

JOINT CUSTODY PRESUMPTION IN VERMONT: A PROPOSAL FOR CO-PARENTING

INTRODUCTION

Although by statute both Vermont and New Hampshire determine child custody issues based on the “best interest of the child” standard, each state implements this standard differently. Based on a primary care provider preference, Vermont focuses on the quality of the parents, disfavoring joint custody and perpetuating the adversarial process in family courts. New Hampshire, on the other hand, presumes joint custody is in the best interest of the child and focuses on the quality of the child’s life, favoring co-parenting and dispute resolutions that promote mutual parental cooperation and provide children with the opportunity to spend quality time with each parent. In a society where nontraditional families outnumber traditional families, and as one of this country’s leaders in gay rights, the Vermont courts should focus less on the parents’ lives and more on the child’s life by interpreting the best interest of the child under a joint custody presumption, similar to New Hampshire domestic relations law.

Child custody embodies two separate types of custody: legal custody and physical custody.¹ Legal custody refers to the “major” decisions regarding a child’s welfare such as educational, medical, and religious decisions. Physical custody refers to the day-to-day decisions regarding a child’s welfare and belongs to the parent enjoying parenting time with the child. This Note discusses only physical custody and the benefits of a joint-physical-custody presumption.

Arguably, joint physical custody awards in particular have a greater effect on the child’s daily life and how the child interprets the parents’ separation or divorce. While joint legal custody promotes co-parenting in significant decisions of a child’s life, joint physical custody further emphasizes each parent’s autonomy to raise his or her child. It also reaffirms to children that both parents love and want to be with them, that

1. “‘Legal responsibility’ means the rights and responsibilities to determine and control various matters affecting a child’s welfare and upbringing, other than routine daily care and control of the child. These matters include but are not limited to education, medical and dental care, religion and travel arrangements.” VT. STAT. ANN. tit. 15, § 664(1)(A) (2010). “‘Physical responsibility’ means the rights and responsibilities to provide routine daily care and control of the child subject to the right of the other parent to have contact with the child.” *Id.* § 664(1)(B). New Hampshire does not distinguish between legal and physical custody in the statute definitions. Rather, the statute defines “[d]ecision-making responsibility” as “the responsibility to make decisions for the child. It may refer to decisions on all issues or on specified issues,” providing parents with the ability to craft their own parenting plans. N.H. REV. STAT. ANN. § 461-A:1 (2004 & Supp. 2011).

both parents make an effort to care for them, and that each parent is as accessible as possible.²

Part I reviews America's history of child custody and the evolution towards the best-interest-of-the-child standard that exists today, specifically in Vermont and New Hampshire. Part II discusses the custody presumptions in Vermont and New Hampshire family courts. While New Hampshire presumes that joint parental rights and responsibilities are in the best interest of the child, Vermont refuses to extend joint custody unless the parents decide on such an arrangement together. If one Vermont parent does not want to share custody, he or she has the "veto" power in court to deny the other parent joint custody.

Part III discusses the differences between Vermont and New Hampshire's relocation statutes and their effect on child custody. Vermont generally presumes the child's best interest is to remain with the custodial parent, even if that means relocating. New Hampshire, however, evaluates the child's best interest and considers the quality of the child's life, including his or her relationship with parents and other external factors. Part IV discusses the adversarial results of refusing a joint custody presumption and the potentially harmful effects on parents and children. Part V recommends Vermont family courts adopt a less adversarial process by accepting a joint custody presumption.

I. THE BEST-INTEREST-OF-THE-CHILD STANDARD

A. History of Child Custody in the United States and Development of the Best-Interest-of-the-Child Standard

During the colonial era, America regarded children as property.³ English common law and the endless demand for labor in early America influenced a master-servant relationship between parents and children,⁴ or "masters" and children.⁵ Fathers had sole legal and physical rights over and

2. Matthew A. Kipp, *Maximizing Custody Options: Abolishing the Presumption Against Joint Physical Custody*, 79 N.D. L. REV. 59, 74 (2003) ("One of the most significant benefits of a joint physical custody arrangement is that it more closely approximates the family situation the child had before the parents divorced or stopped living together.").

3. MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 16 (1994). Divorces did not consider children, let alone discuss what could be in the children's best interest. *Id.* at 6.

4. *Id.* "In labor-scarce America the services or wages of a child over ten was one of the most valuable assets a man could have." *Id.*

5. There was a "well-established English custom of placing children in the home of a master who was obliged to provide ordinary sustenance and some training . . . as specific as teaching a skilled

responsibilities for their children—the right to collect their children’s earned wages and the responsibility to “train their children to be literate, religious, and economically productive citizens.”⁶ Mothers lacked almost any rights or responsibilities toward their children beyond assisting the father.⁷ During this time, custody disputes rarely arose because mothers understood they had no rights to control their children.⁸ Neither parent could exercise custody of a child born out of wedlock.⁹ Although the public assumed physical responsibility of a “bastard” child, fathers were legally responsible for providing the costs the state incurred to raise the child.¹⁰ Children without parents, or with parents too poor to care for them, often found themselves subjected to involuntary apprenticeships or slavery.¹¹

From approximately 1790 to 1890, both the child–parent dynamic and child custody laws shifted. At common law, the preference of a mother’s love and nurturing nature began to prevail over a father’s “right” to children as his property.¹² For the first time, children “were deemed to have interests of their own.”¹³ “The ‘best interests of the child’ slowly developed as a legal concern in the [United States], when, at least for a growing class of parents, child labor needs were less urgent, and children were assigned an emotional value, enhanced by the romanticization of their mothers.”¹⁴

Two main factors contributed to this significant shift in family law. First, America abolished slavery and sought to legitimize as many children as possible; mothers gained custody of their freed slave children.¹⁵ Children born out of wedlock were legally recognized as the “bastard” of the mother’s family but were not generally recognized as a part of the father’s family.¹⁶ Adopted children were also legitimized.¹⁷ Second, women’s status evolved economically and socially. Although during this time women sought property rights that could have resulted in awarding children to the

craft or . . . as general as instruction in basic reading and the catechism” in return for services. *Id.* at 30. “Children could be sons or daughters, apprentices or servants, orphans, bastards, or slaves.” *Id.* at 4.

6. *Id.* at 7.

7. *Id.* at 14–15. Married women, or *femme couvert*, could not own real or personal property. Since children were considered property and women had few legal rights, mothers generally could not claim any rights or responsibilities over their children. *Id.*

8. *Id.* at 17.

9. *Id.* at 24.

10. *Id.* at 25.

11. *Id.* at 31. In 1776, approximately “one in five American children was a slave.” *Id.* at 39.

12. *Id.* at 50.

13. *Id.*

14. *Id.* at 47.

15. *Id.* at 80.

16. *Id.* at 68–70.

17. *Id.* at 50.

mother as property, the development of “the cult of motherhood” asserted that the best interest of children was to be under the care of their mother.¹⁸ This notion co-evolved with the “tender years doctrine,” a doctrine based on the presumption that mothers should exercise rights and responsibilities of the children because of a mother’s naturally nurturing behavior.¹⁹

At the turn of the twentieth century, identified as the Progressive Era, state governments permanently terminated the common law notion that fathers assumed legal rights and responsibilities of their children, awarded custody to mothers, and passed significant child welfare legislation.²⁰ “[T]he state became the superparent, generous and nurturing, but judgmental. It made the final decisions on how children should be raised and with whom they should live.”²¹

For the first time, parents in poverty, especially single mothers, did not automatically lose custody of their legitimate or illegitimate children to orphanages or involuntary apprenticeships.²² Instead, the states provided support and removed children based on parental “incompetence” or “unfitness.”²³ The states scrutinized families more closely; fathers lost rights and responsibilities of their children and were threatened with criminal penalties if they did not support their children, while social workers judged mothers’ “morality” as the focal point of parental fitness.²⁴ During this time, the states developed the best-interest-of-the-child standard.

By the 1970s, most states rejected the “tender years doctrine” and preferred to adopt gender-neutral custody laws in the best interest of the child based on a joint custody or primary care provider presumption.²⁵ By doing so, fathers regained legal rights to the custody of their children but did not experience a reciprocal surge in physical custody.²⁶ In fact, mother-headed

18. *Id.* at 53–54. “While organized women had little success in gaining custody rights for mothers through property rights legislation, the courts increasingly awarded children to their mothers . . . under the newly developing rule of the best interests of the child.” *Id.* at 58.

19. JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 461 (3d ed. 2005).

20. *Id.* at 84 (discussing the doctrine of necessities).

21. MASON, *supra* note 3, at 87.

22. GREGORY ET AL., *supra* note 19, at 118–19, 136.

23. MASON, *supra* note 3, 92, 104.

24. GREGORY ET AL., *supra* note 19, at 353.

25. *Id.* at 461.

26. “As a result of the high rate of divorce and the growth in illegitimacy, mother-headed households grew dramatically. More children were in the sole custody of their mothers than at any other time in American history” *Id.* at 159–60.

households increased due to the higher rates of divorce, growing illegitimacy, and reproductive medical advancements such as in-vitro fertilization.²⁷

B. The Best-Interest-of-the-Child Standard in New Hampshire and Vermont

In New Hampshire, section 461-A:6 provides, “[i]n determining parental rights and responsibilities, the court shall be guided by the best interests of the child.”²⁸ In Vermont, section 665(a) provides,

The court may order parental rights and responsibilities to be divided or shared between the parents on such terms and conditions as serve the best interests of the child. When the parents cannot agree to divide or share parental rights and responsibilities, the court shall award parental rights and responsibilities primarily or solely to one parent.²⁹

Each state lists factors that guide courts in determining the best interest of the child. Both states’ factors to determine the best interest of the child include: the relationship of the child with each parent; the ability of each parent to provide adequate food, clothing, shelter, medical care, and a safe environment; the ability to meet the child’s current and future developmental needs; the quality of the child’s adjustment to the child’s school and community and the potential effect of any change; the ability and disposition of each parent to foster a positive relationship and continuing contact with the other parent; the child’s relationship with any other person who may significantly affect the child; the ability of the parents to communicate and cooperate with each other; and any evidence of abuse.³⁰

However, New Hampshire includes additional factors focusing on the cooperation and mutual support of the child’s parents: “support of *each parent* for the child’s contact with the other parent” and “support of *each parent* for the child’s relationship with the other parent.”³¹ On the other

27. The increasing numbers of illegitimate children “mirrored the no-fault revolution in divorce” and coincided with society’s changing views of sexual behavior outside of marriage. *Id.* at 144, 160.

28. N.H. REV. STAT. ANN. § 461-A:6 (2004 & Supp. 2011).

29. VT. STAT. ANN. tit. 15, § 665(a) (2010 & Supp. 2011).

30. N.H. REV. STAT. ANN. § 461-A:6; VT. STAT. ANN. tit. 15, § 665(b).

31. N.H. REV. STAT. ANN. § 461-A:6(f)–(g) (emphasis added).

In determining parental rights and responsibilities, the court shall be guided by the best interests of the child, and shall consider . . . :

. . . .

hand, the comparable factor in Vermont focuses on only one parent, by considering “the quality of the child’s relationship with the *primary care provider*.”³² Rather than focusing on the mutual responsibility of both parents to cooperate and support parent-child contact with one another, Vermont instead focuses on the significance of one primary care provider. As a result of this factor, Vermont tends to favor just one parent.

II. GENDER-NEUTRAL CUSTODY PRESUMPTIONS: JOINT CUSTODY VERSUS PRIMARY CARE PROVIDER

Gender-neutral child custody presumptions generally take form in joint custody or primary care provider presumptions. In a primary care provider presumption, one parent assumes sole physical custody and primary responsibility for the child, most likely based on past caretaking performances.³³ Joint custody presumptions assume both parents will “share responsibility and decision making on an equal basis.”³⁴ New Hampshire has adopted a joint custody presumption, and Vermont has adopted a primary care provider presumption.

In New Hampshire, section 461-A:5 states, “there shall be a presumption, affecting the burden of proof, that joint decision-making responsibility is in the best interest of minor children.”³⁵ Section 461-A:1 specifically does not include custody in its definition, nor does it reference custody in the domestic relations statutes—an attempt to avoid assumptions and battles of ownership over children.³⁶ New Hampshire requires parents to develop “parenting plans,” defined as written plans “describing each parent’s rights and responsibilities” for each parent to adhere to, including:

- (a) Decision-making responsibility and residential responsibility.
- (b) Information sharing and access, including telephone and electronic access.

The support of each parent for the child’s contact with the other parent as shown by allowing and promoting such contact, including whether contact is likely to result in harm to the child or to a parent.

The support of each parent for the child’s relationship with the other parent, including whether contact is likely to result in harm to the child or to a parent. *Id.*

32. VT. STAT. ANN. tit. 15, § 665(b)(6) (emphasis added).

33. GREGORY, *supra* note 19, at 465–66.

34. *Id.* at 480.

35. N.H. REV. STAT. ANN. § 461-A:5 (2004 & Supp. 2011).

36. *Id.* §§ 461-A:1, 461-A:20. (“Any provision of law that refers to the ‘custody’ of minor children shall mean the allocation of parental rights and responsibilities as provided in this chapter.”).

- (c) Legal residence of a child for school attendance.
- (d) Parenting schedule, including:
 - (1) Holiday, birthday, and vacation planning.
 - (2) Weekends, including holidays, and school in-service days preceding or following weekends.
- (e) Transportation and exchange of the child.
- (f) Relocation of parents.
- (g) Procedure for review and adjustment of the plan.
- (h) Methods for resolving disputes.³⁷

New Hampshire's joint custody presumption does not suggest that *every* divorce or separation results in a joint custody award.³⁸ However, the statute prefers joint custody arrangements when appropriate.³⁹ The American Law Institute agrees that courts should presume that joint decision-making between parents is in the best interest of the child or, at minimum, that quality contact with each parent is important for a child's development.⁴⁰

Even when the child does not have a significant attachment to a parent, contact with that parent may be important. It has long been postulated that meaningful contact between a child and both parents ordinarily is good for the child's development and sense of identity.⁴¹

37. *Id.* §§ 461-A:4, 461-A:1.

38. *Webb v. Knudson*, 582 A.2d 282, 287 (N.H. 1990) (awarding a father sole legal and physical custody due to the "mother's volatile conduct and displays of temper, which, over the years ha[d] been a source of deep emotional upset to the children," and the children preferred to live with their father); *In re Mannion*, 917 A.2d 1272, 1275-76 (N.H. 2007) (awarding a father sole legal and physical custody because communication between the parties was not possible, the mother made false domestic violence accusations against the father, and the father provided "stability and normalcy" to the children).

39. *In re Mannion*, 917 A.2d at 1275 ("When devising a parenting plan relating to decision-making responsibility . . . there is a presumption that joint decision-making responsibility is in the best interest of the child unless there has been a finding of abuse."); *see also In re Rossino*, 893 A.2d 666, 668 (N.H. 2006) (remanding a sole custody award to a mother to consider joint custody considering a father's inability to see the parties' children during the divorce proceeding because the mother had various erroneous complaints against the father including domestic violence, stalking, and a felony charge).

40. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 2.09(2) cmt. a (2002) (arguing joint decision-making should be presumed so long as each parent has exercised "a reasonable share of parenting functions").

41. *Id.* § 2.02 cmt. f.

Arguably, if a child can spend relatively equal quality time with each parent, then the decision-making during each parent's time is per se joint physical custody, regardless of a court order that may state otherwise.

This is in contrast to Vermont's approach under section 665(a) in which courts refuse joint custody arrangements absent an agreement between both parents.⁴² If the parties cannot agree on a custody arrangement, the court awards one parent sole legal and/or physical custody,⁴³ likely to the primary care provider.⁴⁴ This standard applies to children born both inside and outside of marriages.⁴⁵ One parent may independently veto joint custody, often referred to as "veto power." This automatically forbids the other parent from seeking joint custody arrangements and forecloses the court's ability to award joint custody.⁴⁶ Vermont justifies the denial of joint custody as a way to avoid continued conflict between divorcing parents⁴⁷ and assumes it is in the best interest of the child to be under the primary care of one parent.⁴⁸

Recently, Kimberly B. Cheney conducted an evaluation of Vermont Family Court judges and their decision-making process in child custody

42. VT. STAT. ANN. tit. 15, § 665(a) (2010 & Supp. 2011) ("When the parents cannot agree to divide or share parental rights and responsibilities, the court shall award parental rights and responsibilities primarily or solely to one parent.").

43. *Id.*

44. *Id.* § 665(b)(6) (stating that courts shall consider "the quality of the child's relationship with the primary care provider, if appropriate given the child's age and development"); Johnson v. Johnson, 163 Vt. 491, 494, 659 A.2d 1149, 1151 (1995) (citing Harris v. Harris, 149 Vt. 410, 419, 546 A.2d 208, 214 (1988)) (finding that primary care givers should remain the primary custodian unless they are unfit); Spaulding v. Butler, 172 Vt. 467, 482, 782 A.2d 1167, 1177-78 (2001) (reversing sole legal and physical custody award to father because the mother was the primary caregiver); Harris v. Harris, 149 Vt. at 418, 546 A.2d at 214 (finding that the primary caregiver should be given preference towards custody).

45. VT. STAT. ANN. tit. 15, § 301 ("[T]he legal rights, privileges, duties, and obligations of parents [are] established for the benefit of all children, regardless of whether the child is born during civil marriage or out of wedlock."); see Heffernan v. Harbeson, 2004 VT 98, ¶ 8, 177 Vt. 239, 242, 861 A.2d 1149, 1152 (2004) ("[C]hildren are not treated differently under the law solely because of the relationship between their parents at the time of their birth.").

46. See Richard E. Miller, *Child Custody Cases in Vermont: What Is the Best Interest of the Child?*, 2009 VT. BAR J. 30, 37 (recommending eliminating the veto power of either parent under section 665(a)).

47. Cabot v. Cabot, 166 Vt. 485, 493, 697 A.2d 644, 649 (1997) ("The meaning of § 665(a) is plain: where the parents cannot agree, the court must award primary (or sole) parental rights and responsibilities to one parent.").

48. See *id.* at 492, 697 A.2d at 649 (discussing how courts need to focus on the best interest of the child, not the conflict between parents); see also Nickerson v. Nickerson, 158 Vt. 85, 90, 605 A.2d 1331, 1334 (1992) (focusing on the needs of the children rather than the hostile actions of the parents is most important); Renaud v. Renaud, 168 Vt. 306, 309, 721 A.2d 463, 466 (1998) ("Children are not responsible for the misconduct of their parents toward each other, and will not be uprooted from their home merely to punish a wayward parent.").

cases.⁴⁹ She reported that all sitting judges “ranked the ability of parents to discuss and agree on the needs of their children, free from conflicts arising out of their own relationship, as essential to the award of joint custody.”⁵⁰ The judges almost unanimously agreed that the communication between parents had to be more substantive than merely being able to arrange schedules.⁵¹ When one parent wanted the other parent limited to 25% or 30% custody, judges would not enforce a fifty-fifty visitation schedule.⁵²

In *Cabot v. Cabot*, the Vermont Supreme Court, interpreting section 665, rejected a lower court award of joint legal custody to both parents.⁵³ In justifying the sole physical and legal custody award to the mother, the court reasoned that, despite her attempts to alienate her daughter from the father, the mother was the primary care provider before and after the divorce.⁵⁴ “[T]he need to preserve the resulting ‘close, warm, nurturing, and consistent relationship’” between the mother and daughter outweighed other concerns.⁵⁵ The court also noted that the Vermont legislature did not intend to force divorced parents to make decisions together but rather intended to give one parent the primary responsibility to make decisions for the child.⁵⁶

Similarly, in *Renaud v. Renaud*, the Vermont Supreme Court affirmed an award of sole legal and physical custody to the mother, despite her attempts to alienate her daughter from the father and her false claims that the father sexually and physically abused their child.⁵⁷ Even though the parents equally shared rights and responsibilities during the marriage, the court emphasized the existing emotional mother–daughter bond and justified the mother’s behavior as a “transitory” reaction to her anger and distrust resulting from the father’s infidelity.⁵⁸ Ironically, despite its focus

49. Kimberly B. Cheney, *Joint Custody: The Parents’ Best Interests Are in the Child’s Best Interests*, 2001 VT. BAR.J. 33, 34–35.

50. *Id.* at 34.

51. *Id.*

52. *Id.*

53. In *Cabot*, the mother and father had one child and, upon divorce, the mother received sole physical and legal custody of their daughter. The mother refused to allow the father to see the child for nearly four months and made plans to relocate to Virginia once the divorce was final. 166 Vt. at 489, 495, 697 A.2d at 647, 651.

54. *Id.* at 491, 697 A.2d at 648.

55. *Id.* (“Despite Ellen’s unfortunate efforts to disrupt the child’s relationship with her father, the court was reluctant to break the close mother-daughter bond.”); *cf.* *Spaulding v. Butler*, 172 Vt. 467, 477, 782 A.2d 1167, 1175 (2001) (reversing a sole legal and physical custody award to a father because he attempted to alienate the child from his mother, the primary caregiver).

56. *Cabot*, 166 Vt. at 493, 697 A.2d at 650.

57. *Renaud v. Renaud*, 168 Vt. 306, 308, 721 A.2d 463, 465 (1998).

58. *Id.* at 312, 721 A.2d at 468 (stating that the “mother’s reactions were a transient reaction to a highly volatile emotional situation, and that she had progressed to the point where she could within a

on the benefits of awarding sole custody to the mother, the court also emphasized that the father was awarded “extremely liberal visitation, resulting in a nearly equal sharing of time with the child.”⁵⁹ In reality the parents may have what *appears* to be joint physical custody, but so long as the Vermont statute presumes the primary care provider has sole physical custody, then it will simultaneously demean the non-primary care parent’s role in the child’s life.

The New Hampshire and Vermont statutes also differ in their usage of the term “custody.” Although the definitions section of the Vermont statute refers to “parental rights and responsibilities,”⁶⁰ the statute still references “custody,”⁶¹ perpetuating the adversarial process and encouraging disagreements over “ownership” of the children. The New Hampshire statute satisfies society’s need for gender-neutral custody law by emphasizing co-parenting as in the best interest of the child. In contrast, the Vermont statute perpetuates the adversarial custody process by assuming that single-parenting is the best option for the child and, consequently, challenging the court to choose the “better parent.”

III. PARENT RELOCATION: EVALUATING THE BEST INTEREST OF THE CHILD OR THE BETTER PARENT?

Parent relocation becomes a difficult issue in any post-divorce or post-separation arrangement that involves children. When one parent wants to relocate with his or her child, or when a parent wants to prevent the other parent from relocating with his or her child, courts have a complicated decision to make. New Hampshire’s parent relocation statute comprehensively evaluates the best interest of the child. In Vermont, however, the parent relocation statute is an extension of the primary care provider statute; the courts give deference to the primary care provider’s decision to relocate.

In New Hampshire, section 461-A:12 directs the court to evaluate the best interest of the child in a relocation decision. The custodial parent seeking to relocate has the burden to establish, by a preponderance of the evidence, that the relocation serves a legitimate purpose and is reasonable to achieve such purpose.⁶² The burden then shifts to the noncustodial parent to

reasonable period of time cooperate with [the] father and foster a healthy relationship with the child”).

59. *Id.* at 313, 721 A.2d at 468.

60. VT. STAT. ANN. tit. 15, § 664(1) (2010) (referring to parental rights and responsibilities as those “related to a child’s physical living arrangements, parent child contact, education, medical and dental care, religion, travel and any other matter involving a child’s welfare and upbringing”).

61. *See generally* VT. STAT. ANN. tit. 15, § 664 annots. (2010) (discussing physical custody).

62. N.H. REV. STAT. ANN. § 461-A:12 (2004 & Supp. 2011); *see In re Martin*, 8 A.3d 60, 63–

prove by a preponderance of the evidence that the relocation is *not* in the best interest of the child.⁶³ The New Hampshire courts evaluate the best interest of the child under the *Tomasko* factors.⁶⁴ While recognizing an adult's right to relocate and need to move post-divorce, the *Tomasko* factors focus on the impacts of relocation on the child rather than the personal desires of the parent.⁶⁵

New Hampshire recognizes that, most often, the best interest of the child is to have positive, continuous relationships with both parents. In *In re Pfeuffer*, the child's parents shared joint legal and physical custody, but the mother wanted to relocate to South Carolina for a better-paying job. The court rejected the mother's request to modify the custody order because "relocation would substantially interfere with the [father's] relationship with his son."⁶⁶

In Vermont, under section 668, courts defer to the custodial parent's decision to move without requiring any showing or justification for the relocation.⁶⁷ In *Lane v. Schenck*, the court provided three main reasons why deference to the custodial parent's relocation decision is preferable to substituting the court's judgment for the parent's. First, deference precludes relitigation of the issue of which parent is "best suited to have custody." Second, deference ensures that the child will remain in the current family

64 (N.H. 2010) (refusing a mother's request to modify a joint custody arrangement because her desire just to "get away from" the father failed the legitimate purpose requirement).

63. N.H. REV. STAT. ANN. § 461-A:12.

64. The factors, though not dispositive, are: (1) each parent's reasons for or against the relocation; (2) the quality of the child's relationship with each parent; (3) the impact of the relocation on the child's future relationship with the noncustodial parent; (4) the potential economic, emotional, and educational enhancements the child may experience because of the relocation; (5) the feasibility of noncustodial visitation and maintenance of the noncustodial parent and child relationship; (6) any impact of continued or intensified hostility between parents; and (7) the effect of the relocation on extended family members. *Tomasko v. DuBuc*, 761 A.2d 407, 409 (N.H. 2000).

65. *In re Pfeuffer*, 837 A.2d 311, 315 (N.H. 2003) ("[I]t is the rights and needs of the children that must be accorded the greatest weight, since they are innocent victims of their parents' decision to divorce and are the least equipped to handle the stresses of the changing family situation.").

66. *Id.* at 315.

67. *Lane v. Schenck*, 158 Vt. 489, 497, 614 A.2d 786, 790 (1992) ("Vermont has no statute requiring the custodian to make an affirmative showing of cause to justify removal and no statute discouraging relocation."); *Bancroft v. Bancroft*, 154 Vt. 442, 448, 578 A.2d 114, 118 (1990) (stating that when there is no joint custody, "it is in the children's best interest for one parent to have ultimate responsibility for directing their lives"); *Kilduff v. Willey*, 150 Vt. 552, 555, 554 A.2d 677, 679-80 (1988) (noting that a change in custody can be more detrimental than a change in location); *McCart v. McCart*, 166 Vt. 629, 630, 697 A.2d 353, 353 (1997) (citing *Lane*, 158 Vt. at 495, 614 A.2d at 789) (finding that "the court may not substitute its judgment for that of the custodial parent with respect to the wisdom of a decision to relocate"); *Adamson v. Dodge*, 2006 VT 89, ¶ 3, 180 Vt. 612, 613, 910 A.2d 821, 822 (2006) (denying a father's request to modify parental rights and responsibilities when the mother moved to Wisconsin because the relocation did not constitute a significant and unanticipated change of circumstances).

unit. Third, the parent best suited to have custody is also the best parent to “consider the child’s needs.”⁶⁸

Unlike New Hampshire, the custodial parent in Vermont does not need to prove, under any standard, that the relocation is for a legitimate purpose. Rather, the noncustodial parent carries the heavy burden of proving that the relocation substantially interferes with his or her rights and responsibilities,⁶⁹ and that “the child[’s] best interests would be so undermined by a relocation with the custodial parent that a transfer of custody is necessary.”⁷⁰ Court review of modification requests due to relocation focuses on which parent would be the “appropriate custodial parent in light of the change in circumstance,” with a preference towards the current parent with sole custody.⁷¹ The courts label this preference as the best interest of the child.⁷²

When one parent is not the primary care provider, usually as a result of an independent joint custody arrangement, Vermont courts may examine each parent’s role in the best interest of the child.⁷³ However, “[t]here are no fixed standards for determining what meets this threshold.”⁷⁴ For example, in *deBeaumont v. Goodrich*, the mother had sole legal and physical custody, but the courts referred to the parties’ voluntary co-parenting as almost equal.⁷⁵ The parties also had a provision in their divorce decree that, if either party moved more than fifty miles away, such action would constitute a change that warrants reconsideration of child custody.⁷⁶ According to the court, the mother “unilaterally terminated . . . co-parenting” when she moved the parties’ children to Pennsylvania without prior notice to the father and refused to provide the father with contact information for weeks.⁷⁷ As a result, the court awarded sole legal and

68. *Lane*, 158 Vt. at 495, 614 A.2d at 789 (quoting *Auge v. Auge*, 334 N.W.2d 393, 399 (Minn. 1983)).

69. *Hawkes v. Spence*, 2005 VT 57, ¶ 1, 178 Vt. 161, 164, 878 A.2d 273, 275 (2005).

70. *Lane*, 158 Vt. at 499, 614 A.2d at 792; see also *Rogers v. Parrish*, 2007 VT 35, ¶ 25, 181 Vt. 485, 496, 923 A.2d 607, 615 (2007) (finding that a transfer of sole legal and physical custody from the mother to the father was necessary based on the best interest of the child).

71. *Lane*, 158 Vt. at 497, 614 A.2d at 790.

72. *Id.* at 497–98, 614 A.2d at 790–91; see also *McCart*, 166 Vt. at 630, 697 A.2d at 353 (finding that although a mother’s relocation from Vermont to New Mexico with her children would have a substantial impact on the loss of contact with the children’s father, the children “would suffer even more . . . if they were taken from [the mother’s] care and placed with [the father] since she had been their primary caregiver”).

73. *DeBeaumont v. Goodrich*, 162 Vt. 91, 97, 644 A.2d 843, 846 (1994).

74. *Id.* at 97, 644 A.2d at 847 (citing *Kilduff v. Willey*, 150 Vt. 552, 553, 554 A.2d 677, 678 (1988)).

75. *Goodrich*, 162 Vt. at 96, 644 A.2d at 846.

76. *Id.* at 96, 644 A.2d at 845.

77. *Id.* at 98, 644 A.2d at 847.

physical custody to the father in Vermont.⁷⁸ The court likely reached this conclusion based on the fifty-mile modification provision and the fact that the father had the children three days each week, even though the mother had sole legal and physical custody of the children.⁷⁹

However, in *Gazo v. Gazo*, even though the parents shared responsibilities for their children equally before their divorce,⁸⁰ the court awarded the mother sole legal and physical custody of the children and denied the father's modification request when the mother moved to Michigan.⁸¹ The court emphasized that relocation alone "does not amount to a real, substantial or unanticipated change in circumstances justifying modification of the [parental] rights and responsibilities."⁸²

Vermont's deference to the primary care provider in custody decisions and relocation decisions carries a heavy presumption that parents consistently and solely act in the best interest of their child, even above their own interests. This presumption is quite idealistic: While it is simpler for courts when one parent "wins" or maintains custody despite relocation, courts focus too much on choosing the "better" parent. Instead, they should evaluate the child's present and future best interests.

IV. SOCIOLOGICAL IMPACT ON CHILDREN

In the 1970s and shortly before Vermont's section 665(a) passed, many professionals supported the primary care provider theory and presumption of sole custody—"that there can only be one 'care provider' or 'psychological' or 'nurturing' parent."⁸³ Today, this view is no longer

78. *Id.* at 95, 104, 644 A.2d at 845, 850 (finding that the mother was unstable and faced serious financial hardship).

79. *Id.* at 91, 644 A.2d at 845; *but see id.* at 106, 644 A.2d at 852 (Johnson, J., dissenting) (discussing the severe departure from *Lane* and arguing that this case's circumstances do not justify a mother, with sole physical and legal custody, losing her children).

80. *Gazo v. Gazo*, 166 Vt. 434, 441, 697 A.2d 342, 346 (1997) (noting that it is unusual for parents to be "equally situated in terms of the factors" of section 665(b)(1)–(9)).

81. *Id.* at 438, 697 A.2d at 344.

82. *Id.* at 441, 697 A.2d at 345 (quoting *Dunning v. Meaney*, 161 Vt. 287, 290, 640 A.2d 3, 5 (1993)); *see also DeBeaumont*, 162 Vt. at 97, 644 A.2d at 847 ("[R]elocation without more is not per se a substantial change of circumstances.").

83. Miller discusses this "thesis" as well as Vermont's section 665(a) and its common law as derived from *Beyond the Best Interests of the Child*, a 1973 book that had an "influential" impact for a short time. Miller, *supra* note 46, at 32; *see also* JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 38 (1973) ("[T]he noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits.").

widely accepted,⁸⁴ yet Vermont's statute continues to reflect this archaic notion.⁸⁵

Children often suffer emotional trauma when one parent "wins" sole custody and becomes the only decision-maker in the child's life, while the other parent "loses" an influential role in the child's life.⁸⁶ The parent who "loses" cannot fill this void through visitation, and this loss often results in the child feeling abandoned.⁸⁷ This situation only worsens when a parent with sole custody relocates the parties' child across the country.⁸⁸

Despite the best-interest-of-the-child standard's gender-neutral ideology, mothers still receive sole custody more often than fathers.⁸⁹ The United States is the world's leader in fatherless families.⁹⁰ "[L]egal customs tend to make ex-parents of fathers, overburden mothers, and deprive children of full emotional support from both parents."⁹¹ In "traditional" families, fathers and children often suffer when the mother receives sole custody.⁹² While mothers would generally rather have sole custody,⁹³

84. Cheney, *supra* note 49, at 33.

85. VT. STAT. ANN. tit. 15, § 665(a) (2010 & Supp. 2011).

86. Holly L. Robinson, *Joint Custody: An Idea Whose Time Has Come*, 21 J. FAM. L. 641, 645 (1983).

87. See Cabot v. Cabot, 166 Vt. 485, 508, 697 A.2d 644, 659 (1997) (Skoglund, J., dissenting) ("A child's perception of a noncustodial parent is tainted when that parent lacks the ability to exercise any control or make any major decisions in the child's life."); see also Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 488-89 (1984) (noting the positive benefits children receive through joint custody because of the continuing relationships with both parents).

88. See Judith S. Wallerstein and Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L.Q. 305, 322-23 (1996) (encouraging the "vital relationship with both parents" and response to the "child's voice"); see Patrick Parkinson et al., *The Need for Reality Testing in Relocation Cases*, 44 FAM. L.Q. 1, 1 (2010) (discussing the extreme difficulty in maintaining "a close and continuing relationship with a nonresident parent" when the parent with sole custody relocates).

89. "Our family structure is evolving into dual career households where parenting will and should be shared even if the marriage does not remain intact." *Starkeson v. Starkeson*, 397 A.2d 1043, 1046 (N.H. 1979) (Douglas and Brock, JJ., dissenting) (discussing the victimizing repercussions after the tender years doctrine and "[t]he classic contrast between the [male] breadwinner and the [female] bottlewarmer"); see also Gazo v. Gazo, 166 Vt. 434, 438, 697 A.2d 342, 344 (1997) (awarding sole legal and physical custody to a mother despite that, during the marriage, the parties shared equal responsibilities); *Heffernan v. Harbeson*, 2004 VT 98, ¶ 2, 177 Vt. 239, 240, 861 A.2d 1149, 1151 (2004) (awarding sole legal and physical custody to a mother despite that, during the relationship, both parents were "deeply involved in the child's upbringing, each dedicating countless hours to raising the child").

90. Statistics, RAINBOWS.ORG, <http://www.rainbows.org/statistics.html> (last visited May 11, 2012).

91. *Starkeson*, 397 A.2d at 1046-47 (referring to such situations as the "legal death of one parent").

92. *Id.* ("Children view their father's absence as abandonment, and this may lead to erratic emotional behavior," and fathers suffer "the great pain of loss" of their children.); see Joyce A. Arditti, *Differences Between Fathers with Joint Custody and Noncustodial Fathers*, 62 AM. J. ORTHOPSYCHIATRY 186, 187 (1992); Carolyn S. Bratt, *Joint Custody*, 67 KY. L.J. 271, 298-301 (1979) (discussing joint custody as a way in a "traditional" family setting to avoid punishing fathers for working and subsequently spending less time with their children).

93. Joyce A. Arditti & Debra Madden-Derdich, *Joint and Sole Custody Mothers: Implications*

fathers are more satisfied with joint custody.⁹⁴ In Vermont, mothers can exercise their veto power to deprive fathers of joint custody, even if the decision derives from short-term emotional anger resulting from the divorce⁹⁵ or a long-term retributive desire to alienate the father from his children.

Additionally, the primary care provider may not be the appropriate custodial guardian. When one parent automatically has custodial preference in the courtroom, veto powers only enhance that parent's power over the other parent. Thus, one parent can have "a truly awesome power to shape and influence the child's image of, and attitude toward, the noncustodial parent."⁹⁶

While joint custody may not mean equal custody, it does provide parents with the fair opportunity to spend time with, influence, and grow with their children.⁹⁷ Some claim that children do not require significant contact with the noncustodial parent to maintain a close relationship with that parent.⁹⁸ Others claim that such unequal arrangements merely provide fathers with unrestricted rights and their own "veto power," while the mother maintains the burden of all responsibility.⁹⁹ While such claims are likely exaggerated and untrue in most cases, the benefit of joint custody is that it "avoids subjecting the child completely to one parent's will, and instead affords the child in-depth exposure to both parents."¹⁰⁰

One of the most important notions to keep in mind is that children link parents together forever. For many reasons, some parents will decide not to

for Research and Practice, 78 FAMILIES SOC'Y: J. CONTEMP. HUM. SERVICES 36, 37 (1997).

94. See Susan Steinman, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 16 U.C. DAVIS L. REV. 739, 741 (1983) (citing a study finding that fathers with joint custody were less depressed and felt more satisfied than noncustodial fathers); Judith A. Seltzer, *Father by Law: Effects of Joint Legal Custody on Nonresident Fathers' Involvement With Children*, 35 DEMOGRAPHY 135, 141 (1998) (finding a positive effect on father-child relationships with joint custody).

95. Miller, *supra* note 46, at 30 ("It is not surprising that many mothers, suffering the acrimony and disorienting effects associated with the breakup of their marriages and the harsh realities of their divorce proceedings, veto joint custody.").

96. Robinson, *supra* note 86, at 647.

97. Constance R. Ahrons, *Joint Custody Arrangements in the Postdivorce Family*, 3 J. DIVORCE 189, 201 (1980).

98. Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201, 210 (1998). "Research has not established the amount of contact necessary to maintain a 'close relationship' between the parent and the child. Obviously, not having any contact is detrimental to the child. But whether fifteen days per month is significantly better than two days per month is not addressed in research." *Id.*

99. Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 502, 504 (1988) (describing such joint custody arrangements as "maternal-custody-with-liberal-paternal-visitation").

100. *Starkeson v. Starkeson*, 397 A.2d 1043, 1046 (N.H. 1979).

continue their relationship or marriage. Even when together or married, parents may disagree about childrearing. However, the court's desire for a quick and easy solution, or fear of parental conflict post-divorce or post-separation, should not mean that a person has to forfeit his or her right to parent because of a decision to end a relationship or marriage.¹⁰¹ Also, parents' disagreements in, during, or out of court should not justify granting sole custody to only one parent.¹⁰² By giving either parent veto power, specifically a primary care provider (usually the mother),¹⁰³ the court only encourages competition between parents to "win" their children and encourages the adversarial process of a judge's decision on custody.

Others argue that joint custody is fair to the parents but not necessarily fair to the children.¹⁰⁴ Sometimes, children exhibit signs of Parental Alienation Syndrome,¹⁰⁵ which Vermont courts would likely interpret as the child's preference to maintain the "strong" parent-child relationship with the primary care provider. The decision of which parent is the primary caregiver is made for a variety of reasons and is not necessarily based on the parent's desire to care for the child. For example, a parent capable of being the primary care provider may have had higher earning power during the marriage, and consequently spent less time at home while the other parent remained at home with their children. The court should not disadvantage the equally dedicated parent in the workforce because of decisions the parents made together during their marriage for the benefit of their children.

Judges may argue that a joint custody preference will pressure courts to enforce joint custody in inappropriate cases, such as: when the parents are "hostile" and "conflicted",¹⁰⁶ when one parent is less committed, "inactive," or "uncooperative",¹⁰⁷ or as a quick "fix" to a custody dispute.¹⁰⁸ Just

101. *Starkeson*, 397 A.2d at 1047 (suggesting parents can "isolate their marital conflict from their parental responsibilities").

102. "[T]here is more evidence that it is potentially damaging to the child to be completely subject to one parent's will." *Id.*

103. *Cheney*, *supra* note 49, at 34 (noting that the veto right is "usually exercised by the parent with the greatest momentum for winning custody—typically the mother").

104. *Hardcastle*, *supra* note 98, at 205.

105. In a Vermont case, the court awarded sole legal and physical custody to the mother, even after the child began exhibiting signs of Parental Alienation Syndrome. Although the father "demonstrated good parenting skills and enjoyed a healthy relationship with his daughter, . . . the child repeatedly told her mother that she hated her father and that she did not want to spend time with him." Based on expert testimony, the daughter was telling the mother what she wanted to hear, which alludes to signs of Parental Alienation Syndrome. *Cabot v. Cabot*, 166 Vt. 485, 505, 697 A.2d 644, 657 (1997) (Skoglund, J., dissenting).

106. *Hardcastle*, *supra* note 98, at 206.

107. *Id.* at 211.

108. *Singer & Reynolds*, *supra* note 99, at 502.

because parents do not agree in the courtroom—a traditionally adversarial atmosphere—does not mean they can never get along outside of the courtroom.¹⁰⁹ Parents less committed to their children during marriage may not be appropriate joint custody candidates, or it might be that they were unhappy in their marriage and will be more devoted to their children once they are divorced. Any of these possibilities are case-specific and should not lead a court to make presumptions about parents.

Some view joint custody as an upper-middle-class “phenomenon” because it is too expensive to practically maintain two households for a child at the same standard of living as during the marriage,¹¹⁰ and because fathers are less able to pay child support under joint custody.¹¹¹ However, statistics show that fathers with joint custody pay 90.2% of child support owed. Fathers with visitation but without joint custody, on the other hand, pay approximately 79.1% of child support owed, while fathers without visitation or joint custody pay only approximately 44.5% of child support owed.¹¹² In general, a parent’s financial status can be volatile. Just like during divorce, a child’s standard of living can change for various reasons during a marriage as well, including more siblings, the presence of elderly family members, or a parent’s unexpected unemployment. However, courts should not consider a parent’s financial status as a primary reason to avoid joint custody.

While courts implement a primary caregiver presumption under “traditional” notions of a nuclear family, things get more complicated in the context of same-sex marriages and children born out of wedlock.¹¹³ Today, nontraditional families are more prominent and accepted in America. Seven of every ten American youth live in nontraditional families,¹¹⁴ 40% of children are born to unmarried parents,¹¹⁵ one of every eight children is

109. Miller, *supra* note 46, at 36.

110. Hardcastle, *supra* note 98, at 213; *see also* Lila Shapero, *The Case Against a Joint Custody Presumption*, 2001 VT. BAR J. 37, 38 (suggesting that, even in a joint custody arrangement, one parent is the primary caregiver and that joint custody will result in lower child support orders to the primary caregiver).

111. Shapero, *supra* note 110, at 38.

112. RAINBOWS.ORG, *supra* note 90.

113. For a general discussion on the decreasing marriage rates and the lessening importance of marriage in America, *see* Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537 (2007). *See also* Marsha Garrison, *The Decline of Formal Marriage: Inevitable or Reversible?*, 41 FAM. L.Q. 491 (2007); Ira Mark Ellman, *Marital Roles and Declining Marriage Rates*, 41 FAM. L.Q. 455 (2007).

114. RAINBOWS.ORG, *supra* note 90.

115. FED. INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA’S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 8 (2009), *available at* http://www.childstats.gov/pdf/ac2009/ac_09.pdf.

born to a teenage mother,¹¹⁶ and one of every four children lives with only one parent.¹¹⁷ Due to advanced reproductive technology, more gay and lesbian couples have children.¹¹⁸ According to Census Bureau statistics, “[o]f almost 600,000 same-sex households, over fifty percent were raising children” in 2003.¹¹⁹

Throughout history, courts have awarded sole physical custody to one parent, whether to the father during the “master–servant” era or to the mother during the “tender years” era. However, “traditional” families were the only accepted families of that time. Children born out of wedlock were considered “bastards” and banned from membership in the traditional family. Children born to impoverished parents were often sent to serve wealthier families in return for an upbringing, or were even made slaves. Today, while our domestic relations laws are moving away from automatic, sole custody awards based on gender, and focus more on the best interest of the child, states with a primary care provider presumption are still too reliant on notions of traditional nuclear families. A child custody statute must be both gender-neutral and parent-neutral in order to truly focus on the best interest of the child.

V. RECOMMENDATION

It would be in the best interest of Vermont and Vermont’s children to adopt a joint custody presumption in the state’s domestic relations law. New Hampshire is one of many states that have a joint custody presumption.¹²⁰ New Hampshire’s statute, parenting plans, and other family

116. *Id.* at 4.

117. *Id.* at 3.

118. Susan E. Dalton, *From Presumed Fathers to Lesbian Mothers: Sex Discrimination & the Legal Construction of Parenthood*, 9 MICH. J. GENDER & L. 261, 321–22 (2003).

119. Jessica Hawkins, *My Two Dads: Challenging Gender Stereotypes in Applying California’s Recent Supreme Court Cases to Gay Couples*, 41 FAM. L.Q. 623, 623 (2007) (citing U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 9 (2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>).

120. Many states, besides New Hampshire, presume joint custody is in the best interest of the child. *See, e.g.*, D.C. CODE § 16–911(a)(5) (2001) (“There shall be a rebuttable presumption that joint custody is in the best interest of the child”); FLA. STAT. § 61.13(2)(c)(2) (2006 & Supp. 2012) (“The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child.”); IDAHO CODE ANN. § 32–717B(4) (2006) (presumption that joint custody is in the best interest of the child “absent a preponderance of the evidence to the contrary”); MINN. STAT. § 518.17(2) (2006) (joint custody upon request of either or both parties); N.M. STAT. ANN. § 40–4–9.1(A) (2004) (presumption that joint custody is in the best interest of the child). Other states express a preference for joint custody. *See, e.g.*, HAW. REV. STAT. § 571-46.1 (2009); IOWA CODE ANN. § 598.41(2)(a) (2011); KAN. STAT. ANN. § 60-1610(a)(4)(A)–(B) (2005 & Supp. 2010); MICH. COMP. LAWS § 722.26a, (Supp. 2011); N.C. GEN. STAT. § 50-13.2(a) (2012).

court materials promote and encourage co-parenting in the best interest of the child. As such, New Hampshire serves as an excellent model for other states in transition from a primary care provider to a joint custody presumption.

Vermont's custody statute does not promote or encourage joint custody,¹²¹ nor does it promote settlement, as one parent has veto power over the other. Section 665(a) indicates that parents have an option to come to an agreement outside the courtroom regarding joint custody. However, divorces are rarely that simple. Divorces may begin amicably but quickly disintegrate when one spouse realizes the other was having an affair or when spouses cannot agree on property distribution. Custody of children can too easily become part of the game-playing that occurs in divorces and, in Vermont, the primary care provider would more likely win the children in such situations. Similarly, in a contested divorce, either parent may use his or her veto power in anger as retribution against the other, disregarding the negative effect such a decision could have on the child. In such circumstances, the court is powerless to reprimand or to award joint custody even if it is in the child's best interest.

A mere preference for joint custody is an unacceptable solution because "preference" is arbitrary. A joint custody preference would allow judges to consider joint custody or sole custody as an option. This provides even greater deference to family court judges than either a joint custody presumption or a sole custody presumption. Moreover, as Vermont judges have been awarding sole custody to parents for decades, they are unlikely to stray from the current primary care provider presumption.

Awarding sole custody only perpetuates the conflict and bitterness that can arise from divorce. Rather than assuming that awards of sole custody will stop parents from fighting and provide greater stability for children, courts should instead encourage joint custody. That way, one parent does not hold veto power in court. Rather, both parents would be encouraged to work together for their children because the court will presume that joint custody is in the best interest of the child. When parents cannot agree on a custody arrangement, rather than haling one another to court to showcase each other's parental weaknesses, courts could consider mediation before and after decisions are made to promote a less adversarial and more problem-solving and cooperative approach.¹²²

For those parents that would rather litigate the issue to the fullest

121. *Cf.* Cheney, *supra* note 49, at 33 ("[T]he public policy . . . encourages 'joint custody' and the validation of parental agreements to implement it.").

122. *See* Ruth Bettelheim, *No Fault of Their Own*, N.Y. TIMES, Feb. 18, 2010, at A27 (supporting a less-adversarial approach to custody proceedings).

extent, risking great injury to the family, joint custody may not be appropriate. However, in such cases, the court must be very careful in examining the “best interest” factors and avoid assumptions that custody under the current primary care provider is in the child’s best interest. This approach will require professionals in the field of family law to evaluate parents’ attitudes and behaviors in these circumstances.¹²³ Joint custody may not be applicable or beneficial in every circumstance. But, if courts promote a co-parenting resolution through joint custody, rather than a win-or-lose game in the courtroom, parents will be held to a higher expectation of cooperation for the children’s sake.

Circumstances where one parent could relocate are becoming more and more common. As a result, relocation will become a growing issue as dating patterns change through online dating and social networking websites,¹²⁴ and as international mobility increases.¹²⁵ If Vermont continues to give the primary care provider presumed discretion to relocate, then more families could potentially be split across the country.

The current state of domestic law in Vermont, then, could result in a tragic relocation for the noncustodial parent and his or her children. In Vermont, two parents could equally provide care and guidance to their children but the mother has sole custody because the parents could not come to an arrangement outside of court. If a parent decides to relocate, his or her children can be subject to that whim without any explanation to the courts unless the other parent files for modification. Because the court currently only empowers the primary care provider, Vermont’s relocation statute increases the chance that the other parent (likely the father) will either abandon the children or be abandoned by the children. By adopting a joint custody presumption, co-parenting will be established as the court’s standard for and expectation of parents. Furthermore, the focus of custody proceedings can finally be on the child’s best interest rather than the primary care provider’s choice.

123. See Miller, *supra* note 46, at 37 (recommending eliminating the veto power in section 665(a) and the necessary adjustments “Vermont judges, attorneys, and parents” will need to make); Moshe Jacobius, *Civility & the Family Law Gladiator*, 2010 FAM. ADVOC. 6, 6–8 (discussing the need for family lawyers to follow rules of civility, especially in a field that is “so fraught with emotion”).

124. Recent estimates show that over twenty million people per month visit online dating services. *Online Dating Facts*, ONLINE DATING MAG., <http://www.onlinedatingmagazine.com/media-center/onlinedatingfacts.html> (last visited Apr. 5, 2012). Experts estimate online dating will grow up to 30% in the next year or two. Scott James, *In the Calculations of Online Dating, Love Can Be Cruel*, N.Y. TIMES, Feb. 12, 2010, at A25A.

125. Twenty-two percent of children in the United States have at least one foreign-born parent. FED. INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, *supra* note 115; see also Patrick Parkinson et al., *The Need for Reality Testing in Relocation Cases*, 44 FAM. L.Q. 1, 3 (2010) (“[One] factor in the growth of relocation disputes is the increase in international mobility.”).

Finally, as a leading advocate for nontraditional families and gay rights, Vermont's primary care provider statute is archaic. As more children are born out of wedlock and are adopted both nationally and internationally, and as more gay couples take advantage of reproductive technology to have children, it is unrealistic and unfair to grant sole legal and physical custody to one parent.

CONCLUSION

Vermont must adopt a joint custody presumption in its domestic relations law. Vermont can break the mold and can show parents—straight, gay, married, unmarried, divorced, separated, or single—that co-parenting, co-nurturing, co-decision-making, and cooperating is in the best interest of their children. Without a standard for parents to take the higher road, courts will continue to be flooded with adversarial, game-playing parents, fighting to win their children.

—Michelle A. Tarnelli^{*†}

* J.D. Candidate 2012, Vermont Law School; B.A., *cum laude*, 2005, Fordham University.

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