A CRITICAL LOOK AT VERMONT'S NEW CHILD CUSTODY LAW

INTRODUCTION

The Vermont Legislature, in the last days of its 1985-86 Biennial Session, passed a new divorce act which significantly changed how child custody awards are made.[1] The act's statement of purpose declares that joint custody is now presumed to be in the best interest of the children of divorcing parents.[2] However, the legislature no longer uses the word "custody." Instead, the new law incorporates the phrase "shared parental rights and responsibilities."[3]

Vermont's new child custody law follows the trend in a growing number of states that have adopted some form of legislation favoring joint custody.[4] The Vermont legislation based its presumption favoring joint custody on social science data.[5] The data relied upon indicates that post-divorce children are positively affected by a continuation of a loving relationship with both parents.[6]

Aside from the joint custody presumption, the act creates new

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1. VT. STAT. ANN. tit. 15, §§ 650-670 (Supp. 1986). In addition to the new statutes, which address child custody, the legislature also passed new child support laws. *See* VT. STAT. ANN. tit. 15, §§ 651-664 (Supp. 1986). However, the new child support legislation is beyond the scope of this note.

2. VT. STAT. ANN. tit. 15, § 650. "The legislature finds and declares as a public policy that after parents have separated or dissolved their marriage it is in the best interests of their minor child to have the opportunity for maximum continuing physical and emotional contact with both parents, unless direct physical harm or significant emotional harm to the child or parent is likely to result from such contact." *Id.*

3. VT. STAT. ANN. tit. 15, § 664(1). "Parental rights and responsibilities means the rights and responsibilities 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." *Id.* The legislature discarded the word "custody" because the term implied that the child was a prize to be awarded to the most "meritorious" parent. R. CHENEY, T. BECH, VERMONT'S 1986 DIVORCE ACT, A HEALTH VALUE SYSTEM 2, 3 (June 30, 1986) (available from the Vermont Bar Association) [hereinafter CHENEY, VERMONT'S 1986 DIVORCE ACT].

4. *See, e.g.*, CAL. CIV. CODE § 4600.5(a) (West 1984); FLA. STAT. ANN. § 61.13(2)(b)(2) (West 1985); IDAHO CODE § 32.717B(4) (1983); MISS. CODE ANN. § 93-5-24(4) (Supp. 1985); N.H. REV. STAT. ANN. § 458.17 (1981).

5. CHENEY, VERMONT'S 1986 DIVORCE ACT 2 (citing WATTERSTEIN and KELLEY, SURVIVING THE BREAKUP (1980)). Whether social science data actually demonstrates joint custody is best for children is still controversial. *See infra* text accompanying notes 57-62.

6. CHENEY, VERMONT'S 1986 DIVORCE ACT at 2.

guidelines for child custody.[7] These guidelines altered pre-existing discretionary factors.[8] Unlike the pre-existing factors, the new guidelines mandate a more detailed analysis.[9]

Although the new guidelines provide a positive change, the presumption negates the benefit derived from the comprehensive review. This note includes an analysis of the new statute with a critical focus on the presumption that favors joint custody. Before addressing the presumption and the statutorily created factors, brief summaries of prior custody law will be presented.

I. The Joint Custody Presumption

A. Prior Law—Common Law Presumption Against Joint Custody

The Vermont judiciary's past handling of custody issues led to the enactment of the new legislation.[10] Prior to the new legislation, Vermont judges based custody decisions solely on the best interest of the child standard.[11] Parental agreements, whether for joint or sole custody, were not presumed to be in a child's best interest.[12] The trial court could consider the parent's wishes as only one of several factors listed by the legislature.[13] The statute itself remained neutral on joint custody.[14] The Vermont Supreme Court, however, established a common law presumption against joint custody.[15]

In 1975, the Vermont Supreme Court laid out the common law

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7. Vt. Stat. Ann. tit. 15, § 665.

8. *See infra* text accompanying note 78.

9. *See infra* text accompanying notes 81-102.

10. A. Davenport, A Legislative History of Act 181, 1986 Amendments to Vermont's Child Custody Law 1 (1986) (available from Vermont Bar Association) [hereinafter Davenport, A Legislative History].

11. Vt. Stat. Ann. tit. 15, § 652(a) (Supp. 1983). The best interest of the child standard was delineated in the repealed statute. The repealed statute in pertinent part reads as follows:

> In an action under this chapter, the court shall make an order concerning the custody of any minor child of the marriage. The court shall be guided by the best interest of the child . . . .

Id.

12. Vt. Stat. Ann. tit. 15, § 652 (repealed).

13. Vt. Stat. Ann. tit. 15, § 652(a)(1)-(4).

14. *See* Vt. Stat. Ann. tit. 15, § 652.

15. Lumbra v. Lumbra, 136 Vt. 529, 394 A.2d 1141 (1975). "We do not hold that joint custody is against the best interests of the child as a matter of law. We rather presume that this is so . . . ." *Id.* at 532, 394 A.2d at 1144.

presumption against joint custody in *Lumbra v. Lumbra*.[16] The court held that joint custody was presumed to be against a child's best interest.[17] Moreover, the court held that joint custody would be awarded only upon a finding of extraordinary circumstances.[18] The *Lumbra* court only addressed a joint custody recommendation made by the child's appointed attorney.[19] The court did not address a joint custody recommendation by the parents and their children.[20] In spite of this distinction, the court made it very clear that even if the parents had agreed, joint custody would not be awarded except in exceptional cases.[21] The *Lumbra* court established four factors to be considered by trial judges when considering a request for joint custody: (1) the age of the children; (2) the child's need for stability; (3) the distance between the parent's homes; and (4) the ability of the parents to bear the strain of continued contact.[22]

Some judges had such a strong bias against joint custody that they refused to grant joint custody even when all of the factors listed in *Lumbra* mitigated in favor of the joint custody arrangement.[23] In *Barbour v. Barbour*, parents had agreed to share the custody of their two children and requested that the trial court ratify their agreement.[24] The trial court, acting through a majority of the two assistant judges, refused to grant joint custody.[25] The court refused even though the parents had agreed to the joint arrangement, the children were teenagers, and the parents lived only three miles apart.[26] In addition, both a psychologist and a school guidance counselor testified that joint custody was most beneficial to the children and was presently working well.[27]

On appeal to the Vermont Supreme Court, Justice Hill, writ-

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16. *Id.*

17. *Id.* The *Lumbra* court presumed joint custody not to be in a child's best interest because it did not believe that the divorced parents could cooperate effectively. The court determined the fact that custody was being litigated evidenced the parents' lack of cooperation. *Id.*

18. *Id.*

19. *Id.* at 531, 394 A.2d at 1143.

20. *Id.*

21. *Id.*

22. *Id.* at 533, 394 A.2d at 1145.

23. Barbour v. Barbour, 146 Vt. 506, 505 A.2d 1217 (1986).

24. *Id.*

25. *Id.* at 506, 505 A.2d at 1217.

26. *Id.* at 507, 505 A.2d at 1218.

27. *Id.*

ing for the majority, reaffirmed the presumption against joint custody.[28] At the same time, the court remanded the case because the trial court had failed to make findings consistent with *Lumbra*.[29] Only Chief Justice Allen dissented, stating that it was unfair for the parties to have to go through the time and expense of a new trial when there was ample evidence on the record that "all of the factors listed in *Lumbra* mitigated in favor of joint custody."[30] Nonetheless, the Barbours were forced to relitigate when they, their children, a psychologist, a school counselor and a trial judge had all agreed that joint custody was in their children's best interest.

The new custody statutes were originally drafted to specifically address the confusion created by the common law test, and to allow parents who were in agreement to be awarded joint custody.[31] However, the new statute goes further than merely removing the common law presumption against joint custody.

B. The New Statutorily Created Presumption Favoring Joint Custody

The new act declares that joint custody or maximum physical and emotional contact with both parents is in the best interests of children.[32] Under the new bill, the legislature sets forth two different schemes for custody awards, one for parents who agree to joint custody and another for parents who do not agree to share custody or who agree to sole custody.[33]

Under the new law, parents who agree to share custody may do so relatively free from state intervention.[34] The statute declares that a parental agreement for shared custody is presumed to be in the best interest of the child.[35] Any agreement, however, must include provisions which address the physical living arrangements, parent-child contact, education, health care, travel arrangements, procedures for communicating, and procedures for resolving dis-

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28. *Id.*
29. *Id.* at 508, 505 A.2d at 1219.
30. *Id.* at 509, 505 A.2d at 1221. (Allen, C. J., dissenting).
31. A. DAVENPORT, A LEGISLATIVE HISTORY at 1.
32. VT. STAT. ANN. tit. 15, § 650.
33. *Compare* VT. STAT. ANN. tit. 15, § 666 *with* § 665.
34. *See* VT. STAT. ANN. tit. 15, § 666.
35. *Id.*

putes.[36] Parents who draft the detailed plan for shared custody are likely to have their agreements ratified. The court will refuse to ratify such an agreement only if it determines an agreement is contrary to a child's best interest.[37] However, since the adversarial process will reveal little evidence against joint custody when both parties are in agreement, it is unlikely that the court will refuse to approve the agreement.[38]

Conversely, parents who agree to sole or undivided parental rights and responsibilities are not as likely to have their agreements ratified.[39] Parental agreements for sole custody are not presumed to be in the child's best interest under the new law.[40] The statute requires that the court award custody based solely on the consideration of eight statutorily created factors when parents do not agree to joint custody.[41] The statute prohibits consideration of the parents' wishes.[42]

Therefore, when parents agree to joint custody, their agreements are presumed to be in the best interest of the child. Absent clear and convincing evidence to the contrary, the court will ratify the agreement.[43] Parents who agree to sole custody or who cannot agree to a custody solution must allow the court to determine custody based on new factors created by the legislature.[44] After a review of the eight statutorily created factors, the court may award custody "primarily or solely to one parent."[45]

No statutory definition exists for the terms "primarily" or "solely."[46] "Solely" can be presumed to mean that one parent has total rights and responsibilities for the child. "Primarily," however,

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36. *Id.* § 666(b)(1-7).

37. VT. STAT. ANN. tit. 15, § 666(c).

38. When both parents advocate joint custody, the only evidence presented disfavoring the agreement would have to be raised by the court *sua sponte*. Since the trial courts are burdened, it is unlikely that the judge will take time to investigate the issues thoroughly enough to discover issues not raised by the parties themselves.

39. *See* VT. STAT. ANN. tit. 15, § 665(a). "When the parents agree to divide or share parental rights and responsibilities, the court shall award parental rights and responsibilities primarily or solely to one parent." *Id.*

40. *Id.*

41. VT. STAT. ANN. tit. 15, § 665(b)(1)-(8).

42. *Id.*

43. *See, Lumbra*, 126 Vt. 529, 394 A.2d 1141. Clear and convincing evidence is needed to rebut the presumption that joint custody is not in the best interests of the child. *Id.*

44. VT. STAT. ANN. tit. 15, § 665(b)(1)-(8).

45. VT. STAT. ANN. tit. 15, § 665(a).

46. *See* VT. STAT. ANN. tit. 15, § 664 (definitional section).

implies that although one parent may have the majority of rights and responsibilities, the other parent will still share in legal or physical custody. Thus, the trial court can order some form of joint custody absent both parent's agreement. In fact, the new statute allows the court to award joint custody even if both parents had agreed to sole custody.[47] This scheme has been highly criticized in other states.[48]

Legislative history demonstrates that the House and Senate disagreed as to whether a judge should be allowed to award joint custody absent both parent's agreement.[49] A compromise was reached.[50] The compromise language, however, allows a form of joint custody to be awarded absent both parent's agreement.[51] Some feel, however, that the thrust of the court's ability to force parents into joint custody agreements will be tempered by a statutory factor, which requires that parents be able to cooperate with each other.[52] However, even if parents are able to cooperate, there may be other reasons why they do not wish to share custody.[53] Forcing parents to maintain a relationship and constant communication with each other may even be unconstitutional.

The United States Supreme Court has recognized a fundamental right not to associate.[54] The right is not absolute, however, and may be overcome if the state's interest is compelling and the state action is the least restrictive alternative to achieve its interest.[55] In this case, the state would claim that the compelling state

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47. *See* VT. STAT. ANN. tit. 15, § 665(a).

48. *See, e.g.*, In re Heard, 353 N.W.2d 157 (Mich. 1984). Joint custody should not be used to coerce cooperation from parents who cannot cooperate. *Id. In re* Marriage of Lampton, 704 P.2d 847 (Colo. 1985). An award of joint custody absent a parental agreement is an abuse of discretion. *Id.*

49. DAVENPORT, A LEGISLATIVE HISTORY at 3.

50. *Id.*

51. VT. STAT. ANN. tit. 15, § 665(a). "[C]ourt shall award parental rights and responsibilities *primarily* or *solely* to one parent." *Id.* (emphasis added).

52. DAVENPORT, A LEGISLATIVE HISTORY at 3; VT. STAT. ANN. tit. 15, § 665(b)(8).

53. Parents who remarry may not want to retain such a close relationship with their former spouse. Also, parents may be technically "fit" to share custody but may have problems which prevent the parents from sharing a close relationship with a former spouse.

54. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977). The Court held that school board employees were not required to join a union and had a constitutional right not to have their service fees used to support ideological causes of which they disapproved. *Id.*

55. Roe v. Wade, 410 U.S. 113, 155 (1973). "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake . . . ." *Id.* at 155.

interest is the child's best interest and that interest is best served by joint custody. However, whether there is conclusive data which supports this presumption is still at issue.

In fact, the concept of joint custody has been described as "very controversial."[56] Presumptions favoring joint custody have been said to be based primarily on professional and personal opinions rather than on systematic analysis.[57] Joint custody presumptions have also been described as based on "hope."[58]

The major criticism of joint custody has been that divorced parents are not capable or willing to communicate cooperatively with each other to decide issues concerning their children.[59] Joint custody requires divorced parents to share in their children's upbringing as if the marriage had not been dissolved.[60] When both parents can agree to share the rights and responsibilities of their children, joint custody has a much better chance of succeeding. However, even in cases where the parents agree, the joint custody scheme is easily disrupted if one parent remarries or moves.[61]

It is clear that social scientists and legislators disagree as to whether joint custody is in a child's best interest.[62] Whether or not joint custody is in a child's best interest depends on the particular facts and circumstances of each case. Therefore, absent any conclusive data that joint custody should be presumed to be in the best interest of children, the best solution is that no legislative presumption be established.

However, if no presumption exists, the court must decide the custody issue based on the factors created by the legislature.[63] This statutory scheme ignores the fact that the parents, themselves, are in the optimal position to decide what is best for their children. Intact families are presumed to make decisions in their child's best

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56. Skoloff, *Joint Custody: A Jaundiced View* 52, TRIAL, March 1984. *See* J. GOLDSTEIN, A. FREUD, A. SOLNIT, S. GOLDSTEIN, IN THE BEST INTERESTS OF THE CHILD 12 (1986). Steinmenn, *Joint Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications*, 15 U.C. DAVIS L. REV. 739 (1983); Kelly, *Further Observations on Joint Custody*, 16 U.C. DAVIS L. REV. 762 (1983); Lemon, *Joint Custody as a Statutory Presumption: California's New Civil Code*, 11 GOLDEN GATE U. L. REV. 485 (1981).

57. *Steinmenn, supra* note 56, at 740.

58. *Id.*

59. *See, e.g., Lumbra*, 136 Vt. 531, 394 A.2d at 1143.

60. Skoloff, *Joint Custody: A Jaundiced View* 52, 53, TRIAL, March 1984.

61. *Id.* at 54.

62. *See supra* note 60.

63. VT. STAT. ANN. tit. 15, § 665(b).

interest.[64] When the family unit is intact, parent's decisions concerning their children are protected from state intervention unless there is a showing of physical or emotional harm.[65]

Some scholars argue that divorcing parents who agree on a custody resolution, whether for sole or joint custody, should also be presumed to act in their child's best interest.[66] They assert that the divorce does not alter the parents' concern for their child's welfare.[67] The scholars further argue that even divorcing parents have a greater understanding than a judge of what is best for their children.[68] The judge has only a limited amount of time to determine the facts and circumstances of each case presented in an adversarial atmosphere.[69] Allowing parents to decide the custody of their children prevents judges from making cursory decisions which may be based on their personal biases.

The new statute's presumption favoring joint custody is inappropriate and dangerous. The presumption is inappropriate absent conclusive evidence that joint custody is in the best interest of children. The presumption is dangerous because it establishes a favored custody resolution when each case should be decided on its particular facts and circumstances. Each custody resolution should be looked at neutrally. When parents can agree to joint or sole custody, their agreements should be ratified absent proof of resulting physical and emotional harm to the child. If parents cannot agree, custody decisions should be awarded solely to one parent, based on the eight statutory factors.

II. Statutorily Created Factors

A. Prior Custody Decisions—Best Interest Standard

Prior to the new legislation, Vermont judges based custody decisions solely on the best interest of the child standard.[70] The legislature provided judges with a list of factors that they *could* con-

64. Stanley v. Illinois, 405 U.S. 645, 651 (1972). The *Stanley* Court struck down a statutory scheme under which children of unmarried fathers were declared wards of the state upon the death of the mother without any hearings on parental fitness. *Id.*

65. *Id.* at 651.

66. J. Goldstein, A Freud, A Solnit, Before the Best Interests of the Child 31 (1979).

67. *Id.* at 33.

68. *Id.* at 11, 12.

69. *Id.*

70. Vt. Stat. Ann. tit. 15, § 652 (repealed).

sider when making the decision for custody.[71] The factors included, but were not limited to each parent's wishes, the child's interaction with the parents, the child's adjustment to his or her present home, school or community, and the mental and physical health of all of the individuals involved.[72] However, the statute did not mandate judges to base their findings on the listed criteria.[73] As a result, the best interest of the child standard left trial judges with great discretion.[74]

In an attempt to alleviate standardless review, the supreme court required trial court judges to make findings revealing the basis for their decisions.[75] In *Barbour v. Barbour*, for example, the Vermont Supreme Court remanded where facts essential to the disposition of the custody issue were not stated by the trial court.[76] However, the court never required that the trial judges base their written findings on the existing statutorily created factors.[77] Thus, the trial court judges were still left with wide discretion which led to further criticism of the judges and the best interest standard.[78]

B. New Law—Best Interest Standard

In the new law, eight factors were created to guide the determination of what is in the best interest of a child.[79] The use of these factors is no longer discretionary and must be considered by a reviewing court.[80] The legislature focused on factors which have been determined by social scientists to promote the healthy growth of children.[81] The legislature fashioned its new statute on both Maine and Florida legislation, but no state has the exact same cri-

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71. VT. STAT. ANN. tit. 15, § 652(a)(1)-(4).

72. *Id.*

73. *Id.*

74. Note, *Determining Best Interest of the Child in Divorce Custody Disputes: A Procedural Approach*, 8 VT. L. REV. 311, 311 (1984).

75. *Barbour*, 146 Vt. at 506, 505 A.2d at 1217.

76. *Id.* at 508, 505 A.2d at 1219.

77. *Id.* Although the Vermont Supreme Court remanded the *Barbour* case to make findings, the findings the court requested were not the factors listed in the custody statute. However, the court in a footnote stated that the trial court would be guided by the statutory factors. *Id. See also* Mayer v. Mayer, 144 Vt. 214, 475 A.2d 238 (1984); Davis v. Davis, 143 Vt. 100, 465 A.2d 221 (1983); Ohland v. Ohland, 141 Vt. 34, 442 A.2d 1306 (1982); Korshak v. Korshak, 140 Vt. 547, 442 A.2d 464 (1982).

78. *See, e.g.*, CHENEY, 1986 DIVORCE ACT at 4, 5.

79. VT. STAT. ANN. tit. 15, § 665(b)(1)-(8) (Supp. 1986).

80. *Id.*

81. CHENEY, 1986 DIVORCE ACT at 4.

teria for awarding parental rights as Vermont.[82] The criteria were designed to ensure that the child receive the most conducive environment in which to grow physically and emotionally.[83] Unfortunately, even though the legislature mandated that the factors be considered by judges, they did not require judges to make findings based on those factors.[84] However, if prior case law applies, judges will be required to make findings and will hopefully tailor their findings to address the listed criteria.

The first two criteria address a child's need for love, affection, guidance, and the fulfillment of physical needs.[85] The court must consider each parent's ability to provide a safe physical and emotional environment. The drafters also included the consideration that a child be provided for materially within a safe physical environment.[86] However, the statute prohibits custody determinations from being based solely on the financial resources of parents.[87]

The third criterion requires a judge to consider each parent's ability and disposition to meet the child's present and future developmental needs.[88] The legislature acknowledged the changing needs of children from infancy through adolescence.[89] This criterion implies that the parent best able to provide for the child's present needs may not be best able to provide for the child's future needs.[90]

The next criterion focuses on the possible results of the divorce.[91] The judge must evaluate the child's adjustment to his or her present living arrangements and the potential effects of any change.[92] The prior custody law omitted any consideration of the potential effects of any changes in the child's environment after the divorce.[93] The new law allows the court to acknowledge that a new living arrangement may be equally as positive for the child as his or her present environment. The prior law appeared to favor

82. *Id.* at 7.
83. *Id.*
84. VT. STAT. ANN. tit. 15, § 665(b).
85. VT. STAT. ANN. tit. 15, § 665(b)(1)-(2).
86. VT. STAT. ANN. tit. 15, § 665(b)(2).
87. VT. STAT. ANN. tit. 15, § 665(c).
88. VT. STAT. ANN. tit. 15, § 665(b)(3).
89. CHENEY, 1986 DIVORCE ACT at 12.
90. *Id.*
91. VT. STAT. ANN. tit. 15, § 665(b)(4).
92. *Id.*
93. VT. STAT. ANN. tit. 15, § 652(a)(3) (repealed).

the child's existing living arrangements.[94]

Two other criteria address the parents' ability to foster positive continued relationships, and their ability to cooperate with each other.[95] One of the factors contains an exception that allows the court to ignore this consideration if the parent can show that continued contact with the other parent will result in harm to themselves or to the child.[96] The legislature's intent is to protect spouses and children from abuse.[97] However, the legislature worded the statute so that a parent must prove that continued contact with the other spouse *will* result in harm. This creates a heavy burden of proof. If the statute's language were changed to read "except where contact *may* result in harm," the legislature's intent to protect against abuse would be preserved while lessening the burden of proof.

The final factor asks the trial court judges to evaluate the quality of the child's relationship with the primary caretaker.[98] This factor acknowledges the concept that the parent who provides the most care for a child on a daily basis is the parent who provides both the emotional and physical support for the child.[99] In the past, this role was traditionally relegated to the mother. However, society has changed and now fathers also share in the daily care of their children. However, in most families there is usually one parent who assumes the primary responsibility for the child's well-being on a daily basis. The legislators wanted to acknowledge the importance of the primary caretaker to the child's future emotional and physical security. At least one state has enacted legislation which presumes that custody should be awarded to the primary caretaker.[100]

The Vermont Legislature, while acknowledging the importance of the primary caretaker's role in the child's life, qualified consideration of this factor.[101] The statute requires that the child's relationship with the primary caretaker be considered only if ap-

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94. CHENEY, 1986 DIVORCE ACT at 13.
95. VT. STAT. ANN. tit. 15, § 665(b)(5), (8).
96. VT. STAT. ANN. tit. 15, § 665(b)(5).
97. CHENEY, 1986 DIVORCE ACT at 14, 15.
98. VT. STAT. ANN. tit. 15, § 665(b)(6) (emphasis added).
99. CHENEY, 1986 DIVORCE ACT at 19.
100. Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981); W. VA. CODE § 48-2-15 (1982).
101. VT. STAT. ANN. tit. 15, § 665(b)(6). ("[I]f appropriate given the child's age and development.").

propriate, given the child's age and development.[102] This allows judges a great deal of discretion in deciding whether or not to consider this factor. In many custody disputes, consideration of the primary caretaker factor could be the deciding factor. The legislature should remove language which allows judges to ignore the primary caretaker's role. The drafters should reword the statute so that the primary caretaker's relationship with the child is considered in all cases, but less weight should be given to this factor if the child is older and more mature. Thus the legislature could preserve the importance of this factor in all custody cases.

In addition to the eight comprehensive factors, the legislation also addresses what judges cannot consider. The new laws provide a prohibition against the introduction of evidence that does not affect the parents' relationship with the child.[103] The new laws also lessen the probability that a child's wishes will be considered by the court.[104]

Overall, the eight factors compiled by the legislature comprehensively address the needs of a child in an attempt to promote a child's continued growth and development. The prior factors were vague and discretionary. The new factors must be applied by the court, whenever parents do not agree to a joint custody arrangement. However, the creation of a presumption favoring joint custody lessens the strength of the factors. The presumption creates the opportunity for judges to make custody decisions without serious evaluation of all the factors by relying too heavily on the presumption that both parents should share custody.

CONCLUSION

The Vermont Legislature has made an attempt to improve

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102. *Id.*

103. VT. STAT. ANN. tit. 15, § 667(a). This statute provides a prohibition against the introduction of evidence that does not affect the parent's relationship with the child. The intent of the law is to prevent judges from awarding custody based on factors that reflect a judge's personal social values. However, the statute is worded so that judges can consider any conduct affecting the parent-child relationship instead of any conduct that *negatively* affects the parent-child relationship. The wording increases the threat of judges' social biases entering into their decisionmaking.

104. *See* VT. STAT. ANN. tit. 15, § 594 (Supp. 1986). In order for a child's testimony to be heard, the testimony must be determined necessary. Necessary means the evidence is not reasonably available by other means, and its probative value outweighs the detriment to the child. *Id.* This statute lessens the probability that children will be able to state their preference in custody decisions. This statute was hotly debated and narrowly passed.

child custody decisions by requiring judges to consider certain factors that will foster positive physical and emotional growth in children and prevent the award of parental rights and responsibilities based on personal preferences and bias. That effort is to be applauded.

However, the legislature also established a presumption in favor of joint custody for all children unless direct physical or emotional harm is likely to result to the child or parent. The premise that children are best raised by the continued contact with both divorced parents, although a popular concept nationwide, is still debated. Allowing judges to order joint custody arrangements against the desires of both parents should be changed. This type of forced cooperation has already been shown to be a mistake in other states. Divorcing parents should not be forced to consult each other and continue a relationship that they wish to terminate. In fact, such a forced arrangement may be unconstitutional. The children can receive no possible benefit from such a solution.

The best solution is for courts to presume that custody decisions, which parents agree to, whether sole or shared, are in the child's best interest. The premise that parents, whether married or divorced, make decisions in their child's best interest, absent state interference, should be honored unless there is proof of possible harm to the child.

When parents cannot agree and must request court intervention, the court should decide who should have sole custody based on the particular circumstances of each case. The statutory factors should be applied, absent any type of presumption.

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