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Is There Discrimination against Fathers in Child Custody Adjudication?

This report addresses the question of whether there is a bias against fathers in Vermont family courts. First, this report describes the types of statutes that are currently in use and the effects they have on child custody adjudication and on children. This is followed by a review of the scholarly literature on the effects of fathers' involvement in their children's lives. And, finally, we report on research on the question of bias in the handling of child support and through a survey we conducted asking lawyers involved in family law in Vermont their perceptions regarding the question of bias against fathers.

Types of Custody Statutes

Family courts have struggled to find a balance between the rights of parents and the best interests of children in custody proceedings for decades. Two legal doctrines, the best interest of the child and joint custody presumptions or preferences, have dominated the conversation. Debates over child custody statutes are "often cast in terms of a battle between women's and fathers' rights, with children's interests often conflated with those of mothers and fathers respectively."¹

Rebuttable joint custody presumption or preference statutes mandate judges to split custody between the parents except in extreme cases in which shared custody would be detrimental in some way.² Rebuttable presumption/preference statutes provide for shared parenting even in cases when adults cannot find a way to co-parent successfully without the guidance of the courts. Rebuttable presumption/preference statutes are designed to encourage co-parenting. These presumptions have been in effect in some states since 1980 and appeal to legislators because "the continued involvement of both parents in the context of a cooperative parental relationship has been consistently associated with better adjustment in children."³

¹ Edward Kruk, "A Model Equal Parental Responsibility Presumption in Contested Child Custody," *The American Journal of Family Therapy*, 39 (2011): 376.

² Dorothy R. Fait, Vincent M. Wills, and Sylvia F. Borenstein, "The Merits of and Problems with Presumptions for Joint Custody," *Maryland Bar Journal* 45 (2012): 12.

³ Beverly Webster Ferreiro, "Presumptions of Joint Custody: A Family Policy Dilemma," *Family Relations* 39 (1990): 420.

Most of the scholarly work indicates that “unless [rebuttable presumptions of joint custody are] placed in the context of more comprehensive programs to promote the welfare of divorced families, policymakers run the risk of reaching for simple solutions to a very complex issue.”⁴

An alternative approach to custody statutes is the “best interest of the child” doctrine (BIOC). BIOC allows the judge more latitude in tailoring a particular custody agreement to a particular case; however, this also leaves more room for bias at the level of the particular case.⁵ It also leaves important decisions about the best interests of a child to a judge, whose training is in the law, not “the complexities of child development and family dynamics.”⁶ The title, best interests of the child, itself may illicit favorable opinions despite the fact that it is “not...the best interests of children that is at issue, but who is to decide these interests.”⁷

Dealing with Abuse

In addition to choosing a method for apportioning custody, states must also decide how to deal with evidence or allegations of abuse during divorce proceedings.⁸ Laws vary from “factor tests, in which judges consider domestic violence as ‘one factor,’” to “statutes that direct judges to deny sole or joint custody to abusive parents unless they present persuasive evidence establishing their suitability to obtain custody.”⁹ States try to balance taking domestic abuse extremely seriously while remaining skeptical enough that exaggerations of the other parent’s behaviors do not destroy their right to equal parenting and one parent cannot manipulate the system to cause pain for their ex-spouse.¹⁰

There are two stereotypes of divorcing fathers when abuse is part of a divorce: “fathers’ role as the victim of false child abuse allegations,” and “that of fathers as perpetrators of family violence such as child abuse.”¹¹ Research partially supports each of these models. Abuse allegations were made most frequently by mothers against fathers, but just over half of them were actually confirmed by further investigation. Fathers were less likely to accuse mothers of abuse, but most frequently accused “other male family members...[or] the mother’s new partner,” and a higher proportion of the fathers’ allegations were verified by

⁴ Beverly Webster Ferreiro, “The Merits of and Problems with Presumptions for Joint Custody.”

⁵ Amy Levin and Linda G. Mills, “Fighting for Child Custody When Domestic Violence Is at Issue: Survey of State Laws,” *Social Work* 48 (2003): 463.

⁶ Edward Kruk, “A Model Equal Parental Responsibility Presumption in Contested Child Custody,” p. 377.

⁷ Edward Kruk, “A Model Equal Parental Responsibility Presumption in Contested Child Custody,” p. 379.

⁸ Amy Levin and Linda G. Mills, “Fighting for Child Custody When Domestic Violence Is at Issue: Survey of State Laws.”

⁹ Amy Levin and Linda G. Mills, “Fighting for Child Custody When Domestic Violence Is at Issue: Survey of State Laws.”

¹⁰ Amy Levin and Linda G. Mills, “Fighting for Child Custody When Domestic Violence Is at Issue: Survey of State Laws.”

¹¹ Thea Brown, “Fathers and Child Abuse Allegations in the Context of Parental Separation and Divorce,” *Family Court Review* 41 (2003): 367-380.

further investigation.¹² In any event, investigating allegations of abuse complicates matters because, “the process of referring the case to a child protective service for investigation launches the case on the perilous seas of interorganizational domain.”¹³ In order to avoid requiring “many separate organizations to cooperate in solving one family’s complex parenting problems,” it is common to “incorporate the judge’s view of the likelihood of the truth of the allegation.”¹⁴

While it is best for children not to witness constant conflict between their parents, it is argued that “high conflict [between parents before or during the divorce] should not be used to justify restrictions on children’s contact with either of their parents.”¹⁵

Outcomes in Other States

New Hampshire is an “equal parenting state,” but “[does] not have a presumption,” for joint custody.¹⁶ The State Courts rely on the best interest of the child doctrine¹⁷ and it is the explicit policy of the state to “support frequent and continuing contact between each child and both parents...[and to] encourage parents to share in the rights and responsibilities of raising their children after the parents have separated or divorced.”¹⁸ New Hampshire courts may forgo an order of mediation in the event of “an allegation of abuse or neglect of the minor child,” among other things but does not have a rebuttable presumption denying one parent custody after an allegation of abuse.¹⁹

The New Hampshire House Children and Family Law standing committee discussed and heard testimony on a bill during the 2011-2012 session that would have introduced, “a rebuttable presumption that joint parental rights and responsibilities, as close to 50 percent parenting time for each parent as is possible given the parties’ availability and logistics, is in the best interest of the child or children.”²⁰ It would order the court to “consider” the existence of “abuse...and the impact of the abuse on the child and on the relationship between the child and the abusing parent.”²¹ An 11-5 majority laid the bill on the table.²² Although the bill was not introduced to the floor for a vote, Representative

¹² Thea Brown, “Fathers and Child Abuse Allegations in the Context of Parental Separation and Divorce,” p. 379.

¹³ Thea Brown, “Fathers and Child Abuse Allegations in the Context of Parental Separation and Divorce,” p. 373.

¹⁴ Thea Brown, “Fathers and Child Abuse Allegations in the Context of Parental Separation and Divorce,” p. 373-374.

¹⁵ Edward Kruk, “A Model Equal Parental Responsibility Presumption in Contested Child Custody,” p. 383.

¹⁶ Conversation with Rep. Carolyn Gargas (NH-05) February 3, 2012.

¹⁷ N.H. Rev. Stat. Ann. §461-A:6-I <http://www.gencourt.state.nh.us/rsa/html/XLIII/461-A/461-A-6.htm>

¹⁸ N.H. Rev. Stat. Ann. §461-A:2-I <http://www.gencourt.state.nh.us/rsa/html/XLIII/461-A/461-A-2.htm>

¹⁹ N.H. Rev. Stat. Ann. §461-A:7-IV <http://www.gencourt.state.nh.us/rsa/html/XLIII/461-A/461-A-7.htm>

²⁰ N.H. H.B. 0591, 162nd Congress 1st session

<http://www.gencourt.state.nh.us/legislation/2012/HB0591.html>

²¹ H.B. 0591

²² To lay a bill on the table in N.H. is to put a “temporary postponement on a matter before the house, which may later be brought up for consideration by a motion to ‘take from the table.’” “Glossary of Legislative Terms,” *The New Hampshire Challenge*, <http://www.nhchallenge.org/article.asp?ID=252>; New Hampshire General Court - Bill Status System,

Marie Sapienza addressed the House Floor to announce the opinion of the Committee, “the full committee...decided that...while having possible merit for a small group, [the proposed changes] were not a net improvement to the current statute. Existing law...is working very well. The bill would change the focus from what is in the best interest of the child to a standard that the majority respectfully felt as, ‘in the best interest of certain parents.’ ... While the committee had empathy for...a small minority of parents, both male and female, who believed themselves genuinely, sorely abused by various actions within the family court system...we believed the revisions they supported were not in the best interests of the majority of children and parents appearing in family court.”²³ Vermont and New Hampshire’s child custody determination statutes vary in an important way. Vermont statutes give weight to “the quality of the child’s relationship with the primary care provider,” which may influence the outcomes of child custody negotiations especially if the children are very young.²⁴ New Hampshire statutes do not place a similar importance on the “primary care provider” but do consider “the support of each parent for the child’s relationship with the other parent, including whether contact is likely to result in harm to the child or to a parent,” which may encourage more shared parenting.²⁵

In Oregon, the 1997 adoption of a joint custody presumption statute affected divorce cases in several ways.²⁶ Most importantly “the legislation created incentives that led to more dragged out and acrimonious divorces and no more equal parenting.”²⁷ A greater percentage of fathers were awarded sole custody than before, with sole custody to wives dropping from 68% to 51% by 2002. The state saw no significant change in the percentage of cases ending in joint custody.²⁸ A greater percentage of Oregon divorces are now settled through mediation and the time between separation and divorce finalization has risen, meaning divorces tend to take longer. More abuse actions, and many more false allegations of abuse, are now filed during divorce proceedings as parents attempt to use the “‘abuse’ escape clause,” to disqualify the other parent from obtaining custody.²⁹

Effects of Involved Fathers on Children³⁰

The presence of fathers in the lives of children is important, from birth and as adolescents and adults.³¹ In general, “growing up with only one biological parent frequently deprives

http://www.gencourt.state.nh.us/bill_status/bill_status.aspx?lsr=724&sy=2012&sortoption=billnumber&txtsessionyear=2012&txtbillnumber=hb591.

²³ New Hampshire Legislature, House Journal No. 1, 162nd Congress, 2nd session, 4 January 2012.

http://www.gencourt.state.nh.us/house/caljournals/journals/2012/houjou2012_07.html

²⁴ 15 V.S.A. § 665,

<http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=15&Chapter=011&Section=00665>.

²⁵ N.H. R.S.A. XLIII 461-A:6, <http://www.gencourt.state.nh.us/rsa/html/XLIII/461-A/461-A-6.htm>.

²⁶ Douglas W. Allen and Margaret Brinig, “Do Joint Parenting Laws Make Any Difference?” *Journal of Empirical Legal Studies* 8 (2011): 304-324.

²⁷ Douglas W. Allen and Margaret Brinig, “Do Joint Parenting Laws Make Any Difference?” p. 322.

²⁸ Douglas W. Allen and Margaret Brinig, “Do Joint Parenting Laws Make Any Difference?”

²⁹ Douglas W. Allen and Margaret Brinig, “Do Joint Parenting Laws Make Any Difference?” p. 322.

³⁰ Because this report deals with the perception of bias against men, the focus of this section is on the role of fathers and the focus on the importance of fathers should not be construed as minimizing the importance of mothers.

children of important economic, parental, and community resources, and that these deprivations ultimately undermine their chances of future success.”³²

In order to properly serve the best interests of the children, the law must avoid creating systematic barriers to fathers’ involvement when it would be valuable in their children’s lives. Children’s relationships with their non-resident parent (typically the father) after a divorce would be better served by continued, healthy relationships with both parents despite the custody agreement.³³ “Fatherless children are twice as likely to drop out of school as children who live with both parents; children who exhibit violent behavior in school are eleven times more likely not to live with their fathers; overall, fatherless children do far worse in school, are more prone to depression, more likely to abuse drugs, get involved with crime, commit suicide, and are at a much greater risk of becoming teen parents. Seventy-two percent of adolescent murderers and 60 percent of America’s rapists grew up in homes without fathers.”³⁴

Fathers’ consistent involvement in their children’s lives from their infant years through their adolescence has been associated with higher IQ scores, better linguistic and cognitive abilities, higher levels of academic readiness and success, higher academic achievement and children being better adapted to handle the stress of school.³⁵ A 2001 U.S. Department of Education study found that highly involved biological fathers had children 43% more likely than other children to earn mostly A’s and 33% less likely than other children to repeat a grade.³⁶

Father involvement from a young age is also a positive corollary of emotional development and well-being, “Father involvement is positively correlated with children’s overall life satisfaction and their experience of less depression, less emotional distress, less expressions of negative emotionality such as fear and guilt, less conduct problems, less

³¹ Jeffery Rosenberg and Bradford Wilcox, “The Importance of Fathers in the Healthy Development of Children,” U.S. Department of Health and Human Services, Administration for Children and Families, Child Welfare Information Gateway, accessed March 3rd, 2012, <http://www.childwelfare.gov/pubs/usermanuals/fatherhood/chaptertwo.cfm>; Ross D. Parke and Armin A. Brott, *Throwaway Dads: The Myths and Barriers That Keep Men from Being the Fathers They Want to Be* (New York: Houghton Mifflin, 1999), 169; Christine Winquist Nord and Jerry West, “Fathers’ and Mothers’ Involvement in Their Children’s Schools by Family Type and Resident Status,” *National Center for Education Statistics* (2001): accessed March 1st, 2012, <http://nces.ed.gov/pubs2001/2001032.pdf>; Sarah Allen and Kerry Daly, “The Effects of Father Involvement: An Updated Research Summary of the Evidence” *Father Involvement Research Alliance* (2007): Accessed March 19th, 2012 http://www.fira.ca/cms/documents/29/Effects_of_Father_Involvement.pdf.

³² Sara McLanahan and Gary Sandefur, *Growing Up With A Single Parent: What Hurts, What Helps* (Cambridge: Harvard, 1994), 3.

³³ Edward Kruk, “A Model Equal Parental Responsibility Presumption in Contested Child Custody.”

³⁴ Ross D. Parke and Armin A. Brott, *Throwaway Dads: The Myths and Barriers That Keep Men from Being the Fathers They Want to Be* (New York: Houghton Mifflin, 1999), 169.

³⁵ Jeffrey Rosenberg and Bradford Wilcox, “The Importance of Fathers in the Healthy Development of Children,”; Christine Winquist Nord and Jerry West, “Fathers’ and Mothers’ Involvement in Their Children’s Schools by Family Type and Resident Status.”

³⁶ Christine Winquist Nord and Jerry West, “Fathers’ and Mothers’ Involvement in Their Children’s Schools by Family Type and Resident Status.”

psychological distress, greater sense of social competence, higher levels of self-reported happiness, fewer anxiety symptoms, and lower neuroticism.”³⁷ These children of involved fathers are also better problem solvers, more better suited to handling stress, more playful, and less impulsive.³⁸ A 26 year study about fathers found that they were the most important component when it came to children developing a sense of empathy for others.³⁹ These children of involved fathers are better adjusted socially, and tend to see themselves as more reliable, friendly and trusting, as well as a better ability to complete tasks.⁴⁰

The social benefits of involved fathers lasts a lifetime. Their offspring are more successful as adults and throughout life; they are more tolerant, have closer and more meaningful friendships, they adjust better, academically and socially during college, they have more meaningful relationships, and they are less likely to divorce.⁴¹ These same children have a willingness to try new things, as they are more curious, they have less hesitance and fear, and are more likely to want to explore the world.⁴²

Fathers also play a role in the health of their children, as children without involved fathers are more likely to have asthma and be more accident-prone.⁴³ Other studies show that obese children are more likely to live in father-absent housing, further, the fathers’ BMI (body mass index) is the best predictor of their children’s BMI, and more active toddlers are more likely to have a father with a lower BMI.⁴⁴

Delinquency and anti-social behavior is also most associated with father involvement. The chances of young males “[becoming] involved with criminal activity doubles if he is raised without a father”; “the one human being most capable of curbing antisocial aggression of a boy is his biological father.”⁴⁵ This sentiment has also been echoed in various studies, “father involvement protects children from engaging in delinquent behavior and is associated with less substance abuse among adolescents, less delinquency, less drug use,

³⁷ Sarah Allen and Kerry Daly, “The Effects of Father Involvement: An Updated Research Summary of the Evidence.”

³⁸ Sarah Allen and Kerry Daly, “The Effects of Father Involvement: An Updated Research Summary of the Evidence.”

³⁹ “Building Blocks for Father Involvement” US Department of Health and Human Resources, Accessed March 19th, 2012 http://eclkc.ohs.acf.hhs.gov/hslc/tta-system/family/Family%20and%20Community%20Partnerships/New%20Parental%20Involvement/Fatherhood/building_blocks1.pdf

⁴⁰ Sarah Allen and Kerry Daly, “The Effects of Father Involvement: An Updated Research Summary of the Evidence.”

⁴¹ Sarah Allen and Kerry Daly, “The Effects of Father Involvement: An Updated Research Summary of the Evidence.”

⁴² “Positive Father Involvement” Minnesota Fathers & Families Network, Accessed March 19th, 2012 <http://www.mnfathers.org/documents/InfoSheetBenefits.pdf>

⁴³ Sarah Allen and Kerry Daly, “The Effects of Father Involvement: An Updated Research Summary of the Evidence.”

⁴⁴ Sarah Allen and Kerry Daly, “The Effects of Father Involvement: An Updated Research Summary of the Evidence.”

⁴⁵ “Building Blocks for Father Involvement” US Department of Health and Human Resources.

truancy, and stealing, and less drinking.”⁴⁶ Father involvement is shown to lead to less behavioral problems amongst children, less likelihood of depression, “acting out, sadness, and lying,” as well as protection against bullying and general adjustment problems.⁴⁷ Overall, the involvement of fathers in the lives of children through out all developmental stages is crucial, and discrimination against fathers can hinder a child’s outcome in life, whether it is based upon academic achievement and merit or the child’s psychological health.⁴⁸

Vermont Child Support

In 1985, Vermont established that child support would be calculated based on the “Income Shares Model,” which assumes that both parents contribute to the monetary support of the child and both parents’ incomes will be used in calculating the child support order because of a belief that “parents have the responsibility to provide child support and that child support orders should reflect the true costs of raising children and is to be based on the concept that children should receive the same proportion of parental income as they would if their parents lived together in the same household.”⁴⁹ Child support orders are determined based on each parents’ income, the number of children and the type of custody arrangement (sole, split, or shared custody).⁵⁰

Federal statutes guide the way that child support orders are enforced in the state of Vermont by establishing the proper protocol and timeline for action when a non-custodial parent is delinquent on payments.⁵¹ There are certain enforcement remedies that the state’s Office of Child Support is able to take exclusively; other enforcement remedies require court or administrative action.⁵² The steps taken when a non-custodial parent is delinquent ultimately depend on the case itself. “Determining correct remedies is case-specific. Thus, the facts, coupled with Federal and State mandates, dictate how a IV-D caseworker [IV-D refers to “Title IV-D of the Social Security Act” which is “that portion of the Federal law covering the child support enforcement ⁵³], private attorney, or custodial parent should proceed to enforce the particular support order.”⁵⁴

⁴⁶ Sarah Allen and Kerry Daly, “The Effects of Father Involvement: An Updated Research Summary of the Evidence.”

⁴⁷ Sarah Allen and Kerry Daly, “The Effects of Father Involvement: An Updated Research Summary of the Evidence.”

⁴⁸ Jeffery Rosenberg and Bradford Wilcox, “The Importance of Fathers in the Healthy Development of Children.”

⁴⁹ “Frequently Asked Questions,” *Office of Child Support*. Accessed February 29, 2012.

<http://dcf.vermont.gov/ocs/parents/faqs#FAQ1>

⁵⁰ “Frequently Asked Questions,” <http://dcf.vermont.gov/ocs/parents/faqs#FAQ1>

⁵¹ 45 CFR § 303.6 <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=bddd91f1d0dd96c0b177ec4cfba2004a&rgn=div8&view=text&node=45:2.1.2.1.4.0.1.7&idno=45>

⁵² “Chapter 10: Enforcement of Child Support Obligations,” *Office of Child Support Enforcement*, accessed February 29, 2012, <http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials/c10.html>

⁵³ “Glossary of Child Support Terms,” *Arizona Child Support Enforcement*, accessed March 15, 2012

<https://www.azdes.gov/main.aspx?menu=24&id=2806#i>

⁵⁴ “Chapter 10: Enforcement of Child Support Obligations,”

<http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials/c10.html>

As of February 29, 2012, there are an estimated 19,878 active and arrears only cases receiving full services from the Vermont Office of Child Support.⁵⁵ Active cases are “those cases in which OCS has received an application for IV-D services and for which OCS is currently providing services, meaning services related to parentage, establishment, enforcement, modification, parent location, administrative remedies, etc. OCS does not provide services to every family in the State of Vermont that has an order for child support.”⁵⁶ Arrears only cases are defined as “cases in which there is no longer an active support order; however, the obligor still owes support that was not paid during the time there was an active order.”⁵⁷ Of these active and arrears only cases, approximately 90.2% of the non-custodial parents are male and approximately 9.8% of the non-custodial parents are female.⁵⁸ “A review of the cases OCS is currently seeking enforcement on indicates that 87.9% of the cases have a male non-custodial parent and 12.01% of the cases have a female non-custodial parent.”⁵⁹ From these statistics, the Child Support Administrator at the Burlington office of the Vermont Office of Child Support concluded that there is not a distinction between the way delinquent non-custodial mothers and delinquent non-custodial fathers are treated. This is partly due to the aforementioned federal guidelines that establish the proper timeline and treatment of delinquent non-custodial parents. Furthermore, “cases receiving OCS services are entered into the OCS database, which automatically moves cases into the appropriate track based upon the federal requirements...The OCS database automatically reviews all obligated cases at the end of each month.”⁶⁰ Discrimination against non-custodial fathers does not appear to be occurring.

Survey of Lawyers Practicing Family Law in Vermont

In order to test whether discrimination against fathers does occur in the Vermont family courts, we conducted a short survey of divorce and family lawyers. We wanted to determine whether there was any evidence to support a perception that a bias against fathers existed.

⁵⁵ Amy Carlson, Child Support Administrator, Office of Child Support, Department for Children and Families, Agency of Human Services, State of Vermont, letter sent in response to a VLRS inquiry, dated February 29, 2012.

⁵⁶ Amy Carlson, Child Support Administrator, Office of Child Support, Department for Children and Families, Agency of Human Services, State of Vermont, email message sent to authors, dated March 21, 2012.

⁵⁷ Amy Carlson, Child Support Administrator, Office of Child Support, Department for Children and Families, Agency of Human Services, State of Vermont, email message sent to authors, dated March 21, 2012.

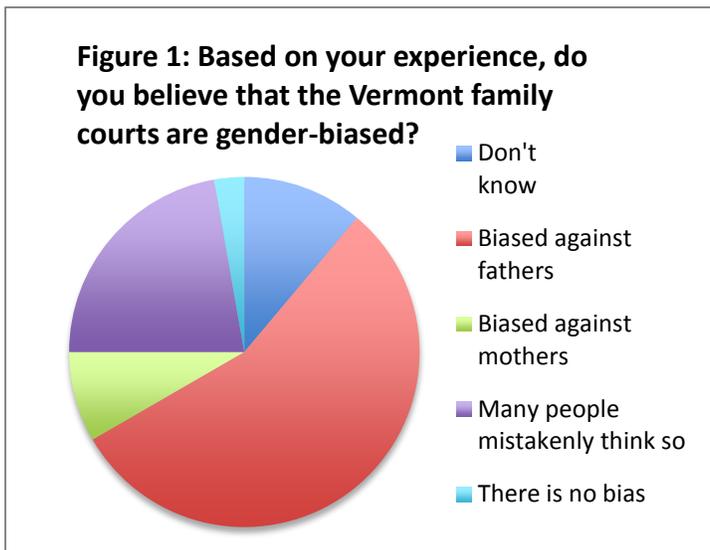
⁵⁸ Amy Carlson, Child Support Administrator, Office of Child Support, Department for Children and Families, Agency of Human Services, State of Vermont, letter sent in response to a VLRS inquiry, dated February 29, 2012.

⁵⁹ Amy Carlson, Child Support Administrator, Office of Child Support, Department for Children and Families, Agency of Human Services, State of Vermont, letter sent in response to a VLRS inquiry, dated February 29, 2012.

⁶⁰ Amy Carlson, Child Support Administrator, Office of Child Support, Department for Children and Families, Agency of Human Services, State of Vermont, letter sent in response to a VLRS inquiry, dated February 29, 2012.

We chose to survey Vermont family and divorce lawyers because they are likely to be aware of the perception or existence of bias in the courts, to have formed any opinions upon experience with multiple judges working in several counties and upon a large number of cases, and finally, they are a relatively easy population to identify and contact.

The survey was conducted online using a Google Document Form and was initially distributed to 42 randomly selected Vermont lawyers via e-mail and received 12 responses. After an email discussing our survey appeared on the Family Law Attorney list serve, a former VLRS researcher contacted Professor Gierzynski about our report and survey. The survey was then forwarded to the entire list serve. We received a total of 38 responses. Note that this is a self-selected sample so one should be cautious in generalizing the results. A copy of the survey has been included at the end of this report.



Results

The survey received responses from lawyers who had experience in all counties in Vermont. The counties the respondent had practiced in had no effect on whether they believe the Vermont family courts are gender-biased.⁶¹ Twelve respondents were male, twenty were female and four declined to state their gender; the respondents' gender was independent from their opinion about gender bias in the courts.⁶² The respondents' had an average of fifteen years of experience. Lawyers who had been practicing in Vermont for less than ten years were more likely to perceive bias against men in the courts than respondents who had been practicing for longer amounts of time.⁶³

When asked, "Based on your experience, do you believe that the Vermont family courts are gender-biased?" 56% of respondents indicated that the courts are biased against fathers, and 22% reported that while the courts are not biased, they are widely and incorrectly perceived as being gender-biased (see Figure 1).

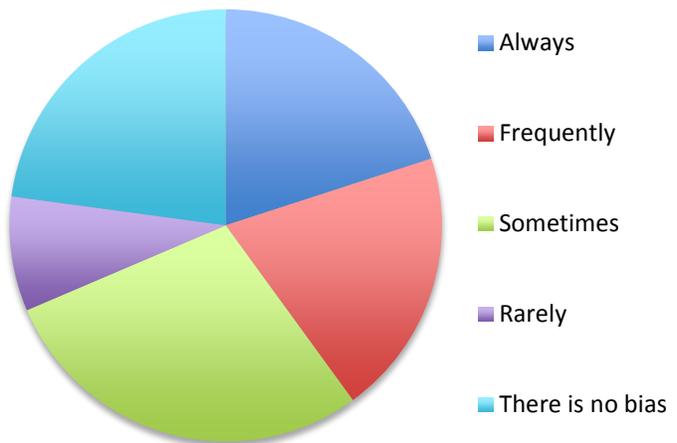
⁶¹ Chi-square = 39.488 with degrees of freedom = 52 and p-value = 0.8988

⁶² Chi-square = 11.16 with degrees of freedom = 8 and a p-value = 0.1928

⁶³ Broken up into 3 groups (less than 10 years, between 11 and 20 years, and 21 or greater) chi-square value = 13.915 with degrees of freedom = 8 and a p-value of 0.0840

Recognizing that a lawyer’s perception of bias could influence the outcome of child custody disputes independently from the courts, respondents were asked, “If you answered that you believe there is bias in the above question, do you make your clients aware of this bias in the courts when helping them decide what sort of parental rights to fight for in divorce proceedings?” Responses were nearly uniform across the range from “Always” (20%) to “Frequently” (20%) to “Sometimes” (28.6%) with 22.9% responding that they had not answered yes to the above question. Only 8.6% responded that they “Rarely” shared their own perception of bias in the courts with their clients (See Figure 2).

Figure 2: If you believe there is bias in the courts, do you make your clients aware of this when helping them decide what sort of parental rights to fight for in divorce proceedings?



Given a scenario in which each parent wanted sole custody of children after a divorce, 2 respondents expected the judge to rule in favor of the father, 13 had no expectation and 19 would expect the judge to give sole custody to the mother.⁶⁴ Of the 17 respondents who had ever counseled a client not to contest custody arrangements because they feared the client’s gender would be a disadvantage, 14 responded that the client was male and of those, 9 “always” or “frequently” make their clients aware of that bias when helping them decide what sort of parental rights to fight for in divorce proceedings.

Of the thirty-eight responses we received, twenty-five lawyers left comments in our additional comments section. Many of the comments discussed similar issues with regards to the family courts. To see all of the comments click [here](#).

The most frequent comment stated that the importance placed on the “primary caregiver” in the Vermont State Statutes has the effect of discriminating against the working parent. Fourteen respondents addressed this issue in their comments and were concerned that this emphasis placed on the importance of the primary caregiver placed working fathers at a disadvantage since mothers tend to be the primary caregiver, especially when the children are very young.

Five respondents commented that the courts are biased against mothers. They noted that there is a double standard for mothers who are perceived as “bad parents” or have misbehaved in the past and that mothers are judged by higher standards than fathers when

⁶⁴ We mistakenly included a response option in the question for granting joint custody. Since only two respondents selected this option, we do not think that this mistake affected the results of the survey.

they misbehave. These arguments were summarized in the following comment. "...there is a double standard. Women's behaviors are judged more severely than men's. A man's violence will be called 'situational' and a woman's pathological. A man's failure to support will be overlooked, a woman's failure to provide care is a character flaw."⁶⁵ Similarly another lawyer wrote in her comments that a mother is far more likely to have her custody or visitation rights taken away for perceived bad behavior than are men. There is a concern that the courts, because of the notion that there is a de facto bias against fathers, are more inclined to be lenient with an inappropriate father in the hopes that he will become a better father given the chance.

Four respondents argued in their comments that the child support system is flawed and this impacts the child custody arrangement. They claim that child support acts as a financial incentive for the parent who earns less money to desire sole custody rather than joint custody in order to receive child support. If the parents were to have a joint custody arrangement, the parent who earns less money would receive significantly less money than if he or she had sole custody of the child(ren). Of the four lawyers who discussed this issue, three argued that it is frequently mothers who either did not work, worked part-time, or had lower-paying jobs that would then be incentivized by the child support system to seek sole custody.

Four survey respondents mentioned that the bias in the court system reflects the bias in our greater society. Mothers are seen as the more capable and biologically suited caregiver, and are therefore more likely to receive sole custody of a child; fathers are seen as better suited to earn money and support the mother and child. Two of those four mentioned that this bias was typically a thing of the past or only seen in older judges who tend to have more traditional views on the gender roles. The other two respondents wrote that this bias is still fairly well embedded in our culture and does affect the way both lawyers and judges think about custody cases. The Honorable Judge Amy Davenport voiced a similar opinion about the role of societal norms in influencing court adjudication; "Courts are a reflection of those norms but they don't create the norms. There is no question that societal norms with respect to raising children are changing and I believe that an historical review of final orders in divorce cases over a period of the last two decades, whether stipulated to or not, would verify this both with respect to decision making responsibility (parental rights and responsibilities) and with respect to the allocation of time between parents (parent child contact)."⁶⁶

Two attorneys wrote that bias depends on the judge, and in matters of child custody adjudication judges have a wide and unchecked discretion in ruling. One lawyer wrote, "The real issue here is that judges have a tremendous amount of discretion (it's rare that the Vermont Supreme Court overturns or remands a child custody decision—hence the wide discretion is rarely checked) and therefore, there is little-to-no-consistency from

⁶⁵ Anonymous, response to VLRS survey, (March 16, 2012).

⁶⁶ Honorable Judge Amy Marie Davenport, Chief Administrative Judge for the Vermont Courts, email message to authors, March 15, 2012.

judge-to-judge or from county-to-county.”⁶⁷ However, this same attorney also wrote that legislators must “tread lightly” when writing statutes on child custody adjudication.

Two respondents wrote that a presumption of joint custody would inhibit any de facto gender bias from occurring. Their comments also mentioned concern about the emphasis placed on the role of the primary caregiver penalizing the working parent.

Conclusion

Designing statutes to guide child custody and support adjudication is about striking a happy medium. Every case is complex with its own specific set of facts that must be considered when determining what is in the best interest of the child.⁶⁸ When states get it wrong the effects on children can be heart wrenching. Our research found a great deal of division among lawyers on the issue of gender discrimination in the Vermont Family Court system.

Assessing whether there is a bias against fathers in child custody adjudication is incredibly difficult because the Department of Health changed the Vermont Record of Divorce or Annulment form in 2006 so that it no longer inquires about the resulting custody of a child after a divorce or annulment.⁶⁹ If that information were to be collected again the state would have the data available to analyze trends in court decisions in order to test for discrimination in the family courts.

“...From the perspective of the child, what is most important, assuming two parents with reasonably comparable parenting skills, is the opportunity to spend sufficient time with each parent so that the child can develop a relationship with each of them.”⁷⁰ Legislators should be cautious with designing child custody statutes and make sure that their focus is on what is best for the child, not for the parents, although fully understanding the relationship between the wording of statutes and outcomes for children is tough in its own right.

This report was completed on April 3, 2012, by Stephen-George O. Davis II, Lydia Lulkin and Josephine Miller under the supervision of graduate student Kate Fournier and Professor Anthony Gierzynski in response to a request from Senator Dick McCormack.

Contact: Professor Anthony Gierzynski, 513 Old Mill, The University of Vermont, Burlington, VT 05405, phone 802-656-7973, email agierzyn@uvm.edu.

⁶⁷ Anonymous, response to VLRS survey, (February 17,2012).

⁶⁸ 15 V.S.A. § 665

<http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=15&Chapter=011&Section=00665>

⁶⁹ Cynthia Hooley, Vital Statistics Information Manager, Vermont Department of Health email message to authors, January 30, 2012.

⁷⁰ Honorable Judge Amy Marie Davenport, Chief Administrative Judge for the Vermont Courts, email message to authors, March 15, 2012.

Disclaimer: This report has been compiled by undergraduate students at the University of Vermont under the supervision of Professor Anthony Gierzynski. The material contained in the report does not reflect the official policy of the University of Vermont.

Appendix A			
Vermont Legislative Research Service Survey – 2/17/2012⁷¹			
<p>My name is Josephine Miller and I am a student researcher with the Vermont Legislative Research Service (VLRS) of the James M. Jeffords Center at the University of Vermont. The VLRS conducts nonpartisan policy research at the request of state legislators. Currently, at the request of a State Senator my research team is examining a perceived bias in the Vermont family courts. Because no current data exists on this issue for the state of Vermont, we are conducting a survey of Vermont family and divorce attorneys. Once we have the information we need, we will compile it into a report for a member of the Vermont legislature. By assisting us you will be contributing to an informed legislative debate over the issue. We hope that you will take a few minutes to provide honest answers (feel free to skip any question that you do not feel you can answer or to provide an explanation of your answers in the box at the bottom). We are very grateful for your help and we hope you have a very nice day.</p>			
Which counties have you worked in as a family or divorce lawyer? Check all that apply.			
<input type="checkbox"/> Addison	<input type="checkbox"/> Essex	<input type="checkbox"/> Orange	<input type="checkbox"/> Washington
<input type="checkbox"/> Bennington	<input type="checkbox"/> Franklin	<input type="checkbox"/> Orleans	<input type="checkbox"/> Windham
<input type="checkbox"/> Caledonia	<input type="checkbox"/> Grand Isle	<input type="checkbox"/> Rutland	<input type="checkbox"/> Windsor
<input type="checkbox"/> Chittenden	<input type="checkbox"/> Lamoille		
How long have you been practicing family or divorce law? Enter approx. number of years.			_____ yrs.
Which best describes your gender?		<input type="checkbox"/> Male <input type="checkbox"/> Female <input type="checkbox"/> Other <input type="checkbox"/> Decline to state	
All things being equal between a mother and a father who each want sole custody of their child(ren) after a divorce, how would you expect the judge to rule?			
<input type="checkbox"/> In favor of the mother <input type="checkbox"/> In favor of the father <input type="checkbox"/> In favor of joint custody <input type="checkbox"/> No expectation			
Has your client's gender ever proven to be a disadvantage in a family court proceeding?			
<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> No opinion			
Have you ever counseled a client not to contest custody arrangements because you feared their gender would be a disadvantage?			
<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Not sure			
If you answered "Yes" to the previous question, was your client:			
<input type="checkbox"/> Male <input type="checkbox"/> Female <input type="checkbox"/> Has occurred with both male and female clients <input type="checkbox"/> I answered "No"			
Based on your experience, do you believe that the Vermont family courts are gender-biased?			
<input type="checkbox"/> Yes, against mothers		<input type="checkbox"/> There is no bias	
<input type="checkbox"/> Yes, against fathers		<input type="checkbox"/> Don't know	
<input type="checkbox"/> No, although many people mistakenly think so			
If you answered that you believe there is bias in the above question, do you make your clients aware of this bias in the courts when helping them decide what sort of parental rights to fight for in divorce proceedings?			
<input type="checkbox"/> Always		<input type="checkbox"/> Sometimes	
<input type="checkbox"/> Frequently		<input type="checkbox"/> Rarely	
		<input type="checkbox"/> Never	
		<input type="checkbox"/> There is no bias	
Do you have any additional comments regarding potential gender bias in the family courts in Vermont?			

⁷¹ This survey was sent to the survey subjects as an on-line form created through Google Documents. <https://docs.google.com/spreadsheets/viewform?formkey=dE8xbmtDakI0MUx0R2lraE9FNmt6b1E6MQ>