NOTE

TOO MANY CHIPS ON THE TABLE: A CALL FOR THE BIFURCATION OF MONEY AND CUSTODY IN DIVORCE

I. INTRODUCTION

Alice and Barry are getting a divorce and have one child, Charlie.[1] During settlement negotiations, Alice has made several reasonable settlement offers, while the financial terms of her husband's offers have been objectively low. After a year of negotiations, Barry tells Alice he is tired of the back and forth and is ready to go to trial. He also tells her he will be seeking full custody. However, he says, she can avoid a lengthy trial and an uncertain outcome if she agrees to waive all claim to the parties' most valuable marital assets. If she is willing to do so, he will agree that Alice can have full custody of Charlie. Throughout the marriage, Alice was the parent who took care of Charlie's needs, while Barry was the "fun parent." She consults with her attorney and confidently states that there is not even a chance her husband can win custody. Though it is unlikely, a chance still exists, despite the fact that she has been the primary caregiver, her attorney tells her. He cannot make Alice any guarantees. She is unwilling to gamble custody of her child, and a trial will cost upwards of sixty thousand dollars in legal fees alone. Alice also makes a third of what Barry does and waiving her rights in the marital assets will severely hurt her. What should Alice do?

The answer is unclear. What is clear, however, is the inequity of bargaining power between these litigants. Alice has fewer financial resources and desperately wants custody of Charlie; Barry has significantly more financial resources than Alice and does not care whether or not he has custody. Some would argue that taking the deal could ultimately produce a fair outcome; the parent who wanted custody will have custody, and they will avoid a lengthy and expensive trial.[2]

1. *See infra* note 108 and accompanying text for the practical inspiration behind the following hypothetical.

2. *See* Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 976 (1979).

However, this type of bargaining is inherently coercive and produces unfair results that prejudice both the needs of the custodial parent and the child.[3]

In the context of divorce, custody and money are often viewed as inseparable.[4] It is argued that these issues are intertwined; that is to say, the determination of one is dependent on the determination of the other.[5] At first blush, this "all-at-once" approach appears to be efficient: because of the same underlying event (i.e., the dissolution of the marriage), divorcing parties are faced with dividing up their finances and their time with their children, so why not address everything at once?[6] There is one unavoidable issue with this approach: with their entire financial lives hanging in the balance, parents begin to see their children as tools to achieve their financial goals.[7] The reality is that by putting money and custody on the table at the same time, children become their parents' bargaining chips, and the children's best interests are sacrificed as a result.[8]

This Note addresses the trading of money for custody in divorce.[9] Part II of this Note presents the history of both divorce law and the best interests of the child standard ("best interests standard") in America.[10] Specifically, it discusses the great power divorcing parties have in settling divorce matters.[11] It further traces the development of the best interests standard, which began as a justification for custody law and ultimately became the foundation of child custody law.[12] Part III of this Note examines the ramifications of deciding custody and finances at the same time, whether it be in settlement negotiations or in litigation.[13] It

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3. *See* Michael Abramowicz & Sarah Abramowicz, *Bifurcating Settlements*, 86 GEO. WASH. L. REV. 376, 391-92 (2018).

4. *See id.* at 413-14; Fox Rothschild LLP, *The Improper Intertwining of Custody and Finances: A Settlement Taboo*, NJ FAM. LEGAL BLOG (Oct. 28, 2013), https://njfamilylaw.foxrothschild.com/2013/10/articles/custody/the-improper-intertwining-of-custody-and-finances-during-the-negotiation-process.

5. *See* Abramowicz & Abramowicz, *supra* note 3, at 413-14.

6. *See id. But see* Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 705, 719 (2000) (discussing skepticism about the efficiency of bifurcation).

7. *See* Abramowicz & Abramowicz, *supra* note 3, at 393-94; Scott Altman, *Lurking in the Shadow*, 68 S. CAL. L. REV. 493, 495-96 (1995); Mnookin & Kornhausert, *supra* note 2, at 968.

8. *See* Abramowicz & Abramowicz, *supra* note 3, at 391-92; Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REFORM 1015, 1024-25 (1985); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1474-75 (1992).

9. *See infra* Parts II–IV.

10. *See infra* Part II.

11. *See infra* Part II.A.

12. *See infra* Part II.B. *See also* Lynn Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 346-47 (2008).

13. *See infra* Part III.

further suggests that there is an inevitable connection between how the court handles divorce matters procedurally and how divorcing parties bargain.[14] Part IV of this Note proposes mandatory bifurcation of divorce matters as a solution to this problem.[15] It ultimately concludes that by dividing the two issues, not only will divorce matters be more quickly and efficiently resolved, but also custody determinations in divorce cases will become focused on promoting the best interests of the child.[16]

II. A HISTORY OF DIVORCE & THE BEST INTERESTS STANDARD

This Part provides a background of both divorce and the best interests standard.[17] Subpart A examines the process by which divorcing parties resolve the issues in divorce matters generally, and it concludes that these parties have an incredible amount of power to resolve these issues without meaningful judicial oversight.[18] Subpart B traces the history of the best interests standard and analyzes the factors courts consider in making custody determinations pursuant to this standard.[19]

A. The Privatization of Divorce

The dissolution of a marriage encompasses several issues, all of which are normally decided in one all-encompassing settlement.[20] There are generally four issues in matrimonial actions: grounds for divorce, child custody, support (both spousal and child), and the division of property (throughout this Note, the division of property and support issues will be referred to collectively as "financials" or "financial issues.").[21] It is estimated that approximately ninety-five percent of divorces settle outside of court[22] and, in most jurisdictions, those

14. *See infra* Part III.B.
15. *See infra* Part IV.
16. *See infra* Part IV.B.
17. *See infra* Part II.A–B.
18. *See infra* Part II.A.
19. *See infra* Part II.B.
20. *See* Mnookin & Kornhausert, *supra* note 2, at 960-66. If a divorce matter is litigated, a court will typically hear all issues at the same time, unless an issue is bifurcated. *See infra* note 91 and accompanying text; *infra* Part IV.A.
21. *See* Mnookin & Kornhausert, *supra* note 2, at 953, 959.
22. Jeff Landers, *Divorcing Women: Is It Best to Litigate or Settle?*, FORBES (May 22, 2014, 9:24 AM), https://www.forbes.com/sites/jefflanders/2014/05/22/divorcing-women-is-it-best-to-litigate-or-settle/#96205b04618c. There are many reasons why parties choose to settle instead of litigating their divorce cases. *See id.* First, it is possible that the parties are genuinely amicable and wish to resolve the issues as quickly and amicably as possible. *See id.* Another issue is that parties may not be willing or able to pay high attorney's fees and, therefore, may be willing to forgo claims in order to save money on attorney's fees. *See id.*; Terin Miller, *How Much Does a Divorce Cost on*

settlements are subject to judicial review.[23] Nonetheless, divorcing parties still maintain a great deal of discretion to decide financials and custody.[24] This is because, although courts must review these agreements, they often "rubberstamp" them without the ability to undertake any deep inquiry into the fairness of its terms.[25] The ability of divorcing parties to dictate the outcomes of their divorces has become known as "private ordering."[26]

Private ordering was not always the norm in divorce.[27] In fact, divorce law did not recognize private ordering as valid and there existed various procedural roadblocks to it until the 1960s.[28] The most significant of these roadblocks was fault-based divorce.[29] Each state proscribed their own "appropriate grounds" for divorce.[30] Thus, a divorce could only be granted if, after judicial inquiry, a judge concluded that a "marital offense" had been committed and divorce was

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Average?, THESTREET, https://www.thestreet.com/personal-finance/education/how-much-does-divorce-cost-14882536 (Apr. 3, 2020, 12:41 PM).

23. *See* Singer, *supra* note 8, at 1474-75.

24. *See id.* at 1549; Mnookin, *supra* note 8, at 1018, 1033. In analyzing the discretion courts have given divorcing parties in determining the outcomes of these issues, Singer has focused on the effects on gender inequality. *See* Singer, *supra* note 8, at 1549. Particularly, she warns:

> The process of parenting may also create or enhance economic and other inequalities between adult family members, particularly mothers and fathers. In light of these disparities, legal rules that grant unfettered discretion to private individuals to structure the process of marital dissolution or that place dissolution-related disputes outside the "shadow of the law" may end up empowering economically stronger family members at the cost of economically weaker ones in much the same way that the legal system's traditional refusal to intervene in the affairs of an ongoing marriage reinforced the power of husbands over wives.

Id. She suggests that the level of privacy given to the institution of marriage by the state contributes to gender inequality as between spouses. *See id.* at 1517-18. Thus, while some private ordering may have benefits in divorce matters, completely unfettered discretion leaves weaker parties in weak positions, unable to advance. *See infra* note 26 and accompanying text; Mnookin, *supra* note 8, at 1027 ("[P]rivate ordering can lead to 'one-sided' outcomes."); Singer, *supra* note 8, at 1549.

25. *See* John Carroll Byrnes, *Custody Reform Needed to Serve Best Interest of Child*, MD. BAR J., July–Aug. 2000, at 48, 51 ("In other words, the reality behind 'settlements' that reduce our case loads may be that custody is a bargaining chip and its use as such is judicially rubber-stamped without an independent judicial analysis of the best interest of the child . . . ."); Singer, *supra* note 8, at 1475.

26. Mnookin & Kornhauser, *supra* note 2, at 952. Mnookin & Kornhauser define "private ordering" as the "process by which parties to a marriage are empowered to create their own legally enforceable commitments." *Id.* at 950. They further recognize that divorcing parties in the United States often do not go to a court until they have agreed on terms, signed an agreement, and need the "rubber stamp." *Id.* at 951.

27. *See id.* at 952-54.

28. Singer, *supra* note 8, at 1470; *see also* Mnookin & Kornhauser, *supra* note 2, at 953.

29. Mnookin & Kornhauser, *supra* note 2, at 953; Singer, *supra* note 8, at 1470-71.

30. *See* Mnookin & Kornhauser, *supra* note 2, at 953; Singer, *supra* note 8, at 1470-71.

warranted.[31] The shift from fault-based divorce to "no-fault" divorce[32] was led by California, the first state to eliminate the fault-based divorce system.[33] Today, there is no American jurisdiction that has retained a fully fault-based divorce system.[34] The shift to private ordering in divorce took place contemporaneously with the no-fault divorce movement.[35]

The Supreme Court's perception of the institution of marriage also contributed to the modern private ordering in divorce.[36] Marriage was characterized by the Supreme Court as a public institution subject to the control of the legislature since as early as 1888.[37] This perception of marriage was not unique to the Court; it reflected the characterization of marriage in the American legal system as a public institution necessary to carry out "vital societal functions."[38] The Court, however, recharacterized marriage as a private relationship in the 1970s.[39] In

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31. Mnookin & Kornhausert, *supra* note 2, at 953; Singer, *supra* note 8, at 1470. The role of the state in regulating divorces by proscribing appropriate grounds has been described by Singer as a moral one in that states were the "moral arbiter[s] of marital behavior." *See* Singer, *supra* note 8, at 1471. In implementing a fault-based divorce system, states were essentially determining when, if ever, "the goal of providing relief to an innocent spouse outweighed the strong public interest in preserving marriage." *Id.*

32. Singer, *supra* note 8, at 1445. "No-fault divorce" refers to the system of divorce where neither party need be found at fault in order to obtain a divorce. *Id.*

33. *Id.* at 1472. Prior to the no-fault system, divorcing parties would have to allege a fault-based ground for divorce and would even do so if it were not true. *See* Gabriella L. Zborovsky, Note, *Baby Steps to "Grown-Up" Divorce: The Introduction of the Collaborative Family Law Center and the Continued Need for True No-Fault Divorce in New York*, 10 CARDOZO J. CONFLICT RESOL. 305, 310 (2008). In non-contentious cases, one party would have to allege a fault-based ground for divorce and the other would have to admit that such were the case. *See id.* at 313. In New York, for example the six grounds for divorce are: "(1) cruel and inhuman treatment, (2) abandonment, (3) adultery, . . . (4) imprisonment of three or more years by the other spouse," (5) "if husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years," or (6) "based on a written and filed separation agreement that the parties have lived pursuant for at least one year." *Id*. at 311-12. The sixth ground was the closest to a no-fault alternative, but still required both parties to enter into a stipulation. *See id*. at 312. Thus, if one party wanted a divorce, the other party contested, and the party wanting the divorce was not entitled to a divorce pursuant to the other grounds, she was unable to obtain a divorce. *See id.* at 313-15.

34. *See* Singer, *supra* note 8, at 1472. States have either completely eliminated fault-based divorce entirely or have added a no-fault ground to their existing statutory grounds for divorce. *See id*. While fault-based divorce has essentially been eliminated from American divorce law, the same cannot be said for legal separation. *See, e.g.*, N.Y. DOM. REL. LAW § 200 (McKinney 2020). For example, while New York has a no-fault ground for divorce, in order to obtain a judgment of separation, the court must make a finding that one party is at fault. *Id.*

35. *See* Mnookin, *supra* note 8, at 1015; Mnookin & Kornhausert, *supra* note 2, at 953; Singer, *supra* note 8, at 1477.

36. *See* Singer, *supra* note 8, at 1510.

37. *See id.* at 1510-11.

38. *See id.* at 1511.

39. *See id*. *Compare* Maynard v. Hill, 125 U.S. 190, 205 (1888), *with* Zablocki v. Redhail, 434 U.S. 374, 383-87 (1978).

Zablocki v. Redhail,[40] the Court recognized the institution of marriage as a private one.[41] In the *Zablocki* decision, the Supreme Court recognized the importance of marriage; however, rather than its importance justifying state involvement, "it becomes the linchpin for insulating private marriage choices from 'interference' by the state."[42]

Regardless of its cause,[43] the privatization of divorce has sparked discussion in the legal community regarding the disadvantages of private ordering and whether this privacy should be limited.[44] While the ability to maintain control and privacy is appealing due to the sensitive nature of these cases, the product of this privacy is often an unregulated agreement that is simply rubber-stamped by a court.[45] Therefore, armed with a constitutional basis for protecting the privacy of one's marriage (and the family),[46] and free from the extinct fault-based divorce judicial oversight, parties have an enormous amount of control over the final disposition of their divorce.[47] In divorces not involving children, private ordering is likely the best case scenario.[48] These parties are in the best position to decide what financial arrangement is in their best interest and settlement of these issues should be encouraged.[49]

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40. 434 U.S. at 374.

41. *See id*. at 384 ("[D]ecisions of this Court confirm that the right to marry is of fundamental importance for all individuals.").

42. Singer, *supra* note 8, at 1511. Singer suggests that this decision reflects a change in the way both law and society viewed marriage; marriage was no longer a public institution, but a private relationship. *See id*. at 1511-12. Further, the purpose of marriage was recognized as "promot[ing] individual happiness and personal fulfillment." *Id.*; *see Zablocki*, 434 U.S. at 383.

43. *See generally* Singer, *supra* note 8, at 1508-31 (discussing several different factors that contributed to the privatization of not only family law, but divorce). In addition to the Supreme Court's recognition of marriage as a private relationship, Singer identifies underlying gender equality issues, law-and-economic analysis and economic discourse, and the dissociation of law and morality as legal developments that led to divorce privatization. *See id.*

44. *See* Mnookin, *supra* note 8, at 1019; Mnookin & Kornhausert, *supra* note 2, at 983-84; *see generally* Singer, *supra* note 8, at 1540-65 (discussing the disadvantages to privatization of family law).

45. *See* Mnookin, *supra* note 8, at 1033. This is not to say that courts will also *enforce* these agreements without any consideration. *See* Sarah Abramowicz, *Contractualizing Custody*, 83 FORDHAM L. REV. 67, 79-80 (2014). The literature on the rubber-stamping of custody agreements is primarily concerned with the approval of such agreements in the first instance, rather than enforcement. *See* Byrnes, *supra* note 25, at 52; Singer, *supra* note 8, at 1474-75; Mnookin, *supra* note 8, at 1033. However, in enforcement actions, courts may choose not to enforce certain provisions for a variety of reasons. *See* Abramowicz, *supra*, at 79-83.

46. *See supra* notes 36-42 and accompanying text.

47. *See* Mnookin, *supra* note 8, at 1018; Mnookin & Kornhausert, *supra* note 2, at 957; Singer, *supra* note 8, at 1535-36.

48. *See* Mnookin & Kornhausert, *supra* note 2, at 957.

49. *See id.* at 956-57. Mnookin and Kornhausert suggest that the proper role of the court in these settled matters should be limited to enforcement. *See id.* at 957. They explain that courts should not, however, "enforce agreements that reflect fraud or overreaching." *Id.*

Further, in those scenarios, the interests involved are primarily limited to those of the parties.[50] By contrast, children, as interested third parties, have a significant interest in the outcome of custody proceedings between their parents.[51] As is discussed in Part III, issues with private ordering in divorce cases arise where the interests of children and the rights of the parties as parents are implicated.[52] In cases involving children, careful scrutiny of agreements is usually required, but courts still approve these agreements without an independent inquiry into whether the custodial arrangement is in the best interests of the child.[53]

B. History of the Best Interests Standard

The prevailing child custody standard in American jurisprudence is the best interests standard.[54] While many scholars estimate that American recognition of this standard only began in the 1960s, traces of it can actually be found in as early as the colonial era.[55] This is because the "best interests of the child" language was already used in English custody law before the colonization of America, and it was therefore later carried to the colonies.[56] Therefore, in order to understand the current applications of this standard, it is necessary to trace its development not only in American law, but in early English law as well.[57]

The development of custody law began in the 1600s, during which time children were viewed as chattel, to which the father had an absolute right.[58] During the eighteenth century, the notion that "childhood" was something to be preserved and protected began to influence English law.[59] While the basis of custody law was still tied to principles of

50. *See id.* at 957.

51. *See id.* at 956-57.

52. *See infra* Part III.

53. *See* Mnookin, *supra* note 8, at 1033-34.

54. *See* Kohm, *supra* note 12, at 338.

55. *See id.* at 348-52 (acknowledging that, while many scholars estimate the best interests of the child standard ("best interests standard") originated in America in the 1960s, traces of this standard actually can be found much earlier); *see also* Erin Bajackson, *Best Interests of the Child – A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. LAWS. 311, 314 (2013). There was a time in Western history when children were seen as "products," but, largely due to the influence of religion, children began to be seen as innocent and deserving of protection. *See* Kohm, *supra* note 12, at 341-43. For an in-depth discussion on the influence of religion on the development of child custody law, see *id.*

56. Kohm, *supra* note 12, at 345-46.

57. *See id.* at 345.

58. *See id.*

59. *See id.* at 346. Kohm also discusses how, at this time, "attitudes and concerns for children were integrated with views on marriage." *Id.* at 346. At this time, marriage was similarly viewed as "a property interest," which served the purpose of securing heirs to family property. *See id.*

property law, the rationale for why fathers should have custody changed toward the end of the eighteenth century; rather than granting custody to fathers based solely on the concept of ownership, the court developed a presumption that it was in the best interests of the child for a father to have custody.[60]

Throughout the nineteenth century, English custody law moved away from this preference for the father and developed a presumption in favor of the mother in the earlier years of a child's life, reasoning that it was in the best interests of the child for the mother to have custody during this time.[61] While this "best interests of the child" language was used in English law throughout the eighteenth and nineteenth centuries, it was not the guiding principle of custody law.[62] Instead, this served as a justification for a presumption for or against a parent.[63] That is to say, when granting custody, courts did not make determinations based on what they found to be in the best interests of the particular child.[64] They justified existing presumptions by stating that the presumptions were in the best interests of the child—the best interests of the child being more akin to an afterthought than a primary consideration.[65]

It was not until English common law was carried to America during the colonial era that the best interests standard began to transform into the foundation of family law, rather than a simple justification for presumptions.[66] From the late eighteenth to early nineteenth centuries, during which time households became less dependent on children's wages, the American image of the child and childhood transformed.[67] America became concerned with the welfare of children and the ability for children to have a "happy" childhood.[68] This ideology was prevalent in adoption law, the foundation of which was the best interests

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Likewise, men were the head of household and women and children were seen as property and even servants. *Id.* at 345 & n.55.

60. *See id.* at 345-46.

61. *See id.* at 346; Bajackson, *supra* note 55, at 313-14. This early English child custody doctrine was known as the "tender years doctrine." *See* Bajackson, *supra* note 55, at 313-14. Under this standard, the determination of custody fell upon the age of the child: if the child was under the age of three years old, the mother would automatically be awarded custody, and if the child was over the age of three, the father would be given custody. *See id.* (discussing the tender years doctrine and noting that some sources have identified the cut off age to be seven years). This standard carried with it inherent gender biases, most notably that the mother was more capable than the father of nurturing their child during these "tender years." *See id.*

62. *See* Kohm, *supra* note 12, at 346-47.

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.* at 347.

67. *See id.*; Bajackson, *supra* note 55, at 314.

68. *See* Kohm, *supra* note 12, at 349-50.

standard.[69] Throughout the twentieth century, the best interests standard continued to develop and permeated all areas of American law involving children.[70]

Presently, every state has enacted legislation requiring that the best interests of the child be considered by the court when making custody determinations.[71] The modern best interests standard is intended to protect and promote a child's psychological, physical, and emotional needs.[72] This standard gives children a "voice" in custody proceedings.[73] It recognizes that a child may have interests of his or her own, and the determination of custody should not solely consider the interests of the parents.[74] Drafted in the 1970s, Section 402 of the Uniform Marriage and Divorce Act[75] outlines five factors that should be considered in custody determinations:

> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
> (4) the child's adjustment to his home, school, and community; and
> (5) the mental and physical health of all individuals involved.[76]

The model was intended to consider the child's wishes, determine the best and most suitable custodial parent for the child, and permit the child to maintain a relationship with the non-custodial parent.[77]

The development of this standard has led to a conflict in family law: Whose interests should be the center of the standard—the child or

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69. *See id.* at 348. The best interests standard was at the center of adoption law, which was revolutionary for adoption law at that time. *See id.* ("The American concept of adoption was so based in the best interests of the child that it entailed a new meaning for adoption: adoption was about finding a family for a child, rather than a child for a family."). This was a shift in family law, as children became the focus of the inquiry rather than their parents and their parents' needs. *See id.*

70. *See id.* at 350 (discussing the use of the best interests standard in the juvenile criminal justice system and family law).

71. *Id.* at 370. *See generally* CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 5-38 (2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=4&view=Full-text%20excerpts%20of%20State%20laws (discussing each state's laws surrounding the best interests of the child).

72. *See* Bajackson, *supra* note 55, at 317-22.

73. *See id.* at 315.

74. *See id.* at 316-17.

75. UNIF. MARRIAGE & DIVORCE ACT § 402 (NAT'L CONF. OF COMM'RS ON UNIF. ST. LAWS 1970) (amended 1973).

76. *Id.*; *see* Bajackson, *supra* note 55, at 315.

77. *See* Bajackson, *supra* note 55, at 315-16.

the parent?[78] The resolution of this conflict cannot be found solely in family law; it also has constitutional implications.[79] The right of a parent to control how his or her child is raised, cared for, and educated has been recognized by the Supreme Court as a constitutionally protected right.[80] Therefore, the best interests standard has been critiqued as allowing children's interests, which are not similarly constitutionally protected, to override the parents' interests.[81] Some states have combatted this view by framing the best interests standard as a compelling state interest.[82] Nonetheless, this standard has become the prevalent standard in child custody law and remains the standard in all fifty states.[83]

In the courtroom context, the best interests of the child are usually determined by a judge, who has great discretion to decide who is best suited to be the custodial parent of the child.[84] The judge will usually

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78. *See* Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS UNIV. L.J. 113, 149 (2009).

79. *See id.*

80. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) ("[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); McLaughlin, *supra* note 78, at 149. The fundamental right of parents to make decisions regarding their children has been recognized by the Supreme Court since as early as 1923. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing the right of a parent to "bring up" his or her children is a liberty within the meaning of the Constitution). Since 1923, the Supreme Court has consistently upheld this right. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); Santosky v. Kramer, 455 U.S. 745, 758-59 (1982) ("*Lassiter* declared it 'plain beyond the need for multiple citation' that a natural parent's 'desire for and right to "the companionship, care, custody, and management of his or her children"' is an interest far more precious than any property right.") (citing Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)). The Supreme Court has declined to assess whether or not children are entitled to a similar fundamental right, that being a fundamental right to a parental relationship. *See* McLaughlin, *supra* note 78, at 143, 151.

81. *See* McLaughlin, *supra* note 78, at 147-48 ("Although the case does not expressly address the right of a child to be raised by loving parents, it raises the question of when, if ever, the state may elevate relational rights of children to at least the same level of constitutional protection enjoyed by the parents."). McLaughlin discusses the question of whether children have a constitutionally protected right to be raised by parents exists and, if so, whether that right is as protected as a parent's right to raise his or her child. *See id.* at 148. According to McLaughlin, the answers to these questions have not yet been clearly answered by the Supreme Court. *See id.* at 151-52.

82. *See id.* at 155-56. In New York, for example, courts have reconciled this conflict by ruling that the best interests standard considers and protects both the parents' fundamental rights and the children's interests. *See* Kohm, *supra* note 12, at 369.

83. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 71, at 1, 5-38 (providing relevant custody statutes from all fifty states). Every state custody statute takes into account the child's interests, though not every statute explicitly uses the terms "best interests." *See, e.g., id.* at 30 (showing Pennsylvania's custody statute does not explicitly use the term); Kohm, *supra* note 12, at 370.

84. Kohm, *supra* note 12, at 371-72. The factors considered by the court vary from state to state. *See id.* at 369; CHILD WELFARE INFO. GATEWAY, *supra* note 71, at 2-3. Some state statutes

take into account the relevant and statutorily permitted or required factors (some of which may be listed in the Uniform Marriage and Divorce Act).[85] However, because nearly ninety-five percent of all divorces settle out of court,[86] custody determinations are more often than not left to the parties.[87] In making these determinations, divorcing parents have a substantial amount of discretion to decide who will be the primary caretaker for their child.[88] While this approach seems to make sense, as most would like to believe that parents naturally want what is in their child's best interests, it is clear that the protection of their children is not always at the forefront of parents' minds in these adversarial proceedings.[89]

III. THE PROBLEM WITH AN ALL-AT-ONCE APPROACH TO DIVORCE PROCEEDINGS

Taking an all-at-once approach to divorce has negative effects both inside and outside of the courtroom.[90] Because custody and financial matters are both part of a divorce, they are often settled together or heard and decided together.[91] Because these issues are often settled or decided together, the negotiation of terms for both financials and custody typically takes place simultaneously.[92] While the law sets forth a

require that a court limit its consideration to only those factors specifically outlined in the statute, while other statutes permit a court to consider whatever factors it determines to be useful. *Id*. For example, Illinois provides fifteen factors to be considered when making a custody determination, 705 ILL. COMP. STAT. 405/1-3 (4.05) (2020), while Mississippi law does not provide factors, but instructs that it is preferable for a parent to have custody, *see* MISS. CODE ANN. § 43-21-103 (2021).

85. *See* UNIF. MARRIAGE & DIVORCE ACT § 402 (NAT'L CONF. OF COMM'RS ON UNIF. ST. LAWS 1970) (amended 1973); Kohm, *supra* note 12, at 373.

86. Landers, *supra* note 22.

87. *See* Mnookin, *supra* note 8, at 1033.

88. *See* Mnookin & Kornhausert, *supra* note 2, at 955-56.

89. *See In re* Marriage of Day, 314 N.W.2d 416, 419 (Iowa 1982) (noting that the father made attempts to alienate the children from the mother in several ways); Candice M. Murphy-Farmer, *Mandatory Appointment of Guardians Ad Litem for Children in Dissolution Proceedings: An Important Step Towards Low-Impact Divorce*, 30 IND. L. REV. 551, 554-55 (1997) ("[T]here is a presumption, although clearly rebuttable, that the parents will be protecting the child's interests in a divorce. The problem with this concept is that, in the heated battle of divorce, parents do not often make rational decisions and are sometimes focused on "winning" and even exacting revenge."); Amy Cynkar, *Cooperating for Kids' Sake*, AM. PSYCH. ASS'N (June 2007), https://www.apa.org/monitor/jun07/cooperating (discussing the negative effects of custody battles on children of divorce); *see also* Abramowicz & Abramowicz, *supra* note 3, at 394 (discussing the use of custody trade-offs in divorces).

90. *See* Abramowicz & Abramowicz, *supra* note 3, at 393-98; Singer, *supra* note 8, at 1550.

91. *See* Abramowicz & Abramowicz, *supra* note 3, at 391, 393; Singer, *supra* note 8, at 1550; Mnookin & Kornhausert, *supra* note 2, at 963-64.

92. *See* Abramowicz & Abramowicz, *supra* note 3, at 393; Singer, *supra* note 8, at 1550; Mnookin & Kornhausert, *supra* note 2, at 963-64.

different standard for determining custody than that used in determining the financial disposition of a case, these clear-cut lines do not translate to out-of-court negotiation.[93] Without a clear line between these two issues, both of which can be decided independently from each other,[94] parties trade custody for a more favorable financial outcome.[95]

This Part discusses the several reasons why these trade-offs are detrimental to divorce proceedings and the outcome of custody in these proceedings.[96] While it is generally deemed improper to partake in these trade-offs, they are still occurring in practice.[97] A judge may never know that this is occurring because he or she is not permitted to know the substance of settlement agreements, and these trade-offs may not be explicitly stated.[98] Further, while courts are required to review divorce settlements, they often approve them without any detailed consideration for what is in the best interest of the child.[99] Without conducting an independent judicial analysis, the state is essentially condoning money-for-custody trades and the unfair coercive tactics used in settling divorce matters under the guise of familial autonomy.[100]

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93. *Compare Child Support Guideline Models*, NAT'L CONF. OF ST. LEGISLATURES (July 10, 2020), http://www.ncsl.org/research/human-services/guideline-models-by-state.aspx (providing a state-by-state analysis of child support guidelines for all fifty states), *with* CHILD WELFARE INFO. GATEWAY, *supra* note 71, at 5-38 (providing an outline of all fifty states' respective custody laws).

94. *Child Support Guideline Models*, *supra* note 93. While the issue of child support cannot be determined absent a custody determination, child support is generally based on statutory formulas that consider the number of children and the payor's income. *Id.* Therefore, while this financial issue is dependent on a custody determination, it is inherently secondary to that custody determination. *See id.* Custody can be determined independently from child support, as it is inherently a threshold question when determining and calculating child support. *See id.*; Abramowicz & Abramowicz, *supra* note 3, at 414.

95. *See* Abramowicz & Abramowicz, *supra* note 3, at 391-93; Mnookin & Kornhausert, *supra* note 2, at 964, 967.

96. *See infra* Part III.A–C.

97. *See* Abramowicz & Abramowicz, *supra* note 3, at 393; Fox Rothschild LLP, *supra* note 4.

98. *See* Fox Rothschild LLP, *supra* note 4. As one practicing attorney noted:

> For instance, the litigant will not agree to any issue in isolation, and will only agree to resolve everything together in a so-called "global" settlement entirely ends the case. In other words, the litigant refuses to resolve custody independently of finances, but in a way that does not expressly suggest that the issues are being intertwined.

Id.

99. *See* Byrnes, *supra* note 25, at 51; Singer, *supra* note 8, at 1474-75; Abramowicz & Abramowicz, *supra* note 3, at 401 ("It is rare, however, for courts to reject parental custody agreements in the name of children's interests.").

100. *See* Byrnes, *supra* note 25, at 50-51 (discussing how divorcing parties will use whatever leverage is available to them and the court's role in allowing these tactics); Singer, *supra* note 8, at 1474-75; *see also* Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 177 (1984).

Part III.A discusses how divorcing parties will use the threat of custody litigation in order to achieve their financial goals.[101] It concludes that, when parties take an all-in-one approach to divorce matters and one party is significantly more invested in custody than the other, there is a significant disparity in bargaining power.[102] Part III.B addresses how these trade-offs work against the child's best interests, which, as was discussed in Part II.B, is the prevailing standard in American child custody law.[103] Specifically, it discusses the financial harm done to children as result of these trade-offs.[104] Finally, Part III.C addresses how, as a practical matter, it is simply more efficient to hear these issues separately because they are different and are decided pursuant to different type of standards.[105]

A. Custody Litigation Threats as a Coercive Tool

Where one party is more invested in custody than the other, the less invested party may use the threat of a custody battle to force the more invested party to settle for less money.[106] Regardless of whether or not the less invested party actually intends to fight for custody, the threat has incredible weight when used against the more invested party.[107] The child becomes a coercive tool for the less invested party, and the more invested spouse may feel forced to forgo money that he or she was legally entitled to.[108] This threat is effective for several reasons.[109] First,

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101. *See infra* Part III.A.

102. *See infra* Part III.A.

103. *See supra* Part II.B; *infra* Part III.B.

104. *See infra* Part III.B.

105. *See infra* Part III.C.

106. *See* Abramowicz & Abramowicz, *supra* note 3, at 397-98; Neely, *supra* note 100, at 177-78 (discussing the effectiveness of threats of custody battles).

107. *See* Neely, *supra* note 100, at 177-78; *Children as an Abusive Mechanism*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/2014/08/29/children-as-an-abusive-mechanism (last visited Apr. 1, 2021); Natalie Pattillo, *For Abuse Survivors, Custody Remains a Means by Which Their Abusers Can Retain Control*, PAC. STANDARD (Mar. 29, 2018), https://psmag.com/social-justice/abuse-survivors-custody-battl.

108. *See* Garska v. McCoy, 278 S.E.2d 357, 362 (W. Va. 1981) (discussing how custody can be used against the primary caretaker as a coercive tool); Abramowicz & Abramowicz, *supra* note 3, at 397; Neely, *supra* note 100, at 181 ("Experience teaches that if there is any chance that the average mother will lose her children at divorce, she will either stay married under oppressive conditions or trade away valuable economic rights to ensure that she will be given custody."). It is clear that:

> Commentators have long noted that the parent less invested in custody will often make a disingenuous threat to litigate custody—that is, a threat to request a custodial allocation that the parent neither desires nor expects to receive—in order to extract financial concessions from a parent fearful of even a small risk of losing primary custody. Scholars and judges have characterized such tactics as "extortionate bargaining" and "blackmail."

the best interests standard tends to be unpredictable.[110] As more fully discussed in Part II.B of this Note, courts consider an array of different factors when determining which parent should be awarded custody.[111] Therefore, there is a real risk that the more invested party, even if he or she has been the primary caretaker of the child, could lose custody.[112] While the more invested party is likely to have a more compelling case for custody under the best interests standard, the risk of a diminished relationship with their child, no matter how small, is not outweighed by their financial interests.[113]

Using this threat is not only coercive in divorce negotiations; its effects on a spouse may run deeper.[114] Threatening to "take . . . the children" can be used as a method for an abusive spouse to regain control.[115] In these situations, it might seem that the victim of the abuse has even more of a compelling case for custody than in the average divorce.[116] However, some courts may not find the abusive history

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Abramowicz & Abramowicz, *supra* note 3, at 397. This inequity of bargaining power has been recorded to have gendered implications. Neely, *supra* note 100, at 181. There is ample support for the notion that, because women have historically been the primary caretaker of the children, they are most frequently disadvantaged in these disputes. *See* Herma Hill Kay, *No-Fault Divorce and Child Custody: Chilling Out the Gender Wars*, 36 FAM. L.Q. 27, 34-35, 38 (2002); Neely, *supra* note 100, at 181. Earlier custody law recognized a maternal preference in resolving custody disputes. *See* Kay, *supra*, at 29-30; Neely, *supra* note 100, at 170. However, modern custody law has largely become sex neutral in most states, recognizing that traditional gender roles should have no bearing on these determinations. *See* Neely, *supra* note 100, at 181. *But see* Matthew B. Firing, Note, *In Whose Best Interests? Courts' Failure to Apply State Custodial Laws Equality Amongst Spouses and Its Constitutional Implications*, 20 QUINNIPIAC PROB. L.J. 223, 249-50 (2007) (noting that these sex-neutral standards tend to be applied in gender-biased ways).

109. *See* Neely, *supra* note 100, at 171.

110. *See* Abramowicz & Abramowicz, *supra* note 3, at 398-99; Kay, *supra* note 108, at 42; Neely, *supra* note 100, at 172.

111. *See supra* Part II.B.

112. *See* Abramowicz & Abramowicz, *supra* note 3, at 394. Three states have adopted the "primary caretaker" presumption, which instructs that it is in the best interest of young children to remain with the parent who has been shown to be the primary caretaker; however, these states eventually replaced the presumption with different approaches. *See id.* at 399; Neely, *supra* note 100, at 180. This presumption increases the predictability of custody proceedings and allows the more invested party, often the parent who would be identified as the primary caretaker, to confidently reject any notion that the less invested party could gain custody. *See* Abramowicz & Abramowicz, *supra* note 3, at 399; Neely, *supra* note 100, at 181. However, this presumption has been criticized for favoring the mother over the father in custody litigation. *See* Abramowicz & Abramowicz, *supra* note 3, at 399-400. Other states have developed a presumption of joint custody, recognizing that the maintenance of a relationship with both parents is important for a child. *See id.* at 400.

113. *See* Abramowicz & Abramowicz, *supra* note 3, at 393, 397; Mnookin & Kornhausert, *supra* note 2, at 966-67 ("Many individuals like spending time with their children and are willing to sacrifice a great deal in order to have child-rearing responsibilities.").

114. *See Children as an Abusive Mechanism*, *supra* note 107; Pattillo, *supra* note 107.

115. *See Children as an Abusive Mechanism*, *supra* note 107; Pattillo, *supra* note 107.

116. *See Children as an Abusive Mechanism*, *supra* note 107; Pattillo, *supra* note 107.

relevant, so long as the conduct does not affect the child.[117] Worse yet, in approximately seventy percent of these cases, the abusers have been able to convince a court that the victim of the abuse is not fit to be the custodial parent.[118] Therefore, while these threats may be empty and baseless, the unpredictability of custody outcomes makes it difficult for the more invested party to feel confident that they will ultimately secure custody, no matter how deserving he or she may actually be.[119] Thus, these parties who are not willing to take even the smallest chance of losing their children are willing to make greater financial concessions in order to preserve their role as the child's primary parent.[120]

Aside from the psychological and emotional pressures, this coercive tactic is also effective because of the cost associated with lengthy custody battles.[121] With custody litigation capable of costing well above $50,000, the threat of custody litigation against the less-monied spouse is quite effective.[122] The attorney fees associated with these battles not only include fees for the representation for each spouse, but they also often include fees for a guardian ad litem or attorney for the child.[123] These attorneys represent the child's interests and will appear in court to advise the court on what the child needs or wants.[124] Further, the parties are often responsible for the payment of the child's attorney's fees.[125]

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117. *See* Pattillo, *supra* note 107; DANIEL G. SAUNDERS ET AL., CHILD CUSTODY EVALUATORS' BELIEFS ABOUT DOMESTIC ABUSE ALLEGATIONS: THEIR RELATIONSHIP TO EVALUATOR DEMOGRAPHICS, BACKGROUND, DOMESTIC VIOLENCE KNOWLEDGE AND CUSTODY-VISITATION RECOMMENDATIONS 103 (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/238891.pdf.

118. Pattillo, *supra* note 107; SAUNDERS ET AL., *supra* note 117, at 17.

119. *See* Altman, *supra* note 7, at 515, 521.

120. *See id.* at 501.

121. *See id.* at 529; Sara Morrison, *'I'm Out of Money, and I'm Out of Hope': Rethinking Custody Battles*, BOS. GLOBE (July 23, 2015), https://www.boston.com/news/local-news/2015/07/23/im-out-of-money-and-im-out-of-hope-rethinking-custody-battles; Miller, *supra* note 22 (discussing the expensive nature of custody and divorce litigation).

122. *See* Altman, *supra* note 7, at 515, 529; Morrison, *supra* note 121.

123. *See* Richard Ducote, *Guardians* Ad Litem *in Private Custody Litigation: The Case for Abolition*, 3 LOY. J. PUB. INT. L. 106, 149 (2002).

124. *See id.* at 116.

125. *Id.* at 149-50. The Uniform Marriage and Divorce Act also sets forth the role of attorneys for the children. UNIF. MARRIAGE & DIVORCE ACT § 310 (NAT'L CONF. OF COMM'RS ON UNIF. ST. LAWS 1970) (amended 1973). Section 310 reads as follows:

> The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his support, custody, and visitation. The court shall enter an order for costs, fees, and disbursements in favor of the child's attorney. The order shall be made against either or both parents, except that, if the responsible party is indigent, the costs, fees, and disbursements shall be borne by the [appropriate agency].

Id. Therefore, divorcing parties would be responsible for not only their own attorney's fees, but their children's as well. *Id.* Considering the fact that attorney's fees for a divorce can reach at least

Therefore, a party who is the less monied spouse and the more invested parent may find themselves in the weakest bargaining position of all.[126] Unable and unwilling to take his or her chances on a custody battle, this parent cannot combat a litigation threat.[127] The use of custody threats cannot simply be dismissed as a negotiation tactic.[128] This is a complete exploitation of both a parent's fear of losing time with his or her child and his or her lack of financial resources.[129] Finally, these types of negotiations impact the children by involving them in this litigation.[130]

B. Working Against the Child's Best Interests

As discussed in Part II.B of this Note, the best interests standard seeks to protect the child's psychological, physical, and emotional needs.[131] Under this standard, custody is to be determined by weighing all factors relevant to these goals to decide what custodial arrangement would be best for the child.[132] Though it may not be necessary, it is worth explicitly stating that whether a child's parent will receive a more favorable financial settlement in a divorce in exchange for a certain custodial arrangement has not been cited as a relevant factor.[133] Nonetheless, in negotiating and deciding custody in divorce matters, parties may use financial terms to influence the outcomes.[134] The result is that children in these divorces are commodified and they become another tradeable asset.[135] When parents trade money for custody, the child may end up in a custody arrangement that had less to do with what

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$20,000, the costs of a divorce involving children may be too much for most to bear. *See* Ducote, *supra* note 123, at 149.

126. *See* Altman, *supra* note 7, at 515.

127. *See id.* Further, Altman concluded that in cases where a party was willing to forgo financial terms in order to secure custody, some lawyers did not attempt to convince clients otherwise. *Id.* at 504 ("[W]hen clients wanted to accept financial losses to secure custodial terms, some lawyers (fifteen percent) did not attempt to convince clients not to do so.").

128. *See id.* at 512-13.

129. *Id.* at 513-15. Altman suggests that these exploitations have more serious implications. *Id.* at 515. Specifically, in cases where there is a history of domestic violence, litigation threats are "particularly common and effective against poorer spouses who are unable to afford litigation." *Id.*

130. *See infra* note 148 and accompanying text.

131. *See supra* Part II.B.

132. *See* UNIF. MARRIAGE & DIVORCE ACT § 402 (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 1970) (amended 1973); Bajackson, *supra* note 55, at 315.

133. *See* Bajackson, *supra* note 55, at 315; CHILD WELFARE INFO. GATEWAY, *supra* note 71, at 2-3.

134. *See* Abramowicz & Abramowicz, *supra* note 3, at 395; Neely, *supra* note 100, at 179; Singer, *supra* note 8, at 1550.

135. *See* Abramowicz & Abramowicz, *supra* note 3, at 395; Neely, *supra* note 100, at 179; Singer, *supra* note 8, at 1552-53.

that child needed and more to do with what the parties were willing to settle for.[136] Trading custody for money is a well-known practice.[137] Though it is considered an improper practice by many courts,[138] attempts to prevent or limit these trade-offs have not proven to be effective.[139]

The primary harm done to children is actually a financial one.[140] As discussed in Part III.A, the coercive effects of threatening a custody battle are significant.[141] Therefore, when a party does make financial concessions in order to secure custody, that party ends up in a worse off financial position.[142] As a result, the child's standard of living may diminish due to the custodial parent's inability to support the lifestyle he or she enjoyed prior to the divorce.[143] Further, if the custodial parent

136. *See* Abramowicz & Abramowicz, *supra* note 3, at 395; Neely, *supra* note 100, at 177; Singer, *supra* note 8, at 1550.

137. *See* Abramowicz & Abramowicz, *supra* note 3, at 391-92; Neely, *supra* note 100, at 179; Mnookin & Kornhausert, *supra* note 2, at 963-64.

138. *See* Garska v. McCoy, 278 S.E.2d 357, 361 (W. Va. 1981) ("Where a custody fight emanates from this reprehensible motive the children inevitably become pawns to be sacrificed in what ultimately becomes a very cynical game."). The *Garska* court was concerned with the issue of custody's potential to be used in an "abusive way as a coercive weapon." *Id.* For example, in *In re Marriage of Day*, the father offered custody to the mother in exchange for her acceptance of his property terms. *In re* Marriage of Day, 314 N.W.2d 416, 417 (Iowa 1982).

139. *See* Abramowicz & Abramowicz, *supra* note 3, at 398-402. Abramowicz and Abramowicz explore three previous attempts at preventing these types of trade-offs. *Id.* First, legislatures and scholars have recently suggested replacing the best interests standard with a more determinate standard. *Id.* at 398-400. It is argued that this would increase the predictability of custody proceeding outcomes and diminish the value of threats of custody battles made by parents unlikely to obtain custody. *See id.* Second, in most jurisdictions, custody agreements are subject to judicial review and are only enforceable once a judge determines that the arrangement therein is in the best interests of the child. *See id.* at 401. However, despite this requirement, judges will not often reject agreements on this ground. *Id.* Further, it is also extremely difficult for judges to tell whether or not a trade-off has occurred. *Id.* Finally, Abramowicz and Abramowicz note that some states have required divorcing parties to submit a custody agreement separately from the financial settlement agreement, as to put a barrier between custody and finances. *Id.* at 401-02. However, they conclude that none of these attempts have been effective at regulating or preventing these trade-offs. *See id.* at 398-402.

140. *See id.* at 394 ("Children are affected not only by child-support awards (which are paid directly to the custodial parent), but also by both the division of their parents' marital property and the presence or absence of an award of spousal support.").

141. *See supra* Part III.A.

142. *See* Abramowicz & Abramowicz, *supra* note 3, at 394 ("[C]ustody trade-offs diminish the material well-being of the children who reside with those parents, thus potentially contributing to the high rates of postdivorce impoverishment of caretakers and their children.").

143. *Id.* It is true that a change in lifestyle is likely inevitable in matrimonial cases. *See id.* For example, the court in *Gonsewski v. Gonsewski* noted:

> While enabling the spouse with less income "to maintain the pre-divorce lifestyle is a laudable goal," the reality is that "[t]wo persons living separately incur more expenses than two persons living together." "Thus, in most divorce cases it is unlikely that both parties will be able to maintain their pre-divorce lifestyle . . . ."

Gonsewski v. Gonsewski, 350 S.W.3d 99, 108 (Tenn. 2011) (internal citations omitted); *see* Johnson v. Johnson, 593 N.W.2d 827, 829 (Wis. Ct. App. 1999) ("[T]he fact that maintaining two

must work more in order to make up for the financial concessions made at the time of the settlement, the child loses time with the parent.[144]

While there is financial harm to the child, that is not to say that children do not suffer emotionally from these types of contentious divorces.[145] First, these trades demean children by treating them like chattel rather than human beings.[146] Beyond that, when parents not only threaten to fight for custody, but also use the child against the other parent to strengthen their position, the child suffers.[147] The parent may attempt to alienate the child from the other parent and discuss the ongoing proceedings with the child.[148] This not only strains the parent-child relationship, but it also can be very confusing for that child.[149]

C. Inefficiency and Impracticality

As a practical matter, deciding the issues of custody and money together is inefficient because custody and financial issues require significantly different discovery and evidence.[150] In custody

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households is more expensive than maintaining one means that 50% of the total income at the time of the divorce will rarely allow either of the parties to maintain the marital standard of living. In most cases, both parties will take a cut in lifestyle as a result of the divorce."). However, the concern is that the lifestyle will change so drastically that the child will be affected and his or her needs will not be sufficiently met. *See* Abramowicz & Abramowicz, *supra* note 3, at 394.

144. Abramowicz & Abramowicz, *supra* note 3, at 394-95.

145. *See id.* at 395; Marlene Moses & Beth A. Townsend, *Parental Alienation in Child Custody Disputes*, TENN. BAR J., May 2011, at 25, 27-28.

146. *See* Abramowicz & Abramowicz, *supra* note 3, at 395. Abramowicz and Abramowicz further acknowledge that agreements in which parents have exchanged money for custody have been long considered to be invalid, as children are not and cannot be treated as chattel. *Id.* at 396. However, because these "trade-offs" tend to happen in private, it is difficult for the court to determine if they have actually occurred. *Id.* at 401.

147. Moses & Townsend, *supra* note 145, at 25-27.

148. *See id.* at 25-26. Moses and Townsend define "parental alienation" as:

> [A] term commonly used to describe the negative impression and attitude children may develop about one parent by listening to the words or following the actions of the other parent. Often, the form of parental alienation most experienced is that of negative words of one parent about another, leading the child's thoughts and attitudes in the same direction. The alienating parent might also cause the child, through manipulation and access blocking, to unjustifiably fear and/or hate the target parent.

Id. at 25.

149. *See id.* at 26 (noting that the result of these conflicts is an unexplained hatred toward the alienated parent). Moses and Townsend further argue that the effects of this alienation only worsen the undermining effects of a divorce on a child's sense of stability and well-being. *See id.* at 28.

150. *Compare* Robert J. Levy, *Custody Investigations in Divorce-Custody Litigation*, 12 J.L. & FAM. STUD. 431, 432-33, 439-42 (2010) (discussing the types of evidence, investigations, and discovery involved in custody disputes), *with* Donald A. Glenn, *Discovery—Not a Job for Christopher Columbus*, FAM. ADVOC., Spring 2009, at 8, 9-10 (discussing financial discovery in divorce cases).

proceedings, the primary goal is to ascertain what custodial arrangement would best serve the needs and interests of the child.[151] Specifically, courts must take into consideration the emotional and psychological well-being of the child.[152] This may involve the use of third-party experts, such as psychologists and counselors, and often requires an attorney to be appointed by the court to represent the child and represent that child's interests.[153] The determination of financial and property issues in divorce matters are equally as complicated, if not more so, but require completely different discovery and evidence for trial.[154] In essence, in preparing for an all-encompassing divorce trial, a lawyer is preparing for two separate trials.[155]

In a divorce action involving children, there are four main issues: grounds for divorce, distribution of property, support, and custody.[156] Since all fifty states permit no-fault divorce, parties no longer need to litigate this issue, as no-fault divorce does not assign blame to either party.[157] With regard to child support determinations, all fifty states use formulas or percentages to make these determinations with little room for discretion.[158] In implementing these formulas and percentages, courts will take into consideration the parties' respective incomes, the lifestyle enjoyed by the child, and a party's ability to pay.[159]

When income claimed is disputed, this will typically involve a review of the parties' financial documents, including tax documents, bank statements, and other financial documents.[160] The discovery required for this portion of the divorce is extensive, detailed, and

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151. *See* Bajackson, *supra* note 55, at 315-16.

152. *See id.* at 317-22.

153. *See* Ducote, *supra* note 123, at 109; Levy, *supra* note 150, at 442.

154. *See* Glenn, *supra* note 150, at 9-10 (outlining the different processes involved with conducting financial discovery in divorce matters); Brett R. Turner, *Theories and Methods for Valuing Marital Assets*, 25 J. AM. ACAD. MATRIM. LAWS. 1, 15-22 (2012) (discussing the use of expert witnesses in evaluating the value of marital assets); *Establishing Spousal Earning Capacity in Divorce Cases with a Vocational Expert*, OCCUPATIONAL ASSESSMENT SERVS., INC. (May 1, 2017), https://www.oasinc.org/establishing-spousal-earning-capacity-in-divorce-cases-with-a-vocational-expert (discussing the role of a vocational expert in divorce cases where earning capacity of a spouse is at issue).

155. *Compare* Glenn, *supra* note 150, at 9-10, *and* Turner, *supra* note 154, at 15-22, *with* Ducote, *supra* note 123, at 116, *and* Levy, *supra* note 150, at 432-33.

156. *See* Mnookin & Kornhausert, *supra* note 2, at 953, 959; Gerald Williams, *Four Primary Issues in Divorce*, WILLIAMS DIVORCE & FAM. L. (Jan. 24, 2013), https://divorcelawyermn.com/2013/01/24/four-primary-issues-divorce.

157. *See supra* notes 31-32, 34 and accompanying text.

158. *Child Support Guideline Models*, *supra* note 93.

159. *Id.*

160. *See id.*; Donna Litman, *Financial Disclosure on Death or Divorce: Balancing Privacy of Information with Public Access to the Courts*, 39 SW. L. REV. 433, 479-82 (2010) (noting that extensive financial disclosure is required in divorce matters).

invasive.[161] Experts may also be required to testify to, for example, a party's earning capacity.[162] The evidence required to divide property overlaps with that necessary for support determinations.[163] The determination of this issue generally rests upon determining the parties' financial circumstances by reviewing financial documents, assessing what is separate property, evaluating debts and assets, and more.[164] This will also involve the use of experts, such as appraisers, to determine the value of any marital assets and any appreciation of property during the marriage.[165]

By contrast, the determination of custody is not equally as objective.[166] Courts must evaluate what is in the best interests of the child.[167] Several factors are considered, but a primary issue is the capability of each party to be the child's custodial parent.[168] This inevitably involves consideration of the parties' conduct, habits, and behavior, all of which are generally irrelevant to the issues of support

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161. *See* Litman, *supra* note 160, at 479-82. For example, Litman analyzes the extent to which courts examine a party's financial circumstances during a divorce by reviewing the New York Statement of Net Worth form, a document parties are required to fill out in order to provide a detailed breakdown of his or her financial circumstances. *Id.* She lists every piece of information requested by the extensive document, which consumed nearly four pages of her article. *Id*. Below is only a portion of the requested information, which must usually be supplemented with supporting statements and documentation:

> [F]or cash, its location, amount, and source of funds, . . . for checking and savings accounts, the name of the financial institution, account number, title holder, date opened, source of funds, and amount, . . . for security deposits and earnest money, the location, title owners, type of deposit, source of funds, date of deposit and amount, . . . for securities, such as stocks, bonds, and mortgages, the description, title holder, location, date of acquisition, original price or value, source of funds to acquire, and current value, . . . for loans to others, the debtor, original amount of loan, source of funds or origin of debt, payment due dates, and current amount due . . . .

Id. at 481.

162. *Establishing Spousal Earning Capacity in Divorce Cases with a Vocational Expert*, *supra* note 154 (discussing the use of vocational experts in establishing earning capacity where a spouse is unemployed).

163. *See* Litman, *supra* note 160, at 479-82.

164. *See id*.; Glenn, *supra* note 150, at 9-10.

165. *See* Jennifer Billock, *Splitting Up Your House in a Divorce? Don't Skip the Home Appraisal*, HOMELIGHT (Sept. 17, 2018), https://www.homelight.com/blog/divorce-home-appraisal (discussing the critical role an appraiser plays in divorce actions).

166. *See supra* Part II.B.

167. *See supra* Part II.B.

168. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 71, at 2-3; Kohm, *supra* note 12, at 369. For example, Delaware law lists as a factor, "[p]ast and present compliance by both parents with their rights and responsibilities to their child." *See* CHILD WELFARE INFO. GATEWAY, *supra* note 71, at 9. This requires the courts to make an inquiry into the parent's habits and history, whereas the issue of support is decided by looking solely at objective facts, such as the parties' incomes. *See id.* at 2-3, 9; *Child Support Guideline Models*, *supra* note 93.

and property division.[169] Further, courts will often appoint an attorney for the subject child and require that the attorney be present during all related proceedings.[170] The court may consider school records, health records of the child, expert witnesses, forensic evaluations, the parents' behavior, and more.[171] This evidence is simply irrelevant to financial determinations.[172] Financial issues and custody issues require completely different evidence, and presenting this evidence at the same time does not promote the best interests of the child or efficiency.[173]

IV. MANDATORY BIFURCATION AS A SOLUTION

Despite arguments claiming that money and custody are inseverable,[174] courts have recognized that these issues are separate and independent of each other.[175] Bifurcation is a tool courts use to separate different issues in a proceeding.[176] While the use of bifurcation is left to the discretion of the court, it is generally appropriate where it will help avoid confusion and promote a quick and fair resolution to a legal

169. *See* Bajackson, *supra* note 55, at 314-16, 321-32; Marsha Garrison, *What's Fair in Divorce Property Distribution: Cross-National Perspectives from Survey Evidence*, 72 LA. L. REV. 57, 68-72 (2011); *Child Support Guideline Models*, *supra* note 93; *Chart 3: Child Support Guidelines*, 46 FAM. L.Q. 528, 528-29 (2013).

170. *See What Does a Guardian* Ad Litem *Do?*, GREGORY S. FORMAN, https://www.gregoryforman.com/faqs/what-does-a-guardian-ad-litem-do (last visited Apr. 1, 2021) (discussing the role of the guardian ad litem in a matrimonial case). Because a child's life is significantly impacted by his or her parents' divorce, they have an interest in the outcome of the proceedings. Murphy-Farmer, *supra* note 89, at 553-55. Thus, appointment of legal counsel is viewed as necessary to ensure that the children's rights and interests are being adequately protected. *Id.* ("One of the most fundamental principles in the legal system is that when a person has an interest in the outcome of a legal proceeding, he has a right to representation.").

171. *See* Stephan C. Hansbury, *Custody Litigation: A Judicial Perspective*, N.J. LAW. MAG., Aug. 2009, at 9, 10-11; Robert F. Kelly & Sarah H. Ramsey, *Child Custody Evaluations: The Need for Systems-Level Outcome Assessments*, 47 FAM. CT. REV. 286, 287 (2009) (discussing various techniques for determining custody, including the use of forensic investigators).

172. *See* Litman, *supra* note 160, at 479-82.

173. *Compare* Kelly & Ramsey, *supra* note 171, at 278, *and* Hansbury, *supra* note 171, at 10-11, *with* Litman, *supra* note 160, at 479-82.

174. *See* Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1341 (1995).

175. *See* Johnson v. Johnson, 363 N.W.2d 355, 358 (Minn. Ct. App. 1985) ("Child custody issues and financial issues are not dependent upon one another but instead are separate claims in the dissolution proceeding."); Kelm v. Kelm, No. 99AP-747, 2000 WL 664720, at *3 (Ohio Ct. App. May 23, 2000) ("However, while the property and support issues related to the parties' divorce have been litigated extensively in this case, the allocation of parental rights and responsibilities has not been litigated. Issues of custody and visitation are separate and distinct from property and support issues.").

176. *See* Steven H. Levy, *Divide and Conquer*, FAM. ADVOC., Winter 1998, at 38, 39-40.

claim.[177] In the context of divorce, this tool is useful to help avoid improper bargaining, harm to children experienced as a result of that bargaining, and general inefficiency.[178] It leads to more efficient trials,[179] and helps ensure that children do not suffer as a result of disparate bargaining power between the parties.[180]

This Part proposes that requiring the bifurcation of divorce matters in the court context can eliminate or lessen the negative effects of family law private ordering.[181] Part IV.A discusses bifurcation generally, the premise behind bifurcation, and the present use of it.[182] Part IV.A discusses how bifurcation is used in divorce cases currently and finds that courts are already employing the tool of bifurcation to simplify these matters.[183] Finally, this Part argues that the same arguments for bifurcation in the settlement and mediation contexts apply to the court context.[184] Moreover, it concludes that what takes place inside the courtroom affects the bargaining outside of the courtroom.[185]

A. Bifurcation and Divorce

Bifurcation is a tool courts may use to separate different issues in a proceeding to hear and decide those issues separately.[186] The decision as to whether issues in a proceeding should be bifurcated has historically been left to the court's discretion, and every state allows bifurcation in civil trials.[187] In some states, there is a strong presumption against bifurcation,[188] while in others bifurcation is favored or must be granted

177. John P. Rowley III & Richard G. Moore, *Bifurcation of Civil Trials*, 45 U. RICH. L. REV. 1, 8-9 (2010).

178. *See* Marce v. Bailey, 636 P.2d 1225, 1227 (Ariz. Ct. App. 1979) (holding that custody issues in a divorce action should be heard and decided separately from other issues due to the fact that the considerations in custody proceedings are not considered in deciding other issues); Abramowicz & Abramowicz, *supra* note 3, at 392-93 (discussing bifurcation in divorce settlements and mediation, along with the issues that arise from deciding money and custody at the same time); Levy, *supra* note 176, at 39 (discussing the use of bifurcation in divorce matters).

179. *See* Gensler, *supra* note 6, at 772 (discussing the efficiency of bifurcated proceedings).

180. *See* Abramowicz & Abramowicz, *supra* note 3, at 393-95 (discussing the sacrifice of the child's best interests when divorcing parties negotiate money for custody); Byrnes, *supra* note 25, at 51.

181. *See infra* Part IV.B.

182. *See infra* Part IV.A.

183. *See infra* Part IV.A.

184. *See infra* Part IV.A–B.

185. *See infra* Part IV.B.

186. *See* Levy, *supra* note 176, at 38.

187. R. Carson Fisk & Will W. Allensworth, *Increased Use of Bifurcation in Construction Cases Involving Derivative Claims*, CONSTR. LAW., Fall 2013, at 6, 8-9.

188. *See* Williams v. Williams, 659 So. 2d 1306, 1307 (Fla. Dist. Ct. App. 1995) (holding that bifurcation should only be used in "exceptional circumstances"); Gensler, *supra* note 6, at 728.

upon a party's request.[189] In recent years, many attorneys and scholars have discussed an increased use of bifurcation and have called for this in different areas of the law.[190] This is for several reasons, including practicality and to prevent any prejudice.[191]

Bifurcating custody from financial issues in divorce proceedings is not a new approach.[192] In fact, many courts already do bifurcate these issues in practice because the issues in a divorce do not need to be decided all at one time.[193] Even where it is not mandatory to divide a divorce proceeding, courts will often do so at a party's request.[194] Many

189. *See* Rowley III & Moore, *supra* note 177, at 7-8 (discussing New Jersey laws that mandate bifurcation in actions involving punitive damages, and New York laws strongly encouraging bifurcation of issues of liability and damages); Marce v. Bailey, 636 P.2d 1225, 1227 (Ariz. Ct. App. 1979) (discussing mandatory bifurcation of custody issues from other issues in divorce proceedings upon a party's written request); *see also* ARIZ. REV. STAT. ANN. § 25-328 (2021).

190. *See* Fisk & Allensworth, *supra* note 187, at 10-11 (discussing the use of bifurcation in construction cases involving derivative claims).

191. *See* Levy, *supra* note 176, at 39-40 (discussing Connecticut's frequent use of bifurcation in divorce cases); Bickford Blado & Botros, *What Is Bifurcation and How Can It Simplify My Family Law Case?*, SAN DIEGO DIVORCE ATT'YS BLOG (Oct. 26, 2016), https://www.sandiegodivorceattorneysblog.com/bifurcation-can-simplify-family-law-case (discussing bifurcation of custody and other issues in divorce cases in California). A rare example of mandatory bifurcation can be seen in West Virginia tort law. *See* Light v. Allstate Ins. Co., 506 S.E.2d 64, 69 (W. Va. 1998). In *Light*, the court held that bifurcation is mandatory in personal injury cases where there is a "third-party bad faith claim against an insurer," holding that "[t]he prejudice inherent in allowing the personal injury claim against [the restaurant] to be tried before the same jury as the additional claims against State Farm . . . is such that the circuit court's refusal to bifurcate was a clear abuse of discretion." *Id.* (internal quotation marks omitted).

192. *See* Levy, *supra* note 176, at 39-40; Bickford Blado & Bostros, *supra* note 191.

193. *See In re* Marriage of Wolfe, 219 Cal. Rptr. 337, 340 (Ct. App. 1985) ("All issues incident to marital termination need not be tried in a single family law proceeding."); Levy, *supra* note 176, at 39-40; Bickford Blado & Bostros, *supra* note 191.

194. Halberg v. Halberg, 519 So. 2d 15, 16 (Fla. Dist. Ct. App. 1987) (reviewing a final judgment of divorce following a bifurcated trial); Grzybala v. Grzybala, No. FA156025260, 2017 WL 3671106, at *1 n.1 (Conn. Super. Ct. July 24, 2017); Todtenbier v. Todtenbier, 48 So. 3d 413, 415 n.4 (La. Ct. App. 2010) ("The custody issues and financial issues were bifurcated at [Petitioner]'s request."); Clark v. Clark, No. FA154127248, 2016 WL 4500127, at *2 (Conn. Super. Ct. July 27, 2016) (deciding custody issues before hearing financial issues). Courts are not only bifurcating these issues in divorce actions, but many states also permit the bifurcation of the divorce decree itself from the financial and custodial issues. *See, e.g.*, Speights v. Speights, No. 2176 EDA 2017, 2018 WL 1465447, at *1-2 (Pa. Super. Ct. Mar. 26, 2018) ("Bifurcation separates the termination of the marriage from the distribution of property so that the marriage and each party's personal life are not held hostage to economic demands."); Veronica R. Woods, *To Bifurcate, or Not to Bifurcate: That Is the Divorce Question*, LEWITT HACKMAN, https://www.lewitthackman.com/to-bifurcate-or-not-to-bifurcate-that-is-the-divorce-question (last visited Apr. 1, 2021). However, courts have also warned against the dangers of bifurcating matrimonial actions in this manner. *See* Costin v. Costin, 638 N.Y.S.2d 786, 787 (App. Div. 1996); Smolinsky v. Smolinsky, No. 3347, 1981 WL 207370, at *370 (Pa. Com. Pl. May 13, 1981). For example, in *Costin*, the New York Appellate Division held that:

have recognized the coercive nature of money in divorce proceedings and have also suggested that custody should be determined separately from economic issues.[195] Therefore, in practice, many courts do hear these issues separately.[196] The issue remains, however, that this is not an automatic, statutorily required approach to divorce, as bifurcation is left to the discretion of the court.[197] Depending on the jurisdiction, a divorce will not be bifurcated until a request is made by a party, and the requesting party may be roadblocked by a presumption or preference against bifurcation.[198]

Many have argued for bifurcation of these issues in the context of settlement and mediation.[199] Bifurcating custody issues from financial

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> Bifurcation of matrimonial actions is generally disfavored because it raises the possibilities of economic coercion, two protracted proceedings, or delay in resolving the financial issues. Absent concrete reasons for bifurcation, such a motion should be denied. Here, the only reason the plaintiff offers is that the grounds phase would progress quickly and the equitable distribution phase would be more complicated. Such a reason does not warrant bifurcation and could well lead to a delay in resolving the financial issues.

Costin, 638 N.Y.S.2d at 787; *see also Smolinsky*, 1981 WL 207370, at *370 ("[B]ifurcation of a matrimonial case has received extensive criticism from all segments of the community and after a review of all the issues, the Committee advised all assignment judges that bifurcation should only be permitted with their approval and that such approval should be granted only in unusual and extenuating circumstances."). In cases where a divorce is granted absent a financial determination, there is a potential that a party could lose his or her interest in marital property if, for example, one of the parties died prior to a financial determination as the surviving spouse would be legally divorced from the decedent. Hannigan v. Hannigan, No. 9970/05, 2005 WL 3050466, at *6 (N.Y. Sup. Ct. Nov. 14, 2005). This is also known as a "status divorce" because the decree changes one's status from married to single, but only one of the four issues (for example, dissolution) is decided. *See* Woods, *supra* ("California's Family Code provides an alternative option: Courts may allow parties to request a bifurcation, which essentially gives the Court the leeway to grant a divorce before other outstanding issues are resolved.").

195. *See* Abramowicz & Abramowicz, *supra* note 3, at 397-98, 402-03 (proposing bifurcation of divorce in the settlement context).

196. *See, e.g.*, Levy, *supra* note 176, at 39; Bickford Blado & Bostros, *supra* note 191.

197. *See* Gensler, *supra* note 6, at 777-78.

198. *See id.* at 728; Rowley III & Moore, *supra* note 177, at 7-8. *But see* Marce v. Bailey, 636 P.2d 1225, 1227 (Ariz. Ct. App. 1979).

199. *See* Abramowicz & Abramowicz, *supra* note 3, at 403-05; McEwen et al., *supra* note 174, at 1340-41 (discussing the separation of custody and financial issues in divorce mediation). Mediation is a popular alternative to litigation as it is more private and less expensive. *See* Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 568-69 (1995) (sharing the story of a victim of domestic violence and her experience with mediation); Archer Law, *Why Divorcing Couples Are Choosing Alternative Dispute Resolution Over Litigation*, PHILLY VOICE (Sept. 12, 2019), https://www.phillyvoice.com/why-divorcing-couples-are-choosing-alternative-dispute-resolution-over-litigation-0599944. Mediation generally involves direct negotiation and communication between parties, which is overseen by a mediator. Hughes, *supra*, at 568-69. Parties may also believe that mediation will be less adversarial; however, this is not always true in situations where couples have an imbalance of power. *Id.* at 568-69, 578. Specifically, any power imbalances between parties may be amplified, and vulnerable spouses may find themselves without an advocate, as the mediator is a *neutral* third party. *See id.* at 566, 578.

issues in divorce matters has been previously attempted and suggested in the mediation context.[200] In mediation, states have attempted to treat custody separately and apart from property and financial issues.[201] States such as California, Michigan, Oregon, Utah, and Nevada have required that mediation be limited to only the issues of custody and visitation.[202] However, these statutes have been ineffective in actually preventing financial issues from weighing on custody determinations in mediation for several reasons.[203]

Hughes recognizes that where there has been a history of domestic violence, mediation can have particularly negative effects. *Id.* at 563-64, 578. He notes:

> Many cases are mediated where a power imbalance adversely impacts the mediation and results in an agreement which reflects the underlying imbalance between the parties. Although many states mitigate power imbalances through statutes that advise against or prohibit mediation if there has been abuse or a history of abuse, many abusive relationships fail to fit the prototypical image of an abusive relationship and will, unfortunately, escape any scrutiny. Other jurisdictions lack any safety net whatsoever. Except for vague, occasional warnings about an inability to bargain in good faith, prospective harm to one participant, manipulative or intimidating bargaining techniques, or power imbalances, no specific, quantifiable warnings against divorce mediation exist on premises other than abuse.

Id. at 563-64. Because these parties already have a manipulative relationship, negotiating one-on-one only perpetuates this abusive relationship and can control the outcome. *Id.* Finally, as mediation and other alternative dispute resolutions are forms of private ordering, the same concern that parties will disregard the child's best interests remain. *See* Singer, *supra* note 8, at 1552-53. Further, mediators are not always concerned with the child's needs or wishes:

> More than one quarter of the mediators surveyed in a recent study, for example, indicated they would accept a custody agreement that cut the children off from their favorite grandparents even though the children were unhappy with the arrangement and the agreement had been arrived at through a "bald-faced trade-off of access to the children for support payments." Most of these mediators rationalized their decision on the basis of the "family's right to autonomous judgment."

Id.

200. *See* McEwen et al., *supra* note 174, at 1340-42 (discussing statutory attempts at requiring mediators to limit discussions to child custody issues).

201. *Id.*

202. *Id.* at 1340 & n.131. The reasons for limiting mediation to custody and visitation issues reflect those issues discussed in Part III herein. *See supra* Part III. For example:

> Commentators state that bargaining imbalances are more likely to cause harm if parties discuss economic as well as child status issues during the mediation. Justifications for this assertion vary. One commentator contends that an aggressive parent will demand economic concessions in exchange for allowing the other parent more access to or rights concerning the children. Separating economic issues from child custody and visitation issues in the mediation process presumably averts these inappropriate trade-offs. Other commentators add that the legally-naive party faces the greatest disadvantage in the negotiation of economic issues, where legal advice, higher education, and experience make choices more informed. . . . Most statutes authorize mandatory mediation only for contested custody and visitation issues, probably to prevent linking these to economic issues, to reduce bargaining imbalances, and to avoid resistance from the bar.

McEwen et al., *supra* note 174, at 1340.

203. *See id.* at 1340-41.

First, mediation is more informal than adversarial court proceedings.[204] Therefore, it is difficult to actually prevent the issue from being discussed or to prevent parties from linking financials to custody.[205] Further, many mediators feel that these issues are naturally intertwined and cannot be separated.[206] While these issues are not actually inseparable, divorce law and divorcing parties tend to treat them as though they are.[207] As discussed above, divorces are normally settled in all-encompassing global settlements, and courts tend to take an approach of handling all of these issues at once.[208] However, case law and real-life practice has instructed that financials and custody can successfully be heard separately from each other.[209]

B. Mandating Bifurcation in Matrimonial Actions

Courts have an obligation to ensure that custody determinations are made in consideration of the child's best interests.[210] Judges are entrusted and able as a neutral third party to make this determination.[211] By requiring that courts bifurcate custody from economic issues in divorces and requiring courts to make an independent finding that the custody determination is in the best interest of the child, states can prevent the use of children as bargaining chips in matrimonial actions.[212] Moreover, this requirement would not only ensure the child's best interests, but also ensure a fair and efficient divorce resolution by keeping the party more invested in custody on equal footing with the less invested party.[213] While the issues with the all-at-once approach to

204. *See* Archer Law, *supra* note 199.

205. *See* McEwen et al., *supra* note 174, at 1340-41.

206. *Id.*

207. *See* Abramowicz & Abramowicz, *supra* note 3, at 413 & n.146 (discussing how courts view divorce as a "mosaic" of issues); Fox Rothschild LLP, *supra* note 4 (discussing the intertwining of custody and finances during settlement negotiations).

208. *See* Abramowicz & Abramowicz, *supra* note 3, at 393; Rebecca Aviel, *Counsel for the Divorce*, 55 B.C. L. REV. 1099, 1132 (2014); Mnookin & Kornhauser, *supra* note 2, at 959.

209. *See, e.g.*, Halberg v. Halberg, 519 So. 2d 15, 16 (Fla. Dist. Ct. App. 1987); Grzybala v. Grzybala, No. FA156025260, 2017 WL 3671106, at *1 n.1 (Conn. Super. Ct. July 24, 2017); Todtenbier v. Todtenbier, 48 So. 3d 413, 415 (La. Ct. App. 2010); Clark v. Clark, No. FA154127248, 2016 WL 4500127, at *2 (Conn. Super. Ct. July 27, 2016).

210. Byrnes, *supra* note 25, at 52 (recognizing that courts have an obligation to ensure that custody determinations are made in consideration of the best interests of the child). While most jurisdictions require judges to review and approve the terms of a divorce settlement generally, this is especially true where children are involved. *See* Singer, *supra* note 8, at 1474-75; Mnookin & Kornhauser, *supra* note 2, at 994.

211. *See* Mnookin & Kornhauser, *supra* note 2, at 994.

212. *See* Abramowicz & Abramowicz, *supra* note 3, at 402-03.

213. *See id.* at 403-04.

divorce are generally associated with settlement,[214] adjusting the way courts procedurally manage divorce cases can influence the type of negotiating that occurs outside of the courtroom.[215]

As discussed in Part IV.A, many courts already do bifurcate the financial and custodial issues in matrimonial actions,[216] but this bifurcation is generally discretionary.[217] However, in Arizona, courts are actually mandated by statute to bifurcate custody issues from other issues in a matrimonial proceeding where custody is contested and where a party requests said bifurcation.[218] In interpreting this statute, the Arizona Court of Appeals noted that the mandatory bifurcation provision was partially enacted due to the different factors considered in determining the issue of custody and visitation as opposed to those considered in determining financial issues.[219] This assessment is true of most states; with the rise of no-fault divorce, the prior conduct and personalities of the parties have largely been eliminated from consideration with reference to the property issues and entitlement to divorce.[220] However, the same is not true for custody determinations.[221] In fact, the conduct of the parties is a central issue in custody proceedings.[222]

In order to prevent improper trade-offs, promote efficiency and the best interests of the child, and to keep these different issues separate, courts should require the bifurcation of custody issues in divorce

214. *See id.* at 413-14; Singer, *supra* note 8, at 1550; Mnookin & Kornhausert, *supra* note 2, at 967.

215. *See* Mnookin & Kornhausert, *supra* note 2, at 980 (discussing how court procedures and standards can influence what happens outside of court).

216. *See supra* Part IV.A.

217. *See* Rowley III & Moore, *supra* note 177, at 7 ("[T]he decision to grant or decline bifurcation is entirely within the sole discretion of the court, and that decision is informed by objective considerations that are not weighted in favor of the parochial litigation interests of one litigant or another.").

218. ARIZ. REV. STAT. ANN. § 25-328 (2021).

219. *See* Marce v. Bailey, 636 P.2d 1225, 1227 (Ariz. Ct. App. 1979); Estes v. Superior Court, In & For Maricopa, 672 P.2d 180, 182 (Ariz. 1983). Specifically, with the adoption of "no-fault divorce" in Arizona, divorce law was moving away from assigning blame and excluding "prior conduct of the parties from the court's consideration of whether the marriage should be dissolved and how the property should be divided." *Marce*, 636 P.2d at 1227. However, "[p]ersonal and parental conduct and habits inevitably must be considered in determining the best interests of the child" and "[t]he provision in [ARIZ. REV. STAT. ANN. § 25-328] for bifurcation of property issues from custody and visitation issues implements this distinction." *Id.*; *see* ARIZ. REV. STAT. ANN. § 25-328.

220. Singer, *supra* note 8, at 1460.

221. *See id.* at 1528-29; CHILD WELFARE INFO. GATEWAY, *supra* note 71, at 2-3.

222. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 71, at 2-3.

proceedings.[223] The importance of separating these issues has been recognized by the Arizona Legislature and Supreme Court,[224] as well as other state courts[225] and scholars.[226] Implementing required bifurcation would help remedy these issues.[227] Therefore, this Note proposes that states should adopt statutory language mandating bifurcation in divorce proceedings.[228]

The proposed statutory language would be based on current Arizona law,[229] but require bifurcation automatically, rather than only upon request and further require that the issue of custody and visitation be heard first:

> In all matrimonial cases where custody or parenting time is a contested issue, the court shall first hear and decide the issue of custody and parenting time (hereinafter, "the first decision") and decide all other issues including maintenance, child support, and division of property thereafter (hereinafter, "the second decision"). The court shall make explicit findings as to the best interests of the child in the first decision. The first decision and the second decision shall be incorporated, but not merged with, the resulting judgment of divorce.[230]

By bifurcating the issues, parties will be forced to separate them and no longer link them in making decisions.[231] Requiring that custody and visitation be heard first prevents the issue of unfair and improper

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223. *See* Abramowicz & Abramowicz, *supra* note 3, at 402-05 (arguing that bifurcated settlements would prevent the trade-offs and other negative effects of determining custody and financial issues together in divorce proceedings).

224. *See Estes*, 672 P.2d at 182. In *Estes*, the court held that financial support issues should be determined "on the basis of the status and needs of the parties at the time of the dissolution, and not marital misconduct." *Id.* However, "[W]hen the court considers which party will be awarded custody of children, reference must be made to the parents' conduct. By requiring separate hearings whenever custody or visitation is contested, our legislature sought to separate matters of money from matters of conduct." *Id.*

225. *See* Halberg v. Halberg, 519 So. 2d 15, 16 (Fla. Dist. Ct. App. 1987); Grzybala v. Grzybala, No. FA156025260, 2017 WL 3671106, at *1 n.1 (Conn. Super. Ct. July 24, 2017); Todtenbier v. Todtenbier, 48 So. 3d 413, 415 (La. Ct. App. 2010); Clark v. Clark, No. FA154127248, 2016 WL 4500127, at *2 (Conn. Super. Ct. July 27, 2016).

226. Abramowicz & Abramowicz, *supra* note 3, at 402.

227. *See id.* at 402-05 (discussing the benefits to bifurcation in the settlement context).

228. *See infra* notes 229-30 and accompanying text.

229. ARIZ. REV. STAT. ANN. § 25-328 (2021). Section 25-328 of the statute reads:

> In all cases when custody or parenting time is a contested issue, the court shall first hear and decide all other issues including maintenance and child support if requested to do so by the petitioner, the respondent or the child's attorney. The request shall be in the form of a written demand filed with a motion to set or a controverting certificate.

Id.

230. *See id.*

231. *See* Abramowicz & Abramowicz, *supra* note 3, at 403.

bargaining by swiftly resolving the issue of custody.[232] This approach, for the reasons stated above, protects both the litigants and children.[233]

If financials were to be heard and decided first, manipulative tactics used against the more invested party will likely continue.[234] For example, the party who does not necessarily want custody may make a settlement offer during the financial trial and, with the issue of custody still unresolved, the more invested, often financially weaker party may still be coerced into accepting the terms.[235] Moreover, it is vital that when addressing the issue of custody trade-offs, the toll of these battles on children must be considered, as parents have been proven to manipulate their children in order to make their own positions stronger.[236] Thus, prioritizing custody issues in divorce cases will allow these issues to be decided expeditiously, such that, in the event that these harms cannot be prevented, the time during which children are subjected to these harms is shortened.[237]

V. CONCLUSION

The dissolution of a marriage encompasses nearly every facet of one's life: assets, debts, children, career, and home.[238] Parties and children going through this transitional period are at their most vulnerable.[239] Often in these cases, there is an imbalance of bargaining

232. *See id.*

233. *See id.* at 402-05.

234. *See id.* at 403.

235. *See id.*

236. *See* Cynkar, *supra* note 89 ("[R]esearch shows that parental conflict often takes a profound emotional toll on children caught in the middle, leading to increased school drop-out rates, behavior problems and mental health issues."). Custody trade-offs are only one way in which parents use children to advance their positions in divorce actions. *See, e.g.*, *In re* Marriage of Day, 314 N.W.2d 416, 419 (Iowa 1982). Parents may directly involve the children in the custody litigation by making attempts to alienate the children from the other parent, discussing the litigation with them, or coaching them through the proceedings. *See id.* ("There is a clear inference, . . . that . . . [the father] attempted to manipulate the children and alienate them from their mother. He told them he was very poor, could not heat his house, and that she took everything away from him including land that had been in the Day family for a long time."); *see also* Abramowicz & Abramowicz, *supra* note 3, at 395 (discussing how trade-offs can commodify children and "demean[] children's dignity"). Thus, children will likely benefit from the prioritization of custody determinations in contentious divorces. *See* Cynkar, *supra* note 89.

237. *See* Cynkar, *supra* note 89; Singer, *supra* note 8, at 1550-51 (noting that private ordering can have negative effects on children).

238. *See* Williams, *supra* note 156.

239. *See* Romeo Vitelli, *Life After Divorce*, PSYCH. TODAY (July 13, 2015), https://www.psychologytoday.com/us/blog/media-spotlight/201507/life-after-divorce (discussing the psychological and emotional toll divorce takes on a family, including parties and children).

power between spouses that existed even prior to the divorce.[240] When it comes to negotiating terms for final settlement, the threat of custody litigation may be made against the parent who is more invested in custody.[241] When a threat like this is made, it can be extremely effective as a manipulation technique.[242] While the legislature and courts cannot entirely control how people bargain, procedural safeguards can be put in place to lessen the validity of these threats and can help keep the focus of custody determinations on the best interests of the child.[243] Without these procedural safeguards, children will continue to be used as pawns against the parent who wants the best for them.[244]

To remedy these issues, courts should be required (or, in the absence of any statutory mandate, exercise their discretion to) bifurcate financial issues from custody issues in divorce cases.[245] Separating these issues will not negatively impact divorce proceedings; in fact, they may become simplified.[246] It may be more practical to hold separate trials on the issues as they involve completely different evidence and discovery.[247] Further, while custody is not supposed to be primarily based on financial factors, the reality is that when custody and finances are decided together, money can corrupt the outcomes of the proceedings.[248] As is the case with most parties in other legal disputes, divorcing parties will also use whatever leverage they have available to them in order to ensure a more favorable outcome.[249] When custody and money are both chips on the table, the temptation for divorcing parties to

240. *See* Altman, *supra* note 7, at 514-15; Hughes, *supra* note 199, at 563-64 (discussing the ways power dynamics carry from the relationship to the divorce action within the context of mediation).

241. *See* Neely, *supra* note 100, at 177-78; *Children as an Abusive Mechanism*, *supra* note 107; Pattillo, *supra* note 107.

242. Pattillo, *supra* note 107; SAUNDERS ET AL., *supra* note 117, at 17.

243. *See* Singer, *supra* note 8, at 1549 (warning that, absent state intervention, the privatization of divorce may lead to inequitable outcomes and disparities in equality as between mothers and fathers).

244. *See* Neely, *supra* note 100, at 179 ("The everyday occurrence of children being traded for money should be sufficient in and of itself to prompt a reevaluation of a system that turns custody awards into bargaining chips.").

245. *See* Abramowicz & Abramowicz, *supra* note 3, at 402.

246. *See id.* at 382 ("[I]t may be easier to settle the first issue rather than the entire case because a single issue is simpler and involves lower stakes than the case as a whole."); *see also supra* text accompanying note 150.

247. *Compare* Levy, *supra* note 150, at 432-33, *with* Glenn, *supra* note 150, at 9-10.

248. *See* Abramowicz & Abramowicz, *supra* note 3, at 392-94; Singer, *supra* note 8, at 1550-51; Mnookin & Kornhausert, *supra* note 2, at 963-64.

249. *See* Byrnes, *supra* note 25, at 51; Abramowicz & Abramowicz, *supra* note 3, at 392-94; Mnookin & Kornhausert, *supra* note 2, at 964.

disregard the best interests of their children and use them in order to secure themselves financially is too great.[250]

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250. *See* Byrnes, *supra* note 25, at 51; Abramowicz & Abramowicz, *supra* note 3, at 392-94; Mnookin & Kornhausert, *supra* note 2, at 964.

* J.D. Candidate, 2021, Maurice A. Deane School of Law at Hofstra University; B.A., Political Science, 2018, Queens College. I dedicate this Note to Maria Schwartz. In addition to being an incredible mother, she is an inspirational mentor, who instilled in me a deep love, appreciation, and respect for the law and the practice thereof. I would like to thank my father, Steven Schwartz, for his unconditional love and support throughout my life and law school career. I would also like to thank my sisters, Alaina and Stephanie Schwartz, for their love and friendship, without which life would be dull. I would also like to thank my grandparents, Gladys and Gustavo Serrano, who devote and devoted their lives to the success of their children and grandchildren. I would also like to express my sincere gratitude to my faculty advisor, Professor J. Scott Colesanti, for his guidance and assistance throughout the writing of this Note. Finally, I would like to thank the members of the *Hofstra Law Review*, including my Notes Editor, Rebecca Marks, the Managing Editors of Volume 49, Leanne Bernhard, Robert Levinson, and Delores Chichi, and the Managing Editors of Volume 50, Nicole M. Donadio, Jason Egielski, and Victoria L. Pepe.