REPORT OF THE
VIRGINIA COMMISSION ON YOUTH ON

The Study of Model Child Custody and Visitation Schedules

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA

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COMMONWEALTH of VIRGINIA

Commission on Youth

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January 18, 1994

TO: The Honorable George Felix Allen, Governor of Virginia

and

Members of the Virginia General Assembly

The 1993 General Assembly, through Senate Joint Resolution 243, requested the Virginia Commission on Youth to "conduct a study of model child custody decrees and child visitation schedules."

Enclosed for your review and consideration is the report which has been prepared in response to this request. The Commission received assistance from all affected agencies and gratefully acknowledges their input in this report.

Respectfully submitted,

R. Edward Houck
Chairman

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I. Authority for Study

§9-292 of the *Code of Virginia* established the Commission on Youth and directs it to "...study and provide recommendations addressing the needs of and services to the Commonwealth's youth and their families." §9-294 provides that the Commission has the power duties to "undertake studies and gather information and data in order to accomplish its purposes...and to formulate and present its recommendations to the Governor and members of the General Assembly."

The 1993 General Assembly enacted Senator Robert L. Calhoun's (Alexandria) Senate Joint Resolution 243 requesting the Commission on Youth to conduct a study of model child custody decrees and visitation schedules. The Commission on Youth, in fulfilling its legislative mandate, undertook the study.

II. Members Appointed to Serve

For the studies enacted in 1993, the Commission on Youth formed three subcommittees to provide oversight and direction for the topics assigned. These three subcommittees were Prevention, Juvenile Justice and Treatment. At the May 7, 1993 Commission on Youth meeting, Senator R. Edward Houck, Chairman, (Spotsylvania) assigned the study of model child custody guidelines and visitation schedules to the Treatment Subcommittee. In addition to Senator Houck, who chairs the subcommittee, its members are Delegates Karen L. Darner (Arlington) and Arthur R. Geisen, Jr. (Waynesboro), Senator Robert L. Calhoun (Alexandria) and Ms. Thomasina T. Binga (Richmond).

III. Executive Summary

During the 1993 General Assembly Session, four bills were introduced in both the House and Senate which sought to alter the legal processes and parameters along which child custody and visitation decisions are made in Virginia. These legislative proposals, which included the codification of a mandatory visitation schedule, creation of a presumption of joint custody, and the expansion of factors considered under the "best interest" standard, did not pass. However, their introduction and the debate among the legislators substantiated the need to review the processes and options afforded to litigants who come before the court for resolution of child custody and visitation issues. The rise in the number of divorces involving children (there has been a 60% increase in the number of custody and visitation cases decided at the District Court level since 1988), the changing demographics of the family, and the increased use of alternative dispute resolution in family matters—all supported the need for review of Virginia's statute regarding child custody and visitation.

As the mandate was to study model child custody guidelines and visitation schedules, this study was less dependent upon the analysis of data and relied instead upon interaction, discussion, and debate among professionals and constituency groups involved in custody and visitation decisions. A review of clinical studies measuring the impact of divorce on families and analysis of national legal trends in child custody was conducted. A work group composed of representatives of the legal and therapeutic communities, circuit and district court judges, mediators, and child advocacy constituency groups was established. Individuals serving on the work group were selected for their professional expertise, as well as their ability to represent specific constituency groups. For a listing of the work group membership, please refer to Appendix B. Through on-going debate and consensus-building, a model for determining child custody and visitation schedules was developed. The current system was then compared to the model. Finally, recommendations were developed with the goal of approximating current practice more closely to the model.

The resulting model articulates guiding principles for all custody and visitation decisions and describes the processes by which these decisions should be made. The model reflects an attempt by the group to balance parents' needs and fears with the primary concern of custody and visitation matters—the needs of the child.

The work group developed guiding principles for model child custody and visitation schedules. The process should:

- Be child-focused
- Promote frequent and continuing contact with each parent
- View the parent/child relationship as primary
- Acknowledge the legitimate role of the court
- Preserve the dignity of all parties
- Help families preserve their resources, *i.e.,* time, good will, emotional health and finances
- Acknowledge that children deserve a healthy, non-abusive family environment at all times.

In developing the model, the work group found that there are no easy answers. The recognition of the need for judicial discretion in determining child custody cases conflicted with the desire to expand and clarify the factors used to determine best interests of the child. The desire to erase stigmatizing language such as "non-custodial parent" was mitigated by the importance of maintaining the case law which provides guidance and insuring that levels of child support were not jeopardized. Expanded use of mediated settlements rather than adversarial proceedings in child custody cases may not adequately protect against the consequences of domestic violence. Attempts to revise the *Code* in terms of "parenting arrangements" resulted in language which appeared to minimize the importance of the child. The desire to support increased contact with both parents carries with it the potential of minimizing the child's needs. The group affirmed that *Code* revisions must be coupled with standardization of child custody evaluations and training for the bench and bar on issues related to child-focused decision-making in custody and visitation cases.

The result of the work group's long deliberation is a multi-faceted approach in which professional training, establishment of professional standards, public education efforts and statutory revisions are required in order to more closely approximate the guiding principles of model child custody decisions and visitation schedules.

On the basis of its findings, the Commission on Youth offers the following recommendations in the areas of Legislative Revisions, Specialized Training and Child Custody Evaluations.

Legislative Revisions

Recommendation 1

Revise §20.107.2 and other relevant sections of the *Code of Virginia* pertaining to child custody and visitation to effect the following:

- Guidance to the court in determining all custody and visitation disputes, regardless of the marital status of the parties;
- Requirement that custody and visitation decisions be made prior to other decisions arising out of divorce and/or separation proceedings (excepting those related to protective orders and *pende lite* hearings);
- Promotion of frequent and continuing contact with each child and each parent when appropriate;
- Support for mediation, as opposed to litigation, as a means to settle custody disputes;
- Expansion of factors defining *best interest of the child*;

Specialized Training

Recommendation 2

The Supreme Court should provide judicial training on the psychological development of the child, post-divorce adjustment and adaptation, as well as other issues that would better enable the bench to assess the factors related to a child's "best interest" in custody cases. In addition judges should receive training in creating specific orders for child visitation which promote frequent and predictable contact for each child with each parent.

Recommendation 3

The Family Law Section of the Virginia State Bar should provide training on the psychological development of the child, post-divorce adjustment and adaptation, as well as other issues that would better enable the bench to assess the factors related to a child's "best interest" in custody and visitation cases. In addition, attorneys should receive training in creating specific arrangements for child visitation which promote frequent and predictable contact for each child with each parent.

Child Custody Evaluations

Recommendation 4
The Boards of the Department of Youth and Family Services and Social Services should, by January 1, 1995, jointly establish the guidelines for child custody evaluations which are conducted by their employees. These guidelines should address both the scope of the inquiry and suggested staff qualifications. Both agencies will be responsible for making their final work products available to judges, *pro se* litigants, and members of the bar across the state.

Recommendation 5
The Health Regulatory Board should provide oversight to the Boards of Psychology, Medicine and Social Work as they develop minimum standards for child custody evaluators within each discipline, with the goal of gathering information relevant to custody decisions. Each Board should make this outline of their standards available to judges, *pro se* litigants and the bar.

Recommendation 6
The Departments of Social Services and Youth and Family Services and relevant Boards under the Health Regulatory Board should share information with each other as they develop minimum standards for child custody evaluators for each discipline, with the goal of identifying relevant information.

Recommendation 7
Support the research pilot of Courts using the testimony of only one evaluator available to both parties in disputed custody cases.

IV. Methodology

The findings of the 1993 Commission on Youth study on model child custody and visitation schedules are based on several different methodologies. The primary focus of the study was the children who are the subject of disputed custody and visitation. This focus guided the research inquiries. An analysis of the child custody and visitation law was conducted for all 50 states and the District of Columbia. Additionally, relevant case law on the subject was reviewed. Legal writings on the subject were reviewed and analyzed. Examples of visitation schedules were analyzed and synthesized into organizational principles. Commission staff reviewed the clinical research on the effects of post-divorce custodial arrangements on children, but, as the field is so large, does not profess to have referenced all of the relevant clinical research. This report does not attempt to provide an exhaustive review of the legislative reform in the divorce and custody field from a national perspective. Given the existence of over 12 professional journals dedicated solely to the fields of custody, divorce, mediation and support enforcement, a complete analysis of all relevant issues is far beyond the scope of this effort. However, research was conducted on recent scientifically valid

investigations on the impact of various custody arrangements and processes on children.

Lastly and perhaps of greatest methodological importance was the process by which the model was developed.

In order to respond to the study mandate to develop model child custody guidelines, a work group of professionals and constituency groups served as the primary forum through which ideas were debated and consensus formed. The disciplines and expertise represented on the work group were: two clinical therapists with specialization in child custody evaluations, two attorneys with primary practice in divorce litigation as well as serving as representatives of two state-wide law associations, an early childhood development specialist, a Circuit and a District Court Judge, a local and a state representative from the Department of Social Services (Child Welfare Divisions), an expert in alternative dispute resolution, and representatives of a private non-profit adoptions agency, child advocacy agency and a parents' rights group. The group also relied upon and responded to the input from representatives of the Poverty Law Center, National Association of Women and individual members of the Children's Rights Council.

Work group members agreed early in deliberations that they would abide by consensus and, in deference to the widely differing views of the group, work to find a middle ground which would uphold the principles they jointly developed. Majority votes were taken only in the final stages of the study when the focus was on legislative language and there appeared to be no compromise position.

After presentations by different members of the work group on assigned topics, the members discussed issues and reach consensus. The deliberations of the group were divided into two parts. The first three months were spent developing the philosophy and principles which characterize model child custody guidelines and visitation schedules. The last three months were devoted to reaching consensus on *Code* revisions. While the majority of the report does reflect consensual agreement, there were points in which votes were taken and the resulting recommendations represent the majority vote(s) on a given issue. A dissenting report[1] is provided in Appendix D.

[1]The dissenting opinion was written in response to preliminary recommendations presented to the Commission on Youth on December 8th. Some of the opinions in the dissent have been incorporated into the final report.

V. Study Goals and Objectives

On the basis of the requirements of Senate Joint Resolution 243, the following study objectives were developed by the work group and approved by the Treatment Subcommittee of the Commission on Youth:

A. Propose a "model" for determining child custody and visitation;

B. Compare the existing law and processes of determining child custody and visitation to the model; and

C. Identify the appropriate strategies which would modify the current system to more closely approximate the model.

In response to the study objectives, the Commission on Youth undertook the following activities:

1. Conduct a national review of child custody statutes;

2. Analyze custody statutes for similarities;

3. Collect visitation schedules used throughout the country;

4. Analyze similarities in visitation schedules;

5. Conduct follow-up research on litigant and professional satisfaction with visitation guidelines;

6. Conduct research to identify salient and relevant factors in custody decision making from a mental health perspective;

7. Develop research methodology to assess utility of a single evaluator approach in disputed custody cases;

8. Identify those Virginia *Code* sections which are inter-dependent on child custody and visitation statutes;

9. Identify values of a model child custody and visitation schedule decision-making process;

10. Develop a model child custody guidelines and visitation schedule;

11. Compare model processes to the present system;

12. Develop a multi-faceted strategy to allow the current system to more closely parallel the model developed.

VI. Background

With the increase in divorce rates nationwide and likelihood that these couples have children, there are increasing numbers of children affected each year. According to *The State of the Judiciary*, published annually by the Supreme Court of Virginia, divorce and disputed custody cases have increased at both District and Circuit Court levels. In 1988 31,536 divorce cases were commenced in Circuit Court and 55,067 custody cases were concluded at the District Court level. (Unfortunately, statistics on custody cases were are not collected in aggregate at the Circuit level.) Divorce filings and custody cases continued to increase in the last five years, as *Figure 1* documents.

Figure 1

	Divorce Cases Commenced (Circuit)	Percentage Increase	Custody Cases Concluded (District)	Percentage Increase
1988	31,536	--	55,067	--
1989	30,984	-1.75%	62,557	+13.60%
1990	32,254	+4.09%	70,828	+13.22%
1991	33,940	+5.22%	79,946	+12.87%
1992	33,820	-0.35%	88,375	+10.54%
Growth from 1988–1992		+7.24%	Growth from 1988–1992	+60.48%

Legislatures across the country have increased their activity in the child custody and child support area in response to constituents' concerns regarding the need for appropriate and equitable child custody dispute resolution. Legislative activity in revising custody and visitation statutes has been characterized by 1) the increasing reliance and support for the concept of shared or joint custody, 2) the strengthening of the inter-relationship between child support and visitation/custody decisions and 3) the streamlining of the judicial process by which decisions affecting the family unit are reached. Virginia has paralleled the rest of the nation with respect to instituting changes in these areas. The tradition in the Commonwealth has been minimal revisions to the divorce statute. Rather, policy in this area is often set through case law. However, the *Code* was amended in 1983 to clarify that the Court will have no presumption toward either parent in awarding custody or visitation for the children. Amendments in 1989 created presumptive child support guidelines which provided a "floor" for the court to determine the minimum amount of child support. Lastly, the General Assembly enacted legislation in 1989 which established the Family Court pilot in six jurisdictions. The result of this pilot has been the enactment of legislation to create a Family Court statewide in Virginia as of January 1995.[2]

[2]Funding for the Family Court will be determined in the 1994 General Assembly Session.

A. LEGAL ISSUES

1. Child Custody Laws

All 50 states maintain some statutory child custody guidelines. A summary of these guidelines, indicating whether they are enunciated in statute or case law, is found on the charts in the following pages. Though the factors considered by courts in awarding custody vary from state to state, issues consistently addressed are: previous primary caretaker of the child, relations between the parent and child, physical and mental condition of the child and parents, parents' willingness to cooperate with custody and visitation orders, and the overall best interest of the child (Virginia Department for Children (VDC), 1987; Divorce; Ellis, 1990; Committee on Suggested State Legislation, 1986).

States vary in the types of custody which can be decreed by the appropriate courts. Laurance Hyde described the different types of custody available in the United States in his article "Child Custody and Visitation." *Sole custody* was defined as one parent's being granted the sole responsibility legally and physically for the child. *Divided custody* allows both parents to attain legal and physical custody of a child during alternating periods. *Split custody* divides the family, allowing one parent to acquire custody of one or more children and the other parent to take custody of the other child. Alabama, Iowa, Louisiana, Missouri, Nebraska, New York, Pennsylvania, Texas, and D.C. disfavor split custody arrangements. Finally, *joint custody* allows parents to share in the legal and physical custody of the child; one parent may have sole physical custody, while both parents remain legally responsible.

A few states utilize the Uniform Marriage and Divorce Act (UMDA) to enumerate statutory factors for consideration during custody disputes (Child Custody and Visitation). The UMDA states:

> *The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:*
> *(1) the wishes of the child's parent or parents as to his custody;*
> *(2) the wishes of the child as to his custodian;*
> *(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;*
> *(4) the child's adjustment to this home, school and community; and*
> *(5) the mental and physical health of all individuals involved.*

Case law, rather than statutory authority, often serves to expand upon the list of "best interest" factors and provide more direction as to how much weight each factor should be given in relation to another.

2. Best Interest Factors

Needs of the Child

In twelve statutes, the child's "needs" is listed as a concern under the "best interest" standard. It is in the case law in four states. The needs of the child are defined as emotional, physical, and spiritual in nature (Dissolution of Marriage). In child custody disputes, the judge weighs the effects and changes that may occur with a change in the family structure and acknowledges that any decision is one which will require adaptation on the part of the child(ren). A child may be forced to change schools, communities, and friends, which, in addition to experiencing the aftermath of a divorce, can be emotionally difficult. It is of special interest to courts when parents reside in the familiar community or within the family home, thus minimizing the amount of adaptation on the part of the child. Similarly, the court attempts to place the child with the parent who has a history of a close interpersonal relationship with them. Included in the consideration of the child's needs are the existence of siblings and their respective relations with one another. Courts hesitate to split up the siblings, but have done so when the age differential between the siblings is rather large.

Eighteen statutes focus on the time a parent has available to the child and that parent's willingness to encourage contact with the other parent. Courts may also seek to identify the parent who has the time to spend with the child and the ability to meet the child's special needs (Clauses for Separation). Acknowledgment of the adjustment of the child to home, school and community is also incorporated in 22 state statutes.

Some state statutes specifically include religious considerations in the factors for consideration in custody disputes. As a result of the establishment clause which prohibits government from advancing or inhibiting religion and the free exercise clause which allows persons to practice whatever form of religion they believe, courts find themselves in precarious situations. If one parent practices a religion to which the child is accustomed, whereas the other parent does not, a court will definitely consider the child's desire to continue his religious practice, but within the appropriate constitutional limits.

Tender Years Doctrine

Traditionally, courts followed the presumption that children of younger ages, *i.e.*, the tender years, would be assigned to the custody of their mother (Moore v. Moore, 212 Va. 153 (1971); Custody and Visitation, Dissolution). That presumption was considered even more compelling when the child was a female (Campbell v. Campbell, 203 Va. 61 (1961); Family Law and Practice). However, as mothers became more active in the work force and fathers began to play a greater role in child rearing, this doctrine was disregarded in favor of an approach mirrored in Virginia's *Code* in which there is no presumption in the law towards either parent. Eventually, the tender years doctrine was deemed violative of state constitutional equal protection laws. It has thus been abrogated in 27 states by case law and in Wyoming by statute, although Utah uses it as a tie breaker (Dissolution of Marriage). Prior to the increase in the number of fathers petitioning the court for custody, this doctrine was not without its problems.

Nothing printed this page.

Figure 1

Custody Laws

	Statutory Custody Guidelines	Joint Custody Presumed	Joint Custody Allowed	Joint Custody Burden of Proof on Parent Opposing Joint Custody	Joint Custody Benefits or Detriments or Arrangement of Child
Alabama	Statute		Statute		
Alaska	Statute		Statute		
Arizona	Statute		Statute		
Arkansas			Statute		
California	Statute				
Colorado	Statute	Statute			
Connecticut	Statute	Statute			
Delaware	Statute	Statute			
District of Columbia	Statute				
Florida	Statute	Statute		Case Law	
Georgia	Statute				
Hawaii	Statute		Statute		
Idaho	Statute	Statute			
Illinois	Statute		Statute		
Indiana	Statute		Statute		Case Law
Iowa	Statute		Statute	Statute	
Kansas	Statute		Statute		
Kentucky	Statute				
Louisiana	Statute		Statute	Case Law	
Maine	Statute		Statute		
Maryland	Case Law		Statute		
Massachusetts		Statute			
Michigan	Statute	Statute			
Minnesota	Statute	Statute			
Mississippi	Statute		Statute		
Missouri	Statute		Statute		
Montana	Statute	Statute		Case Law	
Nebraska	Statute		Statute		
Nevada	Statute	Statute			
New Hampshire		Statute		Case Law	
New Jersey	Statute		Statute		
New Mexico				Case Law	Statute
New York			Statute		
North Carolina			Statute		
North Dakota	Statute		Statute		
Ohio	Statute		Statute		
Oklahoma			Statute		
Oregon	Statute		Statute		
Pennsylvania	Statute		Statute		
Rhode Island			Statute		
South Carolina			Statute		
South Dakota			Statute		
Tennessee			Statute		
Texas	Statute		Statute		
Utah	Statute		Statute	Case Law	Statute
Vermont	Statute	Statute			
Washington	Statute				
West Virginia					
Wisconsin	Statute				
Wyoming					
Virginia	Statute				

Source: Virginia Commission on Youth SJR 243 Work Group, 1993

Figure 2

Parental Behaviors in Determining Child Custody

	Spousal Abuse	Child Abuse	Moral Character of Parents	Parental Conduct Not Affecting Child Not Considered	Sex of Parent Irrelevant/ Gender-Neutral	Continuity of Care and Placement/ "Primary Caretaker"	Proximity of parents' residences
Alabama	Statute	Case Law	Statute	Case Law (2)	Case Law (1)	Case Law	
Alaska	Statute	Statute	Statute		Statute	Statute	
Arizona	Statute	Statute					
Arkansas		Case Law					
California	Statute	Statute		Case Law	Statute		
Colorado	Statute	Case Law		Case Law	Statute		
Connecticut					Statute		
Delaware			Case Law	Statute	Statute		Statute
District of Columbia					Case Law (1)		
Florida	Statute	Statute	Statute	Case Law (2)	Case Law	Case Law	
Georgia				Case Law	Case Law		
Hawaii	Statute	Statute			Case Law		
Idaho		Case Law					
Illinois	Statute	Statute	Case Law	Case Law (2)	Case Law		
Indiana					Case Law		
Iowa	Statute	Statute		Case Law	Case Law	Case Law	Case Law
Kansas	Case Law	Case Law		Case Law (2)	Case Law	Case Law	
Kentucky				Case Law			
Louisiana			Statute	Case Law (2)	Case Law (1)	Statute	Statute
Maine					Statute	Statute	
Maryland	Statute	Statute	Case Law	Case Law (2)	Case Law		Case Law
Massachusetts					Case Law		
Michigan		Case Law	Statute		Case Law	Statute	
Minnesota				Case Law	Case Law	Statute	
Mississippi			Case Law		Case Law (1)		
Missouri		Case Law	Case Law	Case Law (2)	Case Law		
Montana		Statute		Case Law		Case Law	Case Law
Nebraska		Case Law			Case Law		
Nevada					Case Law	Case Law	
New Hampshire		Statute			Statute		
New Jersey			Case Law	Case Law			
New Mexico		Case Law					Case Law
New York		Case Law	Case Law	Case Law (2)	Case Law		
North Carolina					Case Law		
North Dakota	Statute		Statute		Statute	Statute	
Ohio			Case Law		Statute		
Oklahoma							
Oregon	Statute	Case Law	Case Law	Case Law (2)	Statute	Case Law	
Pennsylvania					Case Law		
Rhode Island	Statute						
South Carolina		Statute			Case Law (1)		
South Dakota		Case Law	Case Law	Case Law	Statute		
Tennessee			Case Law		Case Law (1)		Case Law
Texas	Statute	Statute			Case Law		
Utah			Statute	Case Law (2)	Case Law	Case Law	
Vermont				Case Law	Case Law	Case Law	
Washington				Case Law	Case Law		
West Virginia				Case Law (1)	Case Law	Case Law	
Wisconsin	Statute	Statute		Case Law	Case Law		
Wyoming			Case Law		Case Law		
Virginia				Case Law	Statute (1)		
Total other states	Statute: 15 C/Law: 1	Statute: 13 C/Law: 12	Statute: 7 C/Law: 12	Statute: 1 Case Law: 23	Statute: 11 Case Law:30	Statute: 6 Case Law: 10	Statute: 2 C/Law: 5

(1) Maternal preference (2) If not excessive

Source: Virginia Commission on Youth SJR 243 Work Group, 1993

Figure 3

Other Factors in Determining Child Custody

	"Tender Years" Presumption Abrogated	Other Factors Deemed Relevant By Court	Cause of Breakdown Of Marriage	Recommendations of Mediators
Alabama	Case Law		Case Law	
Alaska	Case Law	Statute		Statute
Arizona	Case Law			
Arkansas				
California	Case Law			
Colorado	Case Law			
Connecticut			Statute	
Delaware	Case Law			
District of Columbia				
Florida		Statute		
Georgia	Case Law		Statute	
Hawaii	Case Law			
Idaho	Case Law			
Illinois	Case Law			
Indiana	Case Law			
Iowa				
Kansas				
Kentucky				
Louisiana		Statute		
Maine	Case Law	Statute		
Maryland				
Massachusetts	Case Law			
Michigan		Statute		
Minnesota	Case Law			
Mississippi				
Missouri				
Montana				
Nebraska				
Nevada	Case Law			
New Hampshire	Case Law			
New Jersey				
New Mexico				
New York	Case Law			
North Carolina	Case Law			
North Dakota	Case Law	Statute		
Ohio	Case Law			
Oklahoma				
Oregon	Case Law			
Pennsylvania				
Rhode Island				
South Carolina				
South Dakota	Case Law			
Tennessee	Case Law			
Texas	Case Law			
Utah	Case Law			
Vermont			Case Law	
Washington				
West Virginia	Case Law			
Wisconsin	Case Law	Statute		
Wyoming	Statute			
Virginia		Statute		
Total other states	Statute: 1 Case Law: 27	Statute: 8 Case Law: 0	Statute: 2 Case Law: 2	Statute: 1 Case Law: 0

Source: Virginia Commission on Youth SJR 243 Work Group, 1993

The primary difficulty in its application was the failure of legislatures to state at what age the child no longer qualified as being in the "tender years." The trend is to apply the gender neutral rule and place the child with the primary caretaker as is done in Montana, Minnesota and West Virginia (Child Custody and Visitation). Six states have a primary caretaker concern in the statutes and ten others reference it in case law. Despite the change in statutes, as a result of child rearing practices in many American homes, preference for the primary caretaker in custody decisions translates to a preference towards maternal custody.

Child's Wishes

Thirty-two states mandate the consideration of the preference of a child during custody hearings, and twelve more provide for its consideration in case law. However, a child's wish is not binding on the judge who may disagree with the child's preference and refuse to grant their wish in order to further the child's best interest (Custody, Dissolution of Marriage). The wishes of the child may not be identical to the child's best interest as determined by the adults involved. West Virginia and Minnesota allow the child's preference to rebut the primary caretaker presumption (Clauses for Separation Agreements). At least 18 state legislatures, including Virginia, New Jersey, Delaware, and Alabama, have failed to specify what "certain age" at which the child's preference should control, leaving the determination to be made at the discretion of the judge (Hall v. Hall, 210 Va. 668 (1970); Id.). Judges, in turn, consider the maturity of the child, their ability to make value judgments, and their motives behind the choice. Georgia's law allows youth 14 years old and older to choose their own guardians. Generally, as in New York and New Jersey, the preferences of older children are granted more weight (Child Custody and Visitation, Hall).

Conduct of a Parent

Evidence of a physically abusive parent tremendously influences a court's custody decision. Sexual or physical abuse and/or neglect of a child gives the court sufficient reason to deny custody to the abusive parent (Dissolution of Marriage). Twenty-eight states explicitly recognize child abuse in their laws as a potential prohibitor of custody. Both Illinois and Maryland prevent a parent from attaining custody after documented abuse; however, the Maryland law provides the possibility of the abusive parent's receiving custody after the passage of two years.

At least eighteen states consider the substance abuse of a parent (Clause for Separation Agreements) and may deny parent custody because of the "potential harm to the child" (Child custody and Visitation; Floyd v. Floyd, 218 Ga. 606 (1963); JAS v. DAS, 292 S.E. 2d 48 (W. Va. 1982)). However, parents that are seeking help by attending Alcoholics Anonymous or other rehabilitation programs are looked upon more favorably for custody in some states (In re Marriage of Bales, 439 N.W. 2d (Iowa Ct. App.)).

A parent's willingness to foster continuing contact with the other parent is another important consideration, even though it has only been recognized by nineteen states in case law or statutes. In Louisiana, the more "cooperative" parent is at times the one

who is awarded custody, given that the parent is a fit custodian in all other respects (Family Law and Practice).

Most courts generally agree that the moral misconduct of a parent should not be considered unless it affects the child. Currently, Virginia, Louisiana, and Alabama believe that moral misconduct *per se* does not make a parent unfit (Child Custody and Visitation). However, there is debate on the issue of sexual preference and its relevance to moral conduct. Gay and lesbian parents are still at a disadvantage in some states, as evidenced by the Hall v. Hall, 95 Mich. App. 614 (1980), and more recently the Sharon Bottoms case. Some courts will consider the sexual preference of the parent to the extent that it may have adverse effects on the child. Courts have prohibited the continuance of the homosexual relationship as a condition of retaining custody (MKM v.LEM, 606 S.W. 2d 179 (Mo. Ct. App. 1980)). Moreover, in Roe v. Roe, 228 Va. 722 (1985), the court "found that continuous exposure of a nine-year-old daughter to her father's 'immoral and illicit' homosexual relationship rendered him unfit to be the custodial parent as a matter of law." The recent custody case of Sharon Bottoms illustrates the presence of codified sanctions regarding types of behavior (*i.e.*, homosexuality) can be used as grounds to find the parent unfit, although the behavior does not have a direct bearing to parenting behavior. The deciding factor for California, Colorado, Kentucky, Minnesota, Oregon, South Dakota, and Washington is whether the marital misconduct adversely affects or affected the child; if it does, custody will be denied to that parent (Dissolution of Marriage).

Third Parties

Stepparents, grandparents, and other third party rights are heavily litigated in child custody cases. The preference for the natural parent to acquire custody of a child has prompted the development of a high standard in the *Code* and case law for consideration of awarding custody to a third party (Fine and Fine, 1992; Divorce). It is almost universally established that the best interest of the child is paramount to the desire to grant custody to the biological parent. However, in some states, there must be a showing of abuse and neglect, harm, or general unfitness of the natural parent before even the grandparents can attain custody of a child (Freed and Walker; Divorce). Hawaii and Illinois stand in contrast as there is codified parity between the fitness of a biological parent and third party with respect to obtaining custody (Freed and Walker; Fine and Fine).

3. Custody Modification

A petitioner must meet a high threshold requirement in order for a court to modify a custody decree. In the interests of stability of placement, the courts have taken the position that modification of custody orders should be made only if it can be proven that there has been a substantial change in circumstances since the court-ordered final decree. The modification must be to promote the best interest of the child, not just to promote a higher standard of living or a more agreeable living situation for the child. (Freed and Walker, Wisconsin Legislative Council). In contrast, at least two states have decreased the high standards which were required before a custody award would

be modified. Pennsylvania no longer requires a substantial change in circumstances (Jaindl v. Myers, 520 Pa. 147 (Pa. 1989)). In addition Utah has reduced the quantity of changed circumstances when custody is stipulated (Elmer v. Elmer, 776 P. 2d 599 (Utah 1989)).

4. Joint Custody

Joint custody is defined as an arrangement where both parents are responsible and have equal rights for major decisions concerning a child's life (McKnight; VDC). Joint custody does not necessarily mean joint physical custody. In the *Code of Virginia*,

> *joint custody shall mean either (i) joint 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, or (ii) joint physical custody where both parents share physical and custodial care of the child or (iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child* (§20-107.2).

In Virginia, as well as across the nation, joint custody has been a controversial issue. In the early 1970's most states ignored the issue and refused to consider it. But from 1987 to 1990, 33 of the U.S. states had joint custody laws. In 13 of the 33 states with joint custody laws, there was a form of legal preference or presumption favoring joint custody (Freed and Walker). The Model Joint Custody Act, formulated by the Joint Custody Association in California, created a rebuttable presumption that joint custody is in the best interest of the child and would be awarded unless the parent seeking sole custody could prove that such an arrangement would be detrimental to the child's best interest or both parents consented to sole custody (Folberg, 1984).

As with any custody case, the major consideration in awarding joint custody is the child's best interest, although some states have factors that must be considered only in regard to awarding joint custody (Divorce; Child Custody and Visitation). Each state has its own method, through statutory or judicial guidelines, for determining whether joint custody is appropriate. Florida, Iowa, Louisiana, Minnesota and Montana have a presumption of joint custody. Only California has a preference. Still others only consider the possibility if one or both parents request such a decree (Child Custody and Visitation; Clauses for Separation).

Proponents for joint custody list several advantages to the child and/or parent. These advantages include, but are not limited to the child's not having to choose between parents, fathers playing a more active parenting role, promoting compromise and cooperation between parents, reducing emotional damage to all parties, reducing the burden on a sole custodial parent, and decreasing subsequent litigation of custody awards (VDC). Studies and research conducted in the early 1980's of children in joint custody situations revealed that the self-image of children improved in response to the on-going relations with parents. Additionally, the child made easier academic and social adjustments to the divorce, and boys in joint custody were better adjusted than those in sole custody (VDC). Moreover, a 1982 Cowan study showed that children in

shared residences were faring well and sometimes better than those in maternal or joint custody, but living with one primary caretaker. However, the downsides of this arrangement are the possibilities that conflicting parents may cause stress and tension for the child, decision-making is made difficult by parents in conflict, and both parents are deprived of unilateral decision-making. The opponents to joint custody believe it regulates relationships, fathers abuse it to reduce child support, it continues grounds for conflict between angry parents, the child is forced to feel split, unstable, and confused, and it creates great potential to require judicial intervention as a result of uncooperative parents (VDC; Custody).

However, the validity of these studies has been questioned due to the under-representation of the general population within sample populations. Questionnaires completed by 112 divorced mothers and fathers indicated that fathers were more satisfied with joint custody while mothers were more satisfied with sole custody. Parents with more education, greater income and status occupations were more likely to have joint custody. (Shrier, Diane K., *et al.*, "Level of Satisfaction of Fathers and Mothers with Joint or Sole Custody Arrangements: Results of a Questionnaire. Special Issue: The Consequences of Divorce: Economic and Custodial Impact on Children and Adults" *Journal of Divorce and Remarriage* Vol. 16, 1991.) Specifically, the samples used in the joint custody studies have all been predominantly white, middle class families (VDC).

A review of the few statistically valid studies conducted on joint custody yield conflicting results. Research shows that children enjoy being able to have more contact with their fathers and support payment rates are better for fathers with joint physical custody (VDC). Other studies revealed that children suffer anxiety from the constant movement resulting from having two homes and girls tended to suffer more harm, and even exhibit emotional and behavioral problems (McKnight). Unfortunately all of these studies failed to attain a sample population representative of all ethnic and economic groups.

5. Visitation

Most states have developed standards concerning the non-custodial parent's right to spend some time with their child (Divorce). However, courts can deny visitation because of potential harm that could occur to the child (Freed and Walker). South Carolina and Colorado restrict and deny visitation respectively when the parent has a history of violence. (Freed and Walker). In determining visitation, the court looks to the best interest standards to create the most effective visiting arrangement for the non-custodial parent or other interested parties (Freed and Walker). The frequency of visitation is dependent on what the court finds is reasonable and within the child's best interest. However, the majority of courts do not specify the conditions under which visitation is to take, but rather use the term "liberal" visitation and leave the logistics of the visiting to be worked out between the parties.

B. CLINICAL RESEARCH

In researching the effects of different custody arrangements and/or visitation patterns on children, the reader must be cautioned on a number of points. The relative newness of the field makes much of the clinical research speculative. The explosion in the number of divorced families with children is a new phenomenon in American society, as is the relatively recent trend toward awarding joint custody. The newness of both conditions limits the number of longitudinal studies. Additionally, the majority of custody decisions are made by the separating parents without any judicial involvement. Historically, disputed custody cases comprised approximately 10% of the total divorce caseload involving minor children. While many areas of the child custody field are marked with polarity, there is consensus by all professionals involved in domestic law that custody and visitation cases are the most emotionally draining of all cases heard by the court. Therefore, persons who litigate custody and visitation issues tend to be those most heavily entrenched in conflict and in need of a court system to intervene and make decisions. By their nature, litigated custody cases represent the exception to the majority of divorce cases.

Academic research has provided the majority of insight on custody issues. In 1980, Wallerstein and Kelly published findings from the first major study of post-divorce families with differing custody arrangements. They found that children under the sole custody of their mother "did best" when contact was maintained with the father (Bruch, 1992). Research in the field supports the view that children are highly responsive to the involved non-custodial father (Granite, 1985). However, the mere presence of both parents in the child's life post divorce did not necessarily ensure the child would automatically adjust and "succeed." Research among family members post divorce found that levels of conflict between parents affect the psychological development of a child (Hendrickson, 1991). The more conflict between parents, the more likely that the child exhibited self-hate (Lerman, 1989). There has yet to be conclusive research to demonstrate that joint custodial parents experience less conflict than those in other forms of custody arrangements.

Fathers who were awarded joint custody, in a study of 25 joint custodial and 145 non-custodial fathers, had more contact with their children and were more satisfied with the custody arrangement than the non-custodial fathers (Arditti, 1992). During a secondary analysis of previously researched divorced parents, Pearson and Thoennes found that joint custody, emphasizing physical custody, was more attractive to affluent parents who were cooperative from the beginning of the separation process than those whose divorce was characterized by conflict (Pearson, Jessica; Thoennes, Nancy. "Custody After Divorce: Demographic and Attitudinal Patterns" *American Journal of Orthopsychiatry* Vol. 60(2) April 1990)). Additional caseload studies have revealed that joint custody is as beneficial for the child, if not more beneficial, than sole custody arrangements (Glover, Rebecca J., 1989). By contrast, a dissertation project by Bonnie Bailey entitled *Beyond Divorce: The Adjustment Process for Custodial Parents* revealed that parents with sole custody of their children were more satisfied with the arrangement and with their relationships with their children than parents who shared

custody (Bailey, 1989). Bailey's study involved 120 sole custody and joint physical custody parents. Rosner (1980) found in her research that judges and other child welfare professionals believed joint and split custody to be less than "desirable". According to a survey of the views of 62 judges and child therapists, joint custody "left the child with a fragile sense of predictability and heightened confusion about their daily environment. Opponents of joint custody have argued that children continue to fantasize about the reunification of their parents for longer period of time that their peers with sole custody and this retards their coping processes.

Research has identified certain characteristics of parents that appear to aid in making joint custody of a child a successful venture. Controlling one's anger, tolerance towards the other parent, trusting the other parent's competence, and ability to make decisions for the benefit of the child are the frequently cited characteristics (Underwood, 1989). Studies show that joint custody decrees have helped to reduce the number of relitigated custody cases and increase the number of parents who pay child support.

Mediation as an alternative to adversarial proceedings is frequently used in custody processes. Mediation in the context of divorce is a process of facilitated communication through which the parents (or parties) arrive at an agreement on how they will resolve their dispute(s). The mediator is a trained individual who remains neutral to both sides and works with the parties to help them to make decisions for themselves. The mediator's role is to ensure that each side is working toward an agreement based on similar levels of information and full knowledge of the consequences of their decisions. Supporters of the process believe it reduces litigation and facilitates cooperation of parents (Bruch, 1992). California, Delaware, and Maine are the only states in which mediation is mandated for all contested custody cases (Bruch, 1992). Wisconsin, Kentucky, and Minnesota have all encouraged the use of mediation in custody cases.

A study published in *Joint Custody and Shared Parenting* shows that mediation has the potential to help families who have difficulty reaching and coping with custody arrangements. Of the 48 San Francisco families participating in a program providing parent education and support groups, 12 mediation sessions, child assessments, and follow-up sessions at six and twelve months, 38 reached joint custody agreements. However, not all of these families were able to maintain these arrangements. Only 12 couples were successful at maintaining the arrangement with minimum conflict and distress, while twenty were "stressed" couples who maintained the relationship but with more conflict, frustration and distress. The last 15 families were unable to agree on an arrangement or to maintain one. Surprisingly, the stressed families seemed to be functioning near the level of successful families 18 months after completion of the study. These families reported becoming more satisfied with the child's moving from home to home, considering the other spouse to be important, "feeling positive about the situation," and establishing new relationships. The children in these groups tended to have similar adjustment patterns as their parents. Those families who identified themselves as successful, usually indicated their children to be doing well. Only three of 14 children showed symptoms of stress. Conversely, stressed families revealed

some disturbance in the child's behavior; adjusting to transitions between homes took some time. These children continued to have difficulty at the 18-month check-up. While younger children (six and below) originally had little difficulty with the process, at 18 months they began to encounter problems in behavior. Adolescents had the most difficulty in adjusting to the new family configuration (Brotsky, Steinman and Zemmelman, 1988).

A study by Pearson and Thoennes found high user satisfaction for those who participated in mandatory mediation services in Los Angeles. Ninety-two percent of participants would recommend the process to others in divorce disputes (McIsaac, 1992). Mediation was found helpful to eighty-two percent of those users. In comparison, women users seemed to be less satisfied (Bruch, 1992). Parents also complained about the fact that mediators may misunderstand their concerns and recommend against their custody desires.

C. VIRGINIA'S SYSTEM

1. Legal Processes

The Juvenile and Domestic Relations District Court has jurisdiction over the majority of all child and family related matters. With respect to divorce, child custody and visitation, both the District and Circuit Courts have concurrent but not exclusive jurisdiction. All parties subject to any juvenile court order may appeal the decision to Circuit Court. This is often the case in disputed custody and visitation matters. Once appealed, these cases are heard from the beginning (or *de novo*) in Circuit Court. When a suit for a divorce has been filed in Circuit Court and custody or visitation issues are raised, the Juvenile and Domestic Relations Court is divested of the right to enter any other orders or decrees. Circuit Court judges are able to refer divorce cases to commissioners in chancery. These commissioners are private attorneys who are appointed by the court and serve a quasi-official capacity. They interview the parties and make written findings to the court on the grounds for divorce, custody, visitation, child and spousal support and property divisions. The majority of the Circuit Courts across the state use commissions. An appeal of a Circuit Court decision is heard in the Court of Appeals and is heard on the record.

In the current process, a divorce case in which the issue of custody is contested could be heard up to four different times: first by a Juvenile Court Judge, then by a Commissioner, then a Circuit Court Judge, and potentially a Court of Appeals Judge. Leaving aside the issue of continuances and the routine rotation of judges on the "domestic docket," the current system does not allow for a prompt resolution of custody and visitation issues. The timeframes in which these decisions are made do not account for a child's sense of time and a family's need for closure on emotionally difficult and draining issues.

2. Mediation

Mediation in Virginia is frequently conducted by Court Service Unit staff at the District Court level, Department of Social Services staff, as well as by local community dispute resolution center volunteers and private practitioners. Mediators must meet certain training standards established by the Supreme Court of Virginia. Judges have the authority to order cases to a dispute resolution evaluation session, which is conducted at no cost to the parties and is designed to facilitate the parties' decision about using mediation. Mediation referrals are structured in such a way that they do not interfere with docketing procedures, thus allowing the parties to determine on their own how long they choose to participate in the process. Mediators present themselves as experts in the process, whereas the parties are the experts in the substance of the issue to be decided. After the parties have elected to try mediation, they maintain the final say as to whether they reach an agreement and when they will return to court.

In Virginia, mediation cases are routinely screened for domestic violence prior to a referral to the initial evaluation session. If there is a history of abuse but no indication of its present appearance, additional screening occurs in the evaluation session to assess if the prior victim is interested and prepared for mediation. Mediation allows the parties to regain control over the resolution of their disputes.

3. Child Custody Evaluations

Frequently judges and attorneys turn to mental health experts to help them determine child custody arrangements. Currently the court has the authority to order or allow the parties to introduce testimony as to the character of the parents and their relationship with the child(ren) in question. However, there are no guidelines as to who is qualified to make a recommendation to the court (save those rules of court pertaining to qualifying as an expert witness) or what the appropriate scope of inquiry should be. In many jurisdictions across the state, the court routinely orders a child custody evaluation to be conducted by either the Court Service Unit or local Department of Social Services staff. Both these public agencies routinely conduct home studies pursuant to an investigation for a foster home placement, potential removal of the child as a result of abuse or neglect, adoptive placement, or as a component of developing a social history of a delinquent or status offense youth. These types of investigations call for a distinct set of skills and have different goals from that of evaluations of child custody. In many situations the judge is not always given the most relevant and reliable information required to determine custody cases. Too often the staff performing the evaluation is doing so without the benefit of specialized training or supervision.

There are many mental health professionals across the state who specialize in child custody evaluations. While there is relative consensus among mental health practitioners as to the characteristics of good parenting, there is little professional agreement as to how to measure these characteristics. In an effort to begin to inform the field and lessen the sense of dissatisfaction felt on the part of litigants and judges, the American Psychology Association has begun to draft guidelines for child custody

evaluations. While the historical focus on custody evaluations has been the "fitness of the parent", this approach is beginning to shift. Absent an abstract standard of parental fitness, the focus of the assessment has begun to be on the "goodness of fit" between parent and child.

Concerns have been raised about the premise that two "experts" with limited access to the other parent are of limited utility to the judge. Often these experts provide conflicting testimony. While there has been no empirical study on the issue[3], it has been suggested that a single evaluator with appropriate training and provided access to all pertinent information and evaluation data on all members of the family could provide more useful and accurate information to the judge in disputed custody cases.

4. Family Court

The 1989 Session of the General Assembly enacted legislation which directed the Judicial Council to establish and evaluate an experimental family court project. The Family Court places jurisdiction of all family and child related matters into one court's jurisdiction. In addition to all the cases routinely heard in Juvenile and Domestic Relations Court, Family Courts are empowered to hear suits for annulling or affirming a marriage and/or divorce. Final orders of the Family Court are appealed on the record by the Court of Appeals in any case involving the annulling or affirmation of a marriage, divorce, custody, civil support of a child, spousal support and termination of parental rights. Family Courts do not use commissioners in chancery. The principle behind Family Court is that the procedures and systems of a court system that adjudicates family law cases need to be as simple as possible in order to be accessible to the public and to accommodate those individuals who choose to represent themselves.

VII. Model Child Custody Guidelines and Visitation Schedules

The work group's task was threefold:

1) to propose a "model" for determining child custody and visitation,
2) to compare existing Virginia laws and processes with the proposed "model," and
3) to identify the appropriate strategies (*i.e.*, training, public education, *Code* changes) which would alter the current system to more closely approximate the model.

In order to accomplish those tasks, national statutes were analyzed, along with a sample of visitation schedules used in localities across the country. A synthesis of

[3]The Commission on Youth, in conjunction with the Virginia Commonwealth University's Department of Psychology, plans to conduct research on a single evaluator model in the spring and summer of 1994 and report its findings back to the General Assembly in 1995. An explanation of the proposed research model is listed in Appendix C.

"clinical factors" having particular relevance to custody decisions was identified and discussed.

As a result of presentations and ensuing debates and discussion, the work group constructed guiding principles or values of a model. Once the values were agreed upon, the more concrete components (*i.e.*, the logistics of decision-making with respect to court docketing, the use of experts, the elements of visitation schedules) were then developed.

Work group members began their deliberation acknowledging the limited amount of legislative history in Virginia and the importance of case law (*e.g.*, Harper v. Harper is relied upon to refute the tender years doctrine as much as *Code* language) in custody and visitation decisions. While there is some data available on patterns of custody decisions made (specifically data used in the Family Court Pilot and independent research by the Children's Rights Council) both of these studies have limited statewide applicability due to the smallness of the sample in one case and the unique characteristics of the sample to a statewide pool in the other. The statewide data available on custody decisions is not specific enough (*i.e.*, analysis of the types of custody and visitation decisions made) to be useful for the study effort.

The work group's initial step was to develop a shared value base that allowed for the integration of all the viewpoints. The principles were arrived at after review of both clinical and legal materials. First and foremost, the group affirmed the uniqueness of families and the importance of not relying on a "cookie cutter" approach to any element of custody or visitation decisions. Additionally, it was agreed that any custody and visitation concerns need to acknowledge the needs of unmarried parents as well as "third parties," *i.e.*, grandparents and stepparents.

A. GUIDING PRINCIPLES

After four months of meetings, the work group agreed upon a model. The model in an abbreviated version chart form is provided in *Exhibit 1*. Each element of the model is discussed in detail.

Exhibit 1

MODEL FOR DETERMINING CHILD CUSTODY AND VISITATION

Guiding Principles

- The parent/child relationship is primary.
- The child custody process should be child-focused.
- There is a legitimate role for the courts in custody decisions.
- The dignity of all parties should be preserved.
- The process should help families preserve their resources (*i.e.*, time, good will, emotional health, finances).
- Promote frequent and continuing contact with each parent.
- Children deserve a healthy and non abusive family environment at all times

System Elements

- Fixed number of days/time parent can spend with child with no specific "justification"
- There are bilateral sanctions for non-compliance
- Default schedules have a role in the process
- There are specific days which have special significance
- No presumptive orders

Factors

- Geographic distance of parents
- Transportation /transfer points
- Summer visits
- Extended visits

CHILD VARIABLES	PARENT VARIABLES
Age and developmental maturity	Age
Gender	Physical health
Preference	Geographic location
Special needs: gifts or disabilities (educational, psychological, physical)	Ability to meet basic needs
Relationships with others, siblings, extended family	Relationship with other parent — conflict level and ability to cooperate
Community and school ties	Support for relationship between child and other parent
Attachment to each parent	History as primary caretaker
Continuity and stability of placement	Ability to parent/Adequacy of surrogate caretaker
	Quality of relationship with child
	Accurate perception of self as parent
	Promotes appropriate independence of child
	Knows developmental needs of child and has ability to meet them at each stage
	Able to place child's needs before self
	Provides positive role model for child, including stable and flexible identity, control over impulses, moral values, good coping skills, good self-esteem
	Fosters honest, two-way communication
	Presence of demonstrated risk factors: child abuse/substance abuse
	Quality of other relationships, including family and friends, degree of isolation, ability to form new friendships, community involvement

The parent child relationship is primary—The work group acknowledged the growing role of grandparents, stepparents and foster parents in many custody cases. After reviewing the case law and clinical information, the group affirmed that a child-focused model must acknowledge and make decisions based on the primacy of the parent and child relationship. This value is supported by the wealth of clinical studies which prove children adjust and thrive when they have on-going, non-conflictual relationships with both parents after the divorce.

The child custody process should be child-focused—The child(ren)'s needs should be the primary focus of the model. Throughout the discussions, work group members acknowledged the legal system is rarely child-focused in either its structure or process. Examples of the ways in which disputed custody case procedures are not child-focused include protracted legal battles, invasive custody evaluations, and children being asked to choose between parents. It was hoped that, through an expanded role of the mental health professional, the judge would restrict the information to that which is relevant to the child's needs. Within the membership of the work group, there was an acknowledgment that the needs of the parents and those of the child(ren) are *not* always synonymous and in some situations may conflict. While by no means an easily-reached decision due to its potential consequence, the group decided to maintain a child-based focus for its model.

There is a legitimate role for the courts in custody decisions—Less than ten per cent of all custody cases are litigated in court. With the increased reliance on mediation, fewer custody cases are decided through a purely adversarial system. However, as much as mediation is viewed as the preferred alternative, it is acknowledged that there are cases in which the impartial third party role of the judge, with access to all pertinent facts, was necessary. The affirmation of the role of the court was also made in response to the suggestion that all custody cases be removed from a litigated arena. In deference to the problems with mediation in some types of cases, the incidence of abusive parents, the inability of some parties to resolve conflict, and the necessity of the involvement of the court were re-affirmed in the model.

The dignity of all parties should be preserved—Litigation which allows character assassination was strongly rejected. The use of mediation and increased responsibility for decision-making by the parents is a key component to the model.

The process should help families preserve their resources (i.e., time, good will, emotional health and finances)—Any custody or visitation model operating within the court context needs to acknowledge the cycle of family dissolution and its impact on all the members of the family. Processes providing for the swift adjudication of custody decisions limit the degree of uncertainty for all involved. Lengthy court involvement prolongs hostility and inadvertently promotes the view that access to children can be bargained over or withheld. Model processes should not promote a duel between the parties and/or the "experts." The model embraced was one in which the parties could reach decisions promptly in a non-adversarial way.

Promote frequent and continuing contact with each parent—All clinical research affirms that children do best in adjusting to the break-up of their parents when they have frequent and continuing contact with both parents. The model promotes contact when the parent is deemed fit, specifically with respect to abuse. It was agreed that the next element of the guiding principles conveyed the importance of the provision of a non-abusive environment to the child.

Children deserve a healthy and non-abusive family environment at all times—While there was unanimity on this value with respect to child abuse issues, care was taken that the wording would not give undue favoritism to a parent who had the financial means to live in a "safer" neighborhood. Custody decisions should not be based on the financial ability of the parties. While no judge can assure that one situation is inherently "safer" than another, the model affirms that an overriding value of any decision making should be the ability to provide an abuse-free environment for the child(ren).

B. SYSTEM ELEMENTS

Each component of the model affirms the uniqueness of each family, as do the remaining system elements. The model does not include any presumptive orders for either visitation or custody. At the time of the deliberations, it was agreed upon by all members of the group that any form of presumptions do not take into account the uniqueness of the family configuration. With the model's focus for child custody decisions on the "goodness of fit" between parent and child(ren), presumptions of any kind are contra-indicated. In light of the model's promotion of frequent and continuing contact with each parent, increased reliance on mediation, and shared responsibility for decision-making by the parents, any form of presumption was not supported by the principles and values.

The work group began its deliberation acknowledging the limited amount of legislative history in Virginia and the importance of case law (*e.g.*, Harper v. Harper is relied upon to refute the tender years doctrine as much as *Code* language) in custody and visitation decisions. While there is some data available on patterns of custody decisions made (specifically data used in the Family Court Pilot and independent research by the Children's Rights Council) both of these studies have limited statewide applicability due to the smallness of the sample in one case and the unique characteristics of the sample to a statewide pool in the other. The statewide data available on custody decisions is not specific enough (*i.e.*, analysis of the types of custody and visitation decisions made) to be useful for the study effort.

In addition to a value structure, concrete components of the model were identified. These system elements, like the guiding principles, addressed both custody and visitation concerns. "Minimum" or "default" visitation schedules from selected jurisdictions were reviewed. Common elements and underlying assumptions of these schedules were distilled and discussed. It was decided that no form of visitation

schedules were distilled and discussed. It was decided that no form of visitation schedules should be codified. It was determined after lengthy discussion that the development of default schedules was more appropriately handled through training provided for both the judiciary and attorneys[1]. For those families unable to work out their own agreements, the court does have a role in developing default schedules and these default schedules should affirm the guiding principles of the model. The model, in upholding its child focus, maintained that there should be sanctions for the parent who does not comply with the custody or visitation order. (Non-compliance involves the withholding of children as well as the parent not showing up at scheduled times.) Special days, such as birthdays, religious holidays and school vacations, should be incorporated into default schedules. Additionally, the model allows for additional specified number of days that the parent should be able to spend with the child with no justification. These special days with their own significance should be addressed in any schedule.

C. LOGISTICAL FACTORS

In analyzing the visitation schedules, the work group found that any schedule would need to take into account specific factors. Many of the factors restate the obvious, *e.g.*, geographic distance between the parents needs to be taken into account when developing custody and visitation arrangements. Similarly, the school calendar, with respect to vacation and holidays, needs to be consulted. The issue of shared responsibility for transporting the child(ren) and importance of "neutral" transfer point is affirmed by the model. Any visitation schedule should reflect the child's developmental stages, requiring unique arrangements for infants and toddlers, as well as pre-school age children. Much time was spent discussing the role of the child in developing a visitation schedule. Adolescent-age children, whose primary task is the formation of a separate identity from their parents, posed unique issues. The model supports good parenting skills regardless of the marital status of the parents. The desires of the children should be incorporated into the decision-making process, but the child should not be given inappropriate control in determining custody and/or visitation arrangements.

D. PARENT/CHILD VARIABLES

It was stressed that the variables listed on the model need to be viewed as an inter-locking series of factors, rather than an independent listing of characteristics. The major emphasis in the variables was on how they measured the "goodness of fit" between the child and the parent, as opposed to free-standing assessments of either party. In terms of child-related variables, those which were identified as most important for custody considerations were indices related to the child's development age, relationship with their parents and their other important relationships. Any custody

[1]There was a dissenting opinion from this view from the Children's Rights Council. Please see Appendix D.

decision-making model needs to incorporate the changing developmental needs of the children with respect to all of their relationships, but most specifically those with their parents. An overarching concern in all custody and visitation arrangements was the need for stability and continuity for the child. Visitation schedules should remain consistent and predictable for the child and custody arrangements also must be characterized by their predictability.

With respect to parent variables, the focus is on the adult's ability to parent. Issues related to spousal and or child abuse were listed under child and parent variables. Emphasis was placed on the parent's ability to meet the child's needs. The ability to foster relationships with the child's other parent and extended family members was included as a component of parenting. The parent's past involvement with the child, as well as indices that may serve as predictors of future caretaking ability, were included. While by no means an exhaustive list, the variables included were characterized by their importance in gauging the health and stability of the parent-child relationship.

Much has been written about clinical relevant considerations when making custody decisions. Those listed on the model were agreed upon the group as being the most relevant. For more information, the reader is referred to *Solomon's Sword*, authored by one of the work group's participants, Dr. Benjamin Schutz.

E. TIMING OF PROCESS

Unfortunately, in the current system the issue of custody can end up being used as leverage for unresolved property issues. In response to court dockets and the use of continuances by attorneys, custody cases can drag on for years. Children suffer when custody remains a point of conflict between the parents. Balanced against the need for swift resolution of custody issues is the reality that parents' judgments tend to be most impaired at the early stages of the separation. Frustration, anger, rejection, and vengeance are all commonly-felt emotions by separating (divorcing) couples. Often custody issues are seen as a way to punish the other parent by withholding access to the child or minimizing the role of one parent in the child's life.

The model strongly discourages the raising of custody issues as a means to punish a parent or as a bargaining ploy for the distribution of property. All custody decisions should be raised and resolved in the context of the child's needs. Research on promising approaches across the state was conducted and the process of the Fairfax Circuit Court was identified as a system worth emulating. (For more detail on the Fairfax model, please refer to Appendix F.)

The specific components of the Fairfax process are as follows:

- Custody issues are the first issues addressed by the court, before all other matters arising from the divorce.
- Status conferences are scheduled within 45 days of the filing of the petition at which time the appropriateness of the use of mediation and the need for a *pendente lite* hearing is established.
- All custody cases are referred to mediation by the judge at the 45 day status conference unless the judge deems the case inappropriate. The following factors are considered to make the case inappropriate for mediation:
  - children are of sufficient age and capacity to make decisions for themselves;
  - allegations of sexual or physical abuse;
  - history of substantial substance abuse or mental incapacity by one or both parents;
  - threat of parental kidnapping.
- All final custody decisions are made within 150 days from the filing of the petition if the litigants choose mediation, and within 90 days if there is no referral for mediation.
- Experts to the case must be identified within 60 days of the filing of the petition and a cut-off for discovery (30 days prior to the hearing) is established.
- Mediation must be completed within 100 days of filing and will be conducted by staff of the Juvenile and Domestic Relations Court unless the parties opt to use a private practitioner.

This model is heavily dependent upon mediation, which, due to limited resources, is not available to all litigants across the state. Most local court and social service workers use a screening mechanism to identify cases inappropriate for meditation. The Fairfax process clearly lists the prohibitions of mediation. The model used in Fairfax allows for a separate hearing on child support matters and permits the filing and hearing of these cases prior to the conclusion of the custody issue. While the custody decision is pending (with the outside time limit of 150 days) there are no changes in the child(ren)'s living arrangements.

The model developed does not list factors making cases inappropriate for mediation. These decisions are left up to individual programs. The model also affirmed the importance of allowing for emergency hearings to take place even in "expedited" models such as the one used in Fairfax.

With respect to temporary orders, the model assumes there will be no presumption that a temporary decision will be the same as the final order. While certainly not the intent of the judicial decision, often presiding judges paint themselves into a corner by making temporary custody decsions and then feeling constricted in their ability to reach a different decision in the permanent custody hearing. The awarding of temporary custody is discouraged in the model except for cases where there is a fear of kidnapping or a protective order is issued.

F. ROLE OF ASSESSORS

It was discovered that in many parts of the state a court-ordered custody evaluation is conducted by either the Court Service Unit or local Department of Social Services staff. In these instances, "home studies", which are used for assessment of a child in placement in foster care, or adoptive studies are often conducted instead of custody evaluations. The difference between the two investigations is found in the focus of the inquiry (*i.e.*, the goodness of the parent versus the "goodness of fit" between parent and child). The model recogizes that there are currently a variety of disciplines (*i.e.*, probation officer, social worker, psychologist, psychiatrist) which conduct child custody evaluations. The model requires the identification of those components of an "assessment" which are relevant to custody evaluations.

The model suggests a custody evaluation should be comprehensive and consist of three components: review of the facts of the parents' situations and observation of the parent/child interactions, interviews with the child and parent together and separately; and the administering and interpretation of evaluation assessment and tools. The work group did not create an in-depth listing of issues which need to be addressed in a custody evaluation. However, they did support Virginia Commonwealth University's plan to conduct a single custody assessor pilot as a means of identifying relevant instruments, as well as salient factors to address. (See Appendix C.)

Dr. Schutz created a chart for the work group which identifies the content of a thorough child custody evaluation. This graphic display of relevant information was accepted and incorporated into the model and appears as *Exhibit 2* on the following page.

Content of A Child Custody Evaluation

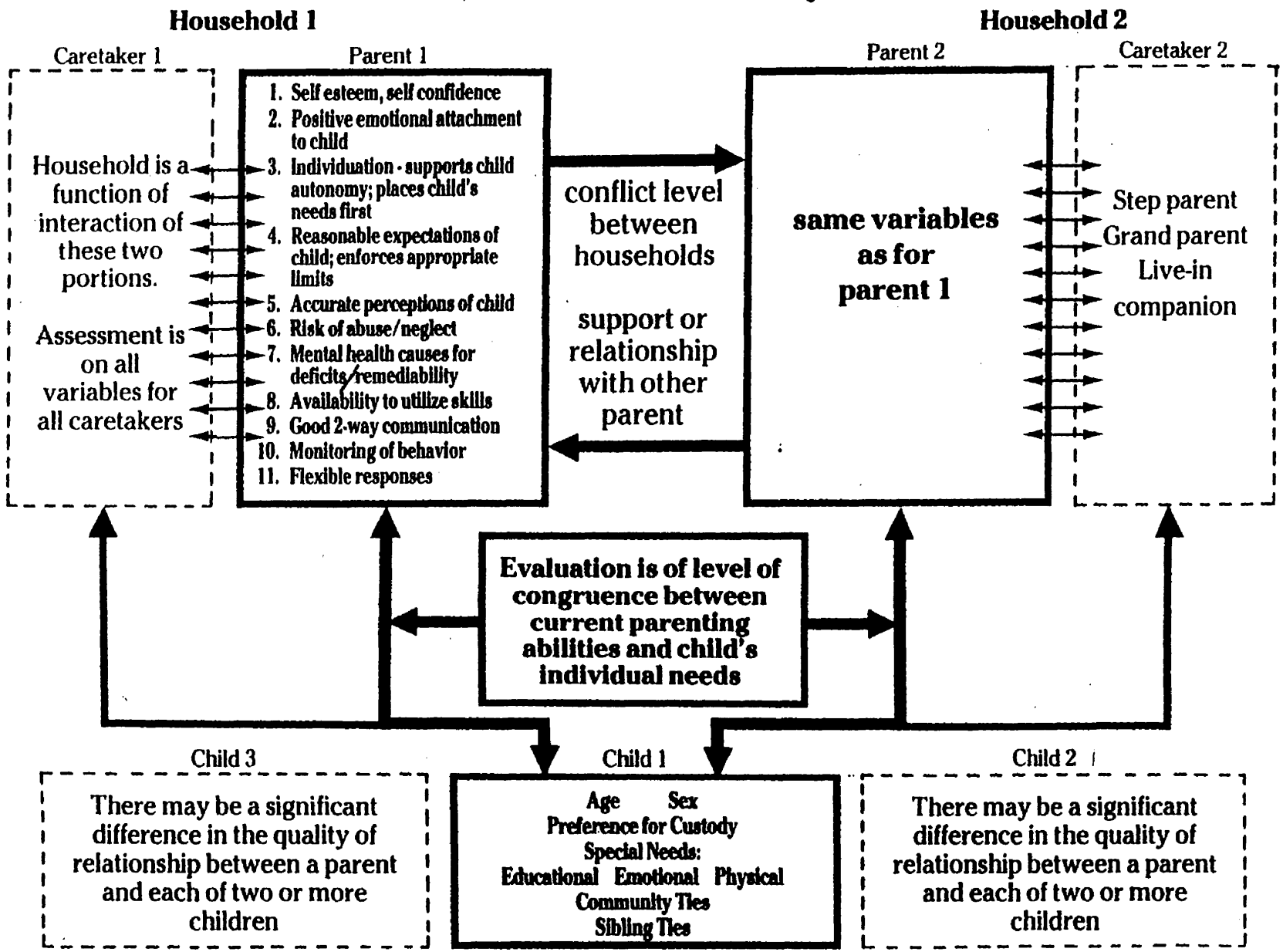

EXHIBIT 2

VIII. Findings and Recommendations

In developing the model, the work group relied on the research and analysis from a variety of fields. Information was distilled into a set of operational principles which would be applied to the current system. General findings which influenced the model are:

- Children need stability and predictability in their lives in order to flourish.
- Children who maintain contact with both parents after a divorce benefit from those relationships.
- Conflicts between parents can adversely affect the children of divorce.
- Children's needs may and often do differ from parents' needs.
- Mediation allows parents to retain responsibility for decision-making.
- Family dissolution has developmental stages of adjustment for all family members.
- Child custody and visitation cases are the most emotional form of court cases.
- Mediators may benefit families which originally could not cooperate for the best interest of the child.
- There are no "winners" in disputed custody cases.
- Current data systems are inadaquate to ascertain if gender bias exists in the awarding of custody in Virginia.
- Children have changing developmental needs which need to be incorporated into custody and visitation decisions.
- Child custody arrangements and child support payments are closely intertwined.
- Language is powerful and there are negative implications to the terms *non-custodial* and *visiting* parent.

Once the model was developed, the task was to compare it to the current system. In those places where differences were identified, the task was to develop strategies which would bring the current practice more in line with the model. Three strategies, *Code* revisions, field research, and professional training, were identified as means of altering the current practice of deciding custody and visitation to more closely resemble the model.

The bulk of the deliberations centered upon the current statutory guidance in child custody and visitation cases. The current statute was reviewed for its congruence with the model and, based on the work group's deliberations, suggestions for *Code* revisions were made. (A copy of the proposed legislation is listed in Appendix G.) A brief discussion on each of the suggested revisions follows.

Recommendation 1:

Revise § 0.107.2 and other relevant sections of the *Code of Virginia* pertaining to child custody and visitation to effect the following:

- **Provide guidance to the court in determining all custody and visitation disputes, regardless of the marital status of the parties**

- **Require that custody and visitation decisions be made prior to other decisions arising out of divorce and/or separation proceedings (excepting those related to protective orders and *pendente lite* hearings)**
- **Promotion of frequent and continuing contact with each child and each parent when appropriate**
- **Support for mediation, as opposed to litigation, as a means to settle custody disputes**
- **Expansion of factors defining "best interest of the child"**

Discussion--Although the *Code* cite §20.1076.2 regarding custody and support of minor children is cross-referenced in the Juvenile and Domestic Relations Court section (§16.1-278), guidance to the Court in custody matters appeared to be largely restricted to married couples. By creating a new chapter, the *Code* is more responsive to the current trend in which unmarried couples seek the intervention of the Court with respect to custody and visitation. Therefore, a new chapter in Title 20, Chapter 6.1, Custody and Visitation for Minor Children, has been drafted.

The issue of terminology represented a unique struggle in drafting legislation. In acknowledging the power of language in conveying social stigma, it was agreed that the concept of a "visiting parent" is inconsistent with the values of the model. However, the importance of language with respect to its interconnection with case law and other sections of the *Code* was acknowledged. The desire to remove stigmatizing language was weighed against the importance of maintaining case law and the codified relationship between child support and custody. The choice not to alter language was made because, for the the majority of the group, the argument was not compelling enough. This was one area in which a vote was taken. The reader is referred to Appendices D and E for more information. It was felt that new language (*parenting arrangements* instead of *custody, parenting schedules* as opposed to *visitation*) would begin to take on the stigma of the current language once it had been in place for a few years. The group reasoned that it was the condition of not living with the child, *not* the terminology, which is so scarring for the adults so named. In the creation of a new terminology, the same stigmatization would undoubtedly occur simply because it describes the same reality, and no new naming of that reality lessens the frustration or sadness on the part of the parent it describes.

While the current language was maintained, there are a number of additions to the *Code* dealing with custody and visitation which are believed to move current practice to more closely approximate the model. Currently the promotion of frequent and continuing visitation with both parents are not specifically mentioned in the *Code*. All research on the effects of divorce on children shows that children adjust better when there is on-going contact with both parents. While the presumptions of joint custody did not encompass the unique nature of each family, the model does support the principle of frequent and continuing contact with both parents.

Another finding which influenced the *Code* revisions was the need for closure and a process which keeps conflict down in custody and visitiation cases. The

timeframe in which custody cases should be decided are not identified in the *Code* despite clinicians' support for adapting child-related cases to a child's sense of time. In the absence of resources, it would be imprudent to recommend the statewide adoption of the Fairfax model. It is hoped, through the funding of the Family Court, mediation services will be available across the state. Rather than set a 150-day limit, *Code* revisions were suggested which promote the swift adjudication of these cases and the settling of custody decisions prior to other matters arising from the case. As was discussed in previous sections, allowances were made for *pende lite* hearings.

The promotion of mediation in custody is a primary value of the model. Adversarial proceedings tend to continue conflict, strip the parties of their decision-making ability and turn the cases into something to be fought and won, with the children often paying the highest price. Mediation returns the decision-making to the hands of those with the greatest investment in the case, the parents. It is acknowledged that there are couples for whom mediation is not indicated. While the majority of the work group wanted mandatory mediation in *all* disputed custody cases, in the end, the work group adopted the same procedures passed by the 1993 General Assembly Session regarding alternative dispute resolution.

Additionally, the importance of the parent-child relationship was added to the *Code*. The model acknowledges and incorporates the primacy of the parent-child relationship and believes this primacy bears mention in the *Code*. The new language also makes clear that the court has the power to punish as contempt any willful noncompliance with a custody or visitation order.

With respect to the expansion of "best interest" factors, a number of changes were made:

- The child's changing developmental needs were added as a modifier of the physical and mental condition of the children.
- The components of a parent's relationship with the child were enunciated with respect to the parent's ability to meet the child's emotional, intellectual and physical needs, as well as to discipline and set limits. These attributes distill the most salient components of the parent variables.
- The child's important relationship with persons other than parents was listed as a component of the child's needs.
- The parent's ability to support the child's relationship, as opposed to mere contact with the other parent, was added.

All research points to the importance of divorced/separated parents not conflicting with one another around or through the child(ren). The new language makes clear that visitation and custody decisions are to take into account the propensity of both parents to support a relationship, as opposed to mere contact with the other parent. It was hoped that the introduction of more "clinical" language into the *Code* would aid the court sharpening its focus on the issues to review. It was argued custody and visitation decisions should be made on the basis of a psychological assessment of "goodness of fit" between parent and child.

Findings

- Ten percent of all divorce cases involving children are litigated.
- Child custody evaluations rely less on that of legal precedent than on human psychology and development.
- Judges are not provided with training on psychological human development issues.
- Judges need additional educational support to make use of the testimony provided by expert witnesses and to aid in their reaching custody and visitation determinations.
- Judges are skeptical of mental health expert testimony in many custody cases.
- The attorneys can play a large role in determining the level of acrimony involved in the case.
- Child custody cases are the most emotionally charged of litigated cases.
- Acceptance of mediation by attorneys varies greatly across the state.
- Law school does not provide training on psychological issues.
- Many attorneys still see custody cases as cases to "win."
- Litigants in disputed custody cases manipulate custody issues for gains in other areas.

Recommendation 2:

The Supreme Court should provide judicial training on the psychological development of the child, post-divorce adjustment and adaptation, as well as other issues that would better enable the bench to assess the factors related to a child's "best interest" in custody cases. In addition, judges should receive training in creating specific orders for visitation which promote frequent and predictable contact for each child with each parent.

Discussion–The issue of professional development was addressed by the study. Judges are often unable to make thorough use of mental health testimony provided in custody cases due to an unfamiliarity with the terms. Child custody cases call for an understanding of information not taught in law school. It was the strong recommendation of the study that judges receive specific training on issues relevant to custody and visitation concerns. Currently training is provided to the judicary by the Supreme Court and takes the form of pre-bench seminars for new judges, mandatory and voluntary annual training events and the oppportunity for specialized training. In order for current practice to more closely resemble the model, judges need training to enhance their ability to make use of expert testimony in these cases. Training needs to address issues relevant to child development assessing best interest factors, understanding adjustment patterns of all familiy members to the crisis of divorce and separation and other issues such as domestic violence in the context of divorcing and/or separating couples. Lastly, as the model did not codify visitation schedules, the provision of training which addresses the underlying assumptions behind default schedules would meet the goal of avoiding a "Wednesday night and alternating weekends" approach. It is hoped that, through training, the barriers between the legal and clinical professions can be lessened.

Recommendation 3:

The Family Law Section of the Virginia State Bar should provide training on the psychological development of the child, post-divorce adjustment and adaptation, as well as other issues that would better enable the bench to assess the factors related to a child's "best interest" in custody and visitation cases. In addition, attorneys should receive training in creating specific arrangements for child visitation which promote frequent and predictable contact for each child with each parent.

Discussion--Litigants are dependent apon the advice of their attorneys. In emotionally charged cases such as custody, the role of the attorney in setting the tone and approach to case is **increased.** The litigant has many different emotions to juggle and the attorney's role should be to help keep conflict down and encourage the client to focus on the issue at hand. The decision of custody should be made by those with the greatest investment, the parents. As with the judge, the attorney has little formal training in child developmental theory or psychological issues to help them handle these cases. By understanding the long-term consequences on children when custody cases are approached as something to "win," lawyers may begin to support mediated and less acrimonious approaches to resolving custody and visitation cases.

Findings

- Courts are provided different types of information in response to their requests for child custody evaluations.
- The term "child custody evaluation" has come to encompass many things.
- Staff from local Departments of Social Services and Court Service Units conduct child custody evalutions across the state.
- The content of home studies and social histories vary from that of child custody evaluations.
- The two public agencies charged with providing child custody evaluations have not clarified what issues need to be addressed when such evaluations are conducted.
- Public agency workers are not provided specialized training in conducting child custody evaluations.
- There are no guidelines for any professions with respect to child custody evaluations.
- Child custody evaluations provide the information upon which the judge makes the determination regarding the child's best interest.

Recommendation 4:

The Boards of the Department of Youth and Family Services and Social Services should, by January 1, 1995, jointly establish the guidelines for child custody evaluations conducted by their employees. These guidelines should address both the scope of the inquiry and suggested staff qualifications. Both agencies will be responsible for making their final work products available to judges, *pro se* litigants, and members of the bar across the state.

Discussion--In many localities across the state, the judge seeks the services of public agencies to conduct a custody evaluation. The term "child custody evaluation" has come to encompass many things. Many courts are provided very different types of information in response to their requests for child custody evaluations. The two public agencies charged with providing the evaluations have not clarified what issues need to be addressed when evaluations are conducted. Given the other types of "studies" made by these agencies, the focus too easily shifts to the parent, rather than on how the child and parent interact. By an interdisciplinary effort, the components of an evaluation and the qualifications of the responsible individual can be standardized within and across the two agencies that are routinely requested to provide the Court with information. Standardization of information should increase the utility of the reports. The Department of Social Services has begun to develop guidelines for their local departments and their work should lay the ground work for the collaborative effort.

Once the components of the evaluations and qualifications of those entrusted to complete them have been agreed upon by the agencies this information should be shared with the public. Dissemination to the judiciary, bar and *pro se* litigants is a means of educating all involved parties on the components and legitimate scope of a child custody evaluation from the perspective of the public agencies.

Findings

- Many litigants engage private therapists to conduct child custody evaluations.
- A variety of professional disciplines (*i.e.,* social work, counseling, psychology) conduct child custody evaluations.
- It is standard practice for both parties to hire therapists to conduct custody evaluation.
- As with the public sector, there is no standardization across the field as to what constitutes a thorough and relevant child custody evaluation.
- Access to both parties by any one evaluator is often barred.
- Judges are often provided with diametrically opposed testimony by the conflicting experts.
- Child custody testimony is often emotionally damaging to the other party.

Recommendation 5:

The Health Regulatory Board should provide oversight to the Boards of Psychology, Medicine and Social Work as they develop minimum standards for child custody evaluators within each discipline, with the goal of gathering information relevant to custody decisions. Each Board should make this outline their standards available to judges, *pro se* litigants and the bar.

Discussion--While many localities rely on public agencies for child custody evaluations, private practitioners across the state also conduct evaluations. The manner in which these evaluations are conducted is fraught with problems, ranging from concern over the validity of the tests, lack of pertinent training, to conflict of interest, potential in light of the potential for financial gain by the evaluator. Faced with conflicting testimony the

judge may find little validity for the child expert. Private practitioners lack a common definition of relevant information to guide their inquiry. As a result, litigants and judges have no way of knowing if the assessments/evaluations offered have relevance in making informed custody and visitation decisions. Given the importance of the decision in the life of the child, development of common indices which are relevant in determining "goodness of fit" between parent and child are recommended. The Boards of the professions cited routinely establish guidelines and/or standards for specific populations or for a specific therapeutic approach. With the goal of developing standardization in the field, each discipline should be charged with establishing its own process as it relates to child custody evaluations. The Health Regulatory Board, in its oversight capacity of these specific Boards, should provide leadership and direction to the task. As with the public sector, it is anticipated that the dissemination of each disciplines' finding to the bench and bar will increase understanding of the mental health experts and promote the appropriate reliance on these disciplines in child custody cases.

Recommendation 6:
The Departments of Social Services and Youth and Family Services and relevant Boards under the Health Regulatory Board should share information with each other as they develop minimum standards for child custody evaluators within each discipline, with the goal of identifying relevant information.

Discussion--The scope of child custody evaluation should not be determined by whether it is conducted by a private or public entity. Standardization across the public and private sectors with respect to relevant indices is necessary if judges are to be able to make appropriate use of the findings.

Findings

- Dueling and conflicting child custody evaluators often exacerbate the trauma for the child and do little to provide the judge with useful information.
- The efficacy of a single evaluator in child custody cases has never been tested.
- There is no research which identifies which assessment tools are most pertinent to child custody evaluations.
- The use of two child custody evaluators is more expensive to the parties than the use of one.
- There is limited specialized training available in Virginia for professionals interested in specializing in child custody evaluations.
- The establishment of Family Court provides an opportunity to evaluate the utility of a single evaluator in child custody cases.

Recommendation 7:

The General Assembly should support and monitor the research of Virginia Commonwealth University in which the use of a single child custody evaluator available to both parties will be piloted in selected juridsictions across the state.

Discussion--The use of a single qualified evaluator has the potential to provide more objective information to the judge, curtail costs for the litigant and lessen the trauma to all involved parties. Clinical research on the utility of a single evaluator for the judiciary, litigant, children and attorneys, as proposed by Virginia Commonwealth University, should be monitored by the General Assembly and reviewed at its conclusion for possible *Code* revisions based on the findings.

IX. Acknowledgments

In addition to the individuals who have served on the work group, the members of the Commission on Youth extend their appreciation to the following individuals and associations for their assistance on this study.

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- Teena D. Grodner, Esquire
- Cherry Harmon, Esquire
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- The Honorable Lawrence Janow
  Juvenile and Domestic Relations Court
  24th Judicial District
- Ms. Lena Lusk
  Law office of Teena D. Grodner
- Ms. Emily McCoy
  National Association of Women, Virginia Chapter
- The Honorable Frederick M. Quayle of Chesapeake
  Senator of Virginia
- Dr. Arnold Stolberg
  Department of Psychology, Virginia Commonwealth University
- The Tidewater Mediation Network
- Virginia Women's Attorney Association

SENATE JOINT RESOLUTION NO. 243

Requesting the Commission on Youth to study and evaluate model child custody decrees and child visitation schedules.

Agreed to by the Senate, February 19, 1993
Agreed to by the House of Delegates, February 17, 1993

WHEREAS, in 1990, Virginia recorded 27,307 divorces and annulments at a rate of 4.4 per 1,000 population; and

WHEREAS, children under 18 were involved in 48 percent of the total divorces and annulments; and

WHEREAS, increasing numbers of litigants in divorce proceedings are requesting some form of joint child custody; and

WHEREAS, child development theory supports the need of children to have consistent and on-going contact with both parents; and

WHEREAS, an increasing number of divorced fathers are requesting a larger role in raising their children, despite dissolution of their marriages; and

WHEREAS, the Supreme Court of Virginia has determined a mediated approach to family issues is preferable over an adversarial system; and

WHEREAS, visitation policies are being challenged with respect to the degree to which both parents are afforded equal access to their children and participation in their children's activities and time; and

WHEREAS, "the tender years doctrine," where preference for custody was presumed in the mother's favor, is also being challenged in light of dramatic social and economic changes to the family; and

WHEREAS, any custody and/or visitation decrees must place the needs of the child before the concerns of the litigants; and

WHEREAS, the current provisions of the Code of Virginia with respect to visitation and custody need to be examined in light of demographic trends; now, therefore, be it

RESOLVED by the Senate, the House of Delegates concurring, That the Commission on Youth conduct a study of model child custody decrees and child visitation schedules.

The Commission shall complete its work in time to submit its findings and recommendations to the Governor and the 1994 General Assembly as provided in the procedures of the Division of Legislative Automated Systems for processing legislative documents.

SJR 243 - Model Child Custody Decrees and Visitation Schedules Study

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Rev. 8/5/93

Developing and Evaluating a Strategy for Conducting Child Custody Evaluations

Rationale

The current manner in which child custody evaluations are conducted is fraught with methodological problems and is often viewed with suspicion by the families, attorneys and judges, the intended beneficiaries of the effort. Complaints of the irrelevance of the tests conducted, lack of pertinent training, conflict of interest in potential financial gain, manipulation of the children, excessive advocacy for one's client and subsequent lack of objectivity greet many evaluators in court. The charge is often "paid liar." Families often feel used by the evaluator and judges, faced with conflicting testimony, may find limited utility in the presence of the child expert. Disciplinary concerns have prompted the American Psychology Association to draft new guidelines for the conduct of child custody evaluations.

The following evaluation strategy proposed to ameliorate some of the more frequently cited problems in the conduct of child custody evaluations. Specifically the proposed strategy will address:

1. the relevance of test instruments and information by defining the relevant areas child custody evaluation should assess;
2. the need for specially trained experts through training provided in topics pertinent to child development and stages of divorce as well as processes which mediate children's adjustment through the divorce process;
3. the need for increased objectivity, thus enhancing judicial confidence by identifying one trained evaluator to conduct the assessment of all family members. Fees will be proportionally assessed for each parent;
4. the credibility of the evaluation process through the involvement of the judiciary with the development of criteria for child custody reports both in terms of content and means of communicating the information in a courtroom setting.

Research Questions

The proposed research methodology will answer the four questions which are essential to advancing the practice of child custody evaluations by expert witnesses.

1. Is a single evaluator, with access to all pertinent information and evaluation data on all family members, superior in making custody recommendations to two evaluators, each reviewing the information of one of the disputants?
2. Which elements of the battery of assessment tests are most useful in determining child custody?

Research Questions (cont.)

3. Is the evaluation battery developed by the project superior to existing published evaluation batteries?
4. What is the most time and cost efficient evaluation package for families?

Methodology

Subjects - Subjects will be legally separated parents who have approached the participating courts to resolve child custody disputes. Subjects will meet pre-screening criteria and will accept the court's invitation to participate in the study. The number of cases will be determined by statistical requirements and available participants. Participating courts will be determined by judicial willingness and geographic diversity

Instruments and Variables: Variables will be grouped into three categories: *treatment, screening and outcome*[1]. *Treatment variables* refer to assessment status of the family, *i.e.* assignment to one evaluation or two evaluators as is currently the process, as well as being assigned to one of three evaluation batteries (the Bricklin Custody Evaluation, Questionnaires, or the Custody Quotient of the Project Defined Battery[2]). *Screening variables* refers to the characteristics of the families which will be used to determined entry into the project. These include server adjustment problems present in either the child and/or the parents and/or extreme hostility between the parents which would make them unsuitable for the project. Lastly, *Outcome variables* refer to those areas expected to influenced by the introduction of one specifically trained evaluator working with a specific battery of assessments. *Outcome variables* is divided into three areas: *Family and Child Adjustment, Court and Legal Considerations* and *Evaluator Recommendations. Family and Child Adjustment* includes assessment of parents' mental health and parents' display of important co-parenting competencies and displayed hostility. *Court and Legal Considerations* includes time to reach a decision, total costs to disputants, disputants' satisfaction with the process, judge's satisfaction with the evaluator's results and presentation, judge's appraisal of evaluator as credible and helpful, disputants' choice to continue litigation or concurrence with evaluator's recommendation. *Evaluator Recommendations* is defined as the quality of recommendations, as determined by review by an external panel of experts, based on their review of the relevant data.

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[1]See Table 1.
[2]See Table 2.

Evaluators

Evaluations will be conducted by licensed clinical psychologists[3] who have participated in custody evaluation training provided by research staff. The evaluators will be paid by the litigants, with each parent covering a portion of the established fees. Training will be comprised of three elements: *didactic presentations* (child development, divorce adjustment process), *assessment/hands-on data interpretation* and *peer and trainer supervision*. The training program will be developed by the project and will be offered by the Department of Psychology at Virginia Commonwealth University..

Procedures

Development procedures[4]:

1. The research team will define the evaluation battery and procedure and will present the information to the participating judges.
2. A minimum of four diverse court sites will be selected.
3. The research team in conjunction with the participating judges will revise the evaluation reporting device and procedures
4. The research team will define a training strategy for all licensed psychologists who wish to participate in the project.

Implementation procedures

Families who present child custody disputes to the participating courts will be asked to complete pre-screening questionnaires. Families meeting selection criteria will be invited to participate in the program and will be randomly assigned to either the Single Evaluator or Two Evaluator conditions and to one of the three evaluation batteries.

Data Collection

Families who accept invitations to participate will complete outcome questionnaires upon entering the project and at established intervals thereafter. Judges will complete outcome evaluations for each cased involved in the project for a six-month period.

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[3]Due to restrictions placed on those who can administer the assessment batteries, only licensed clinical psychologist can participate; however, the staff of the community service boards in the jurisdiction of the participating courts will be involved in the project.

[4]See Project Timeline.

Custody Evaluation Research
Arnie Stolberg, VCU
July 19, 1993

Figure 1

GENERAL RESEARCH METHODOLOGY

I. PRESCREENING

Parents with custody disputes will be asked to complete prescreening questionnaires at the time of filing the dispute.

Measures will assess:
- Interparent hostility
- Family adjustment
- Child adjustment

II. EVALUATION

Families who meet inclusion criteria and who agree to participate will be randomly assigned to either the Single Evaluator or Two Evaluator condition

III. FEEDBACK AND DECISION MAKING

Assessment conclusions will be individually conveyed to attorneys and parents. Decisions regarding custody will be made either by the disputing parents or by the judge

IV. OUTCOME

Outcome dimensions include:
- Family
- Court
- Evaluator

Outcome data will be collected after decisions have been reached. One year follow-up data will be collected on the Family and Court dimensions.

Figure 2

PROCEDURES

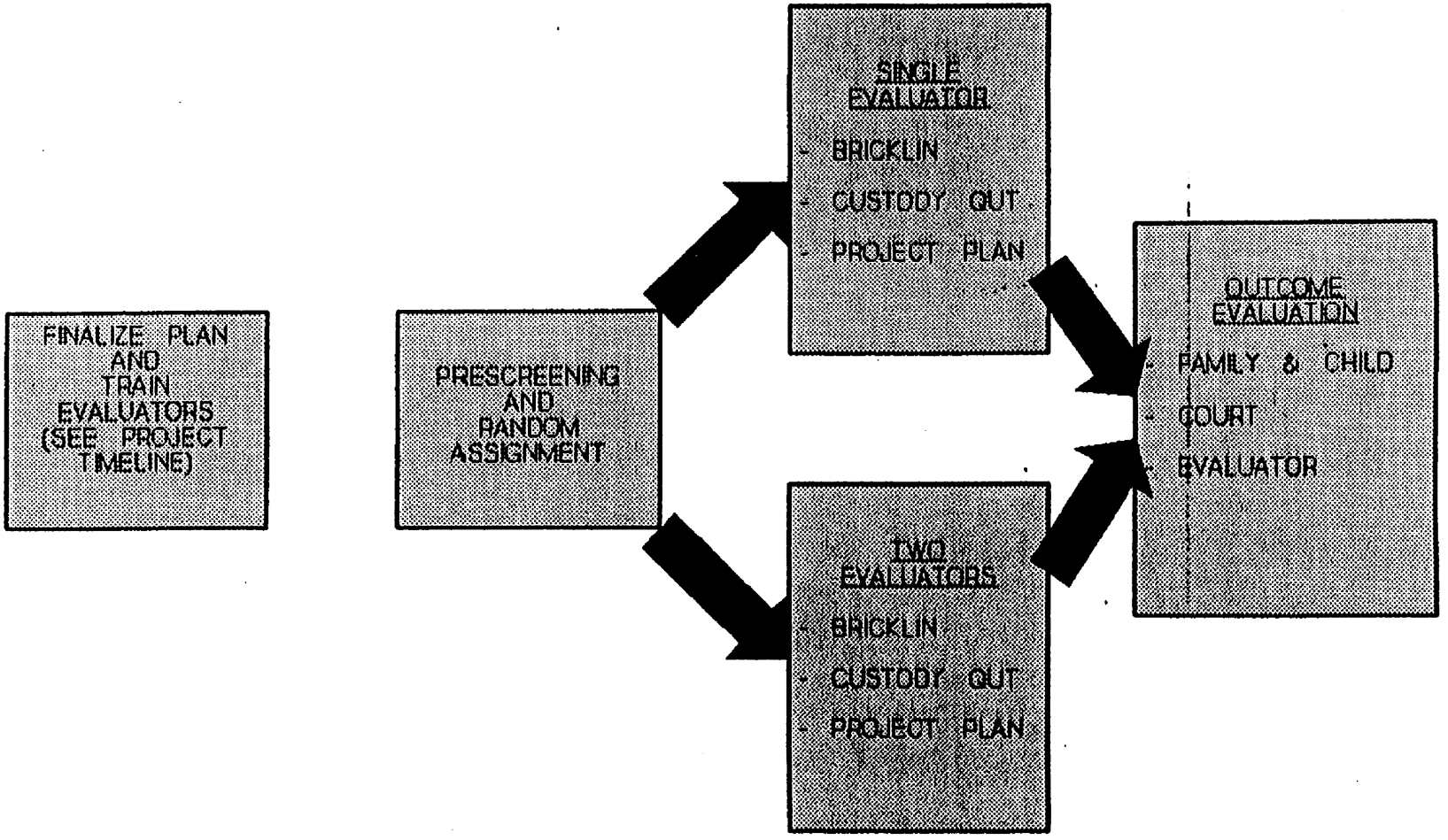

Table 1

Family and Child Adjustment Variables and Measures

Pre-screening variables:	
Child adjustment	Child Behavior Checklist
Parent Adjustment	Minnesota Multiphasic Personality Inventory 2
Inter-parent hostility	O'Leary-Porter Scale of Overt Marital Hostility
Outcome variables:	
Child adjustment	Child Behavior Checklist (parent rating) Teacher's Rating Form (teacher rating) Youth Self-Report, Children's Depression Inventory, State-Trait Anxiety Inventory for Children (child rating)
Parent adjustment	MMPI-2, Single Parenting Questionnaire
Family adjustment	Self-Report Family Inventory, O'Leary-Porter Scale

Table 2

Project Defined Evaluation Protocol

Parenting competence:	Single Parenting Questionnaire
Priority on child development:	Fisher Divorce Adjustment Scale, SPQ, interview
Co-parenting competencies:	Self-Report Family Inventory, interview
Environmental stability:	Life Experiences Survey, interview, unscheduled home observation
Inter-Parent Hostility:	O'Leary-Porter Scale of Overt Marital Hostility, interview to determine who instigates the hostile interactions
Adult adjustment:	Minnesota Multiphasic Personality 2, interview, Substance abuse screens (e.g. SASI, MacAndrews Scale of the MMPI 2)
Child adjustment	Child Behavior Checklist (parent report), Teacher's Rating Form (teacher report), Children's Depression Inventory and State-Trait Anxiety Inventory for Children (child report) or MMPI-Adolescent Form or Youth Self-Report, academic performance records, health records, interview

Minority (Dissenting) Report of the Virginia Commission On Youth SJR 243 Work Group

by: Cynthia L. Lewis, Children's Rights Coalition of Virginia

Date Submitted: December 15, 1993

"Conventional approaches to custody appear to compensate children for the loss [of a parent] by allowing intermittent contact .... -- usually a maximum of every other weekend. I use the word 'appear' because I believe that this tradition reflects an adult sense of time and shows an appalling lack of understanding of the way a child experiences time.... Making children wait thirteen days before seeing one of their parents, and repeating this ordeal twice a month for the duration of their childhood, is, to my way of thinking, cruel.

We do not recognize the cruelty, perhaps because we have taken traditional practices for granted without careful scrutiny. Or perhaps we know of no better alternatives. Or perhaps we cannot bear to accept and own the harm we are inflicting on our children. Nevertheless, the harm exists. In study after study, children have been letting us know just how difficult is the loss of a parent, even when this loss is mitigated by four days of contact per month."

Dr. Richard Warshak

This report is dedicated to all of the children of Virginia who have suffered the pain of losing a parent through divorce or separation and to those who may, unfortunately, encounter these circumstances in the future because of our 'lack of understanding'.

MINORITY REPORT OF THE VIRGINIA COMMISSION ON YOUTH
SJR 243 WORK GROUP

PREFACE

The psychological and sociological literature is replete with empirical research demonstrating the importance of the continued involvement of both parents to the healthy development of children. This understanding applies to children of intact families, as well as to children of divorced and separated parents. The position of the Children's Rights Coalition of Virginia (CRC) is that, absent proven abuse or neglect, **"The Best Parent Is Both Parents"**, i.e. our children need, deserve and benefit from the active 'parenting' of both mothers and fathers, regardless of the marital status of these parents.

It is clear to us that the relationship between the breakup of nuclear families and the disintegration of our society's health has been well documented. Furthermore, it appears now, perhaps for the first time in recent history, that we are seeing bipartisan acknowledgement of the relationship between family dissolution and social problems in this country. We are deeply concerned with the protection and promotion of a child's rights to receive emotional and financial support from both of the parents of a so-called 'broken' family.

Child development researchers may disagree on many things, but one thing they all agree on is that children generally do better when they have the involvement of two parents rather than one. Many children of single parents turn out fine, but, statistically, they are more at risk than children with two parents. Studies show that children from single parent homes are more at risk of having lower self-esteem, abusing drugs and alcohol, getting involved with crime and being unable to form lasting relationships of their own.

Ironically, while married parents are criticized for not sharing the care and responsibility for their children more equitably, divorced or separated parents are actually prevented from doing so.[1]

The published literature on the issues addressed in this minority (dissenting) report is voluminous. Because of time and space constraints, the report references only a selected few of these publications. Additional references on the relevant subjects are available upon request.

This minority report is organized into three major sections. Section I provides a brief description of recent legislative efforts that prompted the creation of SJR 243, information on the divorce/custody process, and some general statements on some issues relevant to the study of "model custody and child visitation". The next two sections present the CRC's dissenting opinions and positions: Section II covers the specific proposals and recommendations of the SJR 243 work group and Section III addresses the lack of study or recommendations on major issues mandated by SJR 243. Finally, this report expresses, in part, our dissatisfaction with a "system" which from our perspective, commits only limited resources (time and funding) to studies such as that requested by SJR 243, and that because of these limitations, the critically important issues are given only peripheral consideration.

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[1]Diane Trombetta, Ph.D., "Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes", Journal of Family Law 19(2), 1980-81

I. INTRODUCTION.

A suite of legislative proposals related to child custody were prepared by the Children's Rights Coalition of Virginia (CRC) in the summer of 1992 and sponsored in the 1993 General Assembly by Delegate Jerrauld Jones and Senator Frederick Quayle. This call for reform was initiated in recognition of the facts that:

1. The current rate of divorce in the Commonwealth and throughout the country (about 53%) is more than triple the rate of 25 years ago and is rapidly increasing.

2. The effects of marital dissolution or parental separation can be, and usually are, devastating to children (there are "no victimless divorces", noted a University of Virginia study) and are the root of many of our domestic problems.

3. The adversarial divorce/custody process is denigrating to children and parents and leaves families financially, emotionally, physically and spiritually impoverished.

4. The Commonwealth's policies and practices regarding child custody are dictated by "tradition", anecdotes, personal opinions and biases, and politics, rather than formulated through dissemination and careful, objective review of factual data and information.

5. Our children of divorce and parental separation are crying out for "best interests" protection not afforded by 'traditional' procedures and policies. The needs of these "at risk" children - our future - to have both parents continually and actively involved in their care, loving and nurturing are unfortunately being superseded or undermined by archaic perceptions about the value of two parents and to a degree, the inherent resistance to deviate from status quo (the erroneous "if it ain't broke, don't fix it" scenario).

6. The diminution of parental importance (i.e. "parentectomies") resulting from traditional custody decisions sends, more often than not, children into "psychological minefields"[2] that may never be successfully or completely forged.

7. Minor changes to the current Code of Virginia, as well as superficial improvements in judicial, social and legislative attitudes, are akin to patching a severed jugular with a band-aid. What is required is "an entirely new approach to custody".[3]

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[2]Richard A. Warshak, Ph.D., "The Custody Revolution: The Father Factor and the Motherhood Mystique", Poseidon Press, 1992.

[3]*supra* note 2.

The Senate Joint Resolution (SJR) 243 Study

The Commission on Youth was asked by the 1993 Virginia General Assembly to evaluate model child custody decrees and child visitation schedules pursuant to Senate Joint Resolution No. 243 (See Appendix A). This study resolution was prompted by two of the above-mentioned bills - one to establish joint custody as a rebuttable presumption and the other to establish statewide minimum visitation guidelines. The Commission established a work group consisting of 12 - 14 people to conduct this study and to report its findings and recommendations to the Commission. The work group commenced its study in May, 1993 and completed its recommendations in November, 1993.

Although the work group was made up of a broad cross-section of representatives from various governmental agencies, members of the legal community, and individuals working on the issues on a professional basis, it consisted of only three laypersons/citizens to represent the interests of the public as a consumer. Of these three individuals, one member represented Virginians Against Child Abuse, another member represented Coordinators/2, an adoption agency, and the third represented the Children's Rights Coalition of Virginia, a coalition of organizations throughout the state that focus on the issues affecting children of divorced, separated and unwed parents. 1/4

It is important to note that this study arose out of concerns raised by, and as a result of legislation supported mostly by, parents who had experienced the feeling of being pushed out of their children's lives by way of a custody decision. Yet, to the best of our knowledge, no "non-custodial parents", that sector of the adult population of the Commonwealth most affected by the recommendations and/or proposed legislation resulting from the study, were a part of the work group. **Can parental concerns and problems related to child custody and visitation be thoroughly understood and fully explored by a study group not soliciting input from those who have clearly experienced it from "the other side"?** We think not. Not having one or more non-custodial parents on the work group for SJR 243 is perhaps akin to establishing a study group to examine issues affecting African-Americans without having an African-American appointed to the group or to creating a work group to study issues related to violence against women without having the involvement of a woman in the study.

Study Approach

Through interaction, discussion and debate, the work group established "guiding principles", "system elements" and "factors" which were intended to serve as the basis for the development of model child custody and visitation schedules. The following principles, elements, factors and other components of the study were approved by an overwhelming majority of the work group:

Guiding Principles

The process for deciding child custody and visitation should:

- View the parent/child relationship as primary
- Be child-focused
- Acknowledge the legitimate role of the court
- Preserve the dignity of all parties
- Help families preserve their resources, *i.e.* time, goodwill, emotional health and finances
- Promote frequent and continuing contact with each parent
- Acknowledge that children deserve a healthy, non-abusive family environment at all times

(It should be noted that the above principles were not prioritized by the group and therefore, were considered to be of equal importance)

System Elements

- There should be a fixed number of days/time each parent can spend with the child with no specific "justification".
- There should be bi-lateral sanctions for non-compliance.
- Default *[visitation]* schedules have a role in the process.
- There are specific days which have special significance that the child should be able to spend with each parent.
- There should be no presumptive orders.

Factors

Factors that should be considered as part of or when determining a *[visitation]* schedule include:

- Geographic distance of parents
- Transportation and transfer points
- Summer visits
- Extended visits

In addition to the above, a list of both child variables and parent variables was developed which the group agreed should be considered when evaluating the *custody* arrangement for a child.

It was determined during the study process that no governmental data were available to provide statistics on custody and/or visitation decisions throughout the Commonwealth. In spite of this fact, no testimony was taken by the work group to develop a comprehensive understanding of the relevant problems experienced

by the citizens (particularly, non-custodial parents) throughout the Commonwealth. Numerous published articles on custody and visitation were presented to the group, including a summary of custody statutes of other states. However, reference to or reliance upon this information in developing a model was clearly lacking. The problems experienced in the Commonwealth are many of the same problems experienced throughout the country. Therefore, reliance upon what other states have had as their process and laws for years may not have been an appropriate gauge for determining the policy of the Commonwealth. Nevertheless, successes, failures and trends noted in other states, should have been considered, to the extent practical and determinable, when developing the custody and visitation models pursuant to the mandates of SJR 243. For example, the Executive Summary of the study group neglects to mention the fact that a number of states have recently established a 'preference' for joint custody, either through statutory changes or via appellate case law, and/or that this trend is on the upswing.

According to the Executive Summary of the SJR 243 study group, there were 88,375 custody and visitation cases concluded in Virginia's District Courts in 1992. Although the source of this statistic was not cited, we know that thousands of children are directly affected by divorce each year. In addition, thousands of children are born to unwed parents in Virginia each year (currently about one million per year nationwide). Further, the 'illegitimacy' birth rate is increasing at a staggering rate.

Brief Historical Perspective of Custody Practices

Throughout history our society has assumed that after marital dissolution only one parent should have custody of the children.[4] The evolution of our society over the years has caused the pendulum of child custody (i.e., the parental favoritism) to swing both ways. Until the early 1900s (to ca. 1920), fathers invariably were awarded custody of the children which were considered their property.[5] Over the next four to six decades, the mother was then openly favored as the sole custodial parent.[6] This was the period of the "Tender Years Doctrine", a legal presumption that the needs of a child of 'tender years' could best be provided by the mother. In Virginia, this doctrine was perpetuated by the judiciary in the form of case law or through 'traditional' rulings. In 1983, the Code of Virginia was amended to state that "the court or judge of any court of competent jurisdiction, in awarding the custody of children to either parent or some other person, shall give primary consideration to the welfare of the children, and as between the parents there shall be no presumption or inference of law in favor of either" (§31-15). By way of this

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[4] *supra* note 2.

[5] P. Woolley, "The Custody Handbook", (New York Summit Books, 1979), 257.

[6] *loc. cit.*

amendment to the statute, gender bias was presumably discarded. The new focus of custody became the so-called "best interests of the child", a concept that has retained its vagary and ambiguity for the past decade.

Outdated "traditions" are slow to be replaced in the Commonwealth. Virginia was one of the last group of states to discard the "tender years presumption" (1983) and to enact legislation giving judges the 'option' of awarding joint custody (1988). Despite these reforms, the prevalent form of custody awarded in Virginia courts is still 'sole custody'[7], with the children "almost invariably awarded to mothers".[8] Unpublished reviews of divorce cases involving child custody in Arlington County, Richmond/ Henrico County and in several Tidewater jurisdictions, further demonstrate that physical custody of minor children is awarded to the mother in 90-95% of the cases.

The Adversarial Process

The divorce process and the process for determining custody and visitation operate as an adversarial system of litigation based on a win-lose principle in which the 'victor' is "awarded" custody of the child(ren) and the loser is basically stripped of all parental rights and ordered to provide financial support. The hostilities created by such an approach to restructuring the post-divorce family can be financially, physically and emotionally destructive to both parents and their children. Given that in the win-lose system there appears to be only one winner, a "parentectomy" - the removal, erasure or severe diminution of a caring parent in a child's life following separation or divorce[9] - is produced as a result of almost all custody disputes. The simple fact that the loser is labeled as the "non-custodial" or "absent" parent[10] and that he/she is granted "visitation privileges" exemplifies the second class status that a parent inherits by "losing" custody. Thus, a grueling custody battle may be the only option for some parents who want to stay involved in their children's lives. In many cases, to acquiesce to the demands and desires of the other parent would mean to walk away from their children and/or to settle for reduced contact and parenting opportunities. To a loving, dedicated parent, the difference between 'winning' and 'losing' the custody

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[7]"Family Law and Practice in Virginia", Virginia Lawyers Practice Handbook, Second Edition, Virginia Law Foundation, 1993. This handbook describes the "norm" as "one parent usually assumes sole custody of each child, with the other parent having corresponding rights of visitation".

[8]Joyce A. Arditti and Katherine R. Allen, "Understanding Distressed Fathers' Perceptions of Legal and Relational Inequities Postdivorce", Family and Conciliation Courts Review, Vol. 31, No. 4, October, 1993, 461-476.

[9]Frank S. Williams, M.D., "Child Custody and Parental Cooperation", Presentation to the American Bar Association Family Law Section. August, 1987.

[10]John P. McCahey, J.D., LL.M., et al., "Child Custody and Visitation Law and Practice", Vol. 3, (New York: Matthew Bender & Co., 1983).

battle may be the difference between having or not having a meaningful relationship with his/her children.

In reality, there are no "winners" in a battle to identify who will be the *parent* and who will be the *visitor*, yet the process insists on forcing a champion to emerge. As stated so eloquently by Michael Oddenino, Esq., a member of the ABA's Custody Committee:

> *"Posing the question 'who is the best parent?' generates more ill-will, anger and blood-letting than almost any other aspect of divorce. We continue to ask this question, notwithstanding its ugly consequences, as though it is simply a necessary element of divorce. It's not."*[11]

This brutal process can and must be demilitarized. **The CRC's position is that if parents entering the divorce arena knew in advance that a form of <u>shared</u> parental rights and responsibilities would be the <u>preferred</u> custody arrangement, hostilities would decrease because the necessity of proving which parent should "have" the children would be eliminated, i.e. many of the battles would not be fought because there would be "no contest and no prize to win".**[12]

<u>Visitation (Access) Provisions</u>

Attorneys and judges often fail to articulate with specificity the days and times when parents and children have access to each other. Many orders provide for "reasonable" or "liberal" visitation, with the determination of what is "reasonable" left to the discretion of the custodial parent, who may because of ongoing hostilities, abuse the reasonableness or liberalness of the child's access to the non-custodial parent. **CRC's position is that the traditional visitation orders of "every other weekend and alternating holidays" are outdated and do not permit the child and his/her non-custodial parent to feel they are integrated into each other's normal, daily lives and activities, including participation in such things as school activities, helping the child with homework, or other activities which take place during the week (athletic practices, doctor's appointments, club meetings, etc.).** Although this 'traditional' schedule may have been the norm of twenty years ago, these restricted visitation periods do not generally satisfy the desires of non-custodial parents today, nor do they support the needs of children to have the <u>significant</u> contribution of both parents. In addition, these traditionally-imposed limitations on visitation are contradictory to the recommendation of the work group to "promote frequent and continuing contact".

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[11]Michael L. Oddenino, Esq., "The Best Parent Is Both Parents", chapter from a forthcoming book entitled "When Kids Come First".

[12]*supra* note 1

Further, if access is denied by the custodial parent, even where an order for visitation exists, there are, in practice, no usable enforcement mechanisms or remedies available to the non-custodial parent. This is particularly true where access is described only as "reasonable" in the court order and when that parent's available funds for litigation are limited.

Mediation

Mediation, a form of dispute resolution, is an alternative to a ugly custody battle. Mediation has been proven to be effective, inexpensive, and less time-consuming and to eliminate much emotional trauma.[13] Mediation has emerged as a promising means of minimizing hostility and facilitating cooperativeness between ex-spouses.[14]

Summary of Position

On the basis of the research we have analyzed on this subject, the CRC adopts the position that what is needed is an expansive, positive, "new" family policy that will minimize rather than increase hostilities and encourage continuing and meaningful contact between children and their divorced or unwed parents. We hope to encourage family policy makers to eschew bias and outdated stereotypes, and to begin to deal instead with the realities with which our children and their families must deal every day. By doing so, the legislature of the Commonwealth will be better able to fulfill the responsibility to foster new policies that will encourage the best possible outcomes for the many children of divorced or unwed parents.

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[13]Jessica Pearson and Nancy Thoennes, "Mediating and Litigating Custody Disputes: A Longitudinal Evaluation," Family Law Quarterly, Vol. 17 (Winter 1984), 497-538.

[14]E.S. Scott and R. Emery, "Child Custody Dispute Resolution: The Adversarial System and Divorce Mediation," in L. Weithorn (Ed.), Psychology and Child Custody Determinations (1987), pp. 23-56.

II. RESPONSE TO SPECIFIC PROPOSALS OF THE WORK GROUP

The following analysis takes each of the provisions recommended by the majority report and briefly responds to the relative merits or deficiencies with each provision. However, more importantly, this minority report addresses the lack of certain recommendations by the work group to address the problems identified.

Recommendations made by the work group:

Recommendation 1:

Revise §20.107.2 and other relevant sections of **The Code of Virginia** pertaining to child custody and visitation to effect the following:

- Provide guidance to the court in determining all custody and visitation disputes, regardless of the marital status of the parties
- Require that custody and visitation decisions be made prior to other decisions arising out of divorce and/or separation proceedings (excepting those related to protective orders and *pendente lite* hearings)
- Promotion of frequent and continuing contact with each child and parent when appropriate
- Support for mediation, as opposed to litigation, as a means to settle custody disputes
- Expansion of factors defining "best interest of the child"

These recommendations, overall, are positive and represent an improvement to the current statute. However, some of the language in the final drafted legislation dated 11/30/93 does not clearly reflect the above stated goals of recommendation 1, raises major concerns as to its effect and in some cases, is not what was agreed upon by the work group.

The changes detailed below are strongly advocated in order for the statutory recommendation of the work group to be reflective of the group's decisions and to accomplish the stated goals. These references are made to the draft copy dated 11/30/93 which was presented at the Commission on Youth public meeting on December 8, 1993.

1) Page 9, Line 22 - The proposed language reads: "the court shall promptly determine custody and visitation arrangements, including support and maintenance for the children, prior to other considerations arising in the matter." This language was included in the proposed draft for the purpose

of effecting the goal as stated above to: Require that custody and visitation decisions be made prior to other decisions arising out of divorce and/or separation proceedings (excepting those related to protective orders and *pendente lite* hearings).

The exception being taken to the proposed language is the insertion of the word "**promptly**". This word was not in Draft #4a of the work group's proposal, which was the latest draft prior to the 11/30/93 draft that was presented to the Commission. One concern we raise about the insertion of this word is that it may promote the use of *pendente lite* orders when unnecessary. In the previous statutory draft of the work group, the terms "swift, informed adjudication" were used. The reasons cited for not using the term "promptly" or simply "swift adjudication" was to avoid quick decisions without due consideration of all the facts and circumstances. Although we wanted to promote a 'fast custody track', the intent was not to do so at the expense of justice or with resulting decisions being made that are not in the best interest of the children. This change made to the drafted legislation after the final meeting of the work group was significant and does not reflect the decisions of the work group. We propose that either the word "promptly" be removed from that sentence or the wording be changed to read: "the court shall provide swift, informed adjudication of custody and visitation arrangements, including support and maintenance for the children, prior to other considerations arising in the matter."

2) Page 9, Line 27 - The proposed language reads: "Mediation may be used as an alternative to litigation where appropriate." The goal of the work group was clearly to require mediation to be used as an alternative to litigation, where appropriate, as stated in the above-recited goal: Support for mediation, as opposed to litigation, as a means to settle custody disputes. The work group agreed that use of mediation should be a mandate to the courts, not an option. The word "may" should simply be replaced with the work "shall" in the proposed language in this sentence.

3) Page 10, line 2 - The proposed language reads: "When appropriate, the court shall assure minor children of frequent and continuing contact with both parents and encourage parents to share in the responsibilities of rearing their children." This sentence was drafted for purposes of effecting the goal which was stated as follows: Promotion of frequent and continuing contact with each child and parent when appropriate. The language can be consistent with the goal by simply changing from a negative beginning to a positive one with the new language reading: "The court shall assure minor children of frequent and continuing contact with both parents, except in cases of where there is abuse or for other good cause, and encourage parents to share in the responsibilities of rearing their children."

4) Page 11, Line 12 - The proposed language reads: "The propensity of each parent to actively support the child's contact with the other parent, ..." As agreed upon by the work group the language should read "The

propensity of each parent to actively support the child's contact **and relationship** with the other parent . . .." The omission of these two words was also pointed out by Delegate Darner at the public meeting on 12/8/93.

5) Page 11, Lines 26 and 27 and Page 12, Lines 1 through 3 - The language reads: "For purposes of this section, factors which may make the case inappropriate for referral include but are not limited to (i) allegations of physical or sexual spousal or child abuse, (ii) a history of spousal or child abuse or coercion, (iii) history of substantial drug or alcohol abuse, (iv) mental incapacity or impairment by one or both parents, and (iv) threat of parental kidnapping."

A trained and skilled mediator is better prepared than the courts to recognize and/or appropriately address in the context of 'mediating' child custody or visitation disputes the factors as set forth in this proposed language. The courts are not in the position to spend the time necessary to deal with such factors to determine whether they do or do not make the case inappropriate for mediation. A qualified mediator will determine when any such factors make the case inappropriate for mediation and will refer it back to the courts. With the language as currently proposed, a case where one party may have had a history of alcohol abuse may be quickly dismissed by the courts as a candidate for mediation. However, the affected party may have successfully gone through treatment for this problem and such history would not make the case inappropriate for mediation. Further, with the increasing trend of false allegations of abuse being launched to gain an edge in a custody battle, there is the concern that the mere mention within the Code as this being an 'out' for parties who to not want to cooperate, could invite more 'false' allegations.

Recommendation 2:

The Supreme Court should provide judicial training on child development, crisis adjustment and adaptation, and domestic violence as it relates to divorce, as well as other issues that would better enable the bench to assess the factors related to a child's "best interest" in custody and visitation cases.

The recommendation for judicial training in the areas of child development, the psychological affects of divorce and separation on children and other issues related to child custody and visitation cases is highly praised. It is a concern, however, that "domestic violence" was singled out as a topic within the general area for which training should be conducted without specifying other equally important topics such as "parental alienation syndrome", genuine child abuse, false allegations of child abuse, parental kidnapping, etc. All of these subjects, including domestic violence are important even though each may only affect a small percentage of total families. However, specifying only one of these topics without specifying the other topics may serve to minimize the importance of including the other topics as part of the training agenda. The draft of this recommendation at

the final meeting of the work group was that: "The Supreme Court develop and provide training on the psychological development of children, post-divorce adjustment and other issues related to disputed child custody decrees." Although the idea of including domestic violence specifically as part of the recommendation was made by a non-member of the work group during the last SJR 243 meeting, my recollection was that the work group did not agree to specifically address this topic on the basis that it was encompassed within the general subject matter for training. We suggest that the specific citing of "domestic violence" be removed as part of the Recommendation or that the many other important subjects that affect families involved in custody and/or visitation disputes be clearly specified within this recommendation.

Recommendation 3:

The Family Law Section of the Virginia State Bar should provide training on child development, crisis adjustment and adaptation, and domestic violence as it relates to divorce, as well as other issues related to the "best interests of the child" factors in making custody and visitation decisions.

The recommendation for education and training for the bar in the areas of child development, the psychological affects of divorce and separation on children and other issues related to child custody and visitation disputes is highly praised as is the recommendation for training for the bench. However, the same concerns about singling out "domestic violence" as one topic out of many important topics without addressing the others also exist here. Again, it is suggested that either "domestic violence" be removed as a specific topic within the recommendation or that the many other important topics included in this general area be specified within the recommendation.

Recommendation 4:

The Boards of the Department of Youth and Family Services and Social Services should, by January 1, 1995, establish jointly the guidelines for child custody evaluations conducted by their employees. These guidelines should address both the scope of the inquiry and suggested staff qualifications. Both agencies will be responsible for making their final work products available to judges, *pro se* litigants, and members of the bar across the state.

Uniform and minimum standards are much needed for use by the governmental agencies that are conducting 'home studies'. We are very much in support of this recommendation, assuming there will be 'consumer' and 'professional' input to assist in the development of these minimum standards and the determination of qualifications required for staff conducting the evaluations.

Recommendation 5:

The Health Regulatory Board should provide oversight to the Boards of Psychology, Medicine and Social Work as they develop minimum standards for child custody evaluators within each discipline, with the goal of gathering information relevant to custody decisions. Each Board should make the outline of their standards available to judges, *pro se* litigants and the bar.

The recommendation for the establishment of minimum standards to apply to licensed professionals who are conducting child custody evaluations is also very much supported by us. Standards for evaluators to use in conducting child custody evaluations will help to provide uniformity for the evaluation of families.

Recommendation 6:

The Departments of Social Services and Youth and Family Services and relevant Boards under the Health Regulatory Board should share information with each other as they develop minimum standards for child custody evaluators for each discipline, with the goal of identifying relevant information.

This recommendation for sharing of information is highly supported as this will help to assure that the best guidelines are developed for both sectors, private and public, that are conducting child custody evaluations.

Recommendation 7:

Support the research pilot of Courts using testimony of only one evaluator available to both parties in disputed child custody cases.

The use of a single, qualified evaluator versus two 'duelling' evaluators is supported by us as a way to minimize the costs incurred by the family and to prevent the courts from having to consider two conflicting expert testimonies.

III. LACK OF RECOMMENDATIONS ON MAJOR ISSUES MANDATED BY SJR 243

The major objectives of SJR 243 were to "study and evaluate model child custody decrees and child visitation schedules." These issues have been the subject of considerable interest to researchers over the past several decades, resulting in hundreds of articles published in the sociological, psychological and legal literature and dozens of technical reports put out by various federal and state agencies (or organizations funded by the federal government). We know, for example, that more than 100 studies of child custody were published prior to 1989. Although a considerable amount of published information was provided by the CRC and some other members to the entire work group, the group did not, to any meaningful degree, use the available resources for its 'study and evaluation of custody and visitation'. Rather, the meetings largely represented 'exchanges of personal opinions', generally not supported by empirical evidence, about the issues. Differences in opinions, sometimes very polarized, were not sorted out by referring to the research literature. Admittedly, time constraints limited the work group's opportunity to provide adequate review of the subjects. Notwithstanding, **it is the CRC's position that, in actuality, the issues of model custody decrees and child visitation schedules were only discussed, not evaluated. Further, the failed effort to thoroughly study and evaluate these critical issues - the major objectives of SJR 243 - was exceedingly more important to the "mission" than was the preparation of specific recommendations on supplemental issues (see previous section of this report). We do, however, applaud the group for making these supplemental recommendations, particularly those related to mediation, as these represent "a step in the right direction".**

In the following section, we provide an overview of the more important issues for which we feel were either not evaluated or were neglected by way of not having recommendations for action. Given that we have space and time constraints, and that a dissenting report is not necessarily the appropriate format for "re-hashing" the issues, this section is only intended to offer the Commission some 'food for thought' for decisions it must make before the 1994 General Assembly or for ideas for future consideration of these important issues.

1) **Replacement of the terms "custody" and "visitation" with more appropriate, less denigrating terms such as "parenting arrangements", "parenting time" and "parenting schedule".**

> *"It is time to consign the terms 'custody' and 'visitation' to the ash heap of archaic linguistic misnomers."*[15]

Although the work group acknowledged early in the study that the "language" of divorce and custody is important and that it needs to be neutralized, no recommendation was made to correct the problem inherent in the current statutory language. In addition to agreeing specifically that language has strong connotations and reflects attitudes of the society, the work group agreed upon the "guiding principles" as stated earlier in this report. **CRC's position is that statutory language, particularly that which has negative connotations, will significantly impact whether or not the Commonwealth can attain the following objectives set forth by the group:**

(1) The parent/child relationship should be recognized as primary,
(2) The dignity of all parties should be preserved,
(3) The process should help families preserve their resources (i.e., time, good will, emotional, health, finances) and
(4) Frequent and continuing contact with each parent should be promoted.

With the acknowledgement that language is important, this analogical question might be posed to make a point: **"Would it be considered a <u>serious</u> effort towards racial equality or gender equality if the state was engaging the use of racially or sexually denigrating terms while allegedly working towards such stated goals?"**

During one of the latter meetings of the study group it appeared that there was still a consensus to replace the language. However, when the possible substitute terms "parenting arrangements", "parenting time", and "parenting schedules" were proposed, the first complaint expressed against this proposed language was that it is not "child-focused". **Is the goal of the Commonwealth to separate parents from children in order to be "child- focused"? Is not being family-focused and parent-focused also being "child-focused"?**

There was also an argument raised by legislative staff that "parenting" was not a word. This is simply not correct. Webster's New World Dictionary, Third College Edition (1988) defines "parenting" as "the work or skill of a parent in raising a child or children". Other concerns about the use of this proposed terminology included that it would not apply in cases where people other than the parents had custody or visitation. Unfortunately, the work group did not explore the option of establishing other more appropriate terms and definitions for such situations. Other possible terminology such as "caretaking arrangements" was suggested, but were not considered by the group.

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[15]Dick Woods, "Linguistic Parentectomy", reprinted in For Our Kids 2(1):4, May, 1993.

In spite of the initial consensus of the work group that "language is important" and that the terms "custody" and "visitation" can have a negative impact on families of divorced or unwed status, the work group later decided through a majority vote not to recommend a change in the terminology in the Code. The primary reason cited for not changing the language was that there is a long-established, judicially-developed understanding of the terms "custody" and "visitation" and that a change could be confusing and problematic within the courts. A suggestion to alleviate these concerns was to include in the proposed statutory language a statement that would clarify that "the terms 'custody' and 'visitation' are being replaced with the terms _____ and _____ (e.g., parenting arrangement and parenting time)". Although it was agreed that such a "substitution" statement would take care of the concerns of preserving the legal definitions, the decision was still made to not change the language.

Other concerns that were raised include how this would effect other parts of the law which rely upon the terms "custody" and "visitation". However, replacing these terms in all relevant sections of the Code of Virginia should be done carefully, as with any change in statutory language, in order to minimize unforeseen or negative consequences. A word search and related research can be conducted by legislative services to determine all affected code sections. It should be noted, however, that these terms are also used in conjunction with "custody" and "visitation" of prisoners and perhaps in other unrelated contexts and therefore, an initial 'word' search would not represent all affected sections of the code.

An additional concern that was raised involved the issue of what affect replacing the term "custody" may have on a parent's ability to take the dependency tax exemptions, the rules for which are set forth in the Internal Revenue Code. It should be noted that other states (e.g. Washington and Texas) have already replaced the terms "custody" and "visitation" in their respective codes. These states have used different terminology for several years now and an inquiry can be made with official parties in those states as to how such change impacted that application of Federal and state tax laws.

The whole history of civil rights and human rights has involved the need to change language and in the past, we have overcome the hurdles. Although the process of identifying and changing the terminology may be an extensive project for legislative services, it is our position that the benefits of a change in terminology will be well worth the investment of time required to effect the change. **Removing the stigmatizing language would further the goal of encouraging shared parenting, preserving the dignity of the family members and reducing hostilities.**

Language is our handle upon the world. Therefore, the perception of individuals is influenced by language and by labels. People exist and realities exist according to the labels we apply and labels are language. If you label a person as the President of the United States, it has a certain significance. If you label a person a 'vagrant', it has a certain meaning which influences people's perception of that person. Labels, because of the significant impact they can have on people's perceptions, can cause conflict.

The language of divorce has be described as having "stinkweed" words.[16] "Non-custodial" parents have been called "parents without portfolio".[17] Children are in the "custody" of one parent while another parent "visits". These terms have had a significant impact on the children. Children have been known to say to their noncustodial parent, "I don't have to listen to you, I only 'visit' you."

Descriptors in the Code need to be liberating and enhancing of the spirit. It needs to be flexible enough to fit all families and to not create impossible problems for the families who do not fit these conditions. It needs to be responsive to the needs of all children and to the special language of youth rooted in the need to be loved and cared for and not treated as possessions or powerless pawns in an awful struggle or control. It must be a language of hope.

The CRC recommends that the denigrating language of "custody" and "visitation" be replaced with the more appropriate terminology of "parenting arrangements" and "parenting time". Perhaps the most disturbing terminology is that of "visitation". And, although it is highly advocated that all denigrating terms be replaced, "visitation" would be the one of highest priority for replacement.

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[16]Isolina Ricci, Ph.D., "Mom's House / Dad's House", Collier Books, 1980.

[17]Judith Wallerstein, Ph.D., Source unknown.

2) Establishment of guidelines for developing "Parenting Schedules".

> *"Parental visitation is probably one of the least carefully considered provisions of a divorce decree. This is unfortunate because visitation can be one of the most frequent areas of post-divorce conflict. Visitation plans must be carefully organized to maintain the bonding between each parent and child. It can make the difference between a child who feels loved and secure and a child who feels the loss of one parent and lives in fear of losing the other."*[18]

Early in the study, the work group acknowledged that there is a reliance on a "cookie cutter" approach to establish "visitation schedules", (e.g. every other weekend and Wednesday nights) and that 'visitation' guidelines could be used to focus negotiations. As previously mentioned, one of the guiding principles established by the work group was to promote frequent and continuing contact between the child and each parent. Further, the work group established "system elements and factors" that it believed should be part of *[visitation]* schedules (hereinafter referred to as "parenting schedules" or "access"):

(1) fixed number of days/time parent can spend with child with no specific "justification"
(2) bilateral sanctions for non-compliance with court orders
(3) default schedules have a role in the process
(4) there are specific days which have special significance
(5) geographic distance of parents has an impact
(6) transportation/transfer points should be defined
(7) summer visits are a factor
(8) extended visits are a factor

Despite all of the determinations made by the work group, no specific recommendation was made regarding parenting schedules or guidelines. The last draft of the proposed legislation prior to this final version included the statement "The order shall include dates, time, transportation arrangements, proposed sanctions for intentional non-compliance by either party, and any other provisions that may help to clarify the *[visitation]* schedule." This statement would have at least required specificity within the orders and avoided the all too common language "reasonable and liberal" visitation. However, this sentence was completely eliminated by the work group and there was no replacement of this language to address the need for specificity. As noted in the Introduction of this report, **a non-specific visitation order is virtually impossible to enforce.**

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[18]Lowell K. Halverson and John W. Kydd, "Divorce in Washington: a humane approach", Pacific Family Law Institute Press, Seattle, 1985.

Recent studies suggest that although specificity may not be a panacea, *"its widespread use at the onset might prevent many problems from developing."*[19] Data from several hundred cases handled in 'visitation enforcement' programs throughout the country factually confirm the point about the use of vague or ambiguous language in visitation orders:

> *"A key outcome of the visitation enforcement programs at all sites is specification and many parents believe that their problems would have been avoided had there been clear, detailed visitation orders in the first place."*[20]

This recent finding shows the importance of having specificity in access orders, a point which the work group readily acknowledged. Nevertheless, the work group made no final recommendation to this effect.

Further, **there was no guidance provided for the definition of "frequent and continuing" contact.** Without this guidance, it is expected that the lack of uniform treatment of "similarly-situated" parties will continue and that "frequent and continuing" may mean 'every other weekend only' to one judge and to another judge, 'every other weekend, one night per week, alternating holidays, special days and vacation time'. Children and families are the victims of this lack of guidance now and they will continue to be so until efforts are made to legislate some consistency and uniformity in the establishment of parenting schedules.

Additionally, it should be noted that copies of access guidelines / default schedules from different parts of the country were obtained by the CRC and provided to the work group for reference. Further, letters were sent to judges and family law attorneys in Texas, where they had been using access guidelines for ten years, in order to obtain some feedback about the use of guidelines, in general. The correspondences received from these judges and attorneys were all very positive about the use of guidelines. (Copies of this correspondence were distributed to members of the work group).

Despite the fact that the work group agreed that 'default' schedules have a role in the process, the first draft of a proposed 'default' schedule or guideline was not presented and addressed by the work group until the latter part of the final meeting. At that time, there was great pressure to conclude the study. Although the work group has suggested that the access guidance issue should now be

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[19]Jessica Pearson, Ph.D., "Ten Myths About Family Law", Family Law Quarterly 27(2), Summer, 1993, p. 292

[20]Jessica Pearson, Ph.D., and Jean Anhalt, M.A., " The Visitation Enforcement Program: Impact on Child Access and Child Support", Final report to the State Justice Institute, The Center for Policy Research, Denver, Co. September 30, 1992. Excerpts from the report of this federally-funded study were provided to the work group and the complete report was made available to any of the members.

handled through education and training of the judiciary and the bar, this means of handling the problem does not seem practical, nor does having the general recommendation for training ensure that it will be addressed in that manner.

The CRC believes that the work group failed to address these specific "visitation" issues due to lack of time. Since the charge of SJR 243 was specifically "to evaluate model child custody decrees and **child visitation schedules**", it is highly recommended that the Commission on Youth make appropriate changes prior to introducing the legislation or that the study as it pertains to "visitation" be continued for another year.

3) **"Shared Parenting" was not recommended by the work group as a preferred custody model.**

> *"Given the problems with conventional custody, parents and courts should entertain viable alternatives rather pigeonhole every family into the identical custody arrangement.... When it comes to managing custody, we have seen that fathers are as capable a mothers and that, on the average, children in father-custody homes suffer no more than those in mother-custody homes.*
>
> *But many do suffer, especially when they lose a parent as a result of divorce. Four days per month (or less), whether with Daddy or Mommy, are not enough to meet most children's need for a parent. We know it is not enough for the noncustodial parent. And it also places an unfair burden on the custodial parent, a burden that was not part of the original agreement, when the couple first decided to have children.*
>
> ***There has got to be a better way to handle custody.***
>
> *There is. But it requires more than minor changes in the current system. It requires an entirely new approach to custody, a revolution in both the substance of custody decisions and the process of making these decisions - in <u>what</u> we decide, and in <u>how</u>, <u>when</u>, and <u>why</u> we decide it."*[21]

The CRCs position is that the public policy of the Commonwealth respecting child custody determinations should <u>actively</u> promote continuing, meaningful involvement of <u>both</u> parents, regardless of their marital status (Note: SJR 243 states "Whereas, child development theory supports the need of children to have consistent and on-going contact with both parents"). Further, in order to effect this policy, the General Assembly should enact legislation which provides a <u>preference</u> for joint custody (not to be confused with a 'presumption') in all cases where both parents are "fit" and residing in relatively close geographic proximity. 'Shared parenting' is not a radical or idealistic concept. Although support of the concept of shared parenting would represent "an entirely new approach to custody" in Virginia, it is not a novel idea. Rather, it has been used successfully in other states for several years and it has continued to gain acceptance over the past two decades because 1) the benefits to the children far outweigh the detriments (if in fact there are negative affects) and 2) a statutory "preference" for this custody arrangement acknowledges that the child is not the "fruit of victory"[22] for the "winner" in a custody dispute.

Since the "study and evaluation of model custody decrees" was a key element of SJR 243, comprehensive and objective consideration should have been given to 'shared parenting' as a preferred custody model in all cases where abuse or neglect

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[21] *supra* note 2 (emphasis added).

[22] *supra* note 15.

is lacking and where both parents have the desire and inclination to continue their full parental role. Unfortunately, a thorough review of this and other forms of child custody was not accomplished by the study group, perhaps due to time constraints. It is our position, therefore, that the Commission on Youth should strengthen the statutory language of the proposed legislation from the work group or alternately, continue the review and evaluation of custody models through 1994.

Shared parenting (joint custody) is a grossly misunderstood concept. Negative opinions among the judiciary and legislative body are seemingly deeply entrenched. Perhaps the reluctance of the SJR 243 work group to recommend a preference for shared parenting is a reflection of these misunderstandings and misperceptions.

Shared or joint custody is *"an arrangement wherein each parent has physical custody, legal authority, control and responsibility [of a child or children] for a designated period of time."*[23] Joint custody is among the most controversial designations in terms of its *"definitional ambiguity, its legal, theoretical, and practical significance, and its sociological implications."*[24] Nevertheless, joint custody *"appears to best reflect the ideal spirit of shared parenting that, in various forms, is implemented by mediation. As such, joint legal custody generally seems to be a more desirable legal designation than sole, alternating, or split custody, unless specifically contraindicated by circumstances.... joint legal custody connotes cooperation, compromise and balanced power."*[25] **Joint custody does not necessarily mean that both parents will be equally involved in rearing their child(ren), that the children's time under these arrangements must be equally divided between the parents, or that the children's loyalties to their parents are split.** The *"best joint custody arrangements reflect more of a state of mind than the parents' legal rights or the distribution of time between them.... the parents acknowledge the reality of their mutual importance to their children."*[26]

Some discussion of the more commonly reported misconceptions and myths about shared parenting (joint custody) is presented in the following pages. We believe that fair, reasonable people will be more understanding of the importance of promoting and encouraging 'shared parenting' for most families of divorce and separation if they will attempt to cast aside the anecdotes and myths and look objectively at the subject.

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[23]*supra* note 18.

[24]Donald T. Saposnek, "Mediating Child Custody Disputes: A Systematic Guide for Family Therapists, Court Counselors, Attorneys, and Judges", Jossey-Bass Publishers, 1991.

[25]*loc. cit.*

[26]*supra* note 2.

- **MYTH: Joint Custody Will Not Work When Parents Are "Uncooperative".**

> *"There is the myth in some mental health, legal and judicial thinking that joint custody can only be effectively undertaken by cooperative parents. To the contrary, joint custody provides one of the best methods of stimulating a degree of significant and meaningful cooperation in warring parents who would otherwise continue years of battling to the detriment of their children. The years of battling are particularly ferocious as one parent abuses the power of sole custody and the other parent fights the abuse in an attempt to gain back his or her lost parental identity."*[27]

Opponents of joint custody, particularly those in the judiciary, tout "failure to cooperate" as reason not to decree shared legal custody. The argument is that if sole custody of the child(ren) is ordered, the parents will in time develop a harmonious relationship. In reality, the "failure to cooperate" argument inspires a recalcitrant parent to generate non-cooperation in hopes of achieving sole custody.[28] The same argument applies to the custody laws of the Commonwealth which, at present, encourage power struggles over custody of the children. The manifestations of custody battles between two fit, loving and dedicated parents is frequently years and years of acrimony and re-litigation.

It is our position that with statutory language which promotes (with judicial support) a preference for shared parenting in most disputed custody cases, the Commonwealth will witness significantly greater parental cooperation during litigation. Again, if there is no contest, there is no need to "win" because there is no prize.

Notwithstanding what has been stated above regarding "parental cooperation", two questions remain to be answered:

1. "If parents could not cooperate enough to get along in marriage, how can we expect them to get along in divorce?"; and
2. "Why can't [divorcing] parents cooperate for the sake of their children?" (a question asked by Delegate Giesen during the Commission's public hearing on 12/8/93).

The answers to both of these questions were provided, at least in part, in a recent publication authored by Dr. Joan Kelly, recognized as one of the country's leading authorities on issues affecting children of divorce:

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[27] *supra* note 9.

[28] James A. Cook, "Policy Implications of Joint Custody", In "Joint Custodian", newsletter of the Joint Custody Association, October 7, 1993.

"While one might assume that the parents' lack of communication about parenting arrangements at separation was related to a systemic problem with communication during the marriage, our findings do not support this. Communication about children in the marriage was reported by parents to be significantly better or more successful than communication in six other marital areas. Sixty six percent of the women and eighty three percent of the men reported that communication about their children was adequate or good during the marriage. This contradicts the common assumption that a failed marriage has failed in all respects, including parenting."[29]

Dr. Kelly goes on to say that the adversarial system serves *"to sharpen differences, heighten anger and suspicion, and reduce the potential for productive discussions between these parents"* and that in this setting, parents were *"often advised by attorneys not to talk with their spouse about anything, including the children, and more often had formal court orders in place prohibiting contact".*

So, are divorcing or separating parents as uncooperative as commonly reported? Isn't it conceivable that cooperation could be enhanced through mediated resolutions, rather than litigated settlements?

- **MYTH: Joint Custody Comprises The Financial Status of Women & Children.**[30]

Critics have argued (without conclusive empirical evidence) that joint custody yields unsatisfactory financial arrangements for both women and children.[31] The Center for Policy Research (CPR) reports that no empirical evidence has ever been found to support this argument.[32] Further, Dr. Jessica Pearson, CPR Director, noted that in the several studies examined, *"child support was ordered in more than 90 percent of joint legal custody cases and closely resembled order level patterns observed in sole maternal custody cases."*[33] In addition, studies relating

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[29]Joan B. Kelly, Ph.D., "Developing and Implementing Post-Divorce Parenting Plans: Does the Forum Make a Difference?", pp. 136-155 In "Nonresidential Parenting: New Vistas in Family Living" (C.E. Depner and J.H. Bray, eds.), Sage Publications. 1993.

[30]Pearson, *op. cit.*, p. 284; the statement is quoted verbatim.

[31]*loc. cit.*

[32]Pearson, *op. cit.*, p. 285.

[33]*loc. cit.;* the author cites: Jessica Pearson and Nancy Thoennes, "Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments", Family Law Quarterly 22:319 (1988).

custody arrangement to child support compliance yield almost irrefutable evidence that joint custodial fathers are significantly more responsible for meeting their financial child support obligations than are fathers without custody:

- A 1991 U.S. Census Bureau report indicated that 90.2% of non-residential fathers with joint custody paid their child support in full.[34] This compliance rate noticeably exceeds the 50% figure frequently cited by the media.
- A 1988 HHS-funded study by The Urban Institute also found that joint custody was associated with higher child support payment levels.[35]
- In California, where almost 80% of all custody cases result in a decree of joint custody, the child support delinquency rate for joint custodial parents is only 6-7% (about the same as the unemployment).[36]

Obviously, these statistics strongly suggest that parents who are allowed to "share" the parental rights are much more willing to share the financial responsibilities of rearing their children. These data also dispel the myth that the financial condition of custodial mothers is jeopardized by way of joint custody. To the contrary, joint custodial mothers are much more likely to receive financial support from the father than are sole custodial mothers.

- **MYTH: Joint Custody Is Too Disruptive and Stressful For Children.**

A major complaint frequently expressed by critics of joint custody, including some attorneys, judges and social workers and occasionally by therapists, is that "living in two homes" is excessively disruptive to children; i.e. being shuttled back and forth between homes is viewed as a "yo-yo" experience that is detrimental to the child's 'stability'.[37] Since no evidence to support this position could be found in an exhaustive review of the published literature, it would appear to be yet another myth perpetuated through exchange of anecdotal information. To the contrary, several studies which have examined the effects of joint custody on children reported that moving 'back and forth between two homes' was <u>not</u>, according to children's testimony, a problem or source of confusion; in fact, this was viewed

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[34]U.S. Census Bureau, "Child Support and Alimony", 1989 Series P-60, No. 173, Issued September, 1991.

[35]Freya L. Sonenstein and Charles A. Calhoun, "Survey of Absent Parents: Pilot Results", The Urban Institute, July 1988.

[36]*supra* note 24.

[37]Shirley S. Ricks, "Determining Child Custody: Trends, Factors, and Alternatives", Conciliation Courts Review 22 (1): 65-70 (June, 1984).

as an advantage by some.[38]

The bottom line is that an arrangement of one parent in one home does not necessarily create a more stable environment for the child.[39] Most children can easily adapt to living in two homes as long as they have a clear understanding of an established schedule.[40]

The relationships between custody type and several measures of emotional stability in children have been examined in at least four independent studies conducted in recent years (i.e. in Arizona, Pennsylvania, California and Colorado). These studies reached the same conclusion -- children in joint custody (legal and physical) had no more emotional or behavioral problems than those in sole custody. In addition, rather than being used as pawns to express their parents' hostility, children in joint custody generally witness less tension and more cooperation between parents than do children in sole custody.[41]

- **MYTH: Joint Custody Deprives Women "Control" Of The Child(ren).**

Although it is true that there may be less "control" over children in joint custody compared to sole custody, the former arrangement actually empowers women by having fathers share in the childrearing responsibilities, thereby allowing more opportunities to pursue careers.[42]

- **MYTH: Joint Custody Forces Continuing Contact Between Hostile Parents, Causing On-going Court Battles.**

No studies or empirical data have been found to suggest any truth behind this myth. To the contrary, statistics from more than one source show that the re-litigation rate in joint custody arrangements is about 50% of that in sole custody

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[38]Judith B. Grief, "Fathers, children, and joint custody", American Journal of Orthopsychiatry 49(2): 311-319 (1979); D.A. Luepnitz, "Joint vs. single-parent custody: some comparative data", unpublished paper (n.d.); M.A. Watson, "Custody alternatives: defining the best interests of the children", Family Relations 30 (J1): 474-479 (1981).

[39]D.J. Salfi and N. Cassady, "My child/your child: Who owns this child?", unpublished manuscript (1980).

[40]Ricks, *op. cit.*, p. 68.

[41]*supra* note 2.

[42]National Council for Children's Rights, "Children's Needs for Two Parents", Report No. R108. Ironically, joint custody is partly an outgrowth of the feminist and women's movement for equality. The phrase "rebuttable presumption of joint custody" was coined by feminist Carol Stack in 1976.

cases.[43] Joint custody represents a "calming" of hostile, post-divorce relationships between parents, a savings to taxpayers and litigants, and a reduction in the case load of our overburdened domestic courts.

- **MYTH: Joint Custody Is Not Applicable To Never-Married Parents.**

Joint custody may be at least as applicable to never-married situations as to divorce cases. As opposed to sole custodial arrangements, joint custody encourages an early indoctrination and responsibility for unwed parents who might otherwise become "absent" from their children, financially, physically and emotionally.[44]

[43] *supra* note 24.

[44] *supra* note 24.

ACKNOWLEDGEMENTS

This report could not have been completed in such a short amount of time without the substantial contribution of R. Michael Ewing, my fiancé and President of the Children's Rights Council of Tidewater Virginia, Inc.

I would like to thank the following members of the Children's Rights Coalition who provided input to this report and dropped everything to give me an "eleventh hour" review: Murray Steinberg, Stuart Miller and Paul Robinson.

Finally, I would also like to acknowledge the efforts of the SJR 243 work group members during the study and thank them for the time and effort they put forth to focus on helping the children.

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December 17, 1993

FAX AND MAIL
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Re: SJR 243 Work Group
Study Recommendation

Dear Nancy:

I am in receipt of the Study Recommendations. I have reviewed the Recommendations, including the proposed legislation, and have solicited the comments of members of the Virginia Women Attorneys Association (VWAA) and other family law attorneys. All of the comments were favorable and supportive of the Recommendations and proposed legislation.

There are only a few modifications which I believe need to be made. First, on page 3 of the Recommendations, Recommendation 2, the phrase "domestic violence as it relates to divorce" should be changed to "domestic violence as it relates to *children*". The same change should be made in Recommendation 3. I believe our intent was to focus on the impact of domestic violence on children and that the above change clarifies that intent.

Second, on page 9 line 19 of the proposed legislation, the definition of "sole custody" needs more specificity and should be consistent with the definition of joint custody. I request that the following language be substituted:

> "Sole custody" means that one person retains legal and physical responsibility for the care and control of a child.

With the missing phrases, which that are included in the definition of joint custody, the currently accepted definition of sole custody (which is not statutory) may be construed to have been changed by the legislation.

Finally, I had understood and my notes reflect that the phrase "and protective orders" was to have been inserted on page 9 line 23 of the legislation after the phrase "including support and maintenance of children". As we discussed Protective Orders in cases where there is domestic violence are essential to stabilizing the family and are often necessary to protect the abused spouse and children. As such, they must not be excluded from the priority treatment which the legislation accords specifically to custody, visitation and support.

I am satisfied with and support the rest of the Recommendations and proposed legislation as set forth in the November 30, 1993 draft. I would be very concerned if there are any substantive changes to the Recommendations or proposed legislation. As you know, the Work Group worked laboriously to assure that the Recommendations and legislation were integrated in such a way as to serve the child oriented goals identified by the Work Group and to satisfy the mandates of Senate Joint Resolution 243. I am concerned that any substantive modification of any part of the Recommendations or legislation would destroy the balance created by those efforts of the Work Group.

I would like to take this opportunity to commend you on the manner in which you facilitated the work of the group. Your efforts brought to the table a diverse group representing all positions and allowed for the fair presentation of all perspectives on very sensitive and emotional issues. I believe the group explored and discussed thoroughly all aspects of the custody and visitation issues, the use of presumptive/default visitation schedules and the inappropriateness of including such schedules in legislation, the importance of training for the judiciary and bar and the necessity of retaining child focused legislation. The result was the integrated package of training, recommended study and guideline development for custody evaluations, and legislation, as set forth in the Recommendations, to which the Work Group agreed.

I appreciate your including me in the Work Group. If I may be of any

further assistance in this project or any in the future, do not hesitate to contact me. I look forward to receiving the final Recommendations and proposed legislation.

Sincerely,

Teena D. Grodner

TDG:lml

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December 16, 1993

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Re: SJR 243 Work Group
Our File No. 10000051

Dear Nancy:

This is written on my and Dr. Schutz' behalf. In three categories, we provide our comments on the December 8, 1993 Executive Summary draft of the SJR 243 Study: First, word and technical changes to the proposed new statute; second, comments on the accompanying Study Recommendations; and finally, a dissent on one point. Please understand Dr. Schutz and I write in our individual capacities, and not purporting to represent any constituent groups. As immediate past chair of the Family Law Section of the Virginia State Bar, I did circulate the draft to our Board of Governors, but it was not received in time for deliberation and discussion at our Winter meeting in Charlottesville. As well as I am able, I later hope to process and present comments from the board.

I. Line Changes to the Proposed Statute:

(1) Page 9, Line 22 - the language of draft 4(a) was "swift, informed adjudication." We prefer that to "promptly" which could foment hurried pendente lite hearings that are prompt but not informed.

(2) Page 9, Line 27 - change "may" to "shall." The discretion of the court is in determining that an alternative to litigation is "appropriate." Once that is done, the appropriate alternative is mediation. We believe this change is consistent with the work group's support for alternatives to litigation and in its clarity and directness assists in swift and informed resolution to the conflict.

(3) Page 11, Line 12 - add "and relationships" after "contact." Our notes on draft 4(a) indicate that these words were added there by the group.

Parenthetically, it was agreed one of the most important functions of our work was to reduce the potential of parental alienation, and to impel each parent's support for the child's relationship with the other. Reference had even been made to a parent handing the telephone to a child while making a denigrating comment concerning the caller, the other parent. Contact is encouraged, but in a destructive context. Support for the relationship appears an important and essential provision. And, we believe it represents the will of the study group.

II. Recommendations on Training, Guidelines and Research:

We believe that specifying certain topics such as "domestic violence" and not other equally important ones for judicial and bar training can result in these other topics being unfairly ignored or treated with less importance, when decisions based on limited time and funds are made.

Further, there should be explicit mention, either in bold face or the underlying rational for the topic, of creating and implementing very specific orders for "visitation." That is the one topic that was explicitly agreed to by the group as appropriate for legal and judicial training when it was deleted from draft 4(a) of the statute.

III. The Language of "Custody" and "Visitation":

This is our sole formal dissent to the draft of December 8, 1993. Although outvoted at the last work meeting, we wish to go on record that we believe the terms "custody" and "visitation" have pernicious effects that sustain conflict and damage parents. Less pejorative language such as "parenting plan," "parenting time" are just as useful and effective without the adverse impact.

We all agree language is important. We likewise were charged with a one-year mandate to study and presumably, to go beyond the expedient and recommend a major change, if warranted. Somewhere in the process, we shied from an important beginning premise by failing to address and delete the stigmatizing "win/lose" words. That we've used words such as custody and visitation for centuries seems of little importance in considering the usefulness of replacing them. It is an empty observation that such a change would effect terminology used in decades of precedential jurisprudence. All states which have in an enlightened way discarded these pejorative terms have now found a way to accommodate application of settled principles of law. In November, 1992, when Chief Justice Carrico addressed the Symposium on Children, Families and the Courts, a substantial portion of that presentation was devoted to the marvelous enlightened approach to child custody and family law cases taken by the Texas judicial system. The vitality and child focus of the Texas Family Courts contributed to the process resulting in the anticipated creation of our new family court. Texas long ago abandoned stigmatizing verbiage in favor of more neutral concepts of "managing" and "possessory" conservators for children. They've taken the win and lose out of custody battles. Certainly we can't shrink from our responsibility to recognize the benefits of such word changes merely because there might be some effort involved in reconciling the new terms with the language of past precedents. Texas did it. Washington did it. And after a

one-year study, as opposed to a rushed legislative enactment, we should be in a position, and indeed probably have the responsibility, to make these changes, and today. The words custody and visitation are pejorative, tend to catalyze and focus domestic disputes and litigation, and send wrong and unnecessary messages to children and parents. We support a change now to the language of earlier drafts which eliminated the use of "custody" and "visitation."

As a final comment, we wish to commend you and the rest of the work group for the significant effort that produced the Executive Summary. Enactment by the legislature would be a substantial improvement for children in Virginia.

Sincerely,

Glenn C. Lewis, Esquire
Benjamin J. Schutz, Ph.D.

GCL:mbm

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA

RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 985
WARRENTON, VIRGINIA 22186

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES

THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEESBURG, VIRGINIA 22075

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

13 December 1993

Nancy H. Ross, Executive Director
COMMISSION ON YOUTH
General Assembly Building
910 Capitol Street
Suite 517-B
Richmond, Va. 23219

Re: SJR 243 Draft Study
Recommendations

Dear Nancy:

I want to compliment you on the very efficient and professional manner in which you guided the study work group. I enjoyed participating in the group. Thank you for asking me to be a part of it.

I have reviewed the draft study recommendations included with your memorandum of December 1, 1993. While I agree that the draft executive summary, study recommendations and proposed statutory revisions do represent the consensus of the views of the study work group, I must make for the record one dissent and some general observations. These are on a separate sheet enclosed herewith.

Have a happy holiday season.

Very truly yours,

James H. Chamblin

James H. Chamblin, Judge

Re: 12/8/93 Draft of SJR 243
Study of Model Child Custody
and Visitation Schedules

I agree with all the Study Recommendations except Recommendation 1 concerning statutory revisions. I do not feel that the statutory revisions are necessary.

In my opinion the statutory revisions do not change existing law. All the additional language in the factors to be considered concern matters which every competent judge already considers in a child custody decision.

If the legislation introduced in the 1993 session of the General Assembly which led ultimately to SJR 243 was precipitated by a feeling that judges are making bad custody decisions, then the remedy would lie in the traditional methods of dealing with judges who are making inappropriate decisions. I discovered nothing in the materials supplied to me as a member of the work group or in the comments made at any meeting which indicated in any way to me that the law needed to be changed. I heard nothing that indicates to me that the proposed statutory revisions would lead to better custody decisions. In my opinion if a judge is making bad decisions under existing law, then the statutory revisions will not cause him or her to make better decisions.

If there is a problem in our present society with the time-honored words used in custody jurisprudence, e.g. "visitation" or "non-custodial parent", then I feel it is the legislature's prerogative to change nomenclature. However, I trust that the General Assembly will consider carefully how a court may construe legislation which changes nomenclature that has been used in the law for many years.

Judicial education may be appropriate. If the Supreme Court decides that it is needed, I must note that if such education comes from psychologists, social workers or other professionals in the child custody area, then it must be recognized that any professional in the area will have a definite slant or view on child custody. If there were only one view or only one school of thought on child development, crisis adjustment or adaptation or domestic violence, then it would not be a problem to find professionals to instruct judges. There may be basic principles in these areas, but I do not think judges need a professional to tell them about these basics because they come from human experience. A family unit can be evaluated by two different psychologists for custody purposes, and there most likely will be two different opinions. Everyone who has ever been involved in custody litigation knows how easy it is to obtain a psychologist or social worker who will render an opinion in favor of whoever is paying the bill.

Virginia has an excellent judiciary. Its judges are very capable and competent. It is my opinion that there is no other area of the law so fraught with emotion as the domestic area in general and child custody in particular. A disappointed litigant in a custody case is more likely to be emotionally devastated than any other non-prevailing litigant. Such disgruntled litigants may have strong voices, but I feel they are few in numbers when all the domestic litigants in Virginia are considered.

If there is a perception that custody decisions differ from one part of the state to another, then I would like to see evidence of this. No two custody cases are exactly the same, and contested custody cases are decided in the context of a lawsuit. Specifically, being lawsuits, they are decided upon the law and the evidence. A judge decides a custody case based on the evidence presented in court from which he makes findings of fact to which the law is applied.

I feel that all the purposes of the statutory revisions mentioned in Recommendation 1 are already in effect. The revisions do not offer courts any more guidelines in custody disputes than they already have. I heard no evidence that judges are deferring custody decisions in favor of other aspects of a domestic proceeding. My experience is that if custody is an issue and at least one party wants it addressed, then any court will address it as soon as possible. If a judge in a custody case does not seek to promote, when appropriate, frequent and continuing contact between each child and each parent, then that judge should not be on the bench. I thought judges have sought this goal from time immemorial. I cannot understand why any judge, if one actually has, would not support mediation as a means to settle custody disputes. I feel that the legislature adequately addressed this policy with the enactment of Section 8.01-576.4 et seq. during the 1993 session. Finally, I do not feel that the expanded factors in proposed Section 20-124.3 adds anything to the existing state of Virginia law on the "best interests" standard. Any factor therein not already found in Section 20-107.2 is a factor already considered by any judge in custody litigation.

For all the foregoing reasons, I respectfully dissent from the work group's recommendation for statutory revisions.

December 13, 1993 — Date

James H. Chamblin — James H. Chamblin, Judge

VIRGINIA POVERTY LAW CENTER, INC.
201 WEST BROAD STREET • SUITE 302
RICHMOND, VA 23220
(804) 782-9430
FAX (804) 649-3746

December 17, 1993

VIA FAX

Nancy H. Ross, Executive Director
Commission on Youth
General Assembly Building
910 Capital Street
Suite 517 B
Richmond, Virginia 23219

RE: SJR 243

Dear Nancy:

My comments are directed generally to the work of this study committee, with a few specific comments to the December 8th draft of legislation from the working committee.

While this committee's mandate is to study only custody and visitation, changes to these laws impact directly upon child support awards in Virginia.

In response to the tremendous welfare debt, in 1988, the federal pushed state governments across the nation for legislation to raise basic child support awards to ensure that families could leave the welfare rolls. This was accomplished through mandating presumptive child support guidelines which were to be a "floor" for providing enough support to raise a child. In Virginia, these guidelines were enacted at Va. Code Section 20-108.2 for that purpose.

Since that time, the General Assembly has been and continues to be pressed by those who wish to lower the child support scale or to avoid application of the guidelines altogether. The focus has moved away from the child's needs, which was the whole theory behind the guidelines, toward accommodating the payor's needs, i.e., he has fathered more children than he can possibly support, so we must give him a break.

Thus through legislative enacted over the past several years, ways to avoid the application of the basic child support scale have been created. This has been accomplished primarily through looking at custody arrangements and the amount of visitation. Now whether there is joint or split custody can drastically lower the amount of support awarded a custodial parent even if the payor never exercises his visitation. The custody relationship and/or visitation arrangement can determine whether the child support guidelines in 20-108.1 apply or when a deviation is appropriate.

By changing the laws governing custody, even whether you call it custody or something else, can create an opportunity to avoid application of the presumptive child support guidelines. Should a presumption of joint custody be adopted by this committee, then under recent appellate case holdings, the presumptive guidelines would NEVER apply, even if the child resided primarily with one parent. Thus the interplay between custody and support law is very direct.

Changing visitation laws is also inextricably linked to paying support. For sake of illustration take the example of the "default" visitation schedule that Ms. Lewis presented which required a fixed number of days during the summer, holidays, etc. as the amount of visitation that would be awarded where the parties could not agree. In working through the examples in the schedule, the total number of "default" days is always more than 110. The ramifications of such a change to the amount of support awarded would be that the presumptive child support schedules would NEVER apply to a case. This is because a multiplier is used where the amount of visitation awarded is more than 110 days per year, permitting a substantial downward deviation from the basic child support scale which is not in line with the amount of increased visitation, even where fully exercised.

Another example of the interplay between child support and this committee's work is in the area of mediation. While mediation is a useful tool, this committee needs to be mindful of the fact that current standards and laws on mediation afford no protections to litigants who seek child support. The child support guidelines require that basic support obligations be arrived at by computations based upon disclosure of gross income. In open court, one can subpoena this information from the other side and one has the threat of perjury. Courts must use the support guidelines work sheet and must state written reasons for deviation from the support guidelines.

In mediation none of these protections now exist. Parties mediating cannot be compelled to disclose their income, even certified mediators are not required to use the child support guidelines work sheet or to disclose in writing the parties' reasons for deviation. Until these protections are mandated through public policy the result will be lowered child support, which is contrary to the interests of children and the state.

Concerning the December 8th draft of legislation, my comments are as follows:

> Page 9, line 8: Why does this definition remain here when the term does not have any legal significance elsewhere in the bill?
>
> Page 9, line 19: The definition of sole custody seems too vague and restrictive. Under this definition if the non-custodial parent had the child for even a few hours visitation, he could argue that the custodial parent does not have responsibility for the child. A better definition would be to say "sole custody means that one parent retains legal and physical responsibility for the child."

Page 9, line 23, 24: There is no mention of protective orders coming ahead of custody and support. Don't we need to say this or at least put those actions on an equal footing with custody and support?

Page 10, line 6-8: On page 9 "persons with a legitimate interest" is generally defined as it appears in the code now at 20-107.2. However, existing language that defines legitimate interests "to accommodate the best interests of the child" has been deleted and replaced by a different standard, "the primacy of the parent-child relationship." This seems inappropriate and a backdoor method of inserting criteria for the award of custody that does not appear in the list of factors. Did the committee vote for this change?

Page 11, line 21: The mandatory nature of the "shall" in this section, even with the qualifying language of "in an appropriate case" conflicts with the existing language in 8.01-576.5, passed just this past Session, which says a court "may" refer any contested matter to a dispute resolution session. The proposed language should be made to conform to the language in 8.01 to avoid confusion.

Page 11, line 26: The "may" language of this section presupposes that a person who has been abused may decide to mediate the case anyhow, or that a judge may refer a case on to mediation even if there has been an allegation of abuse of a child. At a minimum, cases where there has been an allegation of child abuse or snatching should make a case inappropriate for mediation. Since mediators are under no legal duty to report abuse of children and are under an affirmative duty to provide confidentiality to the parties, this language needs to be restructured to protect kids.

Page 12, line 6: Add "any mediated agreement concerning the payment or non-payment of child support shall include the child support guidelines work sheet as provided in 20-108.2 and, where appropriate, shall set forth the written reasons for deviation from the guidelines amount."

Thank you for the opportunity to comment on the work of this committee. If you or the committee have any questions concerning my comments, I will be happy to answer them at your convenience.

Sincerely,

Cherry C. Harman/tep

Cherry C. Harman
Staff Attorney

/tep

MEMORANDUM

June 9, 1993

TO: The Honorable Rosemarie Annunziata
Circuit Court of Fairfax County
FROM: Richard J. Byrd, Esquire
Chairman, Family Law Section
RE: Custody Study and Recommendation by a Neutral Evaluator

We in the Family Law Section very much appreciated your attending our April meeting at which we had three professional custody evaluators discuss their style and procedure on custody evaluation, and in particular, the issue of when it might be appropriate for the Court to appoint such a neutral evaluator. You requested that the Family Law Section give some thought and study to this question and make a recommendation to you for the Circuit Court. We have met several times on this subject, and have had very thorough and broad discussions as to what we feel would be most appropriate, and we would like to make the following comments and recommendations.

One of the difficulties in devising a Court procedure is the time requirements brought about by the present policy of the Court in referring custody cases to mediation. The problem is that if mediation is stacked upon a neutral evaluation, so much time may have to be built into the procedure that parties who fail to achieve a settlement by either of these procedures may have to wait a long time for trial. Taking all of this into account, we feel that the following would be a reasonable procedure.

(1.) If neither party moves the Court to appoint a neutral evaluator, the case would proceed as it does now on the present custody track, and will be set for a Status Conference and sent to mediation, unless the circumstances of the case make it inappropriate for mediation.

(2.) Upon Motion by either party prior to or at the Status Conference to appoint a neutral evaluator, the Court may appoint a neutral evaluator to make a study and recommendation in lieu of mediation based upon the following factors:

(a.) Success in mediation does not seem likely. This may be the conclusion of the Court if mediation has been tried before, or if Counsel for both parties state that they had several "four-way" meetings or made other attempts to resolve the dispute without success, or if the litigation has been long and acrimonious;
or

(b.) Either party has made allegations of psychological or emotional problems of the other party, or one of the parties has a recent mental health history which would make this case appropriate for an expert psychologist/neutral evaluator to report to the Court as to the effect of these psychological or emotional problems or mental history on the issue of custody;
or

(c.) That one or both parties has already picked an expert psychologist or other such professional to give testimony in this cause, and therefore it is likely that each side would be having to pay expenses of having a one-sided expert testify, which is expensive for the parties and not especially informative for the Court, and hence the appointment of a neutral evaluator would be more appropriate for the Court and the parties.

(3.) When either party moves to have the Court appoint a neutral evaluator, that party would provide a list to the Court and opposing Counsel of three neutral evaluators with whom neither party has had any contact. Opposing Counsel may also provide a list of three such acceptable, neutral evaluators. The Court will choose from the list of neutral evaluators provided by Counsel, and this case will proceed under a study, evaluation and recommendation being made to the Court by a neutral evaluator and will not be sent to mediation. A trial date will be set using the same tracking dates as is used in mediation, since it is felt that the study and evaluation will take about the same time as does mediation.

(4.) If a case has been previously set for mediation, and mediation was attempted or has taken place, but has failed in that the parties have not reached an agreement, then again either party may make a Motion to the Court for the appointment of a neutral evaluator, and the Court will hear argument as to whether this is appropriate to assist the Court in making a determination of custody. If mediation has failed, but the Court feels that neutral evaluation is appropriate, the trial date may be adjusted to allow this evaluation to conclude.

3.00 CONTESTED CUSTODY CASES

3.01 Where there is a genuine dispute as to custody and/or visitation, the Domestic Relations Delay Reduction System Bill/Cross-Bill cover Sheet (Appendix 29) must be checked in the affirmative.

3.02 The case will then be automatically placed on the custody track (Appendix 56 for Tracking Schedule) and a status conference will be scheduled within forty-five (45) days of the date for the filing of the answer.

3.03 Parties and their counsel must be present for the status conference which will be held in one of the courtrooms. At that status conference, dates will be set for identification of experts; (60 days after filing) discovery cut-off (30 days

prior to hearing); the date for the final hearing (150 days from filing if case referred for mediation, 90 days from filing if no referral for mediation); and the date for the stipulation conference (20 days before final hearing). (Appendix 57 for Status Conference Order)

3.04 All cases on the custody track will be referred to mediation unless deemed inappropriate by the Judge at the status hearing. (see Appendix 58 for Mediation Order) The following factors may make a case inappropriate for mediation:

a. children of sufficient age and capacity to make intelligent choices for themselves;

b. allegations of sexual abuse or physical abuse;

c. extensive history of spousal abuse or coercion;

d. history of substantial drug or alcohol abuse or mental incapacity or impairment by one or both parents; and

e. threat of parental kidnapping.

3.05 Mediation must be completed within 100 days of filing. Mediation recommendations will not be admissible in court other than whether or not a party participated.

3.06 Mediation will be done through the Fairfax Juveniie and Domestic Relations Court unless the parties elect to choose private mediation.

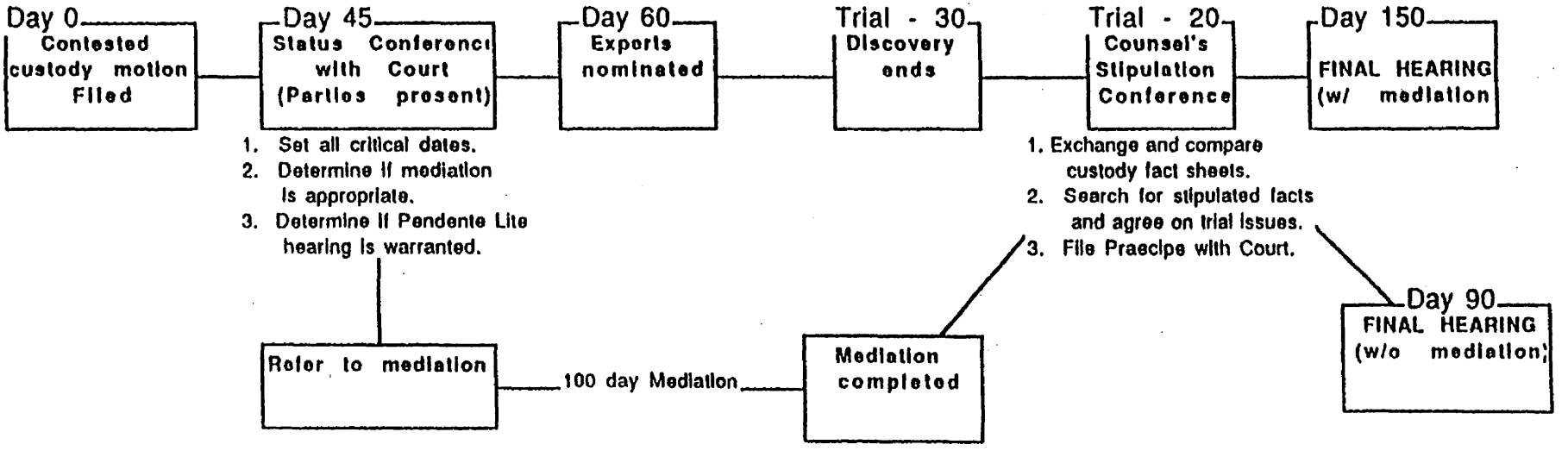
3.07 Twenty (20) days prior to hearing, counsel of record must exchange Custody Information Sheets (Appendix 59), Custody Stipulations (Appendix 60) and Custody Trial Positions (Appendix 61) at the stipulation conference. Counsel will be required to file a praecipe with the court identifying any other stipulated facts and issue upon which agreement can be reached.

3.08 Pendente lite support matters in custody track cases will still be heard pursuant to regular pendente lite support procedures.

3.09 Pendente lite custody or use and possession orders will be entered in appropriate cases. (Appendix 62)

FAIRFAX COUNTY CIRCUIT COURT
DOMESTIC RELATIONS CASE TRACKING SYSTEM
CUSTODY TRACK

CUSTODY TRACK



SENATE JOINT RESOLUTION NO. _____

Requesting the Supreme Court and the Family Law Section of the Virginia State Bar to facilitate development of model child visitation schedules.

WHEREAS, the issues involved in establishing model child visitation schedules was examined by the Commission on Youth pursuant to Senate Joint Resolution No. 243 (1993); and

WHEREAS, the model which was developed in the course of this study identified the values, system components and logistical factors to be addressed in visitation schedules and is a child-focused model, supportive of the concept that children need frequent and predictable contact with both parents while avoiding a "cookie cutter" approach to allocating time between the child and the parents; and

WHEREAS, the model recognized the uniqueness of families, making codification of schedules inappropriate, although a default schedule of visitation was recognized as having utility in those cases where the parents are unable to agree; and

WHEREAS, the study effort concluded that child visitation guidelines are most appropriately developed and implemented at the local level, although there is little guidance currently provided to assist in developing a local model; and

WHEREAS, development of checklist of factors to guide the judiciary in designing model visitation schedules would encourage child-focused creative scheduling while maintaining judicial discretion; now, therefore, be it

RESOLVED by the Senate of Virginia, the House of Delegates concurring, That the Office of the Executive Secretary of the Supreme Court of Virginia, in cooperation with the Family Law Section of the Virginia State Bar, develop a checklist to assist the judiciary in developing and implementing model child visitation schedules.

#

1994 SESSION

LD3703836

SENATE BILL NO. 88

Offered January 17, 1994

A BILL to amend and reenact § 16.1-278.15, as it is currently effective and as it may become effective, § 20-79 , as it is currently effective and as it may become effective, §§ 20-103 and 20-107.2 of the Code of Virginia and to amend the Code of Virginia by adding in Title 20 a chapter numbered 6.1 consisting of sections numbered 20-124.1 through 20-124.6, relating to custody and visitation arrangements for minor children .

Patrons—Calhoun, Barry, Houck, Quayle and Woods; Delegates: Darner, Deeds, Giesen, Jackson and Jones, J.C.

Referred to the Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That §16.1-278.15, as it is currently effective and as it may become effective, § 20-79, as it is currently effective and as it may become effective, and §§ 20-103 and 20-107.2 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding in Title 20 a chapter numbered 6.1 consisting of sections numbered 20-124.1 through 20-124.6 as follows:

§ 16.1-278.15. (For effective date - See note) Custody or visitation, child or spousal support generally.

A. In cases involving the custody, visitation or support of a child pursuant to subdivision A 3 of § 16.1-241, the court may make any order of disposition to protect the welfare of the child and family as may be made by the circuit court. If support is ordered for a child, the order shall provide that support will continue to be paid for a child who is (i) a full-time high school student, (ii) not self-supporting, and (iii) living in the home of the parent seeking or receiving child support, until the child reaches the age of nineteen or graduates from high school, whichever occurs first.

B. In any case involving the custody or visitation of a child, the court may award custody upon petition to any party with a legitimate interest therein, including, but not limited to, grandparents, stepparents, former stepparents, blood relatives and family members. The term "legitimate interest" shall be broadly construed to accommodate the best interest of the child. The authority of the juvenile court to consider a petition involving the custody of a child shall not be proscribed or limited where the custody of the child has previously been awarded to a local board of social services.

C. In any determination of support obligation under this section, the support obligation as it becomes due and unpaid creates a judgment by operation of law. Such judgment becomes a lien against real estate only when docketed in the county or city where such real estate is located. Nothing herein shall be construed to alter or amend the process of attachment of any lien on personal property.

D. In cases involving charges for desertion, abandonment or failure to provide support by any person in violation of law, disposition shall be made in accordance with Chapter 5 (§ 20-61 et seq.) of Title 20.

E. In cases involving a spouse who seeks spousal support after having separated from his spouse, the court may enter any appropriate order to protect the welfare of the spouse seeking support.

F. In any case or proceeding involving the custody or visitation of a child, the court shall consider the best interest of the child, including the considerations for determining custody and visitation set forth in § ~~20-107.2~~ *Chapter 6.1(§ 20-124.1 et seq.) of Title 20* ..

§ 16.1-278.15. (Delayed effective date - See notes) Custody or visitation, child or spousal support generally.

A. In cases involving the custody, visitation or support of a child pursuant to subdivision A 3 of § 16.1-241, the court may make any order of disposition to protect the welfare of the child and family. If support is ordered for a child, the order shall provide that support

will continue to be paid for a child who is (i) a full-time high school student, (ii) not self-supporting, and (iii) living in the home of the parent seeking or receiving child support, until the child reaches the age of nineteen or graduates from high school, whichever occurs first.

B. In any case involving the custody or visitation of a child, the court may award custody upon petition to any party with a legitimate interest therein, including, but not limited to, grandparents, stepparents, former stepparents, blood relatives and family members. The term "legitimate interest" shall be broadly construed to accommodate the best interest of the child. The authority of the family court to consider a petition involving the custody of a child shall not be proscribed or limited where the custody of the child has previously been awarded to a local board of social services.

C. In any determination of support obligation under this section, the support obligation as it becomes due and unpaid creates a judgment by operation of law. Such judgment becomes a lien against real estate only when docketed in the county or city where such real estate is located. Nothing herein shall be construed to alter or amend the process of attachment of any lien on personal property.

D. In cases involving charges for desertion, abandonment or failure to provide support by any person in violation of law, disposition shall be made in accordance with Chapter 5 (§ 20-61 et seq.) of Title 20.

E. In cases involving a spouse who seeks spousal support after having separated from his spouse, the court may enter any appropriate order to protect the welfare of the spouse seeking support.

F. In any case or proceeding involving the custody or visitation of a child, the court shall consider the best interest of the child, including the considerations for determining custody and visitation set forth in § ~~20-107.2~~ *Chapter 6.1 (§ 20-124.1 et seq.) of Title 20.*

§ 20-79. (For effective date - See note) Effect of divorce proceedings.

(a) In any case where an order has been entered under the provisions of this chapter, directing either party to pay any sum or sums of money for the support of his or her spouse, or concerning the care, custody or maintenance of any child, or children, the jurisdiction of the court which entered such order shall cease and its orders become inoperative upon the entry of a decree by the court or the judge thereof in vacation in a suit for divorce instituted in any circuit court in this Commonwealth having jurisdiction thereof, in which decree provision is made for support and maintenance for the spouse or concerning the care, custody or maintenance of a child or children, or concerning any matter provided in a decree in the divorce proceedings in accordance with the provisions of § 20-103.

(b) In any suit for divorce, the court in which the suit is instituted or pending, when either party to the proceedings so requests, shall provide in its decree for the maintenance, support, care or custody of the child or children *in accordance with Chapter 6.1 (20-124.1 et seq.)*, support and maintenance for the spouse, if the same be sought, and counsel fees and other costs, if in the judgment of the court any or all of the foregoing should be so decreed.

(c) In any suit for divorce or suit for maintenance and support, the court may after a hearing, pendente lite, or in any decree of divorce a mensa et thoro, decree of divorce a vinculo matrimonii, final decree for maintenance and support, or subsequent decree in such suit, transfer to the juvenile and domestic relations district court the enforcement of its orders pertaining to support and maintenance for the spouse, maintenance, support, care and custody of the child or children. After the entry of a decree of divorce a vinculo matrimonii the court may transfer to the juvenile and domestic relations district court any other matters pertaining to support and maintenance for the spouse, maintenance, support, care and custody of the child or children on motion by either party, and may so transfer such matters before the entry of such decree on motion joined in by both parties. In the transfer of any matters referred to herein, the court may, upon the motion of any party, or on its own motion, and for good cause shown, transfer any matters covered by said

decree or decrees to any juvenile and domestic relations district court within the Commonwealth that constitutes a more appropriate forum. An appeal of an order by such juvenile and domestic relations district court which is to enforce or modify the decree in the divorce suit shall be as provided in § 16.1-296.

§ 20-79. (Delayed effective date - See notes) Effect of divorce proceedings.

(a) In any case where an order has been entered under the provisions of this chapter, directing either party to pay any sum or sums of money for the support of his or her spouse, or concerning the care, custody or maintenance of any child, or children, such orders become inoperative upon the entry of a decree by the court in a suit for divorce instituted in any family court in this Commonwealth having jurisdiction thereof, in which decree provision is made for support and maintenance for the spouse or concerning the care, custody or maintenance of a child or children, or concerning any matter provided in a decree in the divorce proceedings in accordance with the provisions of § 20-103.

(b) In any suit for divorce, the court in which the suit is instituted or pending, when either party to the proceedings so requests, shall provide in its decree for the maintenance, support, care or custody of the child or children *in accordance with Chapter 6.1 (20-124.1 et seq.)*, support and maintenance for the spouse, if the same be sought, and counsel fees and other costs, if in the judgment of the court any or all of the foregoing should be so decreed.

(c) In any suit for divorce or suit for maintenance and support filed in a circuit court prior to January 1, 1995, the circuit court may after a hearing, pendente lite, or in any decree of divorce a mensa et thoro, decree of divorce a vinculo matrimonii, final decree for maintenance and support, or subsequent decree in such suit, transfer to the family court the enforcement of its orders. After the entry of a decree of divorce a vinculo matrimonii the circuit court may transfer to the family court any other matters on motion by either party, and may so transfer such matters before the entry of such decree on motion joined in by both parties. In the transfer of any matters referred to herein, the circuit court may, for good cause shown, transfer any matters covered by said decree or decrees to any family court within the Commonwealth that constitutes a more appropriate forum. Upon any transfer under this section, the circuit court is divested of any further jurisdiction over the transferred matters. An appeal of an order by a family court which is to enforce or modify the decree in the divorce suit shall be as provided in § 16.1-296.2.

§ 20-103. Court may make orders pending suit for divorce, custody or visitation, etc.

A. The court may, at any time pending ~~the~~ *a* suit *pursuant to this chapter* , in the discretion of such court, make any order that may be proper (i) to compel a spouse to pay any sums necessary for the maintenance and support of the petitioning spouse, including an order that the other spouse provide health care coverage for the petitioning spouse, unless it is shown that such coverage cannot be obtained, (ii) to enable such spouse to carry on the suit, (iii) to prevent either spouse from imposing any restraint on the personal liberty of the other spouse, (iv) to provide for the custody and maintenance of the minor children of the parties, including an order that either party provide health care coverage for the children, (v) to provide support for any child of the parties under the age of nineteen who is a full-time high school student and who otherwise meets the requirements set forth in § 20-107.2, (vi) for the exclusive use and possession of the family residence during the pendency of the suit, (vii) to preserve the estate of either spouse, so that it be forthcoming to meet any decree which may be made in the suit or (viii) to compel either spouse to give security to abide such decree.

B. Upon a showing by a party of reasonable apprehension of physical harm to that party by such party's spouse, and consistent with rules of the Supreme Court of Virginia, the court may enter an order excluding that party's spouse from the jointly owned or jointly rented family dwelling. In any case where an order is entered under this paragraph, pursuant to an ex parte hearing, the order shall not exclude a spouse from the family dwelling for a period in excess of fifteen days from the date the order is served, in person, upon the spouse so excluded. The order may provide for an extension of time

beyond the fifteen days, to become effective automatically. The spouse served may at any time file a written motion in the clerk's office requesting a hearing to dissolve or modify the order. Nothing in this section shall be construed to prohibit the court from extending an order entered under this paragraph for such longer period of time as is deemed appropriate, after a hearing on notice to the parties.

C. In cases other than those for divorce in which a custody or visitation arrangement for a minor child is sought, the court may enter an order providing for custody, visitation or maintenance pending the suit as provided in subsection A. The order shall be directed to either parent or any person with a legitimate interest who is a party to the suit .

D. Orders entered pursuant to this section which provide for custody or visitation arrangements pending the suit shall be made in accordance with the standards set out in Chapter 6.1 (§ 20-124.1 et seq.).

E. An order entered pursuant to this section shall have no presumptive effect and shall not be determinative when adjudicating the underlying cause.

§ 20-107.2. Court may decree as to custody and support of minor children.

Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce, whether from the bond of matrimony or from bed and board, and upon decreeing that neither party is entitled to a divorce, the court may make such further decree as it shall deem expedient concerning the custody, *or* visitation and support of the minor children of the parties *as provided in Chapter 6.1 (§ 20-124.1 et seq.),* including an order that either party provide health care coverage. ~~In any case involving the custody or visitation of a child, the court may award custody or visitation to any party with a legitimate interest therein, including but not limited to, grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. The term "legitimate interest" shall be construed broadly to accommodate the best interests of the child. The court may also order that support be paid for any child of the parties and, if support is ordered, the court shall order that it will continue to be paid for any child who is (i) a full-time high school student, (ii) not self-supporting and (iii) living in the home of the parent seeking or receiving child support until such child reaches the age of nineteen or graduates from high school, whichever first occurs. However, the court may confirm a stipulation or agreement of the parties which extends a support obligation beyond when it would otherwise terminate as provided by law. The court shall have no authority to decree support of children payable by the estate of a deceased party.~~

~~The court, in determining custody and visitation of minor children, shall consider the following:~~

~~1. The age and physical and mental condition of the child or children;~~

~~2. The age and physical and mental condition of each parent;~~

~~3. The relationship existing between each parent and each child;~~

~~4. The needs of the child or children;~~

~~5. The role which each parent has played, and will play in the future, in the upbringing and care of the child or children;~~

~~6. The propensity of each parent to allow the child contact with the other parent and the relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child;~~

~~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 as defined in § 16.1-228; and~~

~~9. Such other factors considered by the court to be relevant to the best interests of the child.~~

~~In awarding the custody of the child or children, the court may give consideration to joint custody or to sole custody, but shall give primary consideration to the welfare of the child or children, and, as between the parents, there shall be no presumption or inference of law in favor of either.~~

~~For the purposes of this section, "joint custody" means (i) joint legal custody 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, (ii) joint physical custody where both parents share physical and custodial care of the child or (iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child.~~

~~In any proceeding involving custody or visitation, the court shall include as a condition of any custody or visitation order a requirement that thirty days' advance written notice be given to the court and the other party by any party intending to relocate and of any intended change of address, unless the court, for good cause shown, orders otherwise. The court may require that the notice be in such form and contain such information as it deems proper and necessary under the circumstances of the case.~~

~~Notwithstanding any other provision of law, neither parent shall be denied access to the academic, medical, hospital or other health records of that parent's minor child unless otherwise ordered by the court for good cause shown.~~

CHAPTER 6.1.

CUSTODY AND VISITATION ARRANGEMENTS FOR MINOR CHILDREN.

§ 20-124.1. Definitions.

As used in this chapter:

"Joint custody" means (i) joint legal custody 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, (ii) joint physical custody where both parents share physical and custodial care of the child or (iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child.

"Person with a legitimate interest" shall be broadly construed and includes, but is not limited to grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. The term shall be broadly construed to accommodate the best interest of the child.

"Sole custody" means that one person retains responsibility for the care and control of a child and has sole authority to make decisions concerning the child.

§ 20-124.2. Court-ordered custody and visitation arrangements.

A. In any case in which custody or visitation of minor children is at issue, whether in a circuit or district court, the court shall provide swift adjudication of custody and visitation arrangements, including support and maintenance for the children, prior to other considerations arising in the matter. The court may enter an order pending the suit as provided in subsection C of § 20-103. The procedures for determining custody and visitation arrangements shall insofar as practicable preserve the dignity and resources of family members. Mediation shall be used as an alternative to litigation where appropriate.

B. In determining custody, the court shall give primary consideration to the best interests of the child. The court shall 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. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may award custody or visitation to any party with a legitimate interest. The court may award joint custody or sole custody.

C. The court may order that support be paid for any child of the parties and, if support is ordered, the court shall order that it will continue to be paid for any child who is (i) a full-time high school student, (ii) not self-supporting and (iii) living in the home of the party seeking or receiving child support until such child reaches the age of nineteen or graduates from high school, whichever first occurs. However, the court may confirm a stipulation or agreement of the parties which extends a support obligation beyond when it would otherwise terminate as provided by law. The court shall have no authority to

decree support of children payable by the estate of a deceased party. The court may make such further decree as it shall deem expedient concerning support of the minor children . including an order that any party provide health care coverage.

The court shall have the continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce any order entered pursuant to this section. including the authority to punish as contempt of court any willful failure of a party to comply with the provisions of the order.

§ 20-124.3. Best interests of the child.

In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendente lite orders pursuant to § 20-103, the court shall consider 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 , giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child and the ability to discipline effectively and set appropriate limits;

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 , the relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in matters affecting the child and to shield the child from their personal conflicts;

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 as that term is defined in §16.1-228; and

9. Such other factors as the court deems necessary and proper to the determination.

§ 20-124.4. Mediation.

In any appropriate case the court shall refer the parents or persons with a legitimate interest to a dispute resolution evaluation session to be conducted at no cost to the parties and in accordance with the procedures set out in Chapter 20.2 of Title 8.01 (§ 8.01-576.4 et seq.). As a means of assessing the appropriateness of a referral, the court shall ascertain whether there is a history of family abuse. If an agreement is not reached on any issue through further mediation as agreed to by the parties, prior to the return date set by the court pursuant to § 8.01-576.5, the court shall proceed with a hearing on any unresolved issue, unless a continuance has been granted by the court.

§ 20-124.5. Notification of relocation.

In any proceeding involving custody or visitation, the court shall include as a condition of any custody or visitation order a requirement that thirty days' advance written notice be given to the court and the other party by any party intending to relocate and of any intended change of address, unless the court, for good cause shown, orders otherwise. The court may require that the notice be in such form and contain such information as it deems proper and necessary under the circumstances of the case.

§ 20-124.6. Access to child's records.

Notwithstanding any other provision of law, neither parent shall be denied access to the academic, medical, hospital or other health records of that parent's minor child unless otherwise ordered by the court for good cause shown.

Official Use By Clerks	
Passed By The Senate	**Passed By The House of Delegates**
without amendment ☐	without amendment ☐
with amendment ☐	with amendment ☐
substitute ☐	substitute ☐
substitute w/amdt ☐	substitute w/amdt ☐
Date: _____	Date: _____
Clerk of the Senate	Clerk of the House of Delegates

BIBLIOGRAPHY

Andrews v. Geyer, 200 VA. 107 (1958).

Arditti, Joyce A. "Differences Between Fathers With Joint Custody and Noncustodial Fathers," American Journal of Orthopsychiatry. Vol. 62 Apr.1992.

"Articulating Custody Standards and Rules." Alternative Visions.

"Awards of Custody Act," Suggested State Legislation, The Council of State Governments, Vol. 40, 1981, 7-9.

Bailey, Bonnie LaVille, "Beyond Divorce: The Adjustment Process for Custodial Parents," 1991. Brooks v. Brooks, 201 Va. 731 (1960).

Bruch, Carol S. "And How Are the Children?" Family and Conciliation Courts Review, 30 Jan. 1992.

Campbell v. Campbell, 203 Va. 61 (1961).

Charles Harper v. Gail Harper, etc., 217 Va. 477 (1976).

Clauses for Separation Agreements

Committee on Suggested State Legislation. Suggested State Legislation. Vol. 45. Lexington, Kentucky: Council of State Governments, 1986.

Commonwealth ex rel. Gray v. Johnson, 7 Va. App. 614 (1989).

Deed, Martha L. "Court-Ordered Child Custody Evaluations: Helping or Victimizing Vulnerable Families." Psychotherapy, 28 Spring (1991).

Dissolution of Marriage

"Divorce," Chapter 8, and "Actions in Tort," Chapter 9, 151-189.

Ellis, Vanessa. Overview of Wisconsin's Divorce Law. Memo 90-2. Madison, Wisconsin, Winsonsin Legislative Council, 1990.

"It Seems to Me....Preventive Family Law," Meyer Elkin, Family and Conciliation Courts Review, Vol. 30, No. 1, January 1992, 144-146.

Family Law and Practice

Family Relations, "Recent Changes in Laws Affecting Stepfamilies: Suggestions for Legal Reform, " July 1992.

Fay, Robert E. Joint Custody In Infants and Toddlers; Medical Aspects of Human Sexuality. Vol. 19(8) Aug. 1985.

Fine, Mark A. and Fine, David R. Recent Changes in Laws Affecting Stepfamilies: Suggestions for Legal Reform. Ed. Family Relations, 1992.

Folberg, Jay, ed. Joint Custody & Shared Parenting. 2nd ed.

Freed, Doris Jones and Walker, Timothy B. Family Law in the Fifty States: An Overview. Vol. 24, No. 4. Ed. Family Law Quarterly, 1991.

Granite, Betsy Harris, "An Investigation of the Relationship Among Self Concept, Parental Behaviors, and the Adjustment of Children in Different Custodial Living Arrangements Following a Marital Separation and/or Divorce," 1985.

Glover, Rebecca J. "Comparing the Effects on the Child of Post-Divorce Parenting Arrangements. Special Issue: Children of Divorce: Developmental and Clinical Issue." Journal of Divorce. Vol. 12, 1988-1989.

Goldstein, Joseph, Anna Freud, and Albert I. Sonit. Beyond the Best Interests of the Child. The Free Press, 1979.

Hall v. Hall, 210 Va. 668 (1970).

Hendrickson, Ray, "Child Custody in Divorce: A Comparison of Sole and Shared Custody Arrangments, and Inter-Parental Support/Conflict Levels." 1991.

House Research Information Brief, "Joint Child Custody and Shared Care," Research Department, Minnesota House of Representatives, December 1988.

Judicial Council of Virginia, Report on the Family Court Pilot Project by the Family Court Pilot Project Advisory Committee, June, 1992.

Hess, Peg. "Promoting Access to Access with Divorcing Parents," Social Casework: the Journal of Contemporary Social Work, December, 1986.

Hyde, Laurance M., Jr., "Child Custody and Visitation." Juvenile & Family Court Journal (1991).

Keel v. Keel, 225 Va. 606 (1983).

Lerman, Isabel A., "Adjustment of Latency Age Children in Joint and Single Custody Arrangement." 19089 Martindale-Hubbell Law Digest.

McIsaac, Hugh. "Mediation of Custody Disputes in the United States; A Response to Carol Bruch." Family and Conciliation Courts Review, 30 Jan. 1992.

McKnight, Deborah K. Joint Child Custody and Shared Care. Minnesota: Minnesota House of Representatives. Research Department, 1988.

Moore v. Moore, 212 Va. 153 (1971).

Neugebauer, R. "Divorce, Custody and Visitation: The Child's Point of View. Special Issue: Children of Divorce: Developmental and Clinical Issue." Journal of Divorce. Vol. 12, 1988-1989.

Pearson, Jessica and Thoennes, Nancy. "Custody After Divorce: Demographic and Attitudinal Patterns." American Journal of Orthopsychiatry, Vol. 60, Apr. 1990.

Report of the Advisory Panel on the Child Oriented Divorce Act of 1987, California's Mandatory Mediation Program, State of California, Special Report Submitted to Senator Alan Robbins, April 1987.

Rosner, Blanche Muriel. "Studies of Contested Child Custody Following Divorce." 1980.

Rowlee v. Rowlee, 211 Va. 689 (1971).

Schutz, Benjamin M., et al. Solomon's Sword: A Practical Guide to Conducting Child Custody Evaluations. San Francisco: Jossey-Bass Publishers, 1989.

Senate Task Force on Family Equity, Final Report, State of California, June 1, 1987.

Simmons v. Simmons, 1 Va. App. 358 (1986).

Teachman, Jay D. and Polonko, Karen. "Negotiating Divorce Outcomes: Can We Identify Patterns in Divorce Settlements?" Journal of Marriage and the Family, Feb. 1990.

Underwood, Laura Jo. "Joint Physical Custody: An Exploration of Successful Coparenting Arrangments." 1989.

Virginia Department for Children. A Report of Legal Professionals' Perceptions on Joint Custody and Mediation: Implications for Legislation in Virginia. 1989.

Wisconsin Legislative Council. Legislation on Custody Arrangements. Report No. 2. Madison, Wisconsin, 1987.