Western New England Law Review

Volume 32 *32 (2010)*
Issue 3 *SYMPOSIUM: WOMEN, ETHNICITY, AND ENTREPRENEURSHIP*

Article 7

1-1-2010

FAMILY LAW—MATERNAL AND JOINT CUSTODY PRESUMPTIONS FOR UNMARRIED PARENTS: CONSTITUTIONAL AND POLICY CONSIDERATIONS IN MASSACHUSETTS AND BEYOND

Bernardo Cuadra

FAMILY LAW—MATERNAL AND JOINT CUSTODY PRESUMPTIONS FOR UNMARRIED PARENTS: CONSTITUTIONAL AND POLICY CONSIDERATIONS IN MASSACHUSETTS AND BEYOND

INTRODUCTION

The Supreme Court has concluded that unmarried fathers and children born out of wedlock are afforded the same constitutional protections as their counterparts in marriage.[1] Even so, the rights of the unmarried father and his child continue to be discussed and argued at length by psychologists, scholars, judges, and students.[2]

At the same time, jurisdictions across the United States have revised their custody statutes to reflect our changing culture and the evolving roles of parents postdivorce.[3] Judges are no longer bound by custodial presumptions in favor of the mother; most states have abolished any explicit maternal-preference standard.[4] However, many states continue to treat the unwed father[5] differently than the unwed mother or divorcing parents. Massachusetts, for example, maintains a statutory custodial presumption in favor of the unwed

1. *See* Gomez v. Perez, 409 U.S. 535, 538 (1973) (holding that the state cannot discriminate against children born out of wedlock); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding that denying unwed father a hearing on his parental fitness while granting same to all other parents was unconstitutional); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (holding as fundamental the right for a parent to care for and raise his child). However, these protections have been qualified, especially those of the unmarried father. *See* Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (requiring something more than a biological link alone before an unmarried father can invoke constitutional protection).

2. *See, e.g.*, RICHARD A. WARSHAK, THE CUSTODY REVOLUTION: THE FATHER FACTOR AND THE MOTHERHOOD MYSTIQUE (1992); David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461 (2006); Hon. Sharon S. Townsend, *Fatherhood: A Judicial Perspective: Unmarried Fathers and the Changing Role of the Family Court*, 41 FAM. CT. REV. 35 (2003); Stacy L. Hill, Note, *Putative Fathers and Parental Interests: A Search for Protection*, 65 IND. L.J. 939 (1990).

3. *See infra* notes 34-39. R

4. William Weston, *Putative Fathers' Rights to Custody–A Rocky Road at Best*, 10 WHITTIER L. REV. 683, 690 (1989).

5. The unwed or unmarried father is a broad category used in this Note to encompass putative, acknowledged, and adjudicated fathers. The putative father is "[t]he alleged biological father of a child born out of wedlock." BLACK'S LAW DICTIONARY 683 (9th ed. 2009). An acknowledged father is one who has a legally recognized relationship with his nonmarital child. *See, e.g.*, TEX. FAM. CODE ANN. § 160.201(b) (Vernon 2008); WYO. STAT. ANN. § 14-2-402(a)(i) (2009). An adjudicated father is one who has been judicially determined to be the father of the nonmarital child. *See, e.g.*, WYO. STAT. ANN. § 14-2-402(a)(ii).

mother, leaving the unwed father with an uphill battle to gain equal rights and equal access to his child.[6] Other jurisdictions create a statutory presumption in favor of joint custody, giving both parents equal rights to their children and equal footing in the courtroom.[7]

Controversy swirls around the justifications for awarding custody to one or both of divorcing or unmarried parents and the various effects different custody awards have on the children.[8] The statistics, however, cannot be disputed: In 2007, of the 19 million marital children[9] under the age of eighteen that live with one parent, only 12.5% of them live with their father.[10] And of the 7.5 million nonmarital children[11] that live with an unmarried parent, only 7% reside with their father.[12] Regardless of the arguments submitted by proponents and opponents to joint custody, in the overwhelming majority of single-parent scenarios, the mother is the primary physical custodian of the child.

This Note examines the statutory custodial presumptions that distinguish the unmarried father from the unmarried mother, as well as from divorcing parents, with a focus on Massachusetts legal custody awards. Given the gender-based distinction built into these statutes and the distinctions drawn between the putative father and the divorcing father, this Note first asks if these statutes are subject

6. *See* MASS. GEN. LAWS ch. 209C, § 10 (2008); *see also infra* Part V.E. Although the statute's provision for custody of nonmarital children operates as an automatic maternal-custody award, this Note will use the term presumption to include the Massachusetts custody scheme.

7. *See, e.g.*, D.C. CODE ANN. § 16-914(a)(2) (LexisNexis Supp. 2010) ("There shall be a rebuttable presumption that joint custody is in the best interest of the child or children . . . ."); FLA. STAT. ANN. § 61.13(2)(b)(2) (West Supp. 2010) ("The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child."); MINN. STAT. ANN. § 518.17(2) (West Supp. 2010) ("The court shall use a rebuttable presumption that upon the request of either or both parties, joint legal custody is in the best interests of the child.").

8. *See* Beverly Webster Ferreiro, *Presumption of Joint Custody: A Family Policy Dilemma*, 39 FAM. REL. 420, 420 (1990) (noting that the issue of joint custody is "hotly debated between fathers' and mothers' rights groups and among mental health and legal professionals" and "arouses passionate feelings on both sides").

9. For the purposes of this Note, children born during lawful marriage will also be referred to as "marital" children.

10. U.S. Census Bureau, Living Arrangements of Children Under 18 Years/1 and Marital Status of Parents, by Age, Sex, Race, and Hispanic Origin/2 and Selected Characteristics of the Child for All Children: 2007, *available at* http://www.census.gov/population/socdemo/hh-fam/cps2007/tabC3-all.xls (last visited June 14, 2010).

11. For the purposes of this Note, children born out of wedlock will also be referred to as "nonmarital" children.

12. *See* U.S. Census Bureau, *supra* note 10. **R**

to constitutional challenge. Second, this Note questions if these statutes reflect sound policy decisions by evaluating the benefits of joint custody arrangements. Third, this Note focuses on the Massachusetts custody statute to determine if it can be more narrowly crafted to protect the interests of willing and involved unwed fathers, especially those similarly situated to their child's unwed mother. This Note ultimately argues that the Massachusetts statutes should be amended to ensure equal treatment of unmarried fathers in custody disputes.

Parts I and II of this Note take a parallel approach to the history of custodial determinations for children, first looking at children born from marriage, then looking at children born out of wedlock. Part III examines the Supreme Court jurisprudence on unmarried fathers. Part IV summarizes the current standards in custody awards, and Part V reviews the custody statutes across the fifty states, with an initial focus on Massachusetts. Part VI then asks the three questions developed above. This Note concludes with a call to revise the Massachusetts statute so that unmarried fathers and their children may receive equal treatment under the law and unmarried fathers may become more involved with their children's upbringing.

I. CUSTODY OF MARITAL CHILDREN

In ancient Rome, the father maintained ultimate authority over his child.[13] Roman law provided the father with complete control over the life of his child under the premise that he was responsible for the child's existence.[14] The law treated the father as the child's natural guardian; even upon the father's death, the child's mother could not become the legal guardian.[15] At base, the father's right to custody was treated as a property right.[16] Eventually, Ro-

13. *See* I WILLIAM BLACKSTONE, COMMENTARIES *452.

14. *See id.* ("The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away."). In contrast, a mother was subject to punishment for killing her child. *See* Allan Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. FAM. L. 423, 425 (1976-77).

15. *See* Roth, *supra* note 14, at 426-27 ("[The mother] was not in the eye of that law their natural guardian, even where the father died intestate, leaving them under age; nor could he legally appoint her their guardian by will." (quoting W. FORSYTH, A TREATISE ON THE LAW RELATING TO THE CUSTODY OF INFANTS IN CASES OF DIFFERENCE BETWEEN PARENTS OR GUARDIANS 9 (1850)) (internal quotation marks omitted)). R

16. *See* Weston, *supra* note 4, at 686. This authority also existed under ancient Persian, Egyptian, Greek, and Gaulish law. Roth, *supra* note 14, at 425. R R

man Emperor Constantine passed a law that banned infanticide, affecting a limit on this absolute authority and representing the state's first action on behalf of the minor child.[17] Although this represented a significant first step away from almost limitless paternal power, it would be a very long time until mothers began to attain parental rights approaching those of the father.

Under English common law, the father still maintained far superior rights over his children in comparison to the mother.[18] Blackstone commented that while the father was entitled to discipline his child and receive the profits from his minor child's labor, the "mother . . . [was] entitled to no power, but only to reverence and respect."[19] The rationale for this continued authority was often based on the father's financial obligations to his offspring as well as the notion that the husband was the decision maker and protector of the family.[20] Some argued that this right was simply a law of nature.[21]

In the rare custody dispute, early English law presumed that the father had the right to custody over his minor children.[22] This right could, however, be displaced by a court of equity to protect the child from an abusive[23] or unfit father.[24] American courts were more likely to exercise discretion when making custody awards but recognized "some sort of a *prima facie* right in the father."[25] Despite this alleged right, the Supreme Court of Indiana once stated

17. *See* Roth, *supra* note 14, at 425; Weston, *supra* note 4, at 686 n.18. **R**

18. *See* I BLACKSTONE, *supra* note 13, at *452-53. **R**

19. *Id.* at *453.

20. *See* Roth, *supra* note 14, at 427; Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 896-97 (1998). **R**

21. *See* Baird v. Baird, 21 N.J. Eq. 384, 393 (1869) ("The laws of nature and society concur in giving to the father the custody of his minor children . . . [T]hat the authority of the father is superior to that of the mother . . . is the doctrine of all civilized nations.") (Dalrimple, J., dissenting) (internal quotation marks omitted); *see also* WARSHAK, *supra* note 2, at 28; Roth, *supra* note 14, at 427-28. **R**

22. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 19.1, at 787 (2d ed. 1988).

23. *See* Roth, *supra* note 14, at 428. **R**

24. *See* Meyer, *supra* note 2, at 1467; *see also* CLARK, *supra* note 22, § 19.4, at 799 ("At common law the father . . . could be deprived of custody only where danger to the child or corruption of the father were proved."). **R**

25. CLARK, *supra* note 22, § 19.1, at 787; *see* Johnson v. Terry, 34 Conn. 259, 263 (1867) ("That the father is entitled to the custody and control of his minor children, even to the exclusion of the mother, is elementary law."); Henson v. Walts, 40 Ind. 170, 172 (1872) ("The father of a minor child, unless good reason to the contrary be shown, is entitled to its custody."). **R**

that a child could be removed from his father's custody as long as the reasons for doing so were "strong and cogent."[26]

In the early nineteenth century, this paternal presumption began to weaken.[27] England enacted The Custody of Infants Act of 1839,[28] which instructed courts to award custody of children under seven to their mothers.[29] This presumptive custodial award became known as the "tender years doctrine."[30] By the early twentieth century in the United States, the tender-years presumption had evolved into a firmly rooted belief that mothers were the parent

26. *Henson*, 40 Ind. at 172. The court did not fail to highlight, however, that a father's right to custody was "in consonance with the law of nature and the dictates of common humanity." *Id.*

27. *See* Meyer, *supra* note 2, at 1467. The oft-cited example of this change is the case of Percy Bysshe Shelly, the English poet who sought custody of his children after their mother committed suicide. Shelly v. Westbrooke, (1817) 37 Eng Rep. 850, 850 (Ch.); Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 633 & n.1 (2006). Shelley was an atheist who "blasphemously derided the truth of the Christian revelation" and unlawfully lived with a woman who was not his wife. *Shelley*, 37 Eng. Rep. at 850. The Lord Chancellor stated that Shelley's behavior was "immoral and vicious" and ultimately denied Shelley custody of his children. *Id.* at 851-52. This shift away from a strict paternal presumption was also observed around the same time in the United States. *See* Meyer, *supra* note 2, at 1468 (noting that "[f]urther cracks began to open in the paternal preference in cases of divorce as early as the 1810s and 1820s"); Volokh, *supra*, at 633. R R

28. Also referred to as the Talfourd Act of 1839, McNeely, *supra* note 20, at 897, or Lord Talfourd's Act, Weston, *supra* note 4, at 688. Serjeant Talfourd was responsible for moving this bill through Parliament. Sanford N. Katz, *"That They Might Thrive" Goal of Child Custody: Reflections on the Apparent Erosion of the Tender Years Presumption and the Emergence of the Primary Caretaker Presumption*, 8 J. CONTEMP. HEALTH L. & POL'Y 123, 126 (1992). R R

29. An Act to Amend the Law Relating to the Custody of Infants, 1839, 2 & 3 Vict. Stat., c. 54 (Eng.), *cited in* Katz, *supra* note 28, at 127 n.11. Prior to the passage of this act, Mrs. Caroline Norton, a prominent member of the London high society, wrote and published several pamphlets about the plight of women unable to see or communicate with their children postdivorce. *Id.* at 126. Two of her most notable pamphlets were published in 1837. *Id.* R

30. CLARK, *supra* note 22, § 19.1, at 787. As the presumption in favor of the father was arguably based on a right earned through his obligation to care for and support his child, the tender-years shift was considered to spring from the mother's duty and obligation to nurture and care for *her* child. *See* Mary Kate Kearney, *The New Paradigm in Custody Law: Looking at Parents with a Loving Eye*, 28 ARIZ. ST. L.J. 543, 548-49 (1996). Although this presumption was intended to provide a benefit to young children, the courts were unable to consistently define what, in fact, the "tender years" were. *See* CLARK, *supra* note 22, § 19.4, at 799 ("The presumption would clearly apply to a child under five years, might apply to one under ten years and perhaps in a very few cases might even apply to a child of eleven or twelve."); *see also* Kendall v. Kendall, 687 N.E.2d 1228, 1235 (Mass. 1997) (noting the trial judge's observation that "children of tender years . . . likely means *at least* up to age 12" (emphasis added)). R R

best suited for permanent child custody awards.[31] In addition, the onset of the Industrial Revolution and the migration of the husband from the field to the factory further diminished his role from one of caregiver to one of provider.[32] Working in tangent, these cultural and legal exclusions served to solidify the mother as the primary custodian, the domestic partner, and the child's nurturing parent.[33]

Although appealing to traditional family-role constructs, the legal prevalence of the tender-years doctrine did not last.[34] In the 1970s, as mothers began to leave their homes to join the workforce, the automatic maternal-custody award lost some of its allure and became less practical.[35] Most states have now abandoned the explicit application of this doctrine[36] in favor of the best interests of the child standard,[37] likely as a result of both cultural[38] and consti-

31. *See* CLARK, *supra* note 22, § 19.1, at 787; WARSHAK, *supra* note 2, at 30; Roth, *supra* note 14, at 428, 432-38; *see, e.g.*, Jenkins v. Jenkins, 181 N.W. 826, 827 (Wis. 1921) ("[The mother] alone has the patience and sympathy required to mold and soothe the infant mind in its adjustment to its environment. The difference between fatherhood and motherhood in this respect is fundamental . . . ."); Duncan v. Duncan, 80 So. 697, 703 (Miss. 1919) (Holden, J. dissenting) ("The natural mother love of a mother for her child is such, in my opinion, that no other person on earth can administer to the care and welfare of her child the same as she can and would."); Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916) ("Mother love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than a father's."). In fact, up until the latter half of the twentieth century, most state courts had at some point awarded custody to the mother based on this maternal presumption, at times even in the face of a statutory bar. *See* Roth, *supra* note 14, at 432 n.38. R R R

32. McNeely, *supra* note 20, at 898. R

33. *See* 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, 391 (2009); McNeely, *supra* note 20, at 898 (discussing the cultural pressure on mothers "to put children first"). R

34. *See* Linda Henry Elrod, *Child Custody and Visitation*, *in* FAMILY LAW & PRACTICE § 32.06(5)(a) (Arnold H. Rutkin ed., 2008).

35. *See id.* § 32.06(5)(a) (noting that courts began to view the tender years presumption as "unrealistic").

36. Wyoming case law illustrates the historical progression of the tender-years doctrine. In chronological order, see Nugent v. Powell, 33 P. 23, 27 (Wyo. 1893) ("[A]ll things being equal, the father has a better right to the custody and services of his child than has the mother, because the law primarily imposes upon the father the duty of maintenance and nurture."); *In re* Kosmicki, 468 P.2d 818, 823 (Wyo. 1970) ("[I]n proceedings involving children of tender years it is only in very exceptional circumstances that a mother should be deprived of the care and custody of her children."); Fanning v. Fanning, 717 P.2d 346, 348 (Wyo. 1986) ("Any remaining semblance of a maternal-preference rule was expressly eliminated from Wyoming law.").

37. *See* Elrod, *supra* note 34, § 32.06(5)(a). R

38. *Id.* Recently, the most traditional notions of family and parenthood have evolved and changed, requiring the law to change with it. *See* Cynthia C. Siebel, *Fathers and Their Children: Legal and Psychological Issues of Joint Custody*, 40 FAM. L.Q.

tutional considerations.[39] The reality, however, is that, even with the change of legal standard, the preference for maternal-custody awards has not been eliminated.[40] The legal community continues to be influenced by gender stereotypes and traditional notions of motherhood and fatherhood.[41] Privately, judges have reported their preference for the tender-years doctrine[42] and have continued to award custody to mothers in great disproportion to fathers.[43]

Working against this continued yet diminished existence of a maternal-custody preference has been the emergence of joint cus-

213, 218 (2006). The increase in unmarried childbearing, same-sex marriages, and alternative reproductive technologies demands this continued evolution. *See id.* at 218-19.

39. Elrod, *supra* note 34, § 32.06(5)(a); *see also* CLARK, *supra* note 22, § 19.4, at 800 & n.22 (noting that such presumptions have been found to violate both state and federal equal protection provisions). R

40. *See* CLARK, *supra* note 22, § 19.4, at 800 (stating that "the custody of young children continues to be awarded to their mothers in the majority of cases"); WARSHAK, *supra* note 2, at 32 ("The legacy of the tender-years presumption has continued to influence custody decisions, so that the best-interest standard, despite its literal meaning, has come to be interpreted primarily as a justification for the mother's preferential claim in custody disputes."); Weston, *supra* note 4, at 690 ("Even though today, the [maternal] preference rule and its alter ego, the tender years doctrine, have been largely abolished, the abolition of the emotional dedication of judges to its application has not been as easily eradicated."). R R R

41. *See* WARSHAK, *supra* note 2, at 33. R

42. Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 LAW & SOC'Y REV. 769, 769-71 (2004). In a study of twenty-five Indiana trial court judges, Professor Artis found that over half endorsed the tender-years doctrine at some point during the study. *Id.* at 771; *see also* Leighton E. Stamps, *Age Differences Among Judges Regarding Maternal Preference in Child Custody Decisions*, CT. REV., Winter 2000, at 20-21 (finding that over 42% of judges surveyed in Alabama, Louisiana, Mississippi, and Tennessee agreed that mothers were the preferred custodian for children six years or younger). Another study examining the opinions of over 700 judges in Maryland, Missouri, Texas, and Washington found that about half responded "Always or Usually" or "Sometimes" to some variation of the question, "Are custody awards made based on the presumption that young children belong with their mothers?" Douglas Dotterweich & Michael McKinney, *National Attitudes Regarding Gender Bias in Child Custody Cases*, 38 FAM. & CONCILIATION CTS. REV. 208, 215, 218-19 (2000). Similarly, only about 45% of the judges surveyed indicated that fathers were "Always or Usually" treated fairly by the courts. *Id.* at 215. The authors noted that this sample of respondents was "deemed to be nationally representative." *Id.* at 208; *see also* McNeely, *supra* note 20, at 918 n.155. Trial judges sometimes overtly apply the tender-years doctrine in spite of legislation and common law to the contrary. *See, e.g.*, Visikides v. Derr, 348 S.E.2d 40, 42 (Va. Ct. App. 1986) (reversing trial judge's application of the "tender years inference," stating that its use was contrary to legislation and common law and therefore reversible error). R

43. *See* Meyer, *supra* note 2, at 1468-69 (noting that "gender bias . . . was largely pushed underground" and that mothers still lead single-parent households by a large margin); McNeely, *supra* note 20, at 918-20, 942 n.281, 942-43 (discussing studies from different jurisdictions that found that gender bias was still prevalent in the courts). R R

tody awards, which gained recognition in the 1970s.[44] Joint custody, at its core, promotes the continued contact and responsibility of both parents in the life of their child.[45] Many states have created statutory presumptions in favor of joint custody, while others simply permit joint custody awards.[46] However, these presumptions mostly find their homes in divorce statutes and are rarely available for unmarried parents.[47]

II. CUSTODY OF NONMARITAL CHILDREN

The distinction between the "legitimate child" and "the bastard," drawn early in English law, was significant.[48] A legitimate child was defined as a child "born in lawful wedlock, or within a competent time afterwards";[49] an illegitimate child, "one that is not only begotten, but born, out of lawful matrimony."[50] Today, these definitions remain largely in force.[51]

The modern presumptions of legitimacy derive from the once strict English rule that a child born from a married mother was le-

---

44. *See* CLARK, *supra* note 22, § 19.5, at 815. The first joint custody statute was passed in North Carolina in 1957. Ferreiro, *supra* note 8, at 420. In 1979, five states had enacted joint custody statutes, and by 1988, thirty-four states had passed similar legislation. *Id.* R R

45. *See* CLARK, *supra* note 22, § 19.5, at 816. Joint custody proponents have argued that the continued contact between both parents and child helps reduce the loss a child may experience when one parent leaves the household; shared responsibility also serves to maintain important stabilizing psychological and emotional ties for both parent and child. *Id.* R

46. Meyer, *supra* note 2, at 1471; *see infra* Part V. R

47. *See infra* Part V.

48. CLARK, *supra* note 22, § 4.1, at 149. The law was unforgiving, burdening the so-called "bastard child" with the sins of his parents: R

> The [illegitimate child's] rights are very few, being only such as he can *acquire*; for he can *inherit* nothing, being looked upon as the son of nobody, and sometimes called *filius nullius* [the son of no one] . . . Yet he may gain a surname by reputation, though he has none by inheritance. All other children have their primary settlement in their father's parish; but a bastard in the parish where born, for he hath no father. . . . [H]e cannot be heir to anyone, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and he has no ancestor from whom any inheritable blood can be derived.

I BLACKSTONE, *supra* note 13, at *459. R

49. *Id.* at *446.

50. *Id.* at *454.

51. CLARK, *supra* note 22, § 4.1, at 151 (stating that "these. . . definitions still hold in our law except so far as they have been altered by statutes providing various methods of legitimating the illegitimate child or limiting the concept of illegitimacy"). R

gitimate: the son or daughter of both married parents.[52] This presumption was nearly impossible to overcome; almost no evidence could be admitted to a jury to prove that a child born from a marriage was "illegitimate."[53] Exceptions existed only for lack of access and impotency.[54] Though theoretically plausible, lack of access required proof that the presumed father was "beyond the four seas"[55] from before conception until postbirth.[56] It mattered not that a husband was overseas for several years; if he showed up one day prior to his child's birth, he was the father and the child was legitimate.[57] In the eighteenth century, this English rule was relaxed to admit relevant evidence and allow a jury to decide whether the child was a "bastard."[58] However, the presumption of legitimacy remained strong and could be overcome only through clear

52. *Id.* § 4.1, at 151-52; Megan S. Calvo, Note, *Say Goodbye to Donna Reed: Recognizing Stepmothers' Rights*, 30 W. NEW ENG. L. REV. 773, 781 (2008) (noting that "the presumption of legitimacy [declared] that a child born into a marital family was a biological child of that union").

53. TAPPING REEVE, THE LAW OF HUSBAND & WIFE, OF PARENT & CHILD, GUARDIAN & WARD, MASTER & SERVANT 338-39 (4th ed. 1888).

54. *Id.* at 338; CLARK, *supra* note 22, § 4.1, at 152; Calvo, *supra* note 52, at 781-83. R

55. If the father was outside of England, he was considered to be "beyond the four seas." CLARK, *supra* note 22, § 4.1, at 152. R

56. Judge Cardozo once explained the force the presumption carried:

> Potent, indeed, the presumption is one of the strongest and most persuasive known to the law, and yet subject to the sway of reason. Time was, the books tell us, when its rank was even higher. If a husband, not physically incapable, was within the four seas of England during the period of gestation, the court would not listen to evidence casting doubt on his paternity. The presumption in such circumstances was said to be conclusive.

In re Findlay, 170 N.E. 471, 472 (N.Y. 1930) (citations omitted). Outside of proof the husband was "beyond the four seas," "no other evidence was admissible; not even if it could be proved that the husband had been confined in a dungeon for years before the birth of the child, and had never seen any person but the jailer." REEVE, *supra* note 53, at 338-39. Some United States courts maintained a presumption close to the one that existed in England for some time. *See, e.g.*, Powell v. State, 95 N.E. 660, 661 (Ohio 1911) ("[T]he four seas doctrine] has practically been adopted in the United States with the modification that if the child is born under such circumstances that render it impossible that the husband of its mother can be its father, then the child may be adjudged a bastard."), *overruled by* State *ex rel.* Walker v. Clark, 58 N.E.2d 773 (Ohio 1944); *see also* Michael H. v. Gerald D., 491 U.S. 110, 124-25 (1989) (plurality opinion) (discussing the traditional presumption of legitimacy in England and the United States). R

57. REEVE, *supra* note 53, at 338. The law had created this incredibly strong presumption "[a]pparently out of a desire to make amends for its shabby treatment of illegitimate children generally." CLARK, *supra* note 22, § 4.4, at 191. Specific policy reasons included the prevention of illegitimate children becoming wards of the state and the promotion of the traditional family. *Michael H.*, 491 U.S. at 125. R R

58. REEVE, *supra* note 53, at 339 n.1; WALTER C. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 219-21 (3d ed. 1896); *see also* Wright v. Hicks, 12 Ga. 155, 160 (1852) (citing Lord Raymond as the first, in 1732, to have the R

evidence supporting nonaccess or impossibility of paternity.[59] By the nineteenth century, courts in the United States had abandoned the "four seas" doctrine as well yet required proof "beyond all reasonable doubt" that the child was born of the alleged father.[60]

The determination of a child's legitimacy, in addition to the obvious impact on the child, also bore its mark on the rights and duties of the parents.[61] In contrast to the historical right fathers had to their children born from marriage, the care and support of a child born out of wedlock was traditionally placed with a child's mother[62] or the parish into which he was born.[63] The unwed mother consistently maintained custodial rights superior to those of the unwed father.[64] This presumption precluded the unwed father from being heard in custody proceedings involving his child; he had no standing and could not object, for example, to the unwed mother's action of placing the child up for adoption.[65] Though seemingly harsh, if not unconstitutional, in its abridgement of an unwed father's rights, the presumption of legitimacy was considered to serve the best interests of the child.[66]

---

courage to overrule the "four seas" doctrine in *Pendrell v. Pendrell*, (1732) 93 Eng. Rep. 945 (K.B.)).

59. REEVE, *supra* note 53, at 339 n.1. **R**

60. *See, e.g.*, Cross v. Cross, 3 Paige Ch. 139, 3 N.Y. Ch. Ann. 89 (1832). In the language of the court,

> The ancient rule, that the husband must be presumed to be the father, if he was within the four seas during any part of the usual period of gestation, has long since exploded; and, as Justice Gross says, "on account of its absolute nonsense." But the modern rule, which is marked out by its good sense, is, that to bastardize the issue of a married woman, it must be shown *beyond all reasonable doubt*, that there was no such access as could have enabled the husband to be the father of the child.

Id. (emphasis added).

61. *See infra* notes 62-66. **R**

62. Weston, *supra* note 4, at 687. **R**

63. GRAHAM DOUTHWAITE, UNMARRIED COUPLES AND THE LAW § 3.6, at 138 (1979).

64. *See* Wright v. Wright, 2 Mass. 109, 110 (1806) ("[T]o provide for [the] support and education [of a nonmarital child], the mother has a right to the custody and control of him, and is bound to maintain him, *as his natural guardian*."); Robalina v. Armstrong, 15 Barb. 247, 248 (N.Y. Gen. Term 1852) ("The mother of a bastard child is entitled to its custody . . . ."); Weston, *supra* note 4, at 688. However, until relatively **R**
recently, the unwed mother was not afforded any right to financial support. *See* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J L. & PUB. POL'Y 1, 6 (2004). Some states did not impose a support obligation on the unwed father until 1971. *Id.*

65. Weston, *supra* note 4, at 691. **R**

66. *Id.* at 693-94. The protection of the traditional family unit (mother, father, and child), and the stability and harmony of the household, were paramount concerns

Through the second half of the twentieth century, however, the Supreme Court finally began to recognize the constitutional rights of unmarried parents and nonmarital children.[67]

III. Protecting the Rights of Unmarried Fathers

During the first half of the twentieth century, the Supreme Court clearly articulated that a parent has the fundamental right to raise and educate his child.[68] Significantly, in *Prince v. Massachusetts*, the Court held that parents maintain highest priority when the issue of care and custody is at stake.[69] But it was not until 1972 that the Court faced, and then upheld, an equal protection challenge raised by an unmarried father contesting a state statute that drew distinctions between unmarried fathers and all other parents.[70] Over the course of the following decade, the Court upheld a father's right to equal protection under the law when distinctions were drawn between unmarried fathers and other classes of parents,[71] and unmarried fathers and unmarried mothers.[72] During the same period, the Court qualified these protections by identifying different classes of unmarried fathers: those that held just a biological link to the child and those that, in addition to being a biological

---

of the state. *Id.* at 694. They remain paramount concerns. *See* Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) (plurality opinion) (stating the "integrity of the traditional family unit" is a stronger interest than the unwed father's relationship to his child).

67. *See* Caban v. Mohammed, 441 U.S. 380 (1979); Gomez v. Perez, 409 U.S. 535 (1973); Stanley v. Illinois, 405 U.S. 645 (1972). The Uniform Parentage Act and most state statutes declare that nonmarital children's rights are equal to those of children born from marriage. Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-less When Nature Prevails in Paternity Actions*, 65 U. Pitt. L. Rev. 811, 821 (2004).

68. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . bring up children . . . .").

69. *Prince*, 321 U.S. at 166.

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

71. *Id.* at 649 ("We conclude that, . . . by denying [the unmarried father] a hearing and extending it to all other parents whose custody of their children is challenged, the State denied [him] the equal protection of the laws guaranteed by the Fourteenth Amendment.").

72. *Caban*, 441 U.S. at 391 ("[T]he distinction in § 111 between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children.").

parent, demonstrated some degree of commitment or responsibility to the child.[73]

The Supreme Court's decision in *Stanley v. Illinois* was the first of several cases that examined the constitutional rights of unmarried fathers.[74] The Court ultimately struck down an Illinois statute that denied unwed fathers a hearing on their fitness before state intervention[75] on both due process[76] and equal protection grounds.[77] Framing the issue as whether "a presumption that distinguishes and burdens all unwed fathers [was] constitutionally repugnant,"[78] the Court held that the distinction drawn between unmarried fathers and all other classes of parents was unconstitutional.[79] This was the Court's first declaration that unmarried fathers had constitutionally protected rights.[80] In subsequent cases,

73. Lehr v. Robertson, 463 U.S. 248, 261 (1983); Quilloin v. Walcott, 434 U.S. 246, 256 (1978).

74. The father in *Stanley*, never married to the mother of his children, lost custody of his children to the State of Illinois without a hearing on his fitness and without a showing of neglect. *Stanley*, 405 U.S. at 646, 658.

75. The statute in dispute allowed the state, upon the death of the mother, to take custody of a child from an unwed father based on the presumption that the unwed father was unfit to raise his child. *Id.* at 646-47. The unwed father was not entitled to a hearing on his fitness prior to the State's assumption of custody of the children. *Id.*

76. *Id.* at 658. The Court acknowledged that the State's interests of protecting the psychological and physical welfare of the child, the best interests of the community, and the child's family bonds were legitimate. *Id.* at 652. The statutory means, however, were not drawn tightly enough; separating a potentially fit parent from his child was found to be contrary to the State's goals. *Id.* at 652-53. The Court went on to reject the State's argument that even though some fathers may be fit to raise their children, because "most unmarried fathers [were] unsuitable and neglectful parents," all unmarried fathers should be considered unfit. *Id.* at 654. Conceding that the administrative ease of such a presumption warranted consideration, the Court stated that "the Constitution recognizes higher values than speed and efficiency." *Id.* at 656. The convenience of "presuming rather than proving [a father's] unfitness" was an advantage insufficient to justify the denial of a father's fundamental right to raise his child. *Id.* at 658.

77. *Id.* at 649. The Illinois dependency statute sought to treat unmarried fathers differently from all other parents. *Id.* at 649-50. On the one hand, married mothers and fathers and unmarried mothers would not lose their children to the state without "notice, hearing, and proof of such unfitness as a parent as amounts to neglect." *Id.* at 650. On the other hand, an unmarried father was not entitled to these neglect proceedings. *Id.* The state instead employed a dependency proceeding, which did not require it to "prove unfitness in fact, because it [was] presumed at law." *Id.* The Court determined "that all Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from custody" and held "that denying such a hearing to [unwed fathers] while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." *Id.* at 658.

78. *Id.* at 649.

79. *Id.* at 658.

80. *See id.*

the Court defined what actions were necessary to trigger these rights.[81]

Several years later, the Court limited the constitutional protection of the unmarried father's rights by finding that an unmarried father who had not "shouldered any significant responsibility" for his child was not entitled to the same rights as a married father.[82] In *Quilloin v. Walcott*, the Supreme Court rejected the father's equal protection claims,[83] distinguishing him from the father in *Stanley*, as well as married fathers, based on his failure to participate in the "daily supervision, education, protection, or care of the child."[84] In drawing the distinction between unmarried fathers, the Court seemed to require that something more than a biological link alone was necessary for a *Stanley* equal protection challenge to be sustained.[85]

One year later, the Court further developed the claim for an unwed father to successfully raise an equal protection challenge.[86] In *Caban v. Mohammed*, the Court found that a statutory, gender-

81. An unwed father's rights to his child gain protection when he "demonstrates a full commitment to the responsibilities of parenthood," Lehr v. Robertson, 463 U.S. 248, 261 (1983), "come[s] forward to participate in the rearing of his child," Caban v. Mohammed, 441 U.S. 380, 392 (1979), or "shoulder[s] any significant responsibility with respect to the daily supervision, education, protection, or care of the child," Quilloin v. Walcott, 434 U.S. 246, 256 (1978).

82. *Quilloin*, 434 U.S. at 256. The issue in *Quilloin* was whether Georgia's adoption statute, which denied the appellant-father any veto right over the adoption of his child, was unconstitutionally applied. *Id.* at 246. The challenge was raised by the father of a child born out of wedlock when the child's stepfather filed a petition for adoption that was granted over the biological father's objections. *Id.* at 247. At no point in the eleven years from the child's birth to the stepfather's initial petition for adoption did the father in *Quilloin* attempt to initiate a legitimization proceeding. *Id.* at 249. Georgia law allowed an unwed father to acquire veto authority only after he legitimized his child. *Id.* at 248-49. Although the father in *Quilloin* petitioned for legitimization and visitation at the time he contested the adoption, the trial court denied both requests. *Id.* at 251. The trial court based its decision on the general finding that the father's irregular relationship with his son was disruptive and that therefore legitimization or visitation would not be in the child's best interests. *Id.*

83. *Id.* at 256.

84. *See id.* The Georgia Supreme Court also noted that the father "had never been a *de facto* member of the child's family unit." *Id.* at 253.

85. *See id.* at 256. When there is a "difference in the extent of commitment to the welfare of the child," the parties should not be considered similarly situated. *See id.* The Court also rejected the father's due process challenge. *Id.* at 255. Again distinguishing this case from *Stanley*, the Court held that because the proposed adoption would not be breaking up an established family unit, but rather would secure one already in existence, the best interests of the child were being served. *Id.* The application of this standard under these circumstances did not violate the father's fundamental liberties. *Id.* at 254.

86. Caban v. Mohammed, 441 U.S. 380 (1979).

based distinction drawn between the unmarried mother and unmarried father was unconstitutional when the father had a substantial relationship with his child and had acknowledged his paternity.[87] The Court reiterated the importance "of the relationship that in fact exists between the parent and child"[88] and conceded that an unwed father who had not established such a relationship and had not accepted the responsibilities of parenthood had no cause of action in the Equal Protection Clause.[89]

The Court reaffirmed this position in 1983, when it stated that "the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parents and the best interests of the child."[90] If the two unmarried parents are not similarly situated with respect to their relationship with their child, there is no remedy under the Equal Protection Clause against a state which allocates a different set of rights to each parent based on gender.[91] Conversely, the Court stated that when the relationship between the two unmarried parents and the child are in fact similar, the statutes in question could

87. *Id.* at 392. The unmarried parents in *Caban* lived together with their children from 1969 through 1973. *Id.* at 382. When the mother left with the two children, they were ages four and two, respectively. *Id.* The father was listed on their birth certificates and contributed to their support while living with the mother. *Id.* The father continued to see his children after they left with their mother. *Id.* In 1976, the mother and her new husband filed a petition to adopt the two children, which was subsequently granted, terminating the father's parental rights. *Id.* at 383-84. Although the father had clearly established a substantial relationship with his children, the New York Court of Appeals upheld the constitutionality of the adoption statute that allowed unwed mothers to block an adoption but did not afford unwed fathers the same authority. *Id.* at 384-86. Applying intermediate scrutiny, the Supreme Court found that the gender-based distinction was not substantially related to the State's interest in providing adoptive homes to children born out of wedlock. *Id.* at 391.

88. *Id.* at 393 n.14.

89. *Id.* at 392. The Court's opinion suggests that an important first step in accepting responsibility would be admitting paternity. *See id.* at 393 & n.15. The Court, reversing the New York Court of Appeals on the gender-based equal protection challenge, did not reach the appellant's claim based on the distinction between married and unmarried fathers or the appellant's substantive due process claim. *Id.* at 394 n.16.

90. Lehr v. Robertson, 463 U.S. 248, 266-67 (1983). *Lehr* presented another constitutional challenge to a New York adoption statute, brought by the unwed father of a two-year-old child. *Id.* at 249-50. The father's challenge was based on his lack of notice of the adoption proceedings. *Id.* at 250. The Court found that because the father in *Lehr* did not take responsibility for nor developed a substantial relationship with his daughter, "the Federal Constitution [would] not automatically compel a state to listen to his opinion of where the child's best interests lie." *Id.* at 262. The interest at issue here, in the absence of a substantial parent-child relationship, was simply the opportunity interest of forming such a relationship. *Id.* at 262-63. The Court held that as a matter of due process, the father's opportunity interest was protected. *Id.* at 265.

91. *Id.* at 267-68.

not be constitutionally applied.[92] Stressing the need for some degree of relationship, the Court stated that "the mere existence of a biological link does not merit equivalent constitutional protection."[93]

This line of cases established the constitutional rights of unmarried fathers but did not grant them absolute rights.[94] Subsequent Supreme Court cases have continued to define the contours of the unmarried father and the rights to which he—and his child—are entitled.[95] None, however, have examined the constitutionality of presumptive custody awards that distinguish between unwed mothers and fathers or between married and unmarried fathers.

IV. CUSTODY DEFINED

Custody is the general term that identifies the legal and physical relationship that exists between the child and his parents.[96] Custody, in the context of a domestic-relations dispute, also carries with

92. *Id.* at 267.

93. *Id.* at 261. One commentator has described the difference in fathers as "the reluctant father" versus "the father who grasps the opportunity biology gives him and develops a relationship with his child." Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 61 (2004). The requirements of the latter father are referred to as "biology plus." *Id.* at 48. This language is useful shorthand for categorizing what the Supreme Court has come to require from an unwed father who is seeking to protect his right to care and custody of his child. *See id.* at 47-48.

94. The rule from these cases, however, is far from clear. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.2.2, at 803 (3d ed. 2006) ("The cases in this area are often difficult to reconcile."); CLARK, *supra* note 22, § 20.2, at 860 ("It is difficult if not impossible to arrive at an accurate or useful assessment of the Supreme Court's decisions from Stanley to Lehr."). R

95. *See* Nguyen v. INS, 533 U.S. 53, 62-70 (2001) (recognizing that an unwed biological mother and an unwed biological father are not similarly situated with respect to the biological verification of parentage, nor the opportunity to develop a parent-child bond); Michael H. v. Gerald D., 491 U.S. 110, 129-130 (1989) (plurality opinion) (holding that a putative father did not have standing to bring a paternity suit when the child was born from a mother married to another man and affording substantial weight to protecting the existing family unit). The Supreme Court has also defined the constitutional rights of children born out of wedlock, repeatedly holding that discrimination against illegitimate children is unconstitutional. *See* Trimble v. Gordon, 430 U.S. 762, 766 n.11 (1977) (citing cases). The Court has been clear that children born out of wedlock cannot be subject to constitutionally invalid discrimination that is intended to deter the parents from some wrongdoing. *Id.* at 769-70. The Court has stated that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to the individual responsibility or wrongdoing." *Id.* (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972)) (internal quotation marks omitted).

96. CLARK, *supra* note 22, § 19.2, at 789. R

it the potential for a court-ordered childrearing arrangement that will inevitably define the contours of a child's relationship with both of his parents.[97] Judges and lawyers recognize this great responsibility they shoulder when faced with a custody dispute but, due to the fact-specific nature of these cases, are little helped by statutes and common law.[98] Every state in the nation has adopted a custody statute intended to assist lawyers and judges in making consistent and predictable decisions in custody cases.[99] The uniform standard for awarding custody across jurisdictions is the "best interests of the child" standard.[100]

In drafting their statutes, many states have explicitly distinguished custody labels identifying both the legal relationship between parents and child as well as the residential and parenting arrangement each parent will have with the child.[101] Massachusetts is one such state.[102] Other states tend to group the legal and physical relationship into the broad custody label, especially when addressing joint custody.[103] In general, however, the terminology tends to be uniform: "legal custody" encompasses the decision-making responsibility of the parent or parents, and "physical custody" defines the living arrangement and parenting schedule between parent and child.[104] The Massachusetts statutory definitions, found in the divorce statute, are no exception.[105]

---

97. *See id.* § 19.1, at 787.

98. *Id.*

99. *See* Elrod, *supra* note 34, § 32.06(1) n.2. R

100. *Id.* § 32.06(1). *See, e.g.*, CAL. FAM. CODE § 3020 (West 2004); CONN. GEN. STAT. ANN. § 46b-56(b) (West 2009); ME. REV. STAT. ANN. tit. 19-A, § 1653(3) (Supp. 2009); MASS. GEN. LAWS ch. 209C, § 10(a) (2008); VT. STAT. ANN. tit. 15, § 665(a) (2002); Webb v. Knudson, 582 A.2d 282, 287 (N.H. 1990); Pettinato v. Pettinato, 582 A.2d 909, 913-14 (R.I. 1990).

101. *See, e.g.*, CAL. FAM. CODE §§ 3006, 3007 (defining sole legal and sole physical custody); MISS. CODE ANN. § 93-5-24 (5) (West 2007) (defining physical and legal custody).

102. MASS. GEN. LAWS ch. 208, § 31 (defining sole and shared legal and physical custody).

103. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-56a (a) (including joint decision-making and shared physical custody in the joint custody award). The Connecticut statute, however, does allow the court to "award joint legal custody without awarding joint physical custody." *Id.*

104. *See* CLARK, *supra* note 22, § 19.2, at 790. R

105. MASS. GEN. LAWS ch. 208, § 31. The Massachusetts definitions are as follows:

> "Sole legal custody", one parent shall have the right and responsibility to make major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development.

Rising out of a desire from both parents to be decision makers (i.e., legal custodians) and residential parents, custody disputes have become commonplace in divorce proceedings as well as in litigation between unmarried parents.[106] Mothers and fathers are petitioning for one or more of the various forms of custody, and courts are now awarding joint legal and physical custody more frequently than before.[107] Although traditional sole custody awards remain dominant, parents, and especially fathers, are fighting for greater parental responsibilities and parenting time with their children.[108]

For the unmarried father, a recognition is growing that once he has acknowledged paternity or been judicially adjudicated the father, he obtains parental rights similar to those of the unwed mother.[109] The challenges that courts face, however, involve applying relatively clear-cut statutory definitions of custody to the in-

> "Shared legal custody", continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare . . .
>
> "Sole physical custody", a child shall reside with and be under the supervision of one parent, subject to reasonable visitation by the other parent, unless the court determines that such visitation would not be in the best interest of the child.
>
> "Shared physical custody", a child shall have periods of residing with and being under the supervision of each parent; provided, however, that physical custody shall be shared by the parents in such a way as to assure a child frequent and continued contact with both parents.

Id. In defining and awarding shared legal custody, Massachusetts makes it clear that both parents may have the right and responsibility to be involved in any major decision involving the child's upbringing. *Id.* These decisions include public versus private education, conventional versus alternative medical care, and the choice of religious teachings—if any. *See id.* However, Massachusetts also recognizes that the award of sole legal custody can also be appropriate when in the best interest of the child. *See id.*

106. *See* William I. Weston, *Child Custody and Visitation Issues in Cases Involving Disputed Paternity*, *in* DISPUTED PATERNITY PROCEEDINGS, §32.05(1)(a) (Carl W. Gilmore ed., 2009).

107. *See id.* (noting the "rapid acceptance of the concept of joint custody").

108. *See id.* Nonmarital fathers, in particular, have been seeking out their parental rights once they have legally established parentage. *See id.*

109. *See id.* This recognition is not without a historical foundation. In both of the previously discussed adoption cases where the Supreme Court rejected the father's constitutional challenge, the relevant statutes would have granted the father the rights he was seeking had he legally recognized his fatherhood. *See* Lehr v. Robertson, 463 U.S. 248, 250-51 (1983) (registration in the New York putative father registry would have demonstrated the father's intent to claim paternity and therefore would have entitled him to notice of the pending adoption); Quilloin v. Walcott, 434 U.S. 246, 248-49 (1978) (legitimization proceeding would have given unwed father the veto authority other parents enjoyed); *see also* Richard P. Perna, *Rights of Putative Fathers to Custody and Visitation*, *in* CHILD CUSTODY AND VISITATION § 30.03 (Sandra Morgan Little ed., 2009) (discussing the progressive dismissal of the maternal preference rule in putative father custody disputes).

creasingly complex scenarios involving the parents of children born out of wedlock.[110] Further complicating the process are statutory presumptions in favor of one form of custody over another.[111] The following section examines the various ways in which state statutes and common law have addressed the issue.

V. STATE STATUTORY SCHEMES

Each of the fifty states and the District of Columbia has, at a minimum, a custody statute that provides the state courts a mechanism for awarding custody to one or both biological parents during divorce or separation proceedings. The vast majority of these statutes address the possibility of some variety of joint custody, including shared custody,[112] joint legal custody,[113] joint decision-making responsibilities,[114] and others. These statutes reflect a full spectrum of legislative opinions on whether joint custody,[115] in any form, is a preferred outcome for separating parents. The subsections below discuss the general categories that each statutory scheme may fall in, with a focus on how these statutes affect unwed fathers.

The five general categories of state statutes are as follows: (1) joint custody presumption or preference for both divorcing and unwed parents;[116] (2) no joint custody presumption or preference in divorcing parents or unwed parents;[117] (3) joint custody presumption or preference in divorcing parents only;[118] (4) no joint custody presumption or preference but maternal sole custody presumption for unwed mothers;[119] and (5) joint custody presumption or preference in divorcing parents only and maternal sole custody presump-

110. *See* Weston, *supra* note 106, § 32.05(1)(b). R

111. *See id.* The greatest difficulties tend to arise when a married woman gives birth to a child whose father is not the mother's husband. *Id.* "This situation creates a no-win situation for a putative father by establishing a custody battle triangle between the mother, her husband . . . and the putative father." *Id.*; *see, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 113-117 (1989) (plurality opinion).

112. *See, e.g.*, 23 PA. CONS. STAT. ANN. § 5304 (West 2001).

113. *See, e.g.*, McCarty v. McCarty, 807 A.2d 1211, 1213 (Md. Ct. Spec. App. 2002).

114. *See, e.g.*, W. VA. CODE ANN. § 48-9-207(b) (LexisNexis 2009).

115. In this Part, joint custody is intended to include any of the following: joint legal custody, joint physical custody, or both joint legal and physical custody.

116. *See, e.g.*, N.H. REV. STAT. ANN. §§ 461-A:5, 461-A:3(II) (Supp. 2009).

117. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-56a(b) (2008); ME. REV. STAT. ANN. tit. 19-A, § 1653(2)(A) (Supp. 2009); R.I. GEN. LAWS § 15-5-16 (2003); VT. STAT. ANN. tit. 15, § 665(a) (2002).

118. *See, e.g.*, NEV. REV. STAT. ANN. § 125.465 (LexisNexis 2004).

119. *See, e.g.*, OHIO REV. CODE ANN. § 3109.03 (West 2005).

tion for unwed mothers.[120] In each of the five following subsections, these categories are labeled and described in depth.[121] The joint custody laws of all fifty states and the District of Columbia are reviewed in greater depth in the Appendix.

A. *Marital-Status-Equality States—With Joint Custody Presumptions or Preferences*

States in this category treat both married and unmarried parents equally by providing for a presumption of or preference for some type of joint custody for all married and unmarried parents. Unwed fathers looking for joint custody in these states are in the best position. First, they have no gender-based presumption to overcome. Second, unless there is a finding that the father is unfit, abusive, or for some other reason would not be a suitable parent to the child, the court considers that joint custody is in the best interests of the child. However, states in this category are in the minority.[122]

New Hampshire, for example, explicitly declares that its policy is to "[s]upport frequent and continuing contact between each child and both parents."[123] The legislative scheme provides for a presumption "that joint decision-making responsibility is in the best interest of minor children."[124] For unwed parents petitioning for parental rights and responsibilities, the statute provides that the same provisions applicable to divorcing parents also apply to unmarried parents.[125]

120. *See, e.g.*, MASS. GEN. LAWS ch. 208, § 31 (2008); *id.* ch. 209C, § 10(a).

121. The category labels focus on the differences between mothers and fathers (gender-based distinctions) and between married and unmarried parents (marital-class distinctions).

122. *See, e.g.*, ALASKA STAT. § 25.20.060(c) (2008); D.C. CODE § 16-914(a)(2) (LexisNexis Supp. 2010); FLA. STAT. ANN. § 61.13(2)(c)(2) (West Supp. 2010); IDAHO CODE ANN. § 32-717B(4) (2006); KAN. STAT. ANN. § 60-1610(a)(4)(A) (2005); LA. CIV. CODE ANN. art. 132 (1999); MINN. STAT. ANN. § 518.17(2) (West Supp. 2010); N.H. REV. STAT. ANN. § 461-A:5 (Supp. 2009); TEX. FAM. CODE ANN. § 153.131(b) (Vernon 2008); W. VA. CODE ANN. § 48-9-207(b) (LexisNexis 2009); WIS. STAT. ANN. § 767.41(2)(am) (West 2009); *see also infra* Appendix.

123. N.H. REV. STAT. ANN. § 461-A:2.

124. *Id.* § 461-A:5; *see also In re* Mannion, 917 A.2d 1272, 1275 (N.H. 2007) ("When devising a parenting plan relating to decision-making responsibility . . . , there is a presumption that joint decision-making responsibility is in the best interest of the child unless there has been a finding of abuse.").

125. N.H. REV. STAT. ANN. § 461-A:3.

B. *Marital-Status-Equality States—Without Joint Custody Presumptions or Preferences*

States in this category also treat married and unmarried parents equally by avoiding joint custody presumptions or preferences for *any* class of parent. An unwed father in this category carries the same burden that the divorcing father carries if he (the unwed father) seeks a joint custody arrangement, but he does not face an overt gender-based presumption.[126] Depending on the criteria, a putative father may successfully petition for joint custody at the beginning of litigation.[127] Petitioners in Connecticut, for example, may be awarded joint custody, which provides for joint decision making and shared physical custody.[128] However, there is no presumption in favor of joint custody in contested disputes.[129] In Connecticut, these provisions apply to "all cases in which the parents of a minor child live separately."[130]

These states, and states that create joint custody presumptions or preferences for all separating parents, treat married and unmar-

126. *See* ALA. CODE § 30-3-152 (LexisNexis 1998); ARIZ. REV. STAT. ANN. § 25.403.01(A) (2007); CAL. FAM. CODE § 3040(b) (West 2004); COLO. REV. STAT. ANN. § 14-10-124 (West Supp. 2009); CONN. GEN. STAT. ANN. § 46b-56(a) (West 2009); DEL. CODE ANN. tit. 13, § 701(a) (2009); GA. CODE ANN. § 19-9-3(a)(1) (Supp. 2009); HAW. REV. STAT. ANN. § 571-46.1(a) (LexisNexis 2009); 750 ILL. COMP. STAT. ANN. 5/602(c) (West Supp. 2010); IOWA CODE ANN. § 598.41 (West Supp. 2010); KY. REV. STAT. ANN. § 403.270 (LexisNexis Supp. 2009); ME. REV. STAT. ANN. tit. 19-A, § 1653 (Supp. 2009); MD. CODE ANN., FAM. LAW § 5-203 (LexisNexis 2006); MICH. COMP. LAWS ANN. § 722.26a (West 2002); MISS. CODE ANN. § 93-5-24 (West 2007); MO. ANN. STAT. § 452.375 (West Supp. 2010); MONT. CODE ANN. § 40-4-212 (2009); N.J. STAT. ANN. 9:2-4 (West 2002); N.Y. DOM. REL. LAW § 240(1)(a) (McKinney Supp. 2010); N.C. GEN. STAT. § 50-13.2(a) (2009); N.D. CENT. CODE § 14-09-31 (Supp. 2010); OKLA. STAT. ANN. tit. 43, § 112(C)(2) (West Supp. 2010); OR. REV. STAT. § 107.105(1)(a) (2007); 23 PA. CONS. STAT. ANN. § 5304 (West 2001); R.I. GEN. LAWS § 15-5-16 (2003); S.C. CODE ANN. § 63-3-530(A)(42) (2010); UTAH CODE ANN. § 30-3-10(5) (Supp. 2009); VT. STAT. ANN. tit. 15, § 665(a) (2002); WASH. REV. CODE ANN. § 26.09.184 (West Supp. 2010); WYO. STAT. ANN. § 20-2-201 (2009); *see also infra* Appendix.

127. Note that there are states that create a presumption in favor of joint custody when the parents are in agreement. *E.g.*, CAL. FAM. CODE § 3080 ("There is a presumption . . . that joint custody is in the best interest of a minor child . . . where the parents have agreed to joint custody . . . ."); CONN. GEN. STAT. ANN. § 46b-56a(b) ("There shall be a presumption . . . that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody . . . of the minor child or children of the marriage."). Because this presumption does not exist when the parties are in disagreement, these states remain classified as disfavoring joint custody presumptions.

128. CONN. GEN. STAT. ANN. § 46b-56.

129. *Id.*; *see also supra* note 127 and accompanying text. R

130. CONN. GEN. STAT. ANN. § 46b-61.

ried couples the same. Yet, many other states apply presumptions based on the marital status or gender of the parent.

C. *Marital-Status-Distinction States*

States in this category do not create any maternal presumptions in any part of their statutory scheme. However, they do allow for a presumption of some type of joint custody in *divorcing* parents but not unmarried parents.[131] This distinction places the unwed father at a disadvantage when compared to the custodial rights of the divorcing father.

In these states, practically speaking, a divorcing father from a marriage of any length is entitled to a presumption of joint custody.[132] However, if the father of a nonmarital child initiates a custody proceeding—even if he has been in a long-term relationship with the mother and has a substantial relationship with his child—he will not be entitled to the same presumption.[133]

D. *Marital-Status- and Gender-Based-Distinction States*

States in this category do not create broad distinctions between parents based on marital status because, as a rule, they do not favor joint custody presumptions or preferences for any class.[134] But, because these states allow for a presumption of sole custody in the unmarried mother, they maintain their status as class- and gender-discriminatory states because, by virtue of this presumption, unwed fathers have a greater burden for achieving joint custody than do divorcing fathers. In other words, these states do not have a preference for joint custody, but they do create a presumption that the unwed mother maintains sole custody of the nonmarital child. For example, in Arkansas, there are no joint custody presumptions for divorcing or unmarried parents.[135] However, legal custody of a child born out of wedlock is awarded to the mother; the father may

131. *See, e.g.*, NEV. REV. STAT. ANN. § 125.465 (LexisNexis 2004); N.M. STAT. ANN. § 40-4-9.1 (West 2003); *see also infra* Appendix.

132. *E.g.*, NEV. REV. STAT. ANN. § 125.480(1)-(3) (LexisNexis Supp. 2005).

133. *See id.*; *infra* Appendix.

134. *See, e.g.*, ARK. CODE ANN. §§ 9-13-101(a)(1)(A)(i), 9-10-113(a) (2009); IND. CODE ANN. § 16-37-2-2.1 (West 2007); IND. CODE ANN. § 31-17-2-13 (West 2008); NEB. REV. STAT. § 42-364 (2008); OHIO REV. CODE ANN. §§ 3109.03, 3109.042 (West 2005); TENN. CODE ANN. 36-2-303 (2005); TENN. CODE ANN. § 36-6-101(a)(2)(A)(i) (Supp. 2009); VA. CODE ANN. § 20-124.2(B) (Supp. 2009); *see also infra* Appendix.

135. ARK. CODE ANN. § 9-13-101(a)(1)(A)(i).

then petition the court for custody once he has established his paternity.[136]

E. *Elevated Marital-Status- and Gender-Based-Distinction States*

States in this category create the greatest divide between unmarried fathers and all other classes of parents (married parents and unwed mothers).[137] Unmarried fathers in these states find themselves at the greatest disadvantage. Not only do they face the burden imposed by the statutory gender-based distinction (that is, the maternal sole-custody presumption), but these fathers are further separated from their divorcing counterparts because the divorcing father starts with a presumption of or preference for some class of joint custody. Massachusetts's custody laws provide an example of this scheme.

Massachusetts draws a clear distinction between divorcing parents and unmarried parents by providing for each class of parents in two completely separate statutes;[138] significantly, the two statutes provide two different sets of custodial presumptions.[139] While the divorce statute contains a joint custody presumption, the paternity statute contains a maternal sole custody presumption.[140]

The Massachusetts divorce statute explicitly awards temporary shared legal custody to divorcing parents, upon commencement of the divorce suit.[141] This presumption is rebuttable: if the judge determines that joint legal custody is not in the best interests of the

136. *Id.* §§ 9-10-113(a) to -113(b).

137. *See, e.g.*, MASS. GEN. LAWS ch. 208, § 31 (2008); *id.* ch. 209C, § 10(a); S.D. CODIFIED LAWS § 25-5-7 (Supp. 2009); S.D. CODIFIED LAWS § 25-5-10 (2004); *see also infra* Appendix.

138. *See* MASS. GEN. LAWS ch. 208 (divorce statute); *id.* ch. 209C (children born out of wedlock statute).

139. *Id.* ch. 208, § 31; *id.* ch. 209C, § 10.

140. *Id.* ch. 208, § 31; *id.* ch. 209C, § 10.

141. *Id.* ch. 208, § 31. The relevant portion of the statutory provision reads,

> *Upon the filing of an action* in accordance with the provisions of this section, section twenty-eight of this chapter, or section thirty-two of chapter two hundred and nine and until a judgment on the merits is rendered, absent emergency conditions, abuse or neglect, *the parents shall have temporary shared legal custody of any minor child of the marriage*; provided, however, that the judge may enter an order for temporary sole legal custody for one parent if written finding are made that such shared custody would not be in the best interest of the child. Nothing herein shall be construed to create any presumption of temporary shared physical custody.

Id. (emphases added). Although the statute removes any such presumption at the time of trial, throughout the course of litigation, each parent maintains equal rights to participate in the major decisions of the child. *Id.*

child, sole legal custody to one parent may be ordered.[142] There is no presumption, temporary or otherwise, of joint physical custody.[143]

The Massachusetts paternity statute takes a different tack. In sharp contrast to parents divorcing in Massachusetts, the paternity statute provides for a presumption of sole custody[144] in the mother from the point of birth, through adjudication or acknowledgement of paternity, and until any further judgment or order of the court.[145] Even after a father has acknowledged his paternity, sole custody remains exclusively with the mother.[146] Although the father interested in joint custody may overcome this presumption by petitioning the court, the judge may only award joint custody if one of two conditions are met.[147] The court may award joint custody if the parties enter into an agreement relative to such an award.[148] Alternatively, the court may grant joint custody if it finds that both parties had exercised joint responsibility for the child prior to litigation *and* that the parties can effectively communicate regarding the

142. *Id.*; *see, e.g.*, Rolde v. Rolde, 425 N.E.2d 388, 392 (Mass. App. Ct. 1981) (upholding sole legal (and physical) custody award to mother in a "divorce traumatized by personal and emotional conflict"). *But see* Kendall v. Kendall, 687 N.E.2d 1228, 1236 (Mass. 1997) (upholding award of joint legal custody even though parties had highly divergent religious views); Doe v. Doe, 452 N.E.2d 293, 295-96 (Mass. App. Ct. 1983) (holding that an award of joint legal (and physical) custody was not precluded by the conflict between the parents when that conflict did not impact the child).

143. MASS. GEN. LAWS ch. 208, § 31.

144. This statutory provision fails to distinguish between physical and legal custody and is therefore presumed to award both to the mother. *Id.* ch. 209C, § 10(b).

145. *Id.* The relevant portion of the statutory provision reads,

> Prior to or in the absence of an adjudication or voluntary acknowledgement of paternity, the mother shall have custody of a child born out of wedlock. In the absence of an order or judgment of a probate and family court relative to custody, *the mother shall continue to have custody of a child after an adjudication of paternity or voluntary acknowledgement of parentage*.

Id. (emphasis added).

146. *Id.*

147. *Id.* § 10(a). The statutory language reads,

> In awarding the parents joint custody, the court shall do so only if the parents have entered into an agreement . . . or the court finds that the parents have successfully exercised joint responsibility for the child prior to the commencement of proceedings . . . and have the ability to communicate and plan with each other concerning the child's best interests.

Id.

148. *Id.*

child's best interests.[149] If the judge awards the parties joint custody, the decision must be supported with written findings.[150]

Massachusetts can therefore be categorized as a state that distinguishes between divorcing parents and unmarried parents by (a) creating a presumption of joint legal custody in divorcing parents and (b) creating a presumption of sole physical *and* sole legal custody in the unmarried mother.

VI. The Constitutionality of Custody Statutes

For married couples, custodial preferences over the past several hundred years have shifted from the authoritative father to the nurturing mother to somewhere in between. For unmarried parents, the biological differences between mother and father have long favored the unwed mother as the de facto custodian of the nonmarital child. The Supreme Court has sifted through this complicated history and clarified the rights of unmarried fathers but has left many questions unanswered. While the states have attempted to answer the parenting policy questions, the spectrum of solutions reflects the ongoing debate over the roles separated fathers and mothers must play in the rearing of their children. And despite legislatures' best efforts, some of these statutory solutions unconstitutionally discriminate against unmarried fathers.

When a custody statute distinguishes all unmarried fathers from any other class of parent—unmarried mothers and divorcing mothers and fathers—that statute is susceptible to an equal protection challenge under the federal constitution. Although such statutes may be difficult to overturn under an intermediate level of federal scrutiny, the Massachusetts statute for children born out of wedlock should be overturned when strict scrutiny is applied as required by the Massachusetts Equal Rights Amendment.

149. *Id.* Because the statute does not distinguish between physical and legal custody, *see id.*, any request for joint legal custody would likely have to meet this standard. *See* K.J.M. v. M.C., 624 N.E.2d 571, 571-72 (Mass. App. Ct. 1993) (applying requirements of § 10(a) when judge granted an award of "'joint custody with [the mother] having the physical care' of the child," which implicitly limited the award to joint legal custody (alteration in original) (quoting trial judge's order)).

150. *See K.J.M.*, 624 N.E.2d at 572 (reversing joint custody order when no findings supporting the order were made). *See generally* Carwina Weng & Dorothy M. Gibson, *Custody, Visitation, and Removal Issues Related to Children of Unmarried Parents*, *in* I Paternity and the Law of Parentage in Massachusetts §§ 6.2.1-6.2.2 (Pauline Quirion ed., 2002) (discussing Massachusetts custody awards in the context of a paternity suit).

A. *Custody Statutes and Constitutional Challenge*

Authors have argued that joint custody is a fundamental constitutional right to which all parents are entitled unless there is a genuine risk of harm to the child.[151] Although many states have created statutory presumptions favoring some form of joint custody,[152] the courts have not declared such an arrangement a constitutionally protected right.[153] Some state statutes continue to maintain a presumption that provides for a sole custody award to the unmarried mother.[154] Further, in several jurisdictions, divorcing fathers are granted a greater set of custodial rights over unmarried fathers.[155]

These statutory provisions raise the following three constitutional issues: (1) whether gender-based distinctions that provide for a presumptive award of sole physical or legal custody to the unwed mother survive equal protection scrutiny;[156] (2) whether the classification of unwed fathers represents a constitutionally prohibited overbroad generalization;[157] and (3) whether unmarried fathers, as compared to divorcing fathers, suffer from unconstitutional discrimination. The next three subsections address these questions and conclude that (1) sweeping custody statutes that provide for maternal preferences for all nonmarital children violate equal protection; (2) forcing all unwed fathers to overcome a greater burden to gain

151. *See, e.g.*, Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27 (1985); James W. Bozzomo, Note, *Joint Legal Custody: A Parent's Constitutional Right in a Reorganized Family*, 31 HOFSTRA L. REV. 547 (2002); Ellen Canacakos, Note, *Joint Custody as a Fundamental Right*, 23 ARIZ. L. REV. 785 (1981).

152. *See supra* Part V.A, C, E.

153. *E.g.*, Jacobs v. Jacobs, 507 A.2d 596, 599 (Me. 1986) ("There is . . . nothing in the United States or the Maine Constitution that requires a divorce court to give a preference to joint custody over other allocations of parental rights and responsibilities."); *see* CLARK, *supra* note 22, § 19.5, at 815 n.2 (noting that "[t]he courts have not gone this far"); Meyer, *supra* note 2, at 1477-79 (discussing unsuccessful constitutional claims for equal custody); *cf.* Arnold v. Arnold, 679 N.W.2d 296, 299 (Wis. Ct. App. 2004) (concluding "that parents [do not] have a 'fundamental right' to 'equal placement periods' after divorce"). Contemplating Professor Clark's observation on "the tendency of some law review writers to expand constitutional doctrines to and beyond their uttermost limits," CLARK, *supra* note 22, § 19.5, at 815 n.2, this Note limits the constitutional discussions to equal protection. R R R

154. *See supra* Part V.D, E.

155. *See supra* Part V.C, E.

156. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) (articulating the requisite standard of review: "To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

157. United States v. Virginia, 518 U.S. 515, 542 (1996).

joint legal custody is both an overinclusive[158] and underinclusive[159] categorization; and (3) unmarried fathers that legally acknowledge or adjudicate their paternity should be entitled to the same set of custody rights as a divorcing father.

1. Custody Statutes and Gender Distinctions

a. The constitutional problem—gender discrimination

A statute that, by its very language, distinguishes between men and women is a facially discriminatory statute[160] and automatically subject to heightened scrutiny under the United States Constitution.[161] A gender-based distinction will be upheld only when it is substantially related to an important government interest.[162] The examination of the relationship between the gender classification and the government interest will necessarily involve a determination of whether the sexes are similarly situated.[163] If the parties are similarly situated, a court examines the effect of the classification, the importance of the government interest, and whether the classification is substantially related to the government interest.[164] If the government fails to provide an "exceedingly persuasive justification" for the classification, the statute cannot withstand judicial review.[165] This equal protection analysis applies where state action overtly implicates gender classifications and would therefore govern a challenge to a gender-based custody statute.

For a custody statute that creates a presumption of sole legal or physical custody of the child in the unmarried mother,[166] the gen-

158. Such categorization is overinclusive because some unwed fathers may be qualified to share legal custody and are de facto similarly situated to the unwed mother; for example, the unwed couple that lived together for ten years and equally shared in the physical, mental, and moral upbringing of their two children before separation.

159. Such categorization is underinclusive because some divorcing fathers may have never experienced fatherhood or shared decision making for the child; for example, the father who left the mother during pregnancy after just a few months of marriage.

160. *See* CHEMERINSKY, *supra* note 94, § 9.4.2, at 757 ("[T]he gender classification can exist on the face of the law; that is, the law in its very terms draws a distinction among people based on gender."). R

161. *See Craig*, 429 U.S. at 197; *see also* Caban v. Mohammed, 441 U.S. 380, 393 (1979) (applying intermediate scrutiny to statute that distinguished between unmarried mothers and unmarried fathers).

162. *See* Lehr v. Robertson, 463 U.S. 248, 265-66 (1983).

163. *Id.* at 267-68.

164. *See* United States v. Virginia, 518 U.S. 515, 532-33 (1996).

165. *See id.* at 533.

166. *See, e.g.*, MASS. GEN. LAWS ch. 209C, § 10(b) (2008).

der-based distinction is apparent,[167] and heightened scrutiny is warranted.[168] To successfully challenge such a statute, the unmarried father would need to establish that he is similarly situated to the unmarried mother.[169] In the context of unmarried parents and their children, an important consideration is the presence or absence of a substantial relationship between each parent and the child.[170] If a court finds that both parents have a substantial relationship with the child,[171] the government carries the burden of showing that the statute is substantially related to the proposed government interest.[172]

Although gender classifications warrant heightened levels of judicial scrutiny, an unmarried father first needs to overcome the argument that mothers and fathers are inherently different.[173] Indeed, the Supreme Court has recognized that mothers and fathers,

167. *Cf.* Caban v. Mohammed, 441 U.S. 380, 386-88 (1979) (finding that the challenged provision of a New York adoption statute, which gave unmarried mothers, but not unmarried fathers, the right to block an adoption, drew its distinction based on sex); Lowell v. Kowalski, 405 N.E.2d 135, 139 (Mass. 1980) ("Clearly, to differentiate between an illegitimate child's right to inherit it from his or her natural mother . . . and that child's right to inherit from his or her natural father . . . is to establish a classification based on sex.").

168. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

169. *See* Lehr v. Robertson, 463 U.S. 248, 267-68 (1983).

170. *Id.* at 266. The *Lehr* Court further articulated the significance of two biological parents with two entirely different parenting relationships with their child by stating, "If one parent has an established custodial relationship with the child and the other parent has . . . never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights." *Id.* at 267-68.

171. Or, theoretically, a court could find that neither parent has a substantial relationship with the child.

172. *See Caban*, 441 U.S. at 393. In *United States v. Virginia*, the Supreme Court examined a classification scheme that limited to males admission to a state military institute. 518 U.S. 515, 520 (1996). In articulating the standard of review, the Court stated that "[t]he burden of justification is demanding and it rests entirely on the State." *Id.* at 533. The Court also required that the justification be "exceedingly persuasive." *Id.*; *see also* Nguyen v. INS, 533 U.S. 53, 74 (2001) (O'Connor, J., dissenting) ("[A] party who seeks to defend a statute that classifies individuals on the basis of sex 'must carry the burden of showing an "exceedingly persuasive justification" for the classification.'" (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1981))). Justice O'Connor, in her dissent, describes at length the significantly higher standard of review imposed on sex-based classifications. *Nguyen*, 533 U.S. at 75-78 (O'Connor, J., dissenting). In addition to reiterating the State's heavy burden and the Court's responsibility to ensure the justification is exceedingly persuasive, she noted that the State's justification must be sincere and cannot rely on overbroad generalizations, even when they have empirical support. *Id.* at 74-76. Further, the government interest must be important, not simply legitimate. *Id.* at 77. Most importantly, the relationship between the contested means and the government interest must be substantial. *Id.*

173. *But cf. Virginia*, 518 U.S. at 533 ("Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications.").

simply through the biology of birth, are not similarly situated.[174] However, once a father has taken the timely initiative to legally establish his paternity, that father has separated himself from the passive, disinterested putative father and should be considered similarly situated to the unwed mother, at least with respect to legal custody presumptions.[175] This treatment should be given greater weight when both parents have signed a voluntary acknowledgement of parentage.[176]

At first, placing unmarried fathers, specifically those who are active and responsible but have yet to establish a meaningful relationship with their children, on equal footing with unmarried mothers may seem contrary to the Supreme Court's "substantial relationship" language of *Lehr*[177] and *Caban*.[178] But the absence of a substantial relationship is not dispositive of an equal protection claim in this context. In finding no "substantial relationship" between the father and child, the *Lehr* Court limited its application to a "relevant criterion."[179] In the contrary holding in *Caban*, the Court determined that the presence of a substantial father-child relationship undermined the constitutionality of the challenged statute but was not explicitly required.[180] And in *Quilloin*, the Court's opinion suggests a different outcome[181] had the putative father made *any* effort to legitimate, seek custody of, or financially sup-

174. *See Nguyen*, 533 U.S. at 62, 73 ("The difference between men and women in relation to the birth process is a real one . . . ."); *Lehr*, 463 U.S. at 261 ("[T]he mere existence of a biological link does not merit equivalent constitutional protection.").

175. *See, e.g.*, *In re* Baby Girl Dockery, 495 S.E.2d 417, 420 (N.C. Ct. App. 1998) (concluding that once putative father completed one of the actions specified by the adoption statute, including acknowledgement of paternity, he could "establish his obligation of parental care and support, beyond the mere biological link to the child, and become similarly situated to the mother"). *But see In re* Byrd, 421 N.E.2d 1284, 1286 (Ohio 1981) (holding "that legitimation is [not] a prerequisite for the natural father to have equality of standing with the mother" in a custody proceeding, where mother's consent was required for all three methods of legitimation).

176. When both parents signal their mutual assent of parentage, the law should recognize these indicia of both paternal responsibility and parental cooperation. Justice White made the same observation twenty-five years ago: "Indeed, there would appear to be more reason to [recognize the rights of unwed fathers] such as Lehr who acknowledge paternity than to those who have been adjudged to be a father in a contested paternity action." *Lehr*, 463 U.S. at 274 (White, J., dissenting).

177. *Id.* at 266 (majority opinion).

178. Caban v. Mohammed, 441 U.S. 380, 393 (1979).

179. *Lehr*, 463 U.S. at 266.

180. *See Caban*, 441 U.S. at 393-94.

181. The Court upheld the statute against the father's challenge. Quilloin v. Walcott, 434 U.S. 246, 256 (1978).

port his child.[182] Because the Court in these cases addressed fathers that clearly did not have a substantial relationship with their children, an unwed father who actively seeks involvement in his child's life and accepts responsibility for the care, custody, and support of his child should be able to assert a valid equal protection challenge as a parent similarly situated to the child's mother.[183] Establishing paternity is an appropriate and accurate representation of a putative father's intention and desire to participate in his child's upbringing.[184]

b. The constitutional solution: recognizing acknowledged fathers

Because contested adoption[185] and custody cases are highly fact-driven, a statute that groups all unwed fathers together goes too far. It is more appropriate to draw the line between the putative father and the acknowledged father.[186] It may be too optimistic to label all unwed fathers who have established their paternity as deserving and responsible fathers. But recognizing the acknowl-

182. *See id.* at 253, 255. In the context of the father's due process challenge, the Court stated, "But this is not a case in which the unwed father at any time had, or *sought*, actual or legal custody of his child." *Id.* at 255 (emphasis added). In reaching its conclusion, the Court highlighted the putative father's complete failure to exercise "actual or legal custody over his child" and the absence of responsibility for the "daily supervision, education, protection, or care of the child" in eleven years since the child's birth. *Id.* at 254, 256.

183. *See* David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 762-63 (1999). Professor Meyer's characterizations are instructive:

> [T]he Court's cases seem to contemplate only two models of fatherhood: the man of virtue who is integrally involved in the rearing of his children and the scofflaw who has slept on his rights while others changed diapers and read bedtime stories. The Court's cases do not squarely resolve what should be done with the father who falls somewhere in between these two poles—for example, the man who has done everything he reasonably could to establish a relationship with his child but who has been thwarted by circumstances beyond his control.

Id. at 763 (footnote omitted).

184. *See, e.g.*, Scheeler v. Rudy, 2 Pa. D. & C.3d 772, 775 (C.P. 1977) ("[W]here an unwed father admits and asserts his paternity of the illegitimate child or children in question, he shall have equal standing in the eyes of the law with the mother of such children to be considered for custody of them."); *cf.* TEX. FAM. CODE ANN. § 101.024(a) (Vernon 2008) (including in the definition of "parent" a "man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, [and] a man who has acknowledged his paternity under applicable law").

185. Adoption provisions were at issue in *Stanley*, *Quilloin*, *Caban*, and *Lehr*. *See supra* Part III.

186. Recall that the putative father is merely alleged to be the biological father. *See supra* note 5. **R**

edged father's efforts by removing the automatic maternal sole custody awards in cases where the father has established paternity would begin to address the unconstitutional disparity these statutes create between unmarried mothers and fathers.[187] The next step would then be to establish a preference for joint legal custody in these cases, a step that would appropriately declare that the unwed father who establishes paternity—and thus his legal obligation to his child—is entitled to the same legal rights as the unwed mother.

The implementation of a statutory scheme based on parental activity would not be breaking new ground. Several states have taken this approach with their joint custody schemes.[188] And in two of the adoption cases decided by the Supreme Court, the Court upheld statutes that awarded paternal rights only after the putative father asserted some legal action reflecting his parentage.[189] Both statutes unsuccessfully challenged in *Lehr* and *Quilloin* in fact granted the father the contested rights upon legitimization[190] or registration of paternity,[191] reflecting an appropriate distinction between fathers who have been legally recognized and those who have not.

Once an unmarried father is recognized as the unmarried mother's equivalent, he is afforded substantial protection of his

187. The *Lehr* Court noted that if the putative father "grasps [the] opportunity [to develop a relationship with his offspring] and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development." Lehr v. Robertson, 463 U.S. 248, 262 (1983). A timely adjudication of paternity would seem to fit this description because a father who has established paternity of his child has arguably accepted "some" measure of responsibility for his child.

188. *See, e.g.*, LA. CIV. CODE ANN. art. 245 (2007) (providing that custody statute applies to unmarried parents if both parents have "formally acknowledged" the nonmarital child); MINN. STAT. ANN. § 257.541(2)(a) (West 2007) (providing that a presumption in favor of joint legal custody applies once "paternity has been acknowledged [and established]"); MARTIN L. SWADEN & LINDA A. OLUP, MINNESOTA PRACTICE SERIES: FAMILY LAW § 18:17 (3d ed. 2009), *available at* 14 MNPRAC § 18:17 (Westlaw) ("Minnesota law makes a differentiation relative to fathers' rights for custody and parenting time by putting them into two groups: one group of alleged fathers, where paternity has not been acknowledged and established; the other group where paternity has been acknowledged and established."); *see also infra* Appendix.

189. *Lehr*, 463 U.S. at 264-65, 268 (power to veto adoption); Quilloin v. Walcott, 434 U.S. 246, 256 (1978) (notice of adoption).

190. *Quilloin*, 434 U.S. at 248-49 ("To acquire the same [adoption] veto authority possessed by other parents, the father of a child born out of wedlock must legitimate his offspring . . . [U]nless and until the child is legitimated, the mother is the only recognized parent . . . .").

191. *Lehr*, 463 U.S. at 250-51 ("A man who files with th[e] [putative father] registry demonstrates his intent to claim paternity of a child born out of wedlock and is therefore entitled to receive notice of any proceeding to adopt that child.").

rights.[192] Even when the court endorses the State's interest, the distinction between similarly situated mothers and fathers may not stand.[193] Frequently, the asserted goal before the court is the promotion of the child's best interest.[194] However, as reflected in the Supreme Court's decisions in *Stanley*[195] and *Caban*,[196] broad gender-based classifications that purport to further that interest may not be appropriate.

Ultimately, statutes that allocate or maintain sole legal custody in an unwed mother once the father has established his paternity should be subject to judicial scrutiny to determine whether the distinction can be considered "reasonable, not arbitrary, and [resting] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[197] Given the multitude of factual scenarios that may present themselves to the court, it is inappropriate to place the same burden on all unwed fathers subject to such custody awards. These overinclusive statutes would appear contrary to the very nature of the Equal Protection Clause.[198] As such, custody statutes for nonmarital children that provide for maternal presumptions of sole legal custody—especially when the father has been legally recognized—should fail under constitutional challenge.[199]

---

192. *See id.* at 261, 267.

193. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 391 (1979). Although the Court certainly found the promotion of the nonmarital child's interest "an important one," the distinction between unmarried mothers and fathers was not "structured reasonably to further" that interest. *Id.* at 391. Notably, the *Caban* Court dismissed the State's alternative justification that a mother has a fundamentally closer relationship with the child than does the father, relying on the facts of that case as evidence to the contrary. *Id.* at 389.

194. *See, e.g.*, *Caban*, 441 U.S. at 391 ("providing for the well-being of illegitimate children"); *Lehr*, 463 U.S. at 266 ("promot[ing] the best interests of the child"); Stanley v. Illinois, 405 U.S. 645, 652 (1972) ("protect[ing] 'the moral, emotional, mental, and physical welfare of the minor . . . .'" (quoting ILL. REV. STAT. ch. 37, §§ 701-02)).

195. *Stanley*, 405 U.S. at 652-54.

196. *Caban*, 441 U.S. at 391.

197. Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

198. The *Caban* Court did not tolerate New York's "overbroad generalizations," holding that the "undifferentiated distinction between unwed mothers and unwed fathers . . . [did] not bear a substantial relationship to the State's asserted interests." *Caban*, 441 U.S. at 394.

199. *See* CLARK, *supra* note 22, § 4.5, at 197-98 ("[A] flat rule excluding the father without regard to his conduct or interest in the child would still seem to be in violation of the Equal Protection Clause as the Supreme Court has applied it to illegitimates."). R

2. Custody Statutes and Overbroad Classifications

In addition to the requirement that the gender-based maternal custody awards be subject to heightened scrutiny, the fact that these statutes consider all unwed fathers to be in one universal category suggests an additional, inherent defect. The Supreme Court has recognized that overbroad generalizations are impermissible and subject to constitutional challenge.[200] As applied to unwed fathers, the classification imposed by the presumptive maternal sole custody award meets the standard of an overbroad generalization as defined in *United Stated v. Virginia*[201] and is thus unconstitutional.

There are many types of fathers that may approach the court looking for joint legal custody. Some of these fathers may be leaving long-term relationships with the mother of their children; others may have only known their partners for a short period of time. Some fathers may be extremely caring, involved, and dedicated to fatherhood; others may be distant, detached, and undecided on the idea of parenting a child. Some may be educated and ambitious; others may be uneducated and unmotivated.

What is significant is that each category of father just described may apply to a divorcing father or a never-married father. By grouping all unmarried fathers together and imposing on them a greater burden to achieve joint legal custody, the state is declaring that unmarried fathers in general are less suited to be parents than unmarried mothers or divorcing fathers.[202] This, in spite of the fact that some unmarried fathers may be extremely qualified parents and some divorcing fathers may barely know their children. Such an overbroad generalization is both overinclusive and underinclusive and is repugnant to the Constitution.[203]

To remedy these unconstitutional burdens, the state must not ask whether unmarried parents in contested custody disputes should be forced into joint custody arrangements but whether the state can constitutionally impose a greater burden towards shared

200. United States v. Virginia, 518 U.S. 515, 533 (1996) (State's justification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); *accord* Nguyen v. INS, 533 U.S. 53, 76 (2001) (O'Connor, J., dissenting); J.E.B. v. Alabama, 511 U.S. 127, 139 n. 11 (1994); Craig v. Boren, 429 U.S. 190, 198-99 (1976); *see* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724-25 (1982).

201. *Virginia*, 518 U.S. at 533-34.

202. As the Court said in *Stanley*, "all unmarried fathers are not [unsuitable and neglectful parents]; some are wholly suited to have custody of their children." Stanley v. Illinois, 405 U.S. 645, 654 (1972).

203. *See Virginia*, 518 U.S. at 533.

decision-making responsibilities on fathers "who have the will and capacity" to be excellent parents to their children.[204] Only when these statutes draw distinctions that more closely align with a parent's likelihood of success[205] will they begin to shed the unconstitutionality of overbroad generalizations.

3. Custody Statutes and Marital Status Distinctions

Statutes that award a broader set of rights to a divorcing father, compared to an unmarried father, would likely be subject to rational basis review under the United States Constitution because marital status is not recognized as a class that deserves heightened scrutiny.[206] Under this standard, the classification scheme must be "rationally related to a legitimate state interest."[207] The burden of proof lies with the challenger, and the presumption he must overcome is significant: statutes under rational basis review are rarely overturned because legislative decision makers are given great deference.[208]

The unmarried father looking to challenge a statutory scheme that creates a presumption of joint legal custody in divorcing par-

204. *Id.* at 542.

205. For example, a statute could distinguish between alleged parents and acknowledged parents.

206. *See* CHEMERINSKY, *supra* note 94, § 9.7, at 782. The only categories that automatically receive heightened levels of scrutiny are race, national origin, gender, alienage, or legitimacy. *Id.* R

207. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

208. *See City of Cleburne*, 473 U.S. at 440; CHEMERINSKY, *supra* note 94, § 9.2.1, at 678. *But see* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 966 (Mass. 2004) (acknowledging that the state legislature is owed "great deference . . . to decide social and policy issues" but reserving for the judiciary questions of constitutional law). Although it is possible for a facially neutral statutory scheme to receive heightened scrutiny, there are significant evidentiary hurdles to overcome. In *Personnel Administrator of Massachusetts v. Feeney*, the Supreme Court required the challenger to prove both discriminatory impact and discriminatory intent in order to for the Court to apply heightened scrutiny to a gender neutral statute. 442 U.S. 256, 274 (1979). The statute in *Feeney* gave preference to qualified veterans (versus nonveterans) for state civil service positions. *Id.* at 259, 263. There was an extremely apparent disparate impact: over ninety-eight percent of veterans in Massachusetts were male. *Id.* at 270. However, to prove discriminatory purpose, the statute must have been enacted "because of," and not simply "in spite of," a desire to harm. *Id.* at 279. Absent proof that the legislature was driven by a gender-based discriminatory purpose in drafting the statute, the Supreme Court upheld the statute. *Id.* at 281. Although the question of whether unmarried fathers are a suspect class subject to intentional discrimination is beyond the scope of this Note, see McNeely, *supra* note 20, at 942-45 for a discussion of this issue as applied to a facially neutral child custody statute. R R

ents, with no such presumption in unmarried parents, faces hurdles similar to those faced by the unwed father challenging the gender-based statutory scheme.[209] Primarily, the unwed father will need to establish that he is similarly situated to the divorcing father and that there is no rational justification for treating the two classes of fathers differently. This argument needs to address the marital-status distinction made in *Quilloin*.[210]

As with the gender-based classification challenge, the unwed father will be best equipped to challenge the statute if he legally asserts his paternity. The argument would rest on the putative father's acceptance of responsibility to care for and financially support his child, in much the same way the divorcing father once did when he entered into marriage. With this legal status secured, the unwed father can distinguish himself from the putative father in *Quilloin*, who ultimately failed to convince the Supreme Court that he should have been treated equally with divorcing fathers.[211] By highlighting the importance of the divorcing father's legal acceptance of responsibility for his children,[212] the *Quilloin* Court seemed to suggest that the putative father who also accepts responsibility for his child by legally acknowledging his paternity may then be treated under the same standard as the divorcing father.

Although an unmarried father may convince a court that he should be recognized as the divorcing father's equal,[213] he faces the higher constitutional hurdle imposed by the lower standard of re-

209. *See supra* Part VI.A.1.

210. Quilloin v. Walcott, 434 U.S. 246, 256 (1978).

211. *Id.* This distinction would be critical, as the Court in *Quilloin* declared that the "[appellant father]'s interests [were] readily distinguishable from those of a separated or divorced father." *Id.*

212. *Id.* ("[E]ven a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of [his] marriage."). Of course, there is an argument to be made that some marriages end shortly after they begin, and some of these short-term marriages result in separations before the child is born, placing those fathers on what would seem to be identical footing as the putative father looking to assert his rights when his nonmarital child is born. *See* Brief of the Appellant at 19, 20, Quilloin v. Walcott, 434 U.S. 246 (1978) (No. 76-6372), 1977 WL 189165, at *19, 20 (comparing unmarried fathers to divorcing fathers from short-term marriages).

213. Though differences in demographics, conflict level, and nonresidential involvement exist between unmarried and divorcing fathers, there are similarities. *See* Glendessa M. Insabella et al., *Individual and Coparenting Differences Between Divorcing and Unmarried Fathers*, 41 FAM. CT. REV. 290, 301 (2003) (finding group similarities between unmarried and divorcing fathers in terms of the father's mental health, the father-child relationship's susceptibility to negative forces, and the father's payment of child support).

view. Put another way, rationality review presumes the statute is constitutional and therefore places the burden of proof on the challenger "to negative every conceivable basis which might support" the statutory classification.[214] Although the constitutional challenge to a statute that provides a joint legal custody presumption only for divorcing parents may seem like a futile battle, there are strong policy reasons for state legislatures to seriously consider joint legal custody presumptions.

B. *Custody Statutes and State Policy*

Custody statutes reflect a state legislature's policy decision with respect to what is in the best interest of the child. The substantial split among the states[215] signifies the difficulty and disagreement inherent in choosing the best policy for decision-making and residential arrangements for children postdivorce or postseparation. However, since the mid-1970s, the general trend has been toward joint custody awards, preferences, and presumptions.[216] Joint legal custody especially has become a common outcome for parents after divorce.[217] This trend represents the recognition that, when parents can work together, a joint custody arrangement of some kind is best for the child.[218] Unfortunately, the trend falls far short of universal acceptance because many states do not recognize the potential benefits of carefully crafted joint legal custody presumptions. These state legislatures should take a closer look at the benefits of encouraging joint legal custody, especially for unmarried parents.

Joint legal custody has been shown in the context of divorce to increase a father's involvement with his child, including parenting

214. *See* Nguyen v. INS, 533 U.S. 53, 75 (2001) (O'Connor, J., dissenting) (quoting Heller v. Doe, 509 U.S. 312, 320-21 (1993)).

215. *See supra* Part V.

216. *See* CLARK, *supra* note 22, § 19.5, at 815 (noting that "[j]oint custody has become a significant option for trial courts in custody cases during the years since 1975"); ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 46 (2004) ("[I]n the late 1970s and the early 1980s [courts began] to award joint custody even over the opposition of one or both parents."). R

217. Christy M. Buchanan & Parissa L. Jahromi, *A Psychological Perspective on Shared Custody Arrangements*, 43 WAKE FOREST L. REV. 419, 422 (2008).

218. DEBORAH ANNA LUEPNITZ, CHILD CUSTODY: A STUDY OF FAMILIES AFTER DIVORCE 150 (1982) (noting that "joint custody at its best is superior to single-parent custody at *its* best").

time and overnights.[219] Subsequent research suggests the same outcome for unwed fathers.[220] Given the well-established importance of a father in his child's life,[221] law makers should seriously look at the recent research that supports a greater role for unwed fathers in their children's lives.

Further, there is a recognized interest in getting more putative fathers to legally recognize their fatherhood and accept responsibility for their children.[222] As more fathers step forward, more child support becomes available and more children may receive greater financial support.[223] Children born out of wedlock are especially in need of this additional financial support, for data show that

219. Chien-Chung Huang et al., *Child Support Enforcement, Joint Legal Custody, and Parental Involvement*, SOC. SERV. REV., June 2003, at 255, 275; Judith A. Seltzer, *Father by Law: Effects of Joint Legal Custody on Nonresident Fathers' Involvement with Children*, 35 DEMOGRAPHY 135, 141-44 (1998). The Seltzer study controlled for differences in the quality of family relationships and concluded that these differences "[did] not explain the positive association between joint legal custody and paternal involvement after divorce." *Id.* at 144.

220. Judith A. Seltzer, *Families Formed Outside of Marriage*, 62 J. MARRIAGE & FAM. 1247, 1262 (2000) ("[B]oth joint legal custody and paternity establishment may increase fathers' involvement with children.").

221. McNeely, *supra* note 20, at 921-22 (reviewing data indicating "that children without fathers are more likely to suffer increased psychological, educational, behavioral, and health disorders, and our society is more likely to suffer increased crime and violence"); *see also* Ferreiro, *supra* note 8, at 421 (noting several studies that support the positive role a father's involvement has in his child's life); Marsha Klein Pruett et al., *The Hand that Rocks the Cradle: Maternal Gatekeeping After Divorce*, 27 PACE L. REV. 709, 716 (2007) (noting that "[t]he father-child relationship is salient because of the consistent finding that children with active, involved fathers fare better emotionally, behaviorally, and cognitively"). A recent British research study found that the more a father was involved with his child, the higher the child's IQ would be at the age of eleven. Daniel Nettle, *Why Do Some Dads Get More Involved than Others? Evidence from a Large British Cohort*, 29 EVOLUTION & HUM. BEHAV. 416, 416, 420-21 (2008). R R

222. Seltzer, *supra* note 220, at 1262 ("Increases in paternity establishment reflect federal emphasis on the need for legal paternity establishment as a first step in assigning child support orders and collecting formal child support on behalf of children born outside of marriage."). R

223. *See, e.g.*, DIANE N. LYE, REPORT TO THE WASHINGTON STATE GENDER AND JUSTICE COMMISSION AND DOMESTIC RELATIONS COMMISSION 4-19 (1999). Dr. Lye reports,

> Virtually every researcher who has studied the issue reports that more frequent child-nonresidential parent contact is associated with improved child support compliance. Fathers who see their children more often and are active participants in their lives make child support payments more frequently and are more likely to pay the full amount than fathers who have little or no contact with their children.

Id.; *see also* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 275, 286 (1992); Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393, 393, 423 (1998); Melissa A. Tracy, *The Equally Shared Parenting Time Presumption—A*

nonmarital children are more likely to be economically disadvantaged.[224] It is certainly a possibility that more fathers will be interested in establishing paternity if there are some legal rights, as well as significant parental responsibilities, that come with the financial obligation.[225] Knowing that he has a legal right to be involved in his child's life, the unmarried father may then present himself to the mother, or to the court, voluntarily and at an earlier stage in the child's life.

Finally, legislative endorsements of joint legal custody also result in more divorcing parents voluntarily choosing joint legal custody as a parenting option.[226] Because several studies support this outcome,[227] it is reasonable to believe that joint custody legislation would have a similar effect with never-married parents.

At the other end of the spectrum, presumptions of sole legal (or physical) custody in favor of the unwed mother provide her with leverage that can ultimately reduce a father's involvement with his child. Often, to overcome the presumption, an unwed father must first demonstrate shared responsibilities and effective communication before even getting to the best interest of the child analysis.[228] As a result, if a father suspects that he might not overcome that initial hurdle in a contested dispute, he may settle for fewer parental rights in order to forgo protracted and potentially unsuccessful litigation.[229] An unwed father may be even less likely to raise a valid challenge considering the perception that courts tend to favor mothers over fathers.[230]

Critics of joint custody argue that joint custody arrangements are harmful to the children, especially in hostile relationships.

Cure-All or a Quagmire for Tennessee Child Custody Law?, 38 U. MEM. L. REV. 153, 174, 181 (2007).

224. *See* Marcia J. Carlson et al., *Coparenting & Nonresident Fathers' Involvement with Young Children After a Nonmarital Birth*, 45 DEMOGRAPHY 461, 462 (2008) (citing studies).

225. *Cf.* Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 984-85 (2005) (discussing the positive effect a joint legal custody presumption would have on divorcing fathers and noting that "[f]athers who believe they can play important roles and influence their children's lives are more likely to be involved in their upbringing").

226. Seltzer, *supra* note 219, at 140. R

227. *See* Huang et al., *supra* note 219, at 256. R

228. *See, e.g.*, MASS. GEN. LAWS ch. 209C, § 10(a) (2008).

229. *See* 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, 390 (2009).

230. This perception becomes elevated in states that articulate a pro-mother policy in their paternity statutes.

However, the evidence does not bear out such a hypothesis in divorcing parents.[231] Although the data are lacking with respect to unmarried parents, there is no evidence showing that joint legal custody would result in negative outcomes for nonmarital children.

C. *The Massachusetts Custody Statutes*

The Commonwealth of Massachusetts presents the perfect storm for an equal rights challenge of a maternal legal custody presumption. The Massachusetts custody statute for children born out of wedlock contains a clear gender-based distinction by providing that the mother, prior to *and after* acknowledgement or adjudication of paternity and until further order of the court, will retain sole custody of the nonmarital child.[232] Massachusetts has also adopted an equal rights amendment, which commands gender "[e]quality under the law."[233] As a result, the nonmarital custody statute's facial gender-based distinction is subject to strict judicial scrutiny in the Commonwealth of Massachusetts and should be considered unconstitutional.[234]

In *contested* custody disputes involving nonmarital children, the Massachusetts custody statute creates a rebuttable presumption that physical *and* legal custody of the child vests at birth and thereafter remains solely with the mother, unless and until the putative father (1) is legally recognized as the biological father of the child, (2) can establish that both he and the mother shared responsibility for the child prior to the litigation, and (3) can prove that he and the mother can effectively communicate about the child's best interests.[235] This gender-based distinction is clearly articulated in the language of the statute:

---

231. *See* Buchanan & Jahromi, *supra* note 217, at 424. These authors caution that evidence suggesting "that joint legal and joint physical custody are associated with aspects of relationships and parenting that tend to predict positive outcomes for children" comes from studies where parents were likely to be more cooperative with each other. *Id.* at 425. However, "there is little evidence that sharing custody either in the legal or the physical sense leads to increased conflict," *id.* at 424, therefore suggesting there is more to gain than there is to lose by creating a rebuttable presumption of joint legal custody. *See id.* at 439 ("[T]here appear to be potential benefits of and little harm from presumptions for joint *legal* custody."). R

232. MASS. GEN. LAWS ch. 209C, § 10(b).

233. MASS. CONST. art. I, *amended by* MASS. CONST. art. CVI.

234. *Cf.* CLARK, *supra* note 22, § 19.4, at 802 (noting that states that have adopted an equal rights amendment have found the tender-years doctrine unconstitutional). R

235. MASS. GEN. LAWS ch. 209C, § 10(a), (b). The burden this imposes on the unwed father is almost insurmountable: the mere fact that the mother contests any or-

> Prior to or in the absence of an adjudication or voluntary acknowledgment of paternity, *the mother shall have custody* of a child born out of wedlock. In the absence of an order or judgment of a probate and family court relative to custody, *the mother shall continue to have custody* of a child after an adjudication of paternity or voluntary acknowledgment of parentage.[236]

For gender-based statutory distinctions, the Massachusetts Constitution requires judicial scrutiny of the highest order.[237]

In 1976, article 106 of the Amendments to the Constitution was approved to amend article 1 of the Massachusetts Declaration of Rights to read,

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. *Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin*.[238]

These two sentences, known as the Equal Rights Amendment ("ERA"), have been understood to command an equal protection requirement stricter than that imposed by the Fourteenth Amend-

---

der of joint custody can support an argument that the parties cannot effectively communicate. This maternal control is sometimes categorized as "maternal gatekeeping." Pruett et al., *supra* note 221, at 712 (defining restrictive or strict maternal gatekeeping as "the beliefs and behaviors that inhibit a collaborative effort between fathers and mothers by limiting men's opportunity/ability to actively care for and rear their children"). In the context of divorce, **R**

> [i]t is theorized that strict gatekeeping may result in less involvement by the nonresidential parent and feelings of insecurity in children regarding their relationship with that parent. . . .
>
> Results from the few studies of gatekeeping with divorced populations converge on findings that mothers' support is key to father involvement after divorce, and that his non-residential status along with her perceptions of his competence lead to more restrictive maternal gatekeeping.

Id. at 717 (footnote omitted). The Massachusetts statute for children born out of wedlock could arguably be considered an enabling statute for maternal gatekeeping.

236. MASS. GEN. LAWS ch. 209C, § 10(b) (emphasis added).

237. Opinion of the Justices to the House of Representatives, 371 N.E.2d 426, 427 (Mass. 1977).

238. MASS. CONST. art. I (emphasis added), *amended by* MASS. CONST. art. CVI; *accord* Attorney Gen. v. Mass. Interscholastic Athletic Ass'n, 393 N.E.2d 284, 286 n.4 (Mass. 1979); Jes Kraus, *Monkey See, Monkey Do: On* Baker*,* Goodridge*, and the Need for Consistency in Same-Sex Alternatives to Marriage*, 26 VT. L. REV. 959, 967 n.55 (2002).

ment.[239] The Commonwealth's freedom to provide a broader net of protection is fundamental to the governing structure of our nation[240] and ultimately commands that gender-based statutory classification be subject to strict judicial scrutiny.[241] Under this standard of review, the gender classification "will be upheld only if a compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose."[242] This standard of review mimics the strict scrutiny language applied to racial classifications under the United States Constitution[243] and was so intended.[244]

Applied to the nonmarital child custody statute, it would appear that the gender classifications should not stand.[245] At the very least, the provision mandating that the unwed mother "shall continue to have custody,"[246] even after the father is legally recognized, should be subject to revision. Once the father has been identified and legally recognized, his decision-making rights should be equal

239. Lowell v. Kowalski, 405 N.E.2d 135, 138 (1980) ("[T]he requirements of the Equal Rights Amendment (ERA) to the Massachusetts Constitution are more stringent than the Fourteenth Amendment equal protection requirements."); *Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d at 291 ("We have held under ERA that classifications on the basis of sex are subject to a degree of constitutional scrutiny 'at least as strict as the scrutiny required by the Fourteenth Amendment for racial classifications.'" (quoting Commonwealth v. King, 372 N.E.2d 196 (Mass. 1977))); Risa E. Kaufman, *State ERAS in the New Era: Securing Poor Women's Equality by Eliminating Reproductive-Based Discrimination*, 24 HARV. WOMEN'S L.J. 191, 210 n.93 (2001) ("The ERA's protection against sex-based distinctions is consistent with other provisions in the Massachusetts Constitution that provide greater protections for individuals than provided for by the U.S. Constitution."); *cf.* Goodridge v. Dep't Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003) ("The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.").

240. *Goodridge*, 798 N.E.2d at 959.

241. *Lowell*, 405 N.E.2d at 139 ("A statutory classification based on sex is subject to strict judicial scrutiny under the State ERA . . . .").

242. *Id.*; *accord Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring); Opinion of the Justices to the House of Representatives, 371 N.E.2d 426, 427 (1977).

243. *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (stating that strict scrutiny analysis requires that the means be "narrowly tailored measures that further compelling governmental interests" (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)) (internal quotation marks omitted)).

244. *See* Kaufman, *supra* note 239, at 210. R

245. *See* CLARK, *supra* note 22, § 4.5, at 198. "It would . . . seem correct to say R that in those states which have adopted a state Equal Rights Amendment there could not constitutionally be a preference given to the mother over the father of the illegitimate child with respect to custody." *Id.* (footnote omitted). Other states operating under an Equal Rights Amendment have concluded likewise. *See, e.g.*, People *ex rel.* Irby v. Dubois, 354 N.E.2d 562, 565-66 (Ill. Ct. App. 1976).

246. MASS. GEN. LAWS ch. 209C, § 10(b) (2008).

to those of the child's mother.[247] Further, by not distinguishing between physical or legal custody, the statute is not narrowly drawn to account for the myriad of circumstances that custody disputes frequently present. Similarly, by grouping, and equally burdening, all putative and recognized unwed fathers together, the statute fails to address the spectrum of fathers that are looking for contact with their children. Finally, by drawing a distinction that reflects "ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage," and outside it, the statute must be examined "in light of the unequivocal language of art. 1, in order to ensure that the governmental conduct challenged here conforms to the supreme charter of [the Commonwealth of Massachusetts]."[248]

The challenge should not end there. Divorcing parents in Massachusetts are granted temporary joint legal custody of the marital child.[249] All of the same policy considerations discussed earlier under the federal Constitution[250] support the same argument that joint legal custody is a viable solution for unmarried parents as well as divorcing parents. Further, a rationality review that "is not 'toothless'"[251] supports the argument that such a statutory scheme should be scrutinized with something greater than sweeping deference.

CONCLUSION

When a child is conceived, nature dictates that a biological mother and father play some part in the child's creation. But when that child is conceived and born out of wedlock, the laws of several states, including Massachusetts, distinguish the rights of the mother and father based simply on the sex of the parent. Even if the father has, from the moment of his awareness of the impending birth of his child, expended every effort to be a part of the pregnancy, birth, and rearing of the child, unless the mother is cooperative, the un-

247. *See supra* Part VI.A.1.

248. Goodridge v. Dep't Pub. Health, 798 N.E.2d 941, 973 (Mass. 2003) (Greaney, J., concurring).

249. MASS. GEN. LAWS ch. 208, § 31.

250. *See supra* Part VI.B.

251. *Goodridge*, 798 N.E.2d at 960 n.20 (quoting Murphy v. Comm'r of the Dep't of Indus. Accidents, 612 N.E.2d 1149 (Mass. 1993)). Rationality review in Massachusetts "requires that 'an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.'" *Id.* at 960. (quoting English v. New Eng. Med. Ctr., 541 N.E.2d 329 (Mass. 1989)).

wed father finds himself at a significant—and unconstitutional—disadvantage. Similarly, although a father may have been in a long-term relationship with the mother of the child and may have a substantial relationship with his son or daughter, a vindictive mother may control the outcome of a custodial decision under the laws of Massachusetts.

The custody scheme in Massachusetts needs to be reviewed and revised to recognize what many other states have already observed: that although there may never have been the legal commitment of marriage, there still remains a constitutional mandate that requires the state to treat both unmarried parents with an equal hand when it comes to evaluating a joint legal custody plan.

*Bernardo Cuadra**

* J.D., Western New England College School of Law, 2010; Managing Editor, *Western New England Law Review*. Thank you to my family for all your support. And thank you to my son, Dillon, to whom this Note is dedicated and to whom I owe everything.

APPENDIX—JOINT CUSTODY STATUTES

Alabama: ALA. CODE § 30-3-152(a) (LexisNexis 1998) ("The court shall in every case consider joint custody but may award any form of custody which is determined to be in the best interest of the child."); *id.* § 30-3-152(b) ("The court may order a form of joint custody without the consent of both parents, when it is in the best interest of the child."); *id.* § 30-3-152(c) ("If both parents request joint custody, the presumption is that joint custody is in the best interest of the child."); DuBois v. DuBois, 714 So. 2d 308, 309 (Ala. Civ. App. 1998) (holding that joint custody is not presumed when both parties do not agree). No presumption in favor of either parent arises during an initial custody determination, regardless of marital status. T.T.W. v. V.A., 868 So. 2d 445, 449 (Ala. Civ. App. 2003) (unwed parents); Nye v. Nye, 785 So. 2d 1147, 1148-49 (Ala. Civ. App. 2000) (divorced parents). However, until an unmarried father has legitimated his child, there is a presumption of awarding custody of the nonmarital child to the mother. B.E.B. v. H.M., 822 So. 2d 429, 430-31 (Ala. Civ. App. 2001). Note that the father's acknowledgment of his child is not enough. *Id.*

Alaska: ALASKA STAT. § 25.20.060(b) (2008) ("Neither parent, regardless of the question of the child's legitimacy, is entitled to preference in the awarding of custody."); *id.* § 25.20.060(c) ("The court may award shared custody to both parents if shared custody is determined by the court to be in the best interests of the child."). Alaska has a preference for joint legal custody, but the preference does not apply if the parents cannot communicate or cooperate. Jaymont v. Skillings-Donat, 216 P.3d 534, 540 (Alaska 2009); Farrell v. Farrell, 819 P.2d 896, 898 n.1, 899 (Alaska 1991) (quoting session laws). This preference appears to afford the trial court authority to award joint legal custody even when one parent objects. Parks v. Parks, 214 P.3d 295, 303 (Alaska 2009) (sustaining award of joint legal custody over wife's challenge); *see also* Spohnholz v. Johnson, No. S-12529, 2007 WL 2685216, at *2 (Alaska Sept. 12, 2007) (noting that the "trial court relied on the legislative preference for joint legal custody" and sustaining joint custody award over unwed mother's challenge).

Arizona: ARIZ. REV. STAT. ANN. § 25-403.01(A) (2007) ("In awarding child custody, the court may order sole custody or joint custody. This section does not create a presumption in favor of one custody arrangement over another. The court in determining custody shall not prefer a parent as custodian because of that parent's

sex."); *id.* § 25-803(D) ("In any case in which paternity is established the parent with whom the child has resided for the greater part of the last six months shall have legal custody unless otherwise ordered by the court."). The custody provisions apply to unmarried parents. *See* Buencamino v. Noftsinger, 221 P.3d 41, 42 (Ariz. Ct. App. 2009) (noting that the lower court properly awarded joint custody to unmarried parents under section 25.403.01). The *Buencamino* court addressed the joint custody issue in an unpublished decision. Buencamino v. Noftsinger, No. 1 CA-CV 08-0374, 2009 WL 4264348 (Ariz. Ct. App. Nov. 27, 2009).

Arkansas: ARK. CODE ANN. § 9-13-101(a)(1)(A)(i) (2009) ("In an action for divorce, the award of custody of a child of the marriage shall be made without regard to the sex of a parent but solely in accordance with the welfare and best interest of the child."); Gray v. Gray, 239 S.W.3d 26, 29 (Ark. Ct. App. 2006) ("Joint custody or equally divided custody of minor children is not favored in Arkansas unless circumstances clearly warrant such action."). Unmarried mothers have a greater right to custody of the nonmarital child than the unmarried father. ARK. CODE ANN. § 9-10-113(a) ("When a child is born to an unmarried woman, legal custody of that child shall be in the woman giving birth to the child until the child reaches eighteen (18) years of age unless a court of competent jurisdiction enters an order placing the child in the custody of another party."); Thomas v. Avant, 260 S.W.3d 266, 272-73 (Ark. 2007).

California: CAL. FAM. CODE § 3021 (West 2004) ("This part applies in any of the following: (a) A proceeding for dissolution of marriage. . . . (f) A proceeding to determine physical or legal custody or visitation in an action pursuant to the Uniform Parentage Act . . . ."); *id.* § 3040(a) ("In making an order granting custody to either parent, the court . . . shall not prefer a parent as custodian because of that parent's sex."); *id.* § 3040(b) ("This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child."); *id.* § 3080 ("There is a presumption . . . that joint custody is in the best interest of a minor child . . . where the parents have agreed to joint custody . . . .").

Colorado: COLO. REV. STAT. ANN. § 14-10-124(1.5)(a) (West Supp. 2009) ("The court, upon the motion of either party or its own motion, may make provisions for parenting time that the court finds are in the child's best interests . . . ."); *id.* § 14-10-124(1.5)(b) ("The

court, upon the motion of either party or its own motion, shall allocate the decision-making responsibilities between the parties based upon the best interests of the child. In determining decision-making responsibility, the court may allocate the decision-making responsibility with respect to each issue affecting the child mutually between both parties or individually to one or the other party or any combination thereof."); *id.* § 14-10-124(3) ("In determining parenting time or decision-making responsibilities, the court shall not presume that any person is better able to serve the best interests of the child because of that person's sex."). The custody provisions apply to unmarried parents. *See* N.A.H. v. S.L.S., 9 P.3d 354, 363 (Colo. 2000) ("Colorado law also directs trial judges to return to the best interests of the child standard after paternity has been established, when the court resolves issues of parenting time and decision-making responsibilities."); *In re* A.D., No. 09CA0756, 2010 WL 1238841, at *2 (Colo. Ct. App. Apr. 1, 2010) (noting lower court's application of section 14-10-124(1.5) in paternity suit).

Connecticut: CONN. GEN. STAT. ANN. § 46b-56(a) (West 2009) ("[T]he court may assign parental responsibility for raising the child to the parents jointly, or may award custody to either parent . . . ."); *id.* § 46b-56a(b) ("There shall be a presumption . . . that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody . . . ."). The custody provisions apply to unmarried parents. *See id.* § 46b-61 (applying custody provisions "[i]n all cases in which the parents of a minor child live separately"); Grynkewich v. McGinley, 490 A.2d 534, 535 n.2 (Conn. App. Ct. 1985) (applying section 46b-61 to custody dispute between unmarried parents); *see also* Hurtado v. Hurtado, 541 A.2d 873, 876 (Conn. App. Ct. 1988) ("[T]here is no presumption in favor of the mother or the father as a custodial parent . . . .").

Delaware: DEL. CODE ANN. tit. 13, § 701(a) (2009) ("Where the parents live apart, the Court may award the custody of their minor child to either of them and neither shall benefit from any presumption of being better suited for such award."); *id.* § 722(b) ("The Court shall not presume that a parent, because of his or her sex, is better qualified than the other parent to act as a joint or sole legal custodian . . . ."); *see also* Roe v. Stansell, 1998 WL 665590, at *2-3 (Del. Fam. Ct. May 4, 1998) (applying sections 701 and 722 to unmarried parents). In Delaware, parents are joint natural custodians. DEL. CODE ANN. tit. 13, § 701(a); *Roe*, 1998 WL 665590, at *2. This joint-custodial arrangement continues absent a court order.

State v. Todd, 509 A.2d 1112, 1114-15 (Del. Super. Ct. 1986). However, once the parties appear in court, there does not appear to be any presumption that such an arrangement should continue. *See* DEL. CODE ANN. tit. 13, § 701(a); D.L.K. v. C.S., 1986 WL 9029, at *1 (Del. Super. Ct. Aug. 5, 1986) ("Title 13 evidences no presumption in favor of joint custody.").

D.C.: D.C. CODE ANN. § 16-914(a)(2) (LexisNexis Supp. 2010) ("There shall be a rebuttable presumption that joint custody is in the best interest of the child or children . . . ."); Ysla v. Lopez, 684 A.2d 775, 780 (D.C. 1996) (applying custody statute to unmarried parents).

Florida: FLA. STAT. ANN. § 61.13(2)(c)(2) (West Supp. 2010) ("The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child."); Decker v. Lyle, 848 So. 2d 501, 503 (Fla. Dist. Ct. App. 2003) (holding custody statute applies to unmarried parents).

Georgia: GA. CODE ANN. § 19-9-3(a)(1) (Supp. 2009) ("In all cases in which the custody of any child is at issue between the parents, there shall be no prima-facie right to the custody of the child in the father or mother. There shall be no presumption in favor of any particular form of custody, legal or physical, nor in favor of either parent."). For unmarried parents, before a child is legitimated, the biological mother maintains outright custody. *Id.* § 19-7-25. However, once the unwed father legitimates the child, he "stands in the same position as any other parent," and section 19-9-3 applies. Braynon v. Hilbert, 621 S.E.2d 529, 530 (Ga. Ct. App. 2005) (citation and internal quotation marks omitted).

Hawaii: HAW. REV. STAT. ANN. § 571-46(a) (LexisNexis Supp. 2009) ("In actions for divorce, separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court . . . may make an order for the custody of the minor child as may seem necessary or proper."); *id.* § 571-46(a)(1) ("Custody should be awarded to either parent or to both parents according to the best interests of the child . . . ."); *id.* § 571-46.1(a) ("Upon the application of either parent, joint custody may be awarded in the discretion of the court.").

Idaho: IDAHO CODE ANN. § 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."). "By its terms, section 32-717 only applies to actions for divorce and to 'children of the marriage,' however, because no specific criteria govern custody orders for non-marital children, we have approved application of section 32-717 to situations where a child's parents are not, or have not been, married." Bartosz v. Jones, 197 P.3d 310, 315 n.1 (Idaho 2008); *see also* State v. Hart, 132 P.3d 1249, 1253-54 (Idaho 2006) (upholding joint custody award to unmarried parents). There does not appear to be an automatic award or preference for the unwed mother.

Illinois: 750 ILL. COMP. STAT. ANN. 5/602(c) (West Supp. 2010) ("[T]he court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child. There shall be no presumption in favor of or against joint custody."); *id.* 5/602.1(b) ("Upon the application of either or both parents, or upon its own motion, the court shall consider an award of joint custody."). Illinois does not carry a presumption in favor of either parent. *See id.* 5/602; *cf. In re* Marriage of Kennedy, 418 N.E.2d 947, 953 (Ill. App. Ct. 1981) ("[T]oday there is no rule requiring that a fit mother be given custody of her child of tender years."). The custody statute applies "[r]egardless of whether the parents have ever been married." Hall v. Hall, 589 N.E.2d 553, 555 (Ill. App. Ct. 1991).

Indiana: IND. CODE ANN. § 31-17-2-8 (West 2008) ("The court shall determine custody and enter a custody order in accordance with the best interests of the child."); *id.* § 31-17-2-13 ("The court may award legal custody of a child jointly if the court finds that an award of joint legal custody would be in the best interest of the child."). For divorcing parents, "[i]n determining the best interests of the child, there is no presumption favoring either parent." *Id.* § 31-17-2-8. For unmarried parents, see *id.* § 31-14-13-2.3(a) ("In a proceeding to which this chapter applies, the court may award legal custody of a child jointly if the court finds that an award of joint legal custody would be in the best interest of the child."). As of this printing, an unmarried father's signature on a paternity affidavit conferred sole legal custody on the unmarried mother. IND. CODE ANN. § 16-37-2-2.1 (West 2007) ("[I]f a paternity affidavit is executed under this section, the child's mother has sole legal custody of the child unless another custody determination is made by a court in a proceeding under [section] 31-14."). Effective July 1, 2010, paternity affidavits afford unmarried parents the option of agreeing to

joint legal custody; absent agreement, however, the unmarried mother will have sole legal custody until further order of the court. Act of Mar. 21, 2010, 2010 Ind. ALS 25 (LEXIS). Once a court makes an order of custody to unmarried parents, no presumption in favor of either parent applies. IND. CODE ANN. § 31-14-13-2.

Iowa: IOWA CODE ANN. § 598.41(1)(a) (West Supp. 2010) ("The court may provide for joint custody of the child by the parties."); *id.* § 598.41(2)(a) ("On the application of either parent, the court shall consider granting joint custody in cases where the parents do not agree to joint custody."). Although there is no presumption or default of joint legal custody, Iowa law provides both parents with equal access to child's records. *Id.* § 598.41(1)(e) ("Unless otherwise ordered by the court in the custody decree, both parents shall have legal access to information concerning the child, including but not limited to medical, educational and law enforcement records."). "The criteria governing custody decisions are the same regardless of whether the parties are dissolving their marriage or are unwed." Yarolem v. Ledford, 529 N.W.2d 297, 298 (Iowa Ct. App. 1994); *see also In re* Rhyan, 756 N.W.2d 710, No. 92/06-1490, 2008 WL 4472300, at *2 (Iowa Aug. 15, 2008) (unpublished table decision) (approving lower court's custody award to unwed parents under section 598.41). In custody disputes, "[t]here is no presumption in favor of the mother or the father." *In re* Marriage of Kunkel, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996); *see also Yarolem*, 529 N.W.2d at 298.

Kansas: KAN. STAT. ANN. § 60-1610(a)(4)(A) (2005) (listing joint legal custody as the preferred custodial arrangement); *In re* Marriage of Debenham, 896 P.2d 1098, 1099 (Kan. Ct. App. 1995) (noting that "joint custody is preferred in Kansas"). It appears that this preference applies to unmarried parents as well, although the courts have not made that preference explicit. *See* Yordy v. Osterman, 149 P.3d 874, 875 (Kan. Ct. App. 2007) (applying section 60-1610(a)(4)(A) to unmarried parents); Smith v. Brungardt, 101 P.3d 740, No. 91653, 2004 WL 2848883, at *1 (Kan. Ct. App. 2004) (unpublished table decision) ("Even though the parties were not married, each possess [sic] the same status as a formerly married parent seeking custody in a divorce proceeding."); *cf.* Carty v. Martin, 660 P.2d 540, 543-44 (Kan. 1983) (unwed father has a right to visitation after paternity has been acknowledged or adjudicated).

Kentucky: KY. REV. STAT. ANN. § 403.270(5) (LexisNexis Supp. 2009) ("The court may grant joint custody to the child's parents . . .

if it is in the best interest of the child."). There is no preference for either parent. *Id.* § 403.270(2) ("The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent . . . ."); Squires v. Squires, 854 S.W.2d 765, 768 (Ky. Ct. App. 1993) ("It is . . . clear that neither parent is the preferred custodian . . . ."). There is no preference for joint custody over sole custody. *Squires*, 854 S.W.2d at 768-70. Section 403.270 applies in custody disputes between unmarried parents. *See* Dull v. George, 982 S.W.2d 227, 230 (Ky. Ct. App. 1998) (also noting that "[t]he best interests standard applies equally when the child is born out of wedlock").

Louisiana: LA. CIV. CODE ANN. art. 132 (1999) ("In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly . . . ."); *id.* art. 132 cmt. b (Comments—1993) (noting this provision's intention to strengthen Louisiana's preference for joint custody); LA. CIV. CODE ANN. art. 245 (2007) ("In a proceeding in which custody of an illegitimate child formally acknowledged by both parents is sought by both parents, . . . custody shall be awarded in accordance with [art. 132]."); *see also* D.R.S. v. L.E.K., No. 09-1274, 2010 La. App. LEXIS 343, at *8 (La. Ct. App. Mar. 10, 2010) (noting Louisiana's "presumption in favor of joint custody").

Maine: ME. REV. STAT. ANN. tit. 19-A, § 1653(2)(D) (Supp. 2009) ("The order of the court awarding parental rights and responsibilities must include the following: (1) Allocated parental rights and responsibilities, shared parental rights and responsibilities or sole parental rights and responsibilities . . . ."); *id.* § 1653(2)(E) ("The court may not apply a preference for one parent over the other in determining parental rights and responsibilities because of the parent's gender . . . ."). The parental rights and responsibilities statute applies to unmarried parents. *See* Leonard v. Boardman, 854 A.2d 869, 874 (Me. 2004); Costa v. Vogel, 777 A.2d 827, 828-29 (Me. 2001).

Maryland: MD. CODE ANN., FAM. LAW § 5-203(d)(1) (LexisNexis 2006) ("If the parents live apart, a court may award custody of a minor child to either parent or joint custody to both parents."); *id.* § 5-203(d)(2) ("Neither parent is presumed to have any right to custody that is superior to the right of the other parent."). The joint custody award is just one option for the trial court to consider. *See* Taylor v. Taylor, 508 A.2d 964, 970 (Md. 1986). Maryland courts apply the same joint custody standard to unmarried parents. Bar-

ton v. Hirshberg, 767 A.2d 874, 886-87 (Md. Ct. Spec. App. 2001) (reviewing and applying *Taylor* in custody dispute between unmarried parents).

Massachusetts: MASS. GEN. LAWS ch. 208, § 31 (2008) ("Upon the filing of an action . . . , the parents shall have temporary shared legal custody of any minor child of the marriage . . . ."); *id.* ch. 209C, § 10(b) ("Prior to or in the absence of an adjudication or voluntary acknowledgement of paternity, the mother shall have custody of a child born out of wedlock. In the absence of an order [from the court], the mother shall continue to have custody of a child after an adjudication of paternity or voluntary acknowledgement of parentage.").

Michigan: MICH. COMP. LAWS ANN. § 722.26a(1) (West 2002) ("In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody . . . . In other cases joint custody may be considered by the court."). "[T]here is no statutory presumption in favor of joint custody." Pladars v. Pladars, No. 276052, 2007 WL 2891999, at *2 (Mich. Ct. App. Oct. 4, 2007); *see also* Wellman v. Wellman, 512 N.W.2d 68, 72 (Mich. Ct. App. 1994). The Child Custody Act applies to all custody disputes, including those between unmarried parents. *See* Aichele v. Hodge, 673 N.W.2d 452, 457 (Mich. Ct. App. 2003). There is no preference for mothers to receive custody. Vodvarka v. Grasmeyer, 675 N.W.2d 847, 856 n.15 (Mich. Ct. App. 2003).

Minnesota: MINN. STAT. ANN. § 257.541(2)(a) (West 2007) ("If paternity has been acknowledged [and established] . . . the father's rights of parenting time or custody are determined under sections 518.17 and 518.175."); MINN. STAT. ANN. § 518.17(2) (West Supp. 2010) ("The court shall use a rebuttable presumption that upon request of *either* or both parties, joint legal custody is in the best interests of the child." (emphasis added)).

Mississippi: Mississippi law provides for the possibility of joint custody but does not carry a presumption in favor of joint custody. *See* MISS. CODE ANN. § 93-5-24(2)-(4) (West 2007). There is no maternal custodial presumption. *Id.* § 93-5-24(7). Once an unmarried father establishes paternity, he has the same custody rights as a divorcing father. Brown v. Crum, 30 So. 3d 1254, 1258 (Miss. Ct. App. 2010). Mississippi courts apply the same analysis when making a custody order of a marital or nonmarital child. *See, e.g.*, Williams v. Stockstill, 990 So. 2d 774, 776-78 (Miss. Ct. App. 2008)

(nonmarital child); Mayfield v. Mayfield, 956 So. 2d 337, 341-42 (Miss. Ct. App. 2007) (marital children).

Missouri: Missouri law encourages parents to mutually participate in the raising of their child but does not carry a presumption in favor of joint custody. MO. ANN. STAT. § 452.375(4), (5) (West Supp. 2010); *In re* Marriage of Kroeger-Eberhart v. Eberhart, 254 S.W.3d 38, 47 (Mo. Ct. App. 2007) ("This statute . . . does not create a presumption in favor of joint custody."). Joint custody may be awarded to unmarried parents. *See, e.g.*, L.J.S. v. F.R.S., 247 S.W.3d 921, 925-29 (Mo. Ct. App. 2008) (applying section 452.375 to unmarried parents). There is no preference for either the mother or the father in custody determinations, regardless of marital status. MO. REV. STAT. ANN. § 452.375(8); Edmison *ex rel.* Edmison v. Clarke, 988 S.W.2d 604, 609 n.3 (Mo. Ct. App. 1999) (noting there is no preference for either parent when the child is born out of wedlock).

Montana: MONT. CODE ANN. § 40-4-212(1) (2009) ("The court shall determine the parenting plan in accordance with the best interest of the child."); *id.* § 40-4-234 (providing for parenting plan criteria, including residential arrangements and decision-making authority). Montana has eliminated its statutory presumption in favor of joint custody. Czapranski v. Czpranski, 63 P.3d 499, 507 (Mont. 2003). In paternity actions, custody is determined under the Uniform Parentage Act. MONT. CODE ANN. § 40-6-116(3); Schuman v. Bestrom, 693 P.2d 536, 539 (Mont. 1985). However, when making joint custody determinations for unmarried parents, the court applies the best interest standard under section 40-4-212. *See In re* N.P., 127 P.3d 1035, 1038 (Mont. 2006). Montana does not maintain a custodial presumption in favor of the mother. *Czapranski*, 63 P.3d at 504. However, older decisions held that a court was "required to give the mother custody of a child of tender years only when other things [were] equal." Libra v. Libra, 484 P.2d 748, 753 (Mont. 1971).

Nebraska: NEB. REV. STAT. § 42-364(3) (2008) ("Custody of a minor child may be placed with both parents on a joint legal custody or joint physical custody basis, or both . . . ."). Parenting plans shall address the issues of custody in accordance with section 42-364 and the best interests of the child. *Id.* § 43-2929(1). Joint custody may be granted whether or not the parents agree, as long as the court finds that joint custody is in the best interests of the child. *Id.* § 42-364(3). There is no presumption in favor of joint custody, and, his-

torically, Nebraska has disfavored joint custody arrangements. Spence v. Bush, 703 N.W.2d 606, 610-11 (Neb. Ct. App. 2005); Dormann v. Dormann, 606 N.W.2d 837, 846 (Neb. Ct. App. 2000) (stating that joint custody "will be reserved for only the rarest of cases"). Recently, however, the Nebraska Supreme Court held that when the Parenting Act applies to a custody dispute, the trial court need not make specific findings as to why joint custody is in the child's best interests. State *ex rel.* Amanda M. v. Justin T., 777 N.W.2d 565, 568-69 (Neb. 2010). The Parenting Act applies to both married and unmarried parents. NEB. REV. STAT. § 43-2925; *see Amanda M.*, 777 N.W.2d at 568-71. Note that the mother of a nonmarital child "is initially entitled to automatic custody of the child, [but] the issue must ultimately be resolved on the basis of the fitness of the parents and the best interests of the child." Coleman v. Kahler, 766 N.W.2d 142, 149 (Neb. Ct. App. 2009) (citation and internal quotation marks omitted).

Nevada: NEV. REV. STAT. ANN. § 125.465 (LexisNexis 2004) ("If a court has not made a determination regarding the custody of a child and the parents of the child are married to each other, each parent has joint legal custody of the child until otherwise ordered by a court of competent jurisdiction."); NEV. REV. STAT. ANN. § 125.480(1)-(3) (LexisNexis Supp. 2005) (providing for an award of joint custody in divorce proceedings when in the best interest of the child and establishing a preference for joint custody); NEV. REV. STAT. ANN. § 125.490 (LexisNexis 2004) (establishing a presumption that joint custody is in the best interest of the child when both parents agree); Mosley v. Figliuzzi, 930 P.2d 1110, 1116 (Nev. 1997) (discussing joint custody presumption and preference). For unmarried parents, sole physical custody vests in the unmarried mother, but only until the court enters an order of paternity. NEV. REV. STAT. ANN. § 126.031 (LexisNexis 2004). Once paternity is established, the courts apply the custody standards applicable to divorce proceedings. *See, e.g.*, Rohling v. Martin, No. 49986, 2009 WL 1456528, at *3 & n.1 (Nev. Apr. 13, 2009); *see also* Rico v. Rodriguez, 120 P.3d 812, 816 (Nev. 2005) (applying to unmarried parents the best interests test from divorce statute). There is no indication in the statutory or case law, however, that a presumption in favor of joint legal custody applies once paternity is established.

New Hampshire: N.H. REV. STAT. ANN. § 461-A:3(II) (Supp. 2009) ("In cases where husband and wife or unwed parents are living apart, . . . [a]ll applicable provisions of [section 461-A] . . . shall

apply to such proceedings."); *id.* § 461-A:5 ("[I]n the making of any order relative to decision-making responsibility, there shall be a presumption . . . that joint decision-making responsibility is in the best interest of minor children . . . (II) [u]pon the application of either parent for joint decision-making responsibility . . . .").

New Jersey: N.J. STAT. ANN. § 9:2-4 (West 2002) ("In any proceeding involving the custody of a minor child, the rights of both parents shall be equal and the court shall enter an order which may include: a. Joint custody of a minor child to both parents . . . ."). The New Jersey courts have stated that joint legal custody is the "preferred arrangement," Grover v. Terlaje, 879 A.2d 138, 142 (N.J. Super. Ct. App. Div. 2005), but "a court should analyze both legal custody and physical custody in reaching its conclusion whether joint legal custody is appropriate or not." Jackson v. Hagans, No. FD-07-520-06, 2007 WL 3006499, at *3 (N.J. Super. Ct. App. Div. Oct. 17, 2007). New Jersey has eliminated marital- and gender-based differences in the law of custody determinations. *See* N.J. STAT. ANN. § 9:17-40 ("The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents."); Gubernat v. Deremer, 657 A.2d 856, 865-66 (N.J. 1995) (discussing history of changes in the law and stating that "[t]he Legislature clearly has ended gender-based differences in marital and parental rights"); *see also Grover*, 879 A.2d at 142-43 (discussing application of joint custody and section 9:2-4 to unmarried parents).

New Mexico: N.M. STAT. ANN. § 40-4-9.1(a) (West 2003) ("There shall be a presumption that joint custody is in the best interests of a child in an initial custody determination [between divorcing parents]."). There is no clear statement that the custody statute applies to unmarried parents, and it is presumed, therefore, that this presumption does not apply to them.

New York: N.Y. DOM. REL. LAW § 240(1)(a) (McKinney Supp. 2010) (providing for authority to enter custody orders in all custody proceedings). New York courts award joint custody only when "the parties involved are relatively stable, amicable parents . . . capable of cooperating in making decisions on matters relating to the care and welfare of the children." *In re* McGivney, 748 N.Y.S.2d 794, 795 (App. Div. 2002) (citation and internal quotation marks omitted); *see* Fullam v. Fullam, 835 N.Y.S.2d 455, 456 (App. Div. 2007) (holding that joint legal custody to divorcing parents was in child's best interests); Williams v. Boger, 822 N.Y.S.2d 647, 648 (App. Div. 2006) (noting lower court's award of joint legal custody to unmar-

ried parents with a history of cooperative parenting). New York expresses no preference for either parent. N.Y. DOM. REL. LAW § 240(1)(a) ("In all cases there shall be no prima facie right to the custody of the child in either parent."); Mohen v. Mohen, 862 N.Y.S.2d 75, 77 (App. Div. 2008).

North Carolina: N.C. GEN. STAT. § 50-13.2(a) (2009) ("Joint custody to the parents shall be considered upon the request of either parent."); Hall v. Hall, 655 S.E.2d 901, 907 n.3 (N.C. Ct. App. 2008) ("There is no presumption in favor of joint custody . . . ."). North Carolina has eliminated any preference or presumption for custody in the mother. N.C. GEN. STAT. § 50-13.2(a). ("Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child."); Rosero v. Blake, 581 S.E.2d 41, 50 (N.C. 2003) (noting that the common law presumption that vested custody of a nonmarital child in the mother had been abrogated and holding "that the father's right to custody of his illegitimate child is legally equal to that of the child's mother"). Remarkably, trial judges continue to award custody in overt violation of current law. *See, e.g.*, Greer v. Greer, 624 S.E.2d 423, 428-29 (N.C. Ct. App. 2006) (reversing trial court's custody award for its reliance on its findings that "the law of nature dictates that early in the life of a child, the mother has a distinct advantage in the opportunity to care for that child" (internal quotation marks omitted)).

North Dakota: North Dakota recently updated its custody statute. Although the revisions did not alter North Dakota's approach to custody (no presumption of joint custody, no distinctions between mothers and fathers), the statute now focuses on more cooperative parenting, provides for the option of a court-mandated parenting coordinator, and removes previous distinctions between marital and nonmarital children. N.D. CENT. CODE § 14-09-29(1) (Supp. 2010) ("Between the mother and father, whether married or unmarried, there is no presumption as to whom will better promote the best interests and welfare of the child."); *id.* § 14-09-31(2) ("If the parents cannot agree on an allocation of decisionmaking responsibility, the court shall enter an order allocating decisionmaking responsibility in the best interests of the child."); *id.* § 14-09.2-02 ("[T]he court, upon its own motion or by motion or agreement of the parties, may appoint a parenting coordinator to assist the parties in resolving issues or disputes related to parenting time."); P.A. v. A.H.O., 757 N.W.2d 58, 63 (N.D. 2008) ("Whether or not joint cus-

tody is in the best interests of a child depends on the facts and circumstances of the particular case."); *see also* N.D. CENT. CODE § 14-09-04 (2004) (repealed 2009) ("The father and mother of a legitimate unmarried minor child are entitled equally to its custody . . . ."); *id.* § 14-09-05 (repealed 2009) ("When maternity and paternity of an illegitimate child are positively established, the custody rights must be equal as between mother and father . . . ."); INTERIM JUDICIAL PROCESS COMM., EXCERPT FROM 2009 LEGISLATIVE COUNCIL REPORT, SENATE BILL NO. 2042, S. 61, at 4 (N.D. 2009), *available at* http://www.legis.nd.gov/assembly/61-2009/bill-status/senate/SB2042.PDF ("The committee concluded that the bill draft that would require the court to use a rebuttable presumption that joint custody is in the best interests of the child should not be recommended to the Legislative Council.").

Ohio: OHIO REV. CODE ANN. § 3109.03 (West 2005) ("When husband and wife are living separate and apart from each other, or are divorced, . . . they shall stand upon an equality as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children, so far as parenthood is involved."); OHIO REV. CODE ANN. § 3109.04(A), (B)(1) (West Supp. 2010) (providing for the allocation of sole or shared parenting rights but not for a presumption of either). The Ohio courts have stated that section 3109.03 does not apply to unmarried parents. *See, e.g.*, *In re* Brown, No. 13-08-46, 2009 Ohio App. LEXIS 1840, at *8-9 (Ohio Ct. App. May 11, 2009). Further, Ohio law mandates that "[a]n unmarried female who gives birth to a child is the sole residential parent and legal custodian of the child until a court of competent jurisdiction issues an order designating another person as the residential parent and legal custodian." OHIO REV. CODE ANN. § 3109.042 (West 2005). Both unmarried parents stand on "equal footing" during the initial custody proceeding. *Id.* However, the default custody award to the unmarried mother will not change until further order of the court. *See id.*; Self v. Turner, No. 10-06-07, 2006 WL 3392077, at *3 (Ohio Ct. App. Nov. 27, 2006). Acknowledgement or adjudication of paternity presumably would not effect any change of such a "default status." *See In re* J.S., No. 07CA0035, 2007 WL 4225419, at *3 (Ohio Ct. App. Dec. 3, 2007) (holding that unmarried father could not assume legal custody "solely on the basis of the establishment of paternity"); *Self*, 2006 WL 3392077, at *3.

Oklahoma: OKLA. STAT. ANN. tit. 43, § 112(C)(2) (West Supp. 2010) ("There shall be neither a legal preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody."). Oklahoma recently repealed a statutory provision that provided for automatic custody of a nonmarital child with the unmarried mother. OKLA. STAT. ANN. tit. 10, § 6 (West 2007) (repealed 2009) ("Except as otherwise provided by law, the mother of an unmarried minor child born out of wedlock is entitled to the care, custody, services and earnings and control of such minor."). Prior to its repeal, the statute did not control once "the [unmarried] father and his parental rights [were] in issue," and the court "[had] discretion to award custody to either parent." Dep't Human Servs. *ex rel.* Martin v. Chronister, 945 P.2d 511, 513 & n.2 (Okl. Civ. App. 1997); *see also* Miles v. Young, 818 P.2d 1258, 1262 (Okl. Civ. App. 1991) (holding that unmarried father's compliance with adoption statute resulted in child's being "deemed for all purposes legitimate from the time of birth" (internal quotation marks omitted)).

Oregon: OR. REV. STAT. § 107.105(1)(a) (2007) ("When appropriate, the court shall recognize the value of close contact with both parents and encourage joint parental custody and joint responsibility for the welfare of the children."); *id.* § 107.169(3) ("The court shall not order joint custody, unless both parents agree to the terms and conditions of the order."); *In re* Marriage of Sigler, 889 P.2d 1323, 1326 (Or. Ct. App. 1995) (finding that wife's objection to joint custody was all that was required to satisfy statute). Once paternity is established, "the [unmarried] father shall have the same rights as a father who is or was married to the mother of the child." OR. REV. STAT. § 109.094; *see also id.* § 109.103(1) ("[Unmarried] parents have the same rights and responsibilities regarding the custody . . . [of] their child that married or divorced parents would have, and the provisions of [sections] 107.093 to 107.425 that relate to custody . . . apply to the proceeding."). Although there is no maternal custody award or presumption for nonmarital children, it's likely that the legal custody provision for unmarried parents has that effect. *See id.* § 109.175 ("If paternity of a child born out of wedlock is established . . . the parent with physical custody at the time [proceedings are initiated] . . . [or] at the time of the filing of the voluntary acknowledgment of paternity, has sole legal custody until a court specifically orders otherwise.").

Pennsylvania: 23 PA. CONS. STAT. ANN. § 5303 (West Supp. 2010) (providing for custody awards); 23 PA. CONS. STAT. ANN. § 5304

(West 2001) ("An order for shared custody may be awarded by the court when it is in the best interest of the child . . . ."); Schwarcz v. Schwarcz, 548 A.2d 556, 563 n.16 (Pa. Super. Ct. 1988) (no presumption in favor of shared custody); Commonwealth *ex rel.* Scott v. Martin, 381 A.2d 173, 174 (Pa. Super. Ct. 1977) ("[T]he mother of an illegitimate child does not have a greater right to custody of that child than its natural father."); *see also* Masser v. Miller, 913 A.2d 912, 921 (Pa. Super. Ct. 2006) (applying section 5303 to unmarried parents in modification and removal proceeding).

Rhode Island: R.I. GEN. LAWS § 15-5-16 (2003) (providing for custody of children); Dupre v. Dupre, 857 A.2d 242, 261 (R.I. 2004) ("[T]he trial court should be free to adopt the [custody] arrangement that it determines best promotes the child's interests."). Rhode Island cases do not explore joint custody awards at length, but the decisions show that the court may award joint custody to both married an unmarried parents. Parker v. Williams, 896 A.2d 44, 46-48 (R.I. 2006) (discussing lower court's joint custody award to unmarried parents); Hurley v. Hurley, 610 A.2d 80, 86-87 (R.I. 1992) (upholding joint custody award to married parents); *see also Dupre*, 857 A.2d at 260-61 ("In initial custody and placement determinations, the focus is squarely on the best interests of the child, and the parents come before the court on an equal footing . . . .").

South Carolina: S.C. CODE ANN. § 20-3-160 (1985) (providing for custody awards in divorce proceedings); S.C. CODE ANN. § 63-3-530(A)(42) (2010) ("The family court has exclusive jurisdiction . . . to order joint or divided custody where the court finds it is in the best interests of the child . . . ."). Joint custody awards are generally disfavored in South Carolina. Scott v. Scott, 579 S.E.2d 620, 624 (S.C. 2003) (acknowledging South Carolina's position but upholding joint custody award); *see also* Patel v. Patel, 599 S.E.2d 114, 121 (S.C. 2004) ("[J]oint or divided custody should only be awarded where there are exceptional circumstances."). South Carolina's reluctance to award joint custody seems to be focused on the residential components of joint custody. *See Scott*, 579 S.E.2d at 624; Arnal v. Arnal, 609 S.E.2d 821, 825 (S.C. Ct. App. 2005) (discussing lower court's joint legal custody award to divorcing parents). South Carolina, in 2008, formally abolished the tender years doctrine. S.C. CODE ANN. § 63-15-10 (2010).

South Dakota: The trial court is authorized to enter an order of joint legal custody, which can address residential responsibilities. S.D. CODIFIED LAWS § 25-5-7.1 (2004) (statutory authority for mar-

ried parties); Alexander v. Hamilton, 525 N.W.2d 41, 47 (S.D. 1994) (applying section 25-5-7.1 to unmarried parents). South Dakota does distinguish between married and unmarried parents and provides for default maternal custody awards for nonmarital children. *See* S.D. CODIFIED LAWS § 25-5-7 (Supp. 2009) ("[T]he father and mother of any minor child born in wedlock are equally entitled to the child's custody, service, and earnings."); S.D. CODIFIED LAWS § 25-5-10 (2004) ("The mother of an unmarried minor born out of wedlock is entitled to its custody, services, and earnings subject to the court's right to award custody of the child to either parent . . . ."); *Alexander*, 525 N.W.2d at 47 (noting statute's award of custody of nonmarital child to unmarried mother); *see also* S.D. CODIFIED LAWS § 25-8-46 (2004) ("In all [records of nonmarital children], it shall be sufficient for all purposes to refer to the mother as the parent having the sole custody of the child or to the child as being in the sole custody of the mother . . . ."). Although South Dakota maintains this default maternal custody award, when custody is contested, courts have no preference for mothers or fathers regardless of marital status. *See* Berger v. Van Winsen, 743 N.W.2d 136, 138 (S.D. 2007) ("Between parents adversely claiming custody, neither may be preferred over the other." (citation and internal quotation marks omitted)).

Tennessee: TENN. CODE ANN. § 36-6-101(a)(1) (Supp. 2009) ("[T]he court may . . . award the care, custody and control of such child or children to either of the parties to the suit or to both parties in the instance of joint custody or shared parenting . . . ."); *id.* § 36-6-101(a)(2)(A)(i) ("[N]either a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody is established . . . ."). Tennessee provides for a default maternal custody award for nonmarital children. TENN. CODE ANN. § 36-2-303 (2005) ("Absent an order of custody to the contrary, custody of a child born out of wedlock is with the mother."); Huntzinger v. Parham, No. M2009-00045-COA-R3-CV, 2010 WL 175108, at *5 (Tenn. Ct. App. Jan. 19, 2010); *In re* Audrey S., 182 S.W.3d 838, 872 (Tenn. Ct. App. 2005).

Texas: TEX. FAM. CODE ANN. § 101.024(a) (Vernon 2008) ("'Parent' means the mother, a man presumed to be the father, a man legally determined to be the father, a man who has been adjudicated to be the father by a court of competent jurisdiction, a man who has acknowledged his paternity under applicable law, or an adoptive mother or father."); *id.* § 153.131(b) ("It is a rebuttable

presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child."); TEX. FAM. CODE ANN. § 153.134(a) (Vernon Supp. 2009) ("[T]he court may render an order appointing the parents joint managing conservators . . . .").

Utah: UTAH CODE ANN. § 30-3-10.2(1) (2007) ("The court may order joint legal custody or joint physical custody or both . . . ."). The Utah joint custody statute once provided for a rebuttable presumption in favor of joint legal custody but later repealed that provision. Thronson v. Thronson, 810 P.2d 428, 432 (Utah Ct. App. 1991); *see also* UTAH CODE ANN. § 30-3-10(5) (Supp. 2009) ("This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody or sole custody . . . ."). Although *Thronson* held that parental agreement was a prerequisite to any award of joint legal custody, *Thronson*, 810 P.2d at 433, the current statute does not contain this requirement. *See* UTAH CODE ANN. § 30-3-10.2(1); Act of Mar. 15, 2001, 2001 Ut. ALS 126 (LEXIS). Although the statutory scheme does not explicitly provide for joint custody awards for unmarried parents, it appears that these awards are authorized in practice. *See* UTAH GUIDELINES, ESTABLISHING COURT-ORDERED PATERNITY: A GUIDE FOR UNMARRIED PARENTS 3 (2009), *available at* http://www.utcourts.gov/mediation/cpm/docs/CMP-Paternity-Unmarried_Parents_Guide.pdf; Utah Legal Servs., Domestic Law Handbook, Parentage/Custody, http://www.utahlegalservices.org/public/self-help-webpages/domestic-law-handbook#Parentage (last modified Aug. 10, 2009); *cf.* UTAH CODE ANN. § 78B-15-113 (2008) (stating that once a "tribunal determines that the alleged father is the father, it may . . . order parent-time rights in accordance with" the parenting-time provisions in the divorce statute).

Vermont: Vermont courts will not award joint custody unless both parents agree. VT. STAT. ANN. tit. 15, § 665(a) (2002) ("When the parents cannot agree to divide or share parental rights and responsibilities, the court shall award parental rights and responsibilities primarily or solely to one parent."); Cabot v. Cabot, 697 A.2d 644, 649-51 (Vt. 1997); *see also* VT. STAT. ANN. tit. 15, § 666(a) ("Any agreement between the parents which divides or shares parental rights and responsibilities shall be presumed to be in the best interests of the child."); *see also* Heffernan v. Harbeson, 861 A.2d 1149, 1153 (Vt. 2004) (concluding that section 665(a) applies to parentage actions); Cloutier v. Blowers, 783 A.2d 961, 963 (Vt. 2001) (apply-

ing *Cabot* to custody award of nonmarital child). This restriction, however, is limited to joint decision making, and the court may fashion custody awards that afford each parent a discrete zone of authority in different areas of the child's life. *See* Chase v. Bowen, 945 A.2d 901, 913-15 (Vt. 2008) (upholding lower court's award of legal rights and responsibilities to father and physical rights and responsibilities to mother because the award "[did] not force the parents to share decision-making authority").

Virginia: VA. CODE ANN. § 20-124.2(B) (Supp. 2009) ("In determining custody . . . there shall be no presumption or inference of law in favor of either [parent]. . . . The court may award joint custody or sole custody."); Taylor v. Commonwealth, 537 S.E.2d 592, 595 (Va. 2000) ("[U]pon birth of an illegitimate child, the right of the natural mother to immediate custody is superior.").

Washington: In Washington, custody orders are implemented through parenting plans, which provide for residential and decision-making responsibilities. WASH. REV. CODE ANN. § 26.09.050(1) (West Supp. 2010); *id.* § 26.09.184(5), (6). For mutual decision-making authority, see *id.* § 26.09.184(5)(a) ("The [permanent parenting] plan shall allocate decision-making authority to one or both parties regarding the children's education, health care, and religious upbringing."); *id.* § 26.09.187(2) (identifying factors to consider). The courts will allocate residential and decision-making authority to unmarried parents, although parenting plans are not required. *See* WASH. REV. CODE ANN. § 26.26.130(7) (West 2005) (addressing residential provisions); Dugger v. Lopez, 173 P.3d 967, 970 (Wash. Ct. App. 2007) (noting lower court's award of joint decision making to unmarried parents).

West Virginia: W. VA. CODE ANN. § 48-9-207(b) (LexisNexis 2009) ("If each of the child's legal parents has been exercising a reasonable share of parenting functions for the child, the court shall presume that an allocation of decision-making responsibility to both parents jointly is in the child's best interests."). Section 48-1-232 defines "legal parent" as "an individual defined as a parent, by law, on the basis of biological relationship, presumed biological relationship, legal adoption or other recognized grounds," and presumably includes unwed parents. *Id.* § 48-1-232; *see also* Kessel v. Leavitt, 511 S.E.2d 720, 799 (W. Va. 1998) ("[T]he jurisprudential history of this State indicates that we have abandoned [non-marital] gender preferences and have long recognized the rights of both parents,

mothers and fathers alike, to the custody of their children, provided the parents are fit to have custody . . . .").

Wisconsin: WIS. STAT. ANN. § 767.41(1)(b) (West 2009) (providing that custody statute applies to divorce and paternity proceedings); *id.* § 767.41(2)(am) ("[T]he court shall presume that joint legal custody is in the best interest of the child.").

Wyoming: WYO. STAT. ANN. § 20-2-201(a) (2009) ("In granting a divorce, . . . or upon the establishment of paternity . . . , the court may make by decree or order any disposition of the children that appears most expedient and in the best interests of the children."); *id.* § 20-2-201(d) ("Custody shall be crafted to promote the best interests of the children, and may include any combination of joint, shared or sole custody."). There is no maternal preference rule. *Id.* § 20-2-201(b) ("In any proceeding in which the custody of a child is at issue the court shall not prefer one (1) parent as a custodian solely because of gender."); Donnelly v. Donnelly, 92 P.3d 298, 306 (Wyo. 2004) ("[A] gender based, maternal preference in custody awards is a mistake of law . . . ."). The custody provisions apply to unmarried parents. WYO. STAT. ANN. § 20-2-201(a); *In re* K.R.A., 85 P.3d 432, 439 (Wyo. 2004) (upholding shared custody award of nonmarital child).