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IMPROVING CUSTODY LAW IN VIRGINIA WITHOUT CREATING A REBUTTABLE PRESUMPTION OF JOINT CUSTODY

I. INTRODUCTION

In its most basic form, child custody is the "care, control and maintenance of a child which may be awarded by a court to one of the parents as in a divorce or separation proceeding."¹ Fundamental changes since the 1970s in the structure of American society, law, and the family, however, have augmented and continue to challenge this basic definition.² Child custody arrangements may now range from the most common sole custody³ to joint legal custody⁴ to joint physical custody,⁵ include split custody⁶ or temporary custody;⁷ or be defined as shared custody,⁸ divided custody⁹ or non-parent custody.¹⁰

Presently, the custody of minor children in Virginia is determined by courts in accordance with the "best interests of the child" standard,¹¹ which is governed by nine statutory factors a court must consider in its decision.¹² The court may award joint custody or sole custody, where sole custody is defined as one person who "retains

1. BLACK'S LAW DICTIONARY 385 (6th ed. 1990).

2. See Josie Redwine, *In Re A.R.B.: Toward a Redefinition of the Best Interests Standard in Georgia Child Custody Cases*, 11 Ga. St. U. L. Rev. 711 (1995) (discussing the appearance in the 1970s of no-fault divorce laws, single-parent homes, blended families and stepparents).

3. See Jay Folberg, *Custody Overview*, in JOINT CUSTODY AND SHARED PARENTING 3, 6 (Jay Folberg ed., 1984) (defining sole custody).

4. See BLACK'S LAW DICTIONARY 385 (6th ed. 1990). See also VA. CODE ANN. § 20-124.1 (Michie 1950).

5. See BLACK'S LAW DICTIONARY 385 (6th ed. 1990). See also VA. CODE ANN. § 20-124.1 (Michie 1950).

6. See Folberg, *supra* note 3, at 6 (defining split custody). See also VA. CODE ANN. § 20-108.2 (Michie 1950) (defining split custody as each parent having physical custody of a child born to the parents).

7. See BLACK'S LAW DICTIONARY 385 (6th ed. 1990) (defining temporary custody as award of custody temporarily to parent awaiting outcome of separation or divorce proceeding).

8. See, e.g., VA. CODE ANN. § 20-108.2(G)(3)(c) (Michie 1950) (defining shared custody for purposes of calculating child support as each parent having physical custody of the child for more than 110 days each year).

9. See BLACK'S LAW DICTIONARY 385 (6th ed. 1990) (defining divided custody as, "where child lives with each parent part of the year . . . parent with whom child is living has complete control over child during that period").

10. See, e.g., VA. CODE ANN. § 20-124.1 (Michie 1950) (defining a "person with a legitimate interest" in custody to include, among others, grandparents and stepparents).

11. § 20-124.2.B. Current legislation proposes to substitute the phrase "needs of the child" to replace the "best interests of the child" standard. H.B. 1239, Reg. Sess. (Va. 1998).

12. See § 20-124.3. See also text accompanying *infra* note 60.

responsibility for the care and control of a child," with "primary authority to make decisions concerning the child."¹³ In determining custody arrangements, courts are instructed to "assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children."¹⁴ No presumption or inference of law is given in favor of either parent with regard to custody.¹⁵

In Virginia, child custody law may be facing significant changes in the near future. In the past legislative session a bill,¹⁶ introduced on January 22, 1996, to require judges to presume that joint legal and physical custody is in the best interests of the child in child custody cases, passed the Virginia Senate but was held over by the House of Delegates for further consideration.¹⁷ The original Senate Bill 496 ultimately failed when an amendment in the nature of a substitute was introduced by the House of Delegates on December 20, 1996, instructing courts to give "due consideration to the benefits to the child of joint legal and physical custody"¹⁸ In essence, this amendment would have formalized consideration of joint custody as one of the nine factors used to determine the custody arrangement in the best interests of the child. The alternative would not likely have affected custody law in Virginia as dramatically as a rebuttable presumption of joint custody, but sought to more clearly delineate the alternative of joint custody as a consideration in custody determinations. At the time of this writing, neither the original proposal for a rebuttable presumption of joint custody nor the House of Delegates' amendment merely requiring "due consideration" of joint custody has been written into law. An amendment to revise the definition of joint custody is, however, pending in the General Assembly.¹⁹

Virginia was not the only state to consider a presumption of joint custody in 1996. Presumptions for joint custody passed in the

13. § 20-124.1.

14. § 20-124.2.

15. *See id.*

16. S. 496, Reg. Sess. (Va. 1996). Senate Bill 496 was introduced by Senator Mark Earley to amend and reenact Virginia Code Section 20-124.2 ("court-ordered custody and visitation arrangements") by inserting the phrase "[t]here shall be a rebuttable presumption that joint legal and physical custody is in the best interests of the minor child or children." *Id.*

17. *See* S. 496, Reg. Sess. (Va. 1996), available in WESTLAW, Bill Tracking File (stating Senate Bill 496 passed the Virginia Senate 21-Y to 19-N on February 13, 1996).

18. S. 496, Reg. Sess. (Va. 1996) (amended by House of Delegates on Dec. 20, 1996).

19. *See* H.B. 1239, Reg. Sess. (Va. 1998).

Senates of Georgia and Michigan in February of 1996.²⁰ Nationwide, at least fourteen states and the District of Columbia²¹ have some form of presumption for joint custody.²²

This Note addresses the advisability of adopting a rebuttable presumption of joint custody in Virginia. Part Two provides an overview of child custody law and its historical basis. Part Three surveys the development of child custody laws through Virginia case law. Part Four discusses the advantages and disadvantages of joint custody. Part Five suggests an alternative solution for Virginia custody law in lieu of a presumption of joint legal and physical custody. The conclusion offered in Part Six includes a discussion of the consequences of a presumption of joint custody.

II. OVERVIEW OF CHILD CUSTODY LAW: HISTORICAL BASIS TO PRESENT

A. *The Meaning of Joint Custody*

Little consensus exists among states with regard to definitions and interpretations of custody terms.²³ A generally accepted definition of "joint custody," also referred to as "shared parenting," is "any form of custody or visitation arrangement which allows both parents to have lots of normal, day-by-day interaction with the offspring and provides that each adult participates in both the responsibilities and the rewards of child raising."²⁴ Jay Folberg has further elaborated on the concept of joint *legal* custody:

20. See *Presumption for Joint Custody Takes Effect in Washington, D.C.*, Speak Out For Children (Q. Newsl. of Children's Rights Council, Inc.), Spring, 1996, at 1, 5 [hereinafter *Presumption for Joint Custody*].

21. States with a presumption of joint custody as defined by "law, court ruling or frequency of availability" include: California, Florida, Idaho, Iowa, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, Oklahoma, and Texas. See Stephanie B. Goldberg, *Make Room for Daddy*, A.B.A. J., Feb. 1997, at 48, 50.

22. California was the first state to authorize the option of joint custody which occurred in 1979. See Elizabeth Simpson, *State Bill Presuming Joint Custody Stirs Parents Backers Say Bill Would Be Fairer to Fathers; Opponents Fear Children Would Be Treated as Pawns*, VA. PILOT & LEDGER-STAR, Nov. 25, 1996, at B1. The option of joint custody is now almost universally recognized in the United States, with South Carolina remaining the only state not permitting joint custody arrangements. See Goldberg, *supra* note 21, at 49.

23. See Marsha Kline et al., *Children's Adjustment in Joint and Sole Physical Custody Families*, 25 DEV. PSYCHOL. 430 (1989). See also Frederic W. Ifeld, Jr. et al., *Does Joint Custody Work? A First Look at Outcome Data of Relitigation*, 139 AM. J. PSYCHIATRY 62 (1982).

24. Ifeld et al., *supra* note 23, at 62 (citing P. WOOLLEY, THE CUSTODY HANDBOOK 13 (1979)).

The distinguishing feature of joint custody is that both parents retain legal responsibility and authority for the care and control of the child, much as in an intact family. Joint custody upon divorce is defined here as an arrangement in which both parents have equal rights and responsibilities regarding major decisions and neither parent's rights are superior. Joint custody basically means providing each parent with an equal voice in the children's education, upbringing, religious training, nonemergency medical care, and general welfare. The parent with whom the child is residing at the time must make immediate and day-to-day decisions regarding discipline, grooming, diet, activities, scheduling social contacts, and emergency care.²⁵

Joint *physical* custody, in contrast, "refers to the sharing of residential care of the child or, in other words, regularly switching with whom the child lives."²⁶ Hence, joint custody arrangements are often distinguished in statutes and research studies²⁷ as being of two types: "joint legal custody" and "joint physical custody." Virginia, for example, defines "joint legal custody" as an arrangement "where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child even though the child's primary residence may be with only one parent"²⁸ "Joint physical custody" exists "where both parents share physical and custodial care of the child"²⁹ When granting an order of joint custody, courts in Virginia are authorized to grant either form or any combination of the two deemed to be in the best interest of the child.³⁰

25. Folberg, *supra* note 3, at 7.

26. *Id.*

27. In general, researchers of joint custody define "joint custody" in their studies as "joint physical custody" where the child is "spending at least 30% of the time with one of the parents, and the remaining time with the other." Joan B. Kelly, *Longer-Term Adjustment in Children of Divorce: Converging Findings and Implications for Practice*, 2 J. FAM. PSYCHOL. 119, 130-31 (1988). See also Meyer Elkin, *Joint Custody: Affirming That Parents and Families are Forever*, SOC. WORK, Jan.-Feb. 1987, at 18, 20 (stating "[j]oint custody does not mean a rigid 50-50 division of residence").

28. VA. CODE ANN. § 20-124.1 (Michie 1950).

29. *Id.*

30. *See id.*

B. A Brief History of Child Custody Law

Historically, fathers held a property right in their children.³¹ Upon separation or divorce, the legal doctrine of *paternal familius* dictated that fathers receive custody of their children.³² In the nineteenth century, however, the "best interests of the child" standard emerged as a shift away from recognizing fathers' exclusive custody rights.³³ Pursuant to this new standard, children were deemed entitled to the best post-separation custody determination possible.³⁴ Custody rights came to be seen "not so much as individual property to be divided between parents, but as a form of social investment in which custody produced concomitant social duties on the part of each parent, the performance of which the state could supervise."³⁵ By 1925, the best interests standard had become a central part of most custody statutes.³⁶

With time, a doctrine known as "tender years" developed as courts continuously interpreted the best interests of the child standard in favor of mothers.³⁷ The "tender years" doctrine was essentially "a legal presumption that directed the placement of children younger than seven – children of tender years – with their mothers, unless their mothers were 'unfit' to provide care."³⁸ The Industrial Revolution coupled with increasing sexual division of labor resulted in Victorian women being viewed as the "idealized protectors of children, family life and familial values"³⁹ Other developments that encouraged the growth of a maternal preference in custody in the nineteenth century included the separation of home and workplace, which resulted from the move to a more urban

31. See Elkin, *supra* note 27, at 19 (noting that in Roman times a father's rights to control his child included the right to sell the child or condemn it to death). See generally, MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 1-47 (1994).

32. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 737 (1988). See also MASON, *supra* note 31, at 58.

33. See generally Redwine, *supra* note 2, at 714; Fineman, *supra* note 32, at 737.

34. See Fineman, *supra* note 32, at 737.

35. *Id.*

36. See Elkin, *supra* note 27, at 19.

37. Specifically, in 1839 the preference for fathers was modified by the English Parliament when it passed the Talfourd Act, which "gave mothers the right to custody of children under the age of seven." Thus, the Talfourd Act was the "beginning of the 'tender years' presumption." Elkin, *supra* note 27, at 19. See generally MASON, *supra* note 31 at 61-62.

38. Fineman, *supra* note 32, at 738.

39. Dianne Trombetta, *Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes*, 19 J. FAM. L. 213, 215 (1980-81).

society and the specialization of parental responsibilities.⁴⁰ Describing why a woman was entitled to custody of her young child, one court in 1938 wrote "[t]here is but a twilight zone between a mother's love and the atmosphere of heaven, and all things being equal, no child should be deprived of that maternal influence."⁴¹

As a result of the "tender years" doctrine, women until recently were awarded sole custody of their children by courts almost automatically. This practice of nearly excluding fathers from playing a central role in post-divorce child-rearing was probably the result of several influences, including "the combined influences of psychoanalytic theory, maternal deprivation research and the continued division of sex roles"⁴² In the 1970s, however, a movement of fathers seeking greater input into custody determinations began to speak out against such influences and the status of custody law generally.⁴³ In the last decade, courts and legislatures have grown more reluctant to grant maternal sole custody almost automatically, as evidenced by the growing number of states with a presumption of joint custody.⁴⁴ Despite increased consideration of fathers in custody arrangements, however, in the thirty years between 1960 and 1990 "[m]ore children were in the sole custody of their mothers than at any other time in American history"⁴⁵

States in recent years have made formidable attempts to change family and child custody law. Several states that have recently passed legislation supporting a presumption or preference of joint custody, for example, have accompanied this legislation with other child custody provisions. To illustrate, Texas recently passed a family law bill creating a presumption that joint custody is in the best interests of the child.⁴⁶ The Texas law contains a requirement

40. See Elkin, *supra* note 27, at 19.

41. Trombetta, *supra* note 39, at 215 (quoting *Tuter v. Tuter*, 120 S.W.2d 203, 205 (Mo. App. 1938)). See also Redwine, *supra* note 2, at 714.

42. Trombetta, *supra* note 39, at 215.

43. See Fineman, *supra* note 32, at 738. See also Elkin, *supra* note 27, at 19.

44. See Goldberg, *supra* note 21, at 50. See also RICHARD A. MARAFIOTE, *THE CUSTODY OF CHILDREN: A BEHAVIORAL ASSESSMENT MODEL* 23 (1985) (commenting that growing arguments challenging maternal sole custody included "pressure from fathers' rights groups, an increase in the number of fathers who seek custody, and evidence that the father's role in child development is significant" (citation omitted)).

45. MASON, *supra* note 31, at 160. Mason notes that the increased numbers of maternal sole custody households is due to a number of diverse factors, including divorce and illegitimacy. See *id.*

46. See *Texas Passes Presumptive Joint Custody; Makes Numerous Other Changes in Law*, SPEAK OUT FOR CHILDREN (Q. Newsl. of Children's Rights Council, Inc.), Summer, 1995, at 1 [hereinafter *Texas Passes Presumptive Joint Custody*]. See also *Presumption for Joint Custody*, *supra* note 20, at 1. A new law for the District of Columbia states: "[T]here shall be a rebuttable presumption that joint custody is in the best interest of the child or children."

for parents to make a "good faith" effort to solve their custody disputes through mediation and a provision making it easier to shift custody from one parent to another in sole custody settings.⁴⁷ Also, although individual state law governs specific custody provisions, the federal government has expressed concern about increasing the strength of families and has stressed the importance of the role of committed fathers in the American family.

On June 16, 1995, for example, President Clinton issued a memorandum to the federal departments and agencies which have programs and policies affecting the family.⁴⁸ In this memorandum, President Clinton ordered all federal offices to "review every program, policy, and initiative (hereinafter referred to collectively as 'programs') that pertains to families to . . . proactively modify those programs that were designed to serve primarily mothers and children, where appropriate and consistent with program objectives, to explicitly include fathers and strengthen their involvement with their children"⁴⁹ Notably, the President's memorandum did not include a suggestion of directives to encourage joint custody. The concern of the federal government in strengthening the role of fathers in the lives of their children is reflected in new state legislation⁵⁰ which seeks to modify the singular role mothers have played in custody arrangements. The federal initiative may influence state legislatures most, however, by encouraging father's rights groups lobbying for changes in state law.

C. Types of Custody Laws Available Today

Varied approaches to custody decisions have evolved as a result of rising divorce rates and increases in the number of custody

Id. It also includes, among other things,:

[seventeen] factors that a court must consider in making a joint or sole custody determination; requires each parent to submit a detailed parenting plan regarding the allocation of rights and responsibilities of each parent; provides that an objection by one parent to any custody arrangement shall not be the sole basis for refusing the entry of an order for the custody arrangement . . . in the best interest of the child.

Id.

47. TEX. FAM. CODE ANN. § 162.102-107 (West 1997)

48. See *White House Publishes Memo Supporting Fathers*, SPEAK OUT FOR CHILDREN, *supra* note 46, at 5 (reprinting Memorandum for the Heads of Executive Departments and Agencies entitled "Supporting the Role of Fathers in Families").

49. MEMORANDUM ON SUPPORTING THE ROLE OF FATHERS IN FAMILIES, 1 PUB. PAPERS, 899-900 (June 16, 1995).

50. See *supra* notes 46-47 and accompanying text.

decisions made each year.⁵¹ With regard to joint custody, statutes may include a rebuttable presumption of joint custody, a preference for joint custody, an option of joint custody, or simply direct judges to order the custody arrangement in the best interests of the child.⁵²

A presumption of joint custody generally directs that joint custody, whether physical or legal, should be ordered by judges in most cases, provided there is not a compelling reason to deny such an arrangement.⁵³ The presumption does not necessarily mean that joint custody will be ordered but, rather, is a starting point for judges and parents alike. Should one parent choose to relinquish custody, for example, or where both parents agree that sole custody is preferable to joint custody, joint custody will generally not be ordered by the court.⁵⁴ In addition, where for some other reason joint custody is shown to be not in the best interests of the child, the presumption may be overcome.⁵⁵ Unlike statutes with a presumption of joint custody, statutes establishing a preference for joint custody may merely require courts to consider joint custody, or may require the court to state its reasons for denying an award of joint custody.⁵⁶

Custody statutes without a presumption of or preference for joint custody often direct judges to determine the custody arrangement that is in the best interests of the child, whether this be joint custody, sole custody, or some other alternative form of custody.⁵⁷ No statutes indicate a presumption other than one for joint custody. A strong preference for maternal sole custody may exist in states such as Virginia, however, through custom resulting from case law.⁵⁸ Courts in states without a presumption of joint custody consider a number of factors to determine the arrangement in the best interests of the child. Generally accepted criteria include: the nurturing character of the caretaker; the use of reasonable discipline by the caretaker; the absence of physical abuse of the child; the mental stability of the caretaker; time available for the child;

51. See MASON, *supra* note 31, at 129.

52. See generally *infra* notes 53-59 and accompanying text. See also Folberg, *supra* note 3, at 9 ("These legislative enactments run the gamut from simply recognizing the legality of joint custody orders to creating a strong presumption favoring joint custody whether or not the parents agree and requiring judicial findings if joint custody is not decreed.").

53. See Joanne Schulmann & Valerie Pitt, *Second Thoughts on Joint Custody: Analysis of Legislation and its Implications for Women and Children*, in JOINT CUSTODY AND SHARED PARENTING, *supra* note 3, at 209, 213.

54. See Trombetta, *supra* note 39, at 232.

55. See Schulmann & Pitt, *supra* note 53, at 214.

56. See *id.* at 210-14.

57. See, e.g., VA. CODE ANN. § 20-124.2 (Michie 1950).

58. See MARGARET F. BRINIG, VIRGINIA DOMESTIC RELATIONS HANDBOOK 364-65 (1996).

continuous rather than intermittent care-taking in the past; and the stability of home life offered by the caretaker.⁵⁹

Under current law, courts in Virginia are guided by nine factors used to determine what custody situation is in the best interests of the child. These criteria include the following:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs; 2. The age and physical and mental condition of each parent; 3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life . . . ; 4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members; 5. The role which each parent has played and will play in the future, in the upbringing and care of the child; 6. The propensity of each parent to actively support the child's contact and relationship with the other parent . . . ; 7. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference; 8. Any history of family abuse . . . ; and 9. Such other factors as the court deems necessary and proper to the determination.⁶⁰

III. THE DEVELOPMENT OF CHILD CUSTODY LAWS THROUGH VIRGINIA CASE LAW

Understanding child custody law requires review of its historical development through case law. From the earliest custody cases in Virginia emerged several basic principles upon which modern custody jurisprudence in the state is founded.⁶¹ The central role of the welfare of the child in custody disputes, for example, is reaffirmed in case after case throughout the history of child custody law in Virginia.⁶² Early cases also announced doctrines which have

59. See Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the Dependency Dilemma*, 2 BERKELEY WOMEN'S L.J. 9, 26 (1986).

60. VA. CODE ANN. § 20-124.3 (Michie 1950).

61. The oldest reported case in Virginia determining custody issues is *Carr v. Carr*, 63 Va. (22 Gratt.) 168 (1872). See also *Shockey v. Shockey*, 30 Va. Cir. 493, 494 (1979). For an excellent summary of Virginia case law related to child custody, see BRIEN A. ROCHE, VIRGINIA DOMESTIC RELATIONS CASE FINDER (1996).

62. For example, early cases refer to "having in view the good of the child." *Carr*, 63 Va. (22 Gratt.) at 174. Numerous cases cite the rule that the "welfare of the infant is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children." BRINIG, *supra* note 58, at 363 (citing

ultimately given way to standards more reflective of present conditions in society, such as the twentieth century shift away from the property right of fathers in their children to a presumptive right of maternal custody of a child of tender years.⁶³

Courts of the nineteenth century looked to English common law for guidance in determining how the property right of a father in his children should be recognized in custody disputes.⁶⁴ Early common law of England held that the father had an absolute right to the custody of his children and upon divorce could deny the mother all access to, or communication with, his children.⁶⁵ This harsh doctrine was later modified by statutes which, although continuing to recognize the father's property right in the child as "high and sacred," looked above all to the interests of the child.⁶⁶ The court in *Latham v. Latham* noted the similarity between the law in Virginia in 1878 and that of England:

The father is the legal guardian of the infant; the law gives it to him against all the world. The right of the father (say all the cases) to the custody of his legitimate minor children, of whatever age they may be, is perfectly clear – too well settled to admit of dispute.⁶⁷

Despite the focus of Virginia courts in the nineteenth century on the rights of fathers to custody of their children in the event of divorce,⁶⁸ the interests of the child were increasingly being recognized as worthy of consideration.⁶⁹ A court in 1872 rendered its

Mullen v. Mullen, 49 S.E.2d 349, 354 (Va. 1948)). See also *Burnside v. Burnside*, 222 S.E.2d 529, 530 (Va. 1976); *Durrette v. Durrette*, 288 S.E.2d 432 (Va. 1982).

63. See Trombetta, *supra* note 39. Cf. *Latham v. Latham*, 71 Va. (30 Gratt.) 307, 331 (1878) (affirming the right of the father as legal custodian of the child). See also *Mullen*, 49 S.E.2d at 354 (stating the mother is the natural custodian of a child of tender years).

64. See Mary Kate Kearney, *The New Paradigm in Custody Law: Looking at Parents with a Loving Eye*, 28 ARIZ. ST. L.J. 543, 547 (1996).

65. See BRINIG, *supra* note 58, at 364 (citing *Latham*, 71 Va. (30 Gratt.) at 331). See also ROCHE, *supra* note 61, at 104 (summarizing the holding in *Latham* to be that "[f]ather is legal custodian of minor children and they will not be taken from him without strongest reasons").

66. *Latham*, 71 Va. (30 Gratt.) at 331-32.

67. *Id.* at 331. An illegitimate child, however, was more readily given to its mother. See BRINIG, *supra* note 58, at 366.

68. The weight accorded fathers in custody determinations was stated in the case of *Coffee and Wife v. Black*, 82 Va. 567, 569 (1886): "The father is entitled to the custody of his child, when he is a fit and suitable person, and when he has not voluntarily relinquished it." *Id.*

69. See *Latham*, 71 Va. (30 Gratt.) at 332. Other states at this time, such as New York, Ohio, Massachusetts, Connecticut, and "indeed in most of the states," had statutes creating a rebuttable presumption of custody in favor of the father. *Id.* at 333-35.

decision "having in view the good of the child."⁷⁰ Likewise, the court in *Latham* acknowledged the potential for the interests of the child to overcome the property interest of a father in the child. The court stated that "[t]he father is universally considered as having claims paramount to those of the mother, his legal authority only yielding to the claims of the infant, whenever the morals or interests of the latter strongly require it."⁷¹ By 1886, the interests of the child were held to prevail at least over the claims of a father who had voluntarily relinquished his legal right to custody.⁷² In *Coffee and Wife v. Black*, the court stated that in such cases, "the welfare of the infant, and not the rights of the parent, is the polar star by which the discretion of the court is guided in awarding the custody of the infant."⁷³ The child's interests, as central in *all* circumstances, became a fundamental principle in Virginia child custody jurisprudence, recognized wholeheartedly in the 1948 benchmark case of *Mullen v. Mullen*.⁷⁴ The *Mullen* court stated, "[i]n Virginia, we have established the rule that the welfare of the infant is the primary, paramount, and controlling consideration of the court in all controversies between parents over the custody of their minor children. All other matters are subordinate."⁷⁵

Like the increased recognition of the interests of the child, the "tender years" doctrine played a fundamental role in custody law in Virginia. In the earliest Virginia cases, the custody of a female child of tender years might be granted to its mother, while a male child of presumably the same age would not:

When the child is a daughter of very tender years, and the mother is deemed a suitable person, the custody is given to her, as essential to the health and life of the infant; while in conformity with the English rule the male child is given to the father, except in very extreme cases.⁷⁶

70. *Carr v. Carr*, 63 Va. (22 Gratt.) 168, 174 (1872) (granting custody of a four-year-old female child to its father after the mother apparently abandoned her husband without sufficient cause).

71. *Latham*, 71 Va. (30 Gratt.) at 332.

72. See *Coffee and Wife v. Black*, 82 Va. 567, 569 (1886)).

73. *Coffee and Wife*, 82 Va. at 569.

74. 49 S.E.2d 349 (Va. 1948).

75. *Id.* at 354. The *Mullen* court cited other Virginia case recognizing the best interests of the child: *Stringfellow v. Somerville*, 29 S.E. 685 (Va. 1898); *Parrish v. Parrish*, 82 S.E. 119 (Va. 1914); *Fleshood v. Fleshood*, 130 S.E. 648 (Va. 1927); *Markley v. Markley*, 134 S.E. 536 (Va. 1926); *Darnell v. Barker*, 18 S.E.2d 271 (Va. 1942); *Elam v. Elam*, 29 S.E.2d 222 (Va. 1944). *Id.*

76. *Latham*, 71 Va. (30 Gratt.) at 333.

Other judges of this time believed that young children of both genders are best served in the custody of their mothers. Contrary to the contemporary standard set out in *Carr*,⁷⁷ the dissent in *Latham* argued that children are best cared for by their mothers who have a God-given duty and responsibility to care for them.⁷⁸ By 1899, the proposition that a mother should be granted custody of her children of tender years, regardless of gender, was well established.⁷⁹

Over time, the mother, rather than the father, of a child of tender years was recognized as the rightful custodian in a custody dispute, provided she was fit and all other things were equal.⁸⁰ Accordingly, the court in the 1948 benchmark case of *Mullen v. Mullen* held:

It is now generally recognized that the mother is the natural custodian of her child of tender years, and that if she is a fit and proper person, other things being equal, she should be given the custody in order that the child may receive the attention, care, supervision, and kindly advice, which arise from a mother's love and devotion, for which no substitute has ever been found. Human experience supports the policy that young children should not be deprived of the care of their mothers and of their love and tenderness, which may be counted upon most unfailingly. . . . Accordingly, it has been held that children of tender age, especially girls, will be awarded to their mothers, if fit and suitable; and that where no injury or disadvantage will result to the child, the feelings of the maternal parent must be given consideration.⁸¹

77. See *Carr v. Carr*, 63 Va. (22 Gratt.) 168, 174 (1872) (holding that a father was necessarily the best caretaker during the ages for moral training and impression).

78. The court stated:

The training and instruction of the children in early life, and during the period when their characters are being formed, properly devolves on the mother. . . . This is the peculiar province of the mother; it is the position wherein God placed her, and she is responsible to Him for the manner in which she discharges the duty.

Latham, 71 Va. (30 Gratt.) at 388.

79. See *Trimble v. Trimble*, 97 Va. 217, 220 (1899) (The court held that the mother has absolute rights of custody of her seven-month-old child of tender years. "No argument is required to show that the mother is the proper custodian of a child of that age.").

80. See BRINIG, *supra* note 58, at 364 (citing *Mullen v. Mullen*, 49 S.E.2d 349, 354 (Va. 1948)). See also, ROCHE, *supra* note 61, at 107-10.

81. *Mullen*, 49 S.E.2d at 354.

Despite statutory language in the Virginia Code stating no presumption of custody to either parent,⁸² a tender years "presumption" for mothers was widely cited as a rule of law in Virginia cases until at least 1971.⁸³ It was not until the 1976 case of *Harper v. Harper* that the court finally applied the plain language of the statutory law, which the court noted "expressly states that there shall be no presumption of law in favor of either parent."⁸⁴ There the court held the conclusion of *Moore v. Moore*,⁸⁵ a 1971 case which held mothers to be the natural custodians of their children of tender years, not to be a rule of law. Instead, in the face of substantial precedent, the court concluded the tender years presumption to be, at best, a rebuttable inference: "At most the principle for which *Moore* stands is no more than a permissible and rebuttable inference, that when the mother is fit, and other things are equal, she, as the natural custodian, should have custody of a child of tender years."⁸⁶ Another case, in 1976, similarly held that the tender years doctrine is flexible, and is not to be applied without regard to surrounding circumstances.⁸⁷

Even following *Harper*, however, courts in Virginia continued to enforce some form of tender years inference in favor of mothers.

82. In the 1970 case of *Hall v. Hall*, the court, in passing, referred to a section of the Virginia Code providing that, "as between parents there shall be no presumption of law in favor of either parent." 173 S.E.2d 865, 868 (Va. 1970) (citing VA. CODE ANN. § 31-15 (Michie 1950)).

83. See, e.g., *DeMott v. DeMott*, 92 S.E.2d 342, 347 (Va. 1956) ("As respects the custody of a young daughter, other things being equal, the law favors the mother if she is a fit person."); *Brooks v. Brooks*, 106 S.E.2d 611, 617-18 (Va. 1959) ("Generally, where the child is of tender years and will be equally well cared for by either the mother or father, the mother, in preference to the father, should be awarded its custody."); *Campbell v. Campbell*, 122 S.E.2d 658, 660 (Va. 1961) ("The mother is the natural custodian of her children of tender years, and if she is a proper person, other things being equal, the law favors awarding her their custody. . . ."); *Moore v. Moore*, 183 S.E.2d 172, 174 (Va. 1971) ("The mother is universally recognized as the natural guardian and custodian of her children of tender years and if she is a fit and proper person, other things being equal, it is the settled practice in this State to award their custody, especially girls, to the mother."). See also ROCHE, *supra* note 61, at 109.

84. *Harper v. Harper*, 229 S.E.2d 875, 877 (Va. 1976).

85. 183 S.E.2d 172 (Va. 1971).

86. *Harper*, 229 S.E.2d at 877. See also *Clark v. Clark*, 234 S.E.2d 266 (Va. 1977) (holding that although no initial presumption favoring either parent exists, there is a permissible inference that when all things are equal, custody of children of tender years should be given to the mother).

87. See *Burnside v. Burnside*, 222 S.E.2d 529, 530 (Va. 1976). Applying the tender years doctrine in light of the statute indicating that as between parents there shall be no presumption in favor of either, the court stated: "Even though the mother . . . might not be unfit, the child's welfare must not be adversely affected for the sake of a mechanical rule, which blindly accepted would require the award of his custody to his mother." *Id.* at 531 (citation omitted).

In the 1977 case of *McCreery v. McCreery*, for example, the court held that the tender years doctrine still applied in Virginia but described it as an "inference":

The "presumption" is, in fact, an inference society has drawn that such right [of the child] is best served when a child of tender years is awarded the custodial care of its mother. . . . And that inference controls unless, in a particular case, it is overcome by evidence that the right of the child will be better served by awarding the child the custodial care of its father. By definition, the inference controls only when the evidence shows that the mother is fit and "other things"⁸⁸ affecting the child's welfare are equal.⁸⁹

Employing the tender years inference outlined in *McCreery*, later courts used a two-fold analysis to decide custody.⁹⁰ First, they determined whether both parents were fit to have custody.⁹¹ If either parent was not found fit, custody was awarded to the fit parent. If, however, both parents were deemed fit, the court considered whether "all other things"⁹² were equal. Only if the two home environments were found to be equal, did the inference arise that the mother should have custody of children of tender years.⁹³

The formal tender years inference in favor of mothers was short-lived. Immediately following application of the tender years inference in the *Durrette* case in 1982, the General Assembly amended section 31-15 of the Virginia Code.⁹⁴ Prior to this amendment in 1983, the Code had stated ". . . there shall be no presump-

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88. The court defined these "other things" affecting the child's welfare as "things which affect the quality of the custodial care received by the child." *McCreery v. McCreery*, 237 S.E.2d 167, 169 (Va. 1977).

89. *McCreery*, 237 S.E.2d at 168.

90. See *Leisge v. Leisge*, 292 S.E.2d 352 (Va. 1982).

91. See, e.g., *Mullen v. Mullen*, 49 S.E.2d 349, 354 (Va. 1948) (defining the elements necessary to determine the fitness of the parents in regard to the welfare of the child to include: the adaptability of the parent to the task of caring for the child; controlling and directing the child; the age, sex, and health of the child as well as its "temporal and moral wellbeing"; the environment and circumstances of the proposed home; and the influences likely to be exerted upon the child"). These factors were eventually codified in the *Virginia Code*. See *supra* note 60 and accompanying text.

92. See *Durrette v. Durrette*, 288 S.E.2d 432 (Va. 1982) (including suitability of the parents' respective homes as among the "other things" to be considered). Suitability of the home was not determined merely by comparing physical accommodations or material advantages. See *id.*

93. See, e.g., *Leisge*, 292 S.E.2d at 354-55.

94. See *Visikides v. Derr*, 348 S.E.2d 40, 42 (Va. App. 1986) (denying the existence of a "tender years" inference).

situations. One study has shown, for example, that relitigation of custody status for joint custody families was one-half that of sole custody families.¹⁰¹ The authors of the study concluded that joint custody was more beneficial than sole custody because of reduced parental conflict in the joint custody setting.¹⁰² These findings are corroborated by another study which concluded that joint custody families engaged in much less relitigation than single custody families, finding that fifty-six percent of the sole custody parents had returned to court at least once subsequent to the initial custody order.¹⁰³ By contrast, none of the joint custody families in the study relitigated.¹⁰⁴ It is possible, however, that joint custody families relitigate less often than sole custody families not because of the custody arrangements themselves, but because courts award joint custody to parents more able to cooperate without court supervision.¹⁰⁵ Perhaps awards on such a basis would predispose these families to less litigation.

Another purported advantage of joint custody arrangements is that fathers with joint custody tend to pay child support with more consistency than do fathers in circumstances where the mother is the sole custodian.¹⁰⁶ Researchers have found that only half of single custody mothers receive reliable child support from their ex-spouse.¹⁰⁷ Why increased reliability of financial support occurs in joint custody settings is unknown, but researchers have postulated that joint custody fathers continue to pay support because they feel more involved with their children.¹⁰⁸ A positive relationship between access to children and payment of child support is revealed in statistics published by the United States Census Bureau in 1991.¹⁰⁹ These statistics reveal that joint custody fathers pay 90.2% of their child support whereas fathers with neither joint custody nor visitation make payments of only 44.5% of their child support.¹¹⁰

Although the effects on children of any custody arrangement must be of primary concern, the custodial parent's satisfaction is

101. See Ilfeld, Jr. et al., *supra* note 23, at 65.

102. *See id.*

103. See Deborah Anna Luepnitz, *A Comparison of Maternal, Paternal, and Joint Custody: Understanding the Varieties of Post-Divorce Family Life*, 9 J. DIVORCE 1, 5 (1986).

104. *See id.*

105. *See id.* at 6.

106. *See Kelly, supra* note 27, at 133.

107. *See Luepnitz, supra* note 103, at 6.

108. *See id.*

109. *See The Relationship Between Child Support and Access*, SPEAK OUT FOR CHILDREN, *supra* note 46, at 9 (citing GORDON H. LESTER, U.S. DEPT OF COMMERCE, SERIES P-60, NO. 173, CHILD SUPPORT AND ALIMONY: 1989 (1991)).

110. *See id.*

tion of law in favor of either [parent]."⁹⁵ The year following *Durrette*, the General Assembly amended the Code to read "... there shall be no presumption or inference of law in favor of either [parent]."⁹⁶ In interpreting these changes to the statute, the court in *Visikides v. Derr* held the use of any such tender years inference in determining what is in the best interests of the child to be reversible error.⁹⁷

Although the tender years inference of maternal custody stated in the 1948 *Mullen* case is no longer quoted as a rule of law by Virginia courts today, the case remains important because it states the basic guiding principle for determination of child custody cases which has endured: the best interests of the child.⁹⁸ Without a formal tender years presumption or inference in favor of either parent, Virginia courts in the 1990s and beyond must strive to reexamine and refine what is truly in the best interests of the child.

IV. THE ADVANTAGES AND DISADVANTAGES OF JOINT CUSTODY ARRANGEMENTS

Research on custody arrangements has resulted in mixed conclusions regarding joint custody's effect on the welfare of children and the advisability of joint custody presumptions.⁹⁹ Stemming from a variety of scientific limitations "[t]he resultant intermingling of sound data, unreliable data, clinical observation, social myth, and unsubstantiated or irrelevant theory has created confusion, strongly voiced opinion, and unevenness in information available to parents, clinicians, schools, lawyers, courts, and the media."¹⁰⁰ Any review of psychological research on the effects of joint custody arrangements, therefore, must be performed with caution.

An argument in favor of promoting a presumption of joint custody is that families with joint custody arrangements tend to relitigate their arrangement less than parents in sole custody

95. VA. CODE ANN. § 31-15 (Michie 1950).

96. VA. CODE ANN. § 31-15 (Michie 1985) (emphasis added).

97. See *Visikides*, 348 S.E.2d at 42.

98. See *Mullen v. Mullen*, 49 S.E.2d 349, 354 (Va. 1948). See also VA. CODE ANN. § 31-15 (Michie 1950) (providing that where parents are separated, the court "in awarding the custody of the child to either parent or to some other person, shall give primary consideration to the welfare of the child . . .").

99. See Kline, *supra* note 23, at 430 (noting that "the scarcity of studies that evaluate children living in different types of custody situations and the exclusive focus on short-term outcomes have advanced only slightly our knowledge about the nature of joint physical custody and its impact on children").

100. Kelly, *supra* note 27, at 120.

also a consideration in drafting new custody laws. Parents with joint physical custody have experienced "high levels of satisfaction" with the arrangement,¹¹¹ but "[p]arents with court-ordered joint custody reported being less satisfied than parents voluntarily entering into joint custody, and spouses reporting high levels of marital conflict tended to be less satisfied as well with their joint custody situation."¹¹² Parents in non-custodial positions, on the other hand, have demonstrated greater difficulty in adjusting to life after divorce. As a result of not gaining custody, such parents must confront the loss of familiar activities and may encounter great lifestyle changes as well.¹¹³ A greater feeling of continuity, due to the presence of the child, may exist for the custodial parent.¹¹⁴ Such continuity is unavailable to the non-custodial parent who in turn may face feelings such as depression and guilt.¹¹⁵ Other benefits to parents of joint custody include a wider variety of child care options and a greater opportunity to escape burn-out from parenting.¹¹⁶ Thus, increased options for child care may exist in joint custody arrangements where parents can rely on one another for substitute care.¹¹⁷

Despite greater parental satisfaction with joint custody in some settings, sole custody may be more advantageous for parents and children when protracted levels of conflict exist between parents. A child's adjustment to joint custody may be impaired when subjected to a high degree of conflict between his or her parents.¹¹⁸ Although the percentage of parents who continue to express hostility toward their former spouse after divorce may only be approximated, one study reported that "[o]nly [twenty percent] of the parents believed that they could cooperate 'not at all' or 'very little' regarding their children at final divorce (an average of 20 months after separation)."¹¹⁹ This significant percentage should not be ignored. Continued conflict between parents could render joint custody unacceptable to parents and children alike.

111. Kelly, *supra* note 27, at 133 (citations omitted).

112. *Id.* (citing Irving et al., *Shared Parenting*, 23 FAM. PROCESS 561-569 (1984)).

113. See Trombetta, *supra* note 39, at 220-21 (citations omitted).

114. See *id.*

115. See *id.*

116. See Luepnitz, *supra* note 103, at 6-7.

117. See *id.*

118. See Kelly, *supra* note 27, at 131.

119. *Id.* at 125 (citing Irving et al., *supra* note 112).

Joint custody arrangements have the potential to increase the independence of women,¹²⁰ but may also foster increased dependence on the former spouse as well.¹²¹ Parents in joint legal custody arrangements must make major decisions jointly with regard to the child, which may create opportunities for the more aggressive parent to manipulate the weaker one.¹²² In joint physical custody situations, the opportunity for continued control, manipulation and abuse is even greater:¹²³ "where physical custody is equalized, frequent contacts between parents are likely, as children are transferred from one parent to the other. . . . Thus, a spouse who was manipulated during the marriage will continue to be subject to influence and power after divorce."¹²⁴

More detrimental than possible continued control of women by their former spouses, statutes which promote joint custody may also allow fathers of children to continue to abuse their former spouses.¹²⁵ This continued contact may "disable some women from emerging from destructive and dependent relationships with their former husbands."¹²⁶ Courts may or may not take into account spousal abuse when deciding custody arrangements — abuse to a *child*, however, will often be taken into account.¹²⁷ Judges may not, however, always equate wife abuse with unfitness as a father.¹²⁸

Much has been written on the negative effects of divorce on children. Worry over lack of contact with one parent is among the most common reactions of children to divorce, which also include: "intense anxiety about their future well-being and caretaking, sadness and acute reactive depressions, [and] increased anger"¹²⁹

120. See Bartlett & Stack, *supra* note 59, at 17 (noting that joint custody, "may force women to give up some of the control and power they exercise over their children, and autonomy and self-definition derived from their status as mothers, but it may also free them from a dependency which may stifle women as well as their children"). Bartlett and Stack ultimately concluded that dependency and oppression of women through joint custody arrangements is not a satisfactory reason to reject joint custody. See *id.* at 26-27.

121. See Bartlett & Stack, *supra* note 59, at 9.

122. See *id.* at 20.

123. See, e.g., Luepnitz, *supra* note 103, at 7 (describing sole custody for the abused women in this study as allowing them "to be free of these battering men in a way that joint custody would not").

124. Bartlett & Stack, *supra* note 59, at 20.

125. See Luepnitz, *supra* note 103, at 10 (stating that up to 50% of all women will be battered at some point by a man who is important in their life).

126. Bartlett & Stack, *supra* note 59, at 14.

127. See Luepnitz, *supra* note 103, at 10.

128. See *id.* (citing *In re Abdullah*, 400 N.E.2d 1063 (Ill. 1980) (granting custody (later revoked on appeal) of a six-year-old boy to his father who had been convicted of murdering the boy's mother)).

129. Kelly, *supra* note 27, at 122.

A study of children in sole custody found that loss of contact with one parent may produce destructive feelings in children who remain in contact with the non-custodial parent primarily through visitation.¹³⁰

The traditional visiting pattern of every other weekend, most often a maximum of four overnights spent with the father per month, created intense dissatisfaction among children, and especially young boys. Youngsters expressed profound feelings of deprivation and loss, and reactive depressions were frequently observed in young school-aged boys.¹³¹

As a result of such dissatisfaction with visitation,¹³² "paternal drop-out" may occur more frequently in sole custody arrangements than in joint custody situations. "Paternal drop-out" refers to the decreased contact with the non-custodial father that a child may experience especially in the first two years after separation.¹³³ Children in the sole custody of their mothers have been shown to be significantly more likely than children in joint custody to experience the effects of "paternal drop-out."¹³⁴ Research on children in joint custody arrangements, in contrast, describes these children as feeling close to both parents and not suffering from the deep sense of loss more common with children in sole custody situations.¹³⁵ The children in joint custody describe "a sense of being loved by both parents and report[] feeling strongly attached to two psycho-

130. See *id.* at 137 (noting that restrictive visitation schedules may eventually destroy a father's relationship with his children). See also Trombetta, *supra* note 39, at 217 (citing J. Greif, Fathers, Children and Joint Custody, paper presented at the annual meeting of the American Orthopsychiatric Association, San Francisco (1978) (finding limited visitation by the noncustodial parent severely restricts the opportunity to provide daily nurturing and comfort needed to strengthen the relationship)).

131. Kelly, *supra* note 27, at 127 (citing J. WALLERSTEIN & J.B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980)). See also Greif, *supra* note 130, at 7 (finding that children in single custody situations are likely to develop fantasized image of absent or noncustodial parent); Kline et al., *supra* note 23, at 430 ("Research has repeatedly indicated that living in single-parent homes, with concomitant father absences, is deleterious for the postdivorce behavioral and emotional adjustment of children.").

132. The United States Census Bureau in 1991 reported that as of Spring 1990, 54.9% of fathers had visitation privileges; only 7.3% had joint custody of their children; and the remaining 37.8% enjoyed neither joint custody or visitation rights. See *The Relationship Between Child Support and Access*, *supra* note 109, at 1.

133. See Kelly, *supra* note 27, at 131 (citations omitted).

134. See *id.* at 128 (citing Kline et al., A Rose By Any Other Name: Children's Adjustment in Joint and Sole Physical Custody Families, paper presented at the annual meeting of the American Orthopsychiatry Association, San Francisco (1988)).

135. See *id.* at 131.

logical parents, in contrast to feeling close to just one primary parent."¹³⁶

Access to both parents, however, does not necessarily guarantee a smooth adjustment for children following the divorce of their parents. Frequent visitation with a non-custodial father may yield a neutral effect "neither foster[ing] nor hinder[ing] child behavioral and emotional adjustment."¹³⁷ Other studies have shown no differences in experiences and feelings of children in sole custody situations compared to those in joint custody arrangements.¹³⁸ Kline found, for example, that custody and access arrangements do not play a major role in the complex family process which affects a child's development.¹³⁹

Despite having more access to both parents, joint custody children show neither less disturbance nor better social and emotional adjustment after divorce than sole custody children. The finding that custody type is not predictive of child outcome is consistent with recent reports of no differences found in behavioral adjustment between children living in joint physical custody or joint legal custody and children living in sole custody arrangements. These results also support findings that paternal access is unrelated to the adjustment of children living in divorced families.¹⁴⁰

Notwithstanding studies showing that children of divorce have a greater tendency toward behavioral problems than do children of intact families,¹⁴¹ sole custody is not necessarily negative and should by no means be abandoned as a viable option in family law. Children of single-parent homes constitute a "substantial population of youngsters . . . who are well adjusted in their social, academic, and psychological behaviors."¹⁴² Further, studies of the psychological impact of custody arrangements have produced mixed

136. *Id.* (citations omitted).

137. Kline et al., *supra* note 23, at 430 (citing F. Furstenberg et al., *Paternal Participation and Children's Well-Being After Marital Dissolution*, 52 AM. SOC. REV. 695-701 (1987)).

138. See Kline et al., *supra* note 23, at 430.

139. See *id.* at 436.

140. *Id.* at 435 (citations omitted).

141. See *id.* at 437. Kline highlights that the conclusions of all psychological studies should be noted with caution, including Kline's finding that custody arrangements are not dispositive of the psychological adjustment of a child. Noted in the study is the caveat that loss of the father following divorce was not assessed and that such a loss has been found to be a primary cause of distress in children undergoing such circumstances. See *id.*

142. Kelly, *supra* note 27, at 125 (citations omitted).

results.¹⁴³ For example, research has shown children in joint custody arrangements to have increased self-esteem, but a "substantial portion of [joint custody] children were visibly distressed and confused."¹⁴⁴

In sum, joint custody arrangements may reduce tension experienced by children of divorcing couples, provided that the couple is not one predisposed to conflict and especially if the joint custody arrangement is voluntary. Joint custody may also result in increased payment of child support, at least in those settings where increased parental involvement is a result. Research addressing the advantages of different custody arrangements on the psychological adjustment of children, however, appears to have mixed results. Such varied conclusions may suggest that custody arrangements are highly individual and must be tailored to each divorcing family's needs. Because neither joint custody nor sole custody appears to be a panacea for children of divorce, legislators should be cautious in implementing any legislation which imposes one type of arrangement to the detrimental exclusion of the other.

V. AN ALTERNATIVE FOR VIRGINIA IN LIEU OF A PRESUMPTION OF JOINT CUSTODY

Legislators seeking to adjust child custody law in Virginia should maintain the "best interests of the child" standard while amending the law to better reflect current research indicating the benefits of joint custody. Changes should seek to reduce gender bias in custody decisions thereby resulting in more post-divorce two-parent involvement with children. Until research shows definitively and repeatedly that joint custody or sole custody is a superior choice in nearly all divorces, no presumptive custody arrangements, whether joint or sole, should be adopted. To adopt a presumption, even when rebuttable, would be to invite a repetition of the same inequalities and gender biases that have historically plagued child custody law in this country.

The "best interests" test and its accompanying factors should not be interpreted as inviting a choice between parents. Joint legal or physical custody may very well be in the best interests of the child. Under no circumstances should children again be viewed as property, subject to a presumed equal division between parents. Instead, new legislation should not impose joint custody on parents

143. See Kline et al., *supra* note 23, at 430.

144. *Id.*

unwilling or unable to accommodate such an order,¹⁴⁵ any more than sole custody should be used to force one parent out of the parenting role. Refining the best interests standard, rather than rejecting it, should be the direction taken by legislators.

The current best interests standard in Virginia has the benefit of clear statutory language and a list of factors to aid courts in custody determinations.¹⁴⁶ To provide the best custody situation possible for the post-divorce family, the Virginia legislature should make specific additions to the list of factors used to determine custody. The statute should be modified to include: 1) mandatory *consideration* of an arrangement of joint custody and, 2) a specific statement denouncing the use of gender-bias in custody determinations.

A. Include Mandatory Consideration of Joint Custody in the Best Interests Factors

Virginia legislators should amend the list of factors to include mandatory consideration of joint custody as proposed in the Amendment in the Nature of a Substitute to Senate Bill 496.¹⁴⁷ The statute should also explicitly state that joint custody is *not* to be presumed. Courts would remain free to implement a custody determination tailored to each unique family situation, but would be required to formally consider a variety of custody arrangements including joint custody. As part of their formal consideration, Virginia judges should be required to account for their consideration of each possible custody arrangement in their final custody decisions.¹⁴⁸ Mandatory consideration of joint custody in the "best interests" factors brings the prospect of joint custody into a more prominent position in the custody arena, without denying the opportunity for other best interests factors to outweigh a preliminary determination of joint custody. A strict presumption of joint custody with exceptions only for situations of abuse or high conflict

145. See Fineman, *supra* note 32, at 769 ("It is one thing for divorcing parents voluntarily to choose the shared parenting ideal, but quite another to impose it on parents who do not or cannot live up to its demands.").

146. See *supra* note 60 and accompanying text.

147. See *supra* note 18 and accompanying text.

148. In the 1998 Session of the Virginia General Assembly, Delegate Eric I. Cantor proposed in HB 1239 that courts should be required to "make written detailed findings as to each factor in this section [Va. Code Ann. § 20-124.3 (Michie 1950)] and explain how such factors led to its determination of the parenting arrangements." H.B. 1239, Reg. Sess. (Va. 1998). The bill has been referred to the Committee for Courts of Justice. See H.B. 1239, Reg. Sess. (Va. 1998), available in WESTLAW, Bill Tracking file.

would not allow for other more subtle, but still important, "best interests" factors to overcome a joint custody presumption. When joint custody must be fully considered by courts but is not legally presumed, parents will not be forced into a potentially harmful joint arrangement when the best interests of the child demands an alternative custody arrangement.

B. Reduce Gender-Bias in Custody Decisions

Courts should be encouraged to reduce gender-bias in making custody decisions. Such a recommendation is perhaps the most difficult to enforce because gender-bias is often borne of custom and tradition, and will likely not be eradicated without intensive awareness campaigns and the passage of time. Increased awareness of the importance of fair consideration of both father and mother as continuing custodians, however, is essential to allowing Virginia courts to retain freedom from custody presumptions. Reduction of gender-bias may occur over time if judges are more stringently required to consider alternative custody arrangements.

VI. CONCLUSION

Laws and customs which nearly automatically award custody of a child to its mother should be examined carefully in light of recent research indicating the benefits to children and to parents of joint custody, while recognizing that neither arrangement is superior to the other in addressing the divergent needs of all divorcing couples. Greater incorporation of joint custody options in family law should not assume joint custody is an "automatic answer" any more than is a standard award of sole maternal custody.

In its current form, the best interests of the child standard provides judges with a wide spectrum of custody arrangements from which to choose. These choices are limited only by statutory criteria which a judge must assess in determining the child's best interest as well as by any form of custody arrangement not permitted by state law. Even more than a preference of joint custody, a legal presumption of joint custody will narrow the judicial system's options of deciding what is in the best interests of the child.¹⁴⁹

At its most basic level, a presumption of joint custody may compel courts to tell parents something akin to the following: "we

149. See Bartlett & Stack, *supra* note 59, at 26.

don't care how you feel about each other. As long as there is no clear, convincing evidence that either of you is abusive and unfit to be a parent, our assumption is that you are both qualified to continue as parents, albeit under different circumstances."¹⁵⁰ A simplistic assessment of a presumption of joint custody, however, does not necessarily take into account the degree of fitness of each parent and his or her past dedication to the child. For example,

[C]ourts have tended to be too easily impressed by the good intentions of fathers and have exaggerated the credit due them for their newfound willingness to assume some active role in parenting. . . . [At the same time] [c]ourts easily ignore the career interests of mothers in making custody orders restricting the geographic location of the children to the place of the father's current employment.¹⁵¹

A presumption of joint physical custody too easily ignores the past performance of parents, and may unduly give credence to the once unavailable parent who upon divorce meets a minimum legal standard of not being abusive or completely unfit.¹⁵²

A presumption of joint custody may equalize the rights of parents to continue parenting more than a "default rule" of sole custody.¹⁵³ The promotion of equal parenting rights, however, must be weighed against the potential for continued violence against women from abusive ex-husbands.¹⁵⁴ Violence or "[t]he threat of violence is not only harmful to the woman but will almost certainly negate the benefits of joint custody for the child."¹⁵⁵ Although the potential for continued spousal abuse should not bar adoption of mandatory consideration of joint custody, Virginia legislators should note that spousal abuse may be underreported and therefore more pervasive than statistical data indicate. The possibility of

150. *Id.* (suggesting what courts would, in effect, say to parents if there was a presumption of joint custody).

151. Bartlett & Stack, *supra* note 59, at 14.

152. Among the factors already present for determining what is in the "best interests" of the child in Virginia is an assessment of the "role which each parent has played . . . in the upbringing and care of the child." VA. CODE. ANN. § 20-124.3 (Michie 1950). *See also supra* note 60 and accompanying text.

153. *See* Elkin, *supra* note 27, at 19 (comparing joint custody to divorce mediation, in that, "both parents are empowered by the court to retain equal legal rights, authority, and responsibility for the care and control of their child, much as in the intact family. Neither parent's rights and authority are superior.").

154. *See, e.g.*, Luepnitz, *supra* note 103, at 11 (not endorsing mandatory joint custody because of the potential result of single mothers having less protection from abusive ex-husbands).

155. Bartlett & Stack, *supra* note 59, at 37.

continued spousal abuse should be considered by lawmakers when considering a presumption that could potentially further such abuse.¹⁵⁶

Despite the lack of a presumption or preference of joint custody, data for custody awards in Virginia for the years 1991 through 1995 already show a rising trend toward joint custody arrangements. Records for these years kept by the Virginia Department of Health reveal that the number of maternal sole custody awards decreased by seven percent while the number of joint custody awards increased by forty-five percent during this time.¹⁵⁷ Sole custody continues to be granted much more than joint custody, and then primarily to mothers.¹⁵⁸ Without reviewing each individual case, however, it is difficult to determine whether the disparity is due to continued gender bias in courts or is simply a reflection of what is indeed in the best interests of the child. Family law legislation in Virginia should have as its primary focus the welfare and best interests of each child, and not as its goal a raw statistical quota of equality between parents.

In Virginia, future changes in attitudes among judges, lawyers, social workers, and divorcing couples may mean that a presumption of joint custody is unnecessary to achieve more balance in the number of sole and joint custody arrangements. A further refinement of the "best interests" standard to include mandatory consideration of joint custody, coupled with increased awareness of the importance of gender-neutral custody determinations, will best determine when joint custody is truly in the best interests of the child.

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156. The *Virginia Code* presently requires courts to consider "any history of family abuse" in determining what is in the best interests of the child. VA. CODE ANN. § 20-124.3 (Michie 1950). See also *supra* note 60 and accompanying text. "Family abuse" is defined as "any act of violence . . . which results in physical injury . . . and which is committed by a person against such person's family or household member." VA. CODE ANN. § 16.1-228 (Michie 1950).

157. See Michael Ewing, A Preliminary Review of Child Custody Awards in Virginia Divorces, 1991-1995, paper presented at the Virginia Fatherhood Conference (Feb. 22, 1997). "Although 'joint custody' awards increased noticeably from 1991-1995, the percentage of fathers awarded *primary* physical custody of their children decreased over this period. Averaged over this [five]-year period, only 12.5% of fathers were awarded primary physical custody of minor children through a sole custody or joint custody award." *Id.*

158. See *id.* Sole custody was granted to the father in 10.9% of the cases (6,737 cases); sole custody was granted to the mother in 69.9% of the cases (43,158 cases); and joint custody was granted in 15.5% of the cases (9,579 cases). The remaining 3.7% of cases (2,264 cases) were disposed of as sole custody to a non-parent. See *id.*