Where’s Daddy’s?: The Court’s Maternal Preference and Why Daddies are Indispensable.

By: Hope H. Causey*

When good fathers seek custody they are met with gender bias, specifically a preference for mothers as the primary custodians of the parties’ children. Unfortunately, evidence shows that custody decisions are often influenced by this preference for mothers over fathers. Consequently, fathers have a much higher burden to prove if they wish to attain physical custody of their children. In addition to proving their fitness as a parent, fathers must overcome the gender obstacle. When there is a custody dispute, is there a preference for mothers over fathers?¹

Part I briefly gives a background on the types of custody parents are awarded, differentiating between legal, physical, sole and joint. Part II analyzes whether there is a maternal preference that exists when there is a custody dispute between the mother and father. The argument that there is only a perception of gender bias is also rebutted. Part III discusses the reason for the removal of the maternal preference in custody disputes, which is that it is imperative for children to have both parents actively involved in their lives. It presents the educational, societal, and developmental benefits to having fathers involved in their children’s lives. Finally, Part IV provides a solution to the maternal preference and the problem of absent fathers.

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¹ I have worked in Kenneth B. Murov’s law office since 2006. I started as a paralegal, and I have continued to work there during law school. Working at the law office, I have witnessed several custody cases where the father struggled to obtain physical custody of his child. The cases where the father deserves custody, but is unable to attain it inspired me to do further research on whether there is an underlying maternal preference when there is a custody dispute.
I. Background: Types of Custody

Custody becomes an issue when the parents of the child no longer have a relationship. The parents become separated, either by divorce or ending their romantic relationship. There are two main types of custody that parents seek, which determine who will be responsible for the decisions affecting the children and where the children will reside: legal and physical. The parent who is awarded legal custody by the court system is granted the authority to make life-altering decisions affecting the child. If the court grants the parent sole legal custody of the child, there is no imperative for the custodial parent to consult the non-custodial parent when deciding matters involving life decisions for the child, including the child’s education, religion, and medical needs. The legal custodian is permitted to make these important decisions on his or her own. However, if the parties have joint legal custody, the parents must mutually decide the life issues affecting the child. The parents are required to consult with each other.

Physical custody of the child refers to the parent with whom the child primarily resides. Parents may be awarded sole, primary or joint physical custody of a child. If a parent is awarded sole or primary custody of a child, the child primarily resides with that one custodial parent for the majority of the year, and the noncustodial parent becomes a visitor, as that parent receives only visitation. The primary physical custodian also controls the physical location of

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3 Id.
4 Id.
5 Id.; see also VA. CODE ANN. §20-124.1 (West 2009).
6 Reynolds, supra note 2, at 1649.
7 Id.; see also generally Fisher v. Hasenjager, 876 N.E.2d 546, 549-52, (Some jurisdictions refer to joint physical custody as shared parenting, and the primary custodial parent may be referred to as the residential parent). Please note that throughout this article, I will only use the term joint and not shared.
8 Reynolds, supra note 2, at 1649.
the child. Joint physical custody refers to the situation wherein the child resides with both parents, usually for an equal amount of time, and does not primarily reside with the one custodial parent. Although, the time spent with each parent is usually equal, physical custody arrangements vary, and the custodial time does not always have to be equal. To be considered, joint physical custody the child must spend at a minimum 25% to 33% percent of the time with each parent. Some jurisdictions determine whether the parents have joint physical custody by the amount of overnights the child spends at each parent’s house. In Virginia, a parent must have at a minimum 110 calendar days per year to be considered a joint physical custodian. When parents are awarded joint physical custody, the parties share the custodial responsibilities and care of the child. Awarding parents joint physical custody is rare; in fact, joint physical custody is awarded in less than ten percent of custody cases.

When determining who is awarded legal and physical custody, and, whether it is joint or sole custody, the court applies the best interests of the child standard. Each jurisdiction has its own set of best interests of the child guidelines that the court system applies when determining custodu, visitation and other major decisions involving the child. In Virginia, to determine the best interests of the child, the court system considers ten factors and how they apply to both

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9 See Fisher, 876 N.Ed.2d at 553-54.
10 Reynolds, supra note 2, at 1649.
12 Id.
14 Swisher, supra note 13. (To be considered a calendar day, the child must spend a “full, consecutive 24-hour period, including an overnight at the parent’s home”).
16 Buchanan, supra note 16, at 422.
17 Id.
19 Id.
parents and the children. Joint legal custody and sole physical custody are the most common types of custody awards. Sole physical custody granted to the mother remains the most prevalent type of custody situation. In fact, statistics show that 84% to 90% of custodial parents are mothers. Fathers are only given the opportunity to be custodial parents 10% to 16% of the time. When observing the percentages of the awards of custody to fathers versus

In determining best interests of a child for purposes of determining custody or visitation arrangements., 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 accurately assess and 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 actively support 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 or sexual abuse. If the court finds such a history, the court may disregard the factors in subdivision 6; and
10. Such other factors as the court deems necessary and proper to the determination.

Each jurisdiction has their own set of factors which they apply, and analyze when determining the best interests of the child.

Joint legal custody has not always been a common decisions in custody disputes between parents. Joint legal custody awards started to increase in the 1980s. Even though joint custody awards to parents started to slowly increase, it still remains a rarity for a judge to actually award joint custody when there is a custody dispute. Please note that when I refer to “custodial parents,” I am referring to the parent that has primary physical custody. The term custodial parent does not refer to legal custody unless specifically noted.

See Firing, supra note 18, at 251 (The Firing article, from 2008, provides the statistic that mothers are primary physical custodians of their children 90% of the time); see also generally U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2005 tbl. 1 (2009). (The U.S. Census Bureau report is the source of the statistic that mothers are primary physical custodians of their children 84% of the time).
the awards of custody to mothers, the disparity is apparent and the obvious question is raised. Is gender bias the reason for this disparity?

II. Where’s Daddy?

Is there a maternal preference when there is a custody dispute? Up until the 1960s, there was an actual “tender years” presumption, which presumed that mothers were better fit to be custodial parents than fathers were. The “tender years” presumption emerged during the Industrial Revolution for the simple reason that fathers went to work. Fathers worked longer hours, and their presence at home lessened considerably. Mothers became the preferred custodians and caregivers for the children because they did not leave for work, but instead remained at home with their children. During the time period of 1840 to the early 1900s, states affirmed the implementation of the tender years presumption, and “judicial opinions continued to reflect a maternal bias into the early part of the twentieth century.” It is interesting to note, that prior to the Industrial Revolution and during the Colonial Period, mothers were considered subordinate to fathers when it came to caring for their family. Children were concluded to be property of their fathers. However, mothers eventually evolved as the primary caregivers, and the maternal presumption dictated the determination of custody awards until it was removed.

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26 In this article, when I refer only to “custody,” I am referring to physical custody unless otherwise noted.
28 Brown, supra note 27, at 177-78.
29 *Id.*
30 *Id.*
31 *Id.*
32 Firing, supra note 18, at 227.
33 *Id.* at 225-26.
34 *Id.* at 225.
from the legal system in the 1970s. In the 1970s, the Child Custody Act of 1970 created the best interests of the child standard in order to move the legal system away from the maternal presumption. “Despite the apparent neutrality of the best interests standard, a predictable gender bias in custodial disputes has continued” into the present day. Even though the legal system has made the effort to equalize who is awarded custody, fathers still are not being granted custody of their children by the courts. Men are denied the right to custody of their children because mother’s are seen as the one “naturally qualified” to have the custodial responsibility of their children. If a mother fails to obtain primary physical custody of her children, then she is given the stigma of being considered “unfit.” On the other hand, if a father does not get physical custody of his child no assumption of the father’s “fitness” is made. Sadly, it is viewed as normal for a father not to be awarded primary physical custody of his children, which seems to illustrate that gender bias is truly a valid concern.

Many state courts have created “task forces” to tackle whether there are gender biases present in their jurisdictions. The Michigan Supreme Court found that judges are still applying the maternal preference in their custody decisions even though the “tender years” presumption no longer exists. In 1999, Michigan’s task force discovered that mothers were awarded custody 13,094 times while fathers were only awarded custody 2,239 times, third parties were

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35 Id. (The removal of the maternal preference was due to the Fourteenth Amendment and equal rights. Fathers started to seek more gender neutral rights when it came to parenting of their children).
38 Id.
39 Vatsis, *supra* note 36, at 56.
40 Maldonado, *supra* note 21, at 938
41 Id.
42 Vatsis, *supra* note 36, at 56. (Michigan’s task force is called the State Bar of Michigan Task Force on Racial/Ethnic and Gender Issues in the Courts and the Legal Profession. It was commissioned by the Michigan Supreme Court because the court found that the divorce process was controlled by tradition and stereotypes).
43 Maldonado, *supra* note 21, at 968.
awarded custody 352 times, and joint custody was awarded 3,918 times. Third parties could include grandparents, non-relatives, or homes for children. The statistics reported in 1995 differ minimally from the statistics reported in 1999. In 1995, mothers were granted custody 15,103 times, fathers were awarded custody 2,332 times, third parties won custody on 273 occasions, and joint physical custody was awarded 3,028 times. In 1999, the amount of custody awards to fathers actually decreased, although, on a positive note, the amount of joint physical custody awards increased. The Michigan task force stated in their 1998 report:

> Women are seen as nurturers and caretakers. A women’s influence is in the home while the man is the breadwinner and protector. Women are seen as naturally qualified to be the custodial parent and men are not. Fundamental attitudes about men and women, divorce, and the role of judges and lawyers contribute to gender disparity in domestic relation cases.

After concluding that the maternal preference remains present in domestic relations cases and decisions, the Michigan task force made several recommendations to the legal system in order to make child custody awards gender neutral. Further supporting the removal of the maternal preference, the task force concluded that courts and judges should look at each parent’s ability to be the custodial parent, and not permit the societal norm that mothers are the most capable at being caregivers influence their rulings. “An assessment of the ability of individual parents to care for and nurture their children should govern child custody recommendations and awards.” Despite the task force’s recommendations, and the support of the Michigan court system in

44 Vatsis, supra note 36 at 57.
45 Id.
46 Id.
48 Id. at 57-58.
49 Id. at 58.
50 Id. at 57.
implementing these recommendations, gender bias still continues to be a problem that fathers are faced with in Michigan courts’ custody decisions.\textsuperscript{51}

Task forces in other states have reached similar conclusions. In Georgia, fathers are often disadvantaged because mothers are perceived to be the better parent.\textsuperscript{52} A Vermont task force discovered that mothers will be awarded custody of their children, unless they are proved to be unfit as parents because it is naturally assumed that children should be with their mothers rather than with their fathers.\textsuperscript{53} After a review of child custody statistics between 1992-1995, the task force in Virginia discovered that in custody cases, physical custody was awarded to the mother fifty-nine percent of time and to the father only eight percent of the time, a small fraction of the number of custody cases awarded to the mother.\textsuperscript{54} Virginia’s task force, in 2007, found that situations had not changed; custody was still predominantly being awarded to the mother.\textsuperscript{55} Therefore, the Virginia task force determined as a result of these findings that “decisions in custody matters may reflect gender bias.”\textsuperscript{56} “May reflect gender bias” seems to be quite an understatement; unfortunately, the task force results show that custody rights are not evolving to achieve equity. Instead of equity or fitness, stereotypes are dictating the decisions of state courts.\textsuperscript{57} Mothers are still primarily being granted custody, and fathers are denied the right to have primary custody of their children, regardless of individual circumstances.

There is evidence that some judges do not even attempt to hide their maternal bias.\textsuperscript{58} In New York, former Kings County Family Court Judge Richard Huttner did not veil his preference

\textsuperscript{51}Id. at 58.
\textsuperscript{52}Id. (The Georgia task force was called, the Georgia Commission on Gender Bias in the Judicial System).
\textsuperscript{53}Maldonado, supra note 21, at 973.
\textsuperscript{54}Philip Trompeter, \textit{Gender Bias Task Force: Comments on Family Law Issues}, 58 WASH. & LEE L. REV. 1089, 1092 (2001). (The task force was created to study gender bias in family law cases in Virginia).
\textsuperscript{55}Id. at 1092-93.
\textsuperscript{56}Id. at 1093.
\textsuperscript{57}Maldonado, supra note 21, at 968.
\textsuperscript{58}Id. at 969.
He went so far as to berate a father who sought more time with his child, and the former judge was even quoted as making the statement that “there is no bigger pain in the ass than the father who wants to get involved; he can be repulsive.” In yet another case a judge in Vermont awarded the mother custody of the child even after being shown a picture of the mother snorting cocaine and after production of evidence that the mother abused her child. The judge penalized the father in making his custody decision because the father was unemployed. However, the mother was also unemployed, which should have been more evidence against her favor, in addition to her reckless behavior. Accordingly, as the evidence indicates, it was the father who was still the most fit to be the custodial parent, not the mother. Nevertheless, the judge awarded the mother custody, because the father did not fit the mold of an economic provider. The other more blatant factors were not valid issues for this judge. In light of these unfortunate cases, fathers often view judges as their enemies in the custody process, because judges fail to rule in their favor even when it is in the best interests of the child.

Further evidence of the maternal preference in custody decisions is the “primary caretaker” guidelines which have been adopted in some states. The primary caretaker guidelines are evidence of gender bias because mothers typically assume this role. The decision as to which parent is the primary caretaker is determined by amount of time, which

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59 Id.
60 Id.
61 Id.
62 Id.
63 Id.
64 Id.
65 Id.
66 Id. (It is assumed that fathers should be the economic providers. Mothers are not assigned this role. As a result the judge looked disparagingly at the father in this case because he did not have a job, while the mother’s transgressions were overlooked).
68 Brown, supra note 27, at 179. (The primary care doctrine states that custody will be granted to the parent who spends the most time with the child prior to divorce. In most custody cases, the primary caretaker is deemed to be the mother).
69 Id.
parent spends the most time with the children prior to the divorce.\textsuperscript{69} For the determination that 
fathers have the role of the primary caretaker, they must spend “significant amounts of time with 
the children before the divorce.”\textsuperscript{70} The primary caretaker guidelines create gender bias because 
society already has the expectation that fathers must be the economic provider in the family, thus 
limiting the amount of time they are able to spend with their children.\textsuperscript{71} The social norm of 
society expects fathers to work and support their children financially, rather than accepting that 
the father may support his children by staying at home.\textsuperscript{72} If fathers are required to be the 
primary caretaker and the economic provider in order to get custody of their children, their 
burden of proof that they are fit to be custodial parents is doubled.

The maternal preference is evident in the U.S. Census Bureau’s statistics. In November 
2009, the U.S. Census Bureau submitted a report of the custodial parent population.\textsuperscript{73} The report 
included the custodial parent population for 2005.\textsuperscript{74} In this report, mothers comprised 84% of 
custodial parents in 2005, while 16% of custodial parents were fathers.\textsuperscript{75} According to the U.S. 
Census Bureau, the living arrangements for children under age 18 are as follows: 69% live with 
both parents, 23% live with mothers only, 4% live with fathers only, and 4% live with neither 
parent.\textsuperscript{76} While we can be relieved that the majority of children are still residing with both 
parents, it is disheartening to see that a small percentage, 4\%, live with their fathers only while 
23\% live with their mothers only. Equally alarming is that the percentage of children who live 

\begin{thebibliography}{99}
\bibitem{69} Id.
\bibitem{70} Id.
\bibitem{71} See generally Maldonado, supra note 21, at 939-43 (discussing the economic role that society has assigned to 
fathers).
\bibitem{72} Id., see also Id. at 968 (As noted above, the Vermont judge penalized the father in the custody case because he 
was unemployed, even though he was more fit than the mother to be the custodial parent).
\bibitem{73} See generally U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, CUSTODIAL MOTHERS AND FATHERS AND 
\bibitem{74} Id.
\bibitem{75} Id.
\bibitem{76} See generally U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, LIVING ARRANGEMENTS OF CHILDREN 
UNDER AGE 18 YEARS AND MARITAL STATUS OF PARENTS, BY AGE, GENDER, RACE, AND HISPANIC ORIGIN OF THE 
\end{thebibliography}
with their father only is the same percentage as for children who reside with neither parent. It could be argued that the high percentage of mothers who serve as custodial parents could be attributed to the fact that most mothers are “stay at home moms;” however, a large amount of women are returning to the workforce. Mothers have been the majority of custodial parents since the 1800s, even though the role of women has changed substantially since the 1800s. However, the statistics have not reflected this change, which clearly provides further evidence of the gender bias. Despite these statistics and the evidence of the courts’ gender bias, some scholars argue that the gender bias in custody matters is merely a perception of the fathers.

Some scholars argue that the gender bias does not exist, but rather that fathers, in fact, are not seeking custody at all and that there is only a perception of gender bias that exists. They assert that the maternal preference is created from the fathers’ fear of seeking custody, which, as a result, discourages their involvement in the custody process. This fear, experienced by fathers, of petitioning for custody of their children is supposedly created by attorneys who warn fathers that they may lose the custody battle. The attorneys advise fathers that mothers, in the vast majority of cases, become the custodial parents, which in turn, scholars argue, creates the perception of gender bias rather than the actuality of gender bias, resulting in fathers’ failure to pursue custody. In addition, scholars argue that relatives and friends often do not support fathers’ custody battles furthering fathers’ apprehension.

However, based on the evidence presented of courts’ decisions and judges’ views of fathers, the gender bias does exist, and this is the basis of the creation of the perception. The

77 Buchanan, supra note 11, at 422.
78 See generally Maldonado, supra note 21, at 967-76.
79 Id.
80 Id.
81 Id. at 973.
82 Id.
83 Id. at 974.
perception was created because the maternal preference is real, not because fathers fail to seek custody. The reality is quite the opposite; fathers are seeking custody of their children, although it may not be at the same level as mothers seek custody of their children due to the social norm, which expects mothers to be custodial parents.84 In 2007, an empirical study of 387 custody cases found that fathers are seeking custody of their children.85 The study found that when mothers were the plaintiffs, they sought primary physical custody 99.1% of the time, joint physical custody in .4% of the cases, and seeking only visitation .4% of the time.86 This was compared to the custody cases when fathers were the plaintiffs.87 When fathers were the plaintiffs, they sought primary custody 77% of the time, joint physical custody 15.3% of the time, visitation only in 6.3% of the cases, and the fathers sought another alternative in 1.4% of the cases.88 Although, fathers are not seeking primary physical custody as often as mothers, they are seeking it.89 It also should be noted that fathers are seeking joint physical custody, 15.3% of the time; therefore, fathers are seeking some form of physical custody 92.3% of the time.90 This empirical study is evidence that the perception is not created by a father’s fear of seeking custody, but by the gender bias which does exist. Some fathers may be deterred from seeking custody, but a large amount of fathers are seeking and advocating for custody.91

Despite some scholars’ argument that the gender bias may only be a perception, it is clear that the maternal preference actually does exist. The evidence presented of gender biases in the court systems and stereotypes shaping custody decisions outweighs any suggestion that the

84 See generally Maldonado, supra note 21, at 938, and see Reynolds supra note 2, at 1666.
85 Reynolds supra note 2, at 1666.
86 Id.
87 Id.
88 Id. (the “alternative” fathers seek in 1.4% of cases was not identified in this Article).
89 Id.
90 Id.
gender bias is only a perception of fathers. Even with the removal of the “tender years”
presumption over 30 years ago, it is clear that the maternal preference for fathers still exists, and
that it often determines, or rather that it dictates the custody decisions in our state court systems.
The gender bias not only limits fathers, but it harms children and insinuates an injustice on all
parties, children, fathers, and even mothers.

III. Why Children Need Their Daddies.

The gender bias harms children because when fathers are not awarded some type of
physical custody, their involvement with their children often decreases dramatically. Whereas,
when fathers are awarded joint physical custody, their relationships with their own children are
fostered, and they are “very involved” in their children’s lives. 92 On the other hand, visitation
awards often limit fathers to spending only weekends (or every other weekend) with their
children. 93 Statistics show that within three years of a divorce, fifty percent of fathers have
either ceased contact with their children or have limited the time they spend with their children
significantly. 94 Fathers act more like uncles than fathers because they spend more time
entertaining their children rather than spending time acting as parents. 95 Fathers become
visitors; they come into their children’s lives weekly, monthly and sometimes less than yearly.96

In 2005, it was reported that sixty percent of children who lived with their mothers had only seen

92 Maldonado, supra note 21, at 998.
93 Brown, supra note 27, at 177.
94 Maldonado, supra note 21, at 924. (Note that this statistic is based on the approximation that there are 1.1 million
divorces per year in the United States, and there are about one million children each year which are affected by the
divorces.); see also Marygold S. Melli & Patricia R. Brown, Exploring a New Family Form – The Shared Time
95 Maldonado, supra note 21, at 948.
96 Id. at 946 – 47.
their parents several times a year, sometimes less, and, alarmingly, thirty percent of those children had not seen their fathers in the past year.\textsuperscript{97} It was further discovered that twenty-three percent of divorced fathers had no contact with their children in five years.\textsuperscript{98} The statistics make it clear that the father’s failure to be awarded custody results in a lack of involvement that has a detrimental impact on their children’s future.

Fathers for Virginia, an advocacy group whose mission is to encourage divorced fathers to take part in the parenting process, reported the following facts about children who come from fatherless homes:

Children from a fatherless home are 5 times more likely to commit suicide, 32 more likely to run away, 20 times more likely to have behavioral disorders, 14 times more likely to commit rape, 9 times more likely to drop out of high school, 10 times more likely to abuse chemical substances, 9 times more likely to end up in state-operated institutions, and 20 times more likely to end up in prison.\textsuperscript{99}

These alarming statistics should be enough to encourage fathers to take part in the upbringing of their children and to foster relationships with their children: however, unfortunately, parents are unaware of the impact that the involvement of both parents has on their children. Statistics show that “it takes eight hundred and fifteen intact homes to generate as much delinquency as is generated by one hundred broken homes.”\textsuperscript{100} When parents work together and both of them take an active interest in their children’s lives, these broken homes can be mended.

Fatherlessness also affects developmental needs of children.\textsuperscript{101} When fathers are involved, children are capable of handling their parents’ divorce better, and they “have higher

\textsuperscript{97} Id.
\textsuperscript{98} Id. at 947.
\textsuperscript{99} Fathers for Virginia, Fatherless Homes, \url{http://fathersforvirginia.org/index.htm} (last visited November 29, 2009). (Fathers for Virginia advocates for fathers to be more involved in their children’s lives, but the advocacy group is not biased towards fathers. The advocacy group’s goal is for both parents to be involved, not just fathers. Their site states, “We believe the Best Parent is BOTH Parents.”)
\textsuperscript{100} Firing, supra note 18, at 251 (quoting Daniel Amneus, Garbage Generation 179 (1990)).
\textsuperscript{101} Maldonado, supra note 21, at 949-50, see also Crowley, supra note 66, at 153 (The children’s development had more positive outcomes when parents had joint custody of the children as opposed to sole custody).
self-esteem and fewer behavioral problems.102 Additionally there are educational benefits to those children whose fathers remain actively involved in their lives.103 Children are less likely to drop out of school; they have higher IQs and excel in school.104

Another shocking impact of a father’s absence is the correlation between the father’s absence in the home with teenage pregnancy.105 When fathers leave prior to their daughter’s fifth birthday, daughters are more likely to engage in sexual activity and become pregnant as teenagers.106 If fathers were part of their girls’ lives, the girls were less likely to become pregnant as teenagers even with the presence of other socioeconomic “risk factors,” “such as poverty, inadequate parental supervision, stressful life events, and defiant behavior in grade school.”107 A father’s absence has a significantly greater impact than other socioeconomic factors that may exist in a young girl’s life.108 When both the mother and father are involved in the upbringing of the child, the child receives social, educational and developmental benefits.

Further, joint legal and joint physical custody is beneficial to the child because the child is not estranged from one parent; rather the child has a better relationship with both parents.109 The joint arrangement results in both parents parenting the child, and the child experiencing more uniformity in the rules and routines established by the parents.110 The child is not torn between what each parent desires of the child.

Joint legal and joint physical custody are associated with aspects of relationships and parenting that tend to predict positive outcomes for children: lower interparental conflict, parenting that is as or more consistent and attentive than in sole custody arrangements,

102 Maldonado, supra note 21, at 950.
103 Id. at 951.
104 Id.; see also Fathers for Virginia supra note 68.
105 Maldonado, supra note 21, at 952.
106 Id. (The correlation between a father’s absence and their daughter’s sexual activity and teenage pregnancy was based upon a thirteen year study conducted in New Zealand and the United States).
107 Id. at 953.
108 Id.
109 Buchanan, supra note 11, at 423.
110 Id. at 424.
and closer relationships between children and both parents. In the words of Robert Emery, ‘In many ways, joint physical custody is the legal arrangement for children because they still have two parents very much involved in their lives.’”

The separated parents also have less conflict due to the joint arrangement, because they need to work together for the benefit of the child. Joint legal and joint physical custody promotes a closer relationship amongst each parent and the children.

IV. The Solution

A very viable solution to the problems of gender bias in custody disputes and fatherless homes is joint legal custody and joint physical custody facilitated by counseling and custody evaluations. Joint legal custody promotes a commitment to children and encourages parents to be involved with their children. Joint physical custody supports the child’s relationship with both the mother and father. The expectation is that both parents will continue to be involved with the child, because of the joint legal and joint physical custody arrangement. The child will reap educational, social, and developmental benefits, which is the opposite from the detrimental impact created by fatherlessness. In combination with the joint custody award, counselors will serve as custody evaluators. In this position counselors are tasked with the

111 Id. at 425.
112 Id. at 423.
113 Please note that I am not suggesting joint legal and joint physical custody in cases where the parent is a substance abuser; in cases where a parent has a history of physical, emotional or sexual abuse towards anyone, especially a family member; or where the parent exhibit serious mental problems. Also in cases where the parent is proven to be unfit, based on the parent’s reckless behavior, joint legal and joint physical custody simply are not feasible. Joint legal and joint physical custody works best when both parents are fit to be parents. The fitness of a parent is determined by the best interests of the child standard. “Parents who are abusive, neglectful, or mentally ill dramatically reduce the likelihood that their children will flourish.” CROWLEY, supra note 66, at 153.
114 Buchanan, supra note 11, at 424.
115 Id.
responsibility of performing forensic psychological assessments on all parties to determine the best custody arrangement and schedule.116

Joint legal and joint physical custody are not always reasonable at the beginning of the separation because of the tension that exists between the parents. If the parents have a tumultuous relationship and there is constant conflict, joint legal and joint physical custody can have adverse effects on the children.117 The joint arrangement requires that the parents cooperate in matters affecting the child.118 However, courts have a limited involvement, and are unable to guarantee that the parents are cooperating. Courts and judges award custody to the parents, and then typically their involvement ends.119 The courts and judges often do not revisit the custody situation unless a parent violates a term of the custody arrangement. Therefore, I propose that the parents and children attend counseling to ensure that parents are cooperating and to insure parents are kept accountable to their parental responsibilities. During the counseling sessions, the counselor will evaluate the parties and work with them to determine the best custody arrangement at that time. Through counseling, the anticipation is that parents can work through their conflicts and the antipathy which is so detrimental to children, in order to create a stable environment for the children. A counselor will be able to determine the kind of joint living arrangements that are in the best interests of the child and when these joint arrangements will be most suitable for all parties involved.

A counselor can also work with the parties while the dynamics between the parties change, helping the parents to adjust to any changes that may effect their custody arrangement. This is in contrast to judges who are unable to have a hands-on approach with parents during the

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116 Elrod, supra note 27, at 413.
117 Id. at 399.
118 Id. at 398.
119 Id. at 384.
custody process. Counselors can work with parents to make future custody decisions, whereas judges are unable to make “future predictions about parenting and their children.”120 Judges’ custody decisions are based on the present situation, not the ever changing dynamic of the family. Therefore, counselors are more appropriately suited to help work out the parenting arrangements between the parents. Also, counselors are able to pay close attention to the children’s developmental needs.121

Further, I propose that the counseling and custody evaluations be paid for by the parents, since it was their decisions that caused their children to become part of a separated family. An investment in a divorce or separation should include an investment in insuring the best future of their child. The fee for the service will be based on the parties’ income. Each parent will submit their most recent tax return, and the fee will be reasonably based on their income. Since parents are willing to pay for their own attorneys and a Guardian ad litem when there is a custody dispute, paying for counseling to create the best solution for their children should not be objectionable. Of primary concern should be what is best for the children

V. Conclusion

A gender bias is present in custody decisions. Mothers are primarily awarded physical custody of their children, and fathers are limited to visitation rather than custody. If fathers seek custody, they are met by a preternatural bent towards a preference for maternal child custody in the court system. Judges often decide who has custody based on this maternal preference, and alarmingly, as has been indicated by the evidence, this maternal preference is desperately harming children.

120 Id. at 384.
121 Id.
Children desperately need their fathers to be in their lives. When fathers are absent, children suffer severe and often permanently detrimental effects, resulting in failure to reap the social, educational, and developmental benefits associated with the advantage experienced by children having both parents involved in their lives.

Therefore, the solution is joint legal and joint physical custody. The purpose of joint legal and joint physical custody is to encourage both mothers and fathers to have an active role in their children’s lives and to give their children the opportunity for a positive future. Counselors will work with the parents and children to facilitate the joint legal and physical custody arrangement.

The bottom line is that children need both of their parents involved in their lives, not just one.