GENDER BIAS AGAINST FATHERS IN CUSTODY? THE IMPORTANT DIFFERENCE BETWEEN OUTCOME AND PROCESS

In 1988 the Vermont Supreme Court and the Vermont Bar Association established the Vermont Task Force on Gender Bias in the Legal System ("Task Force") to examine under what circumstances gender bias might exist in Vermont's legal system.[1] Similar to task forces in other states,[2] Vermont's joint effort by the bench and bar sought to determine the manifestations of gender bias in Vermont's legal system and to propose steps to eliminate them.[3] As the 1991 Task Force report pointed out, "[n]o other system has the central responsibility for fairness that the courts have."[4] The Task Force recognized that for the legal system to "dispense justice evenhandedly," it must not embody the same social biases and stereotypes that operate in society at large.[5] Thus, the goal of the Task Force was to identify whether gender bias exists in the legal system, "the nature and extent of the problem," and what appropriate measures could be adopted to achieve the ideal of gender fairness in the system.[6]

The 1991 Task Force report described instances of gender bias that overwhelmingly affected women.[7] In the area of child custody, however, the Task Force found "a widespread perception among men who are noncustodial parents that child custody awards in Vermont are biased in favor of mothers."[8] The Task Force responded to this finding by recommending that contested custody cases be studied to determine whether judges do favor one parent for custody merely on the basis of gender.[9]

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1. VERMONT SUPREME COURT & VT. BAR ASS'N, GENDER AND JUSTICE: REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL SYSTEM ix (1991) [hereinafter VERMONT TASK FORCE]; Ellen M. Fallon, *Joint Bench/Bar Task Force on Gender Bias in the Legal System: A Challenge for the Future*, VT. B.J. & L. DIG., Apr. 1988, at 3. The Task Force studied domestic violence, courtroom interaction, judicial selection, court personnel, child support, child custody, mediation, guardians ad litem, criminal justice, civil damage awards, and access to the legal system. VERMONT TASK FORCE, *supra*, at i.

2. *See generally* Lynn H. Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL, Feb. 1990, at 28 (describing the efforts of gender bias task forces in other states).

3. Fallon, *supra* note 1, at 3.

4. VERMONT TASK FORCE, *supra* note 1, at xvi-xvii.

5. *Id.*

6. *Id.* at x, xvii.

7. *Id.* at xvi.

8. *Id.* at 100.

9. *Id.* at 111.

As a first step in evaluating the perception of bias against fathers in child custody awards, a Task Force subcommittee[10] gathered data from divorce cases in three Vermont counties.[11] Not surprisingly, the study revealed that only a small fraction of divorce cases is contested.[12] In the 211 cases reviewed, only three involved a contested hearing on the issue of custody.[13] Clearly three cases alone cannot support any conclusions about judicial bias against fathers seeking custody. There are, however, explanations for the existence of a *perception* of bias against fathers in custody decision making. In fact, the Task Force offered two suggestions to explain this perception that were not rooted in judicial bias. First, Vermont's laws governing custody upon divorce may provide a gender neutral reason that fathers are not awarded sole custody as frequently as mothers.[14] Second, the Task Force suggested that attorneys may discourage fathers from seeking or contesting custody.[15]

This note discusses the perception of bias against divorcing fathers in Vermont custody cases, and argues that focusing on custody outcome is misplaced if gender bias in the process is to be identified and eliminated. The 1992 custody data gathered by the Task Force subcommittee, and a series of interviews with Vermont family law attorneys are used to analyze the two suggested explanations for the perception of bias against Vermont's divorcing fathers. For background, the meaning of "gender bias" and the Task Force's findings of bias in child custody cases are provided in parts I.A and I.B. Part I.C reviews Vermont's current child custody laws to demonstrate the importance of parental roles in determining custody outcome upon divorce. In part II, some of the 1992 Custody Study findings are presented. The data provided in this section show that custody arrangements are almost always negotiated between the parties, and that mothers retain physical custody of their children more

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10. In 1991 the Gender Bias Task Force Implementation Committee was established to implement the recommendations in the 1991 Task Force report. Memorandum from Judge Amy M. Davenport, Chair of the Gender Bias Implementation Subcommittee charged with Implementation of Custody Study Recommendation to the Legislative Study Committee on Parental Rights and Responsibilities 1 (Nov. 16, 1992) (on file with author).

11. The three counties were Rutland, Washington, and Windsor. *See infra* note 132.

12. *See infra* notes 155-57 and accompanying text.

13. *See infra* notes 155-57 and accompanying text.

14. VERMONT TASK FORCE, *supra* note 1, at 104.

15. *Id.* at 105.

often than fathers. Part III is a discussion and analysis of the Task Force's explanations for the perception of bias against fathers in custody cases. The first section of this part analyzes how the custody statute's operation gives an advantage to the parent primarily responsible for the child's day-to-day care. The suggestion that Vermont attorneys may discourage fathers from seeking custody, and therefore contribute to the perception of bias, is addressed in part III.B. This section describes how some attorneys view the problem of gender bias against Vermont fathers in custody cases, how they determine what legal advice to give their divorcing clients with children, and what they believe drives parties to settle custody disputes.

The conclusion summarizes the problem with examining gender bias against fathers based on the outcome of custody awards. If gender bias in child custody is to be addressed, the full extent of the problem must first be established; that can only be done through a careful examination of the process. As this note shows, the perception of gender bias against fathers in custody is far more complex than the outcome of custody awards might suggest.

I. BACKGROUND

A. *Definition of Gender Bias*

The Task Force defined gender bias as the "predisposition or tendency to think about and behave toward people mainly on the basis of their sex."[16] Gender bias involves discriminatory

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16. *Id.* at xvi. The gender bias task forces of other states have defined "gender bias" in different ways: "Gender bias encompasses society's perceptions of the value of work assigned to each sex, the myths and misconceptions about the social and economic realities of peoples' lives, and the stereotypes that society has assigned to the behavior of men and women." Utah Task Force on Gender and Justice, *Utah Task Force on Gender and Justice: Report to the Utah Judicial Council*, 16 J. CONTEMP. L. 135, 136 (1990); "Bias is the tendency to view persons and behave toward them principally on the basis of false or outmoded stereotypes or myths. It is the unjustified notion that a person's ability, ambitions or interests are pre-determined by whatever label is attached to that person — . . . 'female' [or] 'male.'" RHODE ISLAND COMM. ON WOMEN IN THE COURTS, FINAL REPORT OF THE RHODE ISLAND COMMITTEE ON WOMEN IN THE COURTS: A REPORT ON GENDER BIAS i (1987); "[D]ecisions . . . made or actions taken because of weight given to preconceived notions of sexual roles rather than upon a fair and unswayed appraisal of merit as to each person or situation." New York Task Force on Women in the Courts, *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 11, 16 (1986-87) (citation omitted); *see* Ellen S. Podgor & Leonard D. Pertnoy, *Bias v. Difference: An Analysis for*

conduct and attitudes or conduct predetermined by the way one believes a man or woman *should* act based on his or her sex.[17] Gender biased actions are not necessarily intentional or precipitated by malice;[18] people acting upon a bias often do so with good intentions or without realizing their actions are biased.[19] Nevertheless, women experience unfairness and hardship in Vermont's legal system as a result of gender bias significantly more often than men.[20]

B. *Task Force Findings Relating to Child Custody*

The Task Force reported that child custody was one of the few areas in which gender bias was perceived to function to the detriment of both men and women.[21] The findings were based on surveys of attorneys and judges, written comments accompanying the surveys, and testimony by litigants, attorneys, and other members of the public during public hearings.[22] The perception of bias against men primarily concerned the outcome of custody cases.[23] In contrast, the bias against women documented by the Task Force focused on the process, specifically judicial scrutiny of women's conduct during marriage.[24]

Those Who Just Don't Get It, 54 ALB. L. REV. 413 (1990) (illustrating the difficulty of detecting gender biased actions).

17. VERMONT TASK FORCE, *supra* note 1, at xvi.

18. *Id.* at xx.

19. *Id.*

20. *Id.* at xvi. This is consistent with findings in other states. *See generally* SUPREME JUDICIAL COURT, GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS *passim* (1989); RHODE ISLAND COMM. ON WOMEN IN THE COURTS, *supra* note 16, *passim*; Utah Task Force on Gender and Justice, *supra* note 16, *passim*; Ricki L. Tannen, *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. v *passim* (1990); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, *Minnesota Supreme Court Task Force for Gender Fairness in the Courts: Final Report*, 15 WM. MITCHELL L. REV. 829 *passim* (1989); ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS, THE 1990 REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS (1990); New York Task Force on Women in the Courts, *supra* note 16, *passim*. The New York Task Force summarized its findings by noting that gender bias against women in New York's legal system is "pervasive" with "grave consequences." New York Task Force on Women in the Courts, *supra* note 16, at 17.

21. VERMONT TASK FORCE, *supra* note 1, at 100.

22. *Id.* at 101.

23. *See infra* notes 25-29 and accompanying text.

24. *See infra* notes 33-36 and accompanying text.

Almost three-quarters of the surveyed attorneys believed that Vermont custody awards are "always" or "often" based "on the assumption that, other things being equal, young children belong with their mothers."[25] Responding to a similar question, twelve of the twenty-two judges surveyed answered that this was "often" the case.[26] However, a majority of the judges also believed that they gave "fair and serious consideration to fathers seeking primary physical or joint custody."[27] Most revealing are comments regarding bias against fathers in child custody cases

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25. VERMONT TASK FORCE, *supra* note 1, at 102-03. Although not the subject of this note, it is worthy to mention that the wording of this question is inherently faulty. First, the phrase "other things being equal" fails to identify what those "other things" are. For example, does this phrase refer to each parent's relationship with the child, each parent's ability to provide for the child's physical, emotional, or material needs, each parent's willingness to foster a healthy relationship between the other parent and the child in the future, and each parent's contribution to the care of the child during marriage? This phrase also fails to account for the reality that women still do a greater portion of child rearing tasks than do men (for example, feeding and dressing the child; shopping for the child's material needs; taking the child to the doctor and dentist). ANTHONY ASTRACHAN, HOW MEN FEEL: THEIR RESPONSE TO WOMEN'S DEMANDS FOR EQUALITY AND POWER 231 (1986); Mary Ann Mason, *Motherhood v. Equal Treatment*, 29 J. FAM. L. 1, 5 (1990-91); GEOFFREY L. GREIF, THE DADDY TRACK AND THE SINGLE FATHER 45-46 (1990); Sylvia F. Fava & Rosalie G. Genovese, *Family, Work, and Individual Development in Dual-Career Marriages: Issues for Research*, 3 RES. IN THE INTERWEAVE OF SOC. ROLES: FAMILIES AND JOBS 163, 166 (1983); Joseph H. Pleck, *Husbands' Paid Work and Family Roles: Current Research Issues*, 3 RES. IN THE INTERWEAVE OF SOC. ROLES: FAMILIES AND JOBS 251, 259 (1983); Janice Drakich, *In Search of the Better Parent: The Social Construction of Ideologies of Fatherhood*, 3 CAN. J. WOMEN & L. 69, 83-85 (1989); *see also infra* notes 167-95 and accompanying text. Second, it is unclear whether the Task Force used the term mother to refer to the archetypal "mother" or whether it was meant to refer to the sex of the parent. The terms "mother" and "father" have different linguistic significance. Mother not only means the female sex of one parent as father means the male sex of the other parent; mother is also commonly used in our language to refer to the tasks mothers generally perform in our society. This difference is highlighted in two ways. When a woman has a child we say she "bears a child" rather than she "mothers a child." When we say a man "fathers a child" we refer to his role as the sexual partner of the woman who bore the child. "Mothering" a child connotes providing daily care for a child. Another common example of the way we use the terms mother and father differently (aside from the terms' reference to sex) is when we speak of people working outside the home. A woman with children who works outside the home is often called a "working mother." Rarely, if ever, is the term "working father" used to refer to a man with children who works outside the home. The different usage derives from the roles men and women generally have in relation to the care of their children. Thus, when the Task Force asked, "other things being equal, [do] young children belong with their mothers?" did the respondents consider the term mother as a substitute for "woman" or were they referring to the archetypal mother who generally is responsible for the care of her children?

26. VERMONT TASK FORCE, *supra* note 1, at 103.

27. *Id.*

elicited by the survey and the public hearings. The Task Force report highlighted one noncustodial father's perception of bias:

> I feel there is a tremendous gender bias in the courts in Vermont against fathers. . . . You people in power must realize that us fathers love and deserve the children every bit as much as the mothers do. And the children should have equal access . . . as it stands now, the laws are punitive against fathers in Vermont.[28]

One attorney commented that mothers "always get[] custody unless you can prove beyond all doubt [their] incompetence. Divorce is very unfair to husbands especially with custody issues."[29] As these responses demonstrate, the bias against fathers centers on the perception that fathers, because they are men, have a more difficult time gaining custody of their children upon divorce than do mothers, because they are women. The focus of that perception is the outcome, who gets custody upon divorce, rather than how the court evaluates the parties during a contested case.

Disparate treatment of men and women during the divorce proceeding was particularly important to the Task Force's findings of bias against women in custody cases. The Task Force found evidence that courts have given greater weight to fathers' child care activities than to mothers' activities in determining custody awards.[30] Female attorneys were more likely to believe that this was true than male attorneys.[31] One female attorney commented that fathers' small child care contributions are "overvalued" in comparison with mothers' care because mothers are *expected* to take primary responsibility for the care of their children.[32]

Similar to the different value placed on mothers' and fathers' child care activities during marriage, the Task Force found that mothers' "misconduct" during or after marriage was used improp-

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28. *Id.* at 102.
29. *Id.*
30. *Id.* at 101.
31. *Id.* at 108-09.
32. *Id.*

erly by trial courts in awarding custody.[33] Trial courts have based paternal custody awards on a mother's fault for the divorce;[34] her extramarital sexual behavior;[35] and a mother's incredibility as a witness, although the court failed to make findings on the father's suitability as a custodial parent.[36]

The Task Force's findings of bias against women in custody and the perception of bias against men differ in their focus on process and outcome. Process looks at the way the court evaluates the parties during the proceeding and the standards it uses to reach a custodial decision. Outcome focuses merely on the end result—that is, who was awarded custody. For example, the core of the perception of bias against women is that trial courts scrutinize mothers' and fathers' conduct during or after marriage differently in making a custodial award. That scrutiny employs stereotypical notions about gender which penalize women for not adhering to the proper "mother" archetype. The perception of bias against men looks at the outcome, that is, that courts award custody to women more frequently than they award custody to men. The Task Force report did not contain findings that men whose parental roles during marriage were the same as women's parental roles failed to get custody, or that fathers' non-traditional or non-stereotypical conduct penalized them in custody.

Vermont's noncustodial fathers have not been alone in their claim that gender bias against men is evidenced by the balance of custody outcomes favoring women. Responding to an article in the *National Law Journal* that outlined state efforts to address

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33. *Id.* at 109. Penalizing mothers in custody cases for their marital "misconduct" or their employment outside the home has been documented by feminist scholars and gender bias task forces from other states. *See generally* Schafran, *supra* note 2, at 30 (summarizing task force findings from Florida, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, Rhode Island, and Washington); Susan B. Boyd, *Child Custody, Ideologies, and Employment*, 3 CAN. J. WOMEN & L. 111 *passim* (1989) (impact of mothers' employment on custody decisions in Canada); Nancy D. Polikoff, *Gender and Child-Custody Determinations: Exploding the Myths*, *in* FAMILIES, POLITICS, AND PUBLIC POLICY: A FEMINIST DIALOGUE ON WOMEN AND THE STATE 183, 188-91 (Irene Diamond ed., 1983) (discussing cases in which judges based paternal custody decisions on mothers' nonmarital sexual behavior and employment outside the home).

34. VERMONT TASK FORCE, *supra* note 1, at 109; *see also* Hansen v. Hansen, 151 Vt. 506, 509, 562 A.2d 1051, 1053 (1989).

35. VERMONT TASK FORCE, *supra* note 1, at 109-10; *see Hansen*, 151 Vt. at 509, 562 A.2d at 1053; Pill v. Pill, 154 Vt. 455, 459, 578 A.2d 642, 644 (1990) (modification of custody).

36. VERMONT TASK FORCE, *supra* note 1, at 110; *see* Poulin v. Upham, 149 Vt. 24, 27, 538 A.2d 181, 183 (1987).

gender bias in the legal system,[37] Fredric Hayward, Executive Director of Men's Rights Inc., pointed to the number of maternal custody awards as proof of gender bias against men: "[C]ourts award the position of 'single head of household' to a woman 90 percent of the time. If any other personnel department had a sexist pattern this dismal in awarding positions, the statistics alone would warrant implementation of corrective action through affirmative action."[38] Another response to this article echoed Mr. Hayward's concern, noting that "[e]xamples of bias against men could well be the award of custody of children to women in 90 percent of divorce cases."[39]

This difference between outcome and process is important because Vermont's current custody laws require trial courts to focus on parental roles, such as providing emotional or physical security.[40] Where those roles are not equal, the outcome will likewise be unequal. In the context of custody, a claim of bias derived solely from disparate outcomes masks the importance of process. Failing to examine how custody decisions are made makes detecting and eliminating bias more difficult. It may also serve to perpetuate a perception of bias that might have little basis in reality. Unless men and women share child care tasks equally, Vermont's custody statute will continue to favor women not because of their gender, but because of their primary responsibility for child rearing.[41] Relying on outcome feeds the notion that fathers are being judged not by their conduct but by their gender. Most importantly, parenting roles and skills must be evaluated to provide for the future well-being of children because children's healthy development depends upon more than just food, clothing, and shelter. The history of Vermont's custody laws and current custody statute elucidates the difficulty in merely relying

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37. Gail D. Cox, *Reports Track Discrimination*, NAT'L L.J., Nov. 26, 1990, at 1.

38. Fredric Hayward, *Gender Bias Has an Impact on Men, Also*, NAT'L L.J., Feb. 4, 1991, at 14. An analogy similar to Mr. Hayward's analogy to workplace discrimination was used by Sen. Richard McCormack during the Vermont Legislative Hearings on Parental Rights and Responsibilities. *Hearings Before the Parental Rights and Responsibilities Committee*, 61st Leg. Biennial, 2d Sess. 28-29 (Nov. 16, 1992) [hereinafter *Hearings I*] (comments of Sen. Richard McCormack); *see infra* note 163 and accompanying text.

39. John E. Siegmund, *Gender Bias Restricts Men's Rights as Well*, NAT'L L.J., Apr. 8, 1991, at 12.

40. *See infra* notes 42-126 and accompanying text.

41. *See infra* notes 167-202 and accompanying text.

on outcome to support a claim of bias against fathers in custody awards.

C. *Vermont's Custody Laws*

On July 1, 1986, the current statutes governing child custody went into effect marking a "true revolution in Vermont divorce law."[42] Like the predecessor statute, the current provisions were constructed under the "best interest of the child" standard;[43] however, the present statute differs considerably from the former. The terminology used to refer to "custody" has been changed and the "best interests" standard is more clearly defined.[44] Furthermore, the court is prohibited from considering evidence that does not have a bearing on the welfare of the child, including the sex of the parents or the children.[45] These changes were made to shift the focus of custody battles from parental acrimony to the future emotional and developmental health of children.[46]

1. From "Custody" to "Parental Rights and Responsibilities"

In its statement of findings and purpose, the Vermont Legislature declared that upon divorce, the best interests of a child are served if the child has "the opportunity for maximum continuing physical and emotional contact with both parents."[47] Consistent with this ideal is the language employed by the sections governing custody upon divorce. Prior to 1986, parental rights and duties were bundled up in two terms: "custody" and

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42. Kimberly B. Cheney & Trine C. Bech, *The 1986 Divorce Revolution*, VT. B.J. & L. DIG., Aug. 1986, at 4.

43. VT. STAT. ANN. tit. 15, §§ 650, 664-667 (1989). *Compare* VT. STAT. ANN. tit. 15, § 652 (repealed 1985) (the best interest of the child shall guide the court in making award of custody) *with* VT. STAT. ANN. tit. 15, § 665(a) (1989 & Supp. 1992) (the court shall order shared or divided parental rights and responsibilities on terms and conditions that serve the child's best interests).

44. *See infra* notes 47-111 and accompanying text.

45. *See infra* notes 112-26 and accompanying text.

46. *See generally* Kimberly B. Cheney & Trine C. Bech, Vermont's 1986 Divorce Act: A Health Value System (June 30, 1986) (unpublished manuscript, on file with the Vermont Bar Association) [hereinafter Cheney & Bech, 1986 Divorce Act].

47. VT. STAT. ANN. tit. 15, § 650 (1989). This provision has a critical exception. If "direct physical harm or significant emotional harm to the child or a parent is likely to result from such contact," it is *not* in the child's best interests to have maximum contact with the harmful parent. *Id.*

"visitation."[48] Since 1986, divorced parents have been awarded "rights and responsibilities" with respect to their minor children, rather than custody.[49] It was felt that custody, implying a "winner-take-all" notion that vests a totality of rights in one parent, was contrary to the "reality that divorce with children alters, but does not eliminate, ongoing parental rights and duties."[50] Further, custody perpetuates the idea that children are their parents' chattel, a concept antithetical to the purpose of providing for a child's "best interests."[51] The new terminology takes into account the various physical arrangements and decision-making responsibilities parents must consider in caring for their children both before and after divorce.[52]

Section 664 defines the term "parental rights and responsibilities" and differentiates "legal" from "physical" responsibility.[53] "Parental rights and responsibilities" mean the "rights and responsibilities [that relate] 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."[54] "Parent child contact," replacing "visitation," is now included within the scope of parental rights and responsibilities rather than within the scope of things awarded to noncustodial parents.[55] "Legal responsibility" encompasses the rights and responsibilities parents exercise in controlling the variety of matters that affect a child's upbringing apart from the "routine daily care" of the child.[56] These matters include, but are not limited to, education, religion, travel, and medical and dental care.[57] "Physical responsibility," on the other hand, includes the rights and responsibilities needed "to provide routine

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48. VT. STAT. ANN. tit. 15, § 652 (repealed 1985); *see also* Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 2-3.

49. VT. STAT. ANN. tit. 15, § 664 (1989) (defining "parental rights and responsibilities"); *id.* § 665 (providing that upon marital dissolution, the court "shall make an order concerning parental rights and responsibilities of any minor child of the parties").

50. Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 2.

51. *Id.* at 2-3.

52. *See infra* notes 53-60 and accompanying text.

53. VT. STAT. ANN. tit. 15, § 664(1)(A), (B) (1989).

54. *Id.* § 664(1).

55. *Id.*

56. *Id.* § 664(1)(A).

57. *Id.* A parent cannot be denied access to the child's medical, dental, educational, or law enforcement records solely because the other parent has sole legal rights and responsibilities. *Id.* § 670.

daily care and control of the child subject to the right of the other parent to have contact with the child."[58] Both legal and physical rights and responsibilities may be held solely by one parent or divided or shared between parents.[59] This terminology divides custody into elemental parts so that the allocation of child care responsibilities during marriage can be reflected in post-divorce parenting arrangements.[60]

2. "Best Interests" Defined

The pre-1986 "best interests of the child" standard, and the criteria guiding that standard,[61] were criticized as being "so vague as to be useless,"[62] and "inadequate, overly broad, and impossible to achieve."[63] The existing provisions that control custody standards in divorce actions are much clearer and far more useful in predicting custody outcome, while remaining flexible so that the needs of the particular children involved in a dispute may be considered.

Parental agreements that allocate parental rights and responsibilities after divorce are presumed to be in the children's best interests.[64] This presumption incorporates one of the 1986 Divorce Act's central policies that continuing "the kinds of parent-child contact . . . which existed prior to divorce" serves the best interests of children.[65] Perhaps more importantly, this presumption recognizes that interparental conflict has tremendous

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58. *Id.* § 664(1)(B).

59. *Id.* § 664(1)(A), (B). If the parties cannot agree to share or divide parental rights and responsibilities, the court may only award those rights and responsibilities primarily or solely to one parent. *Id.* § 665(a).

60. Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 3.

61. In making a custody determination under the prior statute, § 652, courts could have considered four factors but were not limited to those factors: 1) the parents' wishes; 2) the child's relationship and interaction with family members; 3) the child's adjustment to his/her present community, school, and home; and, 4) the health (both physical and mental) of all the individuals involved in the action. VT. STAT. ANN. tit. 15, § 652 (repealed 1985).

62. Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 4.

63. Paula J. Gottwik, Note, *Determining "Best Interests" of the Child in Divorce Custody Disputes: A Procedural Approach*, 9 VT. L. REV. 311, 311 (1984); *see* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 53-64 (1973) (providing a comprehensive critique of the "best interests" standard).

64. VT. STAT. ANN. tit. 15, § 666(a) (1989).

65. Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 3.

negative effects on children.[66] In fact, several studies have shown that parental cooperation and low interparental conflict contribute to successful post-divorce adjustment in children.[67] Accordingly, section 665's presumption in favor of parental agreements favors the principle that children fare better after divorce when their parents reduce the conflict between them and reach agreements about their future child care plans.[68]

Divorcing parents with minor children are required to wait six months from the date of service before they can proceed to a final hearing.[69] This waiting period may help facilitate an agreement by giving the parties time to "cool off" if there is substantial acrimony between them. In the interim, either party can petition the court for a temporary order on parental rights and responsibilities.[70] This temporary period can be a time for parents to experiment with custodial arrangements that will best suit the needs of the family after divorce.[71]

Should parents be unable to reach an agreement on a post-divorce parenting plan, the trial court "shall award parental rights and responsibilities primarily or solely to one parent."[72] Section 665(b) enumerates eight criteria the court must consider in making a parental rights and responsibilities order.[73] Quite

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66. Joan B. Kelly, *Longer-Term Adjustment in Children of Divorce: Converging Findings and Implications for Practice*, 2 J. FAM. PSYCHOL. 119, 125 (1988).

67. *Id.* at 125-26; Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310, 313 (1982); Hugh McIsaac, *Reducing the Pain of a Child Custody Struggle*, FAM. ADVOC., Spring 1992, at 26, 29.

68. *See* Emery, *supra* note 67, at 313.

69. VT. R. FAM. P. 4(h).

70. VT. STAT. ANN. tit. 15, § 594a (1989).

71. Interview with Judge Amy M. Davenport, Vermont Superior Court Judge, in Chelsea, Vt. (Sept. 15, 1992).

72. VT. STAT. ANN. tit. 15, § 665(a) (1989). The assumption implicit in this provision is that imposing a plan which requires parents to share parental rights and responsibilities will not serve the child's best interest, but rather will aggravate the existing interparental conflict demonstrated by their inability to come to an agreement. Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 6.

73. VT. STAT. ANN. tit. 15, § 665(b) (1989). This section provides in pertinent part:

> (b) In making an order under this section, the court shall be guided by the best interests of the child, and shall consider at least the following factors:
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> (1) the relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection and guidance;
>
> (2) the ability and disposition of each parent to assure that the child receives adequate food, clothing, medical care, other material needs and a safe environment;

distinct from the repealed statute, the court is *required* to evaluate the custody dispute according to the criteria set forth in section 665(b).[74] The authors of this section[75] recognized that the wide discretion granted trial courts, combined with a lack of mandatory custody criteria, opened the door to judicial decision-making based on social values instead of the children's particular present and future needs.[76] The future physical and emotional health of children,[77] in accordance with research on child development,[78] became the basis for section 665's mandatory criteria. For example, criterion (b)(1) requires the court to assess "the relationship of the child with each parent and the ability and disposition of each parent to provide the child with love, affection and guidance."[79] Under this criterion, mere declarations of parental love and affection toward a child are not sufficient.[80] Instead, the court must look to parental acts that demonstrate an ability and disposition to fulfill a child's need for love, affection, and guidance to assist the child in developing his or her own

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> (3) the ability and disposition of each parent to meet the child's present and future developmental needs;
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> (4) the quality of the child's adjustment to the child's present housing, school and community and the potential effect of any change;
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> (5) the ability and disposition of each parent to foster a positive relationship and frequent and continuing contact with the other parent, including physical contact, except where contact will result in harm to the child or to a parent;
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> (6) the quality of the child's relationship with the primary care provider, if appropriate given the child's age and development;
>
> (7) the relationship of the child with any other person who may significantly affect the child;
>
> (8) the ability and disposition of the parents to communicate, cooperate with each other and make joint decisions concerning the children where parental rights and responsibilities are to be shared or divided.

Id.

74. *Id.*

75. In 1985, the Vermont Legislature established the Family Proceedings Advisory Committee ("Advisory Committee") to research the problems and effectiveness of judicial rules and statutes relating to family law, and to make recommendations to "improve decision-making in family cases." Act of May 15, 1985, No. 55, 1985 Vt. Laws 134. The Advisory Committee's suggested changes to Vermont's custody laws are contained in section 665. *See* THE FAMILY PROCEEDINGS ADVISORY COMM., FAMILIES, CHILDREN AND THE COURTS: FINDINGS AND RECOMMENDATIONS 6, 10-11, 17 (1986).

76. Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 5.

77. *Id.* at 7.

78. *Id.* at 1-2.

79. VT. STAT. ANN. tit. 15, § 665(b)(1) (1989).

80. Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 8-9.

personality as the child grows.[81] Recognizing that children's needs change as they grow older, criterion (b)(3) requires the court to evaluate each parent's ability and disposition to change their parenting approach to meet the child's developmental needs.[82] The criteria "rest on the assumption that the parent who provides the optimal opportunity for a child to grow up as a healthy autonomous individual should be preferred."[83]

Section 665(b) fails to indicate the weight a court should give each of the eight criteria, and the trial court is given broad discretion in deciding how the "best interests" of the child would be served in each case.[84] Although section 665(b)'s framers structured the criteria with the "most important issues first," they recognized that judicial discretion would be necessary in assigning weight to each criterion.[85] In *Harris v. Harris*, however, the Vermont Supreme Court held that the child's relationship with the primary care provider, criterion (b)(6), is "entitled to great weight unless the primary custodian is unfit."[86] Although the Supreme Court failed to make clear in *Harris* why the primary care provider's relationship with the child should be entitled to "great weight," an explanation for the decision can be found in research on child development. Because divorce presents unique adjustment difficulties for children, researchers point to the importance of maintaining continuity in children's lives[87] and preserving children's emotional and psychological bond with the primary care providing parent.[88] The day-to-day contact the primary care provider has with the child, especially when the

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81. *Id.* at 9-10. In the words of one child development researcher: "The road to many a child's psychological hell is paved by naive acceptance of verbal statements of parents' good intentions despite a mountain of behavioral evidence to the contrary." Paul D. Steinhauer, *Assessing for Parenting Capacity*, 53 AM. J. ORTHOPSYCHIATRY 468, 472 (1983).

82. VT. STAT. ANN. tit. 15, § 665(b)(3) (1989); Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 11-12.

83. Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 7-8. To assist the court in making a determination under these criteria, a guardian ad litem may be appointed to represent the child's best interests. VT. STAT. ANN. tit. 15, § 669 (1989).

84. Bissonette v. Gambrel, 152 Vt. 67, 69-70, 564 A.2d 600, 601 (1989).

85. Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 8.

86. Harris v. Harris, 149 Vt. 410, 418, 546 A.2d 208, 214 (1988).

87. James H. Bray, *Psychosocial Factors Affecting Custodial and Visitation Arrangements*, 9 BEHAVIORAL SCI. & L. 419, 432-33 (1991); Steinhauer, *supra* note 81, at 472-73; *Hearings I*, *supra* note 38, at 46-48 (testimony of Linda Johnson, Executive Director of the Vermont Center for Prevention of Child Abuse).

88. 1 JEFF ATKINSON, MODERN CHILD CUSTODY PRACTICE § 4.10 (1986 & Supp. 1991); Steinhauer, *supra* note 81, at 472.

child is young, facilitates a close psychological bond between them.[89] In addition, the primary care provider has experience meeting the child's daily needs,[90] and has "demonstrated a commitment to caring for the child which, barring contrary evidence, is likely to continue" after divorce.[91] The court must assess the importance of this criterion according to the child's age and developmental stage.[92] Furthermore, for a parent to benefit from this criterion, the court must correctly identify the primary care provider[93] by "focus[ing] on all relevant periods of the child's life" and not solely on the period immediately prior to the divorce proceeding.[94]

In contested custody cases, the trial court must make sufficient findings to show the basis for the parental rights and responsibilities order. Although the court must consider section 665(b)'s eight enumerated factors, its findings must be based on as many of those factors as the evidence will allow.[95] Because families are not fungible, the evidence divorcing parents present at trial should focus on their particular situation, and section 665(b) is a guide to the kind of evidence the court will consider.[96] The court is not required, however, to make a specific finding on each factor as long as the findings taken as a whole demonstrate that the court considered each factor in making its decision.[97] Sufficient findings of fact and conclusions of law are critical for appellate review, and thus the factors on which a trial court relied

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89. ATKINSON, *supra* note 88, § 4.12.

90. *Id.*

91. *Id.* Carol Smart sees the primary care provider criterion as an expression of the moral value society should place on the caring function. Carol Smart, *The Legal and Moral Ordering of Child Custody*, 18 J.L. & SOC'Y 485, 488-89 (1991). Most parents care *about* their children but generally only one, usually the mother, does most of the *caring for* work. *Id.* In Smart's view, legal rules should place a higher priority on the moral value of *caring for* a child. *Id.*

92. VT. STAT. ANN. tit. 15, § 665(b)(6) (1989) ("the quality of the child's relationship with the primary care provider, *if appropriate given the child's age and development*" (emphasis added)); *Hearings I*, *supra* note 38, at 20-21 (testimony of Judge Amy M. Davenport). Judge Davenport noted during her testimony that a child's emotional and psychological bond with the primary care provider may be less important as the child grows older. The needs of young children are different than the needs of adolescents. *Id.*

93. Nickerson v. Nickerson, 158 Vt. 85, 89, 605 A.2d 1331, 1333 (1992).

94. *Id.* at 91, 605 A.2d at 1334.

95. *Bissonette*, 152 Vt. at 69, 564 A.2d at 601; Poulin v. Upham, 149 Vt. 24, 26 n.*, 538 A.2d 181, 182 n.* (1987).

96. *See* Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 8.

97. *Harris*, 149 Vt. at 414, 546 A.2d at 211-12.

to determine custody must be clear.[98] Nevertheless, the court is not compelled to structure its parental rights and responsibilities order in the same manner as the criteria are structured in the statute.[99] The order is sufficient if the blend of facts and standards that support the trial court's conclusions are explained adequately in light of the statutory criteria.[100]

The parties in contested custody cases share the burden of proof.[101] The statutory criteria in section 665(b) require the court to look at the parenting abilities and familial roles of both parents; therefore, the court's factual findings and legal conclusions must address the abilities of *both* parents.[102] It is not sufficient that one parent negate the abilities of the other parent without establishing his or her own suitability as a custodial parent.[103] In *Harris*, for example, the plaintiff's proof focused on the defendant's inadequacy as a "wife and mother" and "offered general statements of his capacity to meet the needs of the children."[104] The defendant focused on her role as the children's primary care provider, her fitness as a custodial parent, and the children's healthy development while in her care.[105] The trial court awarded sole physical parental rights and responsibilities to the plaintiff.[106] In reversing the trial court's decision, the Vermont Supreme Court reasoned that it was error for the trial court to base a parental rights and responsibilities order on evidence that only focused on one of the parties, in this case, the defendant.[107] The court explained:

> [A] parent cannot claim the benefit of a statutory factor solely by showing that the other parent's actual or expected performance with respect to that factor is inadequate. This requires each parent to show his or her relationship with the child in light of the statutory

98. *Poulin*, 149 Vt. at 25-27, 538 A.2d at 182-83.

99. *Harris*, 149 Vt. at 414, 546 A.2d at 212.

100. *Nickerson*, 158 Vt. at 89, 605 A.2d at 1333.

101. *Harris*, 149 Vt. at 417, 546 A.2d at 213. The wording of the statute implies this holding. *See supra* note 73 (providing text of § 665(b)).

102. *Poulin*, 149 Vt. at 27, 538 A.2d at 183; *Harris*, 149 Vt. at 418, 546 A.2d at 214.

103. *Harris*, 149 Vt. at 417, 546 A.2d at 213.

104. *Id.* at 412, 546 A.2d at 210.

105. *Id.* at 411-12, 546 A.2d at 210.

106. *Id.* at 411, 546 A.2d at 210.

107. *Id.* at 417, 546 A.2d at 213.

> factors. To some degree, it will direct the evidence away from the spousal misconduct focus that too often pervades custody hearings and onto the needs of the child.[108]

Thus, the provisions of section 665 would not be met if the court based its parental rights and responsibilities decision on one parent's incapacity to meet the statutory criteria without considering the ability of the other parent.[109]

Section 665 ensures that the post-divorce parenting plan devised by the court will be in the child's "best interests" by requiring the court to consider the parenting abilities of both parents and each parent's relationship with their child.[110] Through mandatory criteria specifying factors that generally provide for physically and mentally healthy children, Vermont courts are restrained from making value judgments in custody decisions and are forced to base decisions on the "best interests of the child."[111]

3. Restrictions on Evidence

Like the mandatory criteria contained in section 665(b), the evidentiary requirements contained in sections 665(c), 667, and 594 restrain judicial decision-making while further defining the best interests standard.[112] Prior to 1986, courts were not

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108. *Id.* at 418, 546 A.2d at 214. The defendant also had presented evidence that her husband's extramarital affair was the cause of their divorce. *Id.* at 411-12, 546 A.2d at 210. The court's admonishment that parents who present evidence about spousal misconduct are missing the mark in custody cases was directed in part to this aspect of the defendant's evidence. *See id.*

109. *Poulin*, 149 Vt. at 27, 538 A.2d at 183.

110. *See supra* notes 101-09 and accompanying text.

111. *See supra* notes 61-100 and accompanying text.

112. Section 665(c) provides: "The court shall not apply a preference for one parent over the other because of the sex of the child, the sex of a parent or the financial resources of a parent." VT. STAT. ANN. tit. 15, § 665(c) (1989). Section 667 provides: "Evidence of conduct of a parent not related to the factors in section 665 of this title shall only be admissible for the purposes of determining parental rights and responsibilities if it is shown that the conduct affects the parent's relationship with the child." *Id.* § 667(a). Section 594 provides in pertinent part:

> The child may only be called as a witness if the court finds after hearing that:
>
> (1) the child's testimony is necessary to assist the court in determining the issue before it;

expressly forbidden from considering the sex of the parent or the child in determining custody,[113] nor were the courts prohibited from basing their custody decisions on the financial resources of a parent.[114] Section 665(c) expressly proscribes consideration of these factors because they are not related to a child's best interests.[115] Similarly, parental conduct that does not affect that parent's relationship with the child is inadmissible in custody disputes.[116] This evidentiary limitation seeks to prevent parents from using the courtroom as a forum for interparental "character assassination[s]."[117] It further serves to focus the dispute on what is best for the child in the future as opposed to what responsibility the parties shared for the breakup of their marriage.[118]

Finally, section 594 makes it difficult for parents to bring their children's preferences into the decision-making process by requiring the court to make specific findings on the necessity of such testimony.[119] This section expresses the policies that children are best cared for when their parents make "judgments

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(2) the probative value of the child's testimony outweighs the potential detriment to the child; and

(3) the evidence sought is not reasonably available by any other means.

Id. § 594(b)(1)-(3). This provision also requires that if the court allows a child to be called as a witness, the court must appoint the child an attorney. *Id.* § 594(b).

113. *See* VT. STAT. ANN. tit. 15, § 652 (repealed 1985).

114. *See id.* Women suffer economically after divorce due to their role as children's primary caretakers, and the weight given to financial resources by some courts severely disadvantages women in custody decisions throughout the United States. Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235 *passim* (1982). This disadvantage is often manifested in divorce negotiations where husbands use custody as a bargaining chip to gain a better financial and property settlement. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 310-12 (1985); HEATHER R. WISHIK, THE ECONOMICS OF DIVORCE IN VERMONT 35 (1984); ATKINSON, *supra* note 88, § 1.05; GREIF, *supra* note 25, at 35.

115. *See supra* note 112 (providing text of § 665(c)). Although one might argue that a parent must have sufficient financial resources to maintain a healthy environment for a child, the theory behind the custody provisions is to allocate parental rights and responsibilities to the parent who can best raise the child to be a healthy autonomous adult. Cheney & Beck, 1986 Divorce Act, *supra* note 46, at 5. Any financial deficiency can be made up in child support payments. ATKINSON, *supra* note 88, § 4.20.

116. VT. STAT. ANN. tit. 15, § 667(a) (1989).

117. Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 6.

118. *Id.* This was the Court's concern in *Harris*. *See supra* notes 101-09 and accompanying text.

119. VT. STAT. ANN. tit. 15, § 594(b) (1989).

on their behalf,"[120] and children suffer when they are forced into the middle of a parental dispute.[121] As two of this section's authors noted:

> Children whose parents are in the process of separation and divorce are subjected to enormous stresses which influence their decision making capacities and make their testimony less reliable. . . . The most obvious conflicting emotions involve a fear of losing the love of one parent, the fear of making a parent lonely, the guilt evoked by expressing a preference, and the reaction to promises made to the child by parents. . . . As a consequence, a child who testifies to a preference may experience severe emotional stress in rejecting one parent, or be fearful of the power he or she apparently has over adult lives.[122]

Thus, the restrictions placed on the type of evidence the parties may submit, and that the court may consider, further the state's interest in providing for the best interests of children upon divorce.

The changes made to Vermont's custody laws in 1986 do not suffer the same vagueness apparent in the prior provisions. The best interests standard is reasonably clear. Children fare better after divorce if their parents are able to agree on the parenting plan that best suits the needs of their children as well as themselves.[123] The best parents, and the ones who meet the best interests standard, are those who have shown their ability and disposition to assist their children in becoming physically and emotionally healthy, autonomous adults.[124] Furthermore, it is not in the best interests of children to be placed with a parent solely on the basis of the parent's sex or the sex of the child, nor solely on the basis of a parent's financial resources.[125] Finally, children should not have to choose between parents or be caught

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120. Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 22.

121. *Id.* at 21-22; Cheney & Bech, *supra* note 42, at 5.

122. Cheney & Bech, 1986 Divorce Act, *supra* note 46, at 21-22.

123. *See supra* notes 64-71 and accompanying text.

124. *See supra* notes 72-83 and accompanying text.

125. *See supra* notes 112-15 and accompanying text.

in the middle of a parental fight because these situations do not further a child's best interests.[126]

II. 1992 SUMMER STUDY ON PARENTAL RIGHTS AND RESPONSIBILITIES

In its 1988 report, the Task Force recommended that a "study of post-1986 contested custody cases should be conducted to determine the frequency and circumstances of the award of sole parental rights and responsibilities to fathers."[127] The study's purpose was to determine whether judges base these awards on the sex of the parent.[128] The Task Force subcommittee responsible for implementing this recommendation "concluded that the first step in the process was to look at the frequency of contested custody decisions and the allocation of custody in a sample of divorce cases which had reached final hearing since the establishment of Family Court in October 1990."[129] The subcommittee conducted this preliminary study during the summer of 1992.[130] This section outlines the methodology of this study and provides some of the study's findings with respect to the award of parental rights and responsibilities.

A. *Methodology*[131]

The subcommittee examined divorce cases in three Vermont counties similar in population and median household income.[132]

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126. *See supra* notes 119-22 and accompanying text.

127. VERMONT TASK FORCE, *supra* note 1, at 111.

128. *Id.*

129. Davenport, *supra* note 10, at 1.

130. *Id.*

131. The methodology of the study was developed by Judge Amy M. Davenport, Chair of the Subcommittee charged with implementing the custody study and Dr. Robert Racusin, Associate Professor of Clinical Psychiatry at the Dartmouth Hitchcock Medical Center. Davenport, *supra* note 10, at 1-2. The findings that appear in this note are derived from the 1992 Custody Study of Washington, Windsor, and Rutland Counties. Custody Study, 1992 (unpublished database, on file with Judge Amy M. Davenport) [hereinafter 1992 Custody Study].

132. Davenport, *supra* note 10, at 2. The three counties studied were Rutland, Washington, and Windsor. According to the 1990 Census, the population and median household income for the three counties studied were: Rutland, total population 62,142, median income $28,229; Washington, total population 54,928, median income $29,623; Windsor, total population 54,055, median income $29,258. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERIS-

Data were extracted from the dockets of every other divorce case involving minor children in which a final divorce decree was issued between October 1990 and May 1992.[133] The total number of cases studied was 211.[134]

The range of data collected was quite comprehensive. Data were collected on issues such as legal representation, the residence of the children at the time of filing, the age and income of the parties, the length of the marriage, and child support awards (the amounts and at what point during the pendency of the case they were made). In addition, data were also collected on which issues were contested and which were decided by agreement of the parties (e.g., property, spousal support, child support, parental rights and responsibilities), the age and sex of the children, whether there was a history of physical abuse in the family, and the parent-child contact schedule.[135] This note presents only findings on the filing patterns, residence of the children at the time of filing, legal representation, involvement of a guardian ad litem, attorney for the children, or family evaluator, and the award of parental rights and responsibilities in the final order.

B. Findings

1. Filing Patterns and Legal Representation

In the 211 cases, the mother was the plaintiff in 153 cases (72.5%) and the father in fifty-eight cases (27.5%).[136] Plaintiffs were represented by counsel at filing in 72.5% of the cases and 27.5% filed pro se.[137] Defendants had legal representation at filing in 36% of the cases, filed a pro se answer 62.2% of the time, and did not respond to the complaint in three cases (1.4%).[138] In the 197 cases that had a temporary hearing on parental rights and responsibilities, the plaintiffs and defendants were represent-

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TICS, VERMONT 1 (1992) (population statistics); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING SURVEY: SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS, VERMONT 43 (1992) (income statistics).

133. Davenport, *supra* note 10, at 2; interview with Judge Amy M. Davenport, Vermont Superior Court Judge, in White River Junction, Vt. (June 10, 1992).

134. *Id.*

135. 1992 Custody Study, *supra* note 131.

136. *Id.*

137. *Id.*

138. *Id.*

ed by an attorney in 149 (76%) and seventy-five (38%) cases respectively.[139] By the final order, the percentage of cases in which plaintiffs and defendants had the benefit of legal representation was 73% and 40%.[140]

2. Residence of Children at Filing

Children resided with their mothers at the time of filing in 124 cases (72.1%).[141] In fourteen cases (8.1%), the children were living with their father when the complaint was filed.[142] In twenty-four cases (14.0%), the children resided with both parents; in five cases (2.9%), the children were split between parents; and in five cases (2.9%), the children resided with neither parent.[143] Thirty-nine cases (18%) had no information on the residence of the children at filing.[144]

3. Guardian Ad Litem, Attorney for Children, Family Evaluation

In very few cases did the court order a guardian ad litem, an attorney for the child, or a family evaluation.[145] Guardians ad litem were ordered to represent the best interests of the child in thirteen cases (6%).[146] An attorney for the children was appointed in just three cases (1.4%).[147] The court ordered a family evaluation in only one out of the 211 cases in this study.[148]

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139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* Family evaluators generally make their custodial recommendation to the court after interviews with the child and the parents; observing the child in his or her home environment; reviewing the child's medical, dental, educational, agency, and criminal (if any) records; and talking to people familiar with the family's situation or who have had significant contact with the child (relatives, paramours, teachers, etc.). *Hearings Before the Parental Rights and Responsibilities Committee*, 61st Leg. Biennial, 2d Sess. 49-50 (Nov. 19, 1992) [hereinafter *Hearings II*] (testimony of Mary Jane Edgerton, Clinical Social Worker). Although only one family evaluation was ordered by the court, other parties may have agreed to have a family evaluation done. The docket only includes court ordered evaluations. 1992 Custody Study, *supra* note 131.

4. Parental Rights and Responsibilities

Table A shows the outcome of parental rights and responsibilities awards in the final order. Legal rights and responsibilities were awarded jointly in ninety-three cases (44.1%).[149] Fathers and mothers received sole legal responsibility in seven cases (3.3%) and 101 cases (47.9%) respectively.[150] The court awarded four cases (1.9%) to "other" and six cases (2.8%) split legal responsibility.[151] Final joint physical rights and responsibilities made up twenty-seven cases (12.8%).[152] The father was awarded sole physical rights and responsibilities in sixteen cases (7.6%) and the mother 153 cases (72.5%).[153] Physical rights and responsibilities were split in eleven cases (5.2%) and awarded to "other" in four cases (1.9%).[154]

The final order on parental rights and responsibilities was based on the agreement of the parties in 190 of the 211 cases (90%).[155] Only three cases were decided after a full contested hearing (1.4%).[156] In eighteen cases the final order was based on default (8.5%).[157]

TABLE A

FINAL LEGAL RIGHTS AND RESPONSIBILITIES

Basis of Order	Joint	Father	Mother	Other	Split	Total
Stipulation	92	7	83	4	4	190 (90%)
Contested Hearing	0	0	3	0	0	3 (1.4%)
Default	1	0	15	0	2	18 (8.5%)
Total	93	7	101	4	6	211
Percentage	44.1%	3.3%	47.9%	1.9%	2.8%	100%

149. 1992 Custody Study, *supra* note 131.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*

FINAL PHYSICAL RIGHTS AND RESPONSIBILITIES

Basis of Order	Joint	Father	Mother	Other	Split	Total
Stipulation	27	16	134	4	9	190 (90%)
Contested Hearing	0	0	3	0	0	3 (1.4%)
Default	0	0	16	0	2	18 (8.5%)
Total	27	16	153	4	11	211
Percentage	12.8%	7.6%	72.5%	1.9%	5.2%	100%

C. Summary

The results of the custody study of Rutland, Washington, and Windsor counties demonstrate that very few divorcing parents contest the issue of parental rights and responsibilities;[158] further, at the time of separation, children generally remain in the care of their mothers.[159] After divorce, mothers assume primary physical responsibility for their children in nearly three-quarters of the cases.[160] Interestingly, parents agree to share physical responsibility of their children more often than they agree to have the father become the primary custodial parent (12.8% and 7.6% respectively).[161]

The post-divorce parenting arrangements evidenced by this data are significant because the high number of custody awards for mothers is the basis for the claim that fathers are unfairly disadvantaged in custody cases due to gender bias.[162] One Vermont legislator has compared the number of maternal custody awards to racial discrimination in civil rights actions, arguing that the disparate figures between mothers and fathers indicate discrimination against men.[163] As noted in the introduction of

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158. *Id.*

159. *Id.*; *see supra* notes 141-44 and accompanying text.

160. 1992 Custody Study, *supra* note 131.

161. *Id.*

162. *See supra* notes 21-41 and accompanying text; Diane Derby, *Child Custody: Some Perceive Bias Against Men*, SUNDAY RUTLAND HERALD AND SUNDAY TIMES ARGUS, Nov. 15, 1992, at 1.

163. *Hearings I*, *supra* note 38, at 28-29 (comments of Sen. Richard McCormack); *see also* COMMITTEE ON PARENTAL RIGHTS AND RESPONSIBILITIES, 62D LEG. BIENNIAL, 1ST SESS., REPORT OF THE COMMITTEE ON PARENTAL RIGHTS AND RESPONSIBILITIES 10 (1993) (comments of Sen. Richard McCormack, dissenting in part). The analogy is curious. One must question how many minority applicants for a job, for example, agree with another job

this note, the Task Force offered two explanations for the perception of bias against fathers.[164] First, section 665's prohibition against court imposed shared parenting in the absence of a parental agreement, combined with the weight given the primary care provider criterion, may be a gender neutral reason for the higher number of maternal custody awards.[165] Second, attorneys may discourage fathers from seeking or contesting custody.[166] The next section analyzes these two explanations for the perception of bias against fathers.

III. OUTCOME VERSUS PROCESS

A. *Bias Explained as the Gender Neutral Operation of Section 665*

Although parental agreements allocating post-divorce child care responsibilities are in the best interests of children,[167] the court must order parental rights and responsibilities solely or primarily to one parent in the absence of such agreements.[168] The court must evaluate each party's custody claim according to the eight criteria provided in section 665(b).[169] As the *Harris* case established, criterion (b)(6), the primary care provider's claim must be afforded "great weight" in the court's evaluation if the court finds that that parent is "fit."[170] A mother or a father can be the primary care provider. It is not a term defined by sex.

Traditionally, however, women have been the primary care providers of children in this country.[171] Although this trend may be changing, women still perform more domestic labor, including child care, than do men: "The average father living with his child spends less than ten minutes a day caring for his child,

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applicant who is white that the white applicant should get the job.

164. *See supra* notes 14-15 and accompanying text.

165. *See supra* note 14 and accompanying text.

166. *See supra* note 15 and accompanying text.

167. VT. STAT. ANN. tit. 15, § 666(a) (1989); *see supra* notes 64-71 and accompanying text.

168. VT. STAT. ANN. tit. 15, § 665(a) (1989); *see supra* notes 72-74 and accompanying text.

169. VT. STAT. ANN. tit. 15, § 665(b) (1989).

170. Harris v. Harris, 149 Vt. 410, 418, 546 A.2d 208, 214 (1988).

171. *See supra* note 25 (discussing the care providing role of "mothers").

while the average mother spends several hours."[172] This disparity of hours between fathers and mothers is not statistically significant where both parents are employed outside the home.[173] In a 1981 study, one researcher found that employed wives/mothers spent twice as much time as their employed husbands/fathers doing family-work (child care and housework).[174] In another study, done in 1985, mothers working full-time were found to spend twenty-four hours a week on child care while fathers spent only fifteen hours per week.[175] Rather than the more time consuming,[176] necessary,[177] or unanticipated tasks,[178] fathers generally do particular housework and child care tasks that are enjoyable[179] or can be scheduled in advance.[180] For example, fathers spend more time playing and interacting with their children than they do attending to their children's physical needs,[181] like changing diapers or nursing a child through an illness.[182] In addition, the responsibility to

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172. Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. Rev. 1415, 1435 (1991).

173. *Id.*

174. Pleck, *supra* note 25, at 256. Pleck's findings might be conservative. Over a one year period, Pleck had every couple in this study record the number of hours each partner spent on the defined family-work tasks for two specific week-days: Saturday and Sunday. *Id.* at 255. The study did not specify what days of the week each parent was employed. So, if the parents worked Monday through Friday, the data merely reflected the amount of family-work each parent performed on their "leisure" days. Furthermore, Pleck did not indicate which parent was pulled away from work during the week if a child was ill or needed a regular medical or dental check-up. *Id.* at 255-56.

175. Laura Pappano, *Division of Labor: Families Try New Ways to Get Things Done*, BOSTON GLOBE, Dec. 31, 1992, at 34. One economist has found that "married men's average time in household tasks had increased only 6% in 20 years, even as women have flooded the workplace." Nancy R. Gibbs, *Bringing Up Father*, TIME, June 28, 1993, at 53, 56.

176. Czapanskiy, *supra* note 172, at 1452; Drakich, *supra* note 25, at 84.

177. Drakich, *supra* note 25, at 84; Czapanskiy, *supra* note 172, at 1452.

178. Deborah L. Rhode, *The "No Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1772 (1991).

179. *Id.*

180. *Id.* Choosing a day care and finding babysitters are other responsibilities most often assumed by mothers. Nathan Cobb, *In Finding Sitters, Dad Sits One Out*, BOSTON GLOBE, May 13, 1993, at 1. A Massachusetts preschool director commented that she met only two of the 17 fathers of enrolled children prior to the first day of school in 1992-93. *Id.*

181. Czapanskiy, *supra* note 172, at 1452 & n.128.

182. Rhode, *supra* note 178, at 1772. Citing a 1989 study, Rhode pointed out that many men "deny or rationalize their lighter burden." *Id.* One way men rationalize their lighter share of child care and domestic labor is

remember, plan, and schedule child care tasks most often falls on mothers' shoulders, not fathers'.[183]

This does not necessarily mean, however, that fathers do not want to be involved parents or that no fathers share child care responsibilities on an equal basis with their children's mothers.[184] Rather, the different earning potentials of men and women may force parents to divide their child care responsibilities unequally.[185] For example, mothers in the 1992 Custody Study earned an average of 55.5% less annually than fathers.[186] Although women have moved into male dominated professions, their representation in higher status or higher paying positions still remains significantly lower than men.[187] Moreover, women with comparable work credentials generally earn less than their male counterparts in the same job categories.[188] A woman's ability to increase her salary is further frustrated by there being fewer opportunities for her to advance in the work place than for men despite her "comparable investments in time, training, and experience."[189] Therefore, it may be economically necessary for couples to assign the primary care providing role to the mother because the family relies on the greater earning capacity of the husband to meet the family's financial needs.[190] Private

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> to revise reality in such a way that women's extra tasks appear matters of personal choice, not joint responsibility. Rather than accept an equal division of cleaning, cooking, or childcare obligations, some men redefine their share as unnecessary; they don't mind unmade beds or frozen pizza, and their infants will do just fine with extra time among their "friends" at daycare. The result for many women is that "I do my half, I do half of [my husband's] half, and the rest doesn't get done."

Id. (citation omitted).

183. Gibbs, *supra* note 175, at 56.

184. A 1990 *Los Angeles Times* poll found that 39% of the fathers surveyed said they would quit their jobs to spend more time with their children, and another 74% said they would prefer a "daddy-track" position rather than a "fast-track" job. *Id.*

185. Women working full time still earn an average of 71 cents for every dollar a working man earns. *Hearings II*, *supra* note 148, at 99 (testimony of Susan Allen, Vermont Governor's Commission on Women).

186. 1992 Custody Study, *supra* note 131. Fathers' average annual income was $19,872 and mothers' $11,044. *Id.*

187. Rhode, *supra* note 178, at 1764.

188. *Id.*

189. *Id.* at 1758.

190. The husband's earning capacity is often a couple's most significant marital asset. Schafran, *supra* note 2, at 29; WISHIK, *supra* note 114, at 33.

employers are still slow to adopt adequate flextime,[191] day care,[192] or paternity leave policies that would offer most parents the option of sharing child care responsibilities on a more equal basis, or enable them to assign the primary care provider role to the father.[193] A paltry 1% of medium and large private employers surveyed in 1989, for example, provided paid paternity leave and only 18% allowed their male employees to take an unpaid leave.[194] Even where employers do have a family leave policy, women overwhelmingly take advantage of the policy while men do not. At the Eastman Kodak Corporation, for example, 93% of women compared to merely 7% of men have taken advantage of the company's family leave benefit that has been in place for the last six years.[195] Whatever the motivations, parents divide child care between themselves such that more often than not, mothers are primarily responsible for their children's day-to-day needs both before and after divorce.

To benefit from the weight given the primary care provider by section 665(b), a parent must have performed that function while the marriage was intact.[196] Because mothers tend to assume the primary care providing role, they generally benefit from the

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191. Kim Triedman, *A Mother's Dilemma*, MS., July/Aug. 1989, at 59; Rhode, *supra* note 178, at 1782. "Flextime" refers to flexible work schedules that permit employees to meet their family and workplace obligations. *See* Linda Hassberg, Comment, *Toward Gender Equality: Testing the Applicability of a Broader Discrimination Standard in the Workplace*, 40 BUFF. L. REV. 217, 245 (1992).

> In one model, there is a core block of time, for example between 10:30 a.m. & 2:30 p.m., when all employees must be at work, but the remaining hours may be scheduled by the individual as desired. In another model, employees may stretch out a forty-hour work week over six days or they may compress it into four.

Id.

192. Triedman, *supra* note 191, at 63; Rhode, *supra* note 178, at 1782.

193. Rhode, *supra* note 178, at 1782; Gibbs, *supra* note 175, at 55; *see generally* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 822-36 (1989) (criticizing the structure of wage labor in which the ideal worker is one who does not have child care responsibilities and arguing that the ideal worker paradigm is necessarily gendered); Nathalie Martin, Note, *Fathers and Families: Expanding the Familial Rights of Men*, 36 SYRACUSE L. REV. 1265 *passim* (1986) (arguing that fathers are prevented from assuming a greater role in child care due to employers' expectations that men do not have same obligations as women to care for children and suggesting that family leave, flextime, and adequate day care facilities can help alleviate this dilemma).

194. Gibbs, *supra* note 175, at 55.

195. *Id.*

196. *See supra* notes 93-94 and accompanying text (discussing the requirement that the court consider all relevant periods in a child's life in custody determinations).

weight given to criterion (b)(6). Where a court is faced with a contested custody case and is prohibited from imposing a shared parenting arrangement, the added weight afforded to the primary care provider by the *Harris* decision can explain the disproportionate physical rights and responsibilities awards to Vermont's divorcing mothers.[197] In addition, as the custody data demonstrate, very few cases actually proceed to a full contested hearing.[198] Most parents arrange their post-divorce allocation of parental rights and responsibilities by agreement.[199] These agreements may reflect the allocation of child care responsibility the parties shared while they were living in the same household; it may also reflect the father's desire not to take on primary custodial responsibility. A 1986 study comparing maternal and joint custody agreements in Kentucky indicated that these two factors are important to many divorcing couples.[200] The researcher identified three criteria on which maternal and joint custody couples relied in making their custodial arrangements upon divorce: 1) "a set of conditions prior to the divorce that reflect the father's definition of his role as father during the marriage"; 2) the couple's beliefs about parenting; and 3) motivational factors at the time of divorce.[201] The couples that agreed to maternal custody were less likely to view the father as an involved parent during marriage (criterion 1), placed a higher priority on the caretaking role of the mother (criterion 2), and the maternal custody fathers were not interested in having custody

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197. A hypothetical might serve to illustrate this point even further. Assume same sex marriages were recognized in Vermont and a couple adopted a child. They decide that one spouse will take primary responsibility for their child while the other provides for the family financially. Under *Harris*, it would hardly seem odd that the parent who had assumed the child care responsibilities would be in a better position for sole physical rights and responsibilities if the parties could not reach an agreement. The focus would be on the bond between child and the parent responsible for caring for the child rather than on the sex of the parent. In other words, looking merely at the outcome in this case tells one nothing about how custody was awarded. The process, or the application of the legal rules to the parties' allocation of child care during marriage is, however, revealing. The problem lies in confusing a woman's gender with the tasks she performs.

198. 1992 Custody Study, *supra* note 131; *see supra* notes 155-57 and accompanying text.

199. 1992 Custody Study, *supra* note 131; Carol R. Lowery, *Maternal and Joint Custody: Differences in the Decision Process*, 10 LAW & HUM. BEHAV. 303, 304 (1986).

200. *See generally* Lowery, *supra* note 199, at 312 (discussing the criteria used by parents to determine custody arrangements).

201. *Id.* at 313.

(criterion 3).[202] Custody outcome under Vermont's scheme overwhelmingly favors mothers, not because of their gender, but because of the parental role they assume during marriage. The outcome of custody disputes alone, therefore, cannot support a claim of gender bias against fathers. Such a claim masks the process by which custody decisions are actually made.

B. The Role of Attorneys

The Task Force suggested that attorneys may discourage divorcing fathers from seeking custody.[203] The question is whether or not attorneys believe a father should not seek custody because his request for custody will not be fairly considered by the court due to the presiding judge's gender bias.[204] It is important to examine the role attorneys might have in perpetuating the perception of bias against fathers in custody cases for two reasons. As the 1992 custody data showed, very few custody decisions are made by Vermont's family court judges;[205] therefore, custody decisions are made privately either between the parties themselves or with the assistance of attorneys, or by default.[206] To explain custody awards as gender biased, it is essential to look at how custody decisions are made in both contested and uncontested cases. To look only at the few contested cases ignores the context in which the overwhelming majority of cases are decided. Additionally, attorneys help shape litigants' views and expecta-

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202. *Id.* Joint custody couples assessed these three criteria differently. These couples shared a perception of the father as an active and involved parent, placed a lower priority on the mother's caretaking and more emphasis on shared values and lifestyles, and the fathers expressed a desire to share custodial responsibility. Lowery, *supra* note 199, at 312; *see also* WEITZMAN, *supra* note 114, at 244 ("[T]he major reason for the low rate of father custody awards lies in the preferences of divorcing men and women: most divorcing fathers are not seriously interested in having custody while most divorcing mothers are.").

203. VERMONT TASK FORCE, *supra* note 1, at 105.

204. The Task Force reported that more than half of the attorneys that responded to its survey said that they would never or rarely discourage fathers from seeking custody because the judge would "not give the request fair consideration." *Id.* Male attorneys were more likely than female attorneys to discourage fathers for this reason. *Id.* Male attorneys discourage fathers for this reason "often" 14.1%, "sometimes" 24.5%, and "rarely" 24.1%. *Id.* Of female attorneys, 4.8% do so "often," 22.6% "sometimes," and 23.8% "rarely." *Id.* at 105-06.

205. *See supra* notes 155-57 and accompanying text.

206. *See supra* notes 155-57 and accompanying text. Seventy-three percent of plaintiffs and 40% of defendants had legal representation by the time of the final hearing. 1992 Custody Study, *supra* note 131; *see supra* note 140 and accompanying text.

tions of the legal system.[207] In addition to assisting clients to file the necessary documents to obtain a divorce, attorneys are an important source of information regarding the legal rules and processes that govern divorce and custody.[208] Attorneys advise clients on what effect the legal rules will have on their problems.[209] If attorneys view the legal system as biased against fathers in custody, it would not be surprising that fathers would share that view even if they did not have direct experience with biased decision-making.[210] Thus, how attorneys counsel their divorcing clients about custody is an important part of the gender bias puzzle. Rather than looking to the outcome of custody cases to determine the existence and extent of gender bias against men, the role attorneys may have in forming a perception of gender bias involves an exploration of process.

This subsection offers some preliminary explanations of the attorney's role in determining the outcome of custody cases in Vermont. This part of the note addresses the extent perceived gender bias against fathers determines the legal advice attorneys give their clients, and whether such advice motivates parties to settle the issue of custody. To analyze the problem of gender bias against fathers, four attorneys practicing family law in Vermont shared their views during in-depth interviews.[211] Although four attorneys do not represent the entire Vermont family law bar, this

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207. Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office*, 20 LAW & SOC'Y REV. 93, 93 (1986); Leonore J. Weitzman & Ruth B. Dixon, *Child Custody Awards: Legal Standards and Empirical Patterns for Child Custody, Support and Visitation After Divorce*, 12 U.C. DAVIS L. REV. 473, 505 (1979).

208. Sarat & Felstiner, *supra* note 207, at 93; KENNETH KRESSEL, THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS 6 (1985).

209. KRESSEL, *supra* note 208, at 6; Sarat & Felstiner, *supra* note 207, at 93.

210. *See* Austin Sarat & William L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L.J. 1663 (1989) (discussing how lawyer-client interaction affects lay-people's image of the legal system).

211. Four attorneys were chosen from the three Vermont counties from which the data for the 1992 Custody Study were extracted. This was done for the sake of consistency. Two male and two female attorneys were interviewed during December 1992 and January 1993. Due to the sensitive nature of talking about gender bias, the small size of the Vermont bar relative to more populous states, and the importance of forthright responses in examining the perception of gender bias, the identities of the attorneys interviewed will not be revealed. Instead they will be referred to as Attorney *A*, Attorney *B*, Attorney *C*, and Attorney *D*. Each had over ten years experience practicing family law, one attorney reported over twenty years experience. The percentage of their practice devoted to family law ranged from approximately 35-90%. Their representation of women and men was roughly fifty-fifty although one attorney reported representing women slightly more often than men. Transcripts of the interviews are on file with the author.

note includes their insights to demonstrate the importance of process in identifying the extent of gender bias against divorcing fathers in Vermont custody cases.

This note discusses the attorneys' comments regarding three areas: (1) the attorneys' general observations about the perception of bias in Vermont judicial decision-making and the criteria of section 665; (2) how attorneys determine the legal advice they give their clients; and (3) the primary reasons divorcing parents decide to settle. The overall conclusion of this subsection is that although three of the interviewed attorneys believe particular judges are biased in favor of mothers based on gender, that belief is not the primary reason attorneys encourage their clients to negotiate a custody settlement, nor is it the primary reason that parties finally decide to forego a full contested trial on the issue of custody. This conclusion indicates the importance of examining the process of custody decision-making if the perception of bias against fathers in Vermont is to be appropriately addressed.

1. Observations About the Perception of Bias Against Fathers and Judicial Decision Making

When asked to comment generally on the perception of bias against fathers in custody, three attorneys focused on the gender neutral wording of section 665,[212] and three indicated that mothers are in a more favorable position than fathers to retain custody in contested cases because mothers are usually the primary care providing parent.[213] One attorney believed more emphasis should be placed on the primary care provider criterion (criterion (b)(6)) because this attorney viewed it as more objective and quantifiable in comparison with section 665's other enumerated criteria.[214] Two attorneys spoke specifically about unequal parenting roles and how section 665 generally favors the parent who has provided the child with day-to-day care; that parent is the mother in nearly every case.[215] One attorney's comments

212. Interviews with Attorneys *A*, *B*, and *D*. Attorney *C*'s comments did not address the neutrality of the statute.

213. Interviews with Attorneys *A*, *B*, and *C*.

214. Interview with Attorney *C*. ("It is . . . objective, you can measure it. Who changed more diapers than the other is a number that you can measure. . . . It has some meaning, you can measure it, there's a way to decide how it fits in.").

215. Interviews with Attorneys *A* and *B*.

distinguished the mother's role from her gender noting that the allocation of child care between parents, and not the primary care provider's gender, strongly influences custody outcome:

> You know I think that it may well be that a lot of primary care givers tend to be the women in the relationship and that may reflect something bias[ed] in their relationships . . . and so the court accepts the case with that historical bias[.] . . . I think that it is important for the court to look at the primary care relationship with the kids[;] . . . if it was the fact you want to think twice about disturbing it. So the court, I think, inherits a system that may have a bias in it, or inherits fact patterns that may have some bias in them. But I don't think the court per se is adding a different bias really.[216]

Another attorney used these words to describe the same phenomenon:

> [B]ecause of the traditional set ups in our society . . . about how children are cared for, . . . women, mothers, tend to be the primary care givers . . . . [I]n nearly every case when you start to ask the basic questions it turns out that the mother has more responsibility for the child than did the father, especially at a young age[;] the younger the child the more likely it is that the mother was the primary care giver. . . . [It's] as if you can't even talk about bias because you're stuck with that fundamental underlying fact. And I think that does color how custody is awarded for children in this state. But I don't see it necessarily as a bias. I just think it's a fact.[217]

These comments parallel the Task Force's suggestion, discussed in part III.A, that the gender neutral operation of section 665 will favor mothers because they usually benefit from the weight afforded to them under criterion (b)(6) due to their role as the primary care provider.[218] Further, as one attorney

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216. Interview with Attorney *B*.

217. Interview with Attorney *A*.

218. *See supra* notes 167-202 and accompanying text.

pointed out, "whoever is the primary caretaker is the primary caretaker because the parties have agreed to that prior to their separation"[219] and not because the statute favors mothers over fathers due to gender. If the parent with whom the children reside at the time the divorce petition is filed is indicative of the parent responsible for the primary care of those children, then the 1992 Custody Data would support the proposition that most of the couples in that study assigned that primary role to the mother.[220] This hypothesis would not be unreasonable. As part III.A indicates, the work place is not parent-friendly in terms of flextime, family leave, and day care options;[221] therefore, it might be difficult for the secondary parent to change his work schedule to accommodate the needs of his children when he may not have needed to do so prior to the separation. Conversely, the primary parent may have foregone employment opportunities outside the home and have achieved a substantial psychological bond with her children; therefore, she may have difficulty relinquishing her role as primary care giver. One attorney had an interesting explanation for the reason fathers who have not had the primary caretaking role believe the legal system to be biased in favor of mothers:

> [T]his may account for the perception of bias. . . . [O]nce the lines are drawn and the parties know they are going to be divorced, a lot of these fathers, and I can generalize about this because I can say I've seen this consistently, who have . . . had limited involvement with their children, suddenly they are candidates for father of the year, and suddenly they have this refound interest in a relationship with their children. To a cynic or a skeptic you would say, oh, they're just doing that because they want to piss off their wife or they're mad at their mother, [or] they [don't] want to pay as much child support. . . . Another, and a less cynical reason is that when fathers realize it is not going to be the status quo anymore, they are forced to confront the value that they put on their

219. Interview with Attorney C; *see also supra* notes 171-95 and accompanying text.

220. Children resided with their mother at the time of filing in 72.1% of the cases (thirty-nine cases not included because no data was available in the file). 1992 Custody Study, *supra* note 131; *see supra* notes 141-44 and accompanying text.

221. *See supra* notes 191-95 and accompanying text.

> relationship with their child, and they're motivated to become more involved in their children's lives. . . . And so I think sometimes these fathers do get to court and they get whacked if they have their custody fight and they feel it's very unfair because they want to be able to demonstrate what good dads they are. But you know, they haven't done it because they've had, at least compared to the mother, they still had a much more traditional relationship with their children.[222]

As the previous section stressed, how parents divide child care during marriage has a significant impact on the outcome of a custody battle.[223] However, looking at the gender of the parent that actually gets custody explains little about why that parent was successful. The outcome therefore depends upon the process.

Despite these attorneys' feelings on the gender neutrality of section 665 and the allocation of child rearing responsibilities between parents, all but one attorney interviewed believed that some Vermont judges are biased against fathers in custody.[224] One attorney described a particularly egregious example:

> I'm thinking of one case where I was appointed to represent the children after the hearing. I wasn't at the hearing but I did see the order, which said that the judge didn't believe that mom in the photograph was snorting Midol as she said, that it probably was cocaine; made a finding that mom abused the child, but dad set[] a horrible example because he didn't have a job, and mom

222. Interview with Attorney *A*. Atkinson commented on this phenomenon: "In the heat of emotion that often accompanies the beginning of a divorce, a parent who has been relatively uninvolved with the child may suddenly decide that having custody is the most important thing in the world." ATKINSON, *supra* note 88, § 1.05.

223. *See supra* notes 167-202 and accompanying text.

224. Interviews with Attorney *A*, *C*, and *D*. Attorney *B* said that he had never had any direct experience with judges who made gender biased custody decisions; however, he did mention a series of cases he believed were overturned due to the trial court judge's bias. Interview with Attorney *B*. Interestingly, these cases did *not* involve gender bias against fathers, but rather bias against mothers. *See supra* notes 30-36 and accompanying text. It should also be noted here that the attorneys were not asked about bias against mothers and thus the absence of comments in this area does not indicate that the bias against mothers identified by the Task Force was unsubstantiated by these attorney interviews.

> gets custody. . . . [Mom] of course was receiving AFDC but that wasn't important.[225]

Note that the attorney described the process of the decision rather than its outcome to demonstrate the bias against the father. The standard the judge applied with respect to employment was different for the mother than the father; while the father was expected to work outside the home, the mother was not. The father apparently was penalized for his failure to adhere to this particular judge's notion about his appropriate gender role.[226]

Two primary complaints with respect to biased decision-making were voiced by the three attorneys who believe that gender bias exists in custody cases: (1) judges do not get enough information on which to base a reasoned decision about custody; and (2) some judges lack sufficient experience with, and knowledge about, divorce and its effects on children.[227] One reason that judges do not get adequate information on which to base reasoned decisions about custody in contested cases is the expense of having a thorough and objective family evaluation done by an expert in the field.[228] The 1992 Custody Study showed that a family evaluation was ordered by the court in only one case.[229] Attorney *D* commented on the usefulness of such evaluations and their prohibitive financial cost:

> The family court, like the whole judicial system, is underfinanced and I think it would be wonderful if there could be some resource available where meaningful custodial evaluations could be done in connection with custodial divorce cases. Good ones are expensive, they typically cost $2,500 to $3,000 to have the report done. . . . [T]hose who do them well do a terrific job and I think are very helpful in making a sensible resolution of the case. . . . And I think the courts for the most part, assuming they feel they have an objective one and not a

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225. Interview with Attorney *C*.

226. It is important to keep in mind that this anecdote also demonstrates the judge's bias about the appropriate role of the mother. Sadly, the real loser in this case was the child, not the father or the mother.

227. Interviews with Attorneys *A*, *C*, and *D*.

228. *Id.*

229. *See supra* note 148 and accompanying text.

> hired report solicited by one side or the other, are gratified that they have some good information to rely on.[230]

The time required to prepare for trial also contributes to the problem that judges do not have enough information to make appropriate custodial decisions.[231] Although the 1986 Divorce Act elucidated the kind of evidence judges must consider in contested cases, thus guiding attorneys preparing for trial,[232] not all attorneys dedicate the amount of time necessary for an adequate trial presentation.

> [T]here is . . . an ignorance on the part of the bar about how to try these cases, but maybe [it's] not even ignorance, because most lawyers, certainly the older lawyers, see the family law area as the bottom of the barrel. I mean they don't want to do it unless they have to, and they prepare their cases that way . . . . And it is not only that; attorneys, myself included, take on far too much work and cannot always adequately prepare for trial. It is just a fact of being too busy in order to make a living . . . . [I]t is not only sloth or ignorance, it is just overwork.[233]

Three attorneys expressed additional frustration regarding some Vermont judges' lack of experience with, knowledge about, and enthusiasm for, family law in particular.[234] Although two

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230. Interview with Attorney *D*. Judge Michael Kupersmith commented to the Legislative Parental Rights and Responsibilities Committee that he finds family evaluations or "home studies" helpful in contested cases. He said in the absence of such an evaluation what results is a "spitting contest" between the parties. *Hearings I*, *supra* note 38, at 167-68 (comments of Judge Michael Kupersmith, District Court Judge). At the same hearings Judge Davenport testified that so far in her experience she has not gone against the recommendation of a court appointed family evaluator, commenting that in those cases where the court appoints an expert, the other evidence generally supports the evaluation. *Id.* at 34 (comments of Judge Amy M. Davenport, Superior Court Judge).

231. Interview with Attorney *C*. At the Legislative Hearings on Parental Rights and Responsibilities, two other attorneys commented that the divorce docket is so overcrowded that the courts do not allow sufficient court time in which to present all the evidence necessary for a contested custody case. *Hearings I*, *supra* note 38, at 141-43, 150-51 (comments of Paul Jarvis, Esquire and John Durrance, Esquire).

232. *See supra* notes 61-126 and accompanying text.

233. Interview with Attorney *C*.

234. Interviews with Attorneys *A*, *C*, and *D*.

of these attorneys believed that gender bias could not be eradicated through extensive judicial training about the way divorce affects children,[235] one attorney believed that such an effort was essential to close the gap between judges deciding contested custody cases.

> I mean . . . there are the superior court judges who handled it for years and years and some of them were better than others. But, a lot of them, you know, when you get these district court judges who have been doing criminal cases, I'll tell you, you get some interesting results. They don't know what the law is. . . . I would give them a reading list, I would have them attend lectures on developmental psychology of children, the impact of divorce on children, dysfunctional family dynamics, . . . including marital abuse and alcoholism, although a lot of judges pick that up, but, yes, I think they could stand to be educated.[236]

One attorney believed better decisions would result if the judges sitting in the family court truly desired to be there.[237] This attorney believed that because family law takes a "certain kind of toll on a person"[238] it was important to have "someone not only . . . capable of doing the work intellectually, because probably virtually all [judges] are, but who wants to be there and who wants to be involved in the issues he or she is seeing every day."[239]

What is interesting about these comments is the contradiction between the overall conclusion that the primary care provider criterion may explain the overwhelming number of custody

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235. Interviews with Attorneys *C* and *D*.

236. Interview with Attorney *A*.

237. Interview with Attorney *D*.

238. *Id.*

239. *Id.* Lenore Weitzman reported similar complaints from attorneys practicing in California:

> It is openly acknowledged that many California judges are political appointees with primary experience in criminal courts: they have no interest or experience in family law; and they resent hearing divorce cases and being assigned to the domestic relations calendar. Such judges may "endure" the assignment but make no effort to keep up with recent case law developments or to master the body of knowledge necessary to make competent judgments.

WEITZMAN, *supra* note 114, at 397-98 (footnote omitted).

awards to mothers and the experiences described by three attorneys with judges whom they believe to be plainly biased against fathers. It is not clear from these particular comments to what extent the perception of biased decision-making influences the legal advice these attorneys give their clients. Neither is it clear to what extent this view is imparted to their clients, instilling in them a perception that their custody case will be determined not by the statutory criteria, or their relative suitability according to those criteria, but by the presiding judge's personal beliefs with respect to stereotypical gender roles. A partial answer to these questions is found in the discussions about how these attorneys give legal advice and why parties so often decline to contest custody.

2. Dispensing Legal Advice

Although three of the attorneys shared the view that particular judges do not fairly consider fathers' requests for custody, this view does not overwhelm the legal advice these attorneys give their clients. All of the attorneys reported taking a lengthy family history from their clients to determine how involved their clients were in caring for their children during marriage.[240] Since attorneys do base their legal advice on what they "reasonably expect to happen in court,"[241] these attorneys focused their inquiry on how their clients would be evaluated under the criteria set forth in section 665.[242] In fact, Attorney *A* reported: "I pull out the criteria and I say this is what the court is going to decide the case on and you have to be honest, how do you stand with respect to [these] criteria?"[243]

Why their clients were seeking custody was equally pertinent in determining the kind of advice three attorneys offer their clients.[244] This inquiry is important for attorneys because too often fighting parents cannot separate their own conflict from the

240. Interviews with Attorneys *A*, *B*, *C*, and *D*.

241. Interview with Attorney *D*.

242. Interviews with Attorneys *A*, *B*, *C*, and *D*.

243. Interview with Attorney *A*. Atkinson believes it is helpful to provide clients with a copy of the state custody statute "to demonstrate to the client that principles of law the client may not like are not in the judge's discretion or the attorney's imagination—but rather the statutes are rules set down by the legislature." ATKINSON, *supra* note 88, § 1.05 (Supp. 1991).

244. Interviews with Attorneys *B*, *C*, and *D*.

needs of their children.[245] In addition, some clients intermingle property issues with custody. All of the attorneys expressed a desire to instill in their clients reasonable expectations of the legal system, and to do that they need to ascertain exactly what their clients' long and short term goals are. Therefore, separating the custody issue from property or parental conflict was important when both parents want what is best for their children. Attorney *B* discussed the problem of separating custody from other client goals:

> [I]s [seeking custody] motivated by what they think is going to be best for their kids or is there some other agenda issue, [such as] they think they can avoid child support [or] they think they can get a better property settlement. . . . [I]f its one of those issues then we try to deal with that separate from the custody issue. Sometimes it is hard for them to break those apart. . . . [M]ost of [my clients] have been really honest about what they are really after, you know, why is custody so important. And you can tell sometimes by the reasons that they give back whether it really is important or whether they are talking about property, they are not talking about kids. Their responses sort of give it away and they might not even realize it.[246]

Jeff Atkinson, author of a child custody treatise, believes that testing the client's sincerity about custody is important to obtaining a positive resolution of that issue for both the parents and the children.[247] This is reasonable in light of an attorney's duty to assist his or her client in achieving the client's goals within the bounds of the law.[248] If the client insists on contesting custody despite the likelihood that the client may lose at trial, two of the attorneys would advocate the client's position nevertheless.[249] In the words of one attorney, clients "are entitled to

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245. Interview with Attorney *A*.

246. Interview with Attorney *B*.

247. ATKINSON, *supra* note 88, § 1.05.

248. *See* VERMONT CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1986 & Supp. 1993).

249. Interviews with Attorneys *A* and *D*. The interviews with Attorneys *B* and C never addressed that question directly, and therefore no conclusions can be drawn with regard to their position on this issue.

make the fight if they want to make the fight."[250] Two attorneys said they would proceed to a contested trial if their client's request for custody was within the bounds of reasonableness.[251] When asked what would be an unreasonable request, the answers varied. For example, Attorney *A* would not represent a client in a contested custody case if that client had previously been convicted of child abuse.[252] On the other hand, Attorney *C*'s response was:

> If a client, for example, wants to fight over custody, admitting their children aren't in danger with the other parent, and that they are quite frankly good where they are, but the client wants to fight for custody because [she doesn't] want to lose [her] kids . . . I won't do that.[253]

In this attorney's opinion, custody is rarely litigated when parents truly put their children's best interests ahead of their own:

> If you can have divorcing people focus on their kids rather than on their fight with each other, almost all cases can be settled. Because most people know what is good for their kids, and do not disagree with their divorcing spouse about that issue. It is all those other issues that they want to fight about. So, if they can focus on their kids and what their kids need, generally speaking the custody fights go away.[254]

The four attorneys interviewed base their legal advice concerning custody primarily on how the client stands with respect to the statutory criteria and what the client's post-divorce goals are. Rather than focus on the gender of the parent they represent, each of the attorneys looks at the conduct of the parties during their marriage. Furthermore, the judicial gender bias identified by the three attorneys does not influence substantially, if at all, the way these attorneys counsel their divorcing clients.

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250. Interview with Attorney *D*.

251. Interviews with Attorneys *A* and *C*.

252. Interview with Attorney *A*.

253. Interview with Attorney *C*.

254. *Id.* This attorney did say that in cases where there "is a real possibility of physical abuse" in the family, and the abuser seeks custody, she will fight it. *Id.*

3. Why Parties Do Not Contest Custody

The attorneys did not consider their perceived gender bias when encouraging fathers (and mothers) to reach agreement regarding custody. When asked what motivates their clients to agree on a post-divorce parenting arrangement, the attorneys responded that couples generally share a concern about how the divorce may affect their children,[255] and a desire to make the custodial decision rather than relinquishing that decision to the courts.[256] As one attorney put it:

> You know the whole process of divorce is taking power away from the parties and giving it to the courts over the most basic decisions of their lives. And the way to give people a good result and feel good about divorce, is to give that power back to them any way you can.[257]

Another attorney outlined some of the reasons his clients decide to reach custody agreements:

> [T]he best reasons to settle a custody case are a recognition that a harmonious relationship between the parents will promote the best interests of the children; will allow the children to feel that they still have two parents in their lives after the divorce; will allow the children to see their parents talk in some sort of cooperative, friendly manner and not fight, especially not fight in their presence. . . . Occasionally a parent will articulate that as the basis for his or her desire to settle the case. Sometimes, usually fathers but not always, predominantly fathers, will settle a custody case for financial reasons. And sometimes a mother will on the other side. You know you'll see a mother take the position that she will make financial concessions so that custody is not challenged.[258]

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255. Interviews with Attorneys *C* and *D*.

256. Interviews with Attorneys *A* and *C*.

257. Interview with Attorney *C*.

258. Interview with Attorney *D*. This pattern was also discussed by Weitzman. *See* WEITZMAN *supra* note 114.

Attorney *C* also listed the cost of litigation and the delay in the finality of the divorce as other reasons clients generally prefer to reach an agreement on custody instead of battling in court.[259] These attorneys did not cite judicial gender bias as important in discouraging fathers from seeking custody; nor was it a factor in the parties' desire not to proceed to a full contested custody trial.

As the interviews with the four attorneys reveal, there are many factors that drive parents to reach an agreement on custody. Although gender bias against fathers is admittedly a problem with particular Vermont judges, that bias appears to have minimal impact on the process that results in significant numbers of maternal custody awards. Therefore, relying on the outcome of custody to support a claim of gender bias is mistaken because it fails to consider the variety of explanations for the percentage of custody awards to mothers.

CONCLUSION

Because the opposing litigants in divorces are men and women, divorce law is particularly susceptible to gender biased decisions by judges predisposed to act on their biases. In the context of child custody in divorce actions, women have been negatively affected by gender biased judicial decision-making.[260] The negative effects of gender bias against women seeking custody is not grounded upon judges' decisions to award custody to fathers in certain cases, but the process by which judges reach those custodial decisions.[261] On the other hand, noncustodial fathers' claims of gender bias have pointed primarily to custody outcome.[262] An examination of the process of custody decision-making provides a more lucid understanding about the outcome of custody favoring women; that outcome, however, is not by itself evidence of gender biased decision-making. This note illustrates the critical distinction between process and outcome in analyzing the extent of gender bias in Vermont custody cases.

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259. Interview with Attorney *C*. These reasons were also suggested by one witness at the Legislative Hearings on Parental Rights and Responsibilities. *Hearings I*, *supra* note 38, at 144 (comments of John Durrance, Esquire).

260. *See supra* notes 30-36 and accompanying text.

261. *See supra* notes 30-41 and accompanying text.

262. *See supra* notes 30-41 and accompanying text.

The Vermont Task Force on Gender Bias in the Legal System analyzed this distinction by recommending that contested custody cases in Vermont be examined to determine to what extent fathers are disadvantaged in custody as a result of judicial gender bias.[263] The Task Force also underscored its commitment to eliminating gender bias in the process of custody decision-making by recommending judicial education concerning gender stereotypes and their effects on judicial decisions.[264] That recommendation was realized as recently as 1993 during the Vermont Judicial College.[265] Nevertheless, the perception of bias against fathers in Vermont still persists.[266] As this note demonstrates, the participation of fathers and mothers in caring for their children before divorce has a significant impact on the outcome of custody cases. Furthermore, the division of labor within a traditional nuclear family is affected by forces outside the family, specifically, continuing discrimination against women in employment and the lack of feasible child care options offered by employers for their workers. Parties' desires for custody, however, appear to be one of the primary factors in custody outcome. This was reflected in the 1992 Custody Study data, as well as in the comments of Vermont family law practitioners interviewed for this note. Most divorcing parents in this state, as elsewhere in this country, stipulate to the post-divorce custodial arrangement.

Custody outcome in divorce cases is merely a reflection of general societal gender bias. The pre-divorce roles parents assume will continue to be fairly accurate predictors of custody outcome. These roles are generally divided by gender: "Unless family law can modify the pre-divorce roles, then it is doubtful that it can have a much greater impact on the post-divorce division of parental responsibilities; most divorcing couples would still typically end up allocating primary child-rearing responsibility to mothers."[267] Nevertheless, the causes for the perpetuation of the perception of bias against fathers are worthy of further research. Such research must focus not on the number of

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263. VERMONT TASK FORCE, *supra* note 1, at 111.

264. *Id.*

265. GENDER IMPLEMENTATION TASK FORCE, GENDER AND JUSTICE: FIRST UPDATE OF THE REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL SYSTEM 4 (1993) (describing judicial education programs on gender bias from 1991-1993).

266. Derby, *supra* note 162, at 1.

267. ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 279 (1992).

paternal custody awards but rather on the impact the various custody participants have on custody outcome. By analyzing process, this note exposes that claims of bias against fathers resting solely on outcome are misleading. Any steps taken to further identify and eliminate gender bias against divorcing fathers in Vermont must not be prompted by a desire to balance the outcome without first knowing wherein the problem lies.

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