North Dakota Law Review

Volume 72 | Number 4 Article 4

1996

A Woman's Touch

William A. Neumann

Tracy Vigness Kolb

A Woman's Touch*

HONORABLE WILLIAM A. NEUMANN** AND TRACY VIGNESS KOLB***

"We hold these truths to be self-evident:
that all men and women are created equal. . . ."[1]

I am pleased to join the North Dakota Law Review's dedication to a person so deserving of recognition, Justice Beryl Levine. I had the privilege of sitting on the bench of the North Dakota Supreme Court with Justice Levine for three of her more than eleven years on the court. Her work, of course, influenced me while we served together on the court, but it also had great impact when I was a trial court judge in my years before coming to the appellate bench. It is from these experiences that I write about Justice Levine.

Justice Levine brought a perspective to the court never before represented on that bench—a perspective informed by a woman's experiences.[2] "For although all of us share in the human experience, the human dimension is not limited to the male perspective."[3] I am told Justice Levine felt her "mere presence" on the court made a difference. But, Justice Levine was far more than a "mere presence." Documented in volumes of the *Northwestern Reporter*, Justice Levine's opinions transcend a gendered perspective. Her work symbolizes a passion for upholding the integrity of the judicial system and a quest for achieving the promise of equal justice under the law.

Representative of this theme was Justice Levine's unflagging commitment to exploring the relationship between gender and the judicial system. She successfully urged the court to study whether

* There ain't nothing wrong with this place that a little cleanin' and organizin' can't fix up. It just needs a woman's touch." A scrap of dialog from more than one old B movie, the names of which escape the elder author's porous memory.

** Justice, North Dakota Supreme Court.

*** Associate, Zuger, Kirmis & Smith, Bismarck, North Dakota; Former Judicial Law Clerk to the Honorable William A. Neumann.

Both authors extend their thanks and appreciation to Jeanne Walstad, Justice Neumann's judicial secretary, for her thoughtful remarks and invaluable assistance in completing this article.

1. Declaration of Sentiments, Address Before the First Woman's Rights Convention, Seneca Falls, New York (July 19-20, 1848), *reprinted in* 1 ELIZABETH CADY STANTON, HISTORY OF WOMAN SUFFRAGE 1848-1861 70 (New York, Fowler & Wells 1881).

2. The North Dakota Supreme Court was created in 1889. It was not until almost one hundred years later, in 1985, that a woman served on the court. The woman was Beryl Levine, who came to the court by appointment by then Governor George Sinner. She was elected to a ten-year term in 1988, and on February 29, 1996, she retired from the court.

3. Justice Beryl Levine, Remarks at her Investiture as a Justice of the North Dakota Supreme Court (Feb. 8, 1985).

gender biases are present in North Dakota's judicial system, and if so, whether they affect judicial decisions in our courts.[4]

Justice Levine recognized that gender biases affect the fair and impartial administration of the law.[5] Through her opinions, she exposed incidents of gender bias and explained how gender bias manifests itself in the interaction of court participants, such as judges, lawyers, litigants, and witnesses, and, ultimately, in courts' decisions.

Through a careful study of selected opinions by Justice Levine, my former law clerk, Tracy Kolb, and I will show how trial courts and their participants have altered their interaction with each other during Justice Levine's tenure on the court—we believe in response to Justice Levine's influence. Justice Levine wrote hundreds of majority and separate opinions, touching upon every area of the law. For purposes of this article, we have narrowed our study to her family law opinions; specifically, to three incidents of divorce: property distribution, spousal support, and child custody.[6]

4. In 1987, Justice Levine persuaded the North Dakota Supreme Court to study gender fairness in North Dakota courts. A subcommittee established by the court reviewed various information, and concluded the information indicated the existence of gender inequities. A cutback in funding delayed the formal study of gender fairness, but Justice Levine persisted, and in 1994, the Commission on Gender Fairness in the Courts began its work. Nine years after Justice Levine's initial urging, the Commission is completing its findings studying gender and its affect on the fair and impartial administration of the law.

5. Bias is "a particular tendency or inclination, esp[ecially] one which prevents unprejudiced consideration of a question." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 144 (unabr. ed. 1966).

6. Gender bias is not limited to family law. For example, Justice Levine pointed out in *Swenson v. Northern Crop Insurance*, an employment law case, that:

> Sex discrimination is based on 'archaic and overbroad assumptions' about the needs and capacities of women, stereotypical notions that "often bear no relationship to [a person's] actual abilities. There are countless examples of the exclusion of women from all walks of life because of the biased view that women are less able than men."

498 N.W.2d 174, 187 (N.D. 1993) (Levine, J., specially concurring) (citations omitted). Justice Levine also wrote about gender bias in peremptory challenges during jury selection. In *City of Mandan v. Fern*, Justice Levine stated:

> That gender bias continues to be a problem in general, and in jury selection, in particular, is evidenced by attorneys' all-too-prevalent reliance on myth and stereotype found in manuals advising on jury selection. It has been noted that:
>
> > "These manuals are riddled with crude stereotypes and categorical assumptions about the influence of gender. They claim, for example, that women make sympathetic jurors when children are involved, that male jurors are preferable when 'clearly demonstrated blackboard figures' are involved, and that men are 'hardboiled' and women 'emotional'. . . ."
>
> These stereotypes remain because we do not confront their fallacy.

501 N.W.2d 739, 746 (N.D. 1993) (quoting Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1932 (1932)).

PROPERTY DISTRIBUTION

Upon divorce, the property of the marital estate must be distributed equitably between the parties.[7] Nevertheless, an equitable distribution does not necessarily mean an equal distribution.[8] Justice Levine did not disagree with this basic rule of property distribution.[9] She did part ways with the court, however, on the issue of fault and its relevance in distributing property. According to the court, under the *Ruff-Fischer* guidelines,[10] the fault of a party, whether economic (for example, financial mismanagement) or noneconomic (for example, adultery), is a relevant consideration for distributing property.[11] Consequently, fault can support a larger property award to the party without fault.[12]

Justice Levine felt fault is an appropriate consideration only if it "substantially affected the economic status of the parties."[13] She explained the rationale for her position in *Erickson v. Erickson*,[14] stating:

> [M]arriage is a partnership enterprise, a joint venture, to which each party contributes his and her efforts and skills, as agreed upon, either or both within or without the home. Upon dissolution therefore, the accumulated property should be distributed on the basis of the contributions to the partnership that entitle each party to a fair share of the property.[15]

Under this view of marriage, noneconomic fault is irrelevant to a fair division of property acquired through joint efforts because, at divorce, each party is being repaid for contributions made during the marriage.[16]

7. N.D. CENT. CODE § 14-05-24 (1991) (providing "[w]hen a divorce is granted, the court shall make such equitable distribution of the real and personal property of the parties as may seem just and proper").

8. *E.g.*, Schmidkunz v. Schmidkunz, 529 N.W.2d 857, 860 (N.D. 1995).

9. *E.g.*, Bader v. Bader, 448 N.W.2d 187, 189 (N.D. 1989).

10. The *Ruff-Fischer* guidelines provide that in making a property distribution under section 14-05-24 of the North Dakota Century Code, the court may consider the respective ages of the parties to the marriage; their earning abilities; the duration of the marriage; the conduct of the parties during the marriage; the parties' station in life and the circumstances and necessities of each; their health and physical condition; their financial circumstances as shown by the property owned at the time; its value and its income-producing capacity, if any, and whether it was accumulated or acquired before or after the marriage; and, such other matters as may be material. Fischer v. Fischer, 139 N.W.2d 845, 847 (N.D. 1966); Ruff v. Ruff, 52 N.W.2d 107, 111 (N.D. 1952). Fault of a party is considered under the *Ruff-Fischer* factor, conduct of the parties. *E.g.*, Rust v. Rust, 321 N.W.2d 504, 506-07 (N.D. 1982).

11. *E.g.*, Erickson v. Erickson, 384 N.W.2d 659, 661 (N.D. 1986).

12. *E.g.*, Davis v. Davis, 458 N.W.2d 309, 316 (N.D. 1990).

13. *Erickson*, 384 N.W.2d at 662 (Levine, J., specially concurring).

14. 384 N.W.2d 659 (N.D. 1986).

15. *Id.* at 663.

16. *Id.* Remarking on the relevance of noneconomic fault, and with usual literary flair, Justice Levine observed: "As far as I am concerned, the adulterer will reap retribution in a different arena." *Id.*

Although the court did not adopt Justice Levine's view that contributions made by spouses in marriage should not be affected by non-economic fault, the court recognized, even before Justice Levine's elevation to the bench, her view of marriage as a partnership, economic or otherwise. For example, in *Briese v. Briese*,[17] the court rejected the husband's argument that he was entitled to a greater share of the property because it had been acquired through his skill and labor, and because his wife did not contribute significantly to the thirty-one-year marriage while taking care of the home and raising eight children.[18] The court responded: "It cannot be said that this was an insignificant contribution to the marriage."[19] Thus, both Justice Levine and the court agreed that both spouses, either directly through employment or indirectly through homemaking, make economic contributions to the marital estate. Justice Levine then sought to teach us how to appropriately value those contributions, particularly, that homemaking "was [not] an insignificant contribution to the marriage,"[20] but rather, a labor of considerable value.

In *Volk v. Volk*,[21] Justice Levine criticized the trial court for undervaluing the homemaking and working contributions of the wife, while overvaluing the working contributions of the husband.[22] In *Volk*, the trial court had found that "nearly all of the property acquired during the marriage came as a result of [the husband's] work effort."[23] Justice Levine wrote:

> Here, Aleta [the wife] not only cared for home and children, she also held a full-time job outside the home for twenty-six years out of this twenty-eight year marriage. Whether her earnings were used for family purposes or her exclusive use, they necessarily constituted a contribution in that they supplemented Pius' [the husband] earnings and made available more funds for property acquisition. If a non-wage-earning homemaker's contribution is substantial, it follows *a fortiori*, that a wage-earning homemaker's contributions are substantial. Yet the trial court noted only that Pius held down more than one job throughout most of the marriage. It overlooks entirely

17. 325 N.W.2d 245 (N.D. 1982).

18. Briese v. Briese, 325 N.W.2d 245, 247 (N.D. 1982).

19. *Id.* Apparently, however, the court was not always so enlightened. *See, e.g.*, Haugeberg v. Haugeberg, 258 N.W.2d 657, 666-68 (N.D. 1977) (Vogel, J., dissenting) (criticizing the court on the issues of fault and the earning ability and the worth of a homemaker).

20. *Briese*, 325 N.W.2d at 247.

21. 376 N.W.2d 16 (N.D. 1985).

22. Volk v. Volk, 376 N.W.2d 16, 19 (N.D. 1985) (Levine, J., concurring and dissenting).

23. *Id.* at 18.

> that the same was true for Aleta. The only difference between their respective extra jobs was Pius' remuneration for his.[24]

Justice Levine took another trial court to task in *Morales v. Morales*.[25] There, she reproached the trial court for misapplying the formula used to divide military pensions earlier developed by that same trial court, and accepted by the supreme court in *Bullock v. Bullock*.[26] Referring to the facts of *Bullock*, the trial court found that, unlike the military wife in *Bullock*, Josephine Morales had rendered "no extensive assistance" to her husband in his military career advancement.[27] Dissenting, Justice Levine wrote:

> [This court has] never held that a wife must render *extensive* assistance to her husband's career advancement in order to be entitled to an equitable share of the marital property. . . . While the record does not contain evidence that [, unlike Patricia Bullock,] Josephine "put on teas" or "belonged to the Officers Wives Club," it can hardly be said that Josephine did not contribute to Julio's career in the military.[28]

Describing those contributions, Justice Levine stated "[d]ue to Josephine's status as a military wife, her role as a homemaker and primary caretaker of the parties' two children included additional responsibilities and sacrifices unique to military families[,]" such as relocating abroad and stateside at least fifteen times, and foregoing a working career.[29]

Volk and *Morales* are only two examples in which Justice Levine urged a proper understanding of the value of a homemaker's contributions to a marriage.[30] She knew denigrating or minimizing a homemaker's contributions is a form of gender bias with no place in the law.

Today, the supreme court rarely hears an argument like the one advanced by the husband in *Briese*. Justice Levine is in part responsible for this development. She expanded on the court's recognition in *Briese* that a homemaker's contributions have some value by teaching that these contributions have significant value. She clearly influenced the

24. *Id.* at 19 (Levine, J., concurring and dissenting).

25. Morales v. Morales, 402 N.W.2d 322, 325-27 (N.D. 1987) (Levine, J., concurring and dissenting).

26. *Id.* (referring to Bullock v. Bullock, 354 N.W.2d 904, 909 (N.D. 1984)).

27. *Id.* at 323.

28. *Id.* at 326-27.

29. *Id.* at 326.

30. Justice Levine also wrote on valuing homemaking contributions in the context of spousal support and child support. *See* Spilovoy v. Spilovoy, 488 N.W.2d 873, 878 (N.D. 1992) (Levine, J., concurring specially) (involving child support and urging that "[t]he labor of child-care, home-care and all other care constitutes 'value'"); Dick v. Dick, 414 N.W.2d 288, 293 (N.D. 1987) (Levine, J., concurring and dissenting) (involving spousal support and stating "[w]hen a homemaker concentrates on a homemaking career, she is necessarily disadvantaged by that choice when the marriage dissolves").

nature of the arguments concerning property distribution (and therefore trial court interaction). She advanced the now uncontroversial concept that marriage is an "equal and shared enterprise"[31] and that its consequences should be distributed accordingly.

SPOUSAL SUPPORT

Justice Levine's opinions in this area of fiscal allocation upon divorce reflect a commitment to ensuring not only that a spouse who needed spousal support received it, but also that it was awarded in adequate measure. Spousal support, like property distribution, is not immune to gender bias. Here, the bias manifests itself in the inadequate economic awards to spouses, particularly homemakers. Justice Levine therefore urged the supreme court and trial courts to realize and understand the reality of the economic consequences of divorce, pointing out that those consequences fall with devastating disproportion on women.[32]

Justice Levine agreed that "disadvantaged as a result of divorce" is the necessary condition for an award of spousal support.[33] For example, in *McAdoo v. McAdoo*,[34] she agreed with the trial court when it determined the wife suffered slight, if any, disadvantage in "a marriage of short duration between two healthy, young and able persons."[35] "[T]he parties left the marriage with what they brought to it—their youth, their vigor, their talents."[36]

But Justice Levine sometimes disagreed with the court's application of the principle. Dissenting from the court's assessment that the wife in *Dick v. Dick*[37] was not "substantially disadvantaged by the divorce," she wrote:

> Throughout this seventeen-year marriage, Maxine's periodic employment outside the home was clearly of secondary importance. She worked outside the home in order to contribute to the family enterprise and not to enhance, expand or even engage in an independent or self-fulfilling career. . . . When a homemaker concentrates on a homemaking career, she is necessarily disadvantaged by that choice when the marriage dissolves.[38]

31. WOMEN LAW. SEC. NEWSL., Mar. 1996, at 2.
32. Beals v. Beals, 517 N.W.2d 413, 418 (N.D. 1994) (Levine, J., concurring specially).
33. Weige v. Weige, 518 N.W.2d 708, 711 (N.D. 1994).
34. 492 N.W.2d 66 (N.D. 1992).
35. McAdoo v. McAdoo, 492 N.W.2d 66, 71 (N.D. 1992).
36. *Id.*
37. 414 N.W.2d 288 (N.D. 1987).
38. Dick v. Dick, 414 N.W.2d 288, 293 (N.D. 1987).

In *Quamme v. Bellino*,[39] in which the court rejected a "call for gender biased treatment" in awarding spousal support because it was based on stereotyped assumptions,[40] Justice Levine stated, "[w]hile it may be biased to award support to a disadvantaged wife based solely on the fact that she is a woman . . . , it is not biased to recognize that women are more likely to fall into the category of 'disadvantaged spouse.'"[41] She reminded the court, "[i]t is not a 'stereotyped assumption' that women are more likely to be economically disadvantaged by divorce than men: [i]t is a plain fact."[42]

Once it is determined a spouse needs spousal support because he or she is disadvantaged, the level of support needs to be determined. The court has recognized two types of spousal support: permanent and rehabilitative.[43] They serve different purposes.[44] Justice Levine challenged two principles addressing the level of support: one concerning the type of support awarded, and the other concerning the effect of the type awarded.

The court prefers awarding rehabilitative support to a disadvantaged spouse.[45] However, Justice Levine did not want the "oft-stated preference" to become the general rule.[46] She explained the preference should only be a "first step" in the analysis of establishing support because temporary rehabilitative support, often, by itself, is not sufficient to achieve economic rehabilitation for a disadvantaged spouse.[47] She reminded trial courts that "[p]ermanent support, often misunderstood or

39. 540 N.W.2d 142 (N.D. 1995).

40. Quamme v. Bellino, 540 N.W.2d 142, 147 (1995).

41. *Id.* at 149 (Levine, J., specially concurring).

42. *Id.* at 148.

43. *E.g.*, Heley v. Heley, 506 N.W.2d 715, 719 (N.D. 1993).

44. Permanent spousal support is an appropriate award for a spouse who is incapable of adequate rehabilitation. Weige v. Weige, 518 N.W.2d 708, 711 (N.D. 1994); *Heley*, 506 N.W.2d at 719. Rehabilitative spousal support is awarded to provide a disadvantaged spouse with the opportunity to develop marketable skills through additional education, training, or experience that will enable the spouse to achieve an independent economic status. *Heley*, 506 N.W.2d at 719. However, other appropriate considerations for rehabilitative support awards include continuing a pre-divorce standard of living, equalizing the burdens created by divorce if the parties do not have enough income to maintain the pre-divorce standard of living, and considering the disparate earning capacity of the parties and the income-producing capacity of the property distributed to the parties. *Id.* at 719-20.

45. *Wiege*, 518 N.W.2d at 711.

46. *Id.* at 712 (Levine, J., concurring).

47. *Id.* at 712-13. The *Wiege* facts provided Justice Levine occasion to demonstrate how rehabilitative support probably would not be sufficient for the disadvantaged spouse, Dianne, to ever achieve economic parity with her former husband, Larry. Both parties were in their mid-40's, each had a high school education, and during the over twenty-year marriage, Dianne had held several low paying jobs, but Larry had worked for eighteen years at a telephone cooperative and was earning $18.90 per hour with pension and medical insurance benefits. *Id.* at 710. Dianne was earning $4.90 per hour. *Id.* Justice Levine wrote: "Larry's earning capacity of four times more than Dianne's is typical of the general disparity in earning capacities between divorcing men and women. Temporary rehabilitative support that enables a spouse like Dianne to obtain education or training is unlikely to achieve the parity necessary for Dianne. . . ." *Id.* at 713. Permanent support was the remedy for the permanent disparity. *Id.*

overlooked, is another part of the arsenal available to restore economic equity to a partner of a failed marital enterprise."[48]

Advocating a proper understanding of permanent support, Justice Levine questioned the logic of the principle that calls for automatic termination of permanent support upon the recipient's remarriage.[49] Viewed properly, permanent support is "compensation for lost career opportunities and advancement."[50] It is "a means of compensating a spouse for the permanent economic disability caused by the husband/wife decision for the one to forego career opportunities and advancement as the other enhances earning capacity. That mutual decision is of benefit to both partners during the life of the marriage. . . ."[51]

Under this view of permanent support, Justice Levine explained that a recipient's remarriage should not automatically terminate the support because it has "nothing to do with the recipient's new partner and everything to do with the recipient's former partner and former partnership[:]"[52]

> The common law duty of the husband to support the wife has been supplanted by the mutual duty of the husband and wife to support each other. . . . [W]hen support was awarded to wives as a continuation of the duty to support and maintain wives during marriage, it made good sense to terminate the duty when the wife remarried and the new husband assumed the duty of support. Today, however, post-divorce support is not a continuation of a duty to support. Instead, it is compensation for lost opportunities and advancement. As such, it remains a cost of the failed marriage and a debt of the one who benefited from the mutual decision to enhance only one career.[53]

Justice Levine rejected rote application of principles used to determine who was a disadvantaged spouse and what type of award would best remedy the disadvantage. She wanted trial court participants to think seriously, and to rethink, if necessary, about the consequences of those determinations. Justice Levine recognized that, upon divorce, marital partners, especially from long-term marriages, do not have a second chance at their economic future; she believed that, despite the divorce,

48. *Id.* at 713.

49. *Id.* at 712; *see also* Rustand v. Rustand, 379 N.W.2d 806, 807 (N.D. 1986) (stating "[p]ermanent spousal support will terminate upon remarriage absent extraordinary circumstances" and citing Nugent v. Nugent, 152 N.W.2d 323 (N.D. 1967)).

50. *Wiege*, 518 N.W.2d at 713 (citations omitted).

51. *Id.* (citations omitted).

52. *Id.* at 714.

53. *Id.* (citations omitted).

the partners still have a certain commitment, and responsibility, to each other for the choices made during the marriage.

CHILD CUSTODY

Perhaps in no area more than child custody did Justice Levine reveal her real passion in the law.[54] A champion of the child, Justice Levine strove mightily to assure that more than mere lip service was given to the guiding principle in child custody matters, "the best interests and welfare of the child." Her paramount concern was a custody arrangement that maintained stability and continuity in a child's life. She reflected this concern in her advocacy of the primary caretaker presumption, her aversion to split custody arrangements, and her explanation of the heavier burden required for a change of custody.

"Neither the trial court nor this court have the wisdom of Solomon" when making the very difficult decision of choosing between parents in child custody disputes.[55] Nonetheless, a decision must be made, under the guiding principle of "the best interests and welfare of the child."[56] Very early in her judicial career, Justice Levine urged the court to adopt a rule she believed not only would aid courts in making the very difficult child custody decision, but also would ensure the parent chosen was the one who would best promote "the best interests and welfare of the child." The rule she urged was a presumption of custody for the child's primary caretaker—"the parent who provides the child with daily nurture, care and support."[57]

54. Justice Levine also expressed strong opinions in the areas of child support. Her opinions demonstrated a commitment to developing rules that established an adequate level of support for the child and to ensuring child support obligors would not evade their obligation. For example, in *Sweeney v. Hoff*, 478 N.W.2d 9, 12 (N.D. 1991) (Levine, J., dissenting), commending a trial court, she wrote:

> "Children are the tragic victims of the present system of inadequate . . . child support." I am disheartened and demoralized that when a trial judge is sensitive to that inadequacy and acts to remedy it in accord with legislatively sanctioned guidelines by supplementing a grossly inadequate amount of child support, a majority of this court reverses.

Id. (citation omitted). However, the advent of the child support guidelines removed some judicial discretion thereby confining courts to application of those guidelines. Nelson v. Nelson, 547 N.W.2d 741, 744 (N.D. 1995). *But compare* Koch v. Williams, 456 N.W.2d 299 (N.D. 1989) (writing for the majority, Justice Levine developed a rule for addressing incarcerated obligors) *with* Spilovoy v. Spilovoy, 511 N.W.2d 230, 232-33 (N.D. 1994) (writing for the court, Justice Levine applied the in-kind income law under the guidelines, despite an earlier suggestion about improving application of that law in *Spilovoy v. Spilovoy*, 488 N.W.2d 873, 878-79 (N.D. 1992) (Levine, J., concurring specially)).

55. Gravning v. Gravning, 389 N.W.2d 621, 622 (N.D. 1986).

56. *See* N.D. CENT. CODE § 14-09-06.1 (1991) (indicating an award of custody must be made "as will, in the opinion of the judge, promote the best interests and welfare of the child"); *see also* N.D. CENT. CODE § 14-09-06.2 (Supp. 1995) (setting forth the factors "affecting the best interests and welfare of the child").

57. *Gravning*, 389 N.W.2d at 624 n.1 (Levine, J., dissenting).

> [T]he following have been held to be indicia of primary caretaker status: (1) preparing and planning meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning and

In *Gravning v. Gravning*,[58] the first case in which she advocated the rule, she wrote: "[w]hen equally fit parents seek custody of children too young to express a preference, and one parent has been the primary caretaker of the children, custody should be awarded to the primary caretaker."[59] As demonstrated in her opinions, Justice Levine had given great thought to the concept of the primary caretaker. She advanced four primary reasons supporting the rule:[60] "An explicit preference would more effectively protect children's primary psychological relationships, reduce the risk of coercive misuse of custody issues in negotiation, and facilitate trial and appellate decisionmaking,"[61] and the rule also is, "on its face, at least, . . . gender neutral."[62]

Though a majority of the court has not accepted the primary caretaker presumption,[63] the court did agree in *Gravning* the concept "inheres" in the best interest factors.[64] In a later opinion, *Dinius v. Dinius*,[65] Justice Levine responded by asking the court: "where . . . does the concept of primary caretaker inhere?"[66] Today, the court agrees

care of clothing; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers; (6) arranging alternative care, i.e., babysitting, day care; (7) putting child to bed at night, waking child in the morning; (8) disciplining child, i.e., teaching general manners and toilet training; (9) educating, i.e. religious, cultural, social, etc.; (10) teaching elementary skills, i.e., reading, writing and arithmetic.

Id. (citations omitted).

58. 389 N.W.2d 621 (N.D. 1986).

59. Gravning v. Gravning, 389 N.W.2d 621, 624-25 (N.D. 1986) (citations omitted).

60. "First, it will generally be in the child's best interest to be in the primary caretaker's custody [because] [t]he intimate interaction of the primary caretaker with the child creates a vital bonding between parent and child." *Id.* at 625. "Second, continuity of care with the primary caretaker is the most objective, and perhaps only predictor of a child's welfare about which there is agreement and which can be competently evaluated by judges." *Id.* "Third, the primary caretaker rule will benefit the negotiation process between divorcing parents." *Id.* "Finally, on its face, at least, the primary caretaker rule is gender neutral; it may benefit either parent." *Id.*

61. Kaloupek v. Burfening, 440 N.W.2d 496, 501 (N.D. 1989) (Levine, J., dissenting) (quoting Marcia O'Kelly, *Blessing the Tie that Binds: Preferring the Primary Caretaker as Custodian*, 63 N.D. L. REV. 481, 534 (1987)).

62. *Gravning*, 389 N.W.2d at 625. Justice Levine continued, throughout her judicial career, explaining and expanding the rationale favoring the primary caretaker rule. *E.g.*, Johnson v. Schlotman, 502 N.W.2d 831, 838 (N.D. 1993) (Levine, J., concurring) (stating "my position is well known that in a contested divorce case where the parents are equally fit to have custody, the one who had done the nursing, the chauffeuring, the tending, the disciplining, the nurturing, i.e., the primary caretaker, should prevail, but that, of course, is another story"); *Kaloupek*, 440 N.W.2d at 500-01 (adopting Professor O'Kelly's rationale for the rule, emphasizing the "strong psychological bonding").

63. In 1989, in *Dinius v. Dinius*, Justice Meschke agreed with Justice Levine "that each of the statutory [best interest] factors is not of equal value." 448 N.W.2d 210, 219 (N.D. 1989) (Meschke, J., dissenting). "When factors 4 and 5 are properly weighed, they go to the overriding importance of the stability, continuity, and permanence embodied in a primary caretaker's relationship with the children." *Id.*

64. *Gravning*, 389 N.W.2d at 622.

65. 448 N.W.2d 210 (N.D. 1989).

66. Dinius v. Dinius, 448 N.W.2d 210, 219 (N.D. 1989) (Levine, J., dissenting). In *Dinius*, Justice Levine believed the court had been given the opportunity, without avail, to "identify and analyze those [best interest] factors in which the primary caretaker concept 'inheres.'" *Id.* at 218. She continued: "By affirming the trial court, the majority pays mere lip service to the importance of the bond between

"[e]stablished patterns of care and nurture are relevant factors for the trial court to have considered."[67]

Also early in her judicial career, Justice Levine expressed disapproval of splitting custody of children, except under very limited circumstances. In *Kaloupek v. Burfening*,[68] she characterized a split custodial arrangement (six months with each parent) as "custodial schizophrenia . . . a state of animated suspension, a custodial limbo."[69] She criticized the trial court for avoiding the tough custodial decision, explaining: "Divided custody should be cautiously applied and approved because 'shifting a child between homes forecloses a stable environment and the development of permanent associations and creates confusion regarding authority and discipline."[70] The court agreed with Justice Levine and her views concerning split custody.[71]

Justice Levine was concerned, and skeptical, that a young child could "develop normally and thrive if . . . [repeatedly] removed from [familiar] surroundings . . . and forced to become accustomed to new ones."[72] Her solution was the primary caretaker presumption because she believed it was the best way to maintain stability and continuity in a child's life.[73]

The importance of stability and continuity was also reflected in Justice Levine's opinions addressing change of custody disputes. She pointed out that the court's use of the language to "'serve' or 'foster' the best interests of the child [was] misleading and inaccurate" in analyzing a change in custody dispute.[74] She clarified the standard:

> In order to warrant modification of a decree to change custody, there must be a significant change of circumstances that *requires* the change of custody in the best interests of the child. It is not every significant change in circumstances that warrants a change in custody. It is only that significant change in circumstances that *necessitates*, to foster the child's best interests, a change in custody. In order to require or necessitate a

children and primary caretaker to the best interests of those children. It also renders ineffective and meaningless our recognition that the primary caretaker concept inheres in the [best interest] statutory factors." *Id.* at 219.

67. Heggen v. Heggen, 452 N.W.2d 96, 101 (N.D. 1990).

68. 440 N.W.2d at 496 (N.D. 1989).

69. Kaloupek v. Burfening, 440 N.W.2d 196, 499 (N.D. 1989).

70. *Id.* at 500.

71. *E.g.*, *id.* at 497 (stating "we have recognized that it is not in the best interests of a child to unnecessarily change custody or to bandy the child back and forth between parents").

72. *Id.* at 500 (Levine, J., dissenting) (quoting Hurst v. Hurst, 27 So.2d 749, 750 (1946) (internal quotation marks omitted)).

73. *Id.*

74. Ludwig v. Burchill, 481 N.W.2d 464, 470 (N.D. 1992) (Levine, J., concurring specially).

> custody transfer, the significant change of circumstances must weigh against the best interests of the child.[75]

Continuing, she wrote:

> There are many significant changes in life that may . . . [*serve* or *foster* the best interests of the child] but nonetheless do not justify changing custody. . . . [I]t would not be *required* or *necessary* for the best interest of the child because it would not outweigh the benefit to the child of maintaining the continuity of the care, guidance and nurture provided by the custodial parent. *The stability of the custodial parent-child relationship is the key to any change-of-custody analysis.*[76]

This is the standard now applied by the court in change of custody disputes.[77]

Unquestionably, Justice Levine influenced trial court interaction in child custody matters. Today, the court frequently hears arguments framed in terms of which parent performed which tasks for the child, and how many times the parent performed those tasks, even though the primary caretaker rule is still not a presumption.[78] Justice Levine also responded swiftly, and with certainty, to allegations of gender bias in child custody decisions, stating "[g]ender bias in judicial proceedings is wholly unacceptable."[79] The court, too, has often, of course, stated its dislike of split custody, and today we rarely find trial courts ordering such an arrangement. And, of course, the change of custody rule, as clarified by Justice Levine, is now the standard in those matters.

---

75. *Id.* at 469 (citations omitted).

76. *Id.* at 470 (emphasis added).

77. Dalin v. Dalin, 512 N.W.2d 685, 687 (N.D. 1994).

78. *See supra* note 57 and accompanying text (describing primary caretaker tasks, such as preparing and planning meals).

79. *Dalin*, 512 N.W.2d at 689. In *Dalin*, the father alleged the trial court "based its custody determination on improper gender bias." *Id.* Justice Levine wrote:

> We agree that if the trial court assumed that fathers, as a group, are incapable of adequately raising their daughters, it would be relying on an improper factor to determine custody. Trial courts should not 'perpetuate the damaging stereotype that a mother's role is one of caregiver, and the father's role is that of an apathetic, irresponsible, or unfit parent'.

Id.; *see* Severson v. Hansen, 529 N.W.2d 167, 170 (N.D. 1995) (Levine, J., concurring in the result) (exposing the issue of gender bias in psychologist's report, which attributed father's defensiveness as "simply 'reacting normally to the stress'" but mother's defensiveness as "hysteria"); *see also* Schmidkunz v. Schmidkunz, 529 N.W.2d 857, 860-61 (N.D. 1995) (Levine, J., concurring in the result) (agreeing with decision awarding custody to the child's primary caregiver, the father); Swanston v. Swanston, 502 N.W.2d 506, 509 (N.D. 1993) (writing for the court, Justice Levine upheld a custody award to the father, who was the children's primary caretaker); Delzer v. Winn, 491 N.W.2d 741, 747 (N.D. 1992) (Levine, J., specially concurring) (agreeing with the majority's reversal of a custody decision that had changed custody from the father, the children's primary caregiver, to the mother).

CONCLUSION

"The Court lost a significant personality and legal scholar on Justice Beryl Levine's retirement. . . . She brought a perspective, wisdom, and level of excellence to the Court by which she well served the people of North Dakota."[80]

In all areas of the law, Justice Levine was generally skeptical of preconceived notions, of absolutes in the law, and of general legal principles that ring hollow when tested by real facts and cases. She continually developed novel and creative solutions for dealing with difficult problems. An area of law that she influenced considerably with her independent thought was family law. This area of the law, perhaps more than others, is susceptible to biases about men and women, and thus provided Justice Levine a natural forum in which to advocate against gender bias.

Documenting the nature and existence of gender bias and its concomitant distortion of the justice system, by way of a formal study or through the voice of a Supreme Court Justice, however, is only a first step in addressing such bias. The ideal is its elimination. Justice Levine made great strides toward accomplishing that ideal. She helped to light the way for us in her opinions: by expressing disapproval of generally inappropriate behavior and attitudes in our courts, by learning to treat men and women with equal respect and insisting that those around us do the same, by rethinking some of the underlying assumptions by which we live, by taking seriously claims that may not bother us personally, and by promoting an understanding that gender bias is simply not acceptable and will not be tolerated. In Justice Levine's words: "The reality of gender-based bias, discrimination and detriment is not pretty, and we cannot make it go away merely by . . . closing our eyes to it under the guise of 'blind justice.'"[81]

We are fortunate to have been graced with more than the "mere presence" of Beryl J. Levine—a justice, a lady, my colleague, and my friend—at whose hands all people, of whatever age or gender, received equity, respect, and protection under the law. By her work and by her example, she has helped make the world a better place for men and women to live their lives and raise their children. One could not hope to accomplish more.

80. Gerald W. VandeWalle, Chief Justice of the North Dakota Supreme Court, Remarks at the 1996 State of the Judiciary Message at the Annual Meeting of the *State Bar Association of North Dakota*.

81. Quamme v. Bellino, 540 N.W.2d 142, 149 (N.D. 1995) (Levine, J., specially concurring).