

Child Custody Cases in Vermont: What Is the Best Interest of the Child?

The standard for making child custody awards in Vermont Courts is “the best interests of the child.”¹ The same standard is used in the courts of most other states, but custody awards in other states often differ significantly from those in Vermont.² What is deemed to be in the best interests of the child in Vermont differs from what it is in most other states. A purpose of this article is to examine Vermont custody laws and recommend changes.

How Child Custody Is Determined in Vermont Courts³

Child custody has two components, physical and legal.⁴ In Vermont, physical custody almost always determines which parent the child lives with most of the time.⁵ Legal custody determines which parent has decision-making authority over almost every aspect of the child’s life, including education, health, religion, and after-school activities. Vermont is among only a few states that give either parent in a child custody proceeding the right to veto joint (meaning shared) custody, physical and legal.⁶ Unless both parents consent, family court (the trial court) judges in Vermont are deprived of the option of crafting a custodial plan that includes joint custody in any form. This is so even when, in the judgment of the trial court, some form of joint custody may be in the best interests of the child.⁷ Under 15 V.S.A. §665, joint custody of any kind is never in the best interests of the child unless both parents consent. This law has a significant impact upon the entire process of child custody and visitation awards, as will be evident from the discussion that follows.

Very early in divorce proceedings, custody and visitation decisions are made that often become permanent and have profound, long-term effects on the lives of the parties and their children.⁸ Unfortunately anger and bitterness are norms in divorce cases. Marriages are failing and families are being broken apart. The emotional strain is so great on divorcing parties, men and women, that it is reasonable to describe them as temporarily unstable.

It is not surprising that many mothers, suffering the acrimony and disorienting effects associated with the breakup of their marriages and the harsh realities of their divorce proceedings, veto joint custody.

Once joint custody is vetoed, an award of physical and legal custody is made to one parent in the best interests of the child, pursuant to 15 V.S.A. §665 and *Cabot v. Cabot*.⁹ In order to determine the best interests of the child regarding custody and visitation, the trial court considers the evidence in light of a list of factors.¹⁰

Custody is given to the one parent who is found to be the “primary care provider,” unless that parent is unfit.¹¹ Although the trial court is not supposed to have a preference based on the sex of the child or parent,¹² once joint custody is vetoed, as a matter of law sole custody awards are to the primary care providers during the marriage and those are almost always assumed to be the mothers.¹³ As physical custody refers to the parent with whom the child spends most of the time, the visitation time of the non-custodial parent is never more and usually far less than the child’s time with the custodial parent. Visitation on alternating weekends and a night or two in between is typical.¹⁴ The process by which joint custody is vetoed by one parent thus has the practical effect of terminating fundamental parenting rights of most non-custodial parents, including decision-making and the ability to see one’s child or children except at scheduled visitations.

If either party is dissatisfied with the determination of the family court and believes the court has made an error or errors of fact or law, he or she may appeal directly to the Vermont Supreme Court. The Supreme Court is supposed to defer to the decision of the trial court that heard the evidence first hand, and is not supposed to set aside the findings of the trial court unless they are clearly erroneous.¹⁵ The Supreme Court may reverse the determination of the trial court if it is not supported by the evidence.¹⁶ As will be discussed later, some decisions of the Supreme

Court have been criticized by dissenting justices of that Court for usurpation of the functions of the trial courts in making child custody awards.

An examination of the landmark decision of the Vermont Supreme Court in *Cabot*¹⁷ shows how these concepts work in practice. The relevant provision of the Vermont statute that permits unilateral veto of joint custody in any form was addressed in *Cabot* and provides in part:

... the court may order parental rights and responsibilities to be divided or shared between the parents on such terms and conditions as serve the best interests of the child. *When the parents cannot agree to divide or share parental rights and responsibilities, the court shall award parental rights and responsibilities primarily or solely to one parent.*¹⁸

Cabot holds that under section 665 each parent has veto power over any form of joint custody, physical and legal.¹⁹

In the *Cabot* case, divorcing parents Ellen and Tom fought over custody of their daughter who was nine years-old when the case reached the Supreme Court. Ellen vetoed joint custody in any form. The family court determined that both parents were devoted to and capable of caring for their child and both had been active in the child’s life. Tom had attempted to maximize his time with his daughter since the divorce. The court found that *Ellen had engaged in an ongoing, deliberate effort to sever Tom’s relationship with his daughter and turn her against him.* Despite this finding, the court awarded Ellen sole physical custody, but awarded legal custody jointly to them. It reasoned that Ellen was the primary care provider and therefore she should retain sole physical custody, but the damage caused by Ellen’s attempt to remove the child from Tom’s life was dealt with, in the best interest of the child, by his continuing, meaningful involvement in his daughter’s life that joint legal custody would encourage.²⁰

Both parents appealed to the Vermont Supreme Court. Tom argued

that the findings of the family court, which acknowledged Ellen's attempts to interfere with his relationship with his daughter, supported an award of sole physical custody to him.²¹ Ellen argued that joint legal custody violated section 665(a) of the Domestic Relations Law because she had objected to it. The Supreme Court found that on balance, Ellen's rights as primary care provider outweighed both Tom's rights and her interference with his relationship with their daughter. It confirmed the award to her of sole physical custody "in the best interests of the child." In addition, *the Supreme Court overturned the lower court's award of joint legal custody based on section 665, and sent the case back for a different determination of legal custody.* It found that joint legal custody violated the statute even though the trial court, by awarding joint legal custody, was seeking to provide a remedy for Ellen's unwillingness to foster Tom's relationship with his daughter.²²

There was a strong dissenting opinion in *Cabot*. One judge found that the plain language of the statute *permitted* an award of joint *legal* custody in this case.²³ He reasoned that the majority opinion encouraged the primary care provider's objectionable conduct and thereby undermined the best interests of the child, which would be served by maximizing the physical and emotional ties with both parents. He took note of a national trend that is critical of any *presumption* against joint custody and recognizes the trauma caused by sole custody awards in which the non-custodial parent loses the right to remain an integral part of the child's life, thus exacerbating the child feelings of abandonment.²⁴

The Supreme Court's majority opinion in *Cabot* remains the law of Vermont.

How Custody Is Determined in the Courts of Other States

It is not within the scope of this article to include a comprehensive review of the custody and visitation laws of every state, but a cursory review may be helpful to lend perspective to Vermont's approach to best interests of the child.²⁵ The statutes in approximately four out of every five states provide their courts with the authority to fashion custody awards that include joint custody and maximize time with a non-custodial parent. Many of these states have statutory presumptions in favor of joint custody.

The custody laws of states that border Vermont are typical of the custody laws in the majority of states. In New Hampshire, joint legal custody is *presumed* to be in the best interests of the child except in case of child abuse. In Massachusetts, each parent is *required* to submit a shared custody implementation plan, and the court may modify, grant, or reject the plan. In New York, joint or sole custody is determined in the discretion of the court according to the best interests of the child.

State custody laws vary from state to state, but a significant majority of states require or encourage parental participation in crafting a custody plan, leave all options open to the court to fashion the best plan in each case, and encourage on-going, active participation of both parents in raising their children. A few examples illustrate the extent to which Vermont custody law and practice differ from those of most other states.

In Alabama, courts may award joint custody whereby the parenting rights of both parents remain intact, with one as a primary custodian and the other as a secondary custodian. Both parents remain involved in the decision-making responsibilities with allocation of final authority for different issues such as education, health, religion, cultural activities, and athletic involvement. In California, the court is free to award joint custody, sole custody, or a combination, in the best interests of the child. In Florida, the court *must* order that parenting be shared by both parents unless there is a strong showing that this would be detrimental to the child. The court may even order *rotating* custody. In Iowa and Michigan, if either parent requests joint custody, there is a presumption in favor of it. If the court rejects joint custody, it must clearly state its reasons. In Connecticut, the court is empowered to award joint legal custody.

Fewer than twenty percent of states have laws that discourage joint custody and only a few of these have laws similar to Vermont's that allow one parent to preclude the court from considering joint custody.²⁶

The Social Policy Behind Child Custody Laws in Vermont and Other States

A book entitled *Beyond the Best Interests of the Child*²⁷ was published six years before the Vermont statute providing for unilateral parent veto of joint custody was adopted, and was influential for a number of years.

The thesis of that book is that there can only be one "care provider" or "psychological" or "nurturing" parent; the best interests of the child are served if that parent is awarded sole custody, physical and legal; and this is especially so if there is conflict between parents (as is routine in divorce proceedings). The Vermont statute and common law implement these same principles.

There is a substantial body of more recent scholarship that vigorously challenges this approach to custody and argues that such laws are anachronistic.²⁸ The principles of this scholarship are that, when parents divorce, from the perspective of the child the greatest tragedy is the loss of meaningful contact with one parent, usually the father. Traditional visiting patterns result in dissatisfaction and frustration for the child. As fathers generally interact with their children differently than mothers, they provide unique, healthy stimulation and activity. Research shows that two nurturing parents who are actively involved in a child's life are essential to maximize child development and should be encouraged. The involvement of responsive and responsible fathers enhances child development including cognitive and intellectual development, mental and physical health, self-esteem, problem-solving, and resiliency. This directly contradicts the concept in Vermont law that there is and can be only one primary care giver. Child psychologists today agree almost unanimously that children in shared-parent-time arrangements are better adjusted.

These studies also show that parental conflict *decreases* as fathers have more time with their children, and a more balanced sharing of physical custody *reduces* conflict between divorced parents. Taking away parental rights from one parent and giving them to the other engenders permanent anger and hostility, whereas with the passing of time and a more balanced arrangement, the parties tend to work together in the interests of the child. Visitation arrangements that provide adequate amounts of time for non-custodial parents to maintain close and *authoritative* relations with their children are a reasonable policy goal. "Authoritative relations" is a reference to joint or allocated legal custody. A solution recommended in this literature and consistent with the no-fault nature of most divorce law is a rebuttable presumption in favor of joint custody of some kind.

What is Being Advocated

Each custody and visitation case has its own unique facts and circumstances. Factors courts may consider include, but are not limited to, the age of the child, the wishes of the child (when old enough to be relied upon), interest, involvement and parenting skills of each parent, and employment situations.²⁹ The issue in awarding custody and visitation is the best interests of the child, not gender conflict. What is being advocated are domestic relations laws (statutory and common) that (1) encourage the active participation of two loving parents in the life of the child, (2) provide the courts with the freedom to fashion awards that encourage the continued participation of both parents, and (3) require the active participation of both parents in the process of fashioning that award.

Vermont domestic relations law discourages this process in several ways. It allows one parent to veto any form of joint custody.³⁰ It presumes there is and can be only one childcare provider. It grants to that one childcare provider virtually plenary decision-making authority, including the right to relocate far from the other parent. It views visitation as subordinate to the custodial right to physical possession.³¹ There is too much contrary evidence in the social sciences for Vermont courts to continue to claim that its statutory and common law of child custody is in the best interest of the child.³²

Vermont Custody Cases

Vermont child custody law has been described, but only the *Cabot* case has been examined. An examination of additional child custody cases follows. These cases are not aberrations; they are routinely cited as precedent.³³ The proposed legislative remedies presented at the end of this article are intended to address the problems these cases illustrate.

In *Nickerson v. Nickerson*,³⁴ the husband and wife voluntarily separated and she moved in with her lover.³⁵ The divorcing couple had a five month-old son and a seven year-old daughter. Pursuant to *written agreement voluntarily entered into between them*, the mother assumed sole custody of the son and the father assumed sole custody of the daughter. That custodial arrangement continued until shortly before trial, when the mother changed her mind and demanded custody of the

daughter for the first time. At the trial the father's expert witness testified that he found a "mutual bond" between father and daughter and the father was a real "psychological parent." After a full evidentiary hearing the trial court awarded the father sole custody of the daughter upon finding that he had cared for and bonded with the daughter, and had given the mother ample visitation.³⁶

The Supreme Court reversed the award of custody to the father and remanded the matter to the trial court, reasoning that the manner in which the trial court had determined the father was the primary care provider was inadequate.³⁷ The Court said that merely because the father had sole physical custody the last two years should not cause the mother, whom the Supreme Court saw as the primary care provider during the marriage, to lose custody. Her written agreement giving custody of their daughter to the father was apparently ignored.³⁸

There was a vigorous dissenting opinion by one Supreme Court justice who was joined by a second justice. Much of the dissent focuses on the issue of usurpation by the Supreme Court of the fact-finding role of the trial court, but it also has much to say about *presumptions* favoring mothers.³⁹ The dissenting opinion states in part:

The real holding of this case is that a parent who leaves the home without notice and without continuing to be the primary-care provider is as a matter of law, entitled to primary-care provider status in the custody analysis. I think this opinion is rigid and inappropriate ... Any rule that allows a child, having been left in the custody of one parent, to be reclaimed at will by the other parent despite the bonding that has occurred and the psychological damage to the child is a *bad rule*.⁴⁰

What the majority is saying is that, unless the mother is unfit, as the primary care provider *during the marriage* she must be awarded custody. The father in that case had in fact been the primary care provider for the two years after the parents separated and the trial court that heard all the evidence, including expert testimony, ruled that it was in the best interests of the child that the father maintains custody.⁴¹

In *Heffernan v. Harbeson*,⁴² the parties were not married and the action for custody was brought under the

Parentage Proceeding Act ("PPA"), which does not contain the veto of *shared custody language in section 665*.⁴³ The mother objected to sharing custody. Both parents were found to be "deeply involved in the child's upbringing, each dedicating countless hours to raising the child."⁴⁴ Citing *Cabot* and years of precedent utilizing the best interests of the child standard, the Supreme Court incorporated the veto language of section 665 into the PPA and awarded sole custody to the mother.⁴⁵ It also ordered that the visitation time initially granted to the father by the trial court be significantly reduced because of a "patent imbalance in the contact of each parent ..."⁴⁶ The Court reasoned that permitting the non-custodial parent equal time is really a form of joint custody, which is prohibited by section 665. *Heffernan* stands for the proposition that even when the Supreme Court of Vermont refers to "substantial" or "liberal" visitation, it still means unequal time.

A 50/50 visitation arrangement would be blessed by the courts if the parents stipulated to it, indicating there is no inherent, legal or psychological impediment to the concept. Why then should equal visitation for the non-custodial parent not at least be an *option* in contested custody cases, subject of course to logistical arrangements in each case in the best interests of the child?

The next few cases consider what the courts do when the custodial parent engages in a course of conduct to interfere with the relationship between the non-custodial parent and the child or children. These cases illustrate that even when the custodial parent is guilty of blatant attempts to alienate the child from the non-custodial parent, the Vermont Supreme Court endeavors to preserve those exclusive custodial rights.

In *Renaud v. Renaud*,⁴⁷ the father admitted to an affair⁴⁸ and requested a divorce.⁴⁹ At the time of the trial their three year-old son was living with the mother. The trial court found that both parents provided the child with love, discipline, structure, and guidance, and either would be fit to serve as the custodial parent.⁵⁰

Almost immediately after the father voluntarily moved out, the mother began to impede the father's contact with the child. In papers repeatedly submitted to the Court, she accused him of physical and sexual abuse of the child. These allegations went on for some

time, resulting in numerous motions and cross-motions, which caused interruption in the father's visitation and his loss of contact with his child. *All of these allegations were found to be totally false and were dismissed.*⁵¹ A court-appointed team of psychiatric experts observed both parents with the child. The team concluded that the mother was damaging the child's relationship with the father and if it continued, the damage could be irreparable.⁵²

Although the trial court and the Supreme Court paid lip service to the principle that *such conduct was so inimical to the child's welfare as to be grounds for denying the offending party custody*,⁵³ they nevertheless agreed upon an award of exclusive physical and legal custody to the mother.⁵⁴ The trial court concluded that as the mother had sought counseling for her emotional problems, she would within a reasonable time be able to help repair the damage. The Supreme Court said that although the mother's repeated allegations were totally false, her actions were transitory and not likely to be repeated.⁵⁵

Renaud is troubling because the opinion clearly indicates that the mother's judgment was impaired and father's was not.⁵⁶ Even if the two courts were reluctant to take physical custody away from the emotionally disturbed mother, why did they decline to allocate legal custody in order both to relieve the damage done by the mother and protect the child against her instability? Apparently even in this extreme situation, allocation of legal custody, which is permitted under section 665, was not seriously considered.⁵⁷

In *Spaulding v. Butler*,⁵⁸ the mother and father both were guilty of poor parenting and judgment, and Supreme Court was faced with a Hobson's choice in that there was no good option for awarding custody.⁵⁹ The trial court had taken custody of the young son, Nathan, away from the mother "in the best interests of the child."⁶⁰ Although there was some uncertainty about the truth of the allegations and cross-allegations of the parties, the trial court found, among other things, that the mother was overwhelmed by the demands of caring for a second, developmentally challenged child from another father. She neglected Nathan to the point of his needing hospital treatment for rashes. While under her care he fell out a second story window of her apartment, after which his mother did not even take him to the hospital or doctor to be checked.

The father had been the primary care provider for two years while the proceedings dragged on. During that time Nathan became so alienated from his mother that he resisted visitation with her.⁶¹

The trial court and the Supreme Court agreed (and the record substantiated) that the father had helped cause the alienation of Nathan from his mother and had made repeated and often false charges to social service agencies against her, but the trial court gave him custody. The Supreme Court remanded the case, indicating its strong preference for the trial court to award custody to the mother, over the objection of a dissent which charged the majority with usurping the functions of the trial court.⁶²

These cases illustrate the adherence of the Vermont courts to the concept that there is only one childcare provider during a marriage to whom sole custody must be awarded and maintained, in spite of subsequent events that contradict the wisdom of that award.

The Vermont law on the issue of the custodial parent's right to relocate differs from the law of most states. In most states the best interests of the child require the custodial parent to provide persuasive justification for moving. In Vermont the custodial parent is often permitted to relocate without a showing of justification.

In *Lane v. Schenck, Jr.*,⁶³ the Supreme Court reversed the ruling of the trial court that had made the mother's continued custody conditional on her move not exceeding four hundred miles.⁶⁴ The trial court had concluded that the needs of the children could not be met with the mother attending law school in another state and in the absence of the father.⁶⁵ The Supreme Court gave the mother the unfettered right to move with their three minor children to Iowa to attend law school. The decision notes the difference between Vermont law and laws in many other states that require justification for relocating far from the non-custodial parent.

Father cites a number of cases in support of his argument that the trial court properly intervened in conditioning mother's continued custody upon her agreement to stay relatively close to Cabot, Vermont. Many of these cases, however, involve statutes unlike Vermont's, see, e.g. *In re Marriage of Kutinac*, 182 Ill.App.3d 377, 382, 131 Ill.Dec. 487, 538 N.E. 2d 862,865 (1989) (statute placing

burden to show good cause for removal on party seeking to relocate); *Dick v. Dick*, 147 Mich. App. 513, 516, 383 N.W.2d 240, 242 (1985) (anti-removal statute) ... Vermont has no such statute requiring the custodian to make an affirmative showing of cause to justify removal and no statute discouraging relocation.⁶⁶

In *Price v. Price*,⁶⁷ the trial court had taken temporary custody away from the mother based in part on her repeated, intentional interference with visitation by the father, including leaving Vermont to frustrate his visitation. The trial court's award of custody to the father was based on some *forty findings of fact* to support it.⁶⁸ The Supreme Court nevertheless reversed, reasoning that the situation could be ameliorated.⁶⁹

It would be surprising to find a court that would reason that depriving a fit and capable non-custodial parent of an active relationship with the child can be in the best interests of the child if the custodial parent makes a decision to move without even giving a compelling reason, yet that is precisely what the Supreme Court did in *McCart v. McCart*.⁷⁰ In that case the mother wanted to move to New Mexico from her home seven miles from the father's home in Vermont. The trial court prohibited the move.⁷¹ The Supreme Court overruled the trial court and allowed the move, reasoning that:

However much we may sympathize with the court's desire to maintain the family unit, it could *not* substitute its judgment for that of the custodial parent." See *id.* at 499, 614 A.2d at 791 ("While the policy promoting visitation must be considered, concerns relating to it must *not* overshadow the proper role of the custodial parent.').⁷²

And again, in *Wells v. Wells*,⁷³ the trial court found that the mother's move to Seattle was for the express purpose of depriving the father of his court-ordered visitation rights, and denied her the right to move.⁷⁴ The Supreme Court reversed and sent the case back for rehearing to determine whether the move was in the child's best interest.⁷⁵

Non-Custodial Parents and Family Court Practice

What parental rights are left to a capable, willing parent in Vermont *after* he or she has been designated the non-

custodial parent? The family courts are bound by the statutory law of the legislature and the common law of the Supreme Court that favor the custodial parent. As demonstrated by the cases discussed, the presumption is either that the custodial parent knows best or possesses the legal authority to act unilaterally. As that is the presumption in a matter as critical as relocation, it follows that this reasoning often extends to routine petitions by non-custodial parents in the family court.⁷⁶

Parties appear before the family court in divorce and post-divorce contested proceedings because they are in disagreement about some issue or issues. It is understandable that family court judges (and Supreme Court justices as well) see this conflict in the courtroom as evidence of an inability of the parties to work out their differences. Based on the concept that contact between parents who appear to be in conflict should be minimized, courts often err in favor of reducing contact.⁷⁷ Family law practice is contentious and can be unpleasant, and family court judges burn out more quickly than in any other area of the law. Moreover, the principle of keeping parents in conflict apart, as formalized in section 665 and *Cabot*, permeates the domestic relations legal system in Vermont.

It does not necessarily follow, however, that these parents are incapable of getting along *outside* the courtroom at that time or in the future. As the research shows, this assumption only *encourages* tension between parents outside the courtroom and can result in reduced contact between the non-custodial parent (usually the father) and child or children. Indeed, the research concludes that if state law encourages two active parents and each party is required to respect the rights of the other, the destructive consequences of empowering the custodial parent at the expense of the non-custodial parent would be avoided in most cases.

The Constitutional Rights of Non-Custodial Parents to Due Process and Equal Protection Under the Fourteenth Amendment⁷⁸

The most direct way to change Vermont child custody policies, precedents, and practices is through the legislative process. This article ends with specific recommendations for legislative remedies. There may also be a basis for challenge in the federal courts.

The Supreme Court of Vermont generally has the final word in Vermont domestic relations cases on matters of custody and visitation.⁷⁹ An exception would arise, however, if parental rights under the Constitution of the United States are being violated by Vermont courts. The law of Vermont as stated in *Cabot* permits a one-parent veto of the other parent's right to joint custody, without finding of fault. This has a disparate impact on fathers because of a presumption-in-practice that there is only one childcare provider during a marriage (almost always the mother) and, therefore, the mother should most often be awarded sole custody. This raises serious issues about violation of constitutionally protected Fourteenth Amendment rights of non-custodial parents.⁸⁰

Legislative Remedies

It should be the legislative policy of Vermont to encourage two nurturing parents in families that have experienced divorce. The recommendations that follow are for changes and additions to Vermont statutory law to foster this policy. As child custody and visitation laws of other states demonstrate, these recommendations are not radical.

1. Vermont Domestic Relations Law, 15 V.S.A., should be amended to eliminate veto by either parent of joint physical and legal custody. Vermont statutes should specify that a family may have more than one childcare provider. This should be taken into account without gender bias in law or practice when awarding custody and visitation. There should be a statutory presumption in favor of sharing or allocating custody in such a manner as to encourage maximum participation by both parents in the lives of their child or children.
2. Vermont statutes should provide a presumption in favor of maximizing visitation by the non-custodial parent, even up to fifty percent of the time in appropriate situations.
3. The non-custodial parent should have the right to petition the court periodically for increase in visitation in recognition of significant changes in the life of

the child. (The courts would retain discretionary power to discourage frivolous or disruptive motion practice, but the threshold burden for justifying change should be lowered to permit adjustments that are in the best interests of the child.)⁸¹

4. Vermont statutes should provide that on each and every occasion a non-custodial parent petitions the family court for relief of any kind, the overriding consideration must be the constitutional right of that parent to procedural due process and equal protection for the companionship, care, and management of his or her child or children. There should be no blanket presumption of authority in favor of a custodial parent beyond the specific terms in the custody award.
5. Vermont statutes should provide that uninterrupted visitation is in the best interests of the child. A presumption should apply against relocation by a custodial parent a significant distance from the non-custodial parent that may only be overcome by a showing of compelling reason.

These remedies require not only changes in the applicable statutes and common law, but also changes in attitudes and how Vermont judges, attorneys, and parents think about the law of domestic relations.

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¹ 15 V.S.A. §665; *Gilbert v. Gilbert*, 163 Vt. 549, 553; 664 A.2d 239, 240-241 (1995).

² See, *infra*, at 5 ("How Child Custody Is Determined in the Courts of Other States").

³ Vermont Domestic Relations Law was amended in 1986 to change the word "custody" to the term "parental rights and responsibilities." The terms are often used interchangeably in judicial opinions. In the same statute the term "parent-child contact" is used instead of the word "visitation." The words "custody" and "visitation" will be used in this article.

⁴ 15 V.S.A. art. 2, Subchap. 3A.

⁵ See, e.g., *Heffernan v. Harbeson*, 177 Vt.

239, 243; 861 A.2d 1149, 1153 (2004).

⁶ See, *infra*, n. 25. 15 V.S.A. §665.

⁷ *Cabot v. Cabot*, 166 Vt. 487, 697 A.2d 644 (1997). See also, *Bancroft v. Bancroft*, 154 Vt. 442, 448; 578 A.2d 114, 118 (1990).

⁸ Among the first determinations in divorce cases involving children is an order by the family court for temporary custody and visitation arrangements. The temporary order usually becomes the basis for the court's permanent custody and visitation order. Once a final custody and visitation order is issued, a high standard is required to change it and the burden is heavy. (See 15 V.S.A. §555 and *Gates v. Gates*, 168 Vt. 64, 69-70, 697 A.2d 644, 649-50 (1998)). The Supreme Court articulated this standard in *Pigeon v. Pigeon*, 173 Vt. 464, 468; 782 A.2d 1236 (2001). The party seeking to change a custody or visitation order must show that there has been a real, substantial, unanticipated change in circumstances. Just how hard it is to satisfy that burden is demonstrated by *Pigeon*. The Court there ruled that just because the child was now in school, maturing, spending more time with friends, and engaged in after-school activities, did not justify a change in the custody or visitation order made when the child was much younger and the life of the child was much different. All this was "anticipated."

⁹ 166 Vt. at 493, 697 A.2d at 649.

¹⁰ 15 V.S.A. §665(b). The factors in §665(b) are non-exclusive, and the trial court may consider other factors relevant to the best interests of the child. See, e.g., *Hansen v. Hansen*, 151 Vt. 506, 508, 562 A.2d 1051, 1053 (1989).

¹¹ See, e.g., *Nickerson v. Nickerson*, 158 Vt. 85, 605 A.2d 1331, 1333 (1992).

¹² 15 V.S.A. §665 (c).

¹³ See, e.g., *Spaulding v. Butler*, 172 Vt. 467, 475, 782 A.2d 1167, 1174 (2001); *Cloutier (Fletcher) v. Blowers*, 172 Vt. 450, 783 A.2d 961 (2001).

¹⁴ *Heffernan*, 177 Vt. at 1163.

¹⁵ See, e.g., *Stickney v. Stickney*, 170 Vt. 547, 548, 742 A.2d 1228, 1230 (1999).

¹⁶ See, e.g., *Johnson v. Johnson*, 163 Vt. 491, 496, 659 A.2d 1149, 1152 (1995).

¹⁷ *Cabot*, 166 Vt. 487, 697 A.2d 644 (1997).

¹⁸ 15 V.S.A. art. 2, Subchap. 3A, Child Custody and Support. 15 V.S.A. §665 (emphasis added).

¹⁹ *Id.* No part of the legal custody may be shared if there is an objection, but decision-making in different areas may be allocated between parents. See *Shea v. Metcalf*, 167 Vt. 494, 499, 712 A.2d 887, 890 (1998), in which parts of legal custody were allocated between parents. In practice this is seldom done.

²⁰ *Id.* at 489-494.

²¹ The Vermont Supreme Court has repeatedly said that such interference with a parent/child relationship is so inimical to the child's welfare as to be grounds for denying the offending party custody. See, e.g., *Renaud v. Renaud*, 168 Vt. 306 (1998).

²² *Cabot*, 166 Vt. at 494.

²³ *Id.* The previously quoted provision of §665 contains the language "award ... primarily or solely to one parent" (emphasis added), which was the basis of the trial court's award of joint legal custody and the dissent. The Supreme Court's majority opinion construed the statute as precluding joint custody of any kind if vetoed by one party.

²⁴ *Id.* at 506-509. The dissent reasons that the law of custody as applied by the majority has devastating psychological effects. The psychology of child custody underlying Vermont custody law will be more fully addressed in this article.

²⁵ The information in this section is from Findlaw®, *Child Custody: Summaries of State Laws*, <http://family.familylaw.com/divorce/state-divorce-laws>.

²⁶ Alaska, Arizona, Nebraska, and West Virginia are among the few other states that permit one parent to veto joint custody. *Id.*

²⁷ JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

²⁸ WARREN FARRELL & JEREMY P. TARCHER, *FATHER AND CHILD REUNION* (2001); STEPHEN BASKERVILLE, *TAKEN INTO CUSTODY* (2007); JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN WOMAN AND CHILDREN A DECADE AFTER DIVORCE* (1989); HENRY B. BILLER, *FATHERS AND FAMILIES: PATERNAL FACTORS IN CHILD DEVELOPMENT* (1993); HENRY B. BILLER & ROBERT J. TROTTER, *THE FATHER FACTOR* (1994); Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 1 J. FAM. PSYCH. 91 (2002); William V. Fabricius & Linda J. Luecken, *Postdivorce Living Arrangements, Parent Conflict, and Long-Term Physical Health Correlates for Children of Divorce*, 21 J. FAM. PSYCH. 195, 203 (2007); MICHAEL E. LAMB, *THE ROLE OF THE FATHER IN CHILD DEVELOPMENT* 360 (2004); *Parenting Our Children: In the Best Interest of the Nation*, U.S. Government Printing Office (1969); JOHN J. BOWLBY, *ATTACHMENT AND LOSS: VOL. 1 ATTACHMENT* (1991); FRANK F. FURSTENBERG & ANDREW J. CHERLIN, *DIVIDED FAMILIES* (1991).

²⁹ *Nickerson*, 158 Vt. 85, 605 A.2d 1331 (1992).

³⁰ 15 V.S.A. art. 2, Subchap. 3A.

³¹ See *infra* at nn. 63-66.

³² See the literature cited *supra* n. 28.

³³ See the cases themselves, which cite each other.

³⁴ 158 Vt. 85, 605 A.2d 1331 (1992).

³⁵ *Id.* at 86.

³⁶ *Id.* at 87-88.

³⁷ *Id.* at 88-89.

³⁸ *Id.* at 89-92.

³⁹ *Id.* at 93-99.

⁴⁰ *Id.* at 98-99.

⁴¹ *Id.* at 97-98.

⁴² 177 Vt. 239, 861 A.2d 1149 (2004).

⁴³ *Id.* at 240-241.

⁴⁴ *Id.* at 240.

⁴⁵ *Id.* at 243.

⁴⁶ *Id.* at 244.

⁴⁷ 168 Vt. 306, 721 A.2d 463 (1998).

⁴⁸ *Id.* at 307.

⁴⁹ Fault is not a legal factor in awarding custody. See, e.g., *Price v. Price*, 149 Vt. 118, 121; 541 A.2d 79 (1987).

⁵⁰ 168 Vt. at 308.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 309.

⁵⁴ *Id.* at 311-312.

⁵⁵ *Id.* at 311.

⁵⁶ *Id.* at 309-312.

⁵⁷ The Supreme Court often cites its own decision in *Renaud* for the proposition that alienation is grounds for denying the offending party custody, although in fact it did not take custody away from the offending party in *Renaud*.

⁵⁸ 172 Vt. 467, 782 A.2d 1167 (2001).

⁵⁹ *Id.* at 469-472.

⁶⁰ *Id.* at 470-474.

⁶¹ *Id.*

⁶² *Id.* at 481-482.

⁶³ 158 Vt. 489, 614 A.2d 786 (1992).

⁶⁴ *Id.* at 498-499.

⁶⁵ *Id.* at 493.

⁶⁶ *Id.* at 497.

⁶⁷ 149 Vt. 118, 541 A.2d 79 (1987).

⁶⁸ *Id.* at 119-120.

⁶⁹ *Id.* at 124.

⁷⁰ 166 Vt. 629, 697 A.2d 353 (1997).

⁷¹ *Id.* at 630.

⁷² *Id.*

⁷³ 150 Vt. 1, 549 A.2d 1039 (1988).

⁷⁴ *Id.* at 2.

⁷⁵ *Id.* at 5-6.

⁷⁶ See, e.g., *Gazo v. Gazo*, 166 Vt. 434, 697 A.2d 342 (1997) for discussion of the scope of decision-making authority of the custodial parent.

⁷⁷ See *Cabot*, 166 Vt. 487.

⁷⁸ U.S. CONST. amend. XIV, § 1 (ratified 1868).

⁷⁹ The tenth amendment to the U.S. Constitution provides powers not delegated to the United States are reserved to the States. U.S. CONST. amend. X.

⁸⁰ The Supreme Court of the United States has said that parental rights are protected under the due process and equal protection provisions of the fourteenth amendment to the Constitution. In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court made the point that persons faced with state intervention into ongoing family affairs have even more critical need for procedural protections under the fundamental rights provided by the fourteenth amendment. The Court has said that a father's interest in the companionship, care, custody, and management of his children is both cognizable and substantial, *Stanley v. Illinois*, 405 US 645 (1972). In *Caban v. Mohammad*, 441 US 380 (1979), the Court ruled that the New York state domestic relations law violated the equal protection clause of the fourteenth amendment. The opinion of the Court in that case contains a lengthy discussion of the problems with state laws that favor one gender over the rights of the other, *without fault*.

⁸¹ See the discussion in note 8, *supra*.

