to do so).

[83] Order Amending Indiana Parenting Time Guidelines (Sept. 2, 2016), http://www.in.gov/judiciary/files/order-rules-2016-0902-parenting.pdf.

[84] *Id.*

[85] *Id.*

[86] Kelly, *supra* note 61, at 239-40.

[87] *See, e.g.*, *In re* Paternity of K.R.H., 784 N.E.2d 985, 991 (Ind. Ct. App. 2003) (noting that although the Indiana Parenting Time Guidelines provide courts with specific parenting time for children of a given age, they do not foreclose parents from agreeing, and being granted, additional or reduced parenting time as deemed reasonable).

[88] *See, e.g.*, Joseph W. Ruppert & Joni L. Sedberry, *Recent Developments: Indiana Family Law*, 40 IND. L. REV. 891, 914 (2007).

[89] Perkinson v. Perkinson, 989 N.E.2d 758, 760 (Ind. 2013) (determining, on the grounds of public policy, that the parties could not agree to forego parenting time in exchange for relief from child support).

Several other factors affect parenting time determinations in Indiana. For example, as often happens with a mobile population,[90] the relocation of one parent impacts existing arrangements.[91] A parent planning to relocate with a child who is the subject of an existing custody order must file a motion with the court that issued the custody or parenting time order.[92] It is possible for courts to modify the original parenting time or custody arrangement due to the relocation. Furthermore, domestic violence affects child custody and visitation decisions.[93]

There is also an Indiana statute permitting grandparent visitation.[94] However, the Indiana Parenting Time Guidelines do not apply to grandparents[95] or to people formerly involved in an intimate relationship with one of the biological parents,[96] which is consistent with U.S. Supreme Court precedent protecting parental autonomy in the Constitution.[97]

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[90] Linda D. Elrod, *A Move in the Right Direction? Best Interests of the Child Emerging as the Standard for Relocation Cases*, 3 J. CHILD CUSTODY 29, 30 (2006) (stating that an estimated twenty-five percent of custodial mothers moved within the first four years of their divorce).

[91] This is true in many states. *See, e.g.*, Paige M. Dempsey, *Joint Custody and Relocation: The Supreme Court of Nebraska Limits Relocation of Parents Sharing Joint Custody in* Brown v. Brown, 35 CREIGHTON L. REV. 185, 237 (2001).

[92] IND. CODE § 31-17-2.2-1(a)(1) (2014). *See, e.g.*, DeCloedt v. Wagaman, 15 N.E.3d 123, 131 (Ind. Ct. App. 2014) (determining that the trial court did not abuse its discretion in denying mother's petition to relocate because the father could demonstrate that the relocation was not in the child's best interests).

[93] For example, the Indiana code requires a rebuttable presumption of supervised parenting time for between one and two years if there is a crime involving domestic or family violence that was witnessed or heard by the child. As a condition of granting the noncustodial parent unsupervised parenting time, the court may require the noncustodial parent to complete a batterer's intervention program certified by the Indiana coalition against domestic violence. IND. CODE § 31-17-2-8.3 (2011); *see also* Margaret Brinig et al., *Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases*, 52 FAM. CT. REV. 271, 271 (2014) (exploring "the implications of domestic violence for shared parenting and for the statutory legal and physical custody presumptions and exceptions which are triggered by or are applicable to domestic violence").

[94] IND. CODE § 31-17-5-1 (1997).

[95] *See, e.g.*, Woodruff v. Klein, 762 N.E.2d 223, 229 (Ind. Ct. App. 2002); K.M. v. K.F., 42 N.E.3d 572, 582 (Ind. Ct. App. 2015).

[96] *See* K.S. v. B.W., 954 N.E.2d 1050, 1052 (Ind. Ct. App. 2011) (holding that the trial court erred in granting visitation time to the mother's former boyfriend because the Indiana Parenting Time Guidelines only apply to a child's biological parents). *But see* Richardson v. Richardson, 34 N.E.3d 696, 701 (Ind. Ct. App. 2015) (confirming that a stepparent is entitled to visitation with a child, even under the Indiana Parenting Time Guidelines, so long as the visitation is not to the detriment of the biological mother and father).

[97] *See supra* note 52. *But see* Caban v. Healey, 634 N.E.2d 540, 543 (Ind. Ct. App. 1994) (affirming visitation to a stepmother who had acted as the child's parent for most of the child's life); Collins v. Gilbreath, 403 N.E.2d 921 (Ind. Ct. App. 1980) (holding that a court may grant visitation to a stepparent over objection of a natural parent if in the child's best interests); *see also* Hoeing v. Williams, 880 N.E.2d 1217, 1221 (Ind. Ct. App. 2008) (determining that the trial court erred in granting paternal grandmother visitation rights almost in conformity with the Indiana Parenting Time Guidelines because while the Grandparent

IV. AN EMPIRICAL ANALYSIS

With any legal framework, the question arises whether judicial decisions stay within it, and what the exact contours of those decisions are. While individual cases are useful, an analysis of their compilation reveals how much discretion courts use and how they use it.

The results of such an analysis are helpful in many ways. They assist litigants in determining when and how to settle divorce cases on their own, especially because settlement may have a better effect on children than litigation.[98] The empirical results also show courts and legislators the family law landscape created by their decisions, which otherwise can only be pieced together from individual state laws and court decisions. Finally, the results help confirm the major trends in family law, with many of them replicated in this data.

A. The Empirical Data

The data for this Article consists of divorces filed during three months in 2008 in Marion County, Indiana that involved minor children.[99] The number of these cases totals approximately 110.

These divorce records were coded for multiple variables, including who filed for the divorce, who received the marital home, how the pension was divided, how many children resulted from the marriage, who received custody of the children, and how parenting time was divided.

In approximately half of these cases, the courts awarded joint legal custody,[100] requiring the parents to share major decisions about their children. However, in over half of the cases in the data, the court awarded primary physical custody to the mother, with the father often receiving parenting time.[101]

A common amount of parenting time awarded in these Marion County divorce cases was 98 days, with approximately 25 noncustodial parents receiving that award.[102] Another common parenting award was 52 days, with approximately fifteen

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Visitation Act provides that a grandparent may seek visitation rights, such visitation may not substantially impede on a parent's fundamental right to control the upbringing of the child).

[98] Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 407 (2005).

> The effects of joint custody on children in such families may be radically different from the effects on children whose parents did not agree to the joint custody, but for whom joint custody was ordered by a court. One would expect that families that choose joint custody have parents who get along better than those who prefer sole custody and that this ability to get along pre-divorce would continue postdivorce, producing better outcomes for the children.

Id.

[99] The data are on file with the author; the Marion County, Indiana cases analyzed were filed in January 2008, April 2008, and September 2008 [hereinafter Data on file with author].

[100] *Id.*

[101] This has not differed from previous trends despite the recent increase in importance placed on fatherhood. *See, e.g.*, Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 758 n.5 (1985) (citing studies showing that mothers obtained custody in most divorce cases).

[102] Data on file with author.

noncustodial parents receiving that award.[103] In several cases, the court awarded over 120 days of parenting time to the noncustodial parent, and in several others, awarded none.[104]

There were child support arrearages in approximately one-third of the cases in the data.[105] In many of them, the court awarded parenting time to the noncustodial parent.[106]

B. Implications

The modern trend across the United States is to maintain the involvement of both parents to the greatest extent possible.[107] There are two ways to do so. The first is through joint custody, and the second is through generous visitation in the event of a sole custody order.[108]

Indiana seems to join the majority of states in recognizing the value of both parents' involvement.[109] In the majority of cases in the data, when the mother received primary custody of the children, the father received parenting time.[110] While Indiana has not joined those states with statutes favoring joint physical custody, the Indiana Parenting Time Guidelines nonetheless encourage significant involvement of both parents, which resembles joint custody in some cases.[111] The Guidelines favor dividing time between the parents, ensured by the Indiana courts in their parenting time awards. This aligns with the national trend of enabling both parents to stay involved.[112] Thus, even when the Indiana courts do not offer joint custody, they award significant parenting time to the noncustodial parent.[113] This

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[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *See supra* Part II.

[108] *But see* Katherine Shaw Spaht, *Developments in the Law: 1983-84*, 45 LA. L. REV. 467, 478, 483 n.51 (1984) ("The judgment in this case awarding joint custody but naming one parent as 'domiciliary parent' with the other parent having reasonable visitation rights is not truly joint custody. The judgment is in effect no different than the award of sole custody to one parent under the law as it formerly existed, except for the co-tutorship and exchange of information provisions of the article which by implication would be part of the judgment.").

[109] *See supra* Part II.

[110] *See supra* Part IV.A.

[111] "Another [Indiana] judge recognizes that although joint custody is not a statutory presumption, the Parenting Time Guidelines essentially create a presumption for joint custody." Julie E. Artis & Andrew V. Krebs, *Family Law and Social Change: Judicial Views of Joint Custody, 1998-2011*, 40 LAW & SOC. INQUIRY 723, 740 (2015). *See also* Miller v. Carpenter, 965 N.E.2d 104, 110-11 (Ind. Ct. App. 2012) (finding that an increase in the father's parenting time from around thirty-five percent to forty percent was not sufficiently substantial to require showing a substantial change for modification of physical custody, but the increase was still in the best interests of the child).

[112] *See supra* Part II.

[113] *See generally supra* Part II.

suggests that even states that do not have a joint custody presumption may still accommodate the involvement of both parents.

The data also reflects adjustments to the child support obligation based on parenting time. Such a credit may incentivize parental involvement. To the extent that it does, states may consider implementing a parenting time credit or similar adjustment.

The empirical data also confirms that child support arrearage does not prevent parenting time in Indiana. This aligns with the common public policy of encouraging visitation regardless of child support payment because of the benefits of visitation to the child.

Finally, the empirical data illustrates that the Indiana Parenting Time Guidelines have indeed influenced parenting time awards, which maintain the child's relationship with the noncustodial parent. A common parenting time award was 98 days.[114] This award would include extended time in the summer, one night per week, and alternating weekends.[115] Holidays rotate between the parties based on odd and even calendar years.[116] Courts offer less parenting time for infants and toddlers.[117] However, Indiana remains in the minority in adopting parenting time guidelines to determine the child's visitation time with the noncustodial parent. Indiana's experience can serve as a model for other states interested in implementing similar guidelines.

A formulaic approach to family law, such as parenting time guidelines, would capitalize on a generally understood and universally accepted understanding of the child's best interests to the extent that it exists. On the other hand, individual justice is the entire point of divorce law. While predictability and consistency are gained by legislative formulae, courts can accomplish individual justice in divorce cases by having significant discretion.[118]

Additionally, individual justice is the reason for having judicial oversight in divorce cases. In the United States, spouses cannot file paperwork to get divorced without court approval; the court's oversight is necessary even if the couple chooses to reach a separation agreement.[119] Just as the government regulates marriage,[120] it regulates divorce.

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[114] *See supra* Part IV.A.

[115] INDIANA PARENTING TIME GUIDELINES § II.D. (DOMESTIC RELATIONS COMM. 2013).

[116] *Id.* at II.F.

[117] *Id.* at II.C. "Parenting time for infants and toddlers is broken down into two subcategories: (1) parenting time in early infancy and (2) parenting time in later infancy. These two subcategories are then even further broken down into several specific age ranges with schedules that incrementally increase the noncustodial parent's visitation time." Laurel W. Brenneise, Comment, *I Love You, You Love Me, Can You Come Up with a Happy Visitation Schedule, Please?: Analyzing the Reform of Texas's Parental Possession Schedule for Children Less Than Three Years of Age*, 45 TEX. TECH L. REV. 499, 525 (2013).

[118] "In deciding between a system of fixed rules and one of judicial discretion in family law disputes, the key issue on which to focus is the extent to which the family law system provides justice for the individual parties." Theodore K. Cheng, *A Call for A New Fixed Rule: Imposition of Child Support Orders Against Recipients of Means-Tested Public Benefits*, 1995 ANN. SURV. AM. L. 647, 653 (1995).

[119] Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1401-03 (1984).

Consequently, the question is how legislative formulae interact with judicial discretion. The empirical data suggests that while the Indiana courts generally follow legislative mandates, an amount of judicial discretion remains—cases have different results and diverge based on the facts. For example, several noncustodial parents in the data had zero days of parenting time, compared to several noncustodial parents who had over 120 days of parenting time.

Indeed, there should be a healthy role for judicial discretion in divorce cases, but this is especially true when children are involved and need protection. Indeed, the flexibility of the child's best interests standard requires judicial determination.[121] Child custody standards that did not rely on judicial discretion, such as presumptions, have historically failed.[122]

The law must preserve judicial discretion to allow courts the flexibility to protect the child's best interests, even if there is legislative involvement aiming to protect children as well. Indeed, judicial discretion and legislative guidance do not have to be mutually exclusive. As seen in the data, Indiana divorce cases generally conform to the legislative guidance, yet outliers exist when the child's best interests require it. Any legislative guidance should thus preserve judicial discretion to help protect children in divorce cases.

V. CONCLUSION

In sum, this Article analyzes empirical data from divorce cases filed during three months in 2008 that involved children in Marion County, Indiana. The aim of this analysis is to illuminate family law practice using descriptive statistics. In order to keep this data in context, this Article examines not only what the courts are doing in family law, but also the underlying law to analyze the correlation between the statutory framework and judicial decisions. This allows for a study of the interplay between legislative guidance and judicial discretion.

The data from Marion County in Indiana confirms the trends seen in family law generally, with a push toward the involvement of both parents. Furthermore, by following the Parenting Time Guidelines, Indiana judges gain consistency and predictability in the average case. However, judges still maintain discretion to ensure the protection of the child's best interests based on the circumstances of each family. The legal framework of the child's best interests still guides the courts in the context of legislative guidance, providing a model to the majority of states that do not have

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> Within the past two decades, however, there has been an even greater demand for a minimizing of such state intervention and for a more unfettered application of simple contract principles to marital agreements. . . . Separation agreements . . . have tended to be swept into both the argument and the conclusion that marital contracts should, in general, be accorded the same judicial treatment as any other contract.

Id.

[120] For example, relatives closer than first cousins cannot marry, and first cousins can marry once they reach sixty-five years of age. IND. CODE § 31-11-1-2 (1997). Other government regulations and restrictions on marriage have fallen over the decades. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015) (prohibiting states from banning same-sex marriage); Loving v. Virginia, 388 U.S. 1, 12 (1967) (prohibiting states from banning interracial marriage).

[121] *See supra* Part II.

[122] *Id.*

parenting time guidelines, but would like to implement them. Future empirical work should continue to illuminate the dynamic family law field today.

In sum, it is important to preserve judicial discretion so that judges may continue to take a case-by-case approach to custody determinations, increasing the likelihood of preserving the child's best interests. However, judicial discretion and legislative guidance are not mutually exclusive, with both the courts and the legislatures able to work together to protect children's best interests in divorce cases.