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Policing Morality: The Inconsistent Application of the Moral Fitness and Fitness Factor

Ariana D. Meyers¹ & Gabrielle C. Wolf²

I. INTRODUCTION

“The ‘best interests of the child’ became a judicial yardstick used to measure all claims for children. Its dramatic impact is most apparent in the resolution of disputes between the natural parents for their children.”³

The Uniform Marriage and Divorce Act (UMDA) enumerates five “best interest of the child” factors:

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

The court shall not consider conduct of a proposed custodian that does not affect [their] relationship to the child.⁴

Arizona, Colorado, Georgia, Minnesota, Montana, and Washington have enacted the UMDA. Some states have expanded upon the factors provided within the UMDA when creating their best interest standards.⁵ The purpose of the UMDA is to focus on the conduct of the parents, as that behavior affects the children.⁶ The UMDA provides as follows:

The last sentence of the section changes the law in those states which continue to use fault notions in custody adjudication. There is no reason to encourage parties to spy on each other in order to discover marital (most commonly, sexual) misconduct for use in a custody contest. This provision makes it clear that unless a

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³ LESLIE JOAN HARRIS ET AL., *FAMILY LAW* 412 (Rachel E. Barlow et al. eds., 7th ed. 2023).

⁴ UNIF. MARRIAGE & DIVORCE ACT § 402(1)–(5) (UNIF. L. COMM’N 1973).⁵ UNIF. L. COMM’N, *Marriage & Divorce Act, Enactment History*, <https://www.uniformlaws.org/committees/community-home?communitykey=c5a9eccc-095f-4e07-a106-2e6df459d0af> (last visited Oct. 8, 2023).

⁵ See COL. REV. STAT. ANN. § 14-10-124(1.5)(a) (West 2021).

⁶ UNIF. MARRIAGE & DIVORCE ACT § 402(1)–(5) (UNIF. L. COMM’N 1973).

contestant is able to prove that the parent's behavior in fact affects [their] relationship to the child (a standard which could seldom be met if the parent's behavior has been circumspect or unknown to the child), evidence of such behavior is irrelevant.⁷

Of the states that have enacted their own best interest of the child standards or have adopted those from the UMDA, a subset of states include a factor devoted to the moral fitness and/or fitness of the parent, a term used interchangeably by states.⁸ The problem with the moral fitness and fitness factor when conducting a best interest analysis is the lack of judicial consistency and uniformity in applying the facts to the law. An analysis of statutes in states that use the moral fitness and fitness factor highlights the ambiguous and inconsistent application of the factor, which leads to detrimental results for litigants. This issue necessitates a reform in the construction of the best interest factors through the elimination or replacement of the moral fitness and fitness factor.

II. *States with moral fitness and fitness factors pertaining to the best interest of the child*

Florida, Louisiana, Michigan, Mississippi, New Jersey, New York, North Dakota, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming consider the fitness of the parents within their best interest analysis when awarding custody of children.⁹

FLORIDA

In Florida's best interest of the child analysis, the judiciary considers twenty factors "affecting the welfare and interests of the particular minor child and the circumstances of that family...."¹⁰ One factor considered is the moral fitness of the parents.¹¹

LOUISIANA

Louisiana has fourteen best interest factors and considers "all relevant factors in determining the best interest of the child...."¹² Included within the factors is "[t]he moral fitness of each party, insofar as it affects the welfare of the child."¹³

⁷ *Id.* § 402.

⁸ See FLA. STAT. § 61.13(3)(f) (2023); LA. CIV. CODE ANN. art. 134(A)(7) (2018); MICH. COMP. LAWS § 722.23(f)(2016); *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983); N.J. STAT. ANN. § 9:2-4(c) (West 1998); *Matter of Supangkat v. Torres*, 101 A.D.3d 889, 890 (N.Y. App. Div. 2012); see *Matter of Swinson v. Brewington*, 84 A.D.3d 1251, 1253 (N.Y. App. Div. 2011); *Matter of Anson v. Anson*, 20 A.D.3d 603, 604 (N.Y. App. Div. 2005); N.D. CENT. CODE § 14-09-06.2(1)(f) (2019); *Pettinato v. Pettinato*, 582 A.2d 909, 913 (R.I. 1990); *Pietrzak v. Schroeder*, 2009 SD 1, ¶ 41, 759 N.W.2d 734, 744 (quoting *Fuerstenberg v. Fuerstenberg*, 1999 SD 35, ¶ 24, 591 N.W.2d 798, 807); TENN. CODE ANN. § 36-6-106(a)(8) (West 2022); UTAH CODE ANN. § 30-3-10(2)(d), (10) (West 2023); WYO. STAT. ANN. § 20-2-201(a)(iii) (West 2018).

⁹ *Id.*

¹⁰ FLA. STAT. § 61.13(3) (2023).

¹¹ *Id.* § 61.13(3)(f).

¹² LA. CIV. CODE ANN. art. 134(A) (2018).

¹³ *Id.* § 134(A)(7).

MICHIGAN

Twelve best interests of the child factors are considered in Michigan, including “the moral fitness of the parties involved.”¹⁴

MISSISSIPPI

When deciding custody, Mississippi considers twelve best interests of the child factors, which have been derived from case law.¹⁵ One factor the court may consider is “the moral fitness of each parent.”¹⁶ Additional enumerated factors include:

(e) Upon a finding by the court that both of the parents of the child have abandoned or deserted such child, or that both such parents are mentally, morally or otherwise unfit to rear and train the child, the court may award physical and legal custody to:

(i) The person in whose home the child has been living in a wholesome and stable environment; or

(ii) Physical and legal custody to any other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.¹⁷

NEW JERSEY

New Jersey considers fourteen factors when awarding custody, including the fitness of the parents; however, the state is not limited to only the evaluation of those factors.¹⁸ In considering the fitness of the parents, “[a] parent shall not be deemed unfit unless the parents' conduct has a substantial adverse effect on the child.”¹⁹

NEW YORK

In making an initial custody determination, New York courts are required to consider five best interest factors, including “each parent’s relative fitness, including his or her ability to guide the child, provide for the child’s overall well-being, and foster the child’s relationship with the noncustodial parent....”²⁰

NORTH DAKOTA

The court considers thirteen best interests of the child factors when applicable.²¹ This includes “[t]he moral fitness of the parents, as that fitness impacts the child.”²²

¹⁴ MICH. COMP. LAWS § 722.23(f) (2016).

¹⁵ *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983).

¹⁶ *Id.*

¹⁷ MISS. CODE ANN. § 93-5-24(e)(i)-(ii) (2003).

¹⁸ N.J. STAT. ANN. § 9:2-4(c) (West 1998).

¹⁹ *Id.*

²⁰ *Matter of Supangkat v. Torres*, 101 A.D.3d 889, 890 (N.Y. App. Div. 2012); *see Matter of Swinson v. Brewington*, 84 A.D.3d 1251, 1253 (N.Y. App. Div. 2011); *Matter of Anson v. Anson*, 20 A.D.3d 603, 604 (N.Y. App. Div. 2005).

²¹ N.D. CENT. CODE § 14-09-06.2(1) (2019).

²² *Id.* § 14-09-06.2(1)(f).

RHODE ISLAND

Rhode Island courts must weigh eight factors, which are derived from case law.²³ Included within the best interest of the child analysis is “[t]he moral fitness of the child’s parents.”²⁴

SOUTH DAKOTA

South Dakota has seven best interest of the child factors that it may consider in its analysis.²⁵ The best interest factors include parental fitness, under which the court may consider six factors.²⁶ This includes:

(1) mental and physical health; (2) capacity and disposition to provide the child with protection, food, clothing, medical care, and other basic needs; (3) ability to give the child love, affection, guidance, education, and to impart the family's religion or creed; (4) willingness to maturely encourage and provide frequent and meaningful contact between the child and the other parent; (5) commitment to prepare the child for responsible adulthood, as well as to insure that the child experiences a fulfilling childhood; and (6) exemplary modeling so that the child witnesses firsthand what it means to be a good parent, a loving spouse, and a responsible citizen.²⁷

TENNESSEE

The State considers sixteen factors when relevant to custody proceedings.²⁸ Tennessee looks to “[t]he moral, physical, mental and emotional fitness of each parent as it relates to their ability to parent the child.”²⁹

UTAH

Utah courts shall consider the relevant factors when making a best interest of the child analysis.³⁰ One factor specifically pertains to the moral fitness of the parents, which references exceptions for parents who possess or otherwise use medicinal cannabis and cannabis devices, and for parents based on their employment in the cannabis industry and/or their medicinal cannabis cardholder status.³¹

(d) in accordance with Subsection (10), the past conduct and demonstrated moral character of the parent.³²

...

²³ Pettinato v. Pettinato, 582 A.2d 909, 913 (R.I. 1990).

²⁴ *Id.*; see FLA. STAT. § 61.13(3)(f) (2023).

²⁵ Pietrzak v. Schroeder, 2009 SD 1, ¶ 41, 759 N.W.2d 734, 744.

²⁶ *Id.* (quoting Fuerstenberg v. Fuerstenberg, 1999 SD 35, ¶ 24, 591 N.W.2d 798, 807).

²⁷ *Id.*

²⁸ TENN. CODE ANN. § 36-6-106(a)(1)-(16) (West 2022).

²⁹ *Id.* § 36-6-106(a)(8).

³⁰ UTAH CODE ANN. § 30-3-10(2) (West 2023).

³¹ *Id.* § 30-3-10(2)(d), (10).

³² *Id.* § 30-3-10(2)(d).

(10) in considering the past conduct and demonstrated moral standards of each party under Subsection (2)(d) or any other factor a court finds relevant, the court may not:

(a) consider or treat a parent’s lawful possession or use of cannabis in a medicinal dosage form, or a medical cannabis device, in accordance with Title 4, Chapter 41a, Cannabis Production Establishments and Pharmacies, Title 26B, Chapter 4, Part 2, Cannabinoid Research and Medical Cannabis, or Subsection 58-37-3.7(2) or (3) any differently than the court would consider or treat the lawful possession or use of any prescribed controlled substance; or

(b) discriminate against a parent because of the parent’s status as a:

(i) cannabis production establishment agent, as that term is defined in Section 4-41a-102;

(ii) medical cannabis pharmacy agent, as that term is defined in Section 26B-4-201;

(iii) medical cannabis courier agent, as that term is defined in Section 26B-4-201; or

(iv) medical cannabis cardholder in accordance with Title 26B, Chapter 4, Part 2, Cannabinoid Research and Medical Cannabis.³³

WYOMING

Ten factors may be evaluated by the courts in Wyoming but are not exhaustive.³⁴ This includes “[t]he relative competency and fitness of each parent.”³⁵

III. HOW STATES HAVE INTERPRETED MORAL FITNESS AND FITNESS

A. The Moral Fitness of the Parents

Statutes and common law doctrines in the States of Florida, Michigan, Mississippi, Rhode Island, and Wyoming do not specifically require the moral fitness of the parents to have a direct consequence on the child within their best interest factors.³⁶

In Florida, while there is no direct consequence to the child within the statutory language pertaining to the moral fitness of the parents, the courts have interpreted otherwise. “In considering the parent’s moral fitness...the trial court should focus on whether the parent’s behavior has a direct impact on the welfare of the child.”³⁷ Over time, the court has further construed the statute more

³³ § 30-3-10(10)(a)-(b)(i)-(iv).

³⁴ WYO. STAT. ANN. § 20-2-201(a)(i)-(x) (West 2018).

³⁵ *Id.* § 20-2-201(a)(iii).

³⁶ *See* FLA STAT. § 61.13(3)(f) (2023); MICH COMP. LAWS § 722.23(f) (2016); *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983); *Pettinato v. Pettinato*, 582 A.2d 909, 913 (R.I. 1990); WYO. STAT. ANN. § 20-2-201(a)(iii) (West 2018).

³⁷ *Maradie v. Maradie*, 680 So.2d 538, 543 (Fla. Dist. Ct. App. 1996); *see Dinkel v. Dinkel*, 322 So.2d 22, 23 (Fla. 1975).

narrowly by requiring actual or prospective harm.³⁸ For instance,

Under *Dinkel*, a connection between the actions of the parent and harm to the child requires an evidentiary basis and cannot be assumed. In addition, the mere possibility of negative impact on the child is not enough. This is not to say that the trial court must have evidence of actual harm, past or present. The trial court can base a decision on proof of the likelihood of prospective harm.³⁹

However, if there is no evidence of actual impact on the child, moral fitness must not be considered by the court.⁴⁰ For example, in *Hughes*, the court found that a wife's sexual misconduct after separation but before the finalization of the divorce did not have a direct impact on the child and, therefore, should not have been considered in making a custody determination.⁴¹

In Michigan, contrary to statutory language, conduct under the moral fitness factor is only relevant insofar as the conduct impairs one's ability to function as a parent. In *Fletcher*, evidence of a parent's extramarital affair was irrelevant to the moral fitness factor unless the conduct significantly affected the individual's ability to function as a parent.⁴² In contrast, in *McIntosh*, a parent admitted to hiding alcohol, attending Alcoholics Anonymous meetings, and being intoxicated during parenting time, actions that directly impacted their ability to function as a parent.⁴³ The impaired ability to function as a parent supported the finding of the moral fitness factor favoring the other parent.⁴⁴

Within Mississippi, evidence relevant to moral fitness includes prior relationships, alcohol consumption, illegal drug usage, use of explicit language, and history of arrest.⁴⁵ Pre-separation adultery, which did not directly impact the child, was not considered relevant to moral fitness.⁴⁶ However, evidence of an adulterous relationship during the marriage resulting in the birth of a child was relevant to moral fitness.⁴⁷ A greater frequency in church attendance with the minor child is relevant to a finding of moral fitness.⁴⁸

Rhode Island found that evidence of alcohol abuse, an extra-marital relationship during divorce proceedings, and sporadic visitation with the minor child constituted "nothing less than horrendous" marital conduct of the parent.⁴⁹

³⁸ *Maradie*, 680 So.2d at 543.

³⁹ *Id.*

⁴⁰ *Hughes v. Hughes*, 955 So.2d 1201, 1202 (Fla. Dist. Ct. App. 2007).

⁴¹ *Id.*

⁴² *Fletcher v. Fletcher*, 447 Mich. 871, 887 (Mich. 1994).

⁴³ *McIntosh v. McIntosh*, 758 N.W.2d 325, 480 (Mich. App. 2009).

⁴⁴ *Id.*

⁴⁵ *Tedford v. Tedford*, 2019-CA-01320-COA (¶ 27) (Miss. Ct. App. 2021).

⁴⁶ *Wooten v. Wooten*, 2020-CA-00353-COA (¶¶ 23-24) (Miss. Ct. App. 2022).

⁴⁷ *Id.* ¶ 24.

⁴⁸ *Latham v. Latham*, 2022-CA-00363-COA (¶ 17) (Miss. Ct. App. 2023).

⁴⁹ *Mattera v. Mattera*, 669 A.2d 538, 541 (R.I. 1996).

Evidence of previous unfitness in Wyoming is relevant to determining competency and current fitness.⁵⁰ For instance, in *Taulo-Millar v. Hognason*, a parent’s prior absconding attempt was relevant to the pending proceeding to provide context to her conversations with the minor child and social media posts.⁵¹ Past absconding attempts were relevant to contextualize the parent’s current competency and fitness.⁵² Moreover, a parent’s behavior in relation to parenting time is relevant to their moral fitness and competency.

The court had ‘doubts’ about Mother’s competency and fitness given (1) her tendency to arrive at visitation with lavish gifts for FIH, including providing her extreme amounts of undergarments, (2) her bathing of FIH in the sink at every visitation in front of others and in view of cameras (bathing ritual), and (3) her decision, without the recommendation of her physician, to discontinue her HIV medication to ‘give her body a break.’⁵³

B. When a Parent’s Moral Fitness Directly Impacts the Child

Louisiana, New Jersey, North Dakota, and Tennessee consider the moral fitness of a parent and its impact on the minor child.⁵⁴

Louisiana examines both the literal and physical fitness of the parent in determining their ability to provide care for the minor child.⁵⁵ In *In re Moore*, evidence of several physical disabilities, use of muscle relaxants, depression medication in conjunction with cigarette and alcohol use, lack of hygiene, and excessive Pepsi consumption were relevant factors the court considered in determining the fitness of the parent.⁵⁶

New Jersey’s standard for parental unfitness, derived from case law, mirrors the second prong of the termination of parental rights standard.⁵⁷ Under the second prong, parental unfitness is established when “[t]he parent is unwilling or unable to eliminate the harm facing the child or is unable or unwilling to provide a safe and stable home for the child and the delay of permanent placement will add to the harm.”⁵⁸

North Dakota considers the direct impact of a parent’s moral fitness on the child. In *Norberg*, the court found that a mother’s report of sexual abuse was fabricated in order to obtain residential responsibility of the children.⁵⁹ In addition, the mother’s false abuse allegations against the father alienated the children from their father and led to his parenting being supervised, which negatively

⁵⁰ *Taulo-Millar v. Hognason*, 2022 WY 8, ¶¶ 48-49, 501 P.3d 1274, 1288 (Wyo. 2022).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* ¶ 22, 501 P.3d at 1282; *see* WYO. STAT. ANN. § 20-2-201(a)(iii) (West 2018).

⁵⁴ *See* LA. CIV. CODE ANN. art. 134(A)(7) (2018); N.J. STAT. ANN. § 9:2-4(c) (West 1998); N.D. CENT. CODE § 14-09-06.2(1)(f) (2019); TENN. CODE ANN. § 36-6-106(a)(8) (West 2022).

⁵⁵ *In re Moore*, 55,047-CA, p. 10-12 (La. App. 2 Cir. 3/1/23); 358 So. 3d 203, 209

⁵⁶ *Id.*

⁵⁷ *K.O. v. N.D.*, No. A-0260-21, 2022 WL 17086523 at *6 (N.J. Super. Ct. App. Div. Nov. 21, 2022).

⁵⁸ *Id.*; *see* N.J. STAT. ANN. § 9:2-4(c) (West 1998).

⁵⁹ *Norberg v. Norberg*, 2014 ND 90, ¶ 13, 845 N.W.2d 348, 354.

impacted their father-child relationships.⁶⁰ The *Norberg* court found that the children were directly impacted by their mother's lies as a result of the public news coverage pertaining to the father's criminal trial and forced supervised parenting time, resulting in the district court awarding the father residential responsibility.⁶¹ Even where a victim of a crime is not a household member, a conviction may still be relevant so long as the parent's conviction directly impacts the child. Where a parent was convicted of a crime involving sexual acts with an unrelated minor child, the conviction is still relevant because the parent was absent from their child's life during incarceration.⁶²

Tennessee courts consider a parent's conduct prior to the birth of the minor child as relevant when making custody determinations.⁶³ For example, a mother who was filmed in a pornographic video prior to meeting the child's father and birthing the child had "questionable moral fitness."⁶⁴ The court balanced the mother's prior conduct with her church attendance together with the father and minor child.⁶⁵ In the same case, the father's moral fitness was questioned due to his manipulation of the parenting plan and ill treatment of the mother.⁶⁶ As both parents were found to have questionable moral fitness, neither parent was favored under this factor.⁶⁷

Likewise, Tennessee courts also consider a parent's conduct during the pendency of a custody proceeding.⁶⁸ For example, in a case where a father invited his girlfriend to move into his residence where he and his minor child were residing, the court found this behavior problematic.⁶⁹ At the time of the hearing, the relationship between the father and the girlfriend had ended; however, due to this past conduct, the court ordered that the "father shall not have any paramours overnight in the home while [Child] is present."⁷⁰

A. States Applying an Individualistic Approach to the Moral Fitness and Fitness Factor

New York, South Dakota, and Utah, each apply their own moral fitness standard, which is unique from that of the other states.⁷¹

NEW YORK

In determining the best interest of the child, the court looks to "each parent's relative fitness,

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Iakel-Garcia v. Anderson*, 2021 ND 210, ¶ 8, 966 N.W.2d 892, 895.

⁶³ *In re B.C.*, No. W2021-00910-COA-R3-JV, 2022 WL 11121595, at *14 (Tenn. Ct. App. Oct. 19, 2022).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Bumbalough v. Hall*, No. M2022-01003-COA-R3-CV, 2023 WL 4401137, at *13 (Tenn. Ct. App. July 7, 2023).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *See Matter of Supangkat v. Torres*, 101 A.D.3d 889, 890 (N.Y. App. Div. 2012); *see Matter of Swinson v. Brewington*, 84 A.D.3d 1251, 1253 (N.Y. App. Div. 2011); *Matter of Anson v. Anson*, 20 A.D.3d 603, 604 (N.Y. App. Div. 2005); *Pietrzak v. Schroeder*, 2009 SD 1, ¶ 41, 759 N.W.2d 734, 744 (quoting *Fuerstenberg v. Fuerstenberg*, 1999 SD 35, ¶ 24, 591 N.W.2d 798, 807); UTAH CODE ANN. § 30-3-10(2)(d), (10) (West 2023).

including his or her ability to guide the child, provide for the child's overall well being, and foster the child's relationship with the noncustodial parent."⁷² Where the custodial parent has denied the noncustodial parent court-ordered visitation and relocated out of state with minor children, the court has found that the custodial parent is unfit to be the custodial parent.⁷³ The court found this refusal to be analogous to child abduction.⁷⁴ Allegations of unfitness can be overcome by proving a parent's history of primary caregiving for the child.⁷⁵

SOUTH DAKOTA

South Dakota considers six factors when determining parental fitness.⁷⁶ The court need not make findings on each factor; rather, the determination is made on the totality of the evidence.⁷⁷ A parent who allowed romantic love interests to stay in the child's home overnight, while the child was in the home and aware of the partner's presence, was deemed harmful to the child.⁷⁸ "The harmful effect is self-evident when parental misconduct is committed in the presence of a child old enough to perceive the misconduct."⁷⁹

UTAH

Factor (d) of Utah's child custody statute specifically pertains to the moral fitness of the parents, which references an exception within Subsection (10), referring to the possession or use of medicinal cannabis and cannabis devices, or discrimination against parents due to their employment or cardholder status.⁸⁰ A failure to pay child support amounts to a finding of poor moral character.⁸¹ Cohabitation with a sexual partner prior to marriage where the child was not exposed to sexual conduct and the child was not old enough to understand the adult nature of the relationship does not support a finding of immoral character.⁸² Exposure of minor children to a third-party romantic interest with a criminal history involving domestic violence and illegal firearm possession concerned the court due to the potential future negative influence on the children.⁸³ A parent's history of illegal marijuana use is also relevant to moral character.⁸⁴

IV. SHOULD THE MORAL FITNESS AND FITNESS FACTOR BE ELIMINATED OR REPLACED?

⁷² *Matter of Supangkat*, 101 A.D.3d at 890; see *Matter of Tinger v. Tinger*, 108 A.D.3d 569, 570 (N.Y. App. Div. 2013); *Matter of Swinson*, 84 A.D.3d at 1253.

⁷³ *Entwistle v. Entwistle*, 61 A.D.2d 380, 384-85 (N.Y. App. Div. 1978).

⁷⁴ *Id.* at 385.

⁷⁵ *Purse v. Crocker*, 95 A.D.3d 1216, 1217 (N.Y. App. Div. 2012).

⁷⁶ *Pietrzak*, 2009 SD 1, ¶ 41, 759 N.W.2d at 744 (quoting *Fuerstenberg v. Fuerstenberg*, 1999 SD 35, ¶ 24, 591 N.W.2d 798, 807-10).

⁷⁷ *Nickles v. Nickles*, 2015 SD 40, ¶ 18, 865 N.W.2d 142, 150; see *Roth v. Haag*, 2013 SD 48, ¶ 13, 834 N.W.2d 337, 340.

⁷⁸ *Fuerstenberg v. Fuerstenberg*, 1999 SD 35, ¶ 31, 591 N.W.2d 798, 809.

⁷⁹ *Id.*; see *Wolff v. Wolff*, 349 N.W.2d 656, 658 (S.D. 1984).

⁸⁰ UTAH CODE ANN. § 30-3-10(2)(d), (10) (West 2023).

⁸¹ *Allen v. Allen*, 2021 UT App 20, ¶ 46, 483 P.3d 730.

⁸² *Hudema v. Carpenter*, 1999 UT App 290, ¶ 34, 989 P.2d 491.

⁸³ *Thomas v. Thomas*, 1999 UT App 239, ¶ 9, 987 P.2d 603.

⁸⁴ *Nebeker v. Orton*, 2019 UT App 23, ¶ 7, 438 P.3d 1053.

A. Inapplicability of the Facts to the Moral Fitness and Fitness Factor

Many of the facts and circumstances that judges have analyzed under the moral fitness and fitness factor, including extramarital affairs, the decision to discontinue medical treatment, drug and alcohol consumption, and absconding with the child, could reasonably be addressed under other, more clearly defined best interest factors.

Under Tennessee's best interest of the child factors, evidence of an extramarital affair would most appropriately be analyzed under "the character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child," rather than consideration under the moral fitness factor.⁸⁵

Wyoming's best interest of the child factors includes an analysis of "the current physical and mental ability of each parent to care for the child," which is the most appropriate factor for an analysis of a parent's decision to discontinue their HIV treatment.⁸⁶ Further, absconding with a child is relevant under "the ability and willingness of each parent to allow the other to provide care without intrusion, respect the other parent's rights and responsibilities, including the right to privacy."⁸⁷

Drug and alcohol consumption should be analyzed under the "physical and mental and age of the parents," rather than under the moral fitness of parents standard in Mississippi.⁸⁸

B. Elimination of the Moral Fitness and Fitness Factor

State legislatures and courts should eliminate the moral fitness and fitness factor in their best interest of the child standards. Both moral fitness and fitness factor have been broadly interpreted and applied inconsistently by the courts, ranging from consideration of a parent's physical fitness and soda consumption, frequency of church attendance, and sexual orientation. The lack of uniformity in interpretation within and amongst the state courts, and in their application of these factors, creates uncertainty for litigants and their respective advocates in anticipating a judge's findings of fitness.

The stress involved in highly contentious custody disputes puts strain on both the judicial system and the families involved. Clearly defined interpretations of law equate to greater predictability, meaning less frequent litigation and a higher likelihood of settlement.

By state legislatures eliminating the moral fitness and fitness factor and replacing them with clearly defined law, the judge can apply facts with a reduced likelihood of appeal through the reduction in judicial discretion and personal bias in the application of the best interest factors.

C. Replacement of the Moral Fitness and Fitness Factor with a Criminal Activity Factor

Some states include a best interest factor that looks at the criminal activity of the parents.⁸⁹ Meanwhile, other states consider a parent's criminal activity under the moral fitness factor; for

⁸⁵ TENN. CODE ANN. § 36-6-106(a)(12) (West 2022).

⁸⁶ WYO. STAT. ANN. § 20-2-201(a)(ix) (West 2018).

⁸⁷ *Id.* § 20-2-201(a)(viii).

⁸⁸ *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983).

⁸⁹ *See* LA. CIV. CODE ANN. art. 134(A)(8) (2018).

example, under North Dakota Law, the court will consider how a parent's moral fitness impacts the child, which includes consideration of any criminal history by the parent.⁹⁰

A clearly defined factor explicitly referencing the criminal activity of a parent provides an unambiguous standard for the judge. This would also notify potential litigants that their criminal history will be relevant to the best interest analysis and may be scrutinized by courts when making a custody determination.

V. CONCLUSION

The UMDA outlined five best interest factors which many states built upon when creating their own best interest factors. However, in the creation of those best interest factors, judges have been afforded broad discretion in the interpretation of the moral fitness and fitness factor. This discretion resulted in a substantial amount of case law focusing on the conduct of the parents rather than on how the parent's conduct impacts the child. Further, many facts analyzed within the moral fitness and fitness factor could have been considered within other pre-existing factors, highlighting the confusion around how the moral fitness and fitness factor should be interpreted between the states and within the same jurisdiction.

In eliminating or replacing the moral fitness or fitness factor with the criminal activity factor, the discretion of the judge will be reduced, and courts will have a defined standard to consider when analyzing the facts of a case. Replacement with the criminal activity factor will also aid litigants in understanding how the court interprets the best interest factors and place them on notice that their criminal activity is relevant to the proceeding. Eliminating the moral fitness and fitness factor would reduce the inconsistency of judicial analysis, making the outcome more predictable for the parties.

By eliminating or replacing the moral fitness and fitness factor, the law will be more clearly defined and shall provide greater consistency within the best interest of the child analysis.

⁹⁰ Topolski v. Topolski, 2014 ND 68, ¶ 22, 844 N.W.2d 875, 884; *see* Smith v. Martinez, 2011 ND 132, ¶¶ 12-13, 800 N.W.2d 304, 308.