

**REPORT OF THE  
OFFICE OF THE EXECUTIVE SECRETARY  
SUPREME COURT OF VIRGINIA**

**Influences on Judges' Decisions  
in Child Custody Disputes in the  
Commonwealth of Virginia**

**TO THE GOVERNOR AND  
THE GENERAL ASSEMBLY OF VIRGINIA**



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EXECUTIVE SECRETARY  
ROBERT N. BALDWIN  
ASST. EXECUTIVE SECRETARY  
FREDERICK A. HODNETT, JR.

SUPREME COURT OF VIRGINIA  
ADMINISTRATIVE OFFICE  
THIRD FLOOR  
100 NORTH NINTH STREET  
RICHMOND, VIRGINIA 23219-2334  
(804) 786-6455  
FACSIMILE  
(804) 786-4542

DIR., DISPUTE RESOLUTION SERVICES  
GEETHA RAVINDRA  
DIR., EDUCATIONAL SERVICES  
THOMAS N. LANGHORNE, III  
DIR., FISCAL SERVICES  
CHARLES P. WORD, JR.  
DIR., JUDICIAL PLANNING  
KATHY L. MAYS  
DIR., LEGAL RESEARCH  
STEVEN L. DALLE MURA  
DIR., MGMT. INFORMATION SYSTEMS  
KENNETH L. MITTENDORFF  
DIR., PERSONNEL  
CATHERINE F. AGEE  
DIR., TECHNICAL ASSISTANCE  
DONALD R. LUCIDO

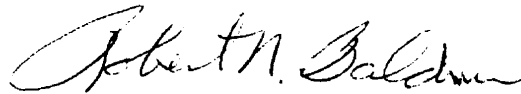
December 15, 2000

TO: The Honorable James S. Gilmore, III, Governor of Virginia  
and  
Members of the Virginia General Assembly

The 1999 Appropriations Act directed the Office of the Executive Secretary, Supreme Court of Virginia, to contract for research designed to compile data regarding the factors influencing judicial decision making in matters involving disputed child custody cases. In accordance with this direction the Office of the Executive Secretary contracted with Research Dimensions, Inc., of Richmond, Virginia, and the enclosed report was prepared.

This report is submitted for your review and consideration.

Respectfully submitted,



Robert N. Baldwin  
Executive Secretary



## REPORT STAFF

This report was researched and written by Research Dimensions Inc., of Richmond, Virginia. The principals in this work were as follows:

Robert L. Maust, Jr., Vice President  
Research Dimensions, Inc.

Andrea G. Erard, Esquire  
Richmond, Virginia

Arnold L. Stolberg, Ph.D., Professor  
Virginia Commonwealth University  
Richmond, Virginia

Everett B. Howerton, Jr., Ph.D., Professor  
The George Washington University  
Washington, D. C.

The Study Advisory Group assembled by Research Dimensions, Inc. for this project included:

Hon. Roy B. Willett, Judge  
Roanoke County Circuit Court  
Roanoke, Virginia

Professor Richard D. Balnave  
University of Virginia Law School  
Charlottesville, Virginia

Hon. Stephen W. Rideout, Judge  
Alexandria Juvenile & Domestic Relations  
District Court  
Alexandria, Virginia

Sharon S. England, Esquire  
Richmond, Virginia

Contacts for further information about this report within the Office of the Executive Secretary, Supreme Court of Virginia are:

Lelia B. Hopper, Director  
Ginny Powell, Ph.D., Research Analyst  
Court Improvement Program - Foster Care and Adoption



**RDI**

1108 E. Main Street, Suite 1000  
Richmond, Virginia 23219  
(804) 643-1082 (804) 643-1085 Fax

**RESEARCH DIMENSIONS INC.**

**Influences on Judges' Decisions in Child Custody Disputes  
in the Commonwealth of Virginia**

**Final Report**

**Prepared for**

**The Office of the Executive Secretary  
Supreme Court of Virginia**

**Prepared by**

**Research Dimensions, Inc  
1101 East Main Street, Suite 1000  
Richmond, VA 23219**

**December 2000**





## EXECUTIVE SUMMARY

### A. Background

The 1999 Session of the General Assembly of Virginia directed that the Office of the Executive Secretary (OES), Supreme Court of Virginia, conduct a study relating to child custody determinations, preparatory to consideration of legislation or guidelines for a presumption of joint physical custody when a marriage or other relationship is dissolved and custody of the children born of that relationship is at issue. This legislative action was initiated because of a study completed by the Virginia Commission on Youth (*Study of Joint Custody and Visitation, Report by the Commission on Youth to the Governor and General Assembly*, House Document No. 24, 1999). That report states that legislation establishing a presumption of joint custody has been offered as a means of responding to a belief held by some that gender bias exists in judicial decision making in child custody cases. It is not evident that such a bias exists or, if the bias is present in Virginia, that joint custody is the proper remedy. (House Document No. 24, 1999, page 27.) Thus, the Commission recommended that a research project be funded to examine the factors which judges use in child custody decisions in Virginia.

The necessity of this study is underscored when one considers the absence of relevant data available to Virginia's Courts and the weaknesses in the broader research literature. Data describing the influences on judges' decisions in specific cases are not available to the Court or the General Assembly. As is noted in reviews of the literature addressing influences on judges' decision-making processes and of the psychological literature on influences on children's adjustment to divorce, no data exist either within the Commonwealth of Virginia or nationally that can answer these questions.

A review of the psychological literature (see Section VIII) indicates that the most salient influences on children's adjustment to divorce include the continued parent-child relationships and the custody decision making that supports continuity in these relationships. Psychological factors and *Code of Virginia* variables stated in § 20-124.3 are substantially overlapping. The exact methods involved in judges' decision-making processes are not known, raising questions such as:

- ❑ How are judges using the *Code of Virginia* in rendering decisions?
- ❑ What elements of § 20-124.3 of the *Code of Virginia* are given the greatest priority?
- ❑ Do in-court and process variables such as effectiveness and demeanor of counsel, experts, and litigants shape the judges' decisions?
- ❑ Does parents' gender influence the judges' decisions?

Section III provides a more detailed description of the guiding questions and other factors that establish the scope of this research.

## B. Methodology

The strategy used to answer General Assembly questions about influences on judges' decisions in child custody disputes between parents involved eight main steps. (A more detailed discussion of the methodology is contained in Section IV.) The eight steps were:

1. Identifying data elements and developing an analytical framework to address the above questions and to permit judges to provide both quantitative and qualitative information relevant to their decision processes.
2. Designing quantitative and qualitative data collection methods to permit acquisition, compilation, and integration of the requisite data.
3. Developing and piloting the resulting surveys and interviews.
4. Distributing and collecting surveys from judges throughout Virginia, observing custody dispute proceedings, and interviewing selected judges across Virginia.
5. Conducting focus groups with judges from around the state, discussing project findings, and inquiring about processes not identified through the procedures in steps 1 through 4.
6. Reviewing the last three years of relevant letter opinions from Virginia Circuit Courts and published opinions of the Virginia Court of Appeals and the Supreme Court of Virginia to determine if, at the Circuit Court level, courts consistently apply all of the factors set out in the *Code of Virginia* § 20-124.3.
7. Conducting a review of the psychological literature on the issue of child custody to be used as a basis of comparison for the results derived from the case profiles, general survey, interviews, and focus groups.
8. Integrating and evaluating the findings from the surveys, in-court research, case reviews, and review of the psychological literature.

No one data collection process can produce results that statistically represent all disputed custody cases between parents. Consequently, the following types of processes and surveys were developed to maximize the breadth of relevant and accurate information that could be collected.

The **Judges' Decision Profile** instrument focused on decision-making factors for specific cases. Surveys were sent to all Circuit Court and Juvenile and Domestic Relations (JDR) judges with the request that they use the instrument to "profile" one or more recent, relevant case. The results derived from this survey provided a basis for quantifying the relative influence of variables influencing judges' decisions.

The **General Survey** provided general, quantitative information on judges' caseloads, the numbers of cases reaching settlements, and judges' orders on legal and physical custody.

**Interviews and observations** of relevant courtroom proceedings provided an opportunity to collect rich, qualitative information concerning the decision-making process. Moreover, the

interviews with approximately 20% of all Circuit and JDR Court judges in Virginia provided invaluable insight as well as a vehicle to corroborate or challenge quantitative results. Interviews were held in all regions of the state, and the participating judges reflect a demographic profile of the total judicial population addressed by this research.

**Focus groups** and additional interviews were held with judges around the Commonwealth to give them a chance to review the project's findings, to initiate a more complete discussion of the study's central questions, and to permit judges the opportunity to validate, dispute, and/or augment preliminary results.

A statistically representative sample of custody cases is probably impossible to achieve. The number of variables is large; the number of combinations and permutations of these variables is extremely large. The process by which Decision Profile data could be collected almost assured that the cases profiled did not reflect a statistically representative sample of all disputed custody cases between parents. The judges were asked to describe their decision-making processes in specific cases they had heard and ruled on in the last thirty days. They were asked to complete many questions about each proceeding and to describe the many intricate details of each case. These data provided a useful "profile" of the decision-making factors for these cases but, in all likelihood, the judges used as examples cases whose details they remembered, whose facts were most completely presented, and that were the most complex and interesting to them. It is possible that more courtroom time was devoted to these cases and that a greater percentage of these cases had legal representation, expert witnesses, and guardian *ad litem* (GAL--a lawyer appointed to represent the best interest of the child) appointments.

However, the results also suggest that factors such as legal representation, expert witnesses, and other aspects distinguishing the more complicated cases do not produce significantly different influence factors in the judges' decisions (see Section V.B.4). Moreover, the qualitative component of this study provided a venue through which to validate or modify the quantitative results. The 47 judges interviewed and/or included in the focus groups represent about 400 years on the bench and probably decide 3,000 to 6,000 disputed custody cases annually. These judges generally concurred with the quantitative results. Consequently, the number of cases considered, the demographics of the courts and judges, and the qualitative validation by judges of the Decision Profile results suggest that the quantitative results can provide valuable insight into, if not a statistically significant profile of, the decision-making process.

### **C. Observations and Conclusions**

The guiding research questions underpinning the study provide a framework for presenting results and conclusions. These questions include: (1) How are judges using the *Code of Virginia* in rendering decisions? (2) What elements of § 20-124.3 of the *Code of Virginia* are given the greatest priority? (3) Do in-court and process variables such as effectiveness and demeanor of counsel, experts, and litigants shape the judges' decisions? And (4) Does parents' gender influence the judges' decisions? The following observations and conclusions reflect results from all data collection approaches used in this study. More detailed discussions of the results leading to these findings are contained in Section V through Section VIII.

1. **Judges' decisions are substantially shaped by the *Code of Virginia's* "best interests" guidelines and are generally consistent with psychological factors found to influence children's adjustment to divorce.**

This conclusion is supported through empirical analyses, interviews with judges, and a review of the last three years of relevant letter opinions from Virginia Circuit Courts and published opinions of the Virginia Court of Appeals and the Supreme Court of Virginia. In the interviews, judges consistently noted that the existing § 20-124.3 of the *Code of Virginia* is adequate, is flexible, permits the application of common sense, and promotes good decision making. Judges also reported that it is rare to find a critical influencing factor that is not covered by § 20-124.3.

2. **Empirical and in-court results suggest patterns in the frequency with which § 20-124.3 variables were applied and influenced results. However, in the in-court interviews and focus groups, judges typically noted that all factors were equally "significant" because each of the factors could be critical in any specific case. They also tended to agree that several factors influenced cases more frequently.**

**Primary Influencing Factors.** Children's needs, parental competence, parental involvement, and parental effectiveness were the statistically significant determinants of custody and visitation for the custody cases profiled for this study. Judges that reviewed the research findings generally concurred with the results derived from the quantitative profiling process. In interviews and focus groups, judges typically reported that stability of the child's environment, parenting competence, and the strength of the parent-child relationship were most frequently the more significant influences on their child custody decisions. The common themes relating to influencing factors derived from the review of Virginia case law included assuring the stability and continuity for the child. The review of the psychology literature also provided consistent conclusions as to what factors should most influence decisions.

**Parental Cooperation and Communication.** Analyses of parents' abilities to work together and to support and respect the role of the other parent were not found to be statistically important in physical custody determinations for the cases profiled. However, most, if not all, of the judges interviewed indicated that these factors are of primary consideration in determining whether or not joint legal custody is a viable solution. These judges also noted that they would not even consider joint physical custody without an exemplary demonstration of the parents' abilities to work together and to support and respect the role of the other parent.

**Problematic Events and Conditions.** The only parent history variable that judges reported as having a significant influence on their decisions was a parent's history of mental or emotional conditions that limited parenting abilities. The influence of histories of child abuse or spouse abuse on custody decisions was indirect, but still substantial. Histories of abuse co-occurred with other problematic events and parenting characteristics, all of which judges weigh heavily in their custody decisions (see Section V).

**Stated Preference of the Child.** A child's stated preference in custody disputes becomes more important for children 13 years of age, or older. Judges more frequently considered the preferences of these older children to be a major influence in the custody determination (see Table 5 for a more detailed presentation of these data). In interviews, judges reported widely varying views on the wisdom of relying on the stated preferences of the children, citing the risks

of manipulation by the parents, undue stress imposed upon the children, and the creation of false expectations for the children as primary concerns. Maturity of the child and comprehension of the custody process were cited as factors most likely to influence the judges' acceptance of a child's preference.

**Visitation.** Influences on judges' decisions about a parent's visitation orders were studied because visitation is usually part of a custody order and because visitation and custody are intricately connected in custody matters. Like custody decisions, the amount of visitation time awarded to a parent in the cases profiled was directly related to parenting competence. When parents were rated as having strong parenting competencies, they were also given more visitation time with their children.

- 3. Empirical Decision Profile results suggest little or no correlation between the presence of legal representation and the resulting custody decisions. In interviews and focus groups, judges expressed very mixed reactions as to the extent and manner in which the in-court and process variables such as effectiveness and demeanor of counsel, experts, and litigants shape their decisions.**

Judges did not rate the credibility and effectiveness of those professionals involved in child custody cases as significant influences on judges' decisions for those cases profiled. However, in interviews and focus groups, judges consistently noted that *the quality of the evidence presented does affect the quality of the decision*. Many of the judges interviewed commented that effective and prepared counsel, GALs, and experts usually help to convey relevant information more clearly and, thereby, facilitate a decision that is in the best interests of the child.

**Lawyers.** Judges reported that effective legal counsel helps to make the trial a more efficient process, but lawyers do not necessarily sway a judge's conclusions in favor of that attorney's client. When attorneys are fair, provide their clients with realistic expectations for case outcomes, and do not promote inter-parent conflict, they are important in making the courtroom process more effective and efficient. Judges typically commented that when attorneys do not meet these standards for performance, they slow down the process and necessitate the involvement of objective third parties (e.g., GALs). Some of the judges commented that they order legal representation for the children in cases where attorneys promote inter-parent hostility. Judges consistently remarked that one of their most difficult problems in obtaining sufficient information to make an informed decision was the imbalance of one party with good representation and one poorly prepared pro se litigant. They also reported that two poorly prepared pro se litigants can present major problems in obtaining sufficient information to make an informed decision.

**GALs.** Judges reported widely varying uses of GALs. Many of the judges interviewed considered GALs among the most important resources available to them, particularly in cases in which the GALs assumed aggressive, investigative roles. However, empirical data and judges' comments portrayed high levels of variability in effectiveness, commitment, and training that limit the impact of GALs, as a whole.

**Expert Witnesses.** Empirical data suggest that experts are generally helpful in extreme cases when abuse is reported and when supervised visitation may be ordered. Many of the judges

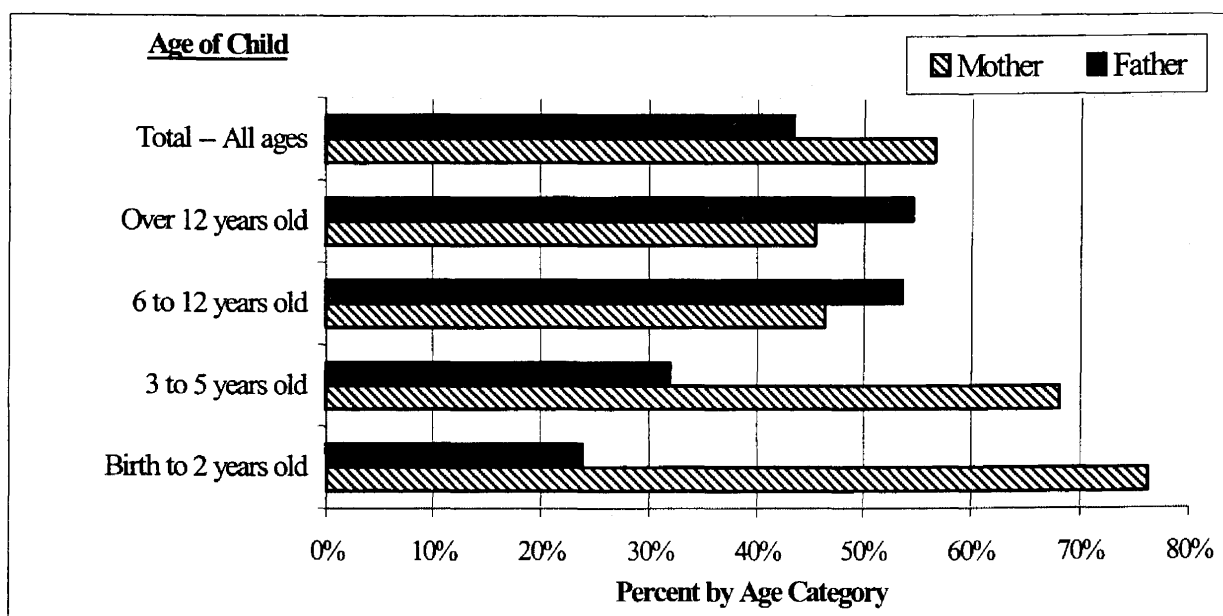
reported that experts often lack objectivity and have limited relevant training. Their utility is directly proportional to their ability to “tell me something I don’t already know.” The role of experts can be maximized when they are well trained in child development, thorough in their evaluations, and able to provide unique and objective information.

4. **There was a very strong correlation between a parent’s gender and judges’ child custody decisions in disputes involving children younger than six years old. A parent’s gender did not correlate with the decisions rendered when custody involved children six years old or older. Interviewed judges generally believed custody awards are slightly in favor of mothers, particularly for younger/infant children. However, most judges also perceived an increasing trend toward fathers’ being awarded custody.**

As shown in Figure 1, mothers of children younger than two years old were awarded custody three times as often as fathers of the same children. Mothers of three- to five-year-olds were awarded custody twice as often as fathers. For children six years old and older, however, fathers were awarded custody slightly more frequently than mothers. In interviews and focus groups, judges noted that frequently the award of younger children to mothers was attributable to assuring the stability of the child’s environment. They observed that, in their experience, the mother had more frequently been the primary care-provider for these younger children.

For the profiled cases, no differences in the parenting competencies of the custodial mothers and non-custodial fathers of these preschool-aged children were found when statistical comparisons were made, thereby suggesting that the differences in custody awards by gender are not due to differences in parenting competencies (see Section V). The fact that the surveys did not provide information as to which parent had custody at the time of the hearing precluded analysis of the influence of “assuring the stability of the child’s environment” on these decisions.

**Figure 1**  
**Custody Awards\* by Gender of the Parent and Age of the Child**



\*Note: Based on 22 cases for children over 12 years old, 69 cases for children 6 to 12 years old, 47 cases for children 3 to 5 years old, and 21 cases for children 2 years old or younger.

## 5. Other Observations and Conclusions

**For the cases profiled in this study, parents appeared in court, typically with representation and supporting witnesses. For these cases, judges were presented with a majority of the information that they needed to make their decisions.** Several judges noted that in their courtrooms, a parent's choosing not to appear for disputed custody cases on the docket was common. For the cases profiled in the study, however, almost 99% of the parents were present in court, over 70% had legal representation, and over 75% had supporting witnesses. Most judges in the interviews and focus groups, particularly the JDR judges, reported somewhat significantly lower values for each of these categories. In over 96% of the cases profiled for this study, judges reported that the pertinent and necessary information needed to make a decision was presented. Differences in the Judges' Decision Profile survey results and the interview and focus group responses probably relate to the representativeness of the sample.

**The nature of the custody and visitation cases before the Court is changing.** Several of the judges noted in interviews that, although the majority of custody disputes occur between previously married parents, the incidence of custody disputes between parents who have never been married and custody disputes between parents and other extended family members such as grandparents, stepparents, aunts, and uncles is significantly on the increase.

Many of the judges also reported other trends in parenting roles and in custody decisions. Several judges observed that fathers are becoming more engaged with their children and are becoming more effective and responsible parents. They are, therefore, awarded custody and substantial time with their children more often than in the past.

**Judges' annual custody docket loads vary greatly.** In interviews, most judges reported that reducing docket load would provide the greatest potential for improving the current manner in which child custody is determined. On the General Survey, the responding judges reported that, on average, they had approximately 250 disputed cases annually with approximately 120 going to trial. In interviews and focus groups, judges also estimated that, on average, about half of their cases went to trial while the remainder reached out-of-court settlements that were approved by the judge. However, their individual estimates ranged from 10% to 90%, showing wide variations by courtroom, type of judge (e.g., Circuit Court versus JDR), and geographic region.

## I. Purpose and Origin of the Study

The 1999 Session of the General Assembly of Virginia directed that the Office of the Executive Secretary, Supreme Court of Virginia, conduct a study relating to child custody determination, preparatory to consideration of legislation or guidelines for joint custody judgments.

This legislative action was initiated because of a study completed by the Virginia Commission on Youth. The study reviewed legislation introduced at the 1998 Session of the General Assembly, which proposed several significant policy changes in the laws governing the resolution of custody and visitation disputes between parents (*Study of Joint Custody and Visitation, Report by the Commission on Youth to the Governor and General Assembly*, House Document No. 24, 1999).

One of these proposed policies concerns the enactment in Virginia of a presumption of joint custody when a marriage or other relationship is dissolved and custody of the children born of that relationship is at issue. Proponents of the presumption of joint custody base their argument on two assumptions:

- 1) Child development is improved when the child has predictable, frequent, and continuing contact with both parents; and
- 2) There is a bias in awarding mothers sole custody when both parents are fit and willing to assume custody (House Document No. 24, 1999, page 21).

This report further states that legislation establishing a presumption of joint custody has been offered as a means of responding to the gender bias which is believed by some to exist in judicial decision making in child custody cases. It is not evident that such a bias exists or, if the bias is present in Virginia, that joint custody is the proper remedy (House Document No. 24, 1999, page 27). Thus, the Commission recommended that a research project be funded which examines the factors that influence child custody decisions in Virginia.

The necessity of the following study is underscored when one considers the absence of relevant data available to Virginia's Courts and the weaknesses in the broader research literature. Data describing the influences on judges' decisions in specific cases are not available to the Court or the General Assembly. The Juvenile and Domestic Relations District Court is not a court of record and, as such, has no consistent documentation on custody decisions. Virginia's judges have been required to provide written or oral feedback on the reasons for their custody decisions only since July 1999. As noted in the review of the psychological literature on influences on children's adjustment to divorce and on influences on judges' decision-making processes, **no data exist either within the Commonwealth of Virginia or nationally that can answer the questions that are the focus of this study** (see Section VIII).



## **II. Statutory Basis and Operative Law for Child Custody Decision Making in Juvenile and Domestic Relations District Courts and in Circuit Courts in Virginia**

The *Code of Virginia* currently defines the standards for making child custody determinations in Virginia's courts. Ten factors based on the Best Interests of the Child standard are the foundation for this element of the *Code of Virginia*, as shown below. The influence of all elements of § 20-124.3 on child custody decisions was studied in this project.

### **§ 20-124.3. Best interests of the child; visitation.**

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 and each child, giving due consideration to the positive involvement with the child's life, the ability to assess accurately and to meet the emotional, intellectual, and physical needs of the child;
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 that 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 support actively the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;
7. 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 and resolve disputes regarding matters affecting the child;
8. 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;
9. Any history of family abuse as that term is defined in § 16.1-228; and
10. Such other factors as the Court deems necessary and proper to the determination.

The judge shall communicate to the parties the basis of the decision either orally or in writing.

6. Reviewing the last three years of relevant letter opinions from Virginia Circuit Courts and published opinions of the Virginia Court of Appeals and the Supreme Court of Virginia, with the goal of determining if, at the Circuit Court level, courts consistently apply all of the factors set out in § 20-124.3 of the *Code of Virginia* to the facts before them in reaching a decision regarding custody between parents;
7. Conducting a review of the psychological literature on the issue of child custody to be used as a basis of comparison for the results derived from the case profiles, general survey, interviews, and focus groups; and
8. Integrating and evaluating the findings from the surveys, in-court research, case reviews, and review of the psychological literature.

Appendix II provides additional information concerning the project strategy and research design. The following sections provide more detailed discussions of the data collection methods, questions asked, and participants.

## **B. Data Collection Approaches and Questions**

Preliminary research in this study suggested that influences on judges' decisions in custody disputes could be structured in three major categories of variables: factors in § 20-124.3 of the *Code of Virginia*, psychological influences on children's adjustment to divorce, and factors that are peripheral to the central "facts of the case". *Code of Virginia* and psychological variables are substantially overlapping and include the needs of the child, parenting competence, parent adjustment, and environmental stability. Peripheral variables include presence of legal counsel, credibility of all witnesses, and the quality of the evidence presented. The data collection approaches used in this study assess these three dimensions.

**1. Judges' Decision Profile.** The purpose of the Judges' Decision Profile was to provide empirical information about influences on a judge's decision on a specific case. This survey focused on decision-making factors judges use in specific cases. The Judges' Decision Profile provided quantitative data required to identify the variables that had significant influences on the judges' decisions in the cases profiled, the relative strength of those variables, and their relationship with custody outcomes. Influences that were rated include all of the elements in the *Code of Virginia* pertaining to custody, the psychological processes that have been demonstrated to influence a child's adjustment to divorce, and variables that are peripheral to the statutory and adjustment concerns (e.g., credibility of the participants, prior history with the family, existence and credibility of evidence/information presented, etc.).

Questions on the survey were of three types: objective descriptors of the case (age of children, number of children, conveyed competence of the parents, etc.), the judge's ratings of litigants' parenting competencies, and the judge's subjective rating of the importance of those variables on his or her decision. This component of the data collection process yielded more than 150 profiled cases. Not all profiled cases could be used for all analyses because of incomplete data.

It is important to note that the Judges' Decision Profiles may have yielded data that are not representative of all contested child custody cases between parents in Virginia and, as such, may make the findings less relevant to all parents engaged in child custody disputes. The judges were

asked to describe their decision-making processes in a specific case they had heard and ruled on in the last thirty days. They were asked to complete many questions about this proceeding and to describe the many intricate details of the case. In all likelihood, the judges used as examples cases whose details they remembered, whose facts were most completely presented, and that were the most complex and interesting to them. It is possible that more courtroom time was devoted to these cases and that a greater percentage of these cases had legal representation, expert witnesses, and GAL appointments. Again, it is important to emphasize that the quantitative results based on cases profiled by judges reflect the sample of cases studied. However, it also is important to note that judges were asked to review survey results in order to ascertain their reactions and, to the extent possible, validate these results.

**2. General Survey.** The General Survey provided general, quantitative information about custody dockets and results. Judges were asked to complete a brief General Survey after completing the case-specific Judges' Decision Profiles. The General Survey asked judges for the following information:

- number of disputed custody cases before each court;
- number of filed cases settled through a hearing versus the number decided by settlement;
- judges' orders on legal and physical custody; and
- judges' approaches to communicating their findings.

Table 1 shows the relationship between the elements in § 20-124.3 of the *Code of Virginia* to the Judges' Decision Profile and General Survey items. Section IV.C. provides additional information concerning the implementation of this survey. Copies of the Judges' Decision Profile and the General Survey instruments are included in Appendix III.

**3. Case Observation and Interviews.** The third data collection process involved observing child custody court hearings and interviewing judges. This approach provided an opportunity to collect rich, qualitative information concerning the decision-making process. Typically, illustrative questions for the interview were sent to the judges before they were interviewed. Interview questions were designed to elicit judges' perceptions about and observations of decision making in child custody disputes gained from the totality of their experiences on the bench. The purpose of the in-court observation of a case was to capture insights into the actual courtroom proceedings. When a case could be observed prior to an interview, that observation provided additional direction for the subsequent interview of the presiding judge. The interviews provided insight from judges on the underlying judicial decision-making process. A set of illustrative questions (see Appendix III) was provided or referenced to most judges as a basis for exploring perceptions and insights related to the custody decision-making process, based on their overall experience with custody disputes. Judges were encouraged to identify and discuss any concepts, considerations, and options they believed would facilitate improving the decision-making process or promote better resolution.

Through these semi-structured interviews, judges' perspectives about the strengths and weaknesses of the courtroom process were solicited and the quantitative data from the surveys were augmented. Information collected in the interviews was generally non-quantifiable. Section IV.C. provides additional information concerning the implementation of in-court

interviews. Responses have been used to highlight recurrent themes conveyed by the judges and to support and challenge the empirical survey data (see Sections VI and IX).

**Table 1**  
**Relationship of Survey Items and Elements of Code of Virginia § 20-124.3**

| Elements of § 20-124.3   | Survey /Section #     | Items or Questions  |
|--|-----------------------|---|
| <b>JDP = Judges' Decision Profile; GS = General Survey</b>   |                       |   |
| 1. Age, physical and mental condition of the child, consideration of changing developmental needs  | JDP I<br><br>JDP IV   | 1 (age)<br>2 (gender)<br>3 (physical needs)<br>4 (emotional/learning problems)<br>1 (age, gender)<br>2 (physical/emotional problems)  |
| 2. Age, physical, mental condition of each parent  | JDP II<br><br>JDP IV  | 7 (age)<br>10 (criminal record)<br>11 (physical limitations)<br>12 (emotional problems)<br>28 (work history)<br>7 (criminal, emotional, abuse history)<br>8 (physical / emotional limitations)<br>9 (substance abuse) |
| 3. Relationship existing between parent and child, consideration to positive involvement with child's life, the ability to assess accurately and meet the emotional, intellectual, and physical needs of child | JDP: II<br><br>JDP IV | 15, 16, 18-27 (specific parenting competencies)<br>6, 10-13 (specific parenting competencies)   |
| 4. The needs of child, consideration to child's other important relationships, including, but not limited to, siblings, peers and extended family members  | JDP I<br>JDP IV       | 5 (changes in relationships/activities)<br>3 (continuity of environment)  |
| 5. Role each parent has played and will play in the future in care of the child  | JDP II<br><br>JDP IV  | 13 (current role)<br>14 (past role)<br>17 (commitment to future care)<br>5 (current/past role)  |
| 6. The propensity of each parent to support child's relationship with the other parent   | JDP II<br>JDP IV      | 30 (supports other parent's role)<br>14 (ability to co-parent)  |
| 7. The demonstrated ability of each parent to maintain a close and continuing relationship with child, and ability of each parent to cooperate in resolution of disputes regarding child                       | JDP II<br>JDP IV      | 29 (works with other parent)<br>14 (ability to co-parent)   |
| 8. The reasonable preference of the child  | JDP I<br>JDP IV       | 6 (child's stated preference)<br>4 (child's stated preference)  |
| 9. History of family abuse   | JDP II<br><br>JDPIV   | 8 (child abuse)<br>9 (spousal abuse)<br>7 (criminal, emotional, abuse history)  |
| 10. Other factors as the Court deems necessary   | JDP IV<br>GS          |   |

**4. Focus Groups Structure.** Finally, focus groups and additional follow-up group interviews were held with judges around the Commonwealth. The purpose of these discussions was to give judges a chance to review the project's findings and to initiate a more complete discussion of the

questions central to the study. The goal was to maximize the comprehensiveness of the overall project procedures and of the subtleties of the findings and to permit judges the opportunity to validate, dispute, and augment preliminary results.

After the preliminary results from the mail surveys became available, several judges were asked to participate in group interviews to discuss the validity and utility of these results. In these meetings, judges were presented selected data and analytical results derived from the Judges' Decision Profiles and General Surveys. Judges were asked to discuss the extent to which these preliminary results were either consistent with their overall experience or different from their overall experience. These focus groups also provided a venue through which to glean impressions and perspectives of the judges concerning all aspects of the decision-making process related to disputed custody cases and to discuss ideas they believed would potentially improve the process or promote better resolution.

**5. Summary.** Multiple data collection strategies were employed to permit judges multiple venues through which to contribute information and insight concerning the child custody decision-making process. The four different data collection approaches described above permitted different types of data to be assembled and blended to produce a broader and richer insight into the process. There was no attempt, or option, to corroborate judges' profiles or interview contributions. File reviews were considered, but dismissed as being too incomplete and inconsistent. Case observations provided insight, but were limited to a very few, not necessarily representative cases. In other words, all data collected and presented in this report reflect judges' recollections and perceptions of their decision making.

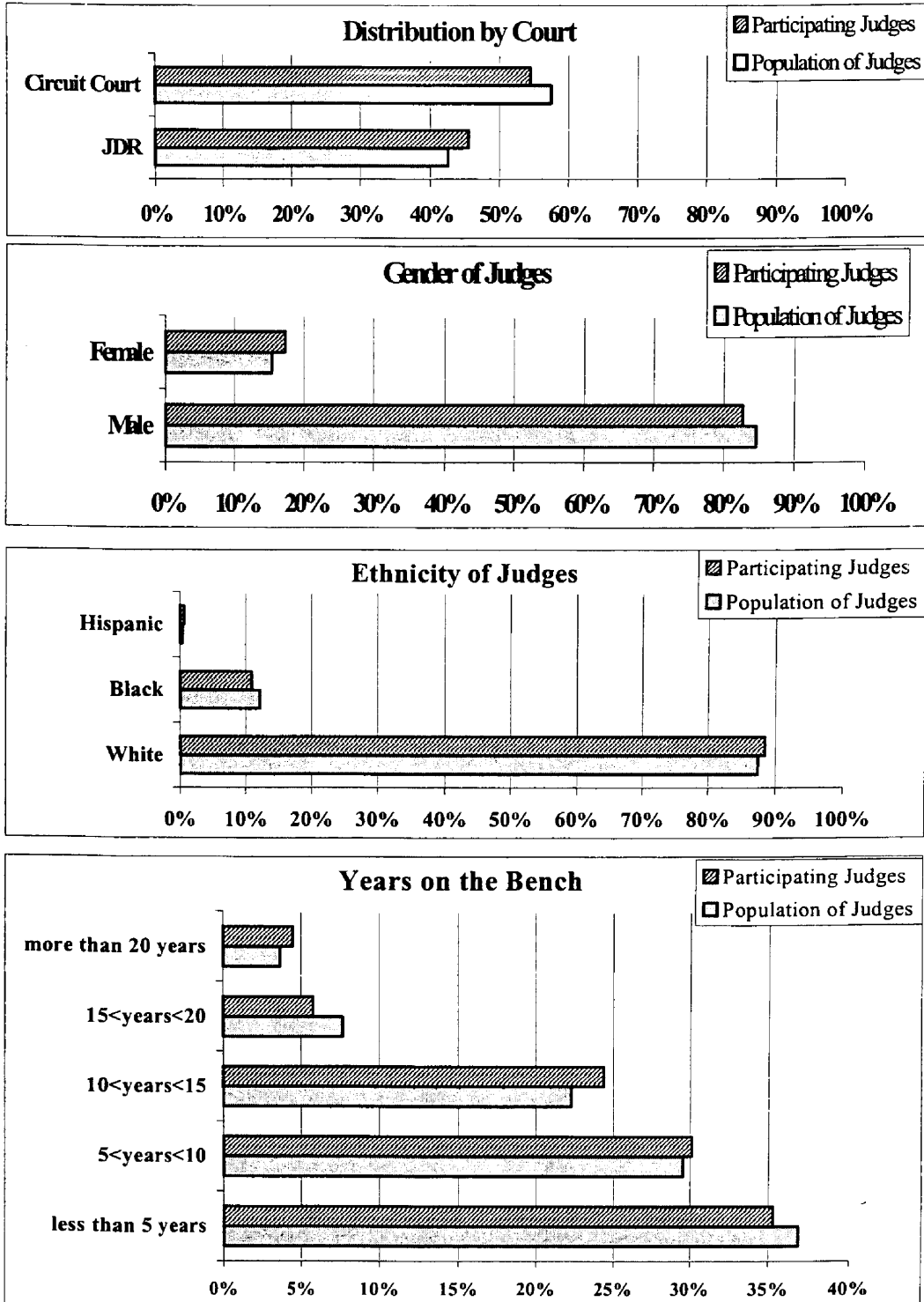
### **C. Participants**

All Virginia Circuit Court judges and JDR District Court judges were included (with the exception of two judges in the Study Advisory Group) in the population of judges considered for this study. Judges in both courts were included because both have jurisdiction over custody disputes in the Commonwealth. Surveys were sent to all 247 judges (142 Circuit Court and 104 JDR judges) in the population in March and again in May of 2000. Of these 247 judges, 156 (63%) participated in some phase of the research (i.e., responded to a mail survey, were interviewed, and/or participated in a focus group). Another 11 judges responded to the mailing, but indicated that they had no recent cases applicable to the study. At least one non-responding judge had retired after the study commenced. Figure 2 provides a comparison that shows the demographic characteristics of the 156 participating judges match those of all 247 of the judges in the study population.

**1. Mail Surveys.** Responses to the General Survey and/or the Judges' Decision Profile were received from 77 (54%) of the Circuit Court judges and from 63 (60%) of the JDR District Court judges. Of the 140 judges that responded to the mail surveys, 83% were males and 17% were females. Eighty-seven percent were white, 12% were black and 1% were Hispanic. Thirty-six percent of the responding judges had been on the bench for fewer than five years; 31% between 5 and 10 years; 23% between 10 and 15 years; 6% between 15 and 20 years; and 4% for 20 or more years. Twenty-three percent of the responding judges were from the west or southwest region of the state; 23% were from Central Virginia; 7% were from Southside Virginia; 24% were from the Tidewater area; and 22% were from the northern portion of the Commonwealth.

All of the aforementioned percentages closely match the distributions of all judges in the Commonwealth, including those who did and did not respond to the surveys.

**Figure 2**  
**Comparison of Demographic Characteristics of All Judges in the Study Population Versus Those That Participated**



**2. In-court Observations and Interviews.** Members of the RDI team interviewed the 47 judges from around the Commonwealth who agreed to participate in the in-court research. Twenty-one of the judges interviewed were from Circuit Courts and 26 were from JDR District Courts. Seventy-nine percent of the interviewed judges were males and 21% were females. Ninety-one percent of the respondents were white; 9% were black. The average number of years on the bench for the sample of judges was eight. Circuit Court judges had an average of 12 years on the bench and JDR District Court judges had an average of 6 years on the bench. Twenty-six percent of the responding judges were from the west or southwest region of the state; 34% were from Central Virginia; 9% were from Southside Virginia; 22% were from the Tidewater area; and 9% were from the northern portion of the Commonwealth. The sample of judges interviewed represents demographic diversity in terms of region of the state, gender, ethnicity, and years on the bench.

**3. Focus Groups.** Five informal focus groups and multi-judge discussions were conducted to address the preliminary results of the project. These focus groups and follow-up interviews were conducted in the Northern, Central, Hampton Roads, Tidewater, and Southside/Southwestern regions of the Commonwealth. A total of sixteen judges participated with two to five judges in each focus group or group interview. Thirty-seven percent of the judges participating were from Circuit Courts and 63% were from JDR District Courts. Three-quarters of the participants were men and one-quarter were women. Eighty-seven percent of the judges were white and 13% were black. The average number of years on the bench for the entire group of judges participating in the focus groups was nine.

The demographic characteristics of the judges participating in interviews and focus groups also were very similar to those of all 247 Circuit Court and JDR judges included in this study.

## V. Findings from the Surveys

### A. Analytical Strategy

This section presents data from the Judges' Decision Profile and the General Survey as well as results derived from these data. The 140 judges that contributed Decision Profiles for 178 cases represent 59% of all JDR judges in the Commonwealth and 54% of the Circuit Court judges. The General Survey was completed by 126 of these judges.

Two kinds of numbers are presented in the following tables and were used in the statistical analyses discussed in this section. Some of the numbers, *group mean scores*, reflect the average scores for a group on a particular question. For example, Table 2 shows average (mean) parent competency scores for two groups of parents, those who have been awarded primary physical custody of their children and those whom the Court has defined as non-custodial parents. Other numbers, *frequency of occurrence scores*, describe how often a particular event occurs in a group. Table 4 describes how often mothers and fathers of children at different ages are awarded custody. Two types of analyses are calculated on these numbers. When considering *group mean scores*, the average scores and range of scores for one group are compared with the average scores and range of scores of another group. For instance, looking at Table 2, *primary physical custodians* were rated by judges as "strong to adequate" on the influence factor "ability to identify and meet child's normal and exceptional needs" (group average score: 1.58). Judges rated *non-custodial parents* as "adequate to weak" (group average score: 2.13) on the same parenting dimension. When using *frequency of occurrence scores*, the number of times an event occurs in one group is compared to the number of times that same event occurs in another group. In Table 4, we see that mothers of children under two years of age (16 cases) are awarded custody of their children three times as often as fathers of children of the same ages (5 cases).

### B. Findings

Six major conclusions are drawn from the analyses of the Judges' Decision Profile and General Survey results.

#### 1. **Judges' disputed custody decisions are substantially shaped by the *Code of Virginia's* "best interests" guidelines and by psychological factors found to influence children's adjustment to divorce.**

As noted in Table 2, children's needs and parental competence, involvement, and effectiveness are the statistically significant determinants of custody and visitation. Parents' gender did correlate to judges' decisions in child custody disputes when the children were five years old or younger. Parents' gender did not correlate to judges' decisions when all of the children in the home were older than five years. Since the surveys did not provide information as to which parent had custody at the time of the hearing, there was no ability to measure the influence of "assuring the stability of the child's environment" on these decisions. No differences in the parenting competencies of the custodial mothers and non-custodial fathers of these preschool-aged children were found when statistical comparisons were made. In the sub-sample of cases



involving young children, there were no measurable survey variables that explained the awards favoring mothers, but, as noted above, there were influencing factors that could not be measured.

**Parent Competence.** As depicted in Table 2, judges rated parents who were awarded primary physical custody of their children as significantly more competent in comparison with parents who were assigned to the non-custodial parent status. Custodial parents were judged to have stronger parenting skills on all parenting dimensions except “ability to provide access to quality schools.” Furthermore, parents who were awarded primary physical custody had stronger parenting skills, as indicated by lower scores on every competence dimension. For example, on the first dimension, “current role in the care of the child,” the custodial parents’ group had an average score of 1.41, indicating a strong to adequate assessment of parenting. The non-custodial parents’ group mean score was 2.10, a score indicating an adequate to weak assessment of parenting by judges. Custodial parents’ group scores were in the strong to adequate range on all dimensions, while non-custodial parents’ group means were in the adequate to weak range on 75% of the items. These factors were found to be statistically significant for all factors except the ability to provide access to quality schools.

**Table 2**  
**Judges’ Ratings of Parent Competence and Their Influences on Custody Decisions**

| <b>Influence Factor</b>  | <b>Non-<br/>Custodial<br/>Parent</b> | <b>Primary<br/>Physical<br/>Custodian</b> |
|--|--------------------------------------|---|
| (1 = strong, 2 = adequate, 3 = weak)   |                                      |   |
| Current role in care of child  | 2.10                                 | 1.41                                      |
| Past role in care of child   | 1.99                                 | 1.73                                      |
| Consistency in parenting the child   | 2.09                                 | 1.79                                      |
| Ability to anticipate future needs of the child  | 2.12                                 | 1.58                                      |
| Commitment to the future care of the child   | 1.76                                 | 1.36                                      |
| Good parenting decisions, responsibility, and capacity   | 2.24                                 | 1.65                                      |
| Ability to identify and meet child’s normal and exceptional needs  | 2.13                                 | 1.58                                      |
| Effective and appropriate use of discipline/control, warmth, and communication                                       | 2.12                                 | 1.69                                      |
| Willingness to put child’s needs above his/her own   | 2.27                                 | 1.86                                      |
| Overall home environment provided by parent  | 2.09                                 | 1.71                                      |
| Demonstrated ability to provide stability for the child  | 2.27                                 | 1.64                                      |
| Ability to provide access to quality schools (not statistically significant)   | 1.78                                 | 1.68                                      |
| Demonstrated support for school and academic performance   | 1.99                                 | 1.56                                      |
| Demonstrated support and encouragement of child’s extra-curricular (social, sporting, etc.) and religious activities | 2.09                                 | 1.65                                      |

**Gender of Parents.** There was a very strong correlation between a parent's gender and judges' child custody decisions in disputes involving children younger than six years old. For children younger than two years old, mothers were awarded custody three times more often than were fathers. Mothers of three- to five-year-olds were awarded custody twice as often as were fathers. Mothers and fathers were awarded custody of their children with relatively equal frequency when their children were six years old or older. Table 3 presents a summary of these data. The distribution favoring awards of very young children to mothers is not explained by differences in parenting competencies. As seen in Table 4, no statistically significant differences between mothers' and fathers' parenting skills were found when judges' ratings of the competencies of parents with children under age six were considered.

**Table 3**  
**Numbers of Custody Awards by Parent Gender and by Age of Child**

| Child's Age | Custody to Mother | Custody to Father | Totals |
|-------------|-------------------|-------------------|--------|
| Birth to 2  | 16                | 5                 | 21     |
| 3 to 5      | 32                | 15                | 47     |
| 6 to 12     | 32                | 37                | 69     |
| 13 to 18    | 10                | 12                | 22     |
| Totals      | 90                | 69                | 159    |

**Table 4**  
**Judges' Ratings of the Parenting Competence of Mothers and Fathers of Young Children**

| Influence Factor<br>(1 = strong, 2 = adequate, 3 = weak)   | Non-Custodial Parent | Primary Physical Custodian |
|--|----------------------|----------------------------|
| Current role in care of child  | 1.80                 | 1.75                       |
| Past role in care of child   | 1.70                 | 2.08                       |
| Consistency in parenting the child   | 2.00                 | 1.83                       |
| Ability to anticipate future needs of the child  | 1.85                 | 1.58                       |
| Commitment to the future care of the child   | 1.65                 | 1.50                       |
| Good parenting decisions, responsibility, and capacity   | 2.25                 | 1.83                       |
| Ability to identify and meet child's normal and exceptional needs  | 1.80                 | 1.58                       |
| Effective and appropriate use of discipline/control, warmth, and communication                                       | 1.85                 | 1.83                       |
| Willingness to put child's needs above his/her own   | 2.15                 | 2.25                       |
| Overall home environment provided by parent  | 1.85                 | 1.67                       |
| Demonstrated ability to provide stability for the child  | 1.85                 | 2.00                       |
| Ability to provide access to quality schools (not statistically significant)   | 1.70                 | 1.75                       |
| Demonstrated support for school and academic performance   | 1.80                 | 1.75                       |
| Demonstrated support and encouragement of child's extra-curricular (social, sporting, etc.) and religious activities | 1.85                 | 1.67                       |

There was no ability to measure the influence on the judges' decisions of assuring the stability of the child's environment because the custody of the child at the time of the hearing was not reported.

**Problematic Events and Conditions.** The occurrence of problematic events in a parent's history was generally associated with that parent also being denied custody of his or her children. This relationship was most frequently true for parents with histories of emotional conditions that limited their parenting and was generally true for parents with histories of child abuse. A parent's history of limiting mental or emotional conditions was found to have a statistically significant influence on judges' child custody decisions. As data in Table 5 show, parents who had such histories were denied custody 65% of the time. Parents with histories of child abuse were denied custody almost 70% of the time, although the low frequency of occurrence of child abuse histories limited the statistical significance of these differences in custodial status. When a parent had a history of spousal abuse, a criminal record, or physical conditions limiting his or her parenting ability, the frequencies of being awarded or denied child custody did not vary in a statistically significant way. For example, the likelihood of a parent with a criminal history being denied custody was about equal to the chance of him or her being awarded custody.

The influence of histories of child abuse or spousal abuse on custody decisions may be more substantial than the previous statistics suggest for three reasons. First, the small frequencies of occurrence of these events limit the ability to draw conclusions from the data. Second, judges rated all of the parenting competencies of these litigants as significantly weaker than they rated those of parents without histories of abuse. Thus, judges were more likely to have denied these parents custody of their children for reasons in addition to their abuse histories. Third, a further statistical analysis of the influence of histories of spouse abuse or child abuse indicated almost half of these parents also had criminal histories and almost one-quarter of these parents had histories of serious psychological problems. Thus, histories of abuse co-occurred with other problematic events and parenting characteristics, all of which judges weigh heavily in their custody decisions and all of which were likely to have resulted in them being denied custody of their children.

**Table 5**  
**Influence of Problematic Events in a Parent's History**  
**on Judges' Custody Decisions**

| Problematic Event and and/or Condition<br>in History: | Event in History |           |
|---|------------------|-----------|
|   | Non-Custodian    | Custodian |
| <b>Factors most likely to influence decisions</b>     |                  |           |
| Child Abuse   | 16 / 69%         | 7 / 31%   |
| Emotional Conditions Limiting Parenting               | 41 / 65%         | 22 / 35%  |
| <b>Factors less likely to influence decisions</b>     |                  |           |
| Spousal Abuse   | 14 / 58%         | 10 / 42%  |
| Criminal Record                                       | 12 / 48%         | 13 / 52%  |
| Physical Conditions Limiting Parenting                | 3 / 60%          | 2 / 40%   |

**Stated Preference of the Child.** As children get older, their preferences in custody disputes become more important. As shown in Table 6, the preferences of children five years old or

younger had a predominantly minor influence on the judges' decisions; whereas, the preferences of older children had more impact on the judges' decisions. In more than half of the cases involving children 13 to 18 and in more than a third involving children from 6 to 12, judges rated the influence of the child's preferences on their decisions between *moderate* and *major*. Overall, however, children's stated custody preferences were not as important as other factors in child custody decisions.

**Table 6**  
**Importance of Children's Stated Preference by Age of Child**

| Age of Children Involved | Judges' Rating of Importance in Decision |                          |                           |                          |                        | Totals     |
|--------------------------|--|--------------------------|---------------------------|--------------------------|------------------------|------------|
|                          | <i>Minor Influence</i>                   | <i>Minor to Moderate</i> | <i>Moderate Influence</i> | <i>Moderate to Major</i> | <i>Major Influence</i> |            |
| <b>Birth to 2</b>        | 22                                       | 2                        | 2                         | 2                        | 0                      | 28         |
| <b>3 to 5</b>            | 35                                       | 5                        | 1                         | 1                        | 0                      | 42         |
| <b>6 to 12</b>           | 36                                       | 14                       | 19                        | 12                       | 0                      | 81         |
| <b>13 to 18</b>          | 7  | 6                        | 8                         | 4                        | 3                      | 28         |
| <b>Total</b>             | <b>93</b>                                | <b>27</b>                | <b>30</b>                 | <b>19</b>                | <b>3</b>               | <b>172</b> |
|                          | 54%                                      | 16%                      | 17%                       | 11%                      | 2%                     | 100%       |

**Parental Cooperation and Communication.** No other Decision Profile variables were found to have statistically significant influences on custody determinations. Parents' abilities to work together and to support and respect the role of the other parent were not found to be statistically important variables in physical custody determinations. Parents' abilities to work together to promote their children's best interests were rated equally for both non-custodial parents and primary physical custodians; i.e., both groups were rated as adequate. Judges also rated respect for the other parent's role as equal for both groups of parents; i.e., both groups were assessed as equally weak. This is not surprising given that the population studied consisted of parents who were litigating the issue of primary physical custody or visitation. One might assume that these parents have a difficult time cooperating and co-parenting and, thus, need the Court's assistance in reaching important decisions regarding their children.

**Visitation.** Because visitation is usually part of a custody order and because visitation and custody are intricately connected in custody matters, judges' decisions on visitation were studied. Like custody decisions, the amount of visitation time awarded to a parent was directly related to parenting competence. For the profiled cases where parents were rated as having stronger parenting competencies, they were also given more visitation time with their children.

The parenting competencies that are most strongly associated with the amount of visitation time awarded to a non-custodial parent are *demonstrated support and encouragement of child's extra-curricular (social, sporting, etc.) and religious activities* and *effective and appropriate use of discipline/control, warmth, and communication*. Parents whose contact with their children was restricted through supervised visitation and those who were assigned visitation schedules of every other weekend and a weekly evening visit were more likely to be rated as having adequate to weak parenting competencies. Those parents who were awarded substantial visitation time

with their children (approaching equal time with the custodial parent) and those who were awarded equal time through joint custody were more likely to be rated as having parenting competencies in the strong to adequate range. As shown in Table 7, below, no other statistically significant differences by visitation type were found.

**Table 7**  
**Judges' Ratings of the Parenting Competence for Parents Awarded Supervised, Limited, or Substantial Visitation or Joint Custody of Their Children**

| <b>Influence Factor</b><br>(1= strong, 2= adequate, 3=weak)   | <b>Average Competence Scores</b> |                |                    |              |
|---|----------------------------------|----------------|--------------------|--------------|
|   | <b>Supervised</b>                | <b>Limited</b> | <b>Substantial</b> | <b>Joint</b> |
| Current role in care of child   | 1.83                             | 1.89           | 1.74               | 2.00         |
| Past role in care of child  | 1.83                             | 1.93           | 1.83               | 2.14         |
| Consistency in parenting the child  | 1.83                             | 1.93           | 1.83               | 2.14         |
| Ability to anticipate future needs of the child   | 1.83                             | 1.88           | 1.82               | 2.00         |
| Commitment to the future care of the child  | 1.58                             | 1.74           | 1.51               | 1.71         |
| Good parenting decisions, responsibility and capacity   | 1.92                             | 1.96           | 1.95               | 2.00         |
| Ability to identify and meet child's normal and exceptional needs   | 1.83                             | 1.92           | 1.78               | 2.28         |
| <b>Effective and appropriate use of discipline/control, warmth and communication</b>  | <b>2.16</b>                      | <b>2.14</b>    | <b>1.79</b>        | <b>1.71</b>  |
| Willingness to put child's needs above his/her own  | 2.16                             | 2.07           | 2.09               | 2.57         |
| Overall home environment provided by parent   | 1.83                             | 1.96           | 1.92               | 1.42         |
| Demonstrated ability to provide stability for the child   | 1.91                             | 2.07           | 1.92               | 1.28         |
| Ability to provide access to quality schools  | 1.83                             | 1.77           | 1.67               | 1.42         |
| Demonstrated support for school and academic performance  | 1.58                             | 1.96           | 1.72               | 1.42         |
| <b>Demonstrated support and encouragement of child's extra-curricular (social, sporting, etc.) and religious activities</b> | <b>1.50</b>                      | <b>2.11</b>    | <b>1.76</b>        | <b>1.80</b>  |

*Factors impacting the continuity of the child's environment (a child factor) and ability of the parents to identify and meet the child's needs and the parent's current and/or past role with the child (parenting factors) were the strongest influences on judges' visitation decisions. Judges did not rate a parent's history and the effectiveness and credibility of their counsel and experts as significant influences on these decisions. When either "Supervised Visitation" or "Substantial Visitation" was ordered, judges put heavy weight on the child and parenting variables listed. When judges ordered every other weekend and a weekly evening visit as the visitation schedule, these influences were not as important in their decisions.*

Results presented in Table 8 summarize the statistical significance of the elements of § 20-124.3 on custody determinations for the cases profiled in this study. Most elements of § 20-124.3 were

important determinants of these custody decisions; exceptions were a parent's propensity to support the role of the other parent, a parent's ability to cooperate with the other parent in the resolution of disputes regarding the child, and a history of family abuse. A parent's having a history of child abuse exerted a substantial influence on judges' custody decisions in the studied cases. A child's stated preference for custody was a major influence for about 11% of teenaged children. In interviews and focus groups in which these findings were discussed, judges unanimously stated that each of the factors that were not statistically significant for the cases in this sample would typically be a significant decision factor if it were germane to a case in their courtroom.

**Table 8  
Influence of Elements of the State Code on Custody Determinations**

| Elements of § 20-124. 3  | Statistically Significant Influence for the Cases Profiled in this Study      |
|--|---|
| 1. Age, physical/mental condition, needs of the child  | Yes   |
| 2. Age, physical and mental condition of each parent   | Yes -- mental condition of parent   |
| 3. Relationship existing between parent and child, consideration to positive involvement with child's life, the ability to accurately assess and meet the emotional, intellectual, and physical needs of child | Yes   |
| 4. The needs of child, consideration to child's other important relationships, including, but not limited to, siblings, peers, and extended family members   | Yes   |
| 5. Role each parent has played and will play in the future in care of the child  | Yes   |
| 6. The propensity of each parent to support child's relationship with the other parent   | No  |
| 7. The demonstrated ability of each parent to maintain a close and continuing relationship with child, and ability of each parent to cooperate in resolution of disputes regarding child                       | Yes -- parent/child relationship<br>No -- ability of the parents to cooperate |
| 8. The reasonable preference of the child  | Limited for teenage children  |
| 9. History of family abuse   | Yes-- child abuse history   |
| 10. Other factors as the Court deems necessary   | Stability, parenting, relationships   |

**2. Parents typically appeared in court with representation and supporting witnesses. Judges had a majority of the information that they needed to make their decisions.**

As presented in Table 9, almost 99% of mothers and fathers appeared at the hearing in the reported cases, almost 75% had legal counsel, approximately 25% had expert witnesses, and over 75% had other supporting witnesses. Fifty-seven percent of the children had their interests represented by GALs. Custody evaluations were performed and presented in about 26% of the cases. Home studies were ordered and were presented in almost 40% of the cases.

**Table 9**  
**Legal Representation and Witnesses Present at the Hearing**

| <b>Parents present at hearing</b>              | <b>Present</b> | <b>Not Present</b> |
|--|----------------|--------------------|
| Mother   | 167 (98.8%)    | 2 (1.2%)           |
| Father   | 168 (99.4%)    | 1 (.6%)            |
| <b>Legal representation present at hearing</b> |                | <b>pro se</b>      |
| For mother                                     | 121 (72%)      | 32 (19%)           |
| For father                                     | 124 (73%)      | 29 (19%)           |
| For child                                      | 96 (57%)       | 14 (13%)           |
| <b>Expert witness(es)</b>                      |                | <b>none</b>        |
| For mother:                                    | 36 (24%)       | 112 (66%)          |
| For father:                                    | 32 (22%)       | 115 (68%)          |
| For child:                                     | 26 (19%)       | 107 (63%)          |
| <b>Other witnesses</b>                         |                | <b>none</b>        |
| For mother:                                    | 122 (79%)      | 31 (18%)           |
| For father:                                    | 119 (77%)      | 34 (20%)           |
| For Child                                      | 44 (37%)       | 72 (43%)           |
| <b>Custody evaluation</b>                      | 42 (26%)       | 122 (74%)          |
| <b>Home study</b>                              | 63 (38%)       | 102 (62%)          |

**3. Judges reported that the influence of professionals involved in the dispute, such as GALs, attorneys, and mental health professionals, was not a consistent one.**

The influence of a professional's credibility on judges' decisions was not found to be a significant one in comparisons of 70 cases in which all litigants, legal representation, and expert witnesses were present. As Table 10 shows, through empirical and objective comparisons, the credibility and effectiveness of professionals representing those parents who were awarded child custody were not found to be statistically different from the credibility of professionals representing parents who were denied custody of their children.

**Table 10**  
**Judges' Ratings of the Importance of In-Court Variables on Their Child Custody Decisions**

| <b>In-Court Variable</b>  | <b>Child Custody Award</b>   |                           |   |
|---|------------------------------|---------------------------|---|
|   | <b>Supervised Visitation</b> | <b>Limited Visitation</b> | <b>Substantial Visitation and Joint Custody</b> |
|   | <b>Influence is ....</b>     | <b>1=minor</b>            | <b>3=moderate</b>                               |
| Parent's credibility  | 4.00                         | 4.35                      | 4.02  |
| Demeanor and preparation of legal representation                  | 2.00                         | 2.47                      | 2.72  |
| Credibility, demeanor and preparation of expert witnesses         | 2.17                         | 2.06                      | 2.00  |
| Credibility and demeanor of other in-court support                | 2.17                         | 2.12                      | 2.34  |
| Evidence supporting each parent's ability to parent and co-parent | 3.83                         | 3.76                      | 3.85  |

4. **The presence of legal representation for a parent had no impact on the custody decisions that the judges reached for these cases.**

The presence of effective, legal representation for a parent appeared to have little or no impact on the custody decisions that judges reached in the cases studied in this report. As reflected in Table 11, analyses of a sub-group of 40 litigated disputes in which only one parent had legal representation indicated that presence of legal representation did not have a statistically significant influence on judges' child custody decisions.

**Table 11**  
**The Relationship between Having or Not Having Legal Representation and Custody Awarded to a Parent**

| Presence of Legal Counsel          | Custody Awarded to Parent |                      |
|------------------------------------|---------------------------|----------------------|
|                                    | Primary Custodial Parent  | Non-Custodial Parent |
| No Legal Representation for Parent | 13                        | 14                   |
| Legal Representation for Parent    | 9                         | 4                    |

A subsequent analysis of judges' ratings of the demeanor and effectiveness of a parent's legal representation in 113 cases also indicated no statistically significant influence on judges' decisions (see Table 12). Thus, the conclusion drawn about the influence of all professionals on the decision-making process appears to hold true for attorneys. Effective legal counsel helps to make the trial a more efficient process, but it does not necessarily sway a judge's conclusions in favor of that attorney's client.

**Table 12**  
**The Relationship between the Effectiveness of Legal Counsel and Custody Awarded to a Parent**

| Judges' Ratings of the Effectiveness of Legal Counsel | Custody Awarded to Parent |                      |
|---|---------------------------|----------------------|
|   | Primary Custodial Parent  | Non-Custodial Parent |
| Strong  | 28                        | 35                   |
| Adequate  | 28                        | 18                   |
| Weak  | 1                         | 3                    |

5. **Expert witnesses play highly variable roles in the courtroom.**

Empirical data suggest that experts may be most helpful in extreme cases when abuse is reported and when supervised visitation may be ordered. As Table 13 shows, judges considered custody evaluations to be a major influence on their decisions to restrict a parent's access to his or her children through orders of supervised visitation. Judges did not consider these evaluations to be of more than moderate influence in all other cases.



**Table 13**  
**Importance of Custody Evaluations on Judges' Decisions**

| Visitation Type                                | Mean Rating of Importance<br>(Influence is ....1 = minor, 3 = moderate, 5 = major) |
|--|--|
| 1. Supervised father visitation                | 5.00   |
| 2. Limited time to father (alternate weekends) | 2.50   |
| 3. Substantial time to father                  | 3.05   |
| 4. Parents have equal visitation time          | 2.50   |
| 5. Substantial time to mother                  | 3.50   |
| 6. Limited time to mother (alternate weekends) | 2.50   |
| 7. Supervised mother visitation                | 4.67   |

**6. Judges' annual custody docket loads vary greatly.**

In the General Survey, judges were asked to estimate the number of disputed child custody cases on their docket annually, the number decided through hearing, and the number decided by settlement. They were further asked to estimate the percentage distribution of their Decision Orders concerning Legal and Primary Physical Custody for these cases. Table 14 presents a summary of judges' responses to these questions.

The General Survey found a wide range in the number of custody and visitation cases heard by each jurisdiction in 1999. The number of these cases in each court averaged 256. About half of these cases were decided by hearings and the remainder reached out-of-court settlements that were approved by the judge. Judges reported awarding legal custody to mothers in about 37% of the disputed cases. Fathers were awarded legal custody in about 18% of these cases. Joint legal custody was awarded 45% of the time. Physical custody was awarded to mothers 66% of the time, to fathers 27% of the time, and jointly 7% of the time.

**Tables 14**  
**Summary of Judicial Caseload and Decision Estimates from the General Survey**

| <b><u>Docket Load</u></b>                 |   |                |                |           |
|---|---|----------------|----------------|-----------|
| Cases per month in 1999:                  | 25 average (minimum 1, maximum 208)                     |                |                |           |
| Cases heard at trial in 1999:             | 120 average (minimum 0, maximum 2125, 50% of all cases) |                |                |           |
| <b><u>Distribution of Decisions</u></b>   |   |                |                |           |
| Cases decided through settlement in 1999: | 101 average (minimum 0, maximum 520, 50% of all cases)  |                |                |           |
| Custody awards in disputed cases:         | Legal Custody   | 37% mother     | 18% father     | 45% joint |
|   | Physical Custody  | 66% mother     | 27% father     | 7% joint  |
| Decision conveyed to parents:             | In writing  | 34% to mothers | 34% to fathers |           |
|   | Verbally  | 62% to mothers | 60% to fathers |           |

## VI. In-Court Research

### A. Analytical Strategy

An overwhelming majority of custody cases are decided in JDR courts, which are “courts not of record.” Consequently, there are limited or no records to support data collection that would permit identifying what factors have affected disputed custody case decisions in the Commonwealth. Based on the General Survey responses from this study, a judge typically decides about 120 disputed custody cases annually. This docket load and the intentional lack of case documentation minimize the ability of judges to recall specific cases (other than some very recent cases) with the requisite specificity to profile influencing factors. These realities dictated developing a conceptual framework for this research that included collecting, integrating, and analyzing several types of quantitative and qualitative data.

The Judges’ Decision Profiles described in the previous section represent a set of selected (by the judges) cases that provided valuable insight into the decision process. Each profile represented a judge’s perceptions related to a large number of factors that potentially influenced that judge’s decisions in one or more of his or her most recent cases. Unfortunately, time and resource constraints precluded collecting the number and diversity of case profiles needed to produce an adequate representation of all disputed custody cases. Consequently, the in-court research employed several qualitative techniques to permit participating judges to extrapolate from the case-specific decision profiling process in ways that provided more general assessments of the factors influencing their decisions. The in-court research involved observing cases, interviewing judges, and conducting focus groups with judges.

**Interviews.** Interviews were conducted with 47 judges, or approximately 25% of the JDR judges and 15% of the Circuit Court judges in the Commonwealth. These judges represented all regions of the Commonwealth and generally matched the demographic characteristics (e.g., gender, ethnicity, age, and years on the bench) of the overall population of judges. Most of the interviews were conducted over a two-month period following the completion of the mail surveys. In general, the interviews reflected the following four dynamics:

- A set of illustrative questions (see Appendix III) was provided or referenced to most judges as a basis for exploring perceptions and insights related to the decision process, in general, based on their overall experience with custody disputes.
- When cases could be observed prior to an interview, the factors influencing that case became another basis for the interview.
- After preliminary empirical data derived from the Decision Profiles and General Surveys became available, judges were asked to react to these results (i.e., were the results consistent with their overall experience, and if not, why not?).
- Judges were encouraged to identify and discuss any concepts, considerations, and options they believed would facilitate improving the decision-making process or promote better resolution.

**Focus Groups or Group Interviews.** After the preliminary results from the mail surveys became available, several judges were asked to participate in focus groups or group interviews to discuss the validity and utility of these results. Five focus groups involving six Circuit Court and ten JDR judges were conducted in five different regions of the state. These judges also reflected a demographic mix in terms of gender (10 male, 5 female), age (average 53 years old, ranging from about 40 to about 70), ethnicity (13 white, 2 black), and years on the bench (average 9 years on the bench, ranging from 1 year to over 15 years).

In these meetings, judges were presented selected data and analytical results derived from the mail surveys and asked to discuss the extent to which these preliminary results were consistent with their overall experience, or how these results differed from their overall experience. The focus groups also provided a venue through which to glean impressions and perspectives of the judges concerning all aspects of the decision-making process related to disputed custody cases and to discuss ideas they believed would potentially improve the process or promote better resolution.

## **B. Findings**

Consistently, judges noted that each case was unique and that factors had to be considered on a case-by-case basis. Overall, these judges seemed to be very cautious or concerned about the process of generalizing the decision-making process. However, these same judges were typically very candid in responding (or not responding) to specific questions and in reacting to preliminary findings of the study. This candor and willingness to participate from judges who decide over 3,000 disputed custody cases annually, provided a form of validation of, or a basis for challenging, the quantitative mail survey results as well as a venue for expanding on the insights derived from these data. The following perceptions are derived from the in-court research.

**1. Perceptions Relating to the Code of Virginia.** *Judges reported that § 20-124.3 of the Code of Virginia promotes good decision making and the interests of the child because it permits sufficient flexibility to deal with variations of the factors as they exist in each case. It permits judges to use common sense. Judges typically noted that they perceived that no valid ranking of the § 20-124.3 factors is possible because of the uniqueness of each case. Judges consistently noted that the existing Code of Virginia is exhaustive and, hence, sufficient.*

In the interviews and focus groups, judges were asked several questions related to the use and value of the existing *Code of Virginia* (see Section II). Questions also addressed judges' perceptions of what *Code of Virginia* modifications might facilitate better decision making. These included:

- In your opinion, which factors in § 20-124.3 of the *Code of Virginia* are generally most significant? Which are least significant?
- Are there other elements or factors which are not stated in § 20-124.3, but which surface regularly in cases you decide?
- Taken together, do the factors in § 20-124.3 promote good judicial decision making in custody disputes and promote the best interests of the child? Why or why not?

Many judges noted that because each of the § 20-124.3 factors can be critical in any specific case, each factor was equally significant and it would be inappropriate to try to rank order their importance. However, when extrapolating from specific cases to general experience, judges indicated several factors that most frequently influence decisions. These included assuring the stability of the child's environment, the factual and less tangible indicators of parenting and co-parenting skills, and parent commitment to the child's development. In several of the observed cases involving teenaged children, the preference of the child was a major deciding factor.

Judges consistently stated that, in their opinion, § 20-124.3 of the *Code of Virginia* is complete and promotes good decision making. They saw no basis for needing further elements, specificity, or presumptions. None of the interviewed judges expressed contrary views. Typical comments included<sup>1</sup>:

- The *Code of Virginia* promotes good judicial decision making because the judge is given the flexibility to rule in the best interests of the child.
- No other *Code of Virginia* elements are needed. The existing factors permit sufficient flexibility to accommodate the variety of cases encountered. I see no need to change § 20-124.3.
- All cases are different; no factors dominate. The existing § 20-124.3 is exhaustive and promotes good decision making and the interests of the child. It permits judges to use common sense.
- The *Code of Virginia* is good as is because it provides the judge the ability to apply common sense and apply all factors presented in the case. It provides for meeting the primary needs of the child for a wide variety of short- and long-term considerations including the physical and emotional safety of the child.
- The *Code of Virginia* permits decision making, but the formulation of a decision is not a checklist process. There are no apparent missing factors, particularly not in the context of evidence. The existing § 20-124.3 does promote good decision making and the interests of the child.
- Factors not in § 20-124.3 (e.g., demeanor and credibility of the parents) and factors external to parenting surface frequently, but, in general, the § 20-124.3 factors permit application of common sense and promote good decision making and the interests of the child. No additional elements are needed.
- The *Code of Virginia* is good and promotes good decision making because it reflects common sense, but the judge must also consider the demeanor, honesty, and believability of parents.
- All factors of the *Code of Virginia* can be critical in any given case. All are necessary to permit the judge to make a proper decision.
- The factors in § 20-124.3 are good, help to frame decisions, and provide clear, understandable guidelines.

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<sup>1</sup> All comments by judges included in this section are *paraphrased* from notes taken during and after interviews and focus groups. By agreement, no sessions were taped or transcribed. Many responses were redundant; the comments reported are an illustrative sample. While judges typically were provided a set of illustrative questions, they also were encouraged to digress to issues that they considered more critical. Based on the court observation and the interview, interviewers often asked questions that were not included in the illustrative list (e.g., judges were asked to respond to issues raised by other judges).

**2. Perceptions Relating to the Process.** *JDR judges were consistently concerned with the custody docket load. Time delays in the appeals process presented problems for Circuit Court judges. Mediation was perceived as having potential, but also as having problems in terms of the process time and risks. There was no strong convergence on the potential of parenting classes, service center concepts, family court concepts, and other counseling options. However, any option that would reduce or focus issues and that has the potential to decrease the Court's workload appeared to have support.*

Judges were asked their perceptions of, and suggestions for, improving the manner in which child custody is determined. The value of mediation was specifically addressed and a range of options such as parenting classes, service center concepts, family court concepts, and other counseling options were discussed when circumstances permitted. Specific questions included:

- What suggestions do you have for improvement of the current manner in which child custody is determined?
- What are your thoughts on alternative methods of dispute resolution such as mediation?

Nearly all JDR judges expressed some level of concern with the docket load and the resulting implications for the amount of time permitted to resolve cases. Some of these judges indicated that many parents appeared to need more information related to the custody process. Several Circuit Court judges noted that the time period between appealing a JDR decision and that case reaching the Circuit Court docket is so long that the circumstances often change substantially.

Judges' suggestions for, or reactions to, potential solutions for these concerns were mixed. Most judges favored mediation, but a vocal minority raised concerns about the time required for mediation and the potential for creating additional problems. Judges appeared interested in the concept of a Family Court, but generally wanted to reserve judgment until a specific concept was actually presented to them. Several judges suggested improving the "intake process," but few specific solutions were discussed. Other counseling options seemed to present few problems, but also seemed to generate minimal interest. Typical comments concerning alternative methods and options included:

- Need more mediation. Mediation would, at a minimum, narrow issues for the judge and should reduce the docket load.
- Need a mechanism by which the Circuit Court can assign, at the Court's expense, a GAL when the litigants cannot afford the cost.
- Practical considerations limit the viability of mediation. The Court works within a schedule. Most alternatives lengthen the process, increase costs and inconveniences, and typically do not work because one or both parties do not cooperate. Litigants need a better understanding of the options, benefits, etc.
- This court rarely employs alternative options; they render the process too long.
- Good lawyers solve problems; mediation exacerbates problems. Mediation causes people to give up rights that create additional problems later. People need more knowledge concerning their rights.

- Mediation can be helpful along with divorce workshops and other pre-trial options.
- Mediation is sometimes the only thing that works.
- A bad court experience equals a better mediation experience.
- This court favors any option that compresses the process, removes lower priority issues, or focuses considerations for the court, particularly at intake or pre-trial.
- This judge has had good experiences with mediation or any other form of negotiations that motivate parties to comply with the ultimate agreement.
- Mediation can be helpful, but SHOULD NOT be mandatory. Counseling on cooperation in divorce custody situations could help.
- This court has very little use for mediation because it dictates that both parents must be committed to making it work and increases the stress on the children. Should consider court service unit and Family Court types of options at Circuit Court level.
- Mediation works only if parents can communicate. Need to make the docketing and trial process more efficient; reduce the time required for coming to a decision.
- Mediation is good and provides “empowerment” IF there is a potential for success (i.e., communication, commitment). There is a need to “equalize” resources across system.
- Mediation is very effective. We need more of it. I frequently order counseling/parenting classes. Need mandatory parent education and a service center concept for pro se parents.
- I have used alternative methods, such as mediation, for over 20 years. Mediation is not appropriate for all cases/parents. Because mediation can either extend the process or reduce process time by providing better focus, it is critical to determine when it is proper to use it and when it is not. I heavily use DSS and other existing services. We need a better up-front process at the intake level to provide better education to litigants and some form of legal services for pro se litigants. I am concerned that any presumption of joint custody could negatively impact the caseload.
- Family court would cut the process time. A better intake process could help.
- Mediation has helped and is becoming more available. Improved intake could help in some cases (e.g., pro se). Family Court could help.
- The major concern of this court is lowering the caseload. Any option that lowers the caseload is probably good. For some, mediation works. For many it is a disaster. The intake process could be improved by improving training and/or automation. Family Court would permit much better continuity in the process and, hence, better decision-making.
- Mediation can be a hurdle to serving the best interests of the child in an expeditious manner. Too many emotions inhibit improving communications for people who typically do not communicate well. Family court makes sense.

- Need to reduce docket load and the resulting process time. To the extent that mediation, better intake, family court, or any other concept does this, they are GOOD. Family Court may force an increased paper load that could offset any decrease in docket load.
- Mediation and counseling can be very helpful, if the parents comply. Improving the quality of community and intake information will produce better-educated litigants (particularly pro se), thereby focusing the in-court issues and reducing the in-court process time.

**3. Perceptions Relating to Lawyers, GALs, and Expert Witnesses.** *Judges consistently stated that good lawyers on both sides facilitate resolution, having representation on only one side places judges in a potentially awkward and difficult position, and having two pro se litigants often leads to difficulties in getting needed information before the Court. Judges consistently noted that GALs are not always needed, but that good GALs provide much better insight as to the child's situation, needs, and relationships. These judges had very mixed reactions towards expert witnesses. They perceived that expert witnesses are most likely to be useful in cases involving allegations of abuse or cases in which the parents and the children have serious emotional and/or mental problems but noted concerns related to the quality and bias of experts.*

Judges were asked to comment on professionals that become involved in the decision-making process of disputed custody cases. These questions included, but were not limited to:

- Do you think that all parties should have legal representation? Do you think that legal representation facilitates or hinders the effective resolution of child custody disputes? How does legal representation influence the custody decision?
- Do you appoint GALs for children in custody cases? If so, do you find them helpful?
- Under what circumstances, if any, have you found expert testimony to be helpful?

Almost all of the JDR judges interviewed stated that lawyers were not essential and should not be mandated, but that good lawyers helped provide the Court the information required to facilitate effective decision making. Judges consistently expressed their concerns in obtaining sufficient and balanced information when representation was unbalanced or did not exist.

Judges provided very mixed reactions as to when they perceived the use of GALs to be appropriate, how they used GALs, and their expectations from GALs. However, most judges reported that when the use of GALs was "appropriate" and if the GAL was good, his or her contribution was invaluable.

Most judges interviewed expressed limited need for expert witnesses. They typically noted that in some cases involving abuse and/or extreme mental and emotional problems, expert witnesses can be very helpful. Many judges expressed concerns with expert witness impartiality (or the lack thereof) and some judges stated that reports from medical doctors (MDs) and from other experts not financed by a litigant are more likely to influence the decision process.

In general, all judges were supportive of any individual that helps to bring relevant information before the Court, effectively frame and focus issues, and present more precise information. They also noted that the unique characteristics of each case determine the need for lawyers, GALs, and experts. Typical comments related to the value of these professionals included:

## LAWYERS

- Representation is not needed by all parties and should not be mandated. It facilitates effective resolution (better information surfaces), but generally does not influence resolution.
- Representation is not always necessary, but good lawyers facilitate effective resolution.
- Lawyers can help the judge balance information and frame problems.
- Representation is necessary because lawyers assure that parties understand their rights and the implications of the agreements being considered; lawyers facilitate and influence decisions by surfacing information that otherwise would not be considered by the judge.
- Parties' being represented best facilitates effective resolution; one party with representation can pose problems for the judge in assuring both parties understand the consequences and implications of the case; neither party having representation frustrates facilitation.
- Only one side represented provides a major problem for the judge. Otherwise, representation is usually preferable.
- In an ideal world, all parties would have lawyers; in the real world all should not have lawyers. Also, lawyers extend the process.
- Good lawyers frame the problem for both sides and present better, more concise information.
- Lawyers slow down the process and present financial burdens, but they also present the judge a more focused and balanced presentation of the relevant information.
- Representation is not always necessary, but the decision process is very dependent on the quality of the lawyers. If the lawyers are competent and comparable, they will help the judge. If one or both are weak, they complicate the judge's decision role and process.
- Two good lawyers facilitate; one good lawyer complicates; if both litigants are pro se, it forces the judge to extract needed information.
- Lawyers are not always needed, but good lawyers are more likely to structure their arguments by the *Code of Virginia*. I much prefer both parties with competent attorneys because it narrows down what needs to be litigated. "Unbalanced" cases present problems and are more difficult.
- Not everyone needs a lawyer. One bad lawyer versus one good lawyer or two poorly prepared pro se litigants present difficulties in presenting the evidence needed to make a properly informed decision. Good lawyers can effectively "get the information across" and control the litigants.
- All parties do not need a lawyer, but good lawyers do facilitate better decisions because they present evidence that better focuses and supports the issues. Conversely, bad lawyers may do no more than slow down the process and mask the fact that key information has not been presented.
- All litigants do not need a lawyer, but the *quality of evidence DOES affect the quality of the decision*. Bad lawyers may, or may not, be better than no lawyers, but they can waste time and miss critical information.



## GALs

- GALs are appointed if appropriate. GALs can be helpful. However, some GALs are much better than others. The decision to appoint a GAL should be left to judge.
- I increasingly see GALs. They are particularly useful when the parents are very adversarial.
- GALs are appointed if appropriate and, particularly, if parents are NOT represented, or if parents are represented by very contentious lawyers. GALs are typically not needed if parents are represented by good lawyers.
- GALs are appointed if there is concern for harm to the child or if there are totally adversarial parents. They are very useful if they are very good and have broad, practical experience (i.e., not a specialist).
- GALs are not appointed as a matter of course (often depends on the existence of good lawyers for parents), but I like to have GOOD GALs and give great weight to their recommendations.
- GALs are used extensively and are expected to assume an aggressive investigative role. I find them very helpful (influential) in decision-making process.
- GALs are very useful, particularly in pro se cases. They are used as investigators.
- Good GALs are helpful; GALs with insufficient experience are not. The “charge” [mission] of GALs could be better articulated.
- GALs are a valuable resource. They permit a much better representation of the children’s situation, needs, and preferences.
- GALs are typically key factors in decision making. They provide the judge true insight into issues from the child’s perspective.
- GALs are not typically used unless DSS deems them necessary. If appointed, I do not bring the GAL into chambers with the children.
- I frequently use GALs. They are typically less biased and better trained than DSS personnel.
- I virtually always appoint GALs. I find the process is better served and their utilization provides better information that is better balanced.
- GALs are definitely not appointed in all cases, probably not in most cases. Typically, GALs are not appointed unless I really need information not otherwise available. In those cases, I use GALs to investigate – I rarely use home studies or DSS services.
- I use GALs only if I need someone with GAL training to get information not otherwise available.
- GALs are appointed frequently, but cautiously. Typically they are appointed if there are no lawyers and there is a concern that pro se litigants will be unable to present evidence needed to make a good decision. Also, I appoint them if I suspect abuse or other suspicious circumstances.
- GALs are almost always appointed because they are very helpful in bringing forth relevant information that would not otherwise have been presented (particularly with pro se litigants, bad lawyers, or very adversarial litigants/lawyers).

## EXPERT WITNESSES

- Experts are very helpful in the child psychology area (particularly, if abuse), if they are GOOD.
- Experts give the judge “a way out” if conflicting testimony (e.g., abuse). Problem has been too many poor *experts*. Also problem with objectivity of experts in recent cases.
- Most experiences have been negative, but expert witnesses are occasionally useful.
- Expert witnesses appear relatively frequently with MIXED results. They can be very helpful, particularly if there are allegations of abuse.
- Have seen very little expert testimony; expert inputs are more likely to be in the form of reports. Expert witness inputs have ranged from very good to very poor. I find school officials to be useful expert witnesses.
- Medical witnesses and psychologists can be useful, but the Court must be careful of “spin.”
- Psychologists and psychiatrists can be very useful, particularly if requested by DSS versus the litigant. Generally, I do not find others (family counselors/social workers) to be useful.
- Reports/statements of experts (e.g., MDs) more helpful than testimony of “hired guns.”
- This court sees expert witnesses rarely. I find most “experts” are not truly independent experts. Reports from MDs typically are helpful. Home studies typically are not.
- This court sees very little expert testimony and relies more on reports by independent 3<sup>rd</sup> parties (e.g., MDs and psychiatrists as requested by DSS). The bias of expert witnesses is a concern.
- Very suspicious of any “expert” testimony. Particularly suspicious if the cost for testimony appears to be great.
- Experts are useful in identifying services needed for the child, but rarely influence the decision. Reports from experts (e.g., DSS ordered MD, psychiatrist, and psychiatrist reports) are more likely to influence the decision.
- Experts can help in cases involving parents and/or children with emotional problems. The key issue/concern is typically the experience and integrity of the expert.
- By and large, I find expert witnesses to be neither credible nor useful.
- Expert witnesses appear frequently in this court, typically in those cases involving lawyers. They help if they can present relevant information about the family that is otherwise not available. I do not need or appreciate “talking heads.”
- This court frequently has expert witnesses with mixed results and experiences. They are most helpful if the children and/or the parents have unique problems that the expert can help to explain in terms useful to the court.
- While this court rarely deals with expert witnesses, they are most likely to be useful in complex cases involving allegations of abuse or in cases in which one or more parents or the children have serious emotional and/or mental problems.

**4. Perceptions Related to Cases Settling Prior to a Custody Hearing.** *These judges reported that from 0% to 90% of the disputed custody cases on their dockets settle prior to a hearing. Most responding judges suggested that they generally exercise subtle pressure (versus overt pressure) or no pressure on lawyers to achieve settlement.*

To ascertain how many cases actually are resolved by the hearing process, as well as what factors influence settlement of cases prior to a hearing, judges were asked:

- What percentage of your custody cases settle immediately prior to the custody hearing?
- What, if anything, do you do to promote settlement of custody cases?
- Do you inquire about the factors before you accept an agreement?

Judges generally expressed no knowledge as to what percentage settled, but about half of the judges guessed that about 50% settle. Other judges typically guessed very high (75% or more) or very low (25% or less). Some judges speculated that the presence of lawyers increased the chances of settlement; other stated that if lawyers were involved, cases were more likely not to settle. There was no apparent pattern to these responses. Several judges indicated that lawyers appearing before their court might promote settlement because they suspected that the judge would favor settlement, but few judges reported overtly pressuring lawyers or litigants to settle. Judges reported being more likely to inquire about *Code of Virginia* factors if no lawyers were involved in the settlement. Illustrative comments included:

- About 50% of appeals (from the JDR Courts to the Circuit Court) “do not show” [are not perfected], and about 50% of those that “do follow through” [are perfected] settle.
- About 50% (possibly 60% or more) settle. Attorneys, if involved, know that this judge prefers settlement and promotes settlement. Typically, this judge does not inquire about the factors if both parties are represented, but does inquire if they are not.
- Zero percent settle. Most lawyers coming in front of this judge know to promote settlement. This judge inquires about factors and structures by factors when writing an opinion.
- About 85% to 90% settle and the settlement rate is increasing. Nothing overt is done to promote settlement.
- About 75% settle. The 6-8 week lag between filing and the hearing promotes settlement. Typically, this judge does not inquire about factors when accepting an agreement.
- About 30% settle if lawyers are involved, 0% if not.
- This judge “estimates” that 80% are decided; 17% settle; 3% are dismissed.
- This judge estimates that about 10% settle and 90% are decided in court.

**5. Perceptions Related to Decision Considerations, Options, and Results.** *Specific reasons that were most frequently given for awarding sole custody included incompetence of one parent, inability of parents to cooperate, or abuse. Most judges expressed that they generally favor joint legal custody when parents’ attitudes, skills, and communications permit co-parenting. They reported that joint physical custody is considered ONLY in exceptional circumstances (e.g.,*

*extremely good co-parenting situation and the wishes of the child and co-location of parents' homes). These judges generally believed that, overall, custody awards are slightly in favor of mothers, and clearly favor mothers for younger/infant children. However, most judges also perceived an increasing trend toward fathers' being awarded custody. When judges reflected on only disputed cases, many then suggested that decisions may slightly favor fathers and that fathers may be less inclined to contest unless circumstances (e.g., age of the child, preference of the child, a mother with "problems") appear in their favor.*

A key objective of this study was to gain insight as to whom has been awarded custody in disputed cases, what types of custody were awarded, and what considerations most influenced these awards. Several interview and focus group questions addressed these objectives, including:

- When is sole custody most appropriate? When is joint custody most appropriate?
- What are the elements or characteristics of a custodial parent?
- Are mothers or fathers awarded custody more often? Why is this?
- What are the factors in the mother or father that lead to this general result?

Most judges stated that they preferred to award joint legal custody because they perceived that it increased parental participation, which in turn benefited the child and improved compliance with the court ruling. The vast majority, if not all, of these judges agreed that the primary requirement for successful joint legal custody is the ability of the parents to communicate and cooperate in the interests of the child. Judges who reported that they rarely awarded joint custody typically noted that few parents appearing in their court demonstrated sufficient communication and cooperation potential.

The judges interviewed and included in focus groups consistently reported that joint physical custody was rarely awarded. These judges noted that for joint physical custody to work in the best interests of the child, the following characteristics had to exist:

- The parents have to demonstrate exceptional communication, cooperation, and other co-parenting skills;
- The parents' homes have to be in relatively close proximity; and
- The children have to be supportive of the arrangement.

Several judges noted that the potential for non-compliance with the custody, visitation, and support decisions and the potential for the parents to return to court were additional considerations in the type of custody awarded. However, these judges were mixed as to whether joint legal custody promoted more parental cooperation or just created additional problems because of non-cooperation. A few judges even expressed their perception that there were potential explosive emotions in their courtroom during some high-profile custody cases and reported that they perceived more personal risk in these cases than in comparable criminal cases.

Most judges seemed uncomfortable with what was intended by or how to interpret "the elements or characteristics of a custodial parent." Those who did respond focused on parenting skills, being able to provide a stable environment, and commitment to the child. Responses by the judges as to what factors most influenced their decisions for the observed in-court cases tended to substantiate these results.

The majority of the interviewed judges believed that, historically, mothers have been awarded custody more often than fathers but that there is a trend towards equality in these decisions. There were mixed responses as to whether mothers or fathers are most frequently awarded custody now. Another trend reported by some of these judges was the perceived increase in custody disputes between unmarried parents and litigants that are NOT parents (e.g., grandparents, other relatives, and non-relatives).

Nearly all judges found the custody award results from the Judges' Decision Profiles to be plausible. They typically explained that the mother has been far more likely to be awarded custody of very young or infant children, principally because she has typically been the primary care giver and represented the most stable custody option. In contested cases involving legal representation and older children, these judges reported that custody awards have been about even for mothers and fathers or have favored the father. Many (possibly half) of the judges suggested that in recent years there seems to have been a trend towards more disputed custody awards to fathers. They varied significantly regarding the extent of the trend and possible factors influencing the trend, but some reported an increase in the number of mothers with problems limiting their parenting abilities and an increase in the number of fathers expressing a willingness to accept responsibility. Illustrative comments included:

#### SOLE VERSUS JOINT CUSTODY

- Sole [legal] custody is awarded if one parent is incompetent or if there is abuse. Joint [legal] custody is awarded when parents' attitudes, skills, and communications permit co-parenting.
- Joint [legal] custody is awarded if parents have the maturity and commitment to child/children to work together in the best interests of the child/children.
- Sole custody is awarded if one parent is incompetent to parent. Joint legal custody is awarded if co-parenting capabilities are evident. Joint physical custody – NEVER!!
- Joint legal custody is awarded if the parents can co-parent/communicate. Joint physical custody is virtually never an option.
- *Always* sole physical custody; joint legal custody is awarded if there is good communication between the parents.
- Start with the presumption of joint legal custody and back off if there is a good reason (i.e., parents are unable to communicate, a dysfunctional parent).
- Sole custody if one parent is dysfunctional or if there is no/poor communication between the parents or if parental stability is an issue. Joint legal custody is an option if there is very good communication, but I award joint custody less often than most judges.
- Sole custody if one really bad parent and one superior parent or if the parents are unwilling to communicate. Joint custody preferable if parents can communicate.
- Joint custody if communications permit and there are not complicating factors. Inability to deal with conflict can preclude joint custody.

## ELEMENTS/CHARACTERISTICS OF A CUSTODIAL PARENT

- Day to day involvement.
- Stability.
- A parent who can provide stability and who demonstrates good parenting skills.
- A parent truly committed to the needs of his or her child.
- Commitment to child's current and future needs.
- Parent who "cares" and has the capacity to provide a quality, stable environment.
- Parenting skills, stability in home environment, evidence of child bonding.
- Parenting capabilities, relationship between child and parent, stable environment for the child.
- Responsibility of the parents to co-parent competently.
- Stability of child's environment – status quo for child.
- Stability and continuity of the child's environment.
- Parent's ability to meet needs of the child.

## AWARDS TO MOTHERS VERSUS FATHERS

- Historically, mothers have been awarded custody more frequently than fathers, but the numbers and percentages of awards to fathers have increased every year over the last five years. This may be because the incidence of incompetent mothers is increasing steadily.
- Mothers have been awarded custody more frequently than fathers, but there appears to be a trend towards more fathers' becoming responsible parents and more mothers' being incompetent parents.
- More mothers have been awarded custody than fathers, but this judge is finding an increasing number of mothers too stressed or otherwise incompetent to be effective parents.
- Awards are about even between mothers and fathers with no clear trend. Historically, the mother got possession because the father typically left family.
- Awards used to favor mothers but are now fairly equal.
- Custody awards have been about 70% to mothers and 30% to fathers, for cases in which there are no disqualifying factors.
- In the past, about 80% to 85% of the custody awards have been to the mothers with a gradual trend now towards equality.
- Historically, awards have been to mothers by a wide margin, with a gradual trend towards dads.
- Awards to mothers and fathers are becoming even. This reflects a mandated reality. Both parents are doing everything – work, housework, parenting.
- In contested cases, about 55% of the awards go to mothers with an apparent trend towards joint physical custody.
- Awards are becoming much more balanced between mothers and fathers. Gender issues are minimal in most disputed cases.
- If contested, about 75% of the awards go to fathers. Typically, fathers do not contest unless there is a problem with the mother. There is a trend towards improved parenting capabilities and commitment among partitioning fathers.

- For disputed cases, fathers are awarded custody more frequently than mothers.
- More mothers are awarded custody, but the trend is towards equality.
- Mothers are more frequently awarded small children because they more frequently have had a much greater role in the parenting of the child, have a greater demonstrated commitment to the child, and, typically, represent a more stable custody option.
- In contested cases for non-infants, awards are approximately equal – possibly a slight advantage to the fathers. For very small children, mothers are typically awarded custody.
- This judge would guess that in 60% of the cases custody is awarded to the fathers (and in 40% of the cases to the mothers) because courts are looking far more in-depth.
- Awards are about 50%-50% to mothers and fathers.

**6. Perceptions Related to the Most Difficult Types of Cases Decided.** *When asked to discuss the most difficult type of custody case that they are called upon to decide, judges' responses were mixed. However, most reported that deciding between two good parents was the most difficult.*

Judges typically were unwilling to discuss specific difficult cases. However, when allowed to generalize to the “type” of case that was most difficult (e.g., two bad parents versus two good parents), judges provided the following types of responses:

- In general, the most difficult cases are those cases between two incompetent parents who force the judge to try to find an alternative solution. Such solutions are not always available.
- The most difficult cases typically involve two good, committed parents with a relocation issue.
- The most difficult cases typically involve two bad parents. (Sitting in judgment of two *children* who have a child.)
- The most pleasant, difficult problem is two good parents.
- In general, two good, involved parents present the most difficult decisions.
- In general, two bad parents present the most difficult decisions. Another difficult situation occurs when children are close but strongly split as to custody.
- In general, two good parents present the most difficult decisions. However, the real “sweat zone” is when dealing with major child abuse cases.

**7. Validation of Quantitative Results.** *Judges generally concurred with the results of the mail survey. Where there appeared to be differences, most judges identified issues with how the mail survey questions may have been interpreted by the responding judges.*

In all of the focus groups and group interviews and a few of the later individual interviews, judges were presented available, preliminary results based on the mail surveys. They were asked to validate or challenge these results based on their overall experience with disputed custody cases between parents. The following statements summarize their reactions to these results.

Judges generally concurred with... *The quantitative and qualitative analyses conducted to date suggest that judges' decisions are substantially shaped by the common sense factors reflected in the Commonwealth's "best interests" guidelines. Judges consistently reported that the existing Code of Virginia factors are sufficient, exhaustive, and well structured, and, hence, promote good decision making in the interests of the child.*

Judges generally concurred with... *Children's needs and parenting competence, involvement, and effectiveness are the significant determinants of custody and visitation.*

Judges generally concurred with... *Parent's gender correlated to custody decisions in cases involving children under the age of six, but was not found to correlate to judicial decisions involving children six or older.*

Judges generally concurred with... *When children were 13 to 18 years of age, judges did sometimes [or were more likely to] consider children's preferences to be a major influence in the custody determination.*

Judges did not concur with... *Effectiveness of counsel and presence of expert witnesses do not appear to influence judicial decisions. Judges noted that if legal representation is balanced, lawyers facilitate a better solution, but do not tend to influence decisions. However, if legal representation is unbalanced, a good lawyer may be able to bring before the Court better evidence that better supports the issues from the perspective of that lawyer's client. Influencing the evidence provided can influence the decision, or as one judge noted, "The quality of evidence does affect the quality of the decision."*

All of the judges reviewing the preliminary results reported that all elements of the *Code of Virginia* were significant, because in any given case each could be critically important. They agreed that some elements are less frequently critical factors, but were adamant in stating that frequency should not be the basis for significance.

Judges generally concurred with the distribution of custody awards by parent gender and age of the child. These data suggest that younger children (less than six years old) are more likely to be awarded to mothers, but that children over six are awarded about equally to mothers and fathers. Judges generally concurred with the results reflecting the importance of the children's stated preferences, albeit they typically found the number of children under 12 years old having a moderate to major influence to be somewhat higher than expected.

Many judges found the percentage of profiled cases with legal representation to be higher than in their courtrooms, but some judges reported that these results did reflect their dockets. They generally concurred with the frequency of experts and other witnesses reported. There was no consensus on the frequency of custody evaluations or home studies.

Judges generally concurred with reported docket loads and the distribution of legal and physical custody awards to mothers and fathers.



## VII. Review of Virginia Case Law for the Years 1997-2000

The purpose of this section is to examine published opinions of the Virginia Supreme Court, the Court of Appeals, and the Circuit Courts during the past three years and to look at how these courts make decisions in contested custody cases between parents. Unlike other areas of the law, child custody cases do not readily lend themselves to categorization. In each case the facts are uniquely specific and it is the specific facts of each case that often determine the outcome. Nonetheless, this section will distill some of the common threads or themes from published cases for the past three years. Specifically, this section will examine the courts' treatment of the statutory factors in *Code of Virginia* § 20-124.3, which the Virginia General Assembly requires courts to consider in determining the best interests of the child in custody disputes. Second, this section will address how courts view stability and consistency with respect to child custody determinations as well as how animosity between parents affects the outcome of a case.

***Code of Virginia Section 20-124.3.*** *Code of Virginia* § 20-124.3 states, in part, *In determining the best interests of a child for purposes of determining custody...the court shall consider the following:...* Almost without exception, courts consistently apply the factors set out in *Code of Virginia* § 20-124.3. Many courts specifically apply all of the factors.

For example, the Court specifically addressed each of the factors in *Code of Virginia* § 20-124.3 in Fanning v. Fanning, 1999 WL 33263 (Va. Cir. Ct.). First, the Court discussed the perception that the child was a well-adjusted, happy four-year-old who was attached to both parents. Second, the Court noted that both parents were in good physical and mental condition. Third, the Court indicated that the child had been residing with the mother since birth and that the mother was very close to her daughter as she had been the primary caregiver since birth. The father had regular visitation every other weekend and twice a week at daycare. The father also had three to four weeks of visitation for ten days at a time each year. Fourth, the Court found that the child had the normal, ordinary needs of a four-year-old. Fifth, the Court found that the mother had played the role of providing day-to-day care and that the father had not. Both parents, however, would continue to be involved in the child's upbringing. Sixth, there was a finding that the mother showed more of a willingness to cooperate with the father in matters involving the child. Seventh, the child had no preference for either parent, as she was four years old. Eighth, there was no history of abuse by either parent. Ninth, the Court found there were no other factors to consider. In summary, the Court pointed out that the child was doing well in the current custodial arrangement and that stability and continuity were important, and therefore, the father's motion for joint custody was denied and sole custody was awarded to the mother.

Likewise, in Tilly v. Tilly, 1999 WL 378776 (Va. Cir. Ct.), the parties agreed that the three children should primarily reside with the mother, but the mother sought sole custody with supervised visitation to the father and the father wanted joint legal custody and reasonable visitation. The Court, in its opinion, specifically discussed each of the statutory factors in *Code of Virginia* § 20-124.3. The Court pointed out that the children were 8, 4, and 1 1/2 years old and in good physical and mental condition. Both parents were 37 and in good physical and mental condition. The mother had been the primary caretaker of the children on a daily basis and she had assessed and met the children's needs. The youngest child was so attached to his mother that separation from her caused anxiety. The father's relationship with his oldest child was distant, "more loving and clingy" with the middle child, and age appropriate with the youngest.

Fourth, the Court noted that the children had relationships with extended family members on both sides of the family. Fifth, and importantly, the Court found that the father had exhibited significant voluntary absences in the lives of the children and that the father presented no evidence to dispute his "significant absences" in his children's lives. Additionally, there was evidence that the father frequently consumed large amounts of alcohol. Sixth, the Court noted that the parents did not demonstrate an ability to cooperate in matters affecting the children. There was no evidence as to the preferences of the children. With regard to family abuse, the father testified as to the mother's temper and several attempts by her to kick him. After considering and weighing all of the factors, the Court found that sole custody to the mother was in the best interests of the children. See also, Piatt v. Piatt, 27 Va. App. 426, 499 S.E.2d 567 (1998); Vissicchio v. Vissicchio, 27 Va. App. 240, 498 S.E.2d 425 (1998); Chewning v. Chewning, 1998 WL 972065 (Va. Cir. Ct.); Wilson v. Wilson, 1998 WL 972315 (Va. Cir. Ct.).

Courts place a heavy emphasis on the factors set out in *Code of Virginia* § 20-124.3. In an analysis of every published opinion for the last three years, courts specifically discussed the factors in 75% of these cases.

**Stability and Continuity.** Courts also place a great deal of emphasis on stability and continuity for children who are the subjects of custody disputes between parents. In Roberts v. Roberts, 1999 WL 703046 (Va. Cir. Ct.), the mother and father married when the child was two months old. They lived together for about a year and then separated. The father was awarded temporary custody, with supervised visitation to the mother. Later, the parents agreed to share custody, alternating on a weekly basis; that agreement was entered by the Court. The Court, in awarding custody of the child to her father, pointed out that the child had spent most of her life with her father in the same place, with the same people, in a familiar environment.

In another case, custody had been given to the father by written agreement in Hanson v. Swygert, 1999 WL 378830 (Va. Cir. Ct.), eight years earlier. The mother was seeking full physical custody. Again, the Court concluded that the father had provided the children with stability and continuity and that it was not in the best interests of the children to change custody. See also: Roberts v. Roberts, 1999 WL 703046 (Va. Cir. Ct.) [The mother and father married when the child was two months old. They lived together for about a year and then separated. The father was awarded temporary custody, with supervised visitation to the mother. Later, the parents agreed to share custody, alternating on a weekly basis. In awarding custody of the child to her father, the Court pointed out that the child had spent most of her life with her father in the same place, with the same people, in a familiar environment.]; Chewning v. Chewning, 1998 WL 972065 (Va. Cir. Ct.) [Mother had quit work when the children were born and had been the primary caretaker.]; Piatt v. Piatt, 27 Va. App. 426, 499 S.E.2d 567 (1998) [Court found that the father was able to provide a more stable home environment than the mother.]; Fanning v. Fanning, 1999 WL 33263 (Va. Cir. Ct.).

**Animosity Between Parents.** In situations where a court finds that there is extreme animosity between parents to the extent that the parents are unable to cooperate with one another and communicate on issues relating to the children, courts tend to award sole custody to one parent over another, provided that the parent will not discourage or diminish the child or children's relationship with the other parent. The case of Chaszar v. Peschard-Sverdrup, 1999 WL 33266 (Va. Cir. Ct.) presents a set of facts where the father filed for a change in custody from the mother of the seven-year-old daughter. The Court found that while there had been a material

change in circumstances, a change in the custodial arrangement would not have been in the best interests of the child. The Court noted that while the mother did have her personal shortcomings (financial irresponsibility and indecisiveness), they did not have an adverse impact upon the child. The Court further stated that the child was doing well, that she had extensive contact with both parents, and that stability and continuity were very important. Possibly of key significance, the Court also stated, "If the father were to be granted sole custody with visitation to the mother, I feel that he would quite possibly do things to diminish the quality of Adrienne's contact with her mother." Chaszar v. Peschard-Sverdrup, 1999 WL 33266 (Va. Cir. Ct.). The Court then pointed out that the father had placed the child in activities without consulting the mother and that he had attempted to keep the mother from participating in these activities when the child was with her father.

Also, in Roberson v. Roberson, 2000 WL 520702 (Va. Cir. Ct.), the Court noted that there was a high degree of animosity between the parents and found that they could not cooperate with one another in order to resolve issues relating to the children. In awarding sole custody to the mother, the Court noted, "Any attempt to force the parties to cooperate in matters under a joint legal custody arrangement would, at this time, only foster instability in the healthy and close relationship that the children bear to each parent." Roberson v. Roberson, 2000 WL 520702, \*2 (Va. Cir. Ct.). The Court, in making its ruling stated, "While sole legal custody shall remain with the mother, the parents shall have shared physical custody of the children." Roberson v. Roberson, 2000 WL 520702, \*2 (Va. Cir. Ct.). The Court then went on to set out a visitation schedule in detail which granted visitation to the father every week-end from 6:00 p.m. Friday until 6:00 p.m. Sunday and every Wednesday evening from 5:00 p.m. until 7:30 p.m. Almost every holiday was essentially evenly divided and it is clear that the Court awarded sole custody to the mother because of the parents' inability to coordinate decision making, but that in setting the visitation schedule, the Court effectuated a shared physical custody arrangement.

In Austin v. Austin, 1999 WL 33246 (Va. Cir. Ct.), the Court affirmed, ratified, and incorporated a property settlement agreement, previously agreed to by the mother and father, awarding legal and physical custody of the child to the mother. The Court tactfully noted, "Absent the ability to work closely with one another, parents may quickly realize that the demands of compromise and conciliation, which are the spirit of collective decision making, may frustrate the concerned parental involvement which was sought through joint legal custody." Austin v. Austin, 1999 WL 33246 (Va. Cir. Ct.). See also: Donofrio v. Donofrio, 1999 WL 380430 (Va. Cir. Ct.) [Court discussed that the mother met the needs of the children and they were doing well and noted that the parents could not communicate; sole custody was awarded to the mother.]

**Conclusion.** Courts consistently apply and rely upon the factors set out in *Code of Virginia* § 20-124.3 in making child custody determinations. They also look to the greatest amount of stability and continuity for children in reaching decisions about child custody. Courts seem to award sole custody to one parent over another only in circumstances where there is animosity and/or an inability to communicate between the parents. In these types of situations, courts tend to award custody to the parent who has had the most care taking responsibility for the child or children and which will provide the most stability and to the parent that will foster a relationship between the child or children and the other parent.

## Table of Cases

### 2000 Cases

Roberson v. Roberson, 2000 WL 520702 (Va. Cir. Ct.)  
Spence v. Spence, 2000WL 626997 (Va. Cir. Ct.)

### 1999 Cases

Anderson v. Anderson, 29 Va. App. 673, 514 S.E. 2d 369 (1999)  
Austin v. Austin, 1999 WL 33246 (Va. Cir. Ct.)  
Brown v. Brown, 30 Va. App. 532, 518 S.E.2d 336 (1999)  
Chaszar v. Peschard-Sverdrup, 1999 WL 33266 (Va. Cir. Ct.)  
Donofrio v. Donofrio, 1999 WL 380430 (Va. Cir. Ct.)  
Fanning v. Fanning, 1999 WL 33263 (Va. Cir. Ct.)  
Hanson v. Swygert, 1999 WL 378830 (Va. Cir. Ct.)  
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In re: Timothy Malcolm Terrell Green, 1999 WL 138913 (Va. Cir. Ct.)  
Parish v. Spaulding, 257 Va. 357, 513 S.E.2d 391 (1999)  
Roberts v. Roberts, 1999 WL 703046 (Va. Cir. Ct.)  
Tilly v. Tilly, 1999 WL 378776 (Va. Cir. Ct.)

### 1998 Cases

Chewning v. Chewning, 1998 WL 972065 (Va. Cir. Ct.)  
Jones v. Jones, 26 Va. App. 689, 496 S.E.2d 150 (1998)  
Piatt v. Piatt, 27 Va. App. 426, 499 S.E.2d 567 (1998)  
Thurmond v. Gropper, 1998 WL 972130 (Va. Cir. Ct.)  
Vissicchio v. Vissicchio, 27 Va. App. 240, 498 S.E.2d 425 (1998)  
Wilson v. Wilson, 1998 WL 972315 (Va. Cir. Ct.)

## VIII. Summary of Psychological Literature on the Issue of Child Custody<sup>2</sup>

In their training, judges are exposed to research addressing the psychological impact of divorce on children. In their courtrooms, judges are confronted with expert witnesses addressing psychological considerations. Much of the content of § 20-124.3 has come from discussions in the Commission on Youth about the psychological impact of divorce on children. In an effort to build a foundation on which to base this study of influences on judges' custody decisions, it is useful and necessary to review this research literature.

Five factors have been found to contribute to the adjustment of children in divorced families or stepfamilies (Hetherington, Bridges & Insabella, 1998):

1. Children's developmental needs and stability of the child's environment,
2. Continuity of parent-child relationships and family composition,
3. Socioeconomic disadvantages resulting from the divorce,
4. Parents' perceived acute emotional distress resulting from the dissolution of the marriage and its impact on parenting competence, and
5. Disrupted family process including diminished co-parenting competencies and deteriorated inter-parent cooperation resulting from increased inter-parent hostility.

Children's Developmental Needs and Stability of the Child's Environment. The child's ongoing developmental needs and the child's resiliency against adversity are the primary components of a child's vulnerability in the face of risk (Hetherington, Bridges & Insabella, 1998). Several child variables have been found to influence children's adjustment to divorce, including the child's gender, age, and temperament or personality (Hetherington, 1989, 1991; Stolberg et al., 1987). Generally, boys display more of these adjustment problems than girls do (Hetherington, 1989), and the problems may be more evident with younger versus adolescent boys (Amato & Keith, 1991). A child with an easy temperament, internal locus of control, and positive self-concept is also more apt to seek and be more successful at finding emotional support inside and outside their own family to adjust to stressful situations (Werner, 1993). Studies on age as a determinant of post-divorce adjustment in children have not produced consistent results (Chess et al., 1983; Dancy and Handal, 1984; & Stolberg et al., 1987).

Continuity of Parent-Child Relationships and Family Composition. Generally, children from two-parent households (never divorced) are more competent in social relationships, in school, and emotionally than children from divorced families (Hetherington, Bridges & Insabella, 1998). This results, in part, because of the disrupted relationship with the non-custodial parent, generally the father (Amato & Keith, 1991). Limited post-divorce involvement with fathers who are effective parents has been found to have immediate and long-term negative effects on children (Stolberg, Mullett & Gourley, 1998). Children display immediate adjustment problems such as difficulties with their peers, poor self-esteem, and increased anxiety, depression and anger. Young adults who had limited time with their divorced fathers during childhood were found to have problems developing healthy young adult relationships.

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<sup>2</sup> See Appendix I for a complete review of the literature and a listing of the references cited in this section.

Stress and Socioeconomic Decline after Divorce. Many studies have examined the change in economic resources of custodial mothers as one of the main stressors in divorce (Amato & Keith, 1991; Furstenberg & Cherlin, 1991; Gould, 1998; Hetherington, Bridges and Insabella, 1998; Hetherington & Stanley-Hagan, 1999; Stolberg et al., 1987; Propst & Fries, 1989). In most cases, children remain with their mother (Furstenberg, 1990). This becomes important, considering that a woman's overall household income drops approximately 30 to 45 percent after divorce (Gould, 1998, Hetherington & Stanley-Hagan, 1999). In addition, less than 15 percent of divorced women receive spousal support or maintenance (Furstenberg & Cherlin, 1991).

Parental Distress and Parenting Competence. The emotional distress resulting from divorce affects parents' psychological and physical well being and, subsequently their parenting skills and their children's adjustment (Stolberg et al., 1987; Wallerstein & Kelly, 1980). The more difficulty a parent has adjusting to the divorce, the more difficulty the child will have, as well (Kline, Johnston and Tschann, 1991). Parents that are effective at coping with the stressors of divorce are likely to be more responsive to their children at a time when the children are most vulnerable. They are likely to be warm in interactions with their children and to communicate clearly and consistently. They have been found to be effective in their use of discipline, to monitor their children's behavior consistently, and to promote appropriately their children's independence.

Disrupted Co-Parenting and Increased Inter-Parent Hostility. Divorce affects family roles, functioning, and family relationships. Conflict and hostility between divorced parents has been shown to be one of the most influential variables affecting the child's adjustment to divorce (Stolberg et al., 1987; Wallerstein & Kelly, 1980). Generally, the greater the hostility levels during the breakup of the marriage, the poorer the joint parenting after the divorce (Camara & Resnick, 1988). Divorced parents who display substantial conflict are likely to communicate ineffectively with each other and, in turn, to be inconsistent with their children (Hetherington, Cox & Cox, 1978). They have been observed to minimize or actively subordinate the role of the other parent.

Children's adjustment to divorce is also substantially influenced by judges' decisions in child custody disputes between parents because these decisions have the potential to minimize or exacerbate the negative consequences of the five processes previously discussed. While the impact of deteriorated parenting effectiveness, increased inter-parent conflict, and disrupted parent-child relationships is understood, empirical investigations have done little to clarify the processes underlying judges' decisions in child custody disputes. Overall, the studies have demonstrated that judges use a mix of legal guidelines, legal process (or in-court) factors, and variables discussed in psychological research to determine custody. However, the studies' conclusions vary greatly (Kunin, Ebbsen & Konecni, 1992; Settle & Lowery 1982; Sorensen et al., 1997; Stamps, Kunen & Rock-Faucheux, 1997).

In 1970, the Uniform Marriage and Divorce Act (UMDA) was created by the National Conference of Commissioners on Uniform State Laws (UMDA, Editors of The Family Law Reporter, 1974). Moving toward more gender equality in custody matters, the UMDA adopted the best interest of the child (BIOC) standard for custody hearings (Buechler and Gerard, 1995). The parent who shows that the child's best interests are served in his or her custody obtains custody. The BIOC appendix contains five main criteria to be used in conjunction with the BIOC:

- (1) the wishes of the child's parent or parents as to his/her custody;
- (2) the wishes of the child as to his/her custodian;
- (3) the interaction and interrelationship of the child with his/her parent(s), siblings, and any other person who may significantly affect the child's best interests;
- (4) the child's adjustment to his/her home, school, and community; and
- (5) the mental and physical health of all individuals involved.

Ten states, including Virginia, use intermediate or supplemental rules in addition to the BIOC standard when making custody decisions. The remaining ten states use *either* the BIOC or the intermediate rules (Buechler & Gerard, 1995).

Psychological theory and research have played a substantial role in states' laws on custody decisions and have yielded a "good fit" between factors in states' codes and psychological considerations. For example, *Beyond the Best Interest of the Child* (Goldstein, Freud & Solnit, 1979) frequently was cited in judicial decisions for its stance on visitation and the discretion of the custodial parent (Jacob, 1988). All of the most salient elements of current psychological research on children's adjustment to divorce are present in today's legal statutes. Notable exceptions are the requirements in some states' laws for a presumption of joint custody over sole physical custody and for consideration of children's preferences (Hetherington, Bridges & Insabella, 1998; Maccoby & Mnookin, 1992). (See Table 15)

It is not sufficient to know the relationship between psychological variables and state law. It is also important to understand how judges reach decisions in child custody disputes between parents. Several studies have examined the factors important to judges when making custody decisions. Findings include child preference and counselor recommendations (Kunin, Ebbsen & Konecni, 1992; Sorensen et al., 1995), sex of the parent (maternal versus paternal) (Pearson and Ring, 1982-83; Stamps, Kunen & Rock-Faucheux, 1997), and presence of child or spousal abuse (Sorensen et al., 1995).

**Table 15**  
**Overlap of Legal and Psychological Variables**

| Psychological Variables  | Legal variables<br>(derived from codes or statutes)  | Agreement between legal and psychological variables   |
|--|--|---|
| Child's developmental needs and stability of the child's environment           | <p><b>BIOC 1:</b> Age, physical/mental condition, needs of the child</p> <p><b>BIOC 4:</b> The needs of child, consideration to child's other important relationships, including, but not limited to, siblings, peers, and extended family members</p>   | Yes   |
| Continuity of parent-child relationships and family composition                | <p><b>BIOC 3:</b> Relationship existing between parent and child, consideration to positive involvement with child's life, the ability to assess accurately and meet the emotional, intellectual, and physical needs of child</p> <p><b>BIOC 5:</b> Role each parent has played and will play in the future in care of the child</p> <p><b>BIOC 7:</b> The demonstrated ability of each parent to maintain a close and continuing relationship with child, and ability of each parent to cooperate in resolution of disputes regarding child</p> | Not completely; psychological literature is more conservative about the positive effects of joint custody   |
| Socioeconomic disadvantages resulting from divorce                             | <p><b>BIOC 3:</b> Relationship existing between parent and child, consideration to positive involvement with child's life, the ability to assess accurately and meet the emotional, intellectual, and physical needs of child</p>  | Yes   |
| Parental distress after divorce and its impact on parenting competence         | <p><b>BIOC 2:</b> Age, physical and mental condition of each parent</p> <p><b>BIOC 9:</b> History of family abuse</p>  | Yes   |
| Disrupted family processes including co-parenting and inter-parent cooperation | <p><b>BIOC 6:</b> The propensity of each parent to support child's relationship with the other parent</p> <p><b>BIOC 7:</b> The demonstrated ability of each parent to maintain a close and continuing relationship with child, and ability of each parent to cooperate in resolution of disputes regarding child.</p>   | Yes   |
| Not a primary element in children's psychological adjustment to divorce        | <p><b>BIOC 8:</b> The reasonable preference of the child</p>   | Psychological theory and research yield inconsistent conclusions on the importance of children's preference |



Unfortunately, these findings are difficult to summarize because of the wide range of methodologies used. More important, the procedures used in these studies further cloud the picture. In some studies, archival data from case files were used. Since much of what is said in court is never recorded directly into the case files, the data can be incomplete. In some, judges completed questionnaires about their opinions on specific issues involving custody decisions, but not about specific custody cases (Lowery, 1981; Settle & Lowery, 1982; Stamps, Kunen & Rock-Faucheux, 1997). Results from these studies may indicate abstract decision-making practices, but not concrete application of these strategies. Others surveyed GALs regarding their perceptions of the judge's decision-making strategy (Sorensen et al., 1995).

In conclusion, much is known about processes influencing children's adjustment to divorce. Among the most salient influences are the continued parent-child relationships and the custody decisions that are reached in disputes between parents. Psychological and *Code of Virginia* variables are substantially overlapping. The exact methods involved in judges' decision-making processes are not known. What elements of the *Code of Virginia* are given the greatest priority? Do in-court and process variables such as effectiveness of counsel and demeanor of the experts and litigants shape the judges' decisions? Does parents' gender influence the judges' decisions? **No empirical data at either the state or national level exist to answer these questions, which are the priority of this study.**

## IX. Integration of Results and Conclusions

Several types of data collection and analysis were applied to answering the following guiding questions for this research as outlined in Section III:

- How are judges using the factors defined in § 20-124.3? What are judges' perceptions about the importance of these factors as child custody decisions are being made?
- What are the significant factors and/or most frequently applied factors in judges' decision making with regard to the awarding of child custody when a marriage or other relationship with children is dissolved and custody of the children is at issue?
- To what extent does the presence and demeanor of lawyers, including GALs, expert witnesses, and other in-court professionals facilitate better decision making and influence decisions? Does the demeanor of litigants shape the judges' decisions?
- What are the results of judicial decisions for children's custody? Who is being awarded custody in custody disputes between parents? What are the main or dispositive factors in those awards?

The following tables present an integration of the results obtained from the mail surveys (Judges' Decision Profiles and General Surveys), the in-court research (interviews and focus groups), review of the Virginia case law, and review of the psychological literature on the issue of child custody. General conclusions are derived from these results.

***Use of the Code of Virginia.*** *Judges' disputed custody decisions are substantially shaped by the Code of Virginia's "best interests" guidelines. Judges reported that the Code of Virginia promotes good decision making and the best interests of the child because it permits sufficient flexibility to deal with the variations of the factors as they exist in each case and permits the application of common sense. Judges consistently noted that the existing Code of Virginia is exhaustive and, hence, sufficient.*

**Table 16**  
**Use of the Code of Virginia**

| <b>How are judges using the factors defined in § 20-124.3 Code of Virginia? What are judges' perceptions about the importance of these factors as child custody decisions are being made?</b> |   |
|---|---|
| <b>Mail Surveys</b>   | Judges apply all factors of the <i>Code of Virginia</i> § 20-124.3. Decisions fall within these factors.  |
| <b>In-Court Research</b>  | Judges consistently report that the existing <i>Code of Virginia</i> § 20-124.3 promotes good decision making and permits them the flexibility needed to rule in the best interests of the child. |
| <b>Case Review</b>  | Almost without exception, the courts consistently applied the factors set out in § 20-124.3. Many courts specifically apply all of the factors.   |
| <b>Psychological Literature</b>   | Not applicable.   |

In general, all sources of data produced consistent results. The judges are using the *Code of Virginia* and believe that it promotes good decision making.

**Elements of the Code of Virginia.** Empirical and in-court results suggest patterns in the frequency with which Code of Virginia § 20-124.3 factors are applied and influence results. However, in the in-court interviews and focus groups, judges typically noted that all factors were equally “significant” because each of the factors can be critical in any specific case. However, they also tended to agree that several factors influenced cases more frequently.

**Table 17**  
**Elements of the Code of Virginia § 20-124.3**

| <b>What are the most significant factors and/or most frequently applied factors in judges’ decision making with regard to the awarding of child custody when a marriage or other relationship with children is dissolved and custody of the children is at issue?</b> |  |
|---|--|
| <b>Mail Surveys</b>   | <p>Most important influences are children’s needs, as well as parental competence, effectiveness, and involvement.</p> <p>There is a significant correlation between parents’ gender and custody awards only for children under 6.</p> <p>Parents’ histories of significant mental health problems have a direct influence on judges’ decisions. Histories of family abuse and criminal records have an indirect influence on decisions.</p> <p>Children’s stated preferences for custody have a major influence on judges’ decisions in only 11% of the cases of children older than 13.</p>  |
| <b>In-Court Research</b>  | <p>Judges reported that assuring the stability of the child’s environment as well as the factual and less tangible indicators of parenting and co-parenting skills and parent commitment to the child’s development were the factors that most frequently influenced their decisions.</p> <p>The ability to communicate and cooperate in the interest of the child was the critical factor in awarding joint legal custody.</p> <p>Judges reported that they perceived custody awards to mothers of very young children typically correlated to seeking options to assure the stability and continuity of the child’s environment. Judges generally reported that they did not perceive gender advantage in custody awards involving older children.</p> <p>In several of the observed cases involving teenaged children, the preference of the child was a major deciding factor.</p> |
| <b>Case Review</b>  | <p>The common themes relating to influencing factors included assuring the stability and continuity for the child.</p> <p>Animosity between parents affecting communication and cooperation tended to influence decisions for sole custody versus joint custody.</p>   |
| <b>Psychological Literature</b>   | <p>Consistent with guidelines.</p> <p>Psychological theory is conservative about the positive effects of joint physical custody and is, thus, cautious about a presumption of joint custody.</p>   |

Again, all of the research components produced relatively consistent results for the factors influencing which parent was awarded custody and whether sole custody or joint custody was awarded.

**In-Court and Process Variables.** *Empirical results suggest little or no correlation between the presence of legal representation and the resulting custody decisions. In interviews and focus groups, judges expressed very mixed reactions as to the extent and manner in which the in-court and process variables such as effectiveness and demeanor of counsel, experts, and litigants shape the judges decisions.*

**Table 18  
In-Court and Process Variables**

| <b>Do in-court and process variables such as effectiveness and demeanor of counsel, experts, and litigants shape the judges' decisions?</b> |  |
|---|--|
| <b>Mail Surveys</b>   | The presence of effective lawyers and experts appeared to have little or no impact on the custody decisions in the cases reported by judges.   |
| <b>In-Court Research</b>  | <p>Judges consistently stated that having <u>good</u> lawyers on both sides facilitates resolution, having representation on only one side places judges in a potentially awkward and difficult position, and having two pro se litigants often leads to difficulties in getting needed information before the Court.</p> <p>Judges reported that GALs are not always needed, but that <u>good</u> GALs provide much better insight regarding the child's situation, needs, and relationships.</p> <p>These judges had very mixed reactions towards expert witnesses. They perceived that expert witnesses are most likely to be useful in cases involving allegations of abuse or cases in which the parents and the children have serious emotional and/or mental problems, but noted concerns related to the quality and bias of experts.</p> |
| <b>Case Review</b>  | Not applicable.  |
| <b>Psychological Literature</b>   | Not applicable.  |

There were mixed results between the quantitative and qualitative results concerning the influence of lawyers, but these results may be attributable more to interpretation and question structure than to actual differences in results. The Decision Profiles suggest no correlation between the presence of representation and the resulting decision. Interviewed judges wanted to modify that finding by saying that although lawyers were not essential, good lawyers helped provide the Court the information required to facilitate effective decision making and that the quality of the information available to the judge could influence decisions.

**Gender Influence on Custody Awards.** *There was a very strong correlation between a parent's gender and judges' child custody decisions in disputes involving children younger than six years old. Parents' gender did not appear to correlate to judicial decisions in disputes involving children six years old or older in the cases profiled for this study. Interviewed judges generally believed custody awards are slightly in favor of mothers, particularly for younger/infant children. However, most judges also perceived an increasing trend toward fathers' being awarded custody.*

**Table 19  
Gender Influence on Custody Awards**

| <b>What are the results of judicial decisions for children's custody? Who is being awarded custody in custody disputes between parents? What are the main or dispositive factors in those awards?</b> |  |
|---|--|
| <b>Mail Surveys</b>   | Parents' gender correlates to custody awards only for children under six years old. For older children, there is no correlation between the gender of the parent and the custody decisions.  |
| <b>In-Court Research</b>  | Mothers have been more likely to be awarded custody of very young or infant children, principally because they have typically been the primary care-givers and have represented the most stable option. In contested cases involving representation and older children, custody awards may have been about even or favorable for the father. |
| <b>Case Review</b>  | No basis for conclusion.   |
| <b>Psychological Literature</b>   | Not applicable.  |

In interviews and focus groups, judges tended to agree with the survey results relating to custody awards by gender. The majority of the interviewed judges believed that, historically, mothers have been awarded custody more often than fathers. Many judges perceived a trend towards equality in these decisions. Judges typically explained that mothers have been far more likely to be awarded custody of very young or infant children, typically because they have been the primary care giver and represented the most stable custody option. Some judges also noted that in contested cases involving legal representation and older children, custody awards have been about even or have favored the father, and that in recent years there seems to have been a trend towards more disputed custody awards to fathers. Judges varied significantly on the extent of the trend and possible factors influencing the trend, but some judges reported an increase in the number of mothers with problems limiting their parenting abilities and an increase in the number of fathers expressing a willingness to accept responsibility.

**APPENDIX I**

**SUMMARY OF PSYCHOLOGICAL LITERATURE ON THE ISSUE OF CHILD  
CUSTODY**

## CHILD CUSTODY AND CHILDREN'S PSYCHOLOGICAL ADJUSTMENT<sup>3</sup>

Over one million children are involved in their parents' divorce proceedings annually (Hoffman, 1991). In approximately 10% of these cases, judges are asked to make decisions on custody and living arrangements for children whom the judges have never met and about whom they know very little (Stamps, Kunen & Rock-Faucheux, 1997). This translates to approximately 6,800 contested divorces in Virginia each year (The Family Court Pilot Project, 1993).

Influences on judges' decisions in child custody and visitation disputes are poorly understood. Although legal statutes have been defined and psychological processes influencing children's adjustment to divorce are well known, the relative importance of these variables is not understood. This lack of clarity results from vagueness of state statutes regarding the priority of each *Code of Virginia* factor on custody and visitation decisions and the resultant freedom a judge is given when reaching his or her decision (Sorensen et al., 1997).

Empirical investigations of these processes have done little to clarify these decision-making processes. Overall, the studies have demonstrated that judges use a mix of legal guidelines, legal process (or in-court) factors, and variables discussed in psychological research to determine custody. However, the studies' conclusions vary greatly (Kunin, Ebbsen & Konecni, 1992; Lowery 1981; Pearson & Ring, 1982-83; Settle & Lowery 1982; Sorensen et al., 1997; Stamps, Kunen & Rock-Faucheux, 1997).

The methodologies employed in these studies further cloud the picture. In some, judges completed questionnaires about their opinions on specific issues involving custody decisions, but not about specific custody cases (Lowery, 1981; Settle & Lowery, 1982; Stamps, Kunen & Rock-Faucheux, 1997). Others survey guardians *ad litem* regarding their perceptions of the judge's decision-making strategy (Sorensen et al., 1995). Still others rely on archival data of actual custody cases to hypothesize judges' decision-making patterns (Kunin, Ebbsen & Konecni, 1992; Pearson & Ring, 1982-83). All of these strategies cast serious doubt on the validity on the conclusions drawn.

The purpose of the present study was to bridge the gap in the current custody decision-making methodology by surveying judges about their decision-making strategy on *specific* cases decided in the past 30 days. The current study provides valuable information for identifying the specific legal, process (in-court), and psychological variables used by judges in custody cases.

### PSYCHOLOGICAL VARIABLES AFFECTING CHILD ADJUSTMENT

Five factors have been found to contribute to the adjustment of children in divorced families or stepfamilies: 1) individual vulnerability and risk; 2) family composition; 3) stress, including socioeconomic disadvantages; 4) parental distress; and 5) disrupted family process (Hetherington, Bridges & Insabella, 1998).

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<sup>3</sup> Report prepared by Kevin Smith, Department of Psychology, Virginia Commonwealth University

### Individual vulnerability and risk

Individual vulnerability and risk refers to both the child's and the parents' resiliency against adversity (Hetherington, Bridges & Insabella, 1998). After a divorce, it is even more vital that the needs of the child be met. Children of divorce commonly experience anger, depression, guilt (Peterson & Zill, 1986), anxiousness, or fearfulness about their own well being (Nichols, 1989), and difficulty interacting with peers or coping with stress (Crosbie-Burnett, 1991). They may also exhibit antisocial, aggressive, and/or noncompliant behaviors (Hetherington & Stanley-Hagan, 1999).

Some children adapt better to divorce than others do. Individual characteristics that have been examined include the sex, age, and personality of the child (Hetherington, 1989, 1991; Stolberg et al., 1987). Generally, there are more negative effects of divorce on the adjustment of boys than girls (Hetherington, 1989; Gould, 1998), but they may be more evident with younger versus adolescent children (Amato & Keith, 1991). A child with an easy temperament, internal locus of control, and positive self-concept is more likely to seek out and find emotional support inside and outside their own family to adjust to stressful situations (Werner, 1993). Studies on age as a determinant of post-divorce adjustment in children have not produced consistent results (Chess et al., 1983; Dancy and Handal, 1984; & Stolberg et al., 1987). It also has been suggested that parents also possess personality characteristics that may influence the child's adjustment to divorce.

### Family composition

Generally, children from two-parent households (never divorced) are more competent than children from divorced families (Hetherington, Bridges & Insabella, 1998). But the loss of one parent, whether through divorce or death, is not the only factor that can contribute to the maladjustment of a child (Amato & Keith, 1991). A study of children's adjustment in families whose parents will later divorce indicated that these children already exhibited difficulties in adjustment several years previous to the divorce (Amato & Keith, 1991). Also, sustained family conflict has been shown to be a better predictor than family composition or emotional and academic performance (Peterson & Zill, 1986). In addition, the parents' ability to shield their children from stress seems to be independent from the structure of the family (Ellwood & Stolberg, 1991).

### Stress and socioeconomic decline after divorce

Many studies have examined the change in economic resources of custodial mothers as one of the main stressors of divorce (Amato & Keith, 1991; Furstenberg & Cherlin, 1991; Gould, 1998; Hetherington, Bridges and Insabella, 1998; Hetherington & Stanley-Hagan, 1999; Stolberg et al., 1987; Propst & Fries, 1989). In most cases, children still reside with their custodial mother (Furstenberg, 1990). This becomes important, considering that a woman's household income drops on average approximately 30% after divorce (Gould, 1998), but could drop as much as 45% (Hetherington & Stanley-Hagan, 1999). In addition, less than 15% of divorced women receive spousal support or maintenance (Furstenberg & Cherlin, 1991). Men generally see only a 10% decline in income after divorce (Hetherington & Stanley-Hagan, 1999).

Although socioeconomic decline after divorce has been identified as affecting a child's adjustment to divorce, there is disagreement regarding the strength of its effect. It seems that,



overall, economic distress is an important mediating variable in a child's adjustment to divorce, but does not primarily affect the success or failure of adjustment (Hetherington, Bridges and Insabella, 1998).

### Parental distress and the adjustment to divorce

Parental adjustment and stress from divorce can affect the parents' psychological and physical well being. Divorcing parents can experience health problems associated with a weakened immune system (Hetherington, 1989). Interpersonal problems may arise, such as lack of a supportive social network. A study by Spanier & Castro (1979) indicated that a lack of social support appeared to increase the difficulties with divorce adjustment. In the same study, over half of the respondents drifted away from many of their close friends after the divorce – especially if these were friends of the ex-spouse as well. In another study, 95% of divorced women did not know what social resources they could utilize for emotional support (Everly, 1977). Divorced parents also can experience high levels of anger associated with their divorce (Dreman, Spielberger & Darzi, 1997; Arendell, 1995). Other psychological problems experienced by divorced parents include depression, anxiety, and irritability (Hetherington, 1989).

It seems that it is not the type of parental stress that can influence a child's adjustment to divorce, but how the stress affects the parent-child relationship and parenting competence (Stolberg et al., 1987; Wallerstein & Kelly, 1980). The more difficulty a parent has in adjusting to the divorce, the more difficulty the child will have, as well (Kline, Johnston and Tschann, 1991). Parents that are more effective at coping with the stressors of divorce are more likely to be more responsive to their child at a time when the child is most vulnerable.

### Family process and its effects on adjustment to divorce

Divorce has an extreme effect on family roles, family functioning, and interpersonal relationships within the family. Conflict with hostility between divorced parents has been shown to be one of the most influential variables affecting the child's adjustment to divorce (Stolberg et al., 1987; Wallerstein & Kelly, 1980). Generally, the greater the level of hostility during the breakup of the marriage, the poorer the parenting (Camara & Resnick, 1988). Even pre-divorce conflicts about the child directly affect the child's adjustment to divorce (Kelly, 1993).

Ongoing conflict between parents after divorce and a lack of co-parenting skills and efforts also can amplify the influence of parental stress and socioeconomic instability. As a result, children who are exposed to conflict between parents may experience outcomes such as depression and lower academic performance (Hetherington, 1989). In addition, marital conflict and weak family alliances also are associated with boys' externalizing behavior (Emery, 1988) and higher levels of child behavior problems (Minuchin, 1974).

Parenting competence involving discipline and childrearing is also a family process that changes after divorce. Divorced parents are more likely not to communicate effectively with each other, and to be more inconsistent with their children (Hetherington, Cox & Cox, 1978).

Environmental stability is also important to a child's healthy adjustment after divorce. As a child struggles with the emotional changes of divorce, it is important that there is some consistency in

his or her physical environment. The familiar surroundings of home and school, as well as access to friends and extracurricular activities, can help to ease the transition.

One factor that can increase or decrease environmental stability is the addition of stepparents. Almost half of all new marriages involve a remarriage for at least one member; one in four marriages contain two previously divorced partners (Saxton, 1996). Stepfamilies struggle to form affectionate bonds among new family members, and to define and maintain both family boundaries and socially defined role relationships (Bray, 1992).

In conclusion, the five factors that have been found to contribute to the adjustment of children in divorced families or stepfamilies are: 1) individual vulnerability and risk; 2) family composition; 3) stress, including socioeconomic disadvantages; 4) parental distress; and 5) disrupted family process (Hetherington, Bridges & Insabella, 1998). Interwoven into these key points are important factors such as the needs of the child, parenting competence, the ability of each parent to co-parent and to handle conflict between each other, and the stability of the child's environment.

#### LEGAL CODES IN THE CUSTODY DECISION-MAKING PROCESS

In 1970, the National Conference of Commissioners on Uniform State Laws created the Uniform Marriage and Divorce Act (UMDA) (UMDA, Editors of The Family Law Reporter, 1974). Moving toward more gender equality in custody matters, the UMDA adopted the best interest of the child (BIOC) standard for custody hearings (Buechler and Gerard, 1995). The parent that shows that the child's best interests are served in his or her custody obtains custody. The BIOC appendix contains five main criteria to be used in conjunction with the BIOC:

- (1) the wishes of the child's parent or parents as to his/her custody;
- (2) the wishes of the child as to his/her custodian;
- (3) the interaction and interrelationship of the child with his/her parent(s), siblings, and any other person who may significantly affect the child's best interests;
- (4) the child's adjustment to his/her home, school, and community; and
- (5) the mental and physical health of all individuals involved.

In 30 states, judges' only legal code is the BIOC standard (Buechler & Gerard, 1995). In addition, 10 states use intermediate standards in addition to the BIOC standard when making custody decisions. The remaining 10 states use *either* the BIOC or the intermediate rules (Buechler & Gerard, 1995).

Intermediate standards have been championed to assist judges in defining the BIOC and to put more weight on certain aspects of the code. The tender years presumption states that unless a mother is proven to be unfit, a child of "tender years" (infancy to possibly teen years) is better off with the mother (Melton, Petrila, Poythress & Solbogin, 1997). It is generally thought that this standard is not widely used and, to date, 45 states and the District of Columbia have laws and/or statutes supporting a gender-neutral decision-making process (Buechler & Gerard, 1995).

The primary caretaker standard states that the parent who was the primary caretaker of the child during the marriage should have custody (Buechler & Gerard, 1995). In a 1981 case in West

Virginia, the Court defined the primary caretaker as one who principally is responsible for the day-to-day child caring and educational needs of the child (Garskav & McCoy, 1981). Advantages of this standard include its focus on past parental performance rather than only future parenting potential, and its relative ease to track (Buechler & Gerard, 1995). Although this standard is more easily quantifiable than the psychological parent standard, it gives judges little guidance to assess the *quality* of the interactions.

Consideration of joint custody involves both parents' right to make decisions for the child; it does not necessarily refer to joint *physical* custody, although this is often the case (Maccoby & Mnookin, 1992). The option of joint custody as a custodial arrangement exists in all states (Stamps, Kunen & Rock-Faucheux, 1997). Nineteen states have statutes that include a presumption or preference for joint custody (Buehler & Gerard, 1995).

Other standards have been proposed or are available to judges when reaching these decisions. The psychological parent preference, suggested by Goldstein, Freud, and Solnit (1979), states that the parent who has the strongest bond or attachment with the child should receive custody. This all-or-nothing standard fails to consider cases in which both parents are strongly bonded to the child (Melton, Petrila, Poythress & Solbogin, 1997). The approximation preference standard suggests that the child's post-divorce living arrangements should be as close as possible to the pre-divorce living arrangements (Folberg, 1991). Although this standard may minimize change in a child's life, the quality of the child's living arrangements before divorce must be considered.

#### THE CONCURRENCE OF CODE AND PSYCHOLOGICAL INFLUENCES

In some instances, it is thought that psychological theory has helped to play a role in judicial custody decisions. For example, Goldstein, Freud, and Solnit's 1979 book entitled, *Beyond the Best Interest of the Child*, was frequently cited in judicial decisions and the legal literature for its stance that a child's visitation with the non-custodial parent should be left to the discretion of the custodial parent (Jacob, 1988). There is evidence that, overall, the current post-divorce child adjustment theories about vulnerability and risk, family composition, stress (including socioeconomic disadvantages), parental distress, and disrupted family process are present in today's legal codes and statutes (see Table 20).

**Table 20**  
**Overlap of Legal Variables and Psychological Variables**

| Psychological variables           | Legal variables<br>(derived from codes or statutes)   | Do legal and psychological<br>variables agree?   |
|-----------------------------------|---|--|
| Individual vulnerability and risk | "The need to consider the mental (and physical) health of all involved" (Appendix of the BIOC).   | Yes  |
| Family composition                | Many states include a <i>presumption or preference</i> for joint custody.   | Not completely; psychological literature is more conservative about the positive effects of joint custody. |
| Socioeconomic factors             | Parents' ability to provide a stable environment for the child, and the probability that the child's physical needs will be met           | Yes  |
| Parental distress after divorce   | The BIOC Appendix stresses the importance of the mental health/mental stability of all involved in the custody proceeding.                | Yes  |
| Family Process                    | "Friendly parent" factor used in 22 states, and the BIOC Appendix cites the importance of the relationships between all parties involved. | Yes  |

With regard to the individual vulnerability and risk factor, the Appendix of the BIOC addresses the need to consider the mental (and physical) health of all involved. However, judges are not given specific instructions about the manner in which mental health should be assessed. One would assume that judges use legal process variables as well to determine how parents are coping with the divorce.

In looking at the effect of family composition on child adjustment, legal codes and statutes tend to favor joint custody, contrary to psychological literature. Nineteen states have statutes that include a presumption or preference for joint custody (Buechler and Gerard, 1995). Psychological research has not suggested that joint custody is *never* effective; in divorces in which the parents cooperate and have low levels of conflict, joint custody may be the best answer. However, research has indicated that this scenario is the exception, and not the rule.

Socioeconomic factors can fall under many different headings in legal codes, varying from state to state. Judges can consider the economic status of the parents when assessing the potential for a stable environment for the child, and the probability that the child's physical needs will be met. No evidence was found that suggests that the parent with the most money gets the child. Rather, economics may become a legal variable when the child's basic needs cannot be met because of one parent's lack of financial resources.

The effect of parental stress on child adjustment is covered in various legal codes, although not specifically cited as "parental stress." The BIOC Appendix stresses the importance of the mental health of all involved in the custody proceeding; in some states, the term "mental instability" is used (Atkinson, 1984). As with the individual vulnerability and risk factor, mental health and mental instability are vague terms, and judges are not always given specifics regarding how they should be assessed. Some states further define mental health to include parenting ability, such as the intelligence, temperament, and training to deal with special needs of the child. The specific levels of parental training or intelligence and the type of temperament needed to parent a child

remain unanswered. Again, it seems not to be a lack of codes, but an absence of specific guidelines for judges to follow when considering these codes.

Family process, one of the more important variables in determining a child's adjustment to divorce, is covered in various factors in the legal code. The previously mentioned "friendly parent" factor -- the parent that is seen as most cooperative with the other parent -- is used in 22 state statutes when considering custody decisions in contested cases (Buechler & Gerard, 1995). Various states mention the importance of a stable environment. A strong, positive relationship between the divorced parents can contribute to this. In addition, the BIOC Appendix cites the relationships between all parties involved as an important factor in determining child custody.

### HOW DO JUDGES MAKE CUSTODY DECISIONS? IN-COURT PROCESS VARIABLES AND METHODOLOGICAL CONSIDERATIONS IN ASSESSING INFLUENCES ON JUDGES' DECISIONS

The vagueness of the child custody legal codes has been an impetus for research about judges' decision-making processes in child custody cases. Findings from these studies are difficult to generalize because of the wide range of methodologies used.

In some studies, archival data from case files were used. Since much of what is said in court is never recorded directly into the case files, the data can be incomplete. Others used questionnaires about judges' opinions on specific issues involving custody decisions, but not about specific custody cases. Results from these studies may indicate abstract decision-making practices, but not concrete application of these strategies. GALs were surveyed in other studies regarding their perception about the judge's decision-making strategy.

One overall methodological weakness of all the studies is that the judges were never surveyed directly about *specific* court cases. Therefore, findings may indicate abstract decision-making practices, but not concrete application of these strategies. The various time frames in which previous studies have been conducted also make summarizing their findings difficult, because attitudes and laws regarding child custody have changed over the years. This may be one reason why some studies have conflicting results.

Despite these limitations, factors that did emerge as affecting judges' decision making in child custody cases include the use of: 1) process variables, such as in-court appearance and demeanor of the parents, their legal representation, and expert witnesses such as mental health professionals and GALs (Kette and Konecni, 1996; Settle & Lowery, 1982); 2) legal variables found in state codes or statutes (Sorensen et al., 1997); and 3) psychological variables about children's adjustment to divorce (Lowery, 1981; Kunin, Ebbsen and Konecni, 1992). However, many of these variables are not accessible to the judge. Sometimes one or both parents do not appear in court, and rarely are expert witnesses such as mental health professionals or GALs used. In these cases, the judge is forced to base his or her decision on incomplete data.

It has been thought that judges utilize non-evidentiary elements in their verdicts (Kette and Konecni, 1996). These elements, or legal process variables, in custody cases can involve factors such as the in-court presence and demeanor of each parent, and their cooperation during previous court dates.

Some statutes specifically focus on the credibility and demeanor of parents' legal representation, any expert witnesses, court appointed representatives (such as a GAL), third parties that appear in the courtroom, and effectiveness of the evidence. Some statutes also specifically instruct judges to consider the effectiveness of the evidence presented to support the basic and special needs of the child, and the parents' competency to parent and co-parent.

While it is thought that judges would consider process or in-court factors on their own, not all states specifically include in-court factors in their custody decision guidelines. The interpretation of these variables and their weight on the custody decision may not be specifically expressed in the state code and, therefore, would be at the judge's discretion.

## CONCLUSION

Deciding the future care of a child in a custody case can be one of the most difficult and important decisions a judge will have to make. Literally, a child's future well being is at stake. To assist in the decision-making process, judges in all 50 states have at their disposal statutes created to promote the best interest of the child (BIOC), and some states provide additional intermediate standards to help interpret the BIOC (Buechler & Gerard, 1995). Overall, these legal variables reflect the factors identified by the psychological literature as vital in influencing the healthy adjustment of a child after divorce: 1) individual vulnerability and risk; 2) family composition; 3) stress, including socioeconomic disadvantages; 4) parental distress; and 5) disrupted family process (Hetherington, Bridges & Insabella, 1998). A notable exception to the psychological literature is state code that contains a presumption or preference for joint custody over sole custody (Hetherington, Bridges & Insabella, 1998; Maccoby & Mnookin, 1992). Other vital factors include the needs of the child, parenting competence, the ability of each parent to co-parent and to handle conflict between each other, and the stability of the child's environment.

Judges also utilize process or in-court variables to determine custody. These variables include the in-court credibility factors of all the parties involved, such as the parents, legal representation, and any expert witnesses (Settle and Lowery, 1982). Frequently, however, the in-court variables are incomplete. Parents may not attend the court proceedings. Expert witnesses may not be utilized, and necessary and relevant evidence may not be presented. Therefore, the judge is left to make a decision without an opportunity to consider the entire picture.

Several studies have examined the factors important to judges when making custody decisions. Findings range from child preference and counselor recommendations (Kunin, Ebbsen & Konecni, 1992; Sorensen et al., 1995), gender of the parent (maternal versus paternal) (Pearson and Ring, 1982-83; Stamps, Kunen & Rock-Faucheux, 1997), and presence of child or spousal abuse (Sorensen et al., 1995).

Unfortunately, these findings are difficult to summarize because of the wide range of methodologies used. In some studies, archival data from case files were used. Since much of what is said in court is never recorded directly into the case files, the data can be incomplete. Other studies asked judges about their overall decision-making strategies, but not about specific cases. Results from these studies may indicate abstract decision-making practices, but not concrete application of these strategies. In this study, we hope to combine the strongest methodological aspects of past research by asking judges about their decision-making strategies

on specific cases heard no more than 30 days preceding the surveys. This study will be valuable for identifying the specific legal, process (in-court), and psychological variables used by judges in custody cases.

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## **APPENDIX II**

### **CONCEPTUAL STRATEGY AND RESEARCH DESIGN**

(Appendix II reflects the original research design for this study)

## **OVERALL MODEL/INSTRUMENTATION OF PROJECT**

The conceptual framework for this research includes analyzing the results of several sources of data collection. One survey instrument, the Judges' Decision Profile, focuses on decision-making factors for specific cases and will provide quantitative information on how these factors influence all disputed custody cases. This survey provides the quantitative data required to identify the variables that have a significant influence on the judges' decisions and the relative strength of those significant variables. The second instrument, the General Survey, provides general, quantitative information on judges' caseloads, the numbers of cases that reached settlements, and the judges' orders on legal and physical custody. The third procedure, interviews with judges after they have heard a case and after the researchers have observed the proceedings, provides an opportunity to collect rich, qualitative information concerning the decision-making process. In this last procedure, questions for the interview will come from a list of open-ended questions sent to the judges before they are interviewed and from a structured observation sheet completed by the observer of the court proceeding. The following discussion outlines the data collection processes, the types of data collected, and the roles that these data may play in the ultimate analytical process.

### **IN-COURT RESEARCH**

**I. INTERVIEW WITH JUDGE.** The purpose of the interview is to gain insight from judges on the processes underlying the judicial and decision-making process. Through semi-structured interviews, the researchers hope to augment the quantitative data obtained by the surveys and gain a unique opportunity to solicit the judges' perspectives about the strengths and weaknesses of the process.

Thirty-five judges from across the state from both Juvenile and Domestic Relations Courts and Circuit Courts will be selected and requested to participate in a scheduled interview. After the interview and court observation are scheduled, each judge will be sent a list of questions. The attached list reflects illustrative questions. Judges will also be asked to consider aspects of the court process about which they have not been asked, that they consider strong and without problem, as well as aspects they consider problematic and in need of change. Interview questions will come from the attached list, from observations related to the in-court case that is observed, and from aspects of the decision-making process not previously considered but deemed important by the judge.

Data collected in the interviews will generally be non-quantifiable. It is anticipated that observations yielded from the interview process will primarily convey process information. Responses will be used to highlight recurrent themes conveyed by the judges, as well as support for the empirical survey data. Each theme will be categorized along dimensions of strength of the current system, weakness in the current system, possible improvement in the process, and general observation.

**II. IN-COURT OBSERVATION.** The purpose of the in-court observation of a case is to capture insights into the actual courtroom proceedings and the decision-making process for a

specific case. In this context, the data collected by the observer will provide additional directions for the subsequent interview of the presiding judge and a vehicle for capturing a broad range of in-court and case file information that may be of interest, but may not directly be usable as decision-profiling variables.

The In-Court Observer instrument provides two collection formats. One parallels the Judges' Decision Profile to direct the observer's thinking about the process and about the upcoming interview. The second instrument provides a "check list" of the Data Element Framework to allow the observer a simple vehicle to note and annotate factors observed during the case or related file review. Data obtained in the observations will not be used in the analysis but may be included in the study database.

## THE SURVEYS

Influences on judges' decisions in custody disputes have been found to reflect three major categories of variables: elements of the *Code of Virginia*, psychological influences on children's adjustment to divorce, and factors that are peripheral to the central "facts of the case". *Code of Virginia* and psychological variables are substantially overlapping and include the needs of the child, parenting competence, parent adjustment, and environmental stability. Peripheral variables include presence of legal counsel, credibility of witnesses, and the quality of the evidence.

### III. JUDGES' DECISION PROFILE:

The purpose of the Judges' Decision Profile is to provide objective and empirical information about specific influences on a judge's decision for a specific case. Influences to be rated include all of the elements in the *Code of Virginia* pertaining to custody, the psychological processes that have been demonstrated to influence a child's adjustment to divorce, and variables that are peripheral to the statutory and adjustment concerns (e.g., credibility of the participants, prior history with the family, existence and credibility of evidence/information presented, etc.).

Questions on the survey are of two types: objective descriptors of the case (age of children, number of children, conveyed competence of the parents, etc.) and the judge's subjective rating of the importance of each variable on his or her decision. Surveys will be sent or provided to all Circuit and Juvenile and Domestic Relations Court judges in the Commonwealth. Judges will be asked to complete one survey, describing the most recent case for which they made a decision and that was heard in the last thirty days. Where deemed appropriate by the judge and the observer, this instrument can be used as part of the interview process to help capture the judge's decision process in the observed case. This component of the data collection process should yield 200 - 250 completed surveys.

Data from this survey will provide four types of information. First, they will identify which variables and combinations of variables are most likely to be statistically significant influences on all judges' decisions and the relative importance of each significant variable in relation to the other. Second, the large number of surveys will allow analysis of influences broken down by sub-groupings of cases, based on the secondary variables included in the survey. For example,

influences for families with only young children can be investigated. So, too, can gender of child, special needs of the child, and child's stated preference be used to select sub-groups. Finally, descriptive information on the cases will allow us to provide descriptions of the kinds of cases heard by judges, the kinds of cases that reach an agreement out of court, the availability of information to the judge upon which he/she can base the decision, and litigants' use of legal representation, GALs, and expert witnesses.

#### **IV. GENERAL SURVEY**

Judges will be asked to complete the brief General Survey after completing the case-specific Decision Profiles. The General Survey also permits a venue for addressing key questions on

- the actual number of disputed custody cases,
- the number of filed cases settled out of court versus *decided* without settlement,
- judges' attitudes towards motivating parties to settle,
- judges' orders on legal and physical custody, and
- judges' approaches to communicating their findings.

**APPENDIX III**

**SURVEYS AND INTERVIEW QUESTIONS**



**SUPREME COURT OF VIRGINIA  
THIRD FLOOR**

**100 NORTH NINTH STREET  
RICHMOND, VIRGINIA 23219-2334**

**(804) 786-6455**

**FACSIMILE**

**(804) 786-4542**

**CLERK  
DAVID B. BEACH**

**EXECUTIVE SECRETARY  
ROBERT N. BALDWIN**

**ASST. EXECUTIVE SECRETARY  
FREDERICK A. HODNETT, JR.**

**CHIEF STAFF ATTORNEY  
JOHN THOMAS BRUCE**

**REPORTER OF DECISIONS  
KENT SINCLAIR**

**CHIEF JUSTICE  
HARRY L. CARRICO**

**JUSTICES  
A. CHRISTIAN COMPTON  
ELIZABETH B. LACY  
LEROY ROUNTREE HASSELL, SR.  
BARBARA MILANO KEENAN  
LAWRENCE L. KOONTZ, JR.  
CYNTHIA D. KINSEY**

**SENIOR JUSTICES  
RICHARD H. POFF  
ROSCOE B. STEPHENSON, JR.  
HENRY H. WHITING**

March 13, 2000

To: Circuit Court Judges  
Juvenile and Domestic Relations District Court Judges

From: Robert N. Baldwin *RB*

Subject: Project to Study Judicial Decision-Making in Custody Disputes Between Parents

The 1999 Session of the Virginia General Assembly directed the Office of the Executive Secretary of the Supreme Court of Virginia to conduct a study relating to judges' decision-making in child custody cases which involve disputes between parents. This direction was a result of numerous legislative proposals in recent years which have sought policy changes in the laws governing the resolution of custody and visitation disputes between parents. This study is designed to collect empirically-based data based on your decisions in actual disputed custody cases as well as to gather information from interviews with several of you which will inform policy and legislation in this complex area of the law.

This Office has awarded a contract for this study to Research Dimensions, Inc. of Richmond, Virginia. A representative of Research Dimensions will be in contact with you concerning your participation in this study through the completion of surveys and, for some of you, courtroom observations and in-person interviews. Others may be asked to read and respond to a preliminary report on the study. Your individual responses will be kept confidential and will only be reported in aggregate form. The Office of the Executive Secretary would appreciate your cooperation with this study, so that we may fulfill our obligations to report to the General Assembly later on this year. We will share with each of you the results of this research effort.

If you have any questions about this work, you may call me or be in touch with Lelia Hopper at 804-786-9546. Thank you for your assistance.



1108 E. Main Street, Suite 1000  
Richmond, Virginia 23219  
(804) 643-1082 (804) 643-1085 Fax

## RESEARCH DIMENSIONS INC.

Date \_\_\_\_\_

Judge \_\_\_\_\_  
Court \_\_\_\_\_  
District \_\_\_\_\_  
Address \_\_\_\_\_  
Address \_\_\_\_\_

Dear Judge \_\_\_\_\_

This letter requests your participation in a research study that was authorized by the Virginia General Assembly and is being conducted by Research Dimensions, Inc. (RDI) under a contract with the Supreme Court of Virginia. A memorandum of introduction from Robert Baldwin, Executive Secretary, Supreme Court of Virginia, is attached.

The purpose of this study is to explore judges' decision-making in child custody disputes between mothers and fathers. The information that this study seeks is important because it will provide the members of the Virginia General Assembly with empirical data to utilize in future policy decisions. Your requested participation involves completing a questionnaire and, possibly, permitting observation of a disputed custody case in your courtroom.

First, we ask that you complete a questionnaire that relates to the most recent disputed custody case between parents about which you have reached a decision. Please complete this questionnaire by March 31. Piloting of the instrument by several judges indicates that the instrument takes about ten minutes to complete. *No identifying demographic information will be connected with your responses to insure that your participation is completely confidential.* We anticipate a second mailing of this questionnaire to be completed for a case that you decide after 31 March.

Second, several courts will be selected for in-court observation of an appropriate case. If your court is selected, an RDI representative will call you to request that an authorized member of the research team be permitted to observe a disputed custody case in your courtroom. We ask that, following the conclusion of that case, you take a moment to meet with the person who observed the case.

Thank you in advance for your willingness to contribute to this project. I appreciate the time constraints that face the courts and understand that your plate is full. A copy of the questionnaire and a postage-free, pre-addressed envelope are enclosed. Please do not hesitate to call me at 804 643-1082 or e-mail me at [rdim@erols.com](mailto:rdim@erols.com) if you have any questions.

Sincerely,

Robert L. Maust  
Vice President

**JUDGES' DECISION PROFILE**  
(Litigated cases between parents only)

*Please take a moment to complete the attached survey, describing the most recent child custody case that you heard. The case must have been decided within the last thirty days. Do not consider cases that reached an out of court settlement.*

**I. NEEDS OF THE CHILD**

1. Dispute relates to children in the following age groups? (Indicate the number of children in each category)

Birth-2 \_\_\_\_\_ 3-5 \_\_\_\_\_ 6-12 \_\_\_\_\_ 13-18 \_\_\_\_\_

Not presented \_\_\_\_\_ Don't remember \_\_\_\_\_

2. Children's gender? (Indicate the number of children in each category)

Girls \_\_\_\_\_ Boys \_\_\_\_\_ Not presented \_\_\_\_\_ Don't remember \_\_\_\_\_

*For the following statements, circle your rating of factors involving the needs of the child.*

*Y: yes N: no NP: not presented DR: don't remember*

- |  |   |   |    |    |
|--|---|---|----|----|
| 3. Did any of the children have exceptional physical needs?  | Y | N | NP | DR |
| 4. Did any of the children have any behavioral, emotional, or learning problems?   | Y | N | NP | DR |
| 5. Would the requested custodial determination or change in custody have adversely impacted the continuity of the child's: |   |   |    |    |
| a. Primary relationships (parents, siblings)   | Y | N | NP | DR |
| b. Secondary relationships (extended family, friends)  | Y | N | NP | DR |
| c. Community relationships (school, athletic, religious groups)  | Y | N | NP | DR |
| 6. Did the child directly indicate to you a custody preference?  | Y | N | NP | DR |
| What other parties, if any, communicated to you the custody preference of the child _____                                  |   |   |    |    |

**II. EACH PARENT'S HISTORY AND COMPETENCIES**

7. Parents' ages: Mother \_\_\_\_\_ Father \_\_\_\_\_ Not Presented \_\_\_\_\_ Don't Remember \_\_\_\_\_  
(Please indicate approximate age)

**For the following statements, circle your rating of factors involving each parent's history and competencies.**

**Y: yes N: no NP: not presented DR: don't remember**

8. History of child abuse by parent  
 Mother: Y N NP DR  
 Father: Y N NP DR
9. History of spousal abuse by  
 Mother: Y N NP DR  
 Father: Y N NP DR
10. Criminal record of parent  
 Mother: Y N NP DR  
 Father: Y N NP DR
11. Physical conditions limiting ability to parent  
 Mother: Y N NP DR  
 Father: Y N NP DR
12. Mental/emotional conditions limiting ability to parent  
 Mother: Y N NP DR  
 Father: Y N NP DR

**For the following statements, circle your rating of factors involving each parent's history and competencies.**

**S: strong A: adequate W: weak NP: not presented DR: don't remember**

13. Current role in care of child  
 Mother: S A W NP DR  
 Father: S A W NP DR
14. Past role in care of child  
 Mother: S A W NP DR  
 Father: S A W NP DR
15. Consistency in parenting the child  
 Mother: S A W NP DR  
 Father: S A W NP DR
16. Ability to anticipate future needs of the child  
 Mother: S A W NP DR  
 Father: S A W NP DR
17. Commitment to the future care of the child  
 Mother: S A W NP DR  
 Father: S A W NP DR
18. Good parenting decisions, responsibility and capacity  
 Mother: S A W NP DR  
 Father: S A W NP DR

**S: strong A: adequate W: weak NP: not presented DR: don't remember**

|  |   |   |   |    |    |
|--|---|---|---|----|----|
| 19. Ability to identify and meet child's normal and exceptional needs  |   |   |   |    |    |
| Mother:  | S | A | W | NP | DR |
| Father:  | S | A | W | NP | DR |
| 20. Effective and appropriate use of discipline/control, warmth and communication                                      |   |   |   |    |    |
| Mother:  | S | A | W | NP | DR |
| Father:  | S | A | W | NP | DR |
| 21. Willingness to put child's needs above his/her own   |   |   |   |    |    |
| Mother:  | S | A | W | NP | DR |
| Father:  | S | A | W | NP | DR |
| 22. Overall home environment provided by parent  |   |   |   |    |    |
| Mother:  | S | A | W | NP | DR |
| Father:  | S | A | W | NP | DR |
| 23. Demonstrated ability to provide stability for the child  |   |   |   |    |    |
| Mother:  | S | A | W | NP | DR |
| Father:  | S | A | W | NP | DR |
| 24. Ability to provide access to quality schools   |   |   |   |    |    |
| Mother:  | S | A | W | NP | DR |
| Father:  | S | A | W | NP | DR |
| 25. Demonstrated support for school and academic performance   |   |   |   |    |    |
| Mother:  | S | A | W | NP | DR |
| Father:  | S | A | W | NP | DR |
| 26. Demonstrated support and encouragement of child's extra-curricular (social, sports, etc.) and religious activities |   |   |   |    |    |
| Mother:  | S | A | W | NP | DR |
| Father:  | S | A | W | NP | DR |
| 27. Ability to support the child economically  |   |   |   |    |    |
| Mother:  | S | A | W | NP | DR |
| Father:  | S | A | W | NP | DR |
| 28. Work history   |   |   |   |    |    |
| Mother:  | S | A | W | NP | DR |
| Father:  | S | A | W | NP | DR |
| 29. Works together with other parent to promote the best interest of the child   |   |   |   |    |    |
| Mother:  | S | A | W | NP | DR |
| Father:  | S | A | W | NP | DR |
| 30. Respects and supports the other parent's role and relationship with the child                                      |   |   |   |    |    |
| Mother:  | S | A | W | NP | DR |
| Father:  | S | A | W | NP | DR |

**III. IN-COURT CREDIBILITY FACTORS**

31. Legal representation present at hearing  
 For mother Attorney present \_\_\_\_\_ Pro Se \_\_\_\_\_ Don't remember \_\_\_\_\_  
 For father Attorney present \_\_\_\_\_ Pro Se \_\_\_\_\_ Don't remember \_\_\_\_\_  
 For child GAL present \_\_\_\_\_ Pro Se \_\_\_\_\_ Don't remember \_\_\_\_\_

*For the following statements, circle your rating of in-court credibility factors for each parent.*

**S: strong A: adequate W: weak NP: not presented DR: don't remember**

32. Demeanor and believability of each parent  
 Mother: S A W NP DR  
 Father: S A W NP DR

33. Compliance of each parent with previous court dates and orders  
 Mother: S A W NP DR  
 Father: S A W NP DR

34. Demeanor and effectiveness of expert witness(es)  
 For mother: S A W NP DR  
 For father: S A W NP DR  
 For child: S A W NP DR

35. Demeanor and effectiveness of legal representation  
 For mother: S A W NP DR  
 For father: S A W NP DR  
 For child (GAL): S A W NP DR

36. Demeanor and effectiveness of other witnesses  
 For mother: S A W NP DR  
 For father: S A W NP DR  
 For Child: S A W NP DR

37. Quality and effectiveness of the **EVIDENCE** supporting:

- a. the ability of parent to meet the basic needs of the child  
 Mother: S A W NP DR  
 Father: S A W NP DR
- b. the ability of parent to meet the special needs of the child  
 Mother: S A W NP DR  
 Father: S A W NP DR
- c. the parent's demonstrated competence to parent  
 Mother: S A W NP DR  
 Father: S A W NP DR
- d. the parent's demonstrated willingness to co-parent  
 Mother: S A W NP DR  
 Father: S A W NP DR
- e. the parent's overall relationship with the child  
 Mother: S A W NP DR  
 Father: S A W NP DR

#### IV. SUBJECTIVE RATINGS OF IMPORTANCE

*Circle your rating of the importance of each influence on your decision in this case*

**1: minor influence, 3: moderate influence, 5: major influence**

|  | Minor | ... | Mod | .... | Major |   |
|--|-------|-----|-----|------|-------|---|
|  | 1     | 2   | 3   | 4    | 5     |   |
| 1. Child or children's age and sex   |       |     |     |      |       |   |
| 2. Child's exceptional physical or emotional conditions                                    | 1     | 2   | 3   | 4    | 5     |   |
| 3. Factors impacting continuity of children's environment                                  | 1     | 2   | 3   | 4    | 5     |   |
| 4. Child's or children's stated preferences for custody/visitation                         | 1     | 2   | 3   | 4    | 5     |   |
| 5. The parents' current and/or past role in the care of the child                          | 1     | 2   | 3   | 4    | 5     |   |
| 6. Ability of parents to identify and meet the child's needs                               | 1     | 2   | 3   | 4    | 5     |   |
| 7. Parents' histories of criminal behavior, emotional problems, and/or child/spousal abuse | 1     | 2   | 3   | 4    | 5     |   |
| 8. Physical, mental and/or emotional conditions limiting ability to parent                 | 1     | 2   | 3   | 4    | 5     |   |
| 9. Parents' history of substance abuse and/or criminal record                              | 1     | 2   | 3   | 4    | 5     |   |
| 10. Childrearing environment provided by each parent                                       | 1     | 2   | 3   | 4    | 5     |   |
| 11. Support for child's academics and extra-curricular activities                          | 1     | 2   | 3   | 4    | 5     |   |
| 12. Each parent's ability to provide economic support for the child                        | 1     | 2   | 3   | 4    | 5     |   |
| 13. Each parent's access to quality schools  | 1     | 2   | 3   | 4    | 5     |   |
| 14. Each parent's demonstrated ability to co-parent  | 1     | 2   | 3   | 4    | 5     |   |
| 15. Each parent's credibility in the courtroom   | 1     | 2   | 3   | 4    | 5     |   |
| 16. Demeanor and preparation of legal representation                                       | 1     | 2   | 3   | 4    | 5     |   |
| 17. Credibility, demeanor and preparation of expert witnesses                              | 1     | 2   | 3   | 4    | 5     |   |
| 18. Credibility and demeanor of other in-court support                                     | 1     | 2   | 3   | 4    | 5     |   |
| 19. Evidence supporting each parent's ability to parent and co-parenting                   | 1     | 2   | 3   | 4    | 5     |   |
| 20. Conclusions of custody evaluation (if none, mark "0")                                  | 0     | 1   | 2   | 3    | 4     | 5 |
| 21. Conclusions of home study (if none, mark "0")  | 0     | 1   | 2   | 3    | 4     | 5 |

**OVERALL SUMMARY AND DECISION ORDER**

1. What were the three most important factors influencing your decision on this case?
  - a. \_\_\_\_\_
  - b. \_\_\_\_\_
  - c. \_\_\_\_\_
  
2. Legal custody was awarded to:  
Mother \_\_\_\_\_ Father \_\_\_\_\_ Joint \_\_\_\_\_
  
3. Primary physical custody was awarded to:  
Mother \_\_\_\_\_ Father \_\_\_\_\_ Shared (50/50) \_\_\_\_\_
  
4. For this decision, how much time was awarded to each parent? (check only one)  
\_\_\_\_ Supervised or no time to father  
\_\_\_\_ Limited time to father (alternating weekends and one evening during week)  
\_\_\_\_ Substantial time to father but less than shared, physical custody  
\_\_\_\_ Shared physical custody (50/50)  
\_\_\_\_ Substantial time to mother but less than shared, physical custody  
\_\_\_\_ Limited time to mother (alternating weekends and one evening during week)  
\_\_\_\_ Supervised or no time to mother
  
5. How was this decision communicated to the father?  
\_\_\_\_ Verbally at the conclusion of the hearing  
\_\_\_\_ In writing at the conclusion of the hearing  
\_\_\_\_ Order was sent to father
  
6. How was this decision communicated to the mother?  
\_\_\_\_ Verbally at the conclusion of the hearing  
\_\_\_\_ In writing at the conclusion of the hearing  
\_\_\_\_ Order was sent to mother

***Thank you for your time and consideration in completing this questionnaire. Please return the completed questionnaire in the enclosed pre-addressed, postage-free envelope to:***

***Research Dimensions, Inc.  
1108 E. Main Street, Suite 1000  
Richmond, Virginia 23219***

*Should you have any questions concerning this questionnaire, please call Robert Maust of RDI at 804 643-1082 or e-mail him at [rdim@erols.com](mailto:rdim@erols.com). Materials also can be faxed to Mr. Maust at 804 643-1085.*



## General Survey

### Court Decision Making in Disputed Child Custody Cases

Please consider all child custody disputes involving parents, only, that you have decided when answering the next questions

1. Please estimate how many disputed child custody cases.....
  - i. were on your docket in 1999 \_\_\_\_\_ or, on average, \_\_\_\_\_ cases per month.
  - ii. were decided through hearing in 1999? \_\_\_\_\_ or, approximately \_\_\_\_\_ %
  - iii. were decided by settlement and confirmed by me in 1999 \_\_\_\_\_ or, approximately \_\_\_\_\_ %
2. & 3. Please estimate the percentage distribution of your Decision Orders concerning Legal and Primary Physical Custody in these disputed cases.

| b. Legal Custody |        |       | c. Primary Physical Custody |        |       |
|------------------|--------|-------|-----------------------------|--------|-------|
| Mother           | Father | Joint | Mother                      | Father | Joint |
| %                | %      | %     | %                           | %      | %     |

4. In general, since July 1, 1999, what percentage of your decisions has been communicated in writing? \_\_\_\_\_ %
5. In general, what three factors most frequently influenced your custody decisions in disputes between parents?
  - i. \_\_\_\_\_
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
6. What else would you like to tell us about the decision-making process for disputed child custody cases? \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

(continue on the back of this page or attach pages if more space is desired)

**Thank you for your time and consideration in completing this General Survey. Please return the completed survey with the Judges' Decision Profile in the enclosed pre-addressed, postage-free envelope to:**

**Research Dimensions, Inc.  
 1108 E. Main Street, Suite 1000  
 Richmond, Virginia 23219**

*Should you have any questions concerning this General Survey or other aspects of the research program, please call Robert Maust of RDI at 804 643-1082 or e-mail him at [rdim@erols.com](mailto:rdim@erols.com). Materials also can be faxed to Mr. Maust at 804 643-1085.*



1108 E. Main Street, Suite 1000  
Richmond, Virginia 23219  
(804) 643-1082 (804) 643-1085 Fax

**RESEARCH DIMENSIONS INC.**

Date

Judge  
Court  
District  
Address  
Address

Dear Judge \_\_\_\_\_

This letter requests your participation in a research study that was authorized by the Virginia General Assembly and is being conducted by Research Dimensions, Inc. (RDI) under a contract with the Supreme Court of Virginia. A memorandum of introduction from Robert Baldwin, Executive Secretary, Supreme Court of Virginia, is attached.

The purpose of this study is to explore judges' decision-making in child custody disputes between mothers and fathers. The information that this study seeks is important because it will provide the members of the Virginia General Assembly with empirical data to utilize in future policy decisions. Your requested participation involves completing a questionnaire and, possibly, permitting observation of a disputed custody case in your courtroom.

First, we ask that you complete a questionnaire that relates to the most recent disputed custody case between parents about which you have reached a decision. Please complete this questionnaire by March 31. Piloting of the instrument by several judges indicates that the instrument takes about ten minutes to complete. *No identifying demographic information will be connected with your responses to insure that your participation is completely confidential.* We anticipate a second mailing of this questionnaire to be completed for a case that you decide after 31 March.

Second, several courts will be selected for in-court observation of an appropriate case. If your court is selected, an RDI representative will call you to request that an authorized member of the research team be permitted to observe a disputed custody case in your courtroom. We ask that, following the conclusion of that case, you take a moment to meet with the person who observed the case.

Thank you in advance for your willingness to contribute to this project. I appreciate the time constraints that face the courts and understand that your plate is full. A copy of the questionnaire and a postage-free, pre-addressed envelope are enclosed. Please do not hesitate to call me at 804 643-1082 or e-mail me at [rdim@erols.com](mailto:rdim@erols.com) if you have any questions.

Sincerely,

Robert L. Maust  
Vice President



1108 E. Main Street, Suite 1000  
Richmond, Virginia 23219  
(804) 643-1082 (804) 643-1085 Fax

**RESEARCH DIMENSIONS INC.**

**Date:** \_\_\_\_\_ 2000

**To:** Hon. \_\_\_\_\_  
Court  
Address  
Address

**From:** Robert L. Maust, Jr. (Bob)  
VP, Research Dimensions, Inc. (RDI)

**Subject:** *In-Court Research – Court Decision-Making in Child Custody Disputes  
Between Parents*

We appreciate your participation to date in this research program to explore judges' decision-making in child custody disputes between mothers and fathers. As we discussed in our telephone conversation, the research team also needs to conduct in-court observation of appropriate cases. In this context, I again appreciate your willingness allow me the opportunity to observe a disputed custody case in your courtroom and to take a moment to meet with you.

The purpose of the requested meeting is designed to discuss your perceptions and insight related to:

- the decision process in the observed case and
- the decision process, in general, based on your overall experience with custody disputes between parents.

The attached questions reflect the material that I would like to discuss with you. These questions are strictly *illustrative*, are but they at least reflect the substance of the issues that we can potentially address. The Court also wanted to involve judges in validating or challenging the results of the research to date. If possible, I would like to discuss your reactions to the interim results.

If you have any questions, please call me at 804 643-1082 or I contact me at our e-mail address, [rdim@erols.com](mailto:rdim@erols.com). Thank you for your consideration. I look forward to hearing from you.

## ILLUSTRATIVE INTERVIEW QUESTIONS

1. In the case that you just decided, which factors most influenced your decision? (e.g., What factors relating to needs of the child? What factors relating to aspects of parental ability?) What factors discussed/presented were not important?
2. In your opinion, which factors in the Code are generally most significant? Which are least significant?
3. Are there other elements or factors which are not stated in the Code, but which surface regularly in cases you decide?
4. Taken together, do the factors in the Code promote good judicial decision-making in custody disputes? Why or why not? Do these factors promote the best interests of the child?
5. What suggestions do you have for improvement of the current manner in which child custody is determined? What are your thoughts on alternative methods of dispute resolution such as mediation?
6. What percentage of custody cases settle immediately prior to the custody hearing? What, if anything, do you do to promote settlement of custody cases? Do you inquire about the factors before you accept an agreement?
7. Do you think that all parties should have legal representation? [Both parents? GAL?] Do you think that legal representation facilitates or hinders the effective resolution of child custody disputes? How does legal representation influence the custody decision?
8. Do you appoint guardians ad litem for children in custody cases? If so, do you find them helpful?
9. Under what circumstances, if any, have you found expert testimony to be helpful?
10. Are mothers or fathers awarded custody more often? Why is this? What are the factors in the mother or father that lead to this general result?
11. What are the elements or characteristics of a custodial parent?
12. When is sole custody most appropriate? When is joint custody most appropriate?
13. What was the most difficult custody case between parents that you were called upon to decide?
14. What made the case difficult?
15. How did you decide the case?
16. Are you satisfied with your decision today?



