State of New Hampshire Supreme Court

No. 2000-146

2001 TERM

FEBRUARY SESSION

IN THE MATTER OF GERARD F. COTE and AMY L. MILLER

RULE 7 APPEAL FROM FINAL DECISION OF
MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF APPELLANT, GERARD COTE

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QUESTIONS PRESENTED

1. To change custody, the court must find a great alteration in circumstances affecting the child's welfare. The court found harm here caused by the parents' inability to effectively negotiate, but nothing about that has changed. Did the court err in switching custody?

2. Once harm has been found, the court must "necessarily concentrate on the circumstances of the family" which caused it. There is no evidence showing that Jerry's family has caused any harm. Did the court err in taking custody from Jerry?

3. Custody determinations cannot be driven by sexual discrimination. In a society where still more women than men have the luxury of not working, basing custody on the ability of one parent to stay at home, especially when both families can devote the same amount of time to the child, is sexual discrimination by another name. Did the court err in switching custody based on these considerations?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

This is a post-divorce proceeding involving the custody of a six-year old child.

The parties were divorced in 1997 after a three-year marriage. One child, Danielle, resulted from their relationship. Upon divorce, Gerard (Jerry) and Amy entered a stipulation (approved by the court) which provided joint legal and joint physical custody, rough guidelines for each party's time with the child, and aspirations for continuing negotiation of the visitation details.

A year after the stipulation, in July 1998, Amy filed a petition to modify the physical custody arrangement, and seeking physical custody of Danielle. Amy's allegation was that the visitation was not working well. She did not allege any great alteration in circumstances affecting Danielle's welfare, nor any strong possibility of harm caused by the then-current situation.

The guardian *ad litem* (*Paul B. Shagoury*, Ph.D.) investigated the case. His report confirmed that the parties do not communicate well, but noted that both parents are equally good, involved, warm, and caring, and that Danielle has equally close relationships with them. The GAL found no harm likely to be caused by either parent, but rather by their mutual inability to shield Danielle from their poor communication.

Amy has re-married, and is solely supported by her husband, Paul. Jerry also has remarried and now has an infant daughter. He works in his home-based computer engineering consulting firm, and has flexible arrangements so that he is Danielle's caretaker during most non-school hours. His wife, Karen, has a similar schedule.

The GAL was initially careful to make no recommendation regarding custody, but rather

provided a number of criteria for the court to consider in making its decision. Though the facts measured by the criteria favored neither parent, the GAL ultimately recommended custody go to Amy.

The court reiterated New Hampshire's policy of no preference in custody determinations based on the sex of the parents. Nonetheless, after several hearings (*Leonard S. Green*, Master; *George L . Manias*, J.) the court awarded custody to Amy.

Because the final order resulted from a motion for reconsideration, no further pleadings were filed, and this appeal followed.

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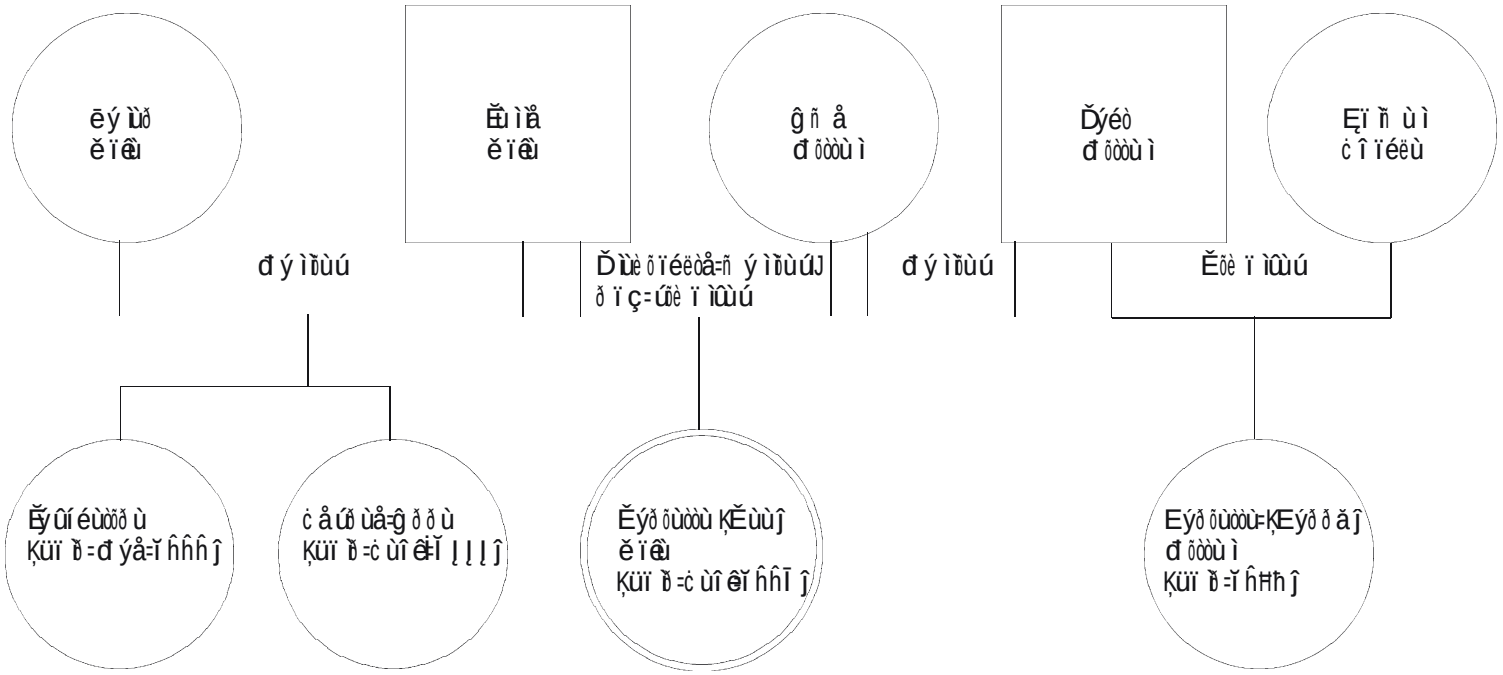

SUMMARY OF ARGUMENT

Jerry first notes that because Amy is the movant, to change custody she carries the burden of proving a great alteration in circumstances caused by the parent from whom custody is being taken. Jerry shows that by everyone's calculation, he is a good father who has caused the child no harm. He then lists each allegation made by Amy and shows, through Amy's own attempt at proof, that no harm was caused by him. Jerry argues that because Amy could not show a great alteration in circumstances, and because she could not show that Jerry caused the child any harm, she did not meet her burden of proof.

Jerry then canvasses the history of child custody law, from the historical presumption toward the father to the current presumption toward the mother. He argues that the best interest standard is vague, allowing social biases to creep into custody determinations. Jerry then notes the historical and current statistics, which suggest that courts favor women over men in custody cases. By going through the criteria as outlined by the GAL in this case, Jerry shows that by every measure he is either an equal or superior parent to Amy. Finally, he argues that because of this, the court's switching custody and giving it to Amy was arbitrary and a product of social bias, and not based on the facts.

ARGUMENT

I. Jerry Cote Caused Danielle No Harm, Making the Switch in Custody Unlawful

Before the current proceeding, there was a permanent custody order granting shared physical custody to both Jerry and Amy. To make a change in that status, Amy was required to prove that shared custody was harming the child, and that the harm was being caused by Jerry. During the trial she brought forth only puny issues, not designed to prove harm, and incapable of proving it. By granting a change in custody nonetheless, the court erred.

A. Amy Bears the Heavy Burden of Proof

Before the court order now being appealed, there was a permanent custody order granting both legal and physical custody jointly to Jerry and Amy. STIPULATED PROPOSED FINAL ORDER, N.O.A. at 16, ¶3.b. Amy commenced this proceeding by filing a request that "physical custody of Danielle be awarded to the Defendant." PETITION TO BRING FORWARD AND MODIFY, *N.O.A.* at 29. Because she was the movant, the burden of proof in this case falls on Amy. *Gillis v. Gillis*, 118 N.H. 206 (1978); *Perreault v. Sullivan*, 124 N.H. 40, 42 (1983) ("recognizing the correlation between the stability of family relationships and the healthy psychological development of children, the court has placed a heavy burden on the party desiring a change").

B. Amy Must Prove a Great Alteration in Circumstances, and a Strong Possibility of Harm Caused by Jerry

Perreault v. Cook, 114 N.H. 440 (1974), is the leading New Hampshire case in this area. In it, this court established the standard which must be proved in order to change physical custody. The standard has been applied and its underlying policy reiterated in nineteen

subsequent reported cases,[1] and innumerable cases that have not reached this court.

Perreault held that custody arrangements must focus on the welfare of the child. It held that repeated "shuffling" of a child's home environments can destroy her sense of security, and that therefore there is an interest in "maintaining the status quo for the purpose of protecting the child from psychological injury." *Perreault*, 114 N.H. 443. The depth of New Hampshire's policy of not switching custody was demonstrated in *Houde v. Beckmeyer*, 116 N.H. 719 (1976). When the custodial parent moved across the country, the other parent argued that his visitation rights would be severely curtailed. This court rejected the argument and found that when circumstances are otherwise equal, it is better to allow the child to move out of state than to switch custodial families. *Houde*, 116 N.H. at 720. (In the Cote's case, however, the court switched custody when Amy left the state.)

> Thus, in New Hampshire, when a permanent custody order exists,
>
> > The relationship established by the custody award should not be disturbed unless the moving party demonstrates that the circumstances affecting the welfare of the child have been so greatly altered that there is a strong possibility the child will be harmed if he continues to live under the present arrangement."

Perreault, 114 N.H. 443. Moreover, "[t]he inquiry must necessarily concentrate on the circumstances of the family in which the child has been placed." *Perreault*, 114 N.H. 443-44.

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[1] *Mathews v. Matthews*, 142 N.H. 733 (1998); *Webb v. Knudson*, 133 N.H. 665 (1990); *Butterick v. Butterick*, 127 N.H. 731 (1986); *Andersen v. Andersen*, 125 N.H. 686 (1984); *Richards v. Richards*, 125 N.H. 331 (1984); *Howard v. Howard*, 124 N.H. 267 (1983); *Perreault v. Sullivan*, 124 N.H. 40 (1983); *Sanborn v. Sanborn*, 123 N.H. 740 (1983); *Surprenant v. Laporte*, 122 N.H. 347 (1982); *Case v. Case*, 121 N.H. 647 (1981); *Morel v. Marable*, 120 N.H. 192 (1980); *Doe v. Doe*, 119 N.H. 773 (1979); *Greenglass v. Greenglass*, 118 N.H. 570 (1978); *Ballou v. Ballou*, 118 N.H. 463 (1978); *Gillis v. Gillis*, 118 N.H. 206 (1978); *Forde v. Sommers*, 117 N.H. 356 (1977); *Houde v. Beckmeyer*, 116 N.H. 719 (1976); *Rousseau v. Rousseau*, 116 N.H. 106 (1976); *Hille v. Hille*, 116 N.H. 109 (1976).

Therefore, to change custody, the movant must prove that (1) there has been a great alteration in the circumstances affecting the child's welfare, (2) the great alteration will create a strong possibility of harm to the child, and (3) the harm is caused by the parent from whom custody is being taken.

C. Jerry Is a Good Dad

It is acknowledged by all involved in this case that Jerry is a good father. Amy's lawyer noted that Jerry's marriage is stable. *2 Trn.* at 101.[2] Amy herself testified that Jerry is responsive to Danielle's needs and communicates well with her. *1 Trn.* at 83. The GAL testified that he believes Jerry is a good parent, *4 Trn.* at 201, in whose home no harm has been done to Danielle. *2 Trn.* at 116 ("I would say there's not in my experience and in my view, a strong possibility of harm in the ususal sense in either one of these homes or in the care of either one of these parents."). In his initial report the GAL wrote:

> Mr. Cote appears comfortable in caring for Danielle, and appears to have a sound understanding of Danielle's needs. He is patient and affectionate with her, and she appears to respond to him with affection. He was involved in her care from birth until the separation, and has been involved in the care of other children. Danielle seems comfortable in his care. He has provided an environment which is safe and secure for her. . . . Danielle appears to have a positive bond with her father and he has a loving one with her. . . . He is gentle with Danielle and responsive and attentive to her needs and expressions."

REPORT OF THE GUARDIAN AD LITEM, *N.O.A.* at 11. The GAL later wrote:

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[2]Citations to the transcripts are as follows:
1 Trn. refers to the first hearing which occurred on July 28, 1999;
2 Trn. refers to the second hearing which occurred on July 29, 1999;
3 Trn. refers to the third hearing which occurred Sept. 21, 1999; and
4 Trn. refers to the fourth hearing which occurred on Jan. 28, 2000.

> I observed Danielle to be comfortable, playful, safe and secure during my visit to her father's home. Her behavior was spontaneous, and entirely content during the time I was present. She interacted with her father . . . in a completely relaxed, close and loving manner.

FINAL REPORT OF THE GUARDIAN AD LITEM, *N.O.A.* at 42. During the various hearings in this case there was no testimony by any witness that Jerry is anything but an upstanding family man who treats his daughter in accordance with his deep love for her. Beyond this, moreover, as further noted in section III of this brief, Jerry's actions reveal that he is involved in Danielle's life in rich and significant ways.

D. Amy's Inadequate Proof

In her attempts to gain custody, Amy raised a number of issues, none of which come anywhere near the harm that would have to be caused by Jerry to take custody from him.[3]

Jerry often takes Danielle swimming. *2 Trn.* at 26. In an apparent attempt to show that Jerry caused her harm, he was asked whether he threw Danielle into the pool against her will during a lesson. He did not. *2 Trn.* at 72.

Jerry gave Danielle a haircut. In another apparent attempt to show harm, Amy testified that it wasn't a good haircut, and that Amy had to have it fixed because Danielle's bangs were crooked. *4 Trn.* at 12.

Jerry and Amy disagree on the appropriateness of young children getting their ears pierced. Jerry told Amy many times he did not want Danielle's ears pierced, *4 Trn.* at 53-54, yet

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[3]Amy's request for custody does not even allege harm. It merely says: "The child is four years old and she is rapidly approaching school age. The joint physical schedule as set forth in the Parties' Final Stipulation is completely unworkable, in part given that the Parties reside in different states, and in part because the Plaintiff has been unreasonable and uncooperative as far as communicating with the mother in discussing custody, care, and that which is in the child's best interest." PETITION TO BRING FORWARD AND MODIFY, *N.O.A.* at 30, ¶6.

Amy had it done nonetheless. *4 Trn.* at 15-18, 31. When Jerry picked up Danielle, he noticed her earrings, and threw them out the window of his car. *4 Trn.* at 70-71. While it was clearly a mistake to throw them out, *4 Trn.* at 167, it is not clear that Danielle even noticed the throw, *4 Trn.* at 70, and the episode had no apparent effect on her. *4 Trn.* at 78-79.

During the depositions and hearings involved in this case, Jerry was repeatedly questioned about having showered with Danielle when she was young. No abuse was ever alleged. While he had ceased doing it by the time Danielle was about four-and-one-half years old, *4 Trn.* at 52, Amy attempted to show the behavior was somehow harmful. Dr. Eric Mart, an expert psychologist testified on a number of issues, also addressed the age at which a girl bathing with her father is no longer appropriate. He testified that there is no known negative effect of nude bathing, *4 Trn.* at 157, that Amy's concern is unjustified, *4 Trn.* at 156-157, and that Amy is overly modest regarding nudity probably because of some abuse in her background. *4 Trn.* at 186. Dr. Mart also noted that, from his personal experience as a judo instructor, both YMCA facilities in Manchester and Concord allows girls into the men's locker room until they are six years old. *4 Trn.* at 124-126. In any event, the court did not take the issue seriously. DECREE ON RECONSIDERATION, *N.O.A.* at 76.

Jerry is a gardener and beekeeper. *2 Trn.* at 27. Amy is either scared of bees, or thinks they are unsafe for children. *1 Trn.* at 73-77. Jerry takes appropriate safety precautions. *2 Trn.* at 26-31. On several occasions, after Danielle's stays with Jerry, Amy noticed bug bites, although it is unknown whether they were all bee stings, *2 Trn.* at 73-77, and which Jerry treated adequately. No adverse reactions were reported. The GAL wrote that "[u]pon investigation, the stings do not appear to have been the result of carelessness on [Jerry's] part. [T]he bee-keeping

does not appear to represent a significant source of harm or likelihood of harm." FINAL REPORT OF THE GUARDIAN AD LITEM, *N.O.A.* at 42.

As noted, prior to the order now on appeal, Jerry and Amy had shared physical custody. When this was changed, the amount of time Jerry could spend with Danielle was severely curtailed. This made him depressed, *4 Trn.* at , 66-67, 84, and he was seen crying by Danielle. Dr. Mart testified that "situational depression" is not uncommon in such circumstances, *4 Trn.* at 132-135, and that exposing a child to a parent crying is not harmful, and can be healthy. *4 Trn.* at 135-136, 168.

That's it. These allegations concerning swimming, a haircut, pierced ears, showering, bug bites, and crying are the totality of the proof offered by Amy to show that Danielle has been harmed by Jerry.

After the evidence of the haircut was presented to the court, Master Green prodded Amy's attorney to please present a "traumatic event" that might measure up to the *Perreault* standard. *4 Trn.* at 13. Nothing traumatic was ever offered. Amy failed to offer evidence, and did not prove, that Jerry has ever done anything to harm Danielle. In its order the court wrote "no specific parent is found to be responsible for creating a harmful environment for Danielle." DECREE ON RECONSIDERATION, *N.O.A.* at 74.

E. Harm Caused Mutually By Poor Communication Between Amy and Jerry

According to all involved, any harm to Danielle is being caused by the on-going conflict between Jerry and Amy, and their poor communication. *See e.g.*, testimony of GAL, *4 Trn.* at 194-198. The GAL wrote that the source of harm is the "inability of the parents to shield Danielle from their anger." FINAL REPORT OF THE GUARDIAN AD LITEM, *N.O.A.* at 43. The GAL

testified that both parents are equally at fault for the lack of effective communication. *2 Trn.* at 110-111; *4 Trn.* at 213. The same point was made throughout the various hearings, by every witness. The court accurately explained in its ruling:

> This case is somewhat unique in the sense that we are not dealing with the issue of a particular parent being abusive, . . . or any or the other types of activities normally consistent [with] serious harm to the child. The Court finds in this case that the actions of both parents and their inability to communicate is so harmful, as a totality, that leaving prior orders intact would result in harm.

DECREE ON RECONSIDERATION, *N.O.A.* at 74.

Absent from the evidence and the court's ruling is any suggestion that the harm alleged is being caused by Jerry any more than by Amy. Any harm is being caused mutually by the inability of the parties to effectively communicate with each other.

F. Amy Failed to Prove the *Perreault* Standard

As noted, in order to change physical custody once it has been ordered, the movant must prove that (1) there has been a great alteration in the circumstances affecting the child's welfare, (2) the great alteration will create a strong possibility of harm to the child, and (3) the harm is caused by the parent from whom custody is being taken.

1. Amy Failed to Prove an Alteration in Circumstances

Amy has not proved a great alteration in circumstances. The new visitation schedule entails the same number of pick-ups and drop-offs as the former plan. *4 Trn.* at 211. Other occasions requiring communication – schooling, medical treatment, etc. – of course do not change either. Thus, the amount and nature of communication necessary between the parents is identical and the new schedule remedies nothing.

Amy has clearly proved she and Jerry cannot communicate well. But the lack of

communication between the parties is long-standing. It existed during their marriage. REPORT OF THE GUARDIAN AD LITEM, *N.O.A.* at 9 ("The marriage was described as problematic from soon after its beginning, in terms of communicating well."). The problems existed at the time of their divorce. DECREE, *N.O.A.* at 58 ("It appears that the parties do not communicate."). It still exists. DECREE ON RECONSIDERATION, *N.O.A.* at 74 ("both parents . . . inability to communicate").

The court made its ruling based squarely on the inability to communicate. Because that has demonstrably not altered, *see e.g.*, *4 Trn.* at 138, however, it cannot be relied on as the great alteration in the circumstances required by law to change custody. The court's reliance on the inability to communicate as a basis for changing custody is therefore in error.

Webb v. Knudson, 133 N.H. 665 (1990), provides an example. In that case the father had primary physical custody. The mother petitioned for primary physical custody, which the lower court granted. Upon reversing, this court wrote:

> In Perreault v. Cook, we explained our reluctance to modify existing custody decrees, noting that "[t]he shuffling of a child back and forth between a father and mother can destroy his sense of security, confuse his emotions, and greatly disrupt his growth as an individual." Accordingly, "[f]amily relationships established under an existing order should not be disrupted in the absence of a 'strong possibility' of harm if continued." *Glaringly absent from the record in this case is any evidence of a relevant change in circumstances inimical to the welfare of the children and warranting their removal from the stable and loving home environment provided by their father and stepmother.*

Webb, 133 N.H. at 673 (citations omitted, emphasis added).

Like in *Webb*, glaringly absent from the record in the Cote case is any evidence of a relevant change in circumstances inimical to Danielle's welfare warranting her removal from Jerry's stable and loving home environment.

If the grounds for finding an alteration in circumstances is Amy having moved to Massachusetts, it must be recalled that it was *Amy* who moved to Massachusetts. By moving, in effect, Amy has sabotaged Jerry's chances of being involved with his daughter's life. The court found that "[s]abotage by one parent of a joint physical custody arrangement should not be rewarded by this Court." REQUEST FOR RULINGS OF LAW AND FINDINGS OF FACT, N.O.A. at 48 ¶10. It is unjust that Amy's whimsical move should marginalize Jerry in Danielle's life.

2. Amy Failed to Prove Harm Caused by Jerry

The law demands that the inquiry concerning harm to the child "must necessarily concentrate on the circumstances of the family in which the child has been placed." *Perreault*, 114 N.H. 443-44. Generalized harm caused by the parents' poor relationship is not sufficient to change custody. Whatever harm may be present in this case was not caused by Jerry, but by Amy and Jerry mutually. Amy has thus failed to meet her burden of proof, and the court's order is contrary to law.

II. Mothers Almost Always Get Custody Because of Society's Bias

A. Historical Background

The history of child custody law has been fully canvassed elsewhere. *Starkeson v. Starkeson*, 119 N.H. 78, 81-85 (1979) (Douglas, J. dissenting); *see generally,* Mary Ann Mason, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES (1994); 2 Sandra Morgan Little, CHILD CUSTODY & VISITATION LAW AND PRACTICE § 10.04 (2000) (tracing "the development of Anglo-American law of custody from a standard of absolute patriarchal guardianship, custody and control of legitimate children to a preference for maternal custody of children of tender years, and finally, to a principle of equal custody and guardianship rights in both mother and father"). Nonetheless, a brief recitation of the history is useful here.

Up through the early part of the 19th Century, the father was virtually automatically granted custody of children, because women and children were seen by the common law as a species of a man's property. *See e.g., Brackett v. Brackett*, 77 N.H. 68 (1913).

That presumption was turned upside down as the law gradually looked beyond a man's property rights, and simultaneously adopted romantic notions of women and the necessity of a "mother's love" for children. Up until recently, the romantic notion of motherhood dominated family law. Custody cases overwhelmingly favored the mother, especially for children of "tender years," unless the father could prove that the woman was a throughly rotten mother. *See e.g., Sheehy v. Sheehy*, 88 N.H. 223, 226 (1936) (although disavowed on jurisdictional grounds on appeal, lower court wrote: "I cannot be unmindful of the fact that a little girl of seven years needs the constant attention which only a mother's love can give and I believe the future welfare

of this child requires that she remain in her mother's custody.").

As society shifted from the common law view to the romantic notion, the law developed the "tender years" doctrine. It allowed the judges to award custody to the mother during a child's tender years, but still maintain the idea that the child belonged to the man as the child matured.

B. Application of Best Interest Standard Reflects Society's Bias

Beginning in the early 1970s, largely because the modern civil rights movement saw children as having rights of their own, the law has begun to recognize the interests of children in custody cases. Nearly all states have now adopted standard akin to New Hampshire's in which "the best interest of the child" is paramount.

But the best interest standard has been widely criticized as being so vague that it is virtually subjective. *See e.g.,* David L. Chambers, *Rethinking the Substantive Rules For Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984). For this reason, some states have adopted differing standards to be used in child custody determinations. *See e.g.*, Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427 (1990).

Child custody determinations are most difficult when, as in Mr. Cote's case, neither parent is terrible. In such cases, courts have turned to what is left of the tender years doctrine as a sort of tie-breaker. When all else is equal, a court generally awards custody to the mother. Little, CHILD CUSTODY & VISITATION LAW at 10-59. If a judge explicitly used such reasoning, the decision would be easily unlawful and unconstitutional. RSA 458:17, VI ("In making any order relative to such custody, the court shall not give any preference to either parent of the

children because of the parent's sex."); *Pusey v. Pusey*, 728 P.2d 117 (Utah 1986) (tender years doctrine used as tie-breaker unconstitutional); *Orr v. Orr*, 440 U.S. 268 (1979) (barring sex discrimination in family law matters).

But more likely, this reasoning is employed but unstated. Application of the best interest standard in the context of a society that deems motherhood "best" for children, results in a standard-less subjective decision that intentionally or inadvertently reflects society's latent but persistent sexism. *Starkeson*, 119 N.H. at 85 (Brock, J. dissenting) (citing"the long history of preference for child custody with the mother," and "the virtually impossible burden of proving or disproving whether so subtle a prejudice or preference is at work"); GENDER & JUSTICE IN THE COURT: A REPORT TO THE SUPREME COURT OF GEORGIA BY THE COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM (1991), *reprinted in* 8 GA. ST. U. L. REV. 539, 657-658 (1992) ("American society has tended to assume that mothers, rather than fathers, should and do have primary responsibility for raising children.").

The flip side of society's view of mother as caretaker is father as breadwinner. There is a general judicial bias against granting custody to a parent who works, whether male or female. Mason, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS. And because far more men than women are a family's primary breadwinner, U.S. Census Bureau, STATISTICAL ABSTRACT OF THE UNITED STATES (1999), this bias further favors custody being granted to women.

C. Result of Bias is That Mothers Almost Always Get Custody

The result of this bias is that mothers almost always get custody.

A 1989 Massachusetts study found that mothers get primary custody 90 percent of the time that custody is first determined by a court. MASSACHUSETTS SUPREME JUDICIAL COURT,

GENDER BIAS STUDY OF THE COURT SYSTEM IN MASSACHUSETTS (1989), *reprinted in* 24 NEW. ENG. L. REV. 745 (1990). Other evidence supports these figures. *See e.g.,* Eleanor E. Maccoby & Robert H. Mnookin, DIVIDING THE CHILD: SOCIAL & LEGAL DILEMMAS OF CUSTODY 103, 300 (1992); *4 Trn*. at 168; *Starkeson*, 119 N.H. at 82 (Douglas, J. dissenting). In New Hampshire, fathers were awarded custody in just 14 percent of contested cases in 1998. N.H. DEP'T OF HEALTH & HUMAN SERV., BUR. OF HEALTH STAT. & DATA MGMT., NEW HAMPSHIRE VITAL STATISTICS REPORT 98 (1998).

III. Jerry Cote Lost Custody Probably Because of Bias Favoring Mothers

The most relevant predictor of the future success of a child is the educational level of her parents and the daily interaction of her parents in their ability to provide rich life experiences. *See e.g.,* Douglas E. Hall, New Hampshire Center for Public Policy Studies, THE TRUTH ABOUT NEW HAMPSHIRE'S SAT SCORES (1999).

A. Jerry Is the Better Parent

Jerry is the better parent. Jerry is an educated and interesting man. He is an entrepreneur, and has a wide variety of non-business interests in which he involves his children. Amy, on the other hand, is uneducated, has indicated few life interests, has not made efforts to expose her children to a wide range of experiences, and brings few objective attributes to a custody case except a willingness to spend all her time at home.

Jerry has a college education, and a graduate degree in business. *2 Trn.* at 7. He has been self-employed for most of his career, designing computer hardware and software. *2 Trn.* at 6-7. He works at home, *2 Trn.* at 7-18, 17-18, and lives in a pleasant house in a suburban neighborhood on a cul-de-sac near the Merrimack River in Concord. *2 Trn.* at 3. Jerry's schedule is flexible. He sets his own hours, is able to schedule his work when the children are at school, and has a short work week. *2 Trn.* at 27, 56-63, 81, 86-87; *4 Trn.* at 49, 64-66. Jerry's current wife, Karen, also has a home business, and flexible and short work hours. *2 Trn.* at 27, 118-119; *4 Trn.* at 66.

Jerry spends a lot of time with Danielle. *2 Trn.* at 13. When she was living at his home, he regularly took her on nature walks at the river, and to the park. *2 Trn.* at 26. He has taught her to ride horses, *2 Trn.* at 26, 42, to swim, *2 Trn.* at 18, 26, 43, and to ski. *2 Trn.* at 18.

Danielle helps Jerry in the family garden, *2 Trn.* at 27, with a variety of farm activities, *2 Trn.* at 29, and with beekeeping, *2 Trn.* at 27, 31. He plays with her with ant hills, sand, and outside generally on his dead-end street. *2 Trn.* at 26-27. Jerry has fostered Danielle's sense of experimentation, *2 Trn.* at 19, including food coloring in the kitchen sink, *2 Trn.* at 20, and with a camera, *2 Trn.* at 20. Jerry has focused on educating Danielle as well. He teaches her letters and writing, *2 Trn.* at 23, and has books and papers for her, *2 Trn.* at 23, 25. He has begun to help her with computer literacy as well. *2 Trn.* at 20, 34-35.

In short, Jerry is a man who has the time, inclination, and maturity to engage his daughter in a rich variety of interesting and wholesome life experiences.

The contrast to Amy's life is striking. Although the record is full of accusations made against Jerry, there is no indication that Amy has any attributes beyond her willingness to abstain from work. She is uneducated, and reported few activities she has done with Danielle beyond coloring books. *1 Trn.* at 79-80. The GAL also questioned Amy's veracity. *2 Trn.* 126-127.

B. GAL's Criteria

As noted, because there is no dispute that both Jerry and Amy have not caused Danielle any harm, the decision about which parent should get custody is difficult. For this reason, in his reports the GAL wisely avoided making a specific recommendation, but instead provided the court with a set of criteria by which the determination could be made. *2 Trn.* at 97. In his final report, after canvassing the basic facts regarding each family and concluding that neither were harmful, the GAL wrote:

> I will describe the important criteria to be considered, by the Court and by the parents, in making a final determination. The first consideration is in which home will Danielle spend the most time with a parent, not in outside day-care. Can she

> leave for school from home, and return to her home after school? How much time will be spent in the care of "other providers"? The second consideration is how much flexibility is available in the parents' schedules for time away from work, both in the summer and in the event of sick days. The third consideration is each parent's ability to help her with school work, be available for after school activities, foster discipline in terms of study habits and school-related issues. The final consideration is [the] extent to which each parent will encourage the relationship with the other.

FINAL REPORT OF THE GUARDIAN AD LITEM, *N.O.A.* at 46. During the hearings, it appears from the GAL's comments that he added two additional criteria – whether or not each parent has to work, and what is the source of each family's income.

The GAL's testimony then consisted of his views on how each family measured up to the criteria, and his overall conclusions with respect to the criteria and each family generally, and for the first time, his recommendation on which family should get custody. *2 Trn.* at 97.

1. Time Spent With Actual Parent

The GAL noted that up until shortly before the hearing, Danielle spent more time with non-parent care-givers when the child was at Amy's house. *2 Trn.* at 105. He then noted that while he questions Amy's veracity, *2 Trn.* at 126-127, he had no choice but to rely on Amy's reporting of her future intentions, *2 Trn.* at 105. As to the availability of step-parents, the GAL conceded that Mr. Miller (Amy's husband) is less available to Danielle than Karen Cote (Jerry's wife). *2 Trn.* at 118-119. The GAL concluding by acknowledging that it would be hard to distinguish between the parents' ability to spend time with Danielle. *2 Trn.* at 98-99.

2. Flexibility of Each Parent's Schedule

The GAL concluded that both parents had similar flexibility in their schedules. *2 Trn.* at 106.

3. Helping Child With School Work

The GAL concluded that both parents are capable of doing a good job helping Danielle with her school work. *2 Trn.* at 106-07.

4. Availability For After-School Activities

The GAL was not able to draw a great distinction between Amy's and Jerry's availability to pick up Danielle from school. *2 Trn.* at 103-104. In his testimony, the GAL did not address the parents' availability for after-school activities. *2 Trn.* at 107. The GAL acknowledged that the ability of each parent to make sure Danielle gets to and from school was equal. *2 Trn.* at 103.

5. Fostering Discipline

The GAL did not address each parent's ability to foster discipline in the child's study habits, as the court expressed a lack of interest in the issue. *2 Trn.* at 108-109.

6. Encouraging Child's Relationship With Other Parent

Jerry has tried to make sure Danielle maintains a relationship with her mother by helping her call, write letters, and send cards to Amy, *2 Trn.* at 24, 37, 42, and by keeping Amy's picture in Danielle's room. *2 Trn.* at 41-42. On the other hand, the GAL reported that Amy was not effective at promoting Danielle's relationship with Jerry. REPORT OF THE GUARDIAN AD LITEM, *N.O.A.* at 12. Amy herself testified that when Danielle talks about Jerry, Amy gets so upset that she has to "walk away, you know, I change the subject and then I have to go in the other room to calm down." *1 Trn.* at 73. The GAL nonetheless testified that neither parent is substantially better at this than the other. *2 Trn.* at 111.

7. Whether The Parent Has to Work

The GAL testified that he was recommending that Amy be granted custody because she

did not plan to have paying work. *2 Trn.* at 100.

8. Source of Parents' Income

The GAL acknowledged that he was relying for his recommendation on the fact that Paul Miller is the source of Amy's income, whereas Jerry is a breadwinner in his home. *2 Trn.* at 102-103. Although no financial record were offered, the court recognized that money may be the deciding factor. *Id.* Both the GAL and the court recognized the resulting uncomfortable social implications. *2 Trn.* at 93-94.

C. Criteria Favor Neither Parents, But GAL's "Judgment" Favors Amy

The use of objective criteria is commendable. Based on these criteria, however, it is apparent that Amy and Jerry measure roughly equally. The testimony and the reports of the GAL do not significantly favor either parent on any of the criteria.

The objective approach having thus failed, there is little left but to be subjective. So the recommendation that Amy get custody was based on nothing more than, according to the GAL, "my own judgment." *2 Trn.* at 99.

But given the history of child custody law, society's bias toward mothers having custody, and the latent application of the tender years doctrine as a tie-breaker in close cases, it is apparent that the GAL's "own judgment" is probably as tainted as the rest of the society in which he lives, and was therefore arbitrary.

Amy's family is much more traditional-minded than Jerry's. As noted, neither Jerry nor his wife Karen have regular jobs outside the home, and they equally share the burden of their family's income requirements. Jerry has unusual hobbies, such as beekeeping. He has demonstrated that he is publicly comfortable being with children in the middle of the day when

most people of his gender are away from their home neighborhoods earning money in their offices, shops, and factories.

Amy, on the other hand, has pledged to be a traditional stay-at-home mom. *1 Trn.* at 29. Her attitude toward work is that she will only if her husband needs her to. Paul Miller has a regular job, *1 Trn.* at 28-29, and Amy testified that Paul would get a second job before sending her off to work, because he views his role in the traditional way – "he wants to provide for us." *1 Trn.* at 63.

Jerry means no criticism of Amy's and Paul's attitudes and lifestyle. And the GAL may be correct in believing that Amy's household may be less likely than Jerry's to "fluctuate." *2 Trn.* at 100. But Jerry's ability and willingness to be present for his child, provide for her materially, and to give her rich experiences, is undisputed. Jerry's and Karen's lifestyle, while perhaps not as traditional as Amy's and Paul's, reflects nonetheless a modern reality – two earners, flexible hours, and involved fathers. This reality is uncomfortable for some, and certainly does not comport with the father-knows-best and a woman's-place-is-in-the-kitchen attitudes of 1950s sitcoms. *See* CHILD CUSTODY AND THE POLITICS OF GENDER (Carol Smart & Selma Sevenhuijsen eds., 1989).

It is apparent, unfortunately, that after attempting objective criteria, the GAL's "judgment" fell back on these arbitrary traditional stereotypes. Such stereotypes were an inappropriate basis for the court's decree, which should therefore be reversed.

CONCLUSION

In accordance with the foregoing, Gerald Cote respectfully requests this court reverse the decree of lower court.

Respectfully submitted,

Gerard F. Cote
By his Attorney,

Law Office of Joshua L. Gordon

Dated: February 2, 2001

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Gerard Cote requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on February 2, 2001, copies of the foregoing will be forwarded to C. Michael Celenza, Esq., and Paul B. Shagoury, Ph.D.

Dated: February 2, 2001

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