

#1B

210

2/3

RESOLVING CONFLICT

One of the primary purposes of shared custody legislation is to lessen the conflict between divorcing parents in the best interests of the children involved. I don't think that there will be any disagreement that the less the conflict between parents during and after divorce, the better the children will adjust to it.

In a recent seminar at DePaul University, Chicago, Illinois. Dr. Sheila Ribordy, a clinical family psychologist, discussed the reactions of children to our present mode of divorce. For pre-adolescent children these reactions are:

1. denial, shock, refusal to believe it is true.
2. sadness and depression- mourning the loss of a parent.
3. Anger, blaming one parent or the other. Children pick up the winner/loser atmosphere.
4. blaming self.. 'if I hadn't..... daddy wouldn't have gone away.'
5. regressive behavior as a reaction to stress.
6. reunion fantasies.
7. feelings of insecurity, afraid to sleep alone or stay with a baby-sitter, a reaction to feeling deserted by one parent and fear of being deserted by the other.
8. idolization or victimization of the absent parent as a way of dealing with feelings of rejection.
9. Divided loyalties. Dr. Ribordy emphasized that this is exaggerated by custody battles and that children under 12 should not be forced to state a preference.
10. school performance suffers-acting out feelings of rejection and loss.

I am immediately struck by two thoughts when reading over this list.

First) That shared custody diffuses many of these problems by not forcing the child to effectively lose one parent (sadness and depression as mourning of loss of one parent; Anger and blaming a parent for the loss of the other one; idolization or victimization of the absent parent; loyalty conflicts caused by having to choose one over the other; feelings of rejection and loss and all the resultant problems such as poor adjustment to school).

Second) That the foundation of most of the suffering felt by children is in the conflict.

The present winner take all custody law in all aspects encourages maximum conflict. It is a "fight to the death" with the stakes no less than being forced to become a non-person as far as the raising of your child is concerned. The conflict can, and very often is, carried on for years beyond the divorce with endless battles over the children, visitation, support, change of circumstance and resulting repeated court appearances. The most serious tips of this same iceberg are child stealing on one hand, and desertion on the other. Both of these are most often the result of the same very real fears: the child is being taken away, 'I am losing my child'.

The legislature, I am sure, wants to help children pass through a divorce, and through life with the minimum of suffering. If this is our goal the legislature will do everything in its power to ENCOURAGE AGREEMENT AND DISCOURAGE CONFLICT.. HB 210 is a vehicle, perhaps as yet imperfect, designed to reach these goals. It is a law designed to try and lessen conflict over child care arrangements during and after divorce.

At the time of separation, HB 210 makes it clear to each parent that the state considers each parent so important to the child that during negotiations both parents will in effect share custody. It further makes it clear that the state will see to it that both parents will be allowed to maintain a continuing, meaningful relationship with their children in spite of the divorce between the parents. This being the expectation of the state, the court may then order the parents to negotiate with the help of a professional mediator, the child care agreement which best serves the interests of their children. Dr. Ribordy, when specifically asked what was the best way to resolve conflicts between divorcing parents over their children, answered unambiguously that "parents need to resolve their conflicts through use of mediation". HB 210 greatly encourages parents to make agreements during the mediation process by presuming that a continuing, meaningful relationship with both parents is in the children's best interests, and by making it clear to both parents that the court will look more favorably on a cooperative parent than on a parent who stonewalls and refuses to be fair and cooperative. With this simple backbone, parents will have to consider what is actually the best way to share caring for their children after divorce, and be discouraged from using them as pawns in a state encouraged war to destroy the other by tearing away the most important bond of human existence— that of parent and child,

Marko Lewis— Mom's House— Dad's House
March 22, 1981


REP. TERRY MARTIN
STATE CAPITOL
POUCH V
JUNEAU, AK 99811


ABSTRACT : The court found the father a loving, fit and proper parent and as he had been previously involved in his daughter's education in a positive way also decreed that he had a specified right to remain assessed of her progress in school. The father has made every attempt to be communicative over a 7 month period. He is being denied by an Alaskan school any access to observe his daughter's educational progress, or any attempt to communicate through conferance with his daughter's teacher. He is in effect being denied visitation by refusal of mother or school to state vacation dates. His daughter is being denied her right to keep her legal patronym (emotionally this translates to denial of father love).

The father has been advised by his attorney that he would be wasting his money going to court and that there is "nothing you can do." When this father is faced with having a beloved daughter grow up without any thing he can do to observe her progress in school, or be the interested and positive father that he feels he is, he becomes frustrated, hostile and angry at the mother, the school and the court. He is often depressed and talks of possible solutions of which there are none.

HB 210 specifically gives the non-custodial parent the access to medical and educational records. It is implied that this right should include conferances with teachers. This aids the schools and phisicians who would be better equipped to understand the child's needs and strengths by communication with both parents. This helps the child who is thus given etter medical and educational attention by a more knowledgeable teacher or phisician, and it helps the parent who is not forced to live in total isolation from a beloved child.

HB 210 gives the courts the power to balance parental responsibilities specifically based on the real needs of the child instead of the Simplistic idea that only one parent is 100% fit to have 100% responsibility over every facet of a child's life. With the passage of HB 210 the court, by considering information supplied in implementation questionnaires, by testimony in court and from information supplied by mediators or counselors, could weigh and balance the strengths of each parent and assign a shared balance of responsibilities based upon the actual best interests of the child.

See page 2 for case history, and insert for implementation planning.

Father is 33 years old, mother is 26. Their daughter is 6 yrs. old and in the first grade, The father took responsibility for infant care when they seperated and after their daughter was two the parents shared custody on an equal time basis by personal agreement. Daughter started school at her father's house in a village in SE Alaska. Shared custody broke down when mother had a religious conversion, at which time she also became convinced that the father's village life style was unsuitable for children.

In court father asked to share custody on a school year/summer vacation basis with alternate holidays and five days a month visitation during the school year for the summer parent. Mother requested sole custody with one month summer visitation for the father. Their daughter preferred a one year/ one year arrangement and so stated her desire.

The court found that both parents were loving, fit and proper parents, and largely on the basis of urban vs. bush lifestyle decreed custody be with the mother who resided in Anchorage. The decree allowed visitation for the father for two months during the summer, alternate Xmases, all Easter Vacations and one weekend a month. The court also decreed that each parent was to keep the other fully assessed upon their daughter's education, medical care and other important facets of her life.

In view of this the father wrote the mother on Sept. 10, Sept. 26, Oct. 12, Oct. 29, Nov. 3, Nov. 17, Dec. 9, and Jan. 4 (eight times) and called thrice during that period requesting the name and address of their daughter's school and teacher, the dates of her vacations, her progress and emotional well being. The letters went unanswered and during the three phone calls the mother stated that she didn't know the school's adress, the dates of vacation, the teacher's name and that their daughter was doing "fine."

On Jan. 17, as a result of negotiations through attorneys, the mother sent the schools phone # with no further comment. As the end result of \$20 worth of long distance calls the father was finally put in contact with his daughter's teacher on Jan. 18.

The teacher answered each of his questions with, " That is the responsibility of the 'gaurdian' to give that information." He was told to make a formal request to the administration in writing for a copy of the report card. He also found out at this time that his child was enrolled under her mothers maiden name, not her legal name and although he objected strenuously that this was in effect making his child a bastard in the eyes of her peers, and serves as an alienation of affection, he was told that it was up to the "gaurdian" (read:custodial mother).

One month after a formal request for a report card the report card was sent with no additional comment to queries concerning his child's progress, interests in school, peer adjustment, dates of vacations or a request for a parent-teacher conferance to discuss what the father felt would be additional information as to Yarrow's needs and strengths. A formal request to use his daughter's legal name on her school records was also ignored.

A note thanking the school for sending the report card was sent Feb. 20, at which time the above queries were renewed and information about his daughter's previous education in S.E. Alaska was volunteered. This letter was completely ignored.

On March 10 the father again called the school but the principal was not available. He was finally reached on March 15. he principal refused to give him any information, refused to supply the dates of his daughter's vacations, refused to allow any communication with the child's teacher, or to use her legal name in her records. He was unaware that a report card had been sent and refused to send further report cards. He held that it WAS ILLEGAL TO SUPPLY ANY INFORMATION OF ANY KIND TO A NON CUSTODIAL PARENT. Mother refuses also to answer any query by phone or letter.

Richard A. Gardner of the Columbia Univ. College of Physicians and Surgeons wrote in the Journal of the American Academy of Psychoanalysis April 1978:

"Divorce proceedings and child custody cases should no longer follow an adversary model, but one of arbitration and mediation. Joint custody provides a reasonable approximation to the natural marital situation. "

Alice Arbanel who studied Shared Parenting after separation and divorce and published her findings in the American Journal of Orthopsychiatry 1979:

"Our other major finding about how important it is for a child to keep a relationship with both original parents points to the need for a concept of greater shared parental responsibility after divorce. In this condition each parent continues to be responsible for, and genuinely concerned about the well being of his or her children and allows the other parent the option as well. "

Mel Roman of the Albert Einstein College of Medicine has studied 40 families who are presently practicing joint custody and concludes in " The Case for Joint Custody " .

" While none of the families has found Joint Custody to be trouble free and most are involved in continuously questioning its effects , there is no doubt that joint custody is working for them all. In most incidences the children are thriving, not merely adjusting and the parents themselves are working out new and they believe productive lifestyles."

Judith Brown Greif , Div. of Child-Adolescent Psychiatry, Albert Einstein College of Medicine studied 40 middle class divorced fathers. She concludes in the American Journal of Orthopsychiatry 1979:

"Another belief about joint custody is that children end up being pawns in parental battles, and that this produces a situation of divided loyalties. Quite the contrary, children often seem "used" in sole custody arrangements because of the inherently unequal distribution of power between parents. In joint custody arrangements, however, parental power and decision making are equally divided, so there is less need to use children to barter for more."

" We tend to approach families of divorce as though they truly consist of only "one parent" - as though the non custodial parent has ceased to exist. Yet research is abundantly clear that, with few exceptions, the trauma of divorce can be minimized by the child's continuous open and easy access to both parents. We therefore have a responsibility to do what we can to support the involvement of the non custodial parent, both for the sake of that parent and for the benefits that accrue to the child.....Rather than support the imposition of legal visitation restrictions, we should do everything in our power to maximize contact between the child and both parents. One clear way of doing that is through joint custody arrangements. "

REP. TERRY MARTIN
STATE CAPITOL
POUCH 5
JUNEAU, AK 99801

* An article in the April 2, 1979 edition of BUSINESS WEEK States:

" The professionals agree and point to these trends in therapy-- Joint custody is in line with the trend in courts to award custody to the best prepared parent. It involves continued co parenting and extremely relaxed visitation rules and demands a strong commitment in time and energy by both parents. The known results, thus far, are successful. "

* Dr. Lee Salk who we all know states :

"Parents do not divorce their children, they divorce each other. "

* Judith Wallerstein and Joan Kelly who studied 60 families in the "Children of Divorce Project" and published their findings in Psychology Today January 1980 states :

" Many people object that parents who cannot agree during marriage ' certainly cannot be expected to reach agreement on child related matters after divorce. Indeed , some infuriated or disturbed parents will never chart a rational course with regard to their children. Yet it seems clear that our society must encourage fathers and mothers to accept the importance of continuity in parent- child relationships after divorce."

* In a litigation known as People ex. rel Watt v. Watt, 77 Misc. 2d 178 (1976); Annot. 70 ALR 3rd 269 which was quoted in a recent Alaskan custody litigation, (4FA-80-506) it is stated:

"Hence, joint custody, under proper circumstances, may be the closest remedy to the shattered ideal and offers viable options in normally dichotomized custody dispositions. Moreover, parents relegated to seeing their children only intermittently experience feelings of deep loss and often react by limiting involvement with their children. Decidedly, conventional single parent custody arrangements not only debilitate sustained involvement with both parents but tend to create de facto ex-parents and emotionally deprived children. " (quote from the Gaurdian ad litem report)

* Beatrice Thompson Ph. D. studied 105 3rd-5th grade children in western South Carolina, divided into two equal groups- father absent and father present to see if there was any difference in arithmetic achievement. A summary in Dissertations Abstract International June 1979 sums up:

" From the results of the survey it is concluded that father absense negatively affected the arithmetic achievement of elementary school children."

* Judith Wallerstein and Joan Kelly, mentioned before, also studied "The effects of Parental Divorce: Experiences of the Child in Early Latency" which was published in the American Journal of Orthopsychiatry January 1976. They find that:

"It was little comfort to these children that they saw their father on occasional visits. The typical visiting pattern of two weekends a month, established by custom and the court, was clearly not sufficient to fulfill the expectations of the seven and eight year-old boys. Such a pattern was experienced by most as depriving and as inadequate to nourish and make gratifying the relationships."

* Dr. Diane Trombetta and Betsy Lebbos LL. D. in an article for the Los Angeles Daily Journal Report state:

" Exclusive custody either intensifies the conflict and ill will so common between divorced or divorcing parents, or leads to one parent effectively "dropping out."

" Dropping out may help clear the court calendar but it also clears one parent out of a child's life. Rather than forcing or encouraging one parent to give up responsibility and care of the child, current research indicates that if our primary concern truly is the best interests of children, we should be doing quite the opposite. "

The above represent conclusions from only a very ^{of the} few studies and articles supporting joint custody which have appeared in the past five years. A bibliography of 130 recent professional articles and books supporting joint custody will be made available upon your request. As Mom's House-Dad's House is able to dig out more references they will be made available to you.

THE EVIDANCE IS CLEAR ! WE MUST REMOVE CHILD CUSTODY FROM A WIN/LOSE
AL./ NOTHING PRESUMPTION TO A PRESUMPTION OF CONSENSUS, EQUALITY AND THE PROTECTION
OF PARENT-CHILD BONDS.

REP. TERRY MARTIN
STATE CAPITOL
FOURTH FLOOR
JUNEAU, AK 99801

Parents select their preferences

Convenient for...at for submission to parents:

- 1. Before court appearance so that decrees reflect preferences of parents,
- or
- 2. Following decree that joint custody will prevail and parent must thereupon submit a joint custody plan.

Joint physical custody time allocation



Nine variations available

(See "Initiating Joint Custody Planning" questionnaire for related issues)

Each parent: Select & rank three choices

-
-
-
-
-
-

- 1. Freedom of movement between two homes. Timing decided by child, as long as net residence effect allocates an approximately equivalent period of time to each parent. (Appeals to older children as a solution.)
- 2. 3 1/2 days -- 3 1/2 days
 - (a) Split weekend
 - (or, b) Complete weekend, but alternating between parents.
 - (c) Special vacation period accorded each parent, in addition.
 (Appeals to "fairness" appreciated by early grade school children.)
- 3. 1 week -- 1 week
 - (a) Special vacation period accorded each parent, in addition.
 (Applicable to infants and junior & senior high years.)
- 4. 2 weeks -- 2 weeks
 - (a) With 'overnights' at the alternate parents.
 - (b) Special vacation period accorded each parent, in addition.
 (Applicable to infants and junior & senior high years.)
- 5. 1 month -- 1 month
 - (a) With at least one exchange weekend plus 'overnights.'
 (Applicable to junior & senior high years.)
- 6. 2 or 3 months -- 2 or 3 months
 - (a) With exchange weekends plus 'overnights.'
 (Applicable to situations of moderate geographic distance.)


 REP. FERRY MARTIN
 STATE CAPITOL
 FOUCH V
 JUNEAU, AK 99811


7. School year -- Entire summer vacation

(a) School year 'parent' offers every other weekend, plus exchange & alternating holidays, & 'overnights' during school year.

(b) Summer vacation 'parent' offers exchange of one weekend a month during summer.

(Fewer weekend exchanges accorded during summer because parent having child during school year including alternating weekends accumulates more days/time with child.)

(Applicable to college age, senior high school and geographically distant parents.)

8. Child remains in original home.

(a) Parents move in and out alternatively on schedule arranged by parents.

9. Workday week -- Weekends

(a) Modified to accommodate substantial vacation periods.

(If one parent is employed during the week and the other is not, a practical division of available time may encourage the #9 option although #9 tends to be the farthest removed from the spirit of joint custody and merely approximates the former custody/visitation arrangements decreed prior to the joint custody statute.)

Note: Residence within the same school district is not necessary to make joint custody operable. Availability of transportation is a consideration.

Furthermore, as an example, a California family having joint custody, wherein the parents live 180 miles apart, are implementing a joint custody arrangement whereby the child in upper grade school years alternates two weeks with one parent in one school and two weeks with the other parent in another school. The child has improved and accommodated academically and the statewide school curriculum is compatible. Originally one parent opposed joint custody, there was protracted conflict before joint custody was achieved, and the case has demonstrated that there need not necessarily be wholehearted and enthusiastic agreement to joint custody to make joint custody work.

Regardless of whether a child is from a conventional or a separated family, school children are already exposed to alternating teachers, alternating classrooms, yearly transfer to new grades, movement back and forth between home and school, and encounters with different friends in different classrooms. Therefore, the addition of a second home or school is not unlike that already experienced by children from nuclear families with access to grandparents, etc.

ADVANTAGES OF SHARED CUSTODY FOR CHILDREN

1. Allows children to maintain a meaningful relationship with both parents after divorce. Allows children to maintain important primary love bonds with both parents.
2. Lessens loyalty conflict (the commonly held view that loyalty conflict would increase with shared custody has been shown by research to be untrue. Loyalty conflict most often springs from absenting one parent).
3. Increases feelings of security , of being important and loved.
4. Feelings of security in knowing he/she has two homes, two responsible parents.
5. Gives child a more varied life experience as he/she is able to experience both parents in full (Documented studies show that the commonly held view that switching homes confuses a child is untrue. Studies show it is precieved by children as no more confusing than switching classrooms. Children precieve the switching as a positive factor and commonly feel sorry for single parent friends).
5. Increases feelings of independence, the obverse of the symbiotic relationship which often occurs in single parent families.
6. Better assures child of adequate sex role identification.
7. Lessens increased conflict due to recidivism in court appearances .
8. Increases likelihood that financial support will continue. Economic security.
9. Cognitive performance in school has been shown to be better in shared custody families than in absent parent families.
10. diffuses child stealing.
11. Greatly lessens children's painful feelings of grief and mourning (re-pain - analogous in children to the death of one parent) which is almost a standard reaction to today's custody procedure. Assures a child that a loved parent won't be forced to go away.
12. Increases respect of children for judicial system which no longer imposes a decree precieved by child as unfair.
13. Teaches children that sharing, and cooperation are more suitable emotions and actions than hostility and uncooperativeness.
14. Gives children the closest possible living experience to the nuclear family in spite of the parents divorce.

PRESENT CUSTODY PRACTISES OFTEN CAUSE ONE PARENT TO BE PRECIEVED AS HAVING "DIED" IN THE EMOTIONS OF A CHILD. IT IS THE RESPONSIBILITY OF THE STATE TO CREATE LAWS WHICH DO THEIR BEST TO ASSURE CHILDREN THAT THEY WILL HAVE TWO "LIVING" PARENTS AFTER A DIVORCE. LAWS SHOULD ENCOURAGE BOTH PARENTS TO TAKE RESPONSIBILITY FOR THE LOVE, AFFECTION AND ECONOMIC SUPPORT OF THEIR CHILDREN AFTER DIVORCE BY ESTABLISHING SHARED CUSTODY AS THE NORM.

The following publications were used in order to compile this list. You are encouraged to read these studies in full:

BOOKS

Galper, Miriam Co-Parenting: A Sourcebook for the Separated or Divorced Family. Philadelphia: Running Press, 1978

Roman, Mel, and William Haddad. The Disposable Parent. New York: Hold, Reinhardt and Winston, 1979.

Ricci, Isolina. Mom's House, Dad's House. 1980

Woolley, Persia. The Custody Handbook. New York: Summit Books, 1979

ARTICLES

Abarbanel, Alice Ruth. Joint custody Families: A Case Study Approach. Ph.D. Dissertation, The California School of Professional Psychology, 1977

Abarbanel, Alice Ruth. Joint Custody, What Are We Afraid Of? (Paper presented at annual meeting of American Orthopsychiatric Association, 1978)

Grief, Judith. Fathers, Children and Joint Custody. Amer. J. Orthopsychiat. 49(2), April, 1979

Hetherington, E. Mavis, Marti. Cox and Roger Cox. THE Aftermath of Divorce, in Stevens, J.H. Jr. and Marilyn Matthews (eds.), Mother-child and Father-child Relations. Washington, DC 1977.

Shinn, M. Father Absence and Children's Cognitive Development, Psychology Bull., 85-295-324, 1978.

Wallerstein, J. and J. Kelley: Children and Parents Eighteen Months after Parental Separation: Factors Related to Differential Outcome. NIMH Divorce Conference, 1978.

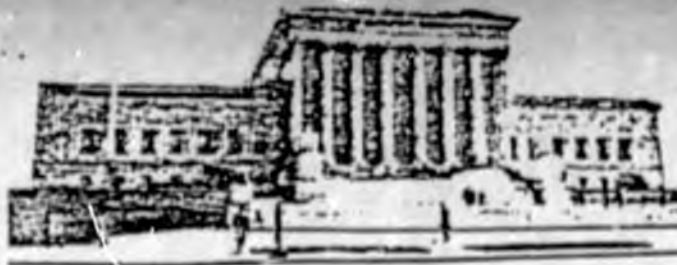
Wallerstein, J. Children Who Cope in Spite of Divorce. 1 Family Advocate 2, Summer 1978.

Wallerstein, Judith and Joan Kelley. The Effects of Parental Divorce: Experiences of the Child in Early Latency. Am. J. Orthopsychiat. 46: 20-32, January 1976

Wallerstein, Judith and Joan Kelley. The Effects of Parental Divorce: Experiences of the Preschool Child. Journ. Amer. Acad. Child. Psychiat. 14: 600, 1975

Wallerstein, Judith and Joan Kelley. California's Children of Divorce- Five Years After the Break-up. Psychology Today January, 1980 67-76

Trombetta, Diane and Betsy Lebbos, Co-Parenting: The Best Custody Solution. June 22, 1979 11-23 The Los Angeles Daily Journal Report



FAMILY LAW REFORM AND JUSTICE COUNCIL OF ALASKA, INC.

P.O. BOX 4-1646
ANCHORAGE, ALASKA 99509

LUDY JOHNSON, PRESIDENT
707 333-6693
"ALASKANS FOR CHILDRENS RIGHTS"

FAIRBANKS - BOX 73256
KETCHIKAN - BOX 7176
SIKKA - BOX

March 21, 1981

Representative Don Clocksin
Chairman HESS Committee
Pouch U
Juneau, Alaska

Dear Mr. Chairman and Members of the Committee:

I am writing this letter to recommend a DO PASS recommendation from this committee concerning HB 210 a joint custody bill before you.

I had planned on testifying in person before you but we only learned of the hearings last Friday. With more time I would share the technical research I have from professionals involved in this area that includes numerous reports and studies, all in favor of the concepts reflected in the bill you are considering. Assuming you will have a sample of technical data from Representative Rogers, I will offer this more personal input based upon my own experience as an advocate of divorce reform organizations and from the perspective of someone who have been there.

I litigated my own children's custody for almost six years in the existing adversary atmosphere of the Alaska Superior Court. That battle has taken me to the Alaska Supreme Court 5 Times and to the United States Supreme Court once. In the process of all this my ex-wife and I each spent in excess of 50,000 dollars. What was the end result?

In the interim my family was destroyed as every sacred detail of the eight and one half years my wife and I spent together was slowly and cruelly presented to the court in the form of pleadings, reports and testimony. Before the dispute began, the one thing we agreed on was that we were both very good parents and loved our children. By the time we were done, one reading the pleadings would have thought the court was dealing with a couple psychopathic, child abusing parents that should have been locked away from society and their children years before. Of course that is all part of the game necessary when playing child custody dispute in the adversary system. Regardless of the fact Alaska is a no-fault state, the decision in the courtroom will get down to who does the judge think is the better person based upon his own morality. All attorneys know this and proceed accordingly.

The attorneys involved were nice people with children of their own and were simply doing their job.

But the sad part is the parents involved take the allegations and pleadings seriously and very personally. By the time it is all over they will be alienated from each other to the point it will be impossible to discuss any issue about their children constructively or objectively for years.

At the end of the initial round of legal games, the hearing that occupied about three weeks in total, the findings of fact of both the Superior Court and the Supreme Court were as they should be and are in most cases; we were both very fit parents and in fact, exceptional parents, and either of us would be a good choice to raise the children. The children were shuffled back and forth to my custody and then here several times by court order, through our legal maneuvers. Each time one of us won or lost custody the other was forced to launch a new legal campaign with new strategy.

Everything we did or said had to be evaluated in terms of how it would affect our case. Every achievement or failure of our children was a weapon to use in the next hearing, one way or another.

How did all this affect our children? As the years went by they learned more about the supreme courts of this country than most adults ever know. They played Supreme Court like most children play dolls and trucks. They became intensely aware of the loyalty battle that was going on and the legal need both of their parents had for them to tell all the strangers who had become involved in their childhood that they wanted to live with Mom or Dad. Although the preference of the child is not determinative in itself, all attorneys know it is a big, big, plus that he and his client need.

So as the battle went on both my ex wife and I tormented our children and robbed them of most of their childhood. They are now 11 and 13. We did this out of love and a sincere belief held by both of us that the children would be better off with us.

After each legal victory or loss, the attorneys, social workers and the judge went home to their routine life and for most of them to their families. They had dinner just as the night before and they all had a good night's sleep to begin another normal day. What about us? I still have few days go by that I do not reflect on one of the many hearings there were or the emotions that were involved. Six years later, here I am talking you about it rather than having forgotten it. My children are still affected by it as my ex wife and I continue to pay for it financially.

How would it have been different if MD 210 was law then and during the following years?

1. We would have been encouraged to communicate and solve our own differences instead of being instructed by our attorneys and the court not to discuss our case with each other.

2. We would have been told it was our responsibility to make sure our children had frequent access to the other parent instead

of being told how legally advantageous it would be to have enough time go by between hearings without the children seeing the other parent. (My own attorney definitely did not encourage me to withhold visitation but the other side did and it is common legal practice to do this as shown by the enclosed letter from Judge Robbin Taylor).

The games with withholding visitation would not have been tolerated by the court and if they were we would have had recourse for immediate orders from the Supreme Court using the legislative intent of HB 210.

4. Playing games with visitation would have been a legally destructive thing to do and we both would have been informed of this.

5. We would have been advised to seek mediation as an alternative to the court and would have been encouraged to make every effort possible to resolve our own differences.

6. Neither of us would have had to go through the indignity of being refused into a parent teachers conference because we never had the written permission of the parent with custody.

7. Neither of us would have had to suffer the indignity of having to say: I lost custody of my children. (When my ex wife lost custody at the initial hearing, her remark to me was; "you have made me the laughing talk of town.")

8. The dispute would not have dragged on for years after the initial decision was made.

It is now six years since the first pleadings were filed and although my ex wife and I are by no means friends, we are working together to raise our children and the children know we will have a united front when considering decisions affecting their lives. They know they can no longer manipulate us, as we taught them to do throughout the litigation by our example and they are feeling much more secure and know they are loved by us both.

We entered into an agreement, through mediation, that neither of us is totally satisfied with but that is dignified and we can both live with.

The brief description of the experience above could have been written about any of the hundreds of divorced families I have dealt with in the past few years in my organizational efforts. (see Judge Taylor's letter). Under the terms of HB 210 all of us would have felt better and because we felt better, we would have helped our children feel better and the State courts would have saved many millions of dollars in court related expenses.

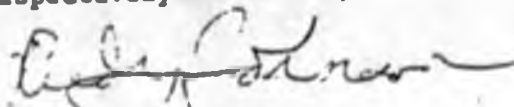
What is more important is all the children involved would have been spared the enormous heartache they all endured because of their parent's divorce.

HB 210 will not guarantee children of divorce equal time with their parents, nor do I believe legislation should attempt to, but it will go a long way in guaranteeing shared time and shared parenting. Those children, there will be over 5000 of them in Alaska this year, will have access to both parents. It will also provide the first link in the chain necessary

to break a trend that has devastated millions of families in America these past 50 years because of current attitudes and procedures used to resolve custody disputes.

SHARED PARENTING IS THE ONLY LOGICAL AND MORALLY ACCEPTABLE ALTERNATIVE TO A HAPPY, INTACT HOME FOR CHILDREN OF DIVORCE.

Respectively Submitted,



Rudy Johnson, President



FAMILY LAW REFORM AND JUSTICE COUNCIL OF ALASKA, INC.

P.O. BOX 4-1646
ANCHORAGE, ALASKA 99509

EDDY JOHNSON, PRESIDENT
377 333-6693
"ALASKANS FOR CHILDRENS RIGHTS"

FAIRBANKS - BOX 73256
KETCHIKAN - BOX 7176
SITKA - BOX

Representative Don Clocksin

Re: Judge Justin Ripleys' letter of April 7, 1981

Re: H. B. 210 - Joint Custody

Dear Mr. Clocksin,

I want to begin this letter by stating that Judge Robbin Taylor wrote his letter of May 3, 1979, at my request and certainly not for the purpose of being exploited by myself in Alaska. The issues involved at the time he wrote the letter are well qualified in his letter. He did not intend it to be distributed to the Alaska Bar, and he never, ever gave me his permission to do so. I have been very careful not to misuse it or to embarrass him by unauthorized use of his very candid letter. When I served on the Governors Task force of the Revised Childs Law Task force in 1977, the director, Ms. Betsy McQuire, wondered why she could not get an Alaskan Judge to any of the meetings although they had all been invited. When Judge Shultz showed up, she was elated. Do any of you wonder why it is difficult to get a judge to speak out and testify before your committees now?

When I sent Judge Taylors' letter to your committee, I did so with the thought that it was not going to be circulated to the legal community or even available to the public. I am sure that when he wrote it, he did so with the same understanding. His letter is a valuable, candid and ACCURATE review of the American divorce courts. I believe he would be the first to tell you, as I do, that not all courts are as he described in his letter. The letter was not intended to apply to all courts, but he does accurately describe the majority of courts.

The studies we have compiled since 1977, show that out of 350,000 child custody disputes, only 4.5% were decided in favor of the fathers. He also noticed the only thing that brought the figures up to those appalling levels, was because of a few judges who had records of awarding children to the fathers (35% and sometimes 40% of the time). There are many, many more judges who

have never awarded custody to a father or those others whose records show that they have done so 3 or 4 % of the time. As I say that, it is important to remember, we do not advocate Mens Rights, we are concerned about children of divorce and the record I spoke of, in my written testimony of April 26, 1981, shows that these childrens' interests have not and are not being protected as the rule. ?

Judge Ripley's statements, on page 2, paragraph 2, talk about how the doctrine of a custodial parents' willingness and ability to foster an open and loving relationship between the child and the noncustodial parent are interesting. I wonder if he knows that the statute originated in my living room, back in 1976. I also wonder if he has any idea what it took to overcome the opposition of this simple statements inclusion into the statutes. I know, and it costs us thousands of dollars in printing costs, travel expenses and time to successfully provide the research and information necessary to convince the legislature this was a good idea. The opposition back then, was as fierce as it is today from people who saw their power being threatened. The bill has worked remarkably well as we showed it would with our research from other states. It began a change in attitudes just as House Bill 210 will.

As for Judge Ripleys' remarks on page 2, as to how House Bill 210 will increase the future litigation of the parties, I refer you to the study we submitted from Judge Alexander of Santa Monica, California. Those are facts that measure the results, not opinions or innuendos. On page 2, he speaks of the justification of meaningless phrases like, "Reasonable Visitation". Each day in the court room amounts to over \$1000 in costs to each of the parties involved with the preparation time etc. Most people simply cannot afford to go back to court to establish their, already, court ordered visitation rights. We see the results of these decrees on the long term basis, where Judge Ripley and people like him assume that all worked out because he never heard from the people again. I hear from them on the average of 20 times a week. Denial of visitation rights is so prevalent that one national divorce reform organization has actually sought political asylum for themselves and their children in all countries outside of the U-nited States that are cosigners to the Universal Declaration of Human Rights, signed in Geneva in 1954. Their letter is enclosed and cannot be given too much weight in analyzing just what a tremendous problem we are dealing with. Then in the late 70s' a plot was discussed to have a mass execution of judges, meeting in Los Angeles, to demonstrate the need for reform. And how about the book, "Rape of the Male", by Richard Dole, that advocates mass and extensive physical violence against judges, social workers and custody investigators, complete with addresses for information on how to build your own bombs etc. Although I certainly do not agree with these peoples means to accomplish their goals, they have my empathy in recognizing there is indeed a problem that needs to be dealt with.....they live with the orders of the court that the "Judge Ripleys" issue.

Are these people crazy? Dr. Carl Abbruzzese, who is the author of the letter to the embassies, is a world famed medical surgeon who is recognized in Who's Who in the West and Who's Who in Europe. I have personally dealt with attorneys, social workers and psychologists who have been so traumatized by their experiences in american divorce courts, that they were crying like children as they explained their ordeal to me and their frustrations with the famous, unenforceable visitation clause that says, "Reasonable rights of visitation".

Oh, and as for guardians (or attorneys) for the children, the Alaska Supreme Court made it very clear in Veasey vs. Veasey, what their role should be. But I personally know of over a dozen cases, where the attorney for the children did not even go to court and in some of those cases, with the approval of the judge. Sometimes the guardians recommendation is coupled with a third party such as the state custody investigator. Many of these people end up in our files and it appears that the custody investigator in Anchorage spends an average of about one hour with each parent to determine the fate of the children involved. He has a staff of two and they have some three hundred cases a year to work on. Although I know he is grossly overworked and could not possibly investigate each case, adequately, I am astonished to hear him tell me that he is always sure when he submits his reports.

As Judge Ripley states, a party or their attorney can always appeal an illegal order. Although this is theoretically correct, the practicalness of this is questionable. An average appeal in Alaska takes about one and a half years. The only real value of an appeal beyond a stay is making some good law that will benefit others until we find a way to get the judges to obey the Supreme Courts decisions. You see the Alaska Supreme Court issued stays 8 times to 1 in favor of mothers when custody of a child is involved. That is significant because in following up the cases I have learned that in virtually all cases where a stay had not been issued and the lower court was reversed, the Supreme Court always remanded the case back to the original trial judge, where he would simply clean up his wording and reaffirm his own decision. In many of the cases where a stay had been issued, the Supreme Court simply reversed and it was out of the trial courts hands. Those appeals costs each party an average of \$10,000 and for the most part, were meaningless in terms of relief, except for making law that is apparently unenforceable. Again we must change attitudes and House Bill 210 will do that!

Judge Ripley is correct in stating we believe in the best interest of the child doctrine but what does that mean? It means something different to every judge. I remember when that particular issue came up on the task force, Judge Shultz said, "I could go over there to the Court House and round up a few judges and get a hell of an argument going over this definition." He then went on to explain how the deciding factor with fit parents must be their attitudes toward each other, because those attitudes will greatly effect the children.

Any judge can justify their decision, legally, with such an ambiguous phrase. In 1977, a judge from Alaska, decided the best interest of the children involved would be served by their being in the custody of their father, who had already been found unfit by another judge because he had been sexually abusing his sons and daughters regularly. (See Horton vs. Horton 519 P 21131, Ak., 1974). Then take a look at Nichles vs. Nichles, 516 P 2732, Ak. where the judge awarded custody of a child to a mother who had physically abused her child, to the point, the child needed hospital care (the child had been in the care of the father for some time). Both of these cases were overturned by the Alaska Supreme Court and stays had been issued in both. The children never actually were returned to the abusing parent in either case. Do you know where that judge is today? He is the Family Court judge here in Anchorage and he daily decides what "in the best interest of the child" means. Judge Ripley's record is not impressive either, but I will wait until the total results are in on the study we are presently doing of the Anchorage Court System, before I elaborate on that!

Personal
attach

As for Judge Ripley's remarks about me (page 4 - 2nd paragraph of his letter), I agree whole heartily that the record speaks for itself in my case. In the one and a half year interim, between the original decision of the trial court to take my children away from me because of the "Tender Years" doctrine (See Johnson vs. Johnson 564 P 271 Ak., 1977) after the first judge had given me custody, he was reversed or remanded by the Supreme Court of Alaska 5 times! This cost over one hundred thousand dollars between my ex-wife and myself. The end results were the same after going through the system and having the trial judge simply clean up his wording and reaffirm his own decision. He went a step further.....he took all my visitation rights away from me except for one day a month, which my ex-wife refused me. Obviously Judge Ripley has not read the record he refers to. I invite him to do so!

*Rudy's
Case*

In closing, I think it is important to boil down the issues surrounding House Bill 210. They boil down to two points:

1. If we agree with Judge Ripley and people like him, that a decree of divorce is an instrument, giving one parent exclusive right to raise the children of a divorced home and that it is a healthy procedure to exclude one parent, then House Bill 210 is not a good idea.
2. If we agree with Judge Shultz and people like him that it is the responsibility of both parents to minimize the grief of divorce for children and to encourage a frequent and loving relationship with both parents after divorce, then we need House Bill 210 immediately!

The available research unequivocally supports the second proposition and House Bill 210.

The opposition is based totally upon personal opinions, unsupported by fact, or even logic in many cases. The attitudes expressed in the opposition are exactly those attitudes that have created the horrendous problems surrounding parents and children after divorce.

I wonder if Judge Ripley opposes House Bill 210 or the fact that Rudy Johnson is associated with it.

This letter is not intended for anyone other than those it is addressed to.

Sincerely

Rudy Johnson
Rudy Johnson

This statement is hereby notified as I now understand the file & public record.
Rudy Johnson
9-24-81

enc/1

ccs/ Judge Ripley
Judge Robbin Taylor
Rep. Terry Gardner
Rep. Brian Rogers
Rep. Cato

Rep. Duncan
Rep. Beirne
Rep. Martin
Equal Rights For Fathers-Alaskans For
Childrens Rights



District Court

State of Alaska

FIRST JUDICIAL DISTRICT

P. O. BOX 869

WRANGELL, ALASKA

99929

ROBIN L. TAYLOR, Judge

June 24, 1981

Honorable J. Justin Ripley
Superior Court Judge
303 K Street
Anchorage, Alaska 99501

Dear Justin:

Your letter of April 7th left me hurt and dismayed. I have now written three letters in response, all of which I tore up because I didn't want you to feel as I did. Basically, I'll attempt to explain to you why I wrote the letter for Rudy Johnson and leave it up to you and others to weigh the validity of my previous and current comments.

I practiced law representing individual clients for over eight years. A significant portion of my practice involved domestic relations work. The real world of divorce work is quite different from the actual trial of a contested property or custody matter. The only people who can appreciate the significance of that statement are those members of the bar who have done a significant amount of domestic relations work in the private sector. I don't say this to be pompous; I say it from experience. Until you've had them crying in your office because they can't see their kids it's difficult to understand the torment this system of ours causes the people to whom we grant "reasonable rights of visitation."

Many times I have heard the following or something similar: "I've made all my payments. I sent presents on birthdays and holidays. The kids don't get the presents. I wrote to her a month in advance that I'd fly down to see the kids. When I got to the house her mother told me they had left the day before for a two week vacation."

Reasonable rights of visitation leaves the party who has physical custody with the option of acting totally unreasonable. The option left to the party without custody is to go back into court. Most attorneys will charge well over \$100.00 per hour and will normally want a retainer to take on such a case. There will likely be costs of travel to Alaska, and a portion, if not all, of the other party's legal fees. It will take several months to resolve the matter as the civil docket is plugged. There also must be proof of the unreasonableness of the party with custody.

Honorable J. Justin Ripley
June 24, 1981
Page Two

When it is all over the noncustodial parent has a paper that says the next time this happens he can go through the whole time consuming, expensive process again.

These are not isolated incidents where a kooky father wastes everyone's time to harass his ex-wife by dragging her through court. Far too often they are viewed that way. In fact, this (problem of "reasonable visitation") is so prevalent and so poorly addressed by our adversary system that men have organized in almost every state to seek changes in the law so that they won't have to go through our expensive and time consuming process just to see their kids once in a while.

Love of one's children has nothing to do with sex. It is a matter of personality and individuality. There are parents of both sexes, and I'll suggest the percentages are equal, that don't really care about their children. Fortunately there are a greater number of mothers and fathers for whom their children are the most important people in the world.

Our society, which our system of justice reflects, believed that mothers were the sole possessors of parental love and this myth supported such antiquated concepts as the (tender years doctrine). Most people today still find it difficult to believe that a father is capable of the loving, caring dedication necessary to raise young children as a single parent.

When each party is represented by counsel and the children have their own attorney, the courts of this state are probably some of the most liberal and forward thinking in the nation. It is the unusual case where visitation would be left to the vague terminology of reasonable rights. However, economic necessity forces the majority of people to utilize the uncontested method of a petition for dissolution. This often involves the appearance in court of only one party, the other having waived his or her right to appear. There is no contest regarding custody or visitation. I'm aware that the court gives "close scrutiny" to custody and visitation agreements as you indicate. But who and what is scrutinized? The one person who shows up in court? And what do they say? I also inquire in depth of these people when sitting as a master for Judge Schulz in Wrangell and Petersburg. The answers I receive are: "We'll work it out", "I guess he'll have to pay costs of transportation", "Yes, my husband agrees I should have custody", etc.

What happens when we have nothing else to go on but the bald assertions of that (one person in court)? Do we send them away to get counsel to make a custody fight out of it? Do we set specific dates of visitation? No, we allow it to go through and hope they can work it out.

From your letter (page 3, last paragraph) I assume that if only one person shows up for a dissolution hearing you won't proceed. Otherwise how can you be assured that there was no "coercion or other factor" involved and how else do you determine that it is a true agreement that is in the best interest of the children?

The courts of this district allow dissolutions involving children to proceed upon the written waiver of one party. Rather than have me recite the numbers of cases in this district which result in the visitation being left "reasonable rights of visitation", maybe you could have your masters in Anchorage tell you the number of decrees issued monthly where that's all that appears.

Honorable J. Justin Ripley
June 24, 1981
Page Three

If you are requiring specific dates each year and minimum visitation and actual access to the noncustodial parent, then you and I have no disagreement. If, however, you are proceeding with only one parent in your courtroom, and most of those uncontested cases actually result in the reasonable right to try to see the kids, then you have overstated your case about "close scrutiny" and "best interest of the child".

The phrase "reasonable rights of visitation" is of course an enforceable right granted to the noncustodial party. ~~But there~~ is also a cost to such enforcement. If you truly believe it is as easy to enforce as your letter implies, call a few of the attorneys presently litigating such matters in Anchorage and ask what the final cost was to the noncustodial parent.

Knowing the humanitarian nature of your personality, I'm surprised that you would controvert the need for greater protection of children's rights to parental access. I'm also shocked that you would take phrases totally out of context from my letter and accuse me of approving of Mr. Johnson's illegal act or of disapproval of my fine colleagues who sat and ruled on his case. Though I don't even have a copy of my letter, I know that I strongly indicated my disapproval of his conduct and felt only sympathy and respect for the fine judges who sat on that difficult case. I'm sure I only mentioned his case to emphasize the illegal and rash actions that frustrated noncustodial parents often take. If his case was an isolated incident it would be different. You know it is not. You also know that child stealing became such a national tragedy that legislation was enacted during the last five years in almost every state. Thus people like Mr. Johnson can now be caught and punished by the long arm of the law. But we still haven't adequately addressed the problem that makes such people do these things and that is the issue.

Some people believe that HB 210 will help solve that problem. I'm not sure that it goes far enough. However, it at least raises the issue and requires the close scrutiny that both of us apparently feel is required. It is the children I am concerned about, Justin, and the knowledge that our system is not adequately protecting their rights to parental access in all cases.

I'll believe that we don't need further legislation and I'll join you in saying that the system is working as it should and we don't need any more changes when I see a guardian ad litem appointed for the kids in every divorce case in this state; when I see a dissolution form which requires that a minimum number of days visitation be provided to noncustodial parents; and when I see the state actively enforcing the rights of noncustodial parents; with at least the same degree of enthusiasm with which child support and URESA's are presently enforced. Until then let's work together to improve justice for children in Alaska and the next time you want to take a poke at your old friend, send me a copy. I'd appreciate the opportunity to respond.

I think you and I agree that the rights of children in a divorce case should be protected. Where we part company is that I believe the court has a duty to protect those rights in all cases and apparently you feel we should only be involved in contested cases. You see, I believe that the court, in all divorce actions where there are children involved, should receive a report and home study presented by an objective disinterested third party before we attempt to render a decree which establishes custody and visitation that is in the best interest of the unrepresented children.

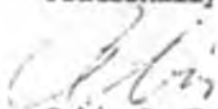
Honorable J. Justin Ripley
June 24, 1981
Page Four

I see that as an affirmative obligation implied by the statutes and case law of this state. The costs of such proceedings should be borne by the state and the parties where they have the ability to pay.

I received (from an unexpected source) a copy of your letter dated April 7th on June 11th. Since your letter was widely circulated, I have attempted to copy each of the people who it appears received your letter.

Justin, my door is always open and the coffee pot is always on. Furthermore, it has been too long since you've been in Wrangell. Ed and Delores Bradley send their regards and hope that you'll take us up on our invitation for Kaye and I would sure enjoy seeing you for a while this summer. The silvers should be here in early August and the river boat is running. We'd all love to see you.

Fraternally yours,


Robin L. Taylor

cc: Honorable Thomas B. Stewart
Honorable Thomas E. Schulz
Honorable Ralph E. Moody
Honorable Victor D. Carlson
Representative Don Clocksin
Representative Terry Gardiner
Representative Brian Rogers
Representative Bette Cato
Representative Jim Duncan
Representative Mike Beirne
Representative Terry Martin
Arthur H. Snowden, II
William Grant Callow, II
William Hitchcock
Rudy Johnson
James Bradley
Peter Page

HB210



Superior Court
State of Alaska

THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA 99501

April 7, 1981

CHAMBERS OF
J. JUSTIN RIPLEY, JUDGE

Mr. William Grant Callow, II, Esq.
General Counsel to Administrative Director
Alaska Court System
303 "K" Street
Anchorage, Alaska 99501

Re: Judge Robin L. Taylor's letter of May 3, 1979
re: presumptive joint custody

Dear Mr. Callow:

There are two things that can be said with absolute certainty about my great and good friend Judge Robin L. Taylor. First, he invests the philosophical positions that he espouses with his own immense personal sincerity. Second, he tends to express himself upon these issues with more eloquence than objectivity. Although his letter to Mrs. Miller and Mrs. Fisher of May 3, 1979 may represent a position which he would be willing to reevaluate in the light of his now two additional years of judicial service, insofar as it may be taken as representing current doctrine, I feel constrained to reply. This because I disagree with virtually all his assertions except that contained in the last sentence of paragraph number one.

Dealing first with our single source of agreement, I agree wholeheartedly with Judge Taylor that disputes over child custody have the potential for producing heart rending and tragic consequences. Where I begin my disagreement with Judge Taylor is that it appears to be his thesis in his letter that presumptions as to joint custody, and indeed joint custody decreases themselves, would reduce or discourage these disputes. I respectfully suggest in the strongest terms that the experience of the Bench generally and a careful analysis of the motivations

of the parties to divorce actions clearly indicate otherwise. As I repeatedly stated in my memorandum to Judge Moody of March 19, 1981, the principle evil of the joint custody presumption proposed in House Bill 210 is that it will encourage and to a certain degree even require continuing legal "disputes" over matters related to child custody, long after the divorce and custodial placement is finalized and the parties and children, in the interest of their emotional health, must be committed to going forward with the rebuilding of their lives. Our existing statutes and decisional law provide this essential stability through a decree granting custody which would only be changed in the best interest of the child, and upon a showing of changed circumstances.

One of the factors the trial court must assess in the entry of such a decree is the custodial parent's willingness and ability to foster an open and loving relationship between the child and the noncustodial parent. The concept that the child needs and requires continuing contact with the noncustodial parent is as essential and central to present considerations of custody as it can possibly be. No joint custody presumption is required to make that concept more central to the judge's custody decision, and attempting to do so by inserting joint custody provisions which are likely to lead to further litigation is absolutely contrary to the conditions of stability which are at the heart of the "best interest of the child" analysis.

Strong issue must be taken with Judge Taylor's assertion in paragraph two that the Courts "blandly skip over" custody issues by the use of the phrase "reasonable rights of visitation". It might first be observed that "reasonable visitation" is not an unenforceable clause. A great body of decisional law exists to guide a reviewing court in the determination of whether a custodial party has been reasonable in complying with the visitation order. Further, such language has been found to be desirable since it encourages the parties to work toward agreement as to the amount and type of visitation which is desirable for the child and is possible for them. Finally, Judge Taylor's experience in this field does not appear to extend to the fact that the Court has the authority to be as specific in its visitation order as the parties request or as the conduct of the parties requires. I know of no situation in which I have refused nor can I envision a situation in which any judge would refuse to spell out rights of visitation with great specificity where visitation by the noncustodial parent was apparently consistent with the best interest of the child and such specificity appeared to be required. It is palpably false to suggest as Judge Taylor does in paragraph two that visitation is an issue

Mr. William Grant Callow, II
April 7, 1981
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which is blandly skipped over.

Judge Taylor incorrectly suggests in paragraph three that the Courts have "only recently" and "very slowly" begun to meet their obligation to consider the necessity of appointment of guardians ad litem for children in contested divorces and in applying the best "interest of the child" standard. I don't know what Judge Taylor's experience has been, but since my appointment to the Anchorage Bench in 1975, guardians ad litem have been appointed routinely when requested by either party. Further, although it is not required, these guardians are often lawyers whose investigations and reports are given great weight by the Court deciding custody issues.

I feel compelled to further suggest that ~~if~~, in his domestic relations practice as an attorney, Judge Taylor found that the Court was failing to adequately consider the concept of "best interest of the child" in awarding custody, he need ~~only have appealed to the Alaska Supreme Court to have that oversight rectified.~~ For the last nearly twenty years, since Rhodes v Rhodes 375 P2d 902 (Ak. 1962), the Alaska Supreme Court has been committed to the proposition that the welfare and the best interest of the children must be given paramount consideration. I suggest there is no basis in fact for Judge Taylor's suggestion that the Trial Courts of Alaska have given only grudging effect to the concept of "best interest of the child", even before that concept was made part of Alaska's statutory law more than thirteen years ago.

Although time does not permit me to continue with my sentence-by-sentence analysis, fairness and accuracy require me to dispute two theses stated by Judge Taylor in paragraphs four and seven. It cannot be said with accuracy that Courts "rubber stamp" the parties ignorance of the law by routinely and unquestioningly approving custody agreements between parties unrepresented by counsel or otherwise. I have spoken to a goodly number of Superior Court Judges who have primary responsibility for domestic relations matters as well as the two standing masters for domestic relations here in Anchorage. The concerns they express to me indicate that their attitude is the same as mine was when for more than a year and a half I was exclusively assigned to family and children's matters in 1976 and 1977. Agreed custody dispositions, particularly those between parties unrepresented by counsel, require close scrutiny by the Court to ensure that the agreement is in fact arrived at with the best interest of the child in view, and not some other motive, and further that the agreement is truly an agreement and not the result of coercion or some other factor. I call upon my friend Judge Taylor to substantiate this "rubber stamp" activity with any cases he wishes to put forward.

Mr. William Grant Callow, II
April 7, 1981
Page -4-

Judge Taylor's second thesis in paragraphs four and seven appears to be that in the usual and typical situation, the father, having consulted his trusted friends, advisors and even his attorney, becomes convinced that he has no opportunity to obtain custody, and further that he must be content with such visitation as his "ex-wife lets him" have. As I stated earlier in this letter, it is a false premise to assume that the phrase "reasonable and liberal rights of visitation" places the entire discretionary control with the ex-wife. Moreover, I challenge Judge Taylor or any other person to produce a single decree granted by the Courts of Alaska which vests total discretionary control over visitation in the custodial parent by its specific terms. (May I request, in order to save us all time, that if anyone is prepared to accept my challenge, he or she read the record which underlies that decree. I would venture an opinion that if such a decree is found, the record underlying it will be replete with evidence supporting the trial judge's decision that such control over the visitation was in fact in the best interest of the child based upon the continuing course of conduct of the noncustodial party.)

Judge Taylor's final paragraphs, eight through fourteen, appear to be a comment on the case of Mr. Rudy Jounson. I leave the record of that case in the various Courts of this jurisdiction to speak for itself, except to observe that it is difficult for me to understand how an allegedly loving and concerned non-custodial parent could attempt to justify, and a judicial officer appear to approve child hostage taking as "the only way left to strike back at a system that won't listen . . ." Page 4, paragraph 13, line 6.

It has not been my intention in this letter to strongly criticize my brother Judge, although I personally believe that his letter of May 3, 1979 requires this type of comment. I would not be adverse however, if, before any of this letter is shared outside the Court System, you took counsel with the Administrator and the Chief Justice to determine the propriety of its release.

Very truly yours,


JUSTIN R. TAYLOR
Superior Court Judge

JJR:all

CC: Arthur H. Snowden, II
Honorable Judge Ralph E. Hoddy
Honorable Victor D. Carlson
William Hitchcock
Andrew Brown
Francis Stevens



District Court

State of Alaska

FIRST JUDICIAL DISTRICT

P. O. BOX 888

WRANGELL, ALASKA

99929

ROBIN L. TAYLOR, Judge

May 3, 1979

Ms. Laura Miller and
Ms. Nancy Fischer

c/o:
Family Law Reform and
Justice Council of Alaska
Rudy Johnson, Coordinator
P.O. Box 4-1646
Anchorage, Alaska 99504

Dear Ms. Miller and Ms. Fischer:

I am a District Court Judge located in Wrangell, Alaska and have been on the bench for approximately 24 years. Prior to my judicial duties I was actively involved in the private practice of law in Ketchikan, Alaska for 14 years. During my years as a lawyer I dealt almost daily with divorce problems of one kind or another. Of all the problems faced in divorce work, none was so heart wrenching or had such tragic consequences as disputes over child custody.

In America we use 12 man juries and open the doors of our appellate process for a murderer who, if convicted, may receive a life sentence. In most states this means that with good behavior he will be out on the streets in 7 1/2 years. Yet we daily allow judges, without the advice or assistance of juries, sentence innocent children to 18 years custody with one parent and blandly skip over the child's rights of access to the non-custodial parent with such non-enforceable clauses as "reasonable rights of visitation", etc.

Those children are often sentenced to a fate far worse than the murderer will receive and for a much longer term. The convict gets 3 meals a day, clothing and a roof over his head - to say nothing of medical, dental, optical and visitation. Only recently have we begun to appoint attorneys to represent the children in contested domestic matters. Only recently, and very slowly I might add, are the courts paying anything more than lip service to the term "best interest of the child".

The system usually works this way. Parents in mid-20's, and children under 5 years of age. Parents want divorce and each relies upon advice from friends, etc. If both husband and wife agree on the terms they file their own papers and the courts rubber stamp their ignorance of the law by granting the divorce because they have it all worked out. Only when they can't agree does the attorney get involved. Prior to this the husband has been told by his friends that he can't get the kids unless he can prove the wife unfit. The wife has been told that she would be a fool to give up the kids because of child support, tax deduction and society's suspicions of a divorced woman who "lost" her children.

The very phrases I've used above demonstrate the problem. The words always used by people discussing these matters are as follows: Wife=she lost her kids - the court took her children away from her - she had to give up her kids - etc. Husband=they just say "oh, he's divorced" and everyone assumes he didn't receive custody - if he did, the words are always spoken in exclamation or with the innuendo that his wife must have really been bad - why do you say that? "Well, they went to court and he got the kids!"

The typical situation I mentioned above usually results in the husband being told he can't get the kids. If he tries he will lose and it will cost him a fortune. Furthermore, he knows from what he has seen or heard happen to so many other divorced fathers that any semblance of father-child relationship will be shattered by the capricious whim of a vindictive ex-wife who will do anything possible to frustrate his exercise of those reasonable rights of visitation. I have personally seen each of the following occur and they are but a sample of the 8 1/2 years I spent working on domestic matters.

1) Wife leaves town with children or moves in with relatives to prevent father from seeing the kids for the one week per year he was allowed under the old decree. This is after the father has given one month's notice of the visit and flown over 1,000 miles to see them. Husband has paid child support faithfully and is current.

2) Wife destroys all letters to children, gifts, etc. She has an unlisted phone number. She refuses to disclose address of residence.

3) Children are sick so doctor and dental appointments, etc., are scheduled to make visitation impossible or impractical at best.

4) Wife refuses to send children to father even though ordered to by the court and the father has paid their round trip fare. She demands \$6,000.00 bond in cash before allowing visitation.

Knowing of these situations the young father who loves his children (and I haven't seen any evidence that indicates that the sex of the parent is in any way an indicator of parental love) bites the bullet and goes along with the advice of his friends and usually the advice and experience of his attorney which results in the same course

of conduct. He watches the ex-wife walk from the court room with a piece of paper that says he may only see his kids if his ex-wife lets him.

(Mr. Rudy Johnson) is a living example of the result that this system of ours creates. His case is only unique in two respects. First, he had the entire weight of a religious organization hiding his wife and children from him and providing his wife with unlimited financial support for legal assistance. It is also unique in that Mr. Johnson loved his children enough to take on the whole system and fight in the only way left to him.- he broke the law. However, before he resorted to the extreme action of physically taking his children, he had spent years in litigation and a small fortune in attorney fees. The and result is that she has custody and he has specific enforceable visitation with his children. This is after 4 or 5 years of fighting the system, being hunted by the law as a child stealing parent and exceptional personal sacrifices on his part. I personally admire his stamina and dedication to be willing at this point to go on with the fight so that the future will hopefully provide better alternatives for other men and women than he was forced to face.

Don't misinterpret my comments as approval of his rash act of taking the children in violation of a standing court order. Nor should you be led by these remarks to believe that I'm critical of the five judges who had to render the difficult decisions posed by the Johnson case. They were only doing what they believed society and the law said should be done.

How many people like Rudy Johnson will have to throw their bodies into the machinery before the system changes? Though I don't know what the make-up of your conference or panel is, I would hope that there are several Rudy Johnsons sitting on that board. If they are not included and listened to, you will only perpetuate a dogma that daily wrecks havoc all across this nation.

When you listen to Mr. Johnson - and I sincerely hope you will - please remember that he is not just speaking for himself. He is saying things that have and will happen to untold numbers of other people unless change occurs.

I don't see this conference as a mere sounding board for aggrieved non-custodial parents and their rights. Though these are important issues, they are not the crux of the problem. The real issue before you is "what are the rights of the child and how will those rights be protected?" In this year of the child I hope that the panel will concentrate on their rights to free access to both parent and to maintaining the parent-child relationship of the non-custodial parent.

Most divorced fathers see less of their children than does the summer camp counselor or their babysitter. The child has a right to better treatment than that and so does the non-custodial parent. Small wonder that the non-custodial parent refuses to pay child support or resorts to "child stealing". It's the only way left to strike back at a system that won't listen to them. Such conduct will continue until we all stop and listen.

I hope you will listen to Rudy Johnson. He's been there.

Sincerely yours,

Robin L. Taylor

Robin L. Taylor

CHAPTER 48

(Senate Bill No. 961)

An act to add Section 4607 to the Civil Code, and to amend Section 1731 of, and to repeal and add Article 2 (commencing with Section 1740) and Article 3 (commencing with Section 1760) of Title 11a. of Part 3 of, the Code of Civil Procedure, and to amend Section 26840.3 of, and to add Section 26862 to, the Government Code, relating to marriage, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor March 27, 1980. Filed with Secretary of State March 27, 1980.]

LEGISLATIVE COUNSEL'S DIGEST

SB 961, Sieroty. Marriage: conciliation courts.

Existing law requires each superior court to exercise jurisdiction as a conciliation court, and sets forth various provisions for the appointment of personnel to assist the conciliation court in disposing of its business in carrying out its functions, the number, classification, compensation, and duties of such personnel differing according to the population of the county involved. This bill would repeal the law relative to conciliation courts and reenact such law in revised form, changing the name of such law to the Family Conciliation Court Law, deleting the latter provisions, and establishing uniform provisions for the appointment of personnel to assist the family conciliation court in disposing of its business in carrying out its functions, the classification in salaries of such persons to be determined by the board of supervisors involved.

Existing law specifies the duties of a supervising conciliation counselor.

This bill would delete such provisions and specify the minimum qualifications for a supervising counselor of conciliation or associate counselor of conciliation.

Existing law authorizes the destruction of specified records by a counselor of conciliation upon order of the judge of the conciliation court.

This bill would authorize such destruction only by the supervising counselor of conciliation.

Existing law does not provide for agreements between counties to provide joint conciliation court services.

This bill would so provide.

Existing law does not specify that the jurisdiction of a conciliation court with respect to controversies arising out of an instance of domestic violence are not exclusive.

This bill would so provide.

Existing law does not grant jurisdiction to the conciliation courts of controversies relating to child custody or visitation regardless of the parents' marital status.

This bill would grant such jurisdiction.

Existing law does not require mediation of an application for modification of an order for child custody or visitation rights.

This bill would so require, operative January 1, 1981.

Existing law provides for various filing and other fees for the support of the conciliation court.

This bill would revise such provisions.

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Under existing law, Sections 2231 and 2234 of the Revenue and Taxation Code require the state to reimburse local agencies and school districts for certain costs mandated by the state. Other provisions require the Department of Finance to review statutes disclaiming these costs and provide, in certain cases, for making claims to the State Board of Control for reimbursement.

This bill provides that no appropriation is made by this act pursuant to Section 2231 or 2234 for a specified reason, but recognizes that local agencies and school districts may pursue their other available remedies to seek reimbursement for these costs.

This bill would take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 1731 of the Code of Civil Procedure is amended to read:

§ 1731. This chapter may be cited as the Family Conciliation Court Law.

SEC. 1.5. Article 2 (commencing with Section 1740) of Title 11a of Part 3 of the Code of Civil Procedure is repealed.

SEC. 2. Article 2 (commencing with Section 1740) is added to Title 11a of Part 3 of the Code of Civil Procedure, to read:

ARTICLE 2

Family Conciliation Courts

§ 1740. Each superior court shall exercise the jurisdiction conferred by this chapter, and while sitting in the exercise of such jurisdiction shall be known and referred to as the "family conciliation court."

§ 1741. In counties having more than one judge of the superior court, the presiding judge of such court shall annually, in the month of January, designate at least one judge to hear all cases under this chapter. The judge or judges so designated shall hold as many sessions of the family conciliation court in each week as are necessary for the prompt disposition of the business before the court.

§ 1742. The judge of the family conciliation court may transfer any case before the family conciliation court pursuant to this chapter to the department of the presiding judge of the superior court for assignment for trial or other proceedings by another judge of the court, whenever in the opinion of the judge of the family conciliation court such transfer is necessary to expedite the business of the family conciliation court or to insure the prompt consideration of the case. When any case is so transferred, the judge to whom it is transferred shall act as the judge of the family conciliation court in the matter.

§ 1743. The presiding judge of the superior court may appoint a judge of the superior court other than the judge of the family conciliation court to act as judge of the family conciliation court during any period when the judge of the family conciliation court is on vacation, absent, or for any reason unable to perform his duty. Any judge so appointed shall have all of the powers and authority of a judge of the family conciliation court in cases under this chapter.

§ 1744. In each county in which a family conciliation court is established, or in which counties have by contract established joint family conciliation court services, the superior court, or the superior courts in contracting counties jointly may appoint one supervising counselor of conciliation and one secretary to assist the family conciliation court in disposing of its business and carrying out its functions.

The supervising counselor of conciliation so appointed shall have the power to:

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(a) Hold conciliation conferences with parties to, and hearings in proceedings under this chapter, and make recommendations concerning such proceedings to the judge of the family conciliation court.

(b) Provide such supervision in connection with the exercise of his jurisdiction as the judge of the family conciliation court may direct.

(c) Cause such reports to be made, such statistics to be compiled and such records to be kept as the judge of the family conciliation court may direct.

(d) Hold such hearings in all family conciliation court cases as may be required by the judge of the family conciliation court, and make such investigations as may be required by the court to carry out the intent of this chapter.

(e) Make recommendations relating to preage marriages.

(f) Make investigations, reports and recommendations as provided in Section 281 of the Welfare and Institutions Code under the authority provided the probation officer in such code.

(g) Act as domestic relations cases investigator.

(h) Conduct mediation of child custody and visitation disputes.

The superior court, or contracting superior courts, may also appoint, with the consent of the board of supervisors, such associate counselors of conciliation and other office assistants as may be necessary to assist the family conciliation court in disposing of its business. Such associate counselors shall carry out their duties under the supervision of the supervising counselor of conciliation and shall have the powers of the supervising counselor of conciliation. Office assistants shall work under the supervision and direction of the supervising counselor of conciliation.

The classification and salaries of persons appointed under this section shall be determined by the board of supervisors of the county which by contract has the responsibility to administer funds of the joint family conciliation court service, or by the board of supervisors of the county in which a noncontracting family conciliation court operates.

§ 1745. (a) Any person employed as a supervising counselor of conciliation or as an associate counselor of conciliation shall have the following minimum qualifications:

(1) A masters degree in psychology, social work, marriage, family and child counseling, or other behavioral science substantially related to marriage and family interpersonal relationships.

(2) At least two years' experience in counseling or psychotherapy, or both, preferably in a setting related to the areas of responsibility of the family conciliation court and with the ethnic population to be served.

(3) Knowledge of the court system of California and the procedures used in family law cases.

(4) Knowledge of other resources in the community to which clients can be referred for assistance.

(5) Knowledge of adult psychopathology and the psychology of families.

(6) Knowledge of child development, clinical issues relating to children, theories of divorce on children, and child custody research sufficient to enable a counselor to assess the mental health needs of children.

(b) The family conciliation court may substitute additional experience for a portion of the education, or additional education for a portion of the experience, required under subdivision (a).

(c) The provisions of this section shall be met by all counselors of conciliation not later than January 1, 1984, provided that this section shall not apply to any supervising counselor of conciliation who is in office on the effective date of this section.

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§ 1746. The probation officer in every county shall give such assistance to the family conciliation court as the court may request to carry out the purposes of this chapter, and to that end the probation officer shall, upon request, make investigations and reports as requested, and in cases pursuant to this chapter, shall exercise all the powers and perform all the duties granted or imposed by the laws of this state relating to probation or to probation officers.

§ 1747. Notwithstanding the provisions of Section 124, all superior court hearings or conferences in proceedings under this chapter shall be held in private and the court shall exclude all persons except the officers of the court, the parties, their counsel and witnesses. Conferences may be held with each party and his counsel separately and in the discretion of the judge, commissioner or counselor conducting the conference or hearing, counsel for one party may be excluded when the adverse party is present. All communications, verbal or written, from parties to the judge, commissioner or counselor in a proceeding under this chapter shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code.

The files of the family conciliation court shall be closed. The petition, supporting affidavit, conciliation agreement and any court order made in the matter may be opened to inspection by any party or his counsel upon the written authority of the judge of the family conciliation court.

§ 1748. Upon order of the judge of the family conciliation court, the supervising counselor of conciliation may destroy any record, paper, or document filed or kept in the office of the supervising counselor of conciliation which is more than two years old, except records of child custody or visitation mediation, which may be destroyed when the minor or minors involved are 18 years of age. In his discretion the judge of the family conciliation court may order the microfilming of any such record, paper, or document.

§ 1749. (a) Any county may contract with any other county or counties to provide joint family conciliation court services.

(b) Any agreement between two or more counties for the operation of a joint family conciliation court service may provide that the treasurer of one participating county shall be the custodian of moneys made available for the purposes of such joint services, and that the treasurer may make payments from such moneys upon audit of the appropriate auditing officer or body of the county for which he is treasurer.

(c) Any agreement between two or more counties for the operation of a joint family conciliation court service may also provide:

(1) For the joint provision or operation of services and facilities or for the provision or operation of services and facilities by one participating county under contract for the other participating counties.

(2) For appointments of members of the staff of the family conciliation court including the supervising counselor.

(3) That, for specified purposes, the members of the staff of the family conciliation court including the supervising counselor, but excluding the judges of the family conciliation court and other court personnel, shall be considered to be employees of one participating county.

(4) For such other matters as are necessary or proper to effectuate the purposes of the Family Conciliation Court Law.

(d) The provisions of this chapter relating to family conciliation court services provided by a single county shall be equally applicable to counties which contract, pursuant to this section, to provide joint family conciliation court services.

SEC. 3. Article 3 (commencing with Section 1740) of Title 11a of Part 3 of the Code of Civil Procedure is repealed.

SEC. 4. Article 3 (commencing with Section 1760) is added to Title 11a of Part 3 of the Code of Civil Procedure, to read:

ARTICLE 3

Proceedings for Conciliation

§ 1760. Whenever any controversy exists between spouses, or between parents regardless of their marital status when such controversy relates to child custody or visitation, which may, unless a reconciliation is achieved, result in the dissolution or annulment of the marriage or in the disruption of the household, and there is any minor child of the spouses or parents or of either of them whose welfare might be affected thereby, the family conciliation court shall have jurisdiction over the controversy, and over the parties thereto and all persons having any relation to the controversy as further provided in this chapter.

The family conciliation court shall also have jurisdiction over the controversy, whether or not there is any minor child of the parties or either of them, where such controversy involves domestic violence.

§ 1761. Prior to the filing of any proceeding for determination of custody or visitation rights, dissolution of marriage, legal separation, or judgment of nullity of a voidable marriage, either spouse or parent, or both, may file in the family conciliation court a petition invoking the jurisdiction of the court for the purpose of preserving the marriage by effecting a reconciliation between the parties, or for amicable settlement of the controversy between the spouses or parents, so as to avoid further litigation over the issue involved.

§ 1762. The petition shall be captioned substantially as follows:

In the Superior Court of the State of California	
in and for the County of	
Upon the petition of (Petitioner) And concerning and Respondents	Petition for Conciliation (Under the Family Conciliation Court Law)

To the Family Conciliation Court:

§ 1763. The petition shall:

- (a) Allege that a controversy exists between the spouses or parents and request the aid of the court to effect a reconciliation or an amicable settlement of the controversy.
- (b) State the name and age of each minor child whose welfare may be affected by the controversy.
- (c) State the name and address of the petitioner, or the names and addresses of the petitioners.
- (d) If the petition is presented by one spouse or parent only, the name of the other spouse or parent as a respondent, and state the address of that spouse or parent.
- (e) Name as a respondent any other person who has any relation to the controversy, and state the address of the person, if known to the petitioner.
- (f) If the petition arises out of an instance of domestic violence, so state generally and without specific allegations as to the incident.
- (g) State such other information as the court may by rule require.

§ 1764. Forms for the county and any person or person requesting family conciliation of the instance of any other

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§ 1764. The clerk of the court shall provide, at the expense of the county, blank forms for petitions for filing pursuant to this chapter. The probation officers of the county and the attachés and employees of the family conciliation court shall assist any person in the preparation and presentation of any such petition, when any person requests such assistance. All public officers in each county shall refer to the family conciliation court all petitions and complaints made to them in respect to controversies within the jurisdiction of the family conciliation court. The jurisdiction of the family conciliation court in respect to controversies arising out of an instance of domestic violence shall not be exclusive, but shall be coextensive with any other remedies either civil or criminal in nature that may be available.

§ 1765. No fee shall be charged by any officer for filing the petition.

§ 1766. The court shall fix a reasonable time and place for hearing on the petition, and shall cause such notice of the filing of the petition and of the time and place of the hearing as it deems necessary to be given to the respondents. The court may, when it deems it necessary, issue a citation to any respondent requiring him to appear at the time and place stated in the citation, and may require the attendance of witnesses as in other civil cases.

§ 1767. For the purpose of conducting hearings pursuant to this chapter, the family conciliation court may be convened at any time and place within the county, and the hearing may be had in chambers or otherwise, except that the time and place for hearing shall not be different from the time and place provided by law for the trial of civil actions if any party, prior to the hearing, objects to any different time or place.

§ 1768. The hearing shall be conducted informally as a conference or a series of conferences to effect a reconciliation of the spouses or an amicable adjustment or settlement of the issues in controversy. To facilitate and promote the purposes of this act the court may, with the consent of both parties to the proceeding, recommend or invoke the aid of medical or other specialists or scientific experts, or of the pastor or director of any religious denomination to which the parties may belong. Such aid, however, shall not be at the expense of the court or of the county unless the board of supervisors of the county specifically provides and authorizes such aid.

§ 1769. (a) At or after the hearing, the court may make such orders in respect to the conduct of the spouses or parents and the subject matter of the controversy as the court deems necessary to preserve the marriage or to implement the reconciliation of the spouses, but in no event shall such orders be effective for more than 30 days from the hearing of the petition, unless the parties mutually consent to a continuation of such time.

(b) Any reconciliation agreement between the parties may be reduced to writing and, with the consent of the parties, a court order may be made requiring the parties to comply fully therewith.

(c) During the pendency of any proceeding under this chapter, the superior court may order the husband or wife, or father or mother, as the case may be, to pay any amount that is necessary for the support and maintenance of the wife or husband and for the support, maintenance and education of the minor children, as the case may be. In determining the amount, the superior court may take into consideration the recommendations of a financial referee when such referee is available to the court. An order made pursuant to this subdivision shall not prejudice the rights of the parties or children with respect to any subsequent order which may be made. Any such order may be modified or revoked at any time except as to any amount that may have accrued prior to the date of filing of the notice of motion or order to show cause to modify or revoke.

§ 1770. During a period beginning upon the filing of the petition for conciliation and continuing until 30 days after the hearing of the petition for conciliation, neither spouse shall file any petition for dissolution of marriage, legal separation, or judgment of nullity of a voidable marriage.

If, however, after the expiration of such period, the controversy between the spouses, or the parents, has not been terminated, either spouse may institute proceedings for dissolution of marriage, legal separation, or a judgment of nullity of a voidable marriage, or a proceeding to determine custody or visitation of the minor child or children. The pendency of a proceeding for dissolution of marriage, legal separation, or declaration of nullity, or a proceeding to determine custody or visitation of the minor child or children, shall not operate as a bar to the instituting of proceedings for conciliation under this chapter.

§ 1771. Whenever any petition for dissolution of marriage, legal separation, or declaration of nullity of a voidable marriage is filed in the superior court, and it appears to the court at any time during the pendency of the proceedings that there is any minor child of the spouses, or of either of them, whose welfare may be adversely affected by the dissolution of the marriage or the disruption of the household or a controversy involving child custody, and that there appears to be some reasonable possibility of a reconciliation being effected, the case may be transferred to the family conciliation court for proceedings for reconciliation of the spouses or amicable settlement of issues in controversy in accordance with the provisions of this chapter.

§ 1772. Whenever application is made to the family conciliation court for conciliation proceedings in respect to a controversy between spouses, or a contested proceeding for dissolution of marriage, legal separation, or judgment of nullity of a voidable marriage, but there is no minor child whose welfare may be affected by the results of the controversy, and it appears to the court that reconciliation of the spouses or amicable adjustment of the controversy can probably be achieved, and that the work of the court in cases involving children will not be seriously impeded by acceptance of the case, the court may accept and dispose of the case in the same manner as similar cases involving the welfare of children are disposed of. In the event of such application and acceptance, the court shall have the same jurisdiction over the controversy and the parties thereto or having any relation thereto that it has under this chapter in similar cases involving the welfare of children.

SEC. 5. Section 4607 is added to the Civil Code, to read:

§ 4607. (a) Where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested, as provided in Section 4600, 4600.1 or 4601, the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents after the marriage is dissolved. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute.

(b) Each superior court shall make available a mediator. Such mediator may be a member of the professional staff of a family conciliation court, probation department, or mental health services agency, or may be any other person or agency designated by the court. In order to provide mediation services, the court shall not be required to institute a family conciliation court. The mediator shall meet the minimum qualifications required of a counselor of conciliation as provided in Section 1745 of the Code of Civil Procedure.

(c) Mediator shall have all communitary proceedings the meaning of the meaning

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(c) Mediation proceedings shall be held in private and shall be confidential, and all communications, verbal or written, from the parties to the mediator made in a proceeding pursuant to this section shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code.

(d) The mediator shall have the authority to exclude counsel from participation in the mediation proceedings where, in the discretion of the mediator, exclusion of counsel is deemed by the mediator to be appropriate or necessary. The mediator shall have the duty to assess the needs and interests of the child or children involved in the controversy and shall be entitled to interview the child or children when the mediator deems such interview appropriate or necessary.

(e) The mediator may, consistent with local court rules, render a recommendation to the court as to the custody or visitation of the child or children. The mediator may, in cases where the parties have not reached agreement as a result of the mediation proceeding, recommend to the court that an investigation be conducted pursuant to Section 4602, or that other action be taken to assist the parties to effect a resolution of the controversy prior to any hearing on the issues. The mediator may, in appropriate cases, recommend that mutual restraining orders be issued, pending determination of the controversy, to protect the well-being of the children involved in the controversy. Any agreement reached by the parties as a result of mediation shall be reported to the court and to counsel for the parties by the mediator on the day set for mediation or any time thereafter designated by the court.

(f) The provisions of this section shall become operative on January 1, 1981.

SEC. 6. Section 26840.3 of the Government Code is amended to read:

§ 26840.3. (a) The superior court in any county may, for the support of the family conciliation court or for conciliation and mediation services provided pursuant to Section 4607 of the Civil Code, upon action of the board of supervisors, to provide all space costs and indirect overhead costs from other sources, increase:

(1) The fee for filing a petition, except a joint petition filed pursuant to Section 4551 of the Civil Code, for dissolution of a marriage, legal separation, or nullity of a marriage, and the fee for a response to such a petition, by an amount not to exceed fifteen dollars (\$15).

(2) The fee for issuing a marriage license, by an amount not to exceed five dollars (\$5).

(3) The fee for issuing a marriage certificate pursuant to Section 4213 of the Civil Code, by an amount not to exceed five dollars (\$5).

(b) The funds shall be paid to the county treasury and an amount equal thereto shall be used exclusively to pay the costs of maintaining the family conciliation court or conciliation and mediation services provided pursuant to Section 4607 of the Civil Code.

SEC. 7. Section 26862 is added to the Government Code, to read:

§ 26862. In any county in which there is a family conciliation court, or in which counties have by contract established joint family conciliation court services, a fee of fifteen dollars (\$15) shall be paid to the county clerk at the time of filing a motion, order to show cause, or other proceeding seeking to modify or enforce that portion of any judgment or order entered in this state or any other state which orders or awards the custody of a minor child or children or which specifies the rights of any party to the proceeding in visitation of a minor child or children. The funds shall be paid to the county treasury and shall be used exclusively to pay the costs of maintaining the family conciliation court.

SEC. 8. Notwithstanding Section 2231 or 2234 of the Revenue and Taxation

Code, no appropriation is made by this act pursuant to these sections because self-financing authority is provided in this act to cover costs that may be incurred by it in carrying on any program or performing any service required to be carried on or performed by it by this act. It is recognized, however, that a local agency or school district may pursue any remedies to obtain reimbursement available to it under Chapter 3 (commencing with Section 2201) of Part 4 of Division 1 of the Revenue and Taxation Code.

SEC. 9. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In order to prevent the discontinuation of family conciliation courts, it is necessary that this act take effect immediately.

HISTORY: S.B. 961, approved and filed March 27, 1980, effective March 27, 1980.

EXPLANATORY NOTES:

CCP § 1731. Substituted "Family Conciliation Court Law" for "Conciliation Court Law".
Gov C § 26840.3. Amended the section to read as at present.

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No-Fault Custody

THREE VIEWS OF CHILD CUSTODY

New York State Domestic Relations Law

Following a 1921 court decision,¹ New York's DRL stated:

In all cases there shall be no prima facie right to custody of the child in either parent, but the court shall determine solely what is for the best interest of the child and what will best promote its welfare and happiness and make the award accordingly.²

The Guidelines For Most New York Courts

There is but a twilight zone between a mother's love and the atmosphere of heaven, and all things being equal, no child should be deprived of that maternal influence unless it be shown there are special or extraordinary reasons for doing so.³

A Father Caught Between The Law And The Court

You've never met my children but as a stranger turned friend, you could walk them down to the corner candy store for a soda, take them out to dinner, have them stay overnight with your children, come over to help them with their homework or have them just drop in.

As their father, I have none of these rights.

Although the letter of the custody law gives each parent equal rights in divorce, the court has done everything to make me an ex-father as well as an ex-husband.

The report that follows attempts to examine the growing discrepancies between the intent of the Legislature and the practice of the courts.

CURRENT PRACTICE

New York Domestic Relations Law Article 70⁴ and its companion, DRL Article 240,⁵ set forth the Legislature's view of custody which, essentially, is that neither parent has a *prima facie* right to custody of children in divorce.

Yet, in nine out of every ten court cases, custody of children is awarded to the mother.

While each case is an individual decision, the net result is that mothers, in New York, are routinely awarded the children and the fathers are allowed visitation rights which, in the best of circumstances, amount to a few evening hours during the week and alternate weekends. In the summer, the father is entitled to "have" the children from two to four weeks. These "standard" visitation rights appear to be allocated regardless of the age or the number of children involved. The father in the opening statement, with three children, is permitted by the court to see them between four and eight on Thursday nights. He writes:

I've never lived more than five minutes—a few blocks away since the separation and divorce, but, as far as the court is concerned, it would have made little difference if I had moved to the suburbs or to California . . . The court has put a wall around the children which strangers can penetrate, but which excludes their father.

The attitude of the bench was summed up by Sybil Hart Kooper, Justice Supreme Court 2nd District who said:

I would like to see judges divorce themselves from their ingrained, preconceived notions that all young children belong with their mothers. It seems to me an act of futility sometimes for a custody case to be heard because it's apparent before the case is ever tried many judges feel that unless this woman is a prostitute and practicing in front of her children or a chronic alcoholic who falls down drunk or a psychotic who is threatening the children's lives, then they will award custody to the mother.⁶

Without exception, all the lawyers contacted in preparation for this report, regardless of their view of no-fault custody concepts, agreed with Judge Kooper's view of the court's historical and traditional bias. Most lawyers counsel their male clients not to seek more than the traditional visitation and custody arrangements.

They also report that alimony considerations are "more often than not" the opposite seat of the custody seesaw. Given the predisposition and predictability of the courts, these attorneys reported that a woman can, and often does, use visitation rights as a counterbalance to alimony demands. A recent Michigan study of fathers who failed to meet their financial obligations to the divorced mother and children by moving out of the reach of the courts, contained footnoted information confirming the view of the New York attorneys

William F Haddad, Director New York State Assembly Office of Legislative Oversight and Analysis, Melvin Roman, PhD Professor of Psychiatry, Albert Einstein College of Medicine and Director of Group and Family Studies, Bronx Municipal Hospital are co-authors of a published study of custody. Melvin Roman and Haddad have recently written *The Disposable Parent: The Case For Joint Custody* (1978, Holt, Rinehart and Winston, New York, NY, \$6.95). This is the first of a Special Report submitted in July 1978 to Hon Speaker Stanley Stratton, The Assembly, State of New York, Albany, NY.

that custody and alimony, in the adversary setting of the courtroom, were often used in tandem.

Within the last five years, however, a considerable number of parents have opted to settle custody questions outside the courtroom, bringing to the court a fait accompli for legal ratification. Most overburdened courts welcome these out-of-courtroom agreements and frequently counsel compromise.

A few courts are beginning to incorporate the out-of-court experience in their decisions. Queens Judge Xavier Ribaud, in a recent decision awarding joint custody wrote:

An award of custody to both parents in the case at bar would give each of them joint control of the child's education and upbringing with an equal voice in the decision-making in very much the same manner the parents enjoyed during their marriage while they lived together and prior to any judicial determination of custody. Not only would this kind of award be in the best interest of the child who is this court's ward, but it would go a long way to ameliorate some of the acrimony and ill-will that have developed between the parents since their separation regarding their son and his best interests.

Joint custody will also serve to give that measure of psychological support and uplift to each parent which would communicate itself to the child in the measure of mutual love, mutual attention and mutual training.

Both the national and local bar associations are also confronting the trend outside the courtroom in an effort to reconcile the glaring difference between the will of the legislatures, as expressed in the domestic relations laws, and the practice of the courts.

Henry H. Poster, Jr. (professor of law emeritus of the New York University School of Law and immediate past chairman of the Family Law Section of the American Bar Association) and Doris Jonas Freed (attorney, expert in matrimonial law and Chairman of the Research Committee, ABA Family Law Section) for example, point out that

historically, custody awards have been dictated by amorphous platitudes or generalizations on the one hand and by rigid absolutes on the other. . . .

One of the difficulties in eliminating the maternal preference is that the older literature on child development esp, cried it, and there have been but few studies on the effect of paternal, as distinguished from maternal deprivation on child development. More recently, a growing number of experts on child development have recognized that a father may be the one for whom the children have the most affectionate relationship and hence he should be awarded custody.

They warn however, that there is a temptation to view child custody decisions in terms of a pendulum's swing, back and forth, between a feudalistic preference for the father and a modern recognition of the importance of the mother.

There is, we contend, a way in which the

pendulum can be brought full center through legislation providing for a presumption of joint custody, mediation and support.

First, however, it is necessary to look at custody in its historical and psychological context, for it is from these roots that the current practice, if not the current law, evolved.

Note

A recent decision in the New York State Court of Appeals is important to review. Judge Breitel questions, in limited circumstances, the awarding of joint custody to parents who involve their children in an extreme level of hostility following divorce. He states:

Entrusting the custody of young children to their parents jointly, especially where the shared responsibility and control includes alternating physical custody is insupportable when the parents are severely antagonistic and embattled. . . .

Joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a civilized fashion."

HISTORY OF CUSTODY

Until the turn of the century and well into the twenties, fathers were almost always awarded custody of the children of divorce. The practice began with the Romans and proceeded in an almost unbroken line through the feudal ages and the industrial revolution weaving its way through both English and American law. For many of those centuries, women and children were "the property" of the master of the castle or of the household. While the Romans offered women respect and . . . made it appear, on parchment, that women had acquired certain rights, none of these rights reached to the essentials of livelihood or decision-making, in or out of court. The early Judeo-Christian tradition and the practice of the "first-born rights" perpetuated the master of the household practices, with the father having the absolute right to apprentice his children.

The custody laws followed closely the bumps and curves of cultural evolution and women's emancipation. The first crack in the wall occurred in 1817 when Percy Bysshe Shelley lost custody of his children after his wife's suicide. That decision, however, seems to have been premised more on his antagonistic atheism than on any change of heart (or law) about custody itself. Earlier Blackstone had set the tone for English law when he stated the father had a

natural right to his children and the mother is entitled to no power (over the children) but only to reverence and respect.

Following the Shelley case, Parliament enacted a series of laws, culminating in the Justice Talfourd Act of 1839 which diluted father's rights so that, in special circumstances, a mother could win custody of children under seven. This appears to be the origin of the so-called "tender years" doctrine which, in many states, serves either as an absolute guideline or a "tie-breaker" in contested custody situations involving minor children. New York lower courts have ruled that this concept may not be used in custody decisions, although, it is clear from a review of decisions that its use is all but universal.

The Talfourd Act also formulized *parens patriae* (the court's assumption of the role of surrogate for children, making them, in effect, perpetual wards of the court).

There is no doubt about the impact of these views on United States law. In 1840, when the court awarded custody to the father, the judge wrote:

By the laws of the land the claims of the father are superior to those of the mother . . . It is possible that our laws relating to the rights and duties of husband and wife have not kept pace with the progress of civilization . . . I will however venture the remark, even at the hazard of being thought out of fashion, that human laws can not be very far out of the way when they are in accordance with the laws of God.¹⁴

In 1857 a midwestern court neatly summed up the situation in this decision:

The general doctrine that the right of the father to the custody of his minor children is paramount to that of the mother is well settled. He may forfeit it by misconduct, or lose it by disqualification, and it may be suspended by reason of the tender age of the child and its welfare requiring it to be with the mother. A strong case must exist, to warrant depriving him of this right, even for a limited period.

The only difficulty, if any, in the present case, in regard to the right of the father to retain the child, arises from the child being of tender age, and deriving its subsistence, in part, from the breasts of the mother. But upon the evidence, I think these circumstances form no obstacle to the father's right. The mother had not sufficient milk for the child; it was, in part, sustained feeding; it was placed by the father with a competent person; and down to the hearing on the habeas corpus, some ten days after separation, had been doing well and growing fleshy; and besides, the husband was willing at any time, on the wife returning to him, to provide for her and allow her the care of the child.¹⁵

The judicial absurdity reflected the cultural norm and the legal perspective until the turn of the century.

When society became more urbanized and the father moved away from the home and left raising of the family to his wife, the pendulum began to swing in the opposite direction. A trend accentuated and propelled by literature and psychology, was perhaps best explained in

Kate Chopin's *The Awakening*, written at the turn of the century:

If it is not a mother's place to look after the children, whose on earth was it? He himself had his hands full with his brokerage business. He could not be at two places at once; making a living for his family on the street, and staying at home to see that no harm befell them!¹⁶

That classic and romantic division of labor still influences court decisions regarding custody, although half the married women work and almost seventy percent of divorced women are employed outside the home. Over 1.5 million males managed single parent households.

Taking note of the cultural change, new psychological theories began to emerge in the twenties emphasizing the importance of the mother in the rearing of children. These theories rapidly became the basis for courtroom decisions which, in turn, led to the awarding of children to the mother.

These earlier psychological theories are now all but replaced with new conceptions, yet the precedent of law based on the earlier concepts remains like a house without a foundation.

This trend intensified until the father, after divorce, became the missing parent, relegated to short visits with his children. The pendulum swung and by the thirties it was stuck in place. Few jurists remember "how it was" and too few, we believe question why it happened.

These awards to the mother, in the face of state laws mandating equal treatment, were conceived to be "in the best interests of the children", yet few had been able to define the phrase which had achieved the status of unquestioned law and almost no scientist (or even journalist) took the time to review what happened to the children after the custody decision.

With recent researchers have learned about the children of divorce is beginning to edge the pendulum back towards a moderate view of custody.

THE PSYCHOLOGY OF CUSTODY

Until recently research on the children of divorce was inexcusably primitive and post-divorce research of the father was non-existent, although an observer sitting in a courtroom and listening to the paid testimony of "experts" in custody matters would have been led to believe the court was listening to reports of an exact and an exacting science. Actually, the opposite was often true. For at least four decades, there has been little to separate the problems of children created by

the divorce itself and those created by the post-divorce environment.

The blunt and painful truth is that the evidence available was, at best, shallow, and, at worst, misused. Theories became clichés. "Children should not be bounced back and forth like a yo-yo." "The child needs his mother." "A father is not equipped by either temperament or experience to raise a child, especially a young child." "A child needs the security of one place that he can call his own." "He can't live in two places." "If parents can't get along in a marriage, how are they going to agree in a divorce?"

These pseudo-psychological clichés, were and are, the language of the custody courtroom. It was the weight of this non-evidence which, we believe, led the courts to single out the mother for custody. Overburdened courts relied on previous settlements as their guide seldom questioning what appeared to be—but was not—an established psychological premise. The courts reacted to conventional logic.

Several recent studies are helping to reshape that conventional logic. These studies are soon to be re-enforced by the report of a divorce research panel of the National Institute of Mental Health. That report will focus on the impact of divorce on children.

The consensus of the panel of experts supports the view that custody arrangements for the children of divorce which remove the father from a child's life are, quite simply stated, the wrong way to provide for "the best interests of the child." To provide an atmosphere for normal development and provide a framework for establishing sound relationships with both parents, the courts must provide the basis for a father to stay involved with his children after divorce and not continue to pose an artificial barrier between children and father.

There is enormous initial pain for children of divorce. The child's balanced world is suddenly shattered by two people who are his role models for life. Feelings of betrayal and abandonment are evoked. Many seek confirmation that there is truth in parents' traditional reassurance that "while mommy and daddy aren't living together any more, we both love you and will always be near you." It is precisely at this moment that the court "in the best interests of the child" intervenes and effectively removes even the most interested and involved father from the daily life of the child. Listen to some of the anecdotes included in the research data we will review shortly:

One child spent his time in his chair listening to records

his mother and her boyfriend and making requests to contact him on a toy telephone."

If mom doesn't stop smoking, I won't have any family at all."

This court enforced absence of a father from his children is based on the belief that this will be in the best interests of the child's psychological development.

The children's quotes may only be the tip of the psychological iceberg. Few researchers in the past have scientifically studied the impact of father's absence on the children of divorce; most research extended only to the family prior to divorce.

The post-divorce research that did take place excluded the father. In fact, in one study of fathers, the researchers admitted they gathered all their information from mothers.

In a paper, *Fathers, Children And Joint Custody*, derived from her doctoral dissertation, Judith Brown Greif, wrote:

In contrast to a popular myth that fathers walk away from divorce and their families unscathed and carefree, the evidence here is that a majority of these men experienced stress severe enough to bring on physical problems.

Denied contact with their children, being forced into the situation of getting permission from the custodial parent for extra time, often being denied access to their child's teachers who won't discuss school performance with non-custodial parents, these fathers see themselves less and less as parents and eventually act in accordance with the role society has assigned them: the absent parent. "Why don't I see more of my kids?" a father lamented. "I'm so angry because so much has been taken away . . . I feel deprived. Why do I have to bug my wife to see more of my child?"

. . . there is a growing literature on joint parenting which documents the positive effects such arrangements have on parents and children alike. Such findings are supported by the results of this study. As seen here, fathers with joint custody of their children feel it works very well, and the fathers themselves seem most satisfied with their post-divorce relationship with their children. Children need active involvement with both parents, and the findings clearly indicate that fathers with joint custody are most likely to continue to have a high degree of influence in their child's growth and development.

Of added interest, some generally held concerns about the effect of joint custody do not seem borne out of this sample. For one, the issue of how disruptive it must be for children to have two homes rather than one seems to be a concern more of the observing public than of the joint custody families themselves. All of the joint custody fathers set up living space for the children in their homes, with special toys, clothes, etc. The children do not arrive with suitcase in hand; nor, after an initial period of adjustment, do they seem to feel disoriented about when they spend time with each parent. As one father explained, "There is no shuttling back and forth, my son is shuttled every day to and from school. This is called consistency, scheduling." Another father pointed out: "We're a mobile society . . . some people move constantly during their lives, the rich often live in several homes . . . what makes a joint living arrangement so different?"

These fathers did not sense that the arrangement posed

a difficulty for their children's friends either. Many of the men explained that to come from a divorced household is not unusual among their children's friends; what makes them special is not the two homes but the fact that they get to see their fathers more than their friends who have visitation fathers.

In addition, not only do the children soon settle into the routine of the arrangement, but the issue of saying good-bye is not as painful as for children in sole custody arrangements. Fathers with limited visitation continually discussed the pain both they and their children experienced when their time together ended, due in part to the long stretch before they could see each other again, and also to the only brief amount of time (the "tonse" referred to earlier) they are allowed to share. This did not hold true for the joint custody fathers who reported they and their children could more easily separate knowing they would soon have a long period of time together again.

A second belief about joint custody is that children end up being pawns in the midst of parental battles, and that this produces a situation of divided loyalties. Quite to the contrary, children seem "used" in sole custody arrangements because of the inherent unequal power distribution structured between the parents. Non-custodial parents withhold visitation if a support payment is late. In joint custody arrangements, however, the parental power and decision-making is equally divided, so there is less need to use children to barter for more. Most importantly, the fathers seem very satisfied with their degree of parental involvement, so there is less motivation to do so.

Thirdly, there are some interesting suggestions about the degree of amicability necessary between spouses in order for joint custody to work. Many professionals raise concern that parents who could not get along well enough to stay married, will not be able to agree on issues once divorced. Yet, a number of these joint custody fathers reported angry, hostile relationships with their ex-wives. Some of these families chose to use the school, rather than the other parent's homes, as the drop-off point for the child. What enables the joint arrangement to work is that, despite the hostilities, the parents both care about their child. That is, these couples have been able to separate out their parental role from the marital issues.

In our attempts to understand and help families of divorce we have been remiss by focusing only on those members who remain together and failing to include those from whom they are separated. We tend to approach families of divorce as though they truly consist of only "one parent"—as though the non-custodial parent has ceased to exist.

Yet research is abundantly clear that with few exceptions the trauma of divorce can be minimized by the child's continuous open and easy access to both parents. We therefore have a responsibility to do what we can to support the involvement of the non-custodial parent, both for the sake of that parent and for the benefits that accrue to the child. In addition, we can no longer impose different standards for what is in the best interest of children from intact families as opposed to children of divorce. Children need loving relationships with two caring parents, regardless of whether those parents no longer care for one another. While divorce seems to be a viable solution for an unsalvageable marriage, parents should not be allowed to divorce their children.

Rather than support the imposition of legal visitation restrictions, we should do everything in our power to maximize contact between the child and both parents. One clear way to doing that is through joint custody arrangements. As seen in this study, structural arrangements such as custody and visitation are crucial to the post-divorce adjustment of fathers and ultimately their children. There is a different quality of psychological in-

volvement that evokes from the opportunity to take care of (ie, to parent) one's child, rather than "visit" with one's child."

A 1976 Virginia study of divorced fathers¹⁰ looked at how divorce affected the entire family over a two year period, choosing homes in which the children were about four years old at the time of separation. The lives of intact families were simultaneously studied and contrasted. The study reported that fathers' absence appears to be associated with a wide range of disruptions in social and cognitive development in children. The effect seems to be most severe if the father leaves the home during the child's pre-school years. The authors add:

Other support systems such as that of grandparents, brothers and sisters, close friends . . . also were related to a mother's effectiveness in inter-relating with the child . . . However none of these support systems were as salient as a continued, positive, mutually supportive relationship of the divorced couple and continued involvement of the father with the child.¹⁰

Ironically, other than money, the friction caused over custody arrangements keeps the post-divorce relationship unsettled, undermining what these researchers believe are the conditions to provide a supportive environment in which to raise the children of divorce.

(These Catch-22 situations appear throughout the legal and psychological literature).

The Divorce Project, a California study was begun in 1971 by Judith Wallerstein, a social worker and Joan Kelly, a clinical child psychologist, who said:

Our inquiry represents a first in-depth look at children of divorce, drawn from a normal population with no history of psychiatric or psychological contact.¹¹

Parents were interviewed, but, unlike the whole family concept of the Virginia study, the child was the focus of the research.

They learned that children whose problems increased after divorce came from homes where the conflict continued after divorce. They found that in these homes the mothers came to be seen as "powerful and terrifying". These were also the homes in which the children gravely missed their fathers.

For children under six the authors commented that

It may be, for example, that some children can make do and grow with the relationship with two adults who, despite being in conflict, supplement each other but the diet becomes too thin in the aftermath of divorce when the fathers' availability is reduced. . . .¹¹

Among children seven and eight, the authors said:

Nearly all of the children in this sample wished for more frequent visits with the fathers. The only children reasonably satisfied were those who could bicycle over to

the father's house several times weekly, and where such frequent visits had the approval of both parents."

The Divorce Project (which is still engaged in following up the sixty families and 131 children involved) found that the pain and sense of loss experienced by the children was severe. Most felt isolated. (Not one child under 13 wanted the divorce to happen and all intensely longed for their father's return). All reflected anxieties about their own survival. Later, many came to terms with the divorce, but of the 89 children under ten, 35 (an extremely high percentage) were felt to be worse off. "These findings are not encouraging," the authors wrote, "if extrapolated to the large numbers of children experiencing divorce."

From these and other studies one point is clear: *those children who fared best after divorce were those who were free to develop loving and full relationships with both parents.*

Neither of the studies were concerned with joint custody but they noted, as did Ms Greif, that those children who saw their fathers very frequently—and for some real length of time—were all satisfied with the new family arrangements. (One of the lingering custody clichés states that "it is not the quantity of but the quality of time, that counts").

Similarly, the Virginia study reported that one-third of the men

who had initially been highly involved, attached, affectionate parents reported that they could not endure the pain of seeing their children only intermittently and by two years after the divorce had coped with this stress by seeing their children infrequently although they continued to experience a great sense of loss and depression."

For over forty years, little if any research was conducted on either the parents or the children of divorce. Since 1971 several studies have begun to fill the void of information. They all reach similar conclusions: (1) the current custody and visitation arrangements which remove a father from the children are psychologically unsound; (2) that the best conditions for continued development, require the deep involvement of both parents; (3) that the most successful children of divorce are those where frequent father contact is coupled to a reduced sense of tension between the parents; one major source of tension has been the father's belief that he has been arbitrarily removed from his children; (4) a Catch-22 situation persists in which mutual support provides the best framework for growth at the same time every condition which might foster mutual support is undermined. The same analogy applies to the involvement of the father which the court curtails in the best interests of the child and which the psychological literature (and plain ordinary common sense)

indicates should be increased. The father who is suspected by the court of moving away from his children does so because the courts put a wall between him and the child making it too painful to continue.

Other states have looked at these Catch-22 problems and evolved new solutions for handling custody.

WHAT'S HAPPENING ELSEWHERE"

Most state laws provide for the equal treatment of both parents in custody matters, but the nine-in-ten ratio of mothers being awarded custody is a national statistic. In short, the assurance of the law has very little impact on the courts themselves.

Recent concerns about custody legislation fall into three categories: (a) removing custody from the adversary setting and placing it in a conciliatory or mediation process; (b) providing for a presumption of joint custody; (c) providing separate counsel for children in contested custody cases.

Two states, Wisconsin and Oregon, have recently enacted joint custody legislation. These laws "encourage" the courts to make joint custody decisions.

The California and Pennsylvania legislatures are now considering joint custody legislation.

Several states and lesser legal jurisdictions have either formally or informally removed or are in the process of removing custody from the adversary process, substituting in its place a mediation process under court auspices.

Children's counsel is a new concept being studied in several jurisdictions.

JOINT CUSTODY

Joint custody is that post-divorce custodial arrangement in which parents agree to equally share the authority and responsibility for making all decisions that significantly affect the lives of their children. It is also the post-divorce arrangement in which children share the households of both parents either on an equal time or a split time basis. The specifics of these time arrangements vary with individual requirements. Some resolve along traditional lines; frequently a child spends half a week or a full week in one home, and an equal amount of time in another; some situations resolve along the lines of school year and non-school year. *The specifics of these decisions are left to the parents themselves, but each parent enters the negotiations as an equal partner in the eyes of the law and it removes what one father described as the "cocked gun" of previous deci-*

sions "lurking in the background as the enforcer."

The court, in joint custody, continues to remain in control of the situation, both maintaining the authority to intervene because of the physical or the psychological incapacity of one parent and the authority to ratify out-of-court decisions. In all instances, the court remains as the protector of the child. Parental access to the courts to alter custody decisions remains intact. In short, the court continues to preside, but within a more carefully and narrowly defined parameter, one which provides, we believe, an equal protection for both parents and makes possible access to both parents by the children of divorce.

CONCILIATION AND FAMILY MEDIATION

The program of the Domestic Relations Division of Hennepin County (Minneapolis) Department of Court Services provides the most vivid illustration of the conciliatory process in operation.

Here an extensive, impressive and sophisticated number of counselling and mediation programs have been devised. They include custody mediation, visitational counselling and divorce adjustment groups, combining private sessions, lectures and discussions.

One, the Divorce Experience is specifically designed for the children of divorce. The three session program focuses primarily on the emotional experience of divorce.

In addition, Minneapolis Family Court has co-sponsored a program with school personnel known as "Understanding and Coping With Family Change." The week long, voluntary, small group course is designed to deal with a child's experience of loss in the marital situation. The teacher is trained to support the other efforts of the court to reduce the stress of divorce on children.

RECOMMENDATIONS

We recommend that these three issues—joint custody, counselling and family mediation, and children's counsel—be considered during a series of public hearings bringing together in one place, at one time, the best of scientific and family data.

The information provided will be subjected to expert questioning providing the rational basis for decisions regarding legislative change in what, to date, has been extremely emotional and acrimonious debate, argued by contestants in a courtroom, with decisions often guided by myths and clichés which have had very little support in fact.

The net effect will be to provide children with equal access to both parents under rational and reasonable conditions, and to enable the father to continue as a full parent after divorce. We believe the current psychological data and the mounting number of out-of-court joint custody decisions provides the backdrop for legislative reconsideration of the domestic relations law. ■

NOTES

1. *Jenkins v Jenkins*, 173 Wis 502, 181 NW 828 (1921).
2. § 70, see *Foster and Freed*, 2 *Law And The Family—New York* 513 (1966, Lawyers Cooperative).
3. *Tuter v Tuter*, 120 SW 2d 803, 205 (CA 1938).
4. *Supra* note 2.
5. New York Domestic Relations Law, Article 240 states:
In all cases there shall be no prima facie right to the custody of the child in either parent.
6. From an unpublished interview with Charlotte Baum Shedy, 1976.
7. *Levy v Levy*, NY Supreme Court 1976, NY Law Journal 1/29/76.
8. See also Roth, *The Tender Years Presumption In Child Custody Disputes*, 15 *J Fam L* 423, 457 (1977).
9. *Foster and Freed*, *Life With Father: 1978*, 11 *Fam LQ* 321, 334 (1978), and Roth, *supra* note 8, at 449-57 for a recent discussion of the literature.
10. *Braiman v Braiman*, New York State Court of Appeals, decided June 8, 1978.
11. *Foster and Freed*, *supra* note 9, at 325-29.
12. Lewis Hochheimer, *A Treatise On The Law Relating To The Custody Of Infants* 43 (Baltimore: John Murphy & Co, 1887).
13. *People v Humphries*, 24 Barb 521 (NY, 1857). Emphasis added.
14. Kate Chopin, *The Awakening* 12-13 (NY and Chicago: MS Stone & Co, 1899).
15. Begun in 1971, Divorce Project is headed by Judith Wallerstein, a social worker and Joann Kelly, a clinical child psychologist. Describing their study, the authors write in *The Effects Of Parental Divorce: Experiences Of The Preschool Child*, 14 *J Child Psychiatry* 601 (1975):
Our inquiry represents a first in-depth look at children of divorce, drawn from a normal population with no history of psychiatric or psychological contact. Prior to the family disruption, all the children were considered by their parents to be within the normal and expectable range of development. They were seen in the divorce counselling service (established by this project at the Maric County Community Mental

Health Center) on referral from family lawyers, pediatricians, and schools within the framework of a preventively-oriented planning service for divorcing families with children. They were not referred as identified patients or as families in declared distress. The initial data was obtained in four to six individual clinical interviews with each family member over a six week time span. All subjects were interviewed approximately a year later, and independent information was obtained from the schools at each of these times.

16. *Id.*
17. **Fathers, Children And Joint Custody**, by Judith Brown Greif, presented at 1978 Meeting of the American

Orthopsychiatric Association in San Francisco, California. Emphasis added.

18. **E. Mavis Hetherington and Martha and Roger Cox, The Aftermath Of Divorce**, an invited address at the meetings of the American Psychological Association (Washington, DC, September, 1976).
19. *Id.* Emphasis added.
20. *Supra* note 15, **Divorce Project**.
21. *Id.* Emphasis added.
22. *Id.*
23. *Supra* note 18.
24. See Foster and Freed, *supra* note 9, at 340-1.

REFERENCES

Brigitte M Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 Fam LQ 304 (1969).

F Reid Creech, and Sandra B Bernard, *The Tender Years Doctrine: A Critical Evaluation*.

Chuck Fager, *Co-parenting: Sharing The Children Of Divorce*, San Francisco Bay Guardian, February 3, 1977.

Henry H Foster and Doris Jonas Freed, *The Shuffled Child And Divorce Court*, Trial Magazine: *Child Custody: The Rise And Fall Of The Feminine Mystique*, NY L J November 25 1977; *Life With Father* 11 Fam LQ 321 (1978).

Doris Jonas Freed, *Child Custody - Who Will Speak For The Child?*, A Family Law Symposium at the annual meeting May 19, 1972.

Emily Jane Goodman, *Custody Sharing: The American Way Of Life*, Viva Magazine.

Judith Brown Greif, *Fathers, Children And Joint Custody*, presented at 1978 Meeting of the American Orthopsychiatric Association in San Francisco, California.

Douglas F Grote and Jeffrey P Weinstein, *Joint Custody: A Viable And Ideal Alternative*, Journal of Divorce, vol 1, no 1, fall 1977.

Harry Finkelstein Keshet and Kristine M Rosenthal, *Fathering After Marital Separation*, Social Work, January 1978.

Karl Menninger and Sam E Howie, *In Praise of Fatherhood: Its Responsibilities And Joys*, Parents Magazine, May 1974.

Melvin Roman, *The Disposable Parent*, Conciliation Courts Review, vol XV, no 2, December 1977.

David M Siegel and Suzanne Hurley, *The Role Of The Child's Preference In Custody Proceedings*, 11 Fam LQ 1 (1977).

Charles Sopkin, *The Roughest Divorce Lawyers In Town*, New York Magazine, November 4, 1974.

Judith S Wallerstein and Joan B Kelly, *The Effects Of Parental Divorce: The Adolescent Experience*, from *The Child In The Family - A Psychiatric Risk* (John Wiley & Sons Inc, 1974); *The Effects Of Parental Divorce - Experiences Of The Preschool Child*, Journal of the American Academy of Child Psychiatry, vol XIV, no 4, Autumn 1975; *Part-Time Parent, Part-Time Child: Visiting After Divorce* Journal of Clinical Child Psychology, summer 1977.

Task Force Report: Divorce and Divorce Reform, by the Task Force on Divorce and Divorce Reform, National Council on Family Relations, Minnesota.

The Legislative Response to Divorce: A Survey of No-Fault Divorce, from the State of Wisconsin.

There is a growing concern among knowledgeable persons in the law and behavioral sciences that present practices and procedures in custody matters are in great need of review, analysis and change. The way it is now, in certain cases, the best interest of the child is not in fact being served nor is there consensus among the various professions as to what is in the best interest of the child.

In an area as complex and critical as custody, there is a pressing need for becoming more aware of what is in the best interest of the child, for developing criteria and guidelines underpinning the decision making process in custody and visitation and translating all this into practices that are more responsive to the needs of divorcing and divorced parents and their children. Neither the law alone nor the behavioral sciences alone can reach this goal. The search must be an interprofessional effort. If the law and the behavioral sciences are not responsive to each others findings and suggestions, both parents and children will suffer. The ultimate goal of divorce practices generally, and custody/visitation specifically, should be to insure the maximization of human resources by minimizing the potential damage that is present for both parents and children in all divorce cases.

There is no such thing as a simple custody/visitation determination. For in that determination we set the pattern of the future for not only the child but the parents. In the case of the child, he or she stands by helplessly as critical decisions are made about his or her life. We owe the children of all ages a custody/visitation determination based on a reasonable rationale and an awareness of what is in the child's best interest. A child is not a piece of property. A child is not a prize to be awarded to a winner. A child has rights. A child should not be used by the parent(s) as a convenient club with which to clobber the other parent. A child's future should not be snuffed out by the gales of rage generated by parents trying to emotionally end a broken but once cherished relationship.

There is no one today who has the answers. Collectively we have a responsibility to search for answers so that when we say, "in the best interest of the child," we will truly know its meaning. Today, for the most part, this statement glibly rolls off the tongue into a pile of social gibberish that contains phrases that do not mean too much but sound good.

It is important that the law and the behavioral sciences work together to find answers. Those involved in court-connected counseling services as well as researchers outside the court system are beginning to shed some light on the direction to take. They are raising important questions without which the search for answers cannot begin.

The following thoughts will hopefully prod the mind into continuing the search. Each thought is like a sign post suggesting a direction to consider. Each thought is designed to stimulate a dialogue among those responsible for custody/visitation determinations.

1. Parents are forever. A divorce decree merely ends the husband/wife role but not the parent role. Often the anger generated by the husband/wife role flows over into the parent role and everything gets mixed up.
2. Families are forever. A divorce decree does not end the family, particularly for the child. It is important therefore for the family system to be protected from unnecessary stress and fragmentation as it proceeds from the filing of the divorce action to the final divorce decree.
3. Coping is learned behavior. The way children cope with the crisis of divorce will, in large part, be determined by the way their parents cope. The parents may need help to cope with the emotional components of divorce. The law has the responsibility to provide such help—and in the courthouse itself where the crisis has been filed. We cannot serve the best interest of the child without serving the best interests of the parental relationship. The two cannot be separated. The kind of relationship the parents maintain during the divorce and after the divorce will have a significant impact on the children involved—

for better or for worse. Family law practitioners should make every effort to modify inappropriate practices and procedures so that the relationship between the parents is a viable one with the anger defused and the communication enhanced.

4. The goal of a custody determination should be the establishment of two functioning homes for the child, not just the home of the custodial parent. Let me make it very clear that this does not mean that the child will be shuttled back and forth between two homes with each parent having custody. What is meant is that during visits the child will have the kind of "space" in the non-custodial parent's home that will enable the child to feel that he or she has two homes. We are traditionally oriented to thinking of one home with a father and mother as the best way to rear children, but with the reality of one million divorces a year involving one million children, we must find a way of encouraging and supporting the concept of two effectively functioning homes despite the fact that one of the homes is the primary home of residence. The two-home approach will only work in families where both parents can maintain an amicable relationship. It is possible for such relationships to exist between a divorced couple but they may need counseling help to attain this desirable relationship. This is another reason why all family courts and domestic relations courts should, whenever possible, provide court-connected marriage and family counseling services. Additionally, divorce courts should implement educational programs in the courthouse for divorcing parents so that these parents become more aware of the experience they are going through as well as prepare them for effective parenting during and after the divorce.
5. There is some research evidence which suggests it is not the divorce per se that hurts kids. The etiology of problems of children of divorce are more readily found in the kind of child/parent relationship that existed before, during and after the divorce. Much attention should be given to the pre-divorce parent/child relationship recognizing, however, that it is possible to considerably improve the relationship with one's child after the stresses of a dysfunctional marriage are set aside.
6. A custody decision should be more than merely establishing a residential address for the child. The overall goal should be shared parenting. The way it is now, the non-custodial parent, usually the father, is defined by the law as a part-time parent ("you shall support your child and shall have reasonable visitation"). The mother feels overwhelmed with the implied message that she is responsible for the rest of the task of rearing their child. Both the law, as a representative of society, and society itself should in effect say to the parents that they are *both* expected to be deeply involved with their child in a responsible, caring, nurturing way. Effective parenting cannot be proclaimed by court edict alone nor can desirable human behavior be legislated. But, effective parenting can be encouraged and realized with expert educational-counseling help.
7. The language of family law is the language of criminal law and should be changed. Words like custody, visitation, award, unfit, non-custodial, all keep us connected to outmoded and inappropriate traditions. New words can link us to the future.
8. Family law courts should allow divorcing couples more self-determination. It is their lives that are involved. It is their future. They should therefore be encouraged and allowed to play a greater part in the decision-making process, particularly in matters like custody and visitation. Rather than fostering increased dependency on the court, these couples should be encouraged to accept more responsibility for decisions affecting their lives and their children. If the anger is too great; if the communication between the parties is broken down, the impulse of the court should be to refer the couples to a court-connected marriage and family counselor before proceeding with the adversary process. Let us not underestimate the ability of divorcing persons to help themselves in their crisis. Let us not rob them of the opportunity to grow with the crisis. More self-determination, when appropriate, increases the chances for this to happen.

9. Custody and visitation conflicts are interrelated. When couples need help with custody they usually need help with visitation matters.
10. A custody proceeding that focuses solely on what is in the best interest of the child is too restrictive an approach. More realistically we should also strive for what is in the best interest of the family.
11. The concept of a winner and loser has no place in custody matters. Our entire society should begin to think in terms of both families having ongoing responsibility and commitment to the child's physical and emotional welfare. The law can provide much needed leadership in moving society in that direction.
12. In family law we should start with a simple premise that lawyers and judges are not marriage and family counselors and conversely that marriage and family counselors are not judges. From this it easily follows that both the law and counseling professions should cooperate and communicate with each other to a greater degree if families, and therefore society, are to be served. The skills of both professions are needed to help families involved in the crisis of divorce, which includes not only the legal divorce but the emotional divorce as well.
13. We should listen to the father who wants custody. Historically the idea of the father getting custody is not new. The emphasis now should be on his ability to nurture, care for and protect the child, not because the child is his property or that he is the only one who can financially support the child as in former times. Women do not have a monopoly on the mother instinct—whatever that means. If there is mother instinct, there is also a father instinct.
14. Let us be more aware that custody and visitation conflicts are not usually the issues, but are often a smokescreen that hides other more relevant issues which show that one or both parties are still connected and are working on their emotional divorce although unsuccessfully.
15. The "problems" manifested by a child of divorce may not be problems specifically due to the divorce itself, but may be an aspect of normal developmental problems which are usually present in all children in various stages whether or not a divorce is pending. This should be carefully considered when one parent alleges that another parent is responsible for the child's problems."
16. The assumption is probably false that most divorcing parents can adequately deal with visitation problems. Many more probably need help with this than we realize.
17. The goal of a court in custody/visitation disputes should be to create a climate for negotiation rather than merely determining the "best" parent.

Whatever changes come about in family law, the changes will need support and reinforcement by society as a whole so that new social attitudes, values and rituals regarding divorce will be consonant with the new changes within the legal profession and counseling profession. It matters not where the changes will start—whether in the courthouse, in the lawyer's office or in society itself—as long as it begins.

—MEYER ELKIN

JOINT CUSTODY

By Anthony Salius, Director

Family Relations Division
West Hartford, Connecticut
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The generally accepted definition of the term "child custody" refers to the right of physical possession and disposition of a child by a parent or other competent person. The custodian normally has the exclusive right to determine and direct the upbringing of the child, including educational, health and religious considerations. It then should follow that the term "joint custody" be defined as a continued sharing of these parental rights and responsibilities by the parents following separation and divorce. However, a review of judicial determinations in this area indicates no clear definition of the term with the range of child care arrangements adopted under the cloak of joint custody varying almost in direct relationship to the number of cases considered. These arrangements may include physical alternation of child care, alternation of parents in the residence of the child, divided custody with each parent as caretaker for some of the children or situations resembling sole custody but including a sharing of decision-making responsibility for the children. Perhaps it is this absence of fixed criteria that is the strength of the joint custody concept, i.e., the needs and desires of the children and adults can be adjusted to "fit" the requirements of the particular situation and individual contracts between the parties can be molded to the specific needs of the family situation.

Although the concept of joint custody has long been recognized by the courts, acceptance of the concept as a viable custodial alternative appears to have increased during the past few years. This expanding acceptance would appear to arise from the combination of a number of factors:

1. In an increasing number of cases both parents have been more equally involved in child rearing than in the past. The traditional role models of parents are being modified and the sharing of child care responsibilities is more prevalent.
2. The increasing involvement of behavioral science and mental health professionals by contemporary family court systems in the decision-making process relative to children of divorce has had a significant impact on expansion of the criteria on which such determinations are made. Counseling, evaluation, conciliation and other dispute-resolution services provided by court-connected agencies have led to an increased understanding of the interpersonal relationships with the family system both for the court and the family members. For example, the staff of the Family Relations Division in Connecticut has observed that, in a majority of cases both parents are considered capable custodians and that the children in many such situations reveal attachment to both parents and a need for the guidance and supervision of each parent.

3. Modern trends, at least in Connecticut, indicate that an increasing number of men are requesting custody of their children in divorce and post-divorce proceedings. Although numerous explanations have been offered for this trend, the major factors appear to be an increasing sensitivity to the importance of their role in the child-rearing process by fathers and a growing awareness that fathers now have a realistic prospect for equitable consideration by the courts in custody proceedings. (Of those custody disputes referred by the Connecticut courts for Family Relations Division evaluation over the past five years, approximately 1,400 annually, fathers have been awarded custody in 38% of the cases with custody going to mothers in 45% of the situations. The remainder of cases resulted in third party custodial placement or divided custody and joint custody arrangements.)
4. Conversely, an increasing number of mothers have begun to acknowledge the competency of fathers to care for the children and are less resistant to fathers continuing to play a major role in the children's lives following the dissolution.
5. The ever-increasing number of post-dissolution proceedings related to custody modification, visitation problems and contempt matters would appear to be symptomatic of problems and inadequacies in our present system of custody dispute resolution.

Before discussion of the pros and cons of joint custody, it is important to explore some concerns and cautions for courts and counselors dealing with this concept and some of the factors or criteria which should be considered by the court or the parents themselves in the determination of whether joint custody would be an appropriate and realistic resolution for a particular family.

It would appear implicit, for a joint or shared custody arrangement to have a reasonable chance to succeed, that the parents have a good understanding of their respective roles in the arrangement, a sincere desire to "make it work", a basic sense of trust and confidence with each other and an ability to communicate at a reasonable level. It is difficult, if not impossible, to envision a court imposing such a resolution in a particular case in the absence of an agreement or understanding between the parents. Without such agreement, the court has little or no alternative but to award full custody and authority to one parent.

As agreement between the parents is a prerequisite for joint or shared custody such arrangements will, in the majority of instances, be a product of private decision-making by the parents. In situations where parents consider shared custody a possible alternative and have been unable to make a decision, the primary mechanism for the determination of appropriate cases for shared custody would be the mediation/conciliation process or other rational problem-solving methods. It is my opinion that, in such cases, it is through some form of conciliation counseling involving the total family unit that the possibility of custody dispute resolution through joint custody would best be identified and explored and that the education of family members relative to the arrangement is best accomplished.

Further, the continuing availability of mediation services or other forms of dispute-resolution to the family following the joint custody decision should be a primary consideration in the original determination. It should be anticipated that problems and conflicts will arise in the arrangement which would best be dealt with through private decision-making or formal dispute-resolution programs rather than through the litigation process which frequently tends to be destructive for all concerned. If such services are not available and easily accessible to the family, a joint custody arrangement may not be advisable.

Counseling or dispute-resolution services may also be helpful to the court and the family in evaluation of joint custody arrangements stipulated by couples involved in divorce proceedings but in which there may be some indication of remaining uncertainty or conflict. Such intervention may help to identify those matters in which joint custody was entered into merely as an expedient compromise to expedite the divorce proceedings with little attention given to the interests of the children. Experience in the Connecticut courts indicates that such compromises are often made in an attempt to avoid protracted litigation or making difficult decisions.

Mediation counseling in such cases may also help to identify, and resolve, those matters in which there is little prospect of a viable joint custody plan due to the personalities of or relationship between the parents or those situations in which the desires of the parents are fulfilled but where the arrangements may not be responsive to the needs and desires of the children. An example of the possible problems created for children in such an arrangement is evidenced by articles published several years ago in the New York Times and a national women's magazine describing the so-called "New Haven Plan", a joint custody arrangement entered into by a group of divorced or divorcing couples, living in close proximity and largely representing faculty members of a local university. The plan involved a nearly equal alternation of the physical residence of the child between the parents and day care services provided on a rotating basis by individuals in the group. The articles reported an interview with one of the couples in which both parents expressed profound personal satisfaction with the arrangement. However, in their description of the dynamics of the arrangement, both parents repeatedly stated that a major benefit was that when one parent was "up to here" with the child, physical residence would be transferred to the other parent and vice versa. It was readily apparent that, although both parents were pleased with the arrangement, neither was accepting any direct responsibility for the guidance and discipline of the child and that the arrangement failed to provide any substantial level of continuity and stability for the child. Although no formal study of the plan was conducted, the counseling staff at the New Haven court reported that the joint custody arrangements made under the plan were, for the most part, short-lived and subsequently revised to sole custody arrangements either by agreement of the parents or by order of the court.

Although it is difficult, if not impossible, to precisely define the types of cases which may be amendable to a joint custody resolution, it would appear, in addition to the level of parental relationship previously discussed, some major considerations would be:

1. Families in which both parents have been nearly equally involved in the care and upbringing of the children.
2. Situations where the parents may be considering a "split-custody" arrangement.
3. Cases where the parents may be contemplating an alternation in the care and physical residence of the children.
4. Situations where the proposed residential parent is encouraging the other parent to continue a full and active role in the lives of the children.
5. Wherever the interests of the children demonstrate a need for a formal recognition of the continuing responsibility of both parents.
6. Situations wherein the physical residence of the parents is in such close proximity as to encourage close parent-child contacts or where the situation of the parents relative to employment and life-styles encourages a continued sharing of child care responsibilities.

7. Although various articles have suggested joint custody as a possible "face-saving" device in some cases, (assisting a parent in relinquishing physical custody of a child without the appearance of being shown as an "unfit parent") it is my opinion that this tactic is misleading and confusing both to the adults and the children and that future problems are often created as such a compromise fails to deal with the realities and problems of the family situation.

However, if such a compromise is determined to be in the best interests of all concerned, it should be cautioned that a written agreement be executed between the parties clearly establishing that one parent will be the primary residential parent and would have major discretion in the child's education, religious training, medical treatment and discipline.

CONCLUSION

In the final analysis it cannot be said that joint custody has been demonstrated to be a more effective arrangement for post-divorce child-care than other custodial alternatives or that it is appropriate in a broad range of cases. There is no objective information available either advocating or opposing the concept and experience indicates that it may be valid and workable only for a small number of families.

However, shared custody is a concept which appears to be responsive to many of the concerns, needs and desires of contemporary divorcing couples. It encourages persons to resolve their own problems and maintain control over their own lives and their children rather than surrendering decision-making power to a third party. Children are provided with an opportunity for continuing a full relationship with both parents following dissolution, minimizing the feelings of guilt, divided loyalty and loss so often observed in children of divorce. The concept is perhaps most effective in avoiding the sense of loss, powerlessness and alienation experienced by non-custodial parents where sole custody has been awarded to one parent.

With increased reliance by courts on the use of dispute-resolution techniques to resolve conflicts between divorcing families, the "win-lose" syndrome surrounding custody issues can be significantly reduced. In this framework the concept of joint or shared parenthood would continue to gain acceptance and, therefore, should be fully understood by all involved in the dissolution of marriage process. Although shared custody may not be a panacea for all cases in which child custody may be in question, it is an important alternative which should be explored and considered by parents as well as by legal and mental health professionals working with divorcing families.

THE PROS AND CONS OF JOINT CUSTODY

Prepared by
 Donald A. Holub, Director
 Milwaukee County Department of Family Conciliation

The term "joint custody" seems to lend itself to misinterpretation because it carries the connotation that all responsibilities for custody are shared equally. There may be an advantage to substituting the term "shared custody" for "joint custody" because it connotes the idea that responsibilities will be accepted by each parent and implies that an agreement as to who does what is in order. The term "shared custody" also seems to imply that each person's territory is respected and that the chances of conflict are thereby diminished. "Sharing" also tends to imply that the non-custodial parent can expect to be constructively involved in the lives of the children.

PROS

1. Joint custody provides an additional alternative for the Court to use in its efforts to safeguard the best interests of the children. With the increasing number of custody contests this additional alternative may be appropriate in some cases.
2. Joint custody arrangements permit the Court to more accurately reflect the present trend in our society in which both parents are expected to take an active role in rearing the children. A Court order of joint custody demonstrates to the parents that the Court recognizes that each parent has an important role to play in their children's lives. The increased feeling of parental responsibility may result in more faithful compliance with support orders and with other orders made for the welfare of the children. A joint custody order when appropriate provides the opportunity for the parents to develop the ability to manage custody conflicts and decisions on their own with less need for outside intervention.
3. Now that many states have diminished or eliminated the concept of fault in the divorce process, joint custody provides a step toward diminishing the concept of fault in the custody process.
4. A joint custody arrangement may provide more adequately for the children's needs when they have a strong attachment to both of their parents. Joint custody provides greater opportunity for both parents to have a means to provide guidance and direction for their children. A successful joint custody arrangement could decrease the feeling of loss that many children feel when it seems they have lost a parent in the divorce, and it could decrease the pressure for them to choose one parent over the other.
5. Joint custody provides the Court with an opportunity to allow more latitude for both parents to have a voice in custody decisions. The assumption is that two parents will make better decisions than one parent could make.

Joint Custody from the Child's Point of View

Jack C. Westman, M.D.*

At one time, fathers were favored over mothers in divorce child custody actions. In recent decades, the preference shifted toward mothers (Derdeyn, 1976). As a result, the idea of joint custody with equal rights and responsibilities of both parents for their children has emerged because of the slighting of the interests of fathers (Roman, 1978).

In thinking about joint custody, it is important to recognize that successful sole custody arrangements in the past have been de facto joint custody arrangements. The financial settlements and access to children in these post-divorce settlements have been based upon realistic sharing between the parents and free access to the children by each parent.

The fundamental appeal of joint custody lies in its philosophical approach to post-divorce relationships between parents and children. When one parent has legal custody and the other is on a visitation basis, there is a tendency to view the custodial parent as more and the visitation parent as less important in the lives of the children. The joint custody concept makes explicit the sharing of rights and responsibilities that have been implicit in successful sole custodial relationships between parents and children. Joint custody is a popular consideration in the minds of many who divorce because both parents can regard themselves as continuing their previous roles in the lives of their children. At a more practical level, joint custody may eliminate child support payments as well.

Joint custody, then, is a means of equalizing the rights of parents vis a vis their children. Joint custody has not been proposed by advocates for children, however. In fact, one group speaking for the interests of children has stressed the opposite: designating a single custodial parent who has complete control over the visitation program (Goldstein, 1973).

Under most circumstances, parents are in the best position to work out custody and visitation arrangements (Mayo, 1976; Milne, 1978). They know their children and life styles and are motivated to carry out their own agreements more than those imposed by a court. When they are responsible for arranging their own post-divorce relationships with their children, there also is a reduced tendency to shift their responsibilities to others. From the point of view of courts and their conciliation services, joint custody eliminates troublesome details from litigation. Although joint custody statutes usually stipulate that

*Professor of Psychiatry, University of Wisconsin-Madison, Madison, Wisconsin.

it be granted only when in the interests of the children, an evaluation of those interests rarely occurs if there is parental agreement to joint custody.

In the case of adolescents who literally have two homes in the same community, joint custody can be a practical arrangement. At that age, youngsters' relationships with their parents are basically formed and they are able to make reasonable choices.

The experience of child psychiatrists with joint custody, however, calls attention to the fact that some parents do not foster the interests of their children. A joint custody arrangement can be a way of avoiding facing specific planning for the affected children. It also promotes the illusion that parental relationships with children can be preserved unaffected by the divorce. Overlooked in the process is the fact that divorce is a family affair and that when two spouses divorce each other, they are in effect divorcing one-half of each of their children (Westman, 1971). As much as many divorcing adults would prefer to ignore the fact, divorce forces children to split their lives between two separate lines of allegiance to each of their parents. Although divorce may create a less pathogenic home for children, divorce does force each child into a new kind of relationship with each parent. Even though successfully mastered by most, divorce constitutes a stress for affected children (Westman 1972). This consideration in itself leads many parents to find other ways of resolving their marital problems than through divorce.

Child advocates are less concerned about joint custody as a concept and more concerned about the ways in which it is implemented. The critical issues are the residential homes for children, the amount of time the children spend with each parent, and the presumed equality of each divorced parent in making decisions that affect the lives of the children.

From the point of view of children, splitting their lives between two homes and emphasis upon the equality of contact between parents and a sharing of responsibility for decision making between two divorced parents pose many practical problems. There is not enough experience with joint custody at this time to know if it really accomplishes its aim of preserving parent-child relationships. Growing clinical evidence suggests that it does not, and actually may be contrary to the interests of children. Joint custody allows parents who have already altered their child's life to further add the ambiguity of two homes, possibly with two neighborhoods and even, incredibly in some cases, two schools. The minds of some divorcing adults are so distant from the interests of their children that clinicians are called upon to point out to them that children have their own lives to lead and are not simply objects to be moved back and forth between their parents.

The flaw in the joint custody concept is that it assumes that each parent can play an equivalent role in a child's life after divorce. This springs from the wish of parents to preserve their pre-divorce relationships with their children after separation. Ignored, however, is the fact that separation inevitably alters the nature of parent-child relationships. As one 14 year old boy put it, "If Mom and Dad both want my custody and want the best for me, why are they getting a divorce?"

Joint custody can be sought by parents as a means of avoiding facing the fact that divorce does change relationships between parents and children. The thought of joint custody can temporarily ease the pain of separation, but inevitably the fact must be faced that the parent living with a child initially plays a more significant role than the separated parent in that child's life. We find that parents seeking joint custody sometimes really are ambivalent about their divorce and are trying to "have it both ways" through separation from their spouse with the hope of not altering their relationships with their children. Furthermore, joint custody can be a way of maintaining a remnant of the marriage through the children to the disadvantage of all parties.

To further compound the problem, joint custody is often sought when there are young children. Prior to the elementary school years, shifting from one home to the other, even when arranged at yearly intervals poses the trauma of separation from a beloved parent periodically. Attempts to resolve them by shifting living arrangements to a weekly basis accentuate the problem since the experience of separation for young children is felt nightly. To illustrate the way in which parents may be insensitive to the impact of weekly transfer on children: a three year old boy was moved from one parental home to the next every other week, and although he was experiencing nightmares and a regression in personal habits, this was disguised by the tendency on the part of each parent to blame the boy's reactions on the time spent with the other parent.

All of this highlights the fact that a joint custody arrangement requires the utmost in harmony and cooperation between two adults who are divorcing each other because of incompatibility. To further complicate the matter, children may express their resentment over the fact that their parents have divorced by manipulating each parent against the other (Westman, 1970).

The problems with joint custody grow with the passage of time. From a child's point of view, the joint custody arrangement contains the potential for disillusionment. Since it is likely that mature people resorting to divorce will remarry others, the remarriage of one spouse or both add step-children to the picture. Consequently, the preservation of a substantial relationship with the children of a previous marriage poses

significant problems in the integration of a new family unit. When one parent or the other inevitably is unable to maintain an "equal" role in the life of a child, maintaining the facade of joint custody belies the dilution of the pre-existing child-parent relationships.

The major problems with joint custody lie in splitting residential living. For growing children, stability and continuity of home and neighborhood arrangements is a primary consideration. It is obvious that continuity of a child's school experience and peer relationships are important. The task of growing up is difficult enough if one has a single set of parents, home, neighborhood and school. Honoring these considerations for children would mandate that the establishment of two homes be such that the school and peer group experiences not be altered. It is true that many children, because of our mobile society, experience moves from one neighborhood or city to another. This is a fact of life to which many children must accommodate, but is not an expression of furthering their developmental interests.

If we look at post-divorce parent-child relationships from a child's point of view, it is clear that free access to contact with both parents is both desired by children (Rosen, 1978) and advantageous developmentally. Free access to parents, however, does not mean adjusting to two homes, two neighborhoods and possibly two communities.

Joint custody also can be used when divorcing parents distrust each other. Neither parent wishes to relinquish the child to the other. Rather than resting upon mutual respect between the divorced parents, the arrangement is an expression of lack of confidence. Shifting children back and forth between such homes is an invitation to exploitation of the child by each parent and the manipulation of parents against each other by the children as well.

When parents are committed to the interests of their children, are able to work harmoniously in post-divorce arrangements, and mutually respect the relationships of the children with each other, the designation of one parent as the primary custodian with an open, amicable communication channel for promoting the children's interests with the separated parent meets the interests of the child. The stability of their home life, peer relationships and school can be preserved while their relationship with the noncustodial parent is fostered. This is de facto joint custody which also allows for the likelihood that relationships with one parent or the other inevitably will be attenuated with the passage of time. When parents divorce, they are electing to follow different life paths, and it is most unlikely that each of their children will remain central in their life priorities. From the point of view of the affected children,

it is preferable to recognize this openly than to maintain the fiction of equal commitment on the part of both parents to the children.

Although often outweighed by parental considerations, it is necessary to point out that, especially when parents can maintain harmonious post-divorce relationships, the affected children wish that the divorce had not taken place at all. It is evident that under most circumstances, post-divorce harmony is not possible between the separated parents, and that fact in itself precludes joint custody. Furthermore, there are circumstances in which the interests of children are served by the limitation or even elimination of contact with one parent against the wishes of that parent (Benedek, 1977).

Of greatest concern is the fact that children are remarkably adaptable to life circumstances. It is well known that even when physically abused by their parents, children seldom complain. The reports of successful joint custody arrangements in which children are moved back and forth between two homes are not based upon an analysis of the long term impact of these arrangements on the children. Most of the sanguine reports are from the parents' points of view. The fact that children do not vocally protest or even behaviorally reflect their discomfort does not mean that long range repercussions from these arrangements will not occur. It is this fact that makes child advocates question the enthusiastic early reports of parents regarding joint custody arrangements.

In conclusion, philosophically it is desirable to approach all divorce arrangements regarding children with the expectation of preserving both parents' rights and responsibilities. The automatic presumption in the past of the primacy of one parent over the other has contributed to many unsatisfactory post-divorce arrangements for children. In that light, the idea of joint custody is appealing. The problem, however, lies in implementation. The conceptual advantage of joint custody breaks down when the realities of divorce are examined. Because of changing life circumstances, one parent or the other usually plays a greater role in the lives of affected children. The fact is that when a family is broken up through divorce, the relationships between parents and children are inevitably altered, rarely equally.

If the spirit of statutes enabling joint custody were followed,

"the court may give the care and custody of such children to the parties jointly if the parties so agree and if the court finds that a joint custody arrangement would be in the best interests of the child or children (State of Wisconsin, 1973)."

joint custody could be used as a means of furthering the best interests of children. In most instances when parents agree to joint custody, however, there is no judicial review of whether or not the interests of the children would be served. Under most circumstances, therefore, it is likely that sole custody is the most realistic post-divorce settlement from the point of view of affected children. The impact of joint custody on children remains to be determined. Whether or not the interests of affected children are served will depend upon the maturity of the parents, not the legal arrangements.

REFERENCES

- Benedek, R.S. and Fenedek, E.P. (1977) "Postdivorce Visitation: A Child's Right." Journal of Child Psychiatry, 16:256-271.
- Derdeyn, A.P. (1976) "Child Custody Contests in Historical Perspective." American Journal of Psychiatry, 133:1369-1376.
- Goldstein, J., Freud, A., and Solnit, A.J. (1973) Beyond the Best Interests of the Child. New York: The Free Press.
- Mayo, M.E. (1976) "Access - Child's Right or Parents' Privilege? Should Court or Custodian Decide?" Anglo-American Law Review, 5:111-130.
- Milne, A. (1978) "Custody of Children in a Divorce Process: A Family Self-Determination Model." Conciliation Courts Review, 16:1-6.
- Roman, M. and Haddad, W. (1978) The Disposable Parent. New York: Holt, Rhinehart & Winston.
- Rosen, R. (1978) "A Discussion of Access: Expression of Feelings of Children of Divorce Regarding Continued Contact with Non-Custodial Parent." Capetown Union of South Africa: University of Capetown. Unpublished Manuscript.
- Westman, J.C. (1971) "Divorce is a Family Affair." Family Law Quarterly, 5:1-10.
- Westman, J.C. (1972) "Effect of Divorce on a Child's Personality Development." Medical Aspects of Human Sexuality, 6:35-55.
- Westman, J.C., Cline, D.W., Swift, W.J. and Kramer, D.A. (1970) "Role of Child Psychiatry in Divorce." Archives of General Psychiatry, 23:416-420.
- State of Wisconsin (1978) Chapter 105, Laws of 1977, Section 247.24(b).

For access to both parents see:

Lewis vs. Lewis 302 SW 2d 861, 863(5)
Lambert vs. Lambert 222 SW 2d 544, 548(6).

Instilling fear and mistrust into children toward the other parent see:

S ___ V. G ___ 298 SW 2d 76, 77(13)
Leethans vs. Leethans 243 SW 2d 801, 803
Rone vs. Rone 20 SW 2d 545, 549
Kiplern vs. Kiplern 227 SW 894(2).

"Where neither parent is unfit, best interest of the child will be served by arrangement which will enable such child's association with both parents, if one parent alienates the other." 394 SW 2d 437.

The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than any kind of authoritative selection." Tinker vs. Des Moines School District 393 US 503, Page 512.

There are two basic policies to be achieved in granting visitation privileges to a parent who does not have custody; the right of the child to the emotional, social and learning benefits of a stable relationship as is possible with both of the parents and the right of the parent to know and share the love of the child.

Oregon Court of Appeals 8-17-74, RE: Marriage of Delf 582 P2d 96.

Parenthood is a continuing bilateral responsibility and opportunity. It cannot be avoided or successfully divided. A decree of divorce offers no excuse or alibi for the abatement of parental interest or obligation. The dissolution of the marriage contract, leaving in its wake children who are the innocent victims of the resultant broken home, should be a challenge to the fathers and mothers of such children to make an even greater effort to minimize, as far as possible, the incidental and unavoidable losses of love, council and guidance. McBetrick vs. McBetrick 284 P2d 352, Oregon.

"Whoever may have custody, it is the duty of each parent and each family member to the children to set aside personal feelings and act in a manner which is supportive of the relationship of the children to the other parent."

Warren vs. Warren 528 P2d 1088, Oregon 1974.

Also see:

Delgado vs. Fancett 515 P2d 210, Alaska 1973.
Ward vs. Ward 353 P2d 89, Arizona 1960.

Concerning children, custody and education see:

Conley vs. Wolen 533 P2d 955, Montana, 1975
RE: Dobbs adoption 531 P2d 303, Washington, 1975
Winters vs. Winters 221 NW 2d 166, Iowa.

Child Custody Contests in Historical Perspective

BY ANDRE P. DERDEYN, M.D.

The author reviews the historical background of interparental child custody disputes. The father's superior right to custody in the nineteenth century continued the English common law tradition, but in the twentieth century the mother's claim became superior to the father's, reflecting women's generally increasing rights and the assumption that women are better suited to caring for children. Partly as a result of recent cultural changes leading to a beginning equalization of parental rights and partly because of greater concern for children, courts are starting to focus more on children's emotional needs. It is likely that courts will increasingly call on psychiatrists and other mental health professionals for help in making their decisions.

CONCERN FOR CHILDREN involved in interparental custody contests has recently been increasing. Efforts to change court practices to conform to the needs of children and to improve both the quantity and the quality of psychiatric consultation reflect this new interest.

Knowledge of the historical background of child custody contests affords some perspective on the current trends for change. This paper will touch briefly on practices in the older Western world and will treat in detail developments in the United States up to the present time.

PRACTICES IN THE OLDER WESTERN WORLD

Roman law gave the father absolute control over his children, whom he could sell or condemn to death with

Presented at the 129th annual meeting of the American Psychiatric Association, Miami Beach, Fla., May 10-14, 1976.

Dr. Derdeyn is Associate Professor of Psychiatry and Pediatrics and Training Director, Division of Child and Adolescent Psychiatry, University of Virginia Medical Center, Charlottesville, Va. 22901.

impunity (1). This concept of absolute right carried over into English law, where it prevailed until the fourteenth century without appreciable change (2). In the Middle Ages childhood was not seen as the unique phase of life we now consider it to be (3). It was customary to send children as young as 7 into service or apprenticeship, where learning was secondary to the labor a child performed for his or her master (4). The child and the servant appear to have been indistinguishable in terms of how they were treated, even the language often failed to use separate terms for each (3, p. 366). It was not until the sixteenth century that children began to be looked on as being of particular interest, having important and specific developmental tasks to perform, and being worthy of affection.

In eighteenth-century England the father's right to custody was almost without limit (5). Because the father owned or managed all of the family property, there was the practical consideration that, should the child be removed from the custody of the father, the financial support of the child was in question (6). However, the idea began to evolve that custody involved not only rights but also responsibilities for the care of the child. The English courts assumed jurisdiction over the welfare of children under the developing doctrine of *parens patriae*, which held that the Crown should protect all those who have no other protector (7). *Benny Sholley* in 1817 was one of the first men to lose custody of his children (8). Custody was refused because of his "vicious and immoral" atheistic beliefs.

The doctrine of *parens patriae* was given substance in 1839 in Talfourd's Act, which gave the court the power to determine custody of infants under the age of 7. The right of the mother to custody in England was gradually increased in a series of acts until the *Guardianship of Infants Act of 1925* proclaimed the equality of the mother and father with respect to the custody of their children (9). It was at about the same time that such equality was achieved in the United States.

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The reader should compare the position of the father of past time as revealed by this article to the current day. Today's father is held in slavery and degradation by today's in power authorities, the court system, the legislature, our society and cultural thinking.

SURVIVING THE BREAKUP

*How Children and Parents
Cope with Divorce*

Judith S. Wallerstein

and

Joan Berlin Kelly

Basic Books, Inc., Publishers

New York

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to substitute for lacunae within the family structure, nevertheless, even if we regard such services as supplementary or secondary, the divorced family is at high risk when it stands alone.

Issues of Custody

Taken as a whole our findings point to the desirability of the child's continuing relationship with both parents during the postdivorce years in an arrangement which enables each parent to be responsible for and genuinely concerned with the well-being of the children. For those parents who are able to reach an agreement on child related matters after divorce and are willing to give the needs of the children priority or a significant role in their decision-making regarding how and where the children reside, joint legal custody may provide the legal structure of choice. (The parents of one-quarter of the children in our study who had been able to maintain a shared commitment and devoted parenting within the conflicted marriage would provide an appropriate pool of candidates for joint custody.) Although the influence of the legal structure on the fabric of family life may be considerably less than many persons believe it to be, nevertheless, there is some evidence that legal accountability may influence and shore up psychological and financial responsibility. Furthermore, there is evidence in our findings, that lacking legal rights to share in decisions about major aspects of their children's lives, that many noncustodial parents withdrew from their children in grief and frustration. Their withdrawal was experienced by the children as a rejection and was detrimental in its impact.

In viewing joint legal custody as a reasonable step, we differentiate shared legal responsibility and shared physical custody. Both concepts require clarification in law and research. Some mistakenly view joint physical custody as requiring a strict sharing of the child's time on an equal or fifty-fifty basis. Actually, joint physical custody can take many forms, and parents can negotiate or modify a division of time in consideration of the needs of the children and of the adults. Central to the notion of shared physical custody is an understanding that it does not mean a precise apportioning of the child's life, but a concept of two committed parents, in two separate homes, caring for their youngsters in a postdivorce atmosphere of civilized, respectful exchange.

There appears to be no compelling legal reason to pattern the divorced family after the married family and to establish one presumptive pattern for all couples. Parents may have little interest in their children; they

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theless, even if the divorced

may demean or exploit their children; they may use the children to establish a permanent foothold in the divorced partner's life. Moreover, joint custody poses many logistical problems because of the mobility of adults in American life and the high incidence of remarriage.

Our findings point, however, to the undesirability of routinely designating one parent as "the psychological parent" and of lodging sole legal and physical custody in that one parent. Such an arrangement has been interpreted by the courts to presume that the child does not have two psychological parents. This finding can be devastating to child and parent when both parents are indeed committed to a continuing relationship with their children.

In taking a position in favor of flexibility and encouragement of joint legal custody where feasible, as a symbol of society's recognition of the child's continuing need for both parents, we offer a view diametrically opposed to that of our esteemed colleagues Goldstein, Freud, and Solnit in their book *Beyond the Best Interests of the Child*.⁶ Although we share a common psychodynamic framework with these colleagues, we have in the course of our research, arrived at findings and recommendations which are greatly at variance with their views. Our findings regarding the centrality of both parents to the psychological health of children and adolescents alike leads us to hold that, where possible, divorcing parents should be encouraged and helped to shape postdivorce arrangements which permit and foster continuity in the children's relations with both parents.

Building Blocks for Constructing Preventive Intervention

We began this work with the conviction that divorce is and should remain a readily available option to adults who are unhappily married. Our findings, although somewhat graver than expected, have not changed our conviction. They have given greater impetus to our interest in easing the family rupture for children and adults alike and in providing a knowledge base in the real experiences of divorcing families for informed parenting as well as for improved legal, educational, and psychological interventions which can prevent, or at least mitigate, unhappy and psychopathological outcomes for the children.

⁶ Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1973).

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Joint Custody

After 11 months, how is the new law working?

By Kathryn Eaker
Bee Staff Writer

"IF YOU HAD TOLD ME a year ago that I'd like joint custody, I would have told you, 'You're a fool!'" laughed Evelyn.

Elsewhere, Barbara declared: "We can deal with each other on a business-like basis, cooperating in a parental role — as long as we keep our personal relationship out of it."

Evelyn and Barbara are two Sacramento mothers who were forced by their ex-husbands, who had the law on their side, to share the physical custody of their children.

After their marriages ended in shards, both women, fearing that frequent contact with their ex-mates would only bring renewed warfare, rejected their husbands' demands to share custody of the children. Yet today both Barbara and Evelyn (not their real names) are champions of joint custody, which became California law in January. There are others who think the joint custody law has worked well in its first 11 months; a few others think it's too early to say.

Hugh McLean, president of the Association of Family Conciliation Courts, says "the major effect of the joint custody law is that it helps kids go through divorce. In 80 percent of the cases, kids break up over the parent who is out of the home. It is critical to maintain that contact." The thrust of joint custody, McLean explains, is "how can both of the parents, in a way that makes sense, bring this child to maturity as a healthy, caring human being?"

Although the following two true stories involving Sacramento families are not intended to be representative of all

the ramifications of joint custody, they illustrate the power of the law to convert solid resistance to staunch support for a radical change affecting the children of divorce.

One afternoon in July, 1976, before her husband came home from work, Evelyn packed up her four-year-old son and walked out of a seven-year marriage. Angry and bitter after years of battling, she wanted nothing more to do with her husband.

She filed for divorce. Despite her husband's protests, she was awarded sole custody. Her husband, Ellis, a communications technician, was required to pay \$250 a month alimony, \$250 a month child support and was given visitation rights every other weekend and alternate holidays.

"I wanted custody at that time, but didn't have a chance," recalls Ellis. Last fall, anticipating passage of the joint custody law, he began proceedings for modification of his custody decree.

IN MARCH, Evelyn and Ellis met with a Family Court Services counselor to mediate the dispute.

Evelyn, who had never heard of joint custody, arrived ready to fight again for sole custody. "When Ellis walked in with a petition and plan for joint custody, I hit the roof. I had sole custody and I intended to keep it.

"I thought, 'I'm not going to put the kid through this.' Our son, Bobby, had had psychiatric therapy, and I felt that the arrangement Ellis was asking for, one week with him and one with me, wouldn't be good for him." She also objected to Ellis' demands that he meet and approve all babysitters and that she have no men in the house.

The counselor asked Evelyn, "What would be a reasonable joint custody arrangement for you?"

"I haven't given it a thought," Evelyn replied testily. "All I could think of was that joint custody would mean fighting with Ellis, and if I'd wanted that, I would have stayed married."

Furthermore, Evelyn was worried about whether Ellis "could raise a child." He was 48 when Bobby, his only child, was born. She questioned his judgment.



Ellis claims that his ex-wife would have rejected the idea on the spot, but the counselor made it clear that if she didn't cooperate she could lose custody altogether.

So despite the rough start, and with "excellent" counseling, Evelyn says she and Ellis established a goal: "Let's make things as easy as possible for Bobby."

Under the new custody arrangement, Ellis has Bobby every other weekend, plus three months in the summer. During summer vacation Ellis assumes the every other weekend privileges.

But that change is only a pale reflection of the radical difference in their lives.

"I'm a father again," Ellis says, smiling broadly. "Before, I was just someone who visited once in a while, and I could never say anything about Bobby. Now Evelyn recognizes me as an equal, she views me differently."

THROUGH THE COMMUNICATION and cooperation developed by sharing the rights and responsibilities of rearing Bobby, Evelyn says she and Ellis have become supportive friends. "We didn't communicate this well when we were married," she laughs. They freely phone to discuss Bobby's problems, "neither of us blaming the other," and, ironically, at times they find themselves united front combating Bobby's attempts to manipulate them.

Moreover, the sharing has gone beyond the legal agreement. Evelyn recently started a new job that requires working evenings. To spare her babysitting fees, Ellis picks up Bobby after work every school day, prepares dinner and helps Bobby with his homework until his mother comes for him.

Says Evelyn, "This is the best decision for all three of us that we could have made."

Bobby, a shy, quiet third-grader, says he is happy that he sees more of his father and that the fighting has stopped. He recently expressed his feelings in an invitation he wrote at school:

Dear Mom,

Dad and you are getting good together. Mom, will you please invite my dad to my first communion. I want you to go together.

Love, Bobby

THE CONDITIONS under which the other family hampered out its joint custody arrangement were wretched, and in some respects the family is still reeling from the experience.

For nine months after Barbara filed for divorce, she and her husband, Steve, and their two young sons continued to live under the same roof in an atmosphere acrid with condemnation and guilt, tongue-lashings and icy silences, fear and pain.

But Barbara, a state accountant clerk, was afraid to leave. She doubted that she could support herself and the boys on her \$1,000-a-month salary, and she was worried about being charged with desertion.

And Steve wouldn't budge unless Barbara agreed to joint custody and his support proposal.

Barbara says she fought joint custody because she is a traditionalist who believed that children belong with their mother and because she couldn't be convinced that shuttling children back and forth week after week would be good for them.

Counseling, books and hours of soul-searching allayed some of her fears, but still she was concerned about dealing with her husband after so much gall had poisoned their relationship.

"That problem didn't bother Steve. 'It's a myth,' he insists, 'that you must be friends for joint custody to work. You just have to work out the rules on how you are going to conduct the business of co-parenting.'"

An active member of Equal Rights for Fathers and tireless worker for passage of the joint custody law, Steve successfully delayed court action on the divorce until the law went into effect.

FACED WITH the proposition of losing custody altogether or accepting joint custody, Barbara acquiesced.

Today she has a small apartment within minutes of the family home that Steve refinanced for himself and the children. He has the boys one week, she the next, an arrangement the four of them worked out together, and one that appears to satisfy everyone.

After five months of joint custody, Barbara admits it is working well. "The children have us equally in their lives. If you don't share in this much of your children's lives, you lose too much of their growing up."

Moreover, she contends that joint custody relieves children of guilt and helps them adjust to the breakup. "Of course the boys go through an adjustment every week," she says, "but they're super."

Another reason Barbara says she likes joint custody is that sharing the burdens and responsibilities of rearing the children leaves her time and energy to rebuild her life.

But the arrangement has kinks. Verbal recriminations continue to punctuate conversations, and the boys complain that their parents at times use them as messengers to avoid communicating.

But despite that — and the fact that they get tired of packing and unpacking their clothes — Michael and Jim say they like the arrangement "because we get to see them both the same."

And both boys express relief that the fighting is over.

ACCORDING TO McIsaac, "Anything we can do to diminish the fighting is good. It is like we (professionals) just recognized that divorce is happening and are for the first time giving support to the families as they reorganize. In the parental role, so divorce takes place. That must continue."

Some psychologists, attorneys and judges question the ability of parents to cooperate after divorce when they couldn't get along while married.

But Briakley Long, director of Sacramento County Family Court Services, notes that "parents who try joint custody find there are levels on which they can communicate."

Critics claim that children need one full-time parent, not two part-timers.

McIsaac counters that with 38 percent of all marriages ending in divorce, 60 percent with children under the age of 12, we are creating a new family system — the bi-nuclear family. "The law is just beginning to catch up with reality," he said.

Although 13 states now have joint custody laws, California alone gives it preferred status. The legislation's sponsor, Assemblyman Charles Imbrecht of Ventura, says that the response to the change has been favorable, but he believes it is still too soon to judge the impact. "We'll look at it at least another year before deciding if it needs refinement," Imbrecht says.

Initiating

JOINT CUSTODY PLANNING

Encouraging & facilitating joint physical & legal custody plans.

California's new Civil Code Sections 4600 and 4600.5 (Chapter 915 of the Statutes of 1979) propose joint legal and physical custody as an initial preference in a logical progression of choices for custody decisions concurrent with divorce of parents.

For good reason the law dictates no plan requirements.
Parents create their own joint custody plan.

The statute does not specify detailed plan preconditions on the assumption that the diversity of American culture as well as family-initiated solutions should not be limited to the perception of the legislation's authors at the time of the measure's passage. Instead, the statute is designed to encourage voluntary and cooperative plan preparation as divorcing parents assume that the initial consideration of the court will be joint custody prior to consideration of sole parent custody.

Also, a plan can be required before decreeing sole custody.

A parent who prefers not to participate in joint custody is cautioned that, unlike practice prior to Chapter 915 of the Statutes of 1979, the court is empowered to require a sole parent custody implementation plan in advance of the court's custody order as a means of discerning how cooperative a sole custodian parent is likely to be in facilitating frequent and continuing contact by the child with a non-custodial parent. Demonstration of a lack of cooperation, or submission of a sole parent custody implementation plan that foretells curtailment of "frequent and continuing contact" could jeopardize and potentially preclude a court order of sole custody to that parent.

Initiating the planning process.

How do Civil Code Sections 4600 and 4600.5 initiate the joint custody planning process?

At the time of, or prior to divorce hearing, each parent has the opportunity to submit, independently, a tentative outline of his/her personal preferences for the administration of joint custody issues. A submission of the tentative outline is similar to the present procedure of submitting a Form 1285.50, Financial Declaration, in advance of hearing. The tentative joint custody plan outline is for use by private or public-agency counselors, intermediaries, or the court. Parents need not compare their separate proposals in advance of hearing unless they desire to do so on the expectation that mutual consultation in advance will facilitate the court's process.

To encourage consideration of joint custody, this is a non-copyrighted procedure and basic plan available for reproduction and adaptation, in part or in whole.

Source: James A. Cook, 10606 Wilkins Avenue, Los Angeles, California 90024

of submitting joint custody preferences.

Independently submitted joint custody preference outlines, from each parent, have the following advantages:

- Giving evidence to the court of how cooperative each of the parents is likely to be in administering a joint custody plan.
- Providing information, in advance and possibly not previously available, on how each parent envisions conducting co-parenting.
- Relieving the court of dictating decisions that could be unacceptable to one or both parents.
- Providing a clue to preferences of each parent and a means of discerning which preferences coincide. Consequently, preferences upon which there is agreement need not become issues of contention.
- Winnowing-out for further discussion the remaining joint custody implementation plan preferences on which there is disagreement.
- Providing a priority ranking system to assist in the negotiation of those joint custody implementation preferences upon which there is disagreement.

Accommodating changes.

Child custody encompasses years during which children are maturing, needs and interests are changing, and the economic circumstances and other responsibilities of parents may also be changing. Therefore, custody plans created by this statute are not intended to be rigid, categorical or without evolution. By avoiding itemization of specific prerequisites within the statute, California's child custody statute of 1979 avoids making adherence to, or interpretation of, a custody plan an additional or substitute focus for the parents' animosities.

The purpose of custody planning within the statute, on behalf of the child's best interests, is to encourage negotiation in a spirit of cooperation and accommodation and to minimize accusation or the imposition of unnecessary restraints upon the options parents may envision for conducting joint custody.

The statute facilitates the resolving of joint custody issues by parents without state-directed impositions in matters of personal preference.

Customarily, child custody encompasses decisions regarding, but not limited to:

Medical care

Education

Religion

Residence

Travel

Support

MEDICAL CARE

Propose names of doctors or clinics available or intended to use.

Will you permit and encourage communication by the other parent with doctors and clinics?

Yes ___ No ___ Comment:

Would you be willing to grant either parent the ability to make medical decisions in emergencies when both parents are not available?

Yes ___ No ___ Comment:

Would you provide advance notification to the other parent about proposed and forthcoming medical care?

Yes ___ No ___ Comment:

Would you offer to participate in medical care costs?

Yes ___ No ___ Comment:

EDUCATION

In considering response to the educational questions, it is not necessarily essential that a child remain exclusively in a particular school, especially if grade curricula is uniform in an educational system.)

If education is now in progress, do you offer to assure continuity of schooling?

Yes ___ No ___ Comment:

Would you exchange information of educational deficiencies or strengths?

Yes ___ No ___ Comment:

Would you make available the opportunity for the other parent to visit teachers?

Yes ___ No ___ Comment:

Indicate schools (and locations) available for present and next grade.

Name:
Address:

Name:
Address:

RELIGION

(The following does not purport to imply that the court either favors or discredits the response to questions on religion. Instead, the questions are posed to aid parents in recognizing and accommodating each others preferences.)

Are you interested in and willing to assume a religious education responsibility?

Yes ___ No ___ Comment:

Do you have a religious preference for each child?

Yes ___ No ___ Comment:

Do you have alternate preferences? Itemize

TRAVEL COSTS

Offer a solution to the child's travel costs if one or the other parent moves from, or is no longer resident in, the original home locality.

For instance, should the parent moving from the county of original residence be required to pay travel costs to and from the alternate parent's residence?

Yes ___ No ___ Comment:

Should travel costs be apportioned based on income and ability to pay?

Yes ___ No ___ Comment:

Will you assume travel costs of the child to fulfill residence with the alternate parent?

Yes ___ No ___ Comment:

SUPPORT

Initial inquiry to determine the assumption of child support costs.

Alternatives:

Will you assume all child support costs?

Yes No Comment:

Will you assume all child support costs while the child is resident with you?

Yes No Comment:

Will you participate in sharing of child support costs based on need and ability of each parent to pay?

Yes No Comment:

If costs are shared or allocated, will you provide a monthly itemization of actual support costs?

Yes No Comment:

Itemize anticipated child support costs by item on monthly or yearly basis:

RESIDENCE SCHEDULE

(Indication of where the child is resident, either on an alternating basis or consistently, and the sharing of significant calendar dates.)

Under the present statute it is no longer necessary to use the term 'visitation' with its connotations of superficiality, brevity, condescension or permission. A few parents may, or may not, wish to designate a primary and a secondary residence for the child but this ranking is not necessary for those parents establishing equality in joint custody.

Indicate preference and proposals for sharing residence.

Not all schedules need to indicate an exactly equal sharing of time, and you are encouraged to propose time schedules that are practical, realistic, and suitable for your personal schedule as well as accommodating to the probable schedule of the alternate parent.

In exchanging and allocating time available, consider not only alternate days, but alternate weeks, months, seasons or years as well as the sharing or trading of holidays.

In general, how would you prefer to apportion:

The school year?

The vacation season?

Are the following days important in your scheduling?

(Note: Many of these dates have not heretofore been alternated in conventional custody/visitation decrees with omissions occurring by intent or oversight. This list is intended to rectify an observation of non-custodial parents that many of these dates were omitted entirely from former visitation schedules.)

<u>Yes</u>	<u>No</u>	<u>Date</u>	<u>Preferred resolution</u>
		Child's birthday	
		Your birthday	
		Christmas	
		Hannukah	
		Special religious dates	
		Winter vacation	
		New Year's Eve & Day	
		Washington's birthday	
		Lincoln's birthday	
		Valentine's Day	
		Spring (school) vacation	
		Memorial Day	
		Independence Day	
		Labor Day	
		Halloween	

continued on page 7

Yes

No

Date

Preferred resolution

continued from page 6

Thanksgiving Day

Thanksgiving Holiday

Mother's Day

Father's Day

Other relatives' birthdays

School or teacher-convenient days off

Are there events, club meetings, obligations or opportunities you would like to accommodate on behalf of the child? Itemize.

REMAINING ISSUES

Are there issues or considerations of particular importance to you, which have not been previously itemized, that would be helpful to you and to the child if indicated in a joint custody plan?

Itemize, comment:

While not as critical to the underlying functioning of an implementation plan as the items previously indicated, the following are secondary issues that will help both parents toward implementing joint custody.

Relationships

Do you agree or permit that yours is not the only acceptable and satisfactory way to raise children?

Comment:

Do you recognize that the part-time absence of your child, and joint custody, is not a denunciation or derogatory reflection of your ability to parent?

Comment:

Will you substantiate with your child and with your other contacts that joint custody has established two equally valid homes?

Comment:

Do you agree not to estrange your child from the other parent?

Comment:

Will you respect the other parent's right to opinions and a reasonable freedom of action when with the child?

Comment:

Do you recognize that other people have differing philosophies and that it is permissible for a child to experience and evaluate these philosophies for themselves?

Comment:

If brothers and sisters are also involved, how would you prefer the relationship, residence and other activities be coordinated?

Comment:

How would you approach situations that conventional families usually attend together, such as graduation, recitals, athletic performances, etc.

Comment:

Will you facilitate the child's contact with grandparents?

Comment:

Communications

Describe the level of involvement you can tolerate with the other parent in joint custody implementation.

Comment:

Do you anticipate that your level of tolerance with the other parent will change, and under what possible circumstances?

Comment:

Is oral communication between parents satisfactory for you?

Comment:

Will you require written confirmation of verbal agreements?

Comment:

Will you facilitate telephone calls or chats by the child with the other parent during those times when the child is resident with you?

Comment:

Parenting and Services

Each parent has a different quotient of parenting skills, and varying degrees of interest and effectiveness in parenting skills. For realistic and efficient co-parenting both parents are well advised to recognize and admit these variations without rancor, ridicule or judgement. Insofar as parenting:

Which parenting task do you believe you do best?

Which tasks do you perform least well?

Which services and responsibilities would you most like to assume?

Which would you like least to do?

In making joint custody work, which service or consideration or task would you most like the other parent to do?

If baby sitting or equivalent service is needed, will you give the other parent the first opportunity to do so before selecting or engaging an individual other than the parent?

(Prior to enactment of Chapter 915 (AB 1480), Statutes of 1979, and for no discernible or equitable reason, one parent most often had to assume the expense and inconvenience of picking up and delivering the child so that the child had access to the other parent during "visitation." Since the new statute redresses the imbalance in such relationships, the following question is asked:)

Will you, or can you, pick up and deliver the child to the other parent as frequently as the same is done for you?

Financial (other than child support)

Do you believe your joint custody situation calls for a budget and a mutual understanding about that budget?

Comment:

Do you have preferences or intentions about financial savings for the child?

Comment:

Discipline

Do you have opinions about the child's safety that you would like to guarantee or convey to the other parents?

Comment:

Do you have preferences and opinions about manners, deportment, and how the child behaves that you wish to convey?

Comment:

Do you have proposals or preferences regarding punishment?

Comment:

Will you honor the joint custody implementation plan even though a child's remarks may be counter to the other parent's preferences?

Comment:

Will you concur that if the child is upset at circumstances in one home that they can't merely pick up and move to the other house without communication between the parents?

Comment:

Decisions

Will you agree that the parent having day to day jurisdiction can make decisions of the moment?

Comment:

Do you believe that substantial decisions of longer term consequence should be resolved by consensus?

Comment:

Dispute

Do you have fears or apprehensions about joint custody not working?

What are they:

Do you believe that a plan should be subject to periodic review?

Comment:

Will you permit input about the plan from the child, even if the child's observations are critical of your preferences?

Comment:

Will you participate in property and custody settlements out-of-court?

Comment:

Would you be amenable to mediation or arbitration in case of serious custody dispute?

Comment:

Information and Records

Civil Code Section 4600.5 (g). Chapter 915, Statutes of 1979, prohibits a custodial parent from prohibiting access to records and information by a non-custodial parent.

So that each parent may anticipate which records and information regarding the child are likely to be desired by the other parent, indicate which of the following are of interest to you.

Medical
Dental
School
Religious

Camps
Clubs
Cultural or extra-curricular activities
Friends & associates

Diet
Rest
Living & sleeping accommodations
Clothing
Pets
Other

Hobbies & interests
Work
Income

Not every question can or need be fully answered.

The intent of this exercise is not to imply that every consideration needs to be resolved before joint custody can be implemented.

Instead, the intent of these questions has been to focus your attention on the practical considerations of implementing joint custody and to do so without the antagonisms or apprehensions that frequently accompany divorce.

Finally, our intention has been to demonstrate that since there is such a wide range of considerations (no single item need be crucial) parents are encouraged to be flexible and accommodating in recognizing each other's preferences and needs.

APPENDIX A

CALIFORNIA

THE FOLLOWING DOCUMENT(S) MAY NOT FILM
LEGIBLY BECAUSE OF POOR QUALITY OF THE
ORIGINAL.

on] date of the filing of the joint may, upon application of either the marriage, and such final single persons and permit either shall send a notice of entry of r her last known address.

gations] a final adjudication of the rights of the status of the marriage and of their respective rights to request findings of fact, and new trial.

on 4553 shall not prejudice nor tstitute an action to set aside the t, mistake, or other grounds motion pursuant to Section 473

ment made pursuant to Section e marriage, upon proof that they Section 4550 at the time the

be supplied by court] rochure, the contents and form Council, describing the require for this chapter. The brochure al Council in both English and age, all the following: consult an attorney regarding he services of an attorney may group or prepaid legal services, on this brochure which is not proceedings under this chapter.

(c) A concise summary of the provisions and procedures of this chapter and Sections 4514, 4530, and 4531:

(d) The nature of services of the conciliation court, where available:

(e) That neither party to the marriage can in the future obtain spousal support from the other.

(f) A statement in boldface type to the effect that upon entry of the final judgment, the rights and obligations of the parties to the marriage with respect to the marriage, including property and spousal support rights, will be permanently adjudicated without right of appeal, except that neither party shall be barred from instituting an action to set aside such final judgment for fraud, duress, accident, mistake, or other grounds at law or in equity, or to make a motion pursuant to Section 473 of the Code of Civil Procedure.

(g) That the parties to the marriage retain the status of married persons and cannot remarry until final judgment dissolving the marriage is entered.

(h) Such other matters as the Judicial Council may deem appropriate:

Added Stats 1978 ch 308 § 2

§ 4600. [Custody order: Consideration of child's wishes: Order of preference: Pleading and finding before award of custody to person(s) other than parent, and exclusion of public from hearing]

(a) The Legislature finds and declares that it is the public policy of this state, to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification thereof. In determining the person or persons to whom custody should be awarded under paragraph (2) or (3) of subdivision (b), the court shall consider and give due weight to the nomination of a guardian of the person of the child by a parent under Article 1 (commencing with Section 1500) of Chapter 1 of Part 2 of Division 4 of the Probate Code.

(b) Custody should be awarded in the following order of preference according to the best interests of the child:

(1) To both parents jointly pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex.

The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

(2) If, to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

(c) Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings. The court may, in its discretion, exclude the public from the hearing on this issue.

Amended by Stats 1972 ch 1007 § 1; Stats 1979 ch 204 § 1, ch 730 § 13, operative January 1, 1981, ch 915 § 3.

Amendments:

1972 Amendment: Deleted "but, other things being equal, custody should be given to the mother if the child is of tender years" after "child" in subd (a).

1979 Amendment: (1) Substituted subds (a) and (b) for the former first paragraph which read:

"In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:

- (a) To either parent according to the best interests of the child;
 - (b) To the person or persons in whose home the child has been living in a wholesome and stable environment;
 - (c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.";
- and (2) redesignated the former second paragraph to be subd (c).

Note—Stats 1972 ch 1007 also provides: § 3. The amendments made by this act shall not be construed to affect any judgment or order made prior to the effective date of this act.

Note 2—See note following § 4600.5.

Law Revision Commission Comment:

Section 4600 is amended to add the last sentence to subdivision (a) and to make a few nonsubstantive changes. The addition of the last sentence to subdivision (a) makes clear that a nomination under the new Probate Code provisions is to be considered and given due weight, regardless of the nature of the custody proceeding.

Family Law Rules—CRC: Rules 1201 et seq.

Within Procedure 2d pp 330, 235R. Within Summary (8th ed) pp 4531, 4587, 4590, 4594, 4598, 4599, 4610, 4615, 4641, 4673, 4675, 4680, 4682.

Cal Jur 3d Family Law §§ 205, 229, 232, 235, 237, 238, 243, 771.

6 Am Jur Proof of Facts 2d 499, Change in Circumstances Justifying Modification of Child Custody Order; (¶¶ 7-23, in general) (¶¶ 26-46, proof of remarriage of noncustodian) (¶¶ 35-46, proof of remarriage of custodian). Child custody litigation, 22 Am Jur Trials 347.

The expanding role of the juvenile court in child custody disputes. (1975) 61 CLR 236.

Hitchens and Price, Trial strategy in Indian mother custody case: the use of expert testimony. (1978-1979) 9 Golden Gate ULR 451.

Custody rights of unwed fathers. 4 Pacific LJ 922. Review of Selected 1979 California Legislation. 11 Pacific LJ 478.

Custody rights of unwed fathers; prefer New trends and requirements in adoption. The evolution of California's child-custody law. Southwestern ULR 1.

Role of child's wishes in California custody. Modern status of maternal preference in California. Effect, in subsequent proceedings, of parent's consent in support or custody order made in earlier proceedings.

De facto parents, such as foster parents, are permitted to appear as parties in juvenile proceedings to assert and protect their interest in the companionship, care, custody and management of the child involved. The juvenile court in a dispositional hearing must undertake a dispassionate appraisal of all available evidence of the child's best interests, including an appraisal of the relative merits of alternative awards. Civ. Code, § 4600, provides that when an award of custody to the parent would be detrimental, next in order of preference is the person or persons in whose home the child has been living in a wholesome and stable environment. B.O. In re (1974) 11 CJD 67 Rptr 444, 523 P2d 244.

Reversal of a juvenile court order awarding custody to two children as dependent children of and denying their mother legal and physical custody was required where the court found that an award of custody to the mother would be detrimental to the children. Where the court made no finding that an award of custody to the mother would be detrimental to the children as required by Civ. Code before an order may be made awarding custody to a nonparent as against a parent, where the court strongly suggested that it is a question of custody solely on the basis of the interests of the children, without any principle that an award to a parent is the proper disposition, and that a contrary result showing that such custody would be harmful to the child, and where the case is so closely balanced with each party having advantages, B.O. In re (1974) 11 CJD 67 Rptr 444, 523 P2d 244.

Civ. Code, § 4600, relating to custody of children and enacted as a part of the Probate Act, governs custody awards in juvenile proceedings. The Legislature's specific intent is that it applies to any proceeding where there is at issue the custody of a minor child. It was enacted to achieve the objective of providing a uniform rule for proceedings in which custody questions are litigated. B.O. In re (1974) 11 CJD 67 Rptr 444, 523 P2d 244.

In enacting Civ. Code, § 4600, which amended the former requirement for awarding custody of a child to a nonparent as against a parent if the parent be found "unfit" and substitute

such filing, the court shall, except in exceptional circumstances, enter an order awarding temporary custody in accordance with the agreement or understanding, or in accordance with any stipulation of the parties. In the absence of an agreement, understanding, or stipulation, the court may, if jurisdiction is appropriate, enter an ex parte order, set a hearing date within 20 days and issue an order to show cause on the responding party. If the responding party does not appear or respond within the time set, the temporary order may be extended as necessary, pending the termination of the proceedings.

Added Stats 1976 ch 1399 § 2.
 Review of Selected 1976 California Legislation, 8 Pacific LJ 315.

§ 4600.2. [Award of custody to parent receiving assistance: Order for support]

Any order awarding custody to a parent who is receiving, or in the opinion of the court is likely to receive, assistance pursuant to the Burton-Miller Act (Chapter 2 (commencing with Section 11200) of Part 3 of Division 9 of the Welfare and Institutions Code) for the maintenance of the child shall include an order pursuant to Section 4700 or 4702 directing the noncustodial parent to pay any amount necessary for the support of the child, to the extent of the noncustodial parent's ability to pay.

Added Stats 1979 ch 1030 § 1.
 Review of Selected 1979 California Legislation, 11 Pacific LJ 481.

§ 4600.5. [Presumption regarding joint custody and award thereof: Reasons for denial: Modification or termination of order: Consultation with conciliation court: Access to child's records]

(a) There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.

If the court declines to enter an order awarding joint custody pursuant to this subdivision, the court shall state in its decision the reasons for denial of an award of joint custody.

(b) Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases. For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to the provisions of Section 4602. If the court declines to enter an order awarding joint custody pursuant to this subdivision, the court shall state in its decision the reasons for denial of an award of joint custody.

(c) For the purposes of this section, "joint custody" means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with

both parents; provided, if custody without awarding (d) Any order for joint custody of one or both parents shall state that the best interests of the child are served by the order. The court shall state the reasons for its termination of the joint custody or termination order.

(e) Any order for custody entered by a court in this section shall be subject to the jurisdictional requirements at any time to an order of this section.

(f) In counties having a court for the purpose of implementation of the court has arisen in the implementation of the court.

(g) Notwithstanding any information pertaining to medical, dental, and school records of such parent is not the child.

Added Stats 1979 ch 915 § 2.

Note — Another version of this section prevails. See Civ. C. § 9605.

Review of Selected 1979 California Legislation, 11 Pacific LJ 481.

In proceedings on an order to modify a joint custody arrangement, the court shall exercise its discretion by making its ruling on custody of both children on the basis of preexisting bias, against rather than on the evidence adduced at trial, court harbored and exhibited prejudice against the parties, court.

Added Stats 1980 ch 863 § 1.

§ 4600.6. [Trial]

(a) In any case in which sole contested issue, the court shall, except matters to which assigning a trial date and

(b) In any case in which the issues is of the custody, shall order a preference over other civil matters may be given by law, for

Added Stats 1980 ch 863 § 1.

ional circumstances, enter an
 lance with the agreement or
 ulation of the parties. In the
 stipulation, the court may, if
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and award thereof: Reasons
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 f Section 4602. If the court
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 ions for denial of an award
 custody" means an order
 dren to both parents and
 y the parents in such a way
 nd continuing contact with

both parents; provided, however, that such order may award joint legal custody without awarding joint physical custody.

(d) Any order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child require modification or termination of the order. The court shall state in its decision the reasons for modification or termination of the joint custody order if either parent opposes the modification or termination order.

(e) Any order for the custody of the minor child or children of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section.

(f) In counties having a conciliation court, the court or the parties may, at any time, pursuant to local rules of court, consult with the conciliation court for the purpose of assisting the parties to formulate a plan for implementation of the custody order or to resolve any controversy which has arisen in the implementation of a plan for custody.

(g) Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including but not limited to, medical, dental, and school records, shall not be denied to a parent because such parent is not the child's custodial parent.

Note—Another version of this section was added by Stats. 1979 ch 204. (The version enacted by ch 915 prevails. See Gov C § 9605.)
 Review of Selected 1979 California Legislation, 11 Pacific LJ 478.

In proceedings on an order to show cause filed by a former wife to modify a joint custody agreement under which the parties' minor boy lived with the father and the minor girl lived with the mother, the trial court prejudicially abused its discretion by making its ruling awarding physical custody of both children to the former wife on the basis of preexisting bias against split custody, rather than on the evidence adduced, where the trial court harbored and exhibited an unshakable prejudice against the parties' court-approved cus-

tody agreement and the possibility that the children might properly reside in different homes. The former husband was entitled to an order based on the trial court's review of all the evidence before it, as well as on the exercise of an impartial legal discretion. Moreover, agreements by the former husband and his counsel that split custody was improper, which agreements were the result of judicial arm-twisting, did not neutralize the prejudicial effect of the trial court's bias. *Swartz, 104 Cal Rptr 418 (1980) 104 CA3d 92, 163 Cal Rptr 418.*

§ 4600.6. [Trial]

(a) In any case in which a contested issue of custody of a minor child is the sole contested issue, the case shall be given preference over other civil cases, except matters to which special precedence may be given by law, for assigning a trial date and shall be given an early hearing.

(b) In any case in which there is more than one contested issue and one of the issues is of the custody of a minor child, the court, as to the issue of custody, shall order a separate trial. The separate trial shall be given preference over other civil cases, except matters to which special precedence may be given by law, for assigning a trial date.

Added Stats 1980 ch 863 § 1.

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(Signature)

**Award—Due to Change in Circum-
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19... 19... respon-
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r other order of the court.

(c) In performing the functions described in subdivisions (a) and (b), the district attorney shall act on behalf of the court and shall not represent any party to the custody proceedings.

Added Stats 1976 ch 1399 § 3.
Review of Selected 1976 California Legislation, 8 Pacific LJ 315.

§ 4605. [Expenses of district attorney]

(a) When the district attorney incurs expenses pursuant to Section 4604, including expenses incurred in a sister state, payment of such expenses may be advanced by the county subject to reimbursement by the state, and shall be audited by the State Controller and paid by the State Treasury according to law.

(b) The court, in which the custody proceeding is pending, or which has continuing jurisdiction, shall, if appropriate, allocate liability for the reimbursement of actual expenses incurred by the district attorney to either or both parties to the proceedings and such allocation shall constitute a judgment for the state for the funds advanced pursuant to this section. The county shall take reasonable action to enforce such liability and shall transmit all recovered funds to the state.

Added Stats 1976 ch 1399 § 4.
Review of Selected 1976 California Legislation, 8 Pacific LJ 315.

62 Op. Att. Gen. 369 (CC § 460) authorizes state reimbursement for expenses incurred by a district attorney in retaining Canadian counsel to compel an individual to comply with a California custody order where the individual has been charged in California with the offense of concealing a child in violation of a custody decree (Pen. Code, § 278.5) and where criminal extradition of the individual appears futile.

§ 4606. [Appointment of counsel to represent minor child]

In any proceeding under this part where there is in issue the custody of a minor child, the court may, if it finds it would be in the best interests of the minor child, appoint private counsel to represent the interests of the minor child. When the court appoints counsel to represent the minor, counsel shall receive a reasonable sum for compensation and expenses, the amount of which shall be determined by the court. Such amount shall be paid by the parents in such proportions as the court deems just.

Added Stats 1976 ch 588 § 1.

Appointment of legal counsel for ward, proposed ward, conservator, or proposed conservator: Prob. C § 1470-1472.

§ 4607. [Mediation]

(a) Where it appears on the face of the petition or other application for an order or modification of an order for the custody or visitation of a child or children that either or both such issues are contested, as provided in Section 4600, 4600.1 or 4601, the matter shall be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing. The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents after the

marriage is dissolved. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute.

(b) Each superior court shall make available a mediator. Such mediator may be a member of the professional staff of a family conciliation court, probation department, or mental health services agency, or may be any other person or agency designated by the court. In order to provide mediation services, the court shall not be required to institute a family conciliation court. The mediator shall meet the minimum qualifications required of a counselor of conciliation as provided in Section 1745 of the Code of Civil Procedure.

(c) Mediation proceedings shall be held in private and shall be confidential, and all communications, verbal or written, from the parties to the mediator made in a proceeding pursuant to this section shall be deemed to be official information within the meaning of Section 1040 of the Evidence Code.

(d) The mediator shall have the authority to exclude counsel from participation in the mediation proceedings where, in the discretion of the mediator, exclusion of counsel is deemed by the mediator to be appropriate or necessary. The mediator shall have the duty to assess the needs and interests of the child or children involved in the controversy and shall be entitled to interview the child or children when the mediator deems such interview appropriate or necessary.

(e) The mediator may, consistent with local court rules, render a recommendation to the court as to the custody or visitation of the child or children. The mediator may, in cases where the parties have not reached agreement as a result of the mediation proceeding, recommend to the court that an investigation be conducted pursuant to Section 4602, or that other action be taken to assist the parties to effect a resolution of the controversy prior to any hearing on the issues. The mediator may, in appropriate cases, recommend that mutual restraining orders be issued, pending determination of the controversy, to protect the well-being of the children involved in the controversy. Any agreement reached by the parties as a result of mediation shall be reported to the court and to counsel for the parties by the mediator on the day set for mediation or any time thereafter designated by the court.

(f) The provisions of this section shall become operative on January 1, 1981. Added State 1980 ch 48 § 1, effective March 27, 1980, operative January 1, 1981.

§ 4700. [Order for child support]

(a) In any proceeding where there is at issue the support of a minor child, the court may order either or both parents to pay any amount necessary for the support, maintenance, and education of the child. At the request of either party, the court shall make appropriate findings with respect to the circumstances on which the order for the support of a minor child is based. Upon a showing of good cause, the court may order the parent or parents required to make the payment of support to give reasonable security therefor. All payments of support shall be made by the person owing the support payment prior to the payment of any debts owing to creditors. Any order for child support may be modified or revoked as the court may deem necessary, except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or revoke. The order of modification or revocation may be made retroactive to

the date of the filing of the notice to modify or revoke, or to any date of modification or revocation may include the prevailing party.

(b) When a court orders a person to pay child support during the child's minority, the liability of the person upon the happening of the child's emancipation, or the death of the person having physical custody of the child, shall be limited to the amount of the contingency fund, if any, established by the court, and all support payments which were made pursuant to the original order for support, or whom payments are to be made pursuant to the contingency fund, or his or her attorney.

(c) In the event of the bankruptcy of the obligor, the court may modify the order for support, maintenance and education of the child.

Amended by State 1972 ch 1118 § 2; State 1977 ch 1118 § 1.

1972 Amendment: Added the third and fourth sentences. 1977 Amendment: (1) Substituted "the person" for "the obligor" in the first sentence; (2) substituting "the person" for "the obligor" in the second sentence; and (3) adding "or her" after "person" in the second sentence.

Note: State 1972 ch 1118 also provided for the Family Law Act of 1972.

Family Law Rules, CRC Rule 1201 et seq. Within Summary, (8th ed) pp. 4331, 4431.

1980 Amendment: See also Cal. Civ. Code § 4700, 4701, 4702, 4703, 4704, 4705, 4706, 4707, 4708, 4709, 4710, 4711, 4712, 4713, 4714, 4715, 4716, 4717, 4718, 4719, 4720, 4721, 4722, 4723, 4724, 4725, 4726, 4727, 4728, 4729, 4730, 4731, 4732, 4733, 4734, 4735, 4736, 4737, 4738, 4739, 4740, 4741, 4742, 4743, 4744, 4745, 4746, 4747, 4748, 4749, 4750, 4751, 4752, 4753, 4754, 4755, 4756, 4757, 4758, 4759, 4760, 4761, 4762, 4763, 4764, 4765, 4766, 4767, 4768, 4769, 4770, 4771, 4772, 4773, 4774, 4775, 4776, 4777, 4778, 4779, 4780, 4781, 4782, 4783, 4784, 4785, 4786, 4787, 4788, 4789, 4790, 4791, 4792, 4793, 4794, 4795, 4796, 4797, 4798, 4799, 4800.

1 Am. Jur. Proof of Facts 2d 1, Change in § 6 et seq. (Proof that circumstances to justify modification of order).

Rights and obligations of child support. (Annulment of later marriage as revoking agreement. 45 ALR3d 103).

Right to credit on accrued support payments. 47 ALR3d 1031.

Respective increase in allowance for a provision to decree that one party obtain ALR3d 9.

Right to credit on child support payments made for benefit of child. 27 ALR3d 1.

Father's liability for support of child but made no provision for support. 91

Birth Control § 5, Criminal Law §§ 60, 216, 1700, 2352, 2353, 2357, 2358, 2360, 2365, 2366, 2368, 2377, 2379, 3169; Witkin Crimes pp 519, 520, 522, 523, 525, 991; Criminal Procedure p 46; Summary (8th ed) p 3557.

§ 275. [Soliciting and taking drug or submitting to an attempt to procure miscarriage: Exceptions: Punishment.] Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison. [1872; 1967 ch 327 § 4; 1976 ch 1139 § 168, operative July 1, 1977.] *Cal Jur 3d Criminal Law §§ 60, 216, 2352, 2353, 2357, 2365, 3169.*

§ 276. [Soliciting woman to submit to operation, etc., to procure miscarriage: Exceptions: Punishment: Proof necessary.] Every person who solicits any woman to submit to any operation, or to the use of any means whatever, to procure a miscarriage, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the county jail not longer than one year or in the state prison, or by fine of not more than five thousand dollars (\$5,000). Such offense must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances. [1957 ch 270 § 1; 1967 ch 327 § 5; 1976 ch 1139 § 169, operative July 1, 1977.] *21 Cal Jur 3d Criminal Law §§ 2352, 2353, 2365, 2387; Witkin Crimes pp 78, 79, 520, 525, 526.*

CHAPTER 4

Child Abduction

[The heading of Chapter 4, consisting of §§ 278-280, was amended to read as above by Stats 1976 ch 1399 § 8.]

§ 278. Definition and penalty: Return of child.

§ 278.5. Detention or concealment of child in violation of custody decree.

§ 280. Wilfully causing or permitting removal or concealment of child pursuant to adoption proceeding.

§ 278. [Definition and penalty; Return of child.] (a) Every person, not having a right of custody, who maliciously takes, entices away, detains or conceals any minor child with intent to detain or conceal such child from a parent, or guardian, or other person having the lawful charge of such child shall be punished by imprisonment in the state prison for two, three or four years, a fine of not more than ten thousand dollars (\$10,000), or both, or imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars (\$1,000), or both.

(b) A child who has been detained or concealed in violation of subdivision (a) shall be returned to the person having lawful charge of the child. Any expenses incurred in returning the child shall be reimbursed as provided in Section 4605 of the Civil Code. Such costs shall be assessed against any defendant convicted of a violation of this section. [1976 ch 1399 §§ 10, 10.5, operative July 1, 1977.]

§ 278.5. [Detention or concealment of child in violation of custody decree.] (a)

Every person who in violation of a custody decree takes, retains after the expiration of a visitation period, or conceals the child from his legal custodian, and every person who has custody of a child pursuant to an order, judgment or decree of any court which grants another person rights to custody or visitation of such child, and who detains or conceals such child with the intent to deprive the other person of such right to custody or visitation shall be punished by imprisonment in the state prison for a period of not more than one year and one day or by imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars (\$1,000), or both.

(b) A child who has been detained or concealed in violation of subdivision (a) shall be returned to the person having lawful charge of the child. Any expense incurred in returning the child shall be reimbursed as provided in Section 4605 of the Civil Code. Such costs shall be assessed against any defendant convicted of a violation of this section. [1976 ch 1399 § 11.]

THE PRECEDING DOCUMENT(S) MAY NOT FILM
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ORIGINAL.

APPENDIX B

OREGON

House Bill 2538

Sponsored by Representative RICHARDS

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure as introduced.

Creates a disputable presumption that joint custody is in the best interests and welfare of the child.

NOTE: Matter in bold face in an amended section is new; matter *(italic and bracketed)* is existing law to be omitted; complete new sections begin with **SECTION**

A BILL FOR AN ACT

Relating to domestic relations; amending ORS 107.137.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 107.137 is amended to read:

107.137. (1) In determining custody of a minor child pursuant to ORS 107.105 or 107.135, the court shall give primary consideration to the best interests and welfare of the child. In determining the best interests and welfare of the child, the court may consider the following relevant factors:

(a) The emotional ties between the child and other family members;

(b) The interest of the parties in and attitude toward the child; and

(c) The desirability of continuing an existing relationship.

(2) The best interests and welfare of the child in a custody matter shall not be determined by isolating any one of the relevant factors referred to in subsection (1) of this section, or any other relevant factor, and relying on it to the exclusion of other factors.

(3) No preference in custody shall be given to the mother over the father for the sole reason that she is the mother.

(4) It is a disputable presumption that joint custody is in the best interests and welfare of the child.

~~[(4)]~~ (5) In determining custody of a minor child pursuant to ORS 107.105 or 107.135, the court shall consider the conduct, marital status, income, social environment or life style of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child.

visitation rights of the parent or parents not having custody of such children.

(c) For the restraint of a party from in any manner molesting or interfering with the other or the minor children.

(d) That if minor children reside in the family home and the court considers it necessary for their best interest to do so, the court may require either party to move out of the home for such period of time and under such conditions as the court may determine, whether the home is rented, owned or being purchased by one party or both parties.

(e) Restraining and enjoining either party or both from encumbering or disposing of any of their property, real or personal, except as ordered by the court.

(f) For the temporary use, possession and control of the real or personal property of the parties or either of them and the payment of instalment liens and encumbrances thereon.

(g) That even if no minor children reside in the family home, the court may require one party to move out of the home for such period of time and under such conditions as the court determines, whether the home is rented, owned or being purchased by one party or both parties if that party assaults or threatens to assault the other.

(2) In case default is made in the payment of any moneys being due under the terms of an order pending suit, any such delinquent amount shall be entered and docketed as a judgment, and execution may issue thereon to enforce payment thereof in the same manner and with like effect as upon a final decree. The remedy provided in this subsection shall be deemed cumulative and not exclusive.

(3) The court shall not require an undertaking in case of the issuance of an order under paragraph (c), (d), (e), (f) or (g) of subsection (1) of this section.

(4) In a suit for annulment or dissolution of marriage or for separation, wherein the parties are copetitioners or the respondent is found by the court to be in default, the court may, when the cause is otherwise ready for hearing on the merits, if support or custody of minor children is not involved, in lieu of such hearing, enter a decree of annulment or dissolution or for separation based upon an affidavit of the petitioner, setting forth a prima facie case, and covering such additional matters as the court may require.

(1973 c.289 §12; 1973 c.302 §7; 1977 c.305 §1; 1977 c.347 §1; 1977 c.678 §1a)

• 107.100 [Amended by 1953 c.553 §2; 1953 c.635 §2; 1961 c.540 §1; 1963 c.476 §1; 1965 c.603 §6; 1969 c.199 §53; 1969 c.591 §283; repealed by 1971 c.280 §28]

107.105 Provisions of decree. (1) Whenever the court grants a decree of annulment or dissolution of marriage or of separation, it has power further to decree as follows:

(a) For the future care and custody of the minor children of the marriage by one party or jointly and for the visitation rights of the parent or parents not having custody of such children as it may deem just and proper.

(b) For the recovery from the party not allowed the care and custody of such children, or from either party or both parties if joint custody is decreed, such amount of money, in gross or in instalments, or both, as may be just and proper for such party, either party or both parties to contribute toward the support and welfare of such children. The court may at any time require an accounting from the custodian of the children with reference to the use of the money awarded.

(c) For the support of a party, in gross or in instalments, or both, such amount of money for such period of time as it may be just and equitable for the other party to contribute. The court may approve, ratify, and decree voluntary, property settlement, agreement, providing contribution to the support of a party. If required by either party, the court shall make and set forth in its decree the findings of fact upon which its award or denial of support was based. In making such support order, the court shall consider the following matters:

- (A) The duration of the marriage;
- (B) The ages of the parties;
- (C) Their health and conditions;
- (D) Their work experience and earning capacities;
- (E) Their financial conditions, resources and property rights;
- (F) The provisions of the decree relating to custody of the minor children of the parties;
- (G) The ages, health and dependency conditions of the children of the parties, or either of them;

(H) The need for maintenance, retraining or education to enable the spouse to become employable at suitable work or to enable the spouse to pursue career objectives; and

(I) Such other matters as the court shall deem relevant.

(d) For the delivery to one party of such party's personal property in the possession or

control of the other at the time of the giving of the decree.

(e) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances. The court shall view the contribution of a spouse as a homemaker in the contribution of marital assets. There is a rebuttable presumption that both spouses have contributed equally to the acquisition of property during the marriage. The court shall require full disclosure of all assets by the parties in arriving at a just property division.

(f) If there is a minor child of the marriage:

(A) For the appointment of one or more trustees to hold, control and manage for the benefit of the children of the parties, of the marriage or otherwise, such of the real or personal property of either or both of the parties, as the court may order to be allocated or appropriated to their support and welfare; and to collect, receive, expend, manage or invest any sum of money decreed for the support and well. of minor children of the parties.

(B) For the appointment of one or more trustees to hold, manage and control such amount of money or such real or personal property of either or both of the parties, as may be set aside, allocated or appropriated for the support of a party.

(C) The court shall direct the terms of the trust and make provision for the disposition or distribution of such money or property to or between the parties, their successors, heirs and assigns after the purpose of the trust has been accomplished. Upon petition of a party or a person having an interest in the trust showing a change of circumstances warranting a change in the terms of the trust, the court shall have the power to make and direct reasonable modifications in its terms.

(g) To change the name of either spouse to a name the spouse held before the marriage. The court must decree a change if it is requested by the affected party.

(h) A judgment against one party in favor of the other for any sums of money found to be then remaining unpaid upon any enforceable order or orders theretofore duly made and entered in the proceedings pursuant to any of the provisions of ORS 107.005, and for any such further sums as additional attorney fees or additional costs and expenses of suit or defense as the court finds reasonably and necessarily incurred by such party, or, in the

absence of any such order or orders pendente lite, a like judgment for such amount of money as the court finds was reasonably necessary to enable such party to prosecute or defend the suit.

(2) In determining the proper amount of support and the proper division of property pursuant to paragraphs (b), (c) and (e) of subsection (1) of this section, the court may consider evidence of the tax consequences on the parties of its proposed decree.

(3) If an appeal is taken from a decree of annulment or dissolution of marriage or of separation or from any part of a decree rendered in pursuance of the provisions of ORS 107.005 to 107.105, 107.115 to 107.142, 107.405, 107.425, 107.445 to 107.520, 107.540 and 107.610, the court making such decree shall provide for the temporary support of the minor children of the parties thereto, and may provide for the temporary support of a party. The order may be modified at any time by the court making the decree appealed from, shall provide that the support money be paid in monthly instalments, and shall further provide that it is to be in effect only during the pendency of the appeal. No appeal lies from any such temporary order.

(4) If an appeal is taken from the decree or other appealable order in a suit for annulment or dissolution of a marriage or for separation, and the appellate court awards costs and disbursements to the prevailing party, it may also award to that party, as part of the costs, such additional sum of money as it may adjudge reasonable as an attorney fee on the appeal.

(5) If, as a result of a suit for the annulment or dissolution of a marriage or for separation, the parties to such suit become owners of an undivided interest in any real or personal property, or both, either party may maintain supplemental proceedings by filing a petition in such suit for the partition of such real or personal property, or both, within two years from the entry of said decree, showing among other things that the original parties to such decree and their joint or several creditors having a lien upon any such real or personal property, if any there be, constitute the sole and only necessary parties to such supplemental proceedings. The procedure in the supplemental proceedings, so far as applicable, shall be the procedure provided in ORS 105.405, for the partition of real property, and the court granting such decree shall have in

the first instance and retain jurisdiction in equity therefor.

(1971 c.280 §13; 1973 c.502 §8; 1975 c.722 §1; 1975 c.733 §2; 1977 c.205 §2; 1977 c.547 §2; 1977 c.578 §2a)

107.108 Support or maintenance for child attending school. (1) In addition to any other authority of the court, the court may provide for the support or maintenance of a child attending school:

(a) After the commencement of a suit for annulment or dissolution of a marriage or for separation from bed and board and before the decree therein;

(b) In a decree of annulment or dissolution of a marriage or of separation from bed and board; and

(c) During the pendency of an appeal taken from all or part of a decree rendered in pursuance of ORS 107.005 to 107.142, 107.280, 107.405, 107.425, 107.445 to 107.520, 107.540, 107.610 or this section.

(2) An order providing for temporary support pursuant to paragraph (c) of subsection (1) of this section may be modified at any time by the court making the decree appealed from, shall provide that the support money be paid in monthly instalments, and shall further provide that it is to be in effect only during the pendency of the appeal. No appeal lies from any such temporary order.

(3) If the court provides for the support and maintenance of a child attending school pursuant to this section, the child is a party for purposes of matters related to that provision.

(4) As used in this section, "child attending school" means a child of the parties who is unmarried, is 18 years of age or older and under 21 years of age and is a student regularly attending school, community college, college or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment. (1975 c.527 §12a)

107.110 (Amended by 1965 c.803 §4; 1969 c.179 §1; 1969 c.198 §54; 1969 c.221 §25a; repealed by 1971 c.280 §28)

107.115 Effect of decree effective date appeal. (1) A decree of annulment or dissolution of a marriage restores the parties thereto to the status of unmarried persons, unless a party is married to another person. Such decree shall give the court jurisdiction to award, to be effective immediately, the relief provided by ORS 107.105. The decree shall revoke a will pursuant to the provisions of ORS 112.315, but the decree shall not be

effective in so far as it affects the marital status of the parties until the expiration of 60 days from the date of the decree, or, if an appeal is taken, until the suit is determined on appeal, whichever is later.

(2) In case either party dies within the 60-day period specified in subsection (1) of this section, the decree shall be considered to have entirely terminated the marriage relationship immediately before such death, unless an appeal is pending.

(3) (a) The Court of Appeals or Supreme Court shall continue to have jurisdiction of such an appeal pending at the time of the death of either party. The appeal may be continued by the personal representative of the deceased party. The attorney of record on the appeal, for the deceased party, may be allowed a reasonable attorney fee, to be paid from the decedent's estate. However, costs on appeal may not be awarded to either party.

(b) The Court of Appeals or Supreme Court shall have the power to determine finally all matters presented on such appeal. Before making final disposition, the Court of Appeals or Supreme Court may refer the proceeding back to the trial court for such additional findings of fact as are required.

(4) The marriage relationship is terminated in all respects at the expiration of the 60-day period specified in subsection (1) of this section, or, if an appeal is taken, when the suit is determined on appeal, whichever is later, without any further action by either party. However, at any time within the 60-day period or while an appeal is pending, the court may set aside the decree upon motion of both parties.

(5) A decree declaring a marriage void or dissolved shall specify the date on which the decree becomes finally effective to terminate the marriage relationship of the parties.

(6) The 60-day period specified in subsection (1) of this section does not apply when a decree declares a marriage void under ORS 107.005.

(1971 c.280 §14)

107.120 (Repealed by 1971 c.280 §28)

107.125 (1965 c.336 §3; repealed by 1971 c.280 §28)

107.126 Decrees and orders as liens; duration. No order or decree for the future payment of money in gross or in instalments, entered under ORS 107.085 or 107.105, shall continue to be a lien on real property for a period of more than 10 years from the date of

(5) In a proceeding held under subsection (1) of this section, the court may assess against either party a reasonable attorney fee for the benefit of the other party.
 (1975 c.500 §3)

107.415 Notice of change of status of minor child required; effect of failure to give notice. (1) If a party is required by a decree of a court in a domestic relations suit, as defined in ORS 107.510, to contribute to the support, nurture or education of a minor child while the other party has custody thereof, the custodial parent shall notify the party contributing such money when the minor child receives income from his own gainful employment, or is married or enters the military service.

(2) Any custodial parent who does not provide notice, as required by subsection (1) of this section may be required by the court to make restitution to the contributing party of any money paid, as required by the decree. The court may enter a judgment or satisfy all or part of any accrued judgment to accomplish the restitution.

(1971 c.314 §1)
 107.420 [1961 c.340 §1; repealed by 1971 c.280 §28]

107.425 Investigation of parties in domestic relations suit involving welfare of children; counsel for children; staff. (1) Whenever a domestic relations suit, as defined in ORS 107.510, is filed, or whenever a habeas corpus proceeding or motion to modify an existing decree in a domestic relations suit is before the court, the court having jurisdiction may, in cases in which there are minor children involved, cause an investigation to be made, as to the character, family relations, past conduct, earning ability and financial worth of the parties to the suit for the purpose of protecting the children's future interest. The court may defer the entry of a final decree until the court is satisfied that its decree in such suit will properly protect the welfare of such children. The investigative findings shall be offered as and subject to all rules of evidence.

(2) The court, on its own motion, may:
 (a) Cite either party to the suit to appear and testify as a witness during this investigation; and
 (b) Appoint counsel for the children. A reasonable fee for an attorney so appointed may be charged against either or both of the parties or as a cost in the proceedings.

(3) The court having jurisdiction of cases described in subsection (1) of this section may

hire and fix the salaries of such professional and clerical personnel as are necessary to carry out the purposes of this section. The salaries of the professional and clerical assistants shall be paid in the same manner as the salaries of county officers are paid.
 (1971 c.280 §3; 1973 c.502 §11)

107.430 [Formerly 107.180; 1963 c.223 §1; repealed by 1971 c.280 §28]

107.431 Modification of portion of decree regarding visitation of minor child; procedure. At any time after a decree of annulment or dissolution of a marriage or a separation is granted, the court may set aside, alter or modify so much of the decree relating to visitation of a minor child as it deems just and proper or may terminate or modify that part of the order or decree requiring payment of money for the support of the minor child with whom visitation is being denied after:

(1) Motion to set aside, alter or modify is made by the parent having visitation rights;

(2) Service of notice on the parent or other person having custody of the minor child is made in the manner provided by law for service of a summons; and

(3) A showing that the parent or other person having custody of the child or a person acting in that parent or other person's behalf has interfered with or denied without good cause the exercise of the parent's visitation rights.

(1977 c.578 §4)
 107.435 [1971 c.280 §19; repealed by 1973 c.502 §18]

107.440 [1963 c.434 §14; 1965 c.381 §1; repealed by 1971 c.280 §28]

107.445 Attorney fees in certain domestic relations proceedings. In any proceeding brought under ORS 108.110 and 108.120, and in any contempt proceeding brought to compel compliance with any orders authorized by ORS 107.095, or with the decree in any suit to annul or dissolve a marriage or for separation the court may make an order awarding to a party a sum of money determined to be reasonable as an attorney fee therein. The order shall be entered and docketed as a judgment, and execution may issue thereon in the same manner and with like effect as upon a final decree.
 (1971 c.280 §18)

107.450 [1963 c.434 §13; 1965 c.381 §2; repealed by 1971 c.280 §28]

APPENDIX C

WASHINGTON

upon the payment of a license fee as fixed in RCW 36.18.010 shall require each applicant therefor to make and file in his office upon blanks to be provided by the county for that purpose, an affidavit showing that they are not afflicted with any contagious venereal disease. He shall also require an affidavit of some disinterested credible person showing that neither of said persons is an habitual criminal, and that the applicants are the age of eighteen years or over: *Provided, further*, That if the consent in writing is obtained of the father, mother, or legal guardian of the person for whom the license is required, the license may be granted in cases where the female has attained the age of seventeen years or the male has attained the age of seventeen years. Such affidavit may be subscribed and sworn to before any person authorized to administer oaths. Anyone knowingly swearing falsely to any of the statements contained in the affidavits mentioned in this section shall be deemed guilty of perjury and punished as provided by the laws of the state of Washington. [1979 ex.s. c 128 § 2; 1973 1st ex.s. c 154 § 29; 1970 ex.s. c 17 § 5; 1963 c 230 § 4; 1959 c 149 § 3; 1909 ex.s. c 16 § 3; 1909 c 174 § 3; Code 1881 §§ 2391, 2392; 1867 p 104 § 1; 1866 p 83 §§ 13, 14; RRS § 8451.]

Severability—1973 1st ex.s. c 154: See note following RCW 2.12.030.

Penalty for violation of marriage requirements: RCW 26.04.230.

26.04.220 Retention of license by person solemnizing—Auditor's record. The person solemnizing the marriage is authorized to retain in his possession the license, but the county auditor who issues the same, before delivering it, shall enter in his marriage record a memorandum of the names of the parties, the consent of the parents or guardian, if any, and the name of the affiant and the substance of the affidavit upon which said license issued, and the date of such license. [Code 1881 § 2393; 1866 p 84 § 15; RRS § 8453.]

26.04.230 Penalty for violation of marriage requirements. Any person knowingly violating any of the provision: of *this act shall, upon conviction thereof, be punished by a fine of not more than one thousand dollars, or by imprisonment in the state penitentiary for a period of not more than three years, or by both such fine and imprisonment. [1909 ex.s. c 16 § 4; 1909 c 174 § 4; Code 1881 § 2394; 1866 p 84 § 16; RRS § 8452.]

*Reviser's note: "this act" is codified as RCW 26.04.030, 26.04.040, 26.04.210, and 26.04.230.

26.04.240 Penalty for unlawful solemnization—Code 1881. Any person who shall undertake to join others in marriage knowing that he is not lawfully authorized so to do, or any person authorized to solemnize marriage, who shall join persons in marriage contrary to the provisions of *this chapter, shall, upon conviction thereof, be punished by a fine of not more than five hundred, nor less than one hundred dollars. [Code 1881 § 2395; 1866 p 84 § 17; RRS § 8454. FORMER PART OF SECTION: 1909 c 249 § 419; RRS § 2671 now codified as RCW 26.04.250.]

*Reviser's note: "this chapter" (chapter 182, Code 1881) is codified as RCW 26.04.010, 26.04.050 through 26.04.140 and 26.04.220 through 26.04.240. Code 1881 §§ 2391 and 2392, being part of chapter 182, Code 1881, appear to be superseded by 1909 ex.s. c 16 § 3 (RCW 26.04.210) which is subject to the penalties of RCW 26.04.230.

26.04.250 Penalty for unlawful solemnization—1909 c 249. Every person who shall solemnize a marriage when either party thereto is known to him to be under the age of legal consent or a marriage to which, within his knowledge, any legal impediment exists, shall be guilty of a gross misdemeanor. [1979 ex.s. c 128 § 3; 1909 c 249 § 419; RRS § 2671. Formerly, RCW 26.04.240, part.]

Punishment of gross misdemeanor when not fixed by statute: RCW 9.92.020.

Chapter 26.09

DISSOLUTION OF MARRIAGE—LEGAL SEPARATION—DECLARATIONS CONCERNING VALIDITY OF MARRIAGE

Sections	
26.09.010	Civil practice to govern—Designation of proceedings—Decrees.
26.09.020	Petition in proceeding for dissolution of marriage, legal separation, or for a declaration concerning validity of marriage—Contents—Parties.
26.09.030	Power for dissolution of marriage—Court proceedings, findings—Transfer to family court—Legal separation in lieu of dissolution.
26.09.040	Petition to have marriage declared invalid or judicial determination of validity—Procedure—Findings—Grounds—Legitimacy of children.
26.09.050	Provisions for child support, custody and visitation—Maintenance—Disposition of property and liabilities.
26.09.060	Temporary maintenance or child support—Temporary restraining order—Preliminary injunction.
26.09.070	Separation contracts.
26.09.080	Disposition of property and liabilities—Factors.
26.09.090	Maintenance orders for either spouse—Factors.
26.09.100	Child support—Apportionment of expense.
26.09.110	Minor or dependent child—Court appointed attorney to represent—Payment of costs, fees, and disbursements.
26.09.120	Support or maintenance payments—To whom paid—Arrears, etc.
26.09.130	Support or maintenance payments—Order to make assignment of periodic earnings or trust income—Duty of payor to withhold and transmit.
26.09.140	Payment of costs, attorney's fees, etc.
26.09.150	Decree of dissolution of marriage, legal separation, or declaration of invalidity—Finality—Appeal—Conversion of decree of legal separation to decree of dissolution—Name of wife.
26.09.160	Failure to comply with decree or temporary injunction—Obligation to make support or maintenance payments or permit visitation or suspended—Motion.
26.09.170	Modification of decree for maintenance or support, property disposition—Termination of maintenance obligation and child support—Grounds.
26.09.180	Child custody proceeding—Commencement—Notice—Intervention.
26.09.190	Child custody—Relevant factors in awarding custody.
26.09.200	Child custody—Temporary custody order—Vacation of order.
26.09.210	Child custody—Interview with child by court—Advice of professional personnel.
26.09.220	Child custody—Investigation and report.

- 26.09.230 Child custody—Priority status of proceedings—Hearing—Record—Expenses of witnesses.
- 26.09.240 Child custody—Visitation rights.
- 26.09.250 Child custody—Powers and duties of custodian—Supervision by appropriate agency when necessary.
- 26.09.260 Child custody decree—Modification.
- 26.09.270 Child custody—Temporary custody order or modification of custody decree—Affidavits required.
- 26.09.280 Child custody or support actions or proceedings—Venue.
- 26.09.290 Final decree of divorce nunc pro tunc.
- 26.09.300 Restraining orders—Notice—Refusal to comply—Penalty—Defense.
- 26.09.900 Construction—Pending divorce actions.
- 26.09.901 Conversion of pending action to dissolution proceeding.
- 26.09.902 RCW 26.09.900 and 26.09.901 deemed in effect on July 16, 1973.
- 26.09.905 Construction of chapter with uniform child custody jurisdiction act (chapter 26.27 RCW).

Living in marital relationship within state submits person to state jurisdiction as to proceedings under this chapter: RCW 428.185.

Process—Domestic relations actions: Rules of court: CR 4.1.

26.09.010 Civil practice to govern—Designation of proceedings—Decrees. (1) Except as otherwise specifically provided herein, the practice in civil action shall govern all proceedings under this chapter, except that trial by jury is dispensed with.

(2) A proceeding for dissolution of marriage, legal separation or a declaration concerning the validity of a marriage shall be entitled "In re the marriage of and" Such proceeding may be filed in the superior court of the county where the petitioner resides.

(3) In cases where there has been no prior proceeding in this state involving the marital status of the parties or custody or support obligations, a separate custody or support proceeding shall be entitled "In re the (custody) (support) of"

(4) The initial pleading in all proceedings for dissolution of marriage under this chapter shall be denominated a petition. A responsive pleading shall be denominated a response. Other pleadings, and all pleadings in other matters under this chapter shall be denominated as provided in the civil rules for superior court.

(5) In this chapter, "decree" includes "judgment".

(6) A decree of dissolution, of legal separation, or a declaration concerning the validity of a marriage shall not be awarded to one of the parties, but shall provide that it affects the status previously existing between the parties in the manner decreed. [1975 c 32 § 1; 1973 1st ex.s. c 157 § 1.]

26.09.020 Petition in proceeding for dissolution of marriage, legal separation, or for a declaration concerning validity of marriage—Contents—Parties. (1) A petition in a proceeding for dissolution of marriage, legal separation, or for a declaration concerning the validity of a marriage, shall allege the following:

- (a) The last known residence of each party;
- (b) The date and place of the marriage;
- (c) If the parties are separated the date on which the separation occurred;

(d) The names, ages, and addresses of any child dependent upon either or both spouses and whether the wife is pregnant;

(e) Any arrangements as to the custody, visitation and support of the children and the maintenance of a spouse;

(f) A statement specifying whether there is community or separate property owned by the parties to be disposed of;

(g) The relief sought.

(2) Either or both parties to the marriage may initiate the proceeding. [1973 2nd ex.s. c 23 § 1; 1973 1st ex.s. c 157 § 2.]

26.09.030 Petition for dissolution of marriage—Court proceedings, findings—Transfer to family court—Legal separation in lieu of dissolution. When a party who is a resident of this state or who is a member of the armed forces and is stationed in this state, petitions for a dissolution of marriage, and alleges that the marriage is irretrievably broken and when ninety days have elapsed since the petition was filed and from the date when service of summons was made upon the respondent or the first publication of summons was made, the court shall proceed as follows:

(1) If the other party joins in the petition or does not deny that the marriage is irretrievably broken, the court shall enter a decree of dissolution.

(2) If the other party alleges that the petitioner was induced to file the petition by fraud, or coercion, the court shall make a finding as to that allegation and, if it so finds shall dismiss the petition.

(3) If the other party denies that the marriage is irretrievably broken the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospects for reconciliation and shall:

(a) Make a finding that the marriage is irretrievably broken and enter a decree of dissolution of the marriage; or

(b) At the request of either party or on its own motion, transfer the cause to the family court, refer them to another counseling service of their choice, and request a report back from the counseling service within sixty days, or continue the matter for not more than sixty days for hearing. If the cause is returned from the family court or at the adjourned hearing, the court shall:

(i) Find that the parties have agreed to reconciliation and dismiss the petition; or

(ii) Find that the parties have not been reconciled, and that either party continues to allege that the marriage is irretrievably broken. When such facts are found, the court shall enter a decree of dissolution of the marriage.

(4) If the petitioner requests the court to decree legal separation in lieu of dissolution, the court shall enter the decree in that form unless the other party objects and petitions for a decree of dissolution or declaration of invalidity. [1973 1st ex.s. c 157 § 3.]

26.09.040 Petition to have marriage declared invalid or judicial determination of validity—Procedure—

Findings—Grounds—Legitimacy of children. (1) While both parties to an alleged marriage are living, and at least one party is resident in this state or a member of the armed service and stationed in the state, a petition to have the marriage declared invalid may be sought by:

(a) Either or both parties, or the guardian of an incompetent spouse, for any cause specified in subsection (4) of this section; or

(b) Either or both parties, the legal spouse, or a child of either party when it is alleged that the marriage is bigamous.

(2) If the validity of a marriage is denied or questioned at any time, either or both parties to the marriage may petition the court for a judicial determination of the validity of such marriage.

(3) In a proceeding to declare the invalidity of a marriage, the court shall proceed in the manner and shall have the jurisdiction, including the authority to provide for maintenance, custody, visitation, support, and division of the property of the parties, provided by this chapter.

(4) After hearing the evidence concerning the validity of a marriage, if both parties to the alleged marriage are still living, the court:

(a) If it finds the marriage to be valid, shall enter a decree of validity;

(b) If it finds that:

(i) The marriage should not have been contracted because of age of one or both of the parties, lack of required parental or court approval, a prior undissolved marriage of one or both of the parties, reasons of consanguinity, or because a party lacked capacity to consent to the marriage, either because of mental incapacity or because of the influence of alcohol or other incapacitating substances, or because a party was induced to enter into the marriage by force or duress, or by fraud involving the essentials of marriage, and that the parties have not ratified their marriage by voluntarily cohabiting after attaining the age of consent, or after attaining capacity to consent, or after cessation of the force or duress or discovery of the fraud, shall declare the marriage invalid as of the date it was purportedly contracted;

(ii) The marriage should not have been contracted because of any reason other than those above, shall upon motion of a party, order any action which may be appropriate to complete or to correct the record and enter a decree declaring such marriage to be valid for all purposes from the date upon which it was purportedly contracted;

(c) If it finds that a marriage contracted in a jurisdiction other than this state, was void or voidable under the law of the place where the marriage was contracted, and in the absence of proof that such marriage was subsequently validated by the laws of the place of contract or of a subsequent domicile of the parties, shall declare the marriage invalid as of the date of the marriage.

(5) Any child of the parties born or conceived during the existence of a marriage of record is legitimate and

remains legitimate notwithstanding the entry of a declaration of invalidity of the marriage. [1975 c 32 § 2; 1973 1st ex.s. c 157 § 4.]

26.09.050 Provisions for child support, custody and visitation—Maintenance—Disposition of property and liabilities. In entering a decree of dissolution of marriage, legal separation, or declaration of invalidity, the court shall consider, approve, or make provision for child custody and visitation, the support of any child of the marriage entitled to support, the maintenance of either spouse, and the disposition of property and liabilities of the parties. [1973 1st ex.s. c 157 § 5.]

26.09.060 Temporary maintenance or child support—Temporary restraining order—Preliminary injunction. (1) In a proceeding for:

(a) Dissolution of marriage, legal separation, or a declaration of invalidity; or

(b) Disposition of property or liabilities, maintenance, or support following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse; either party may move for temporary maintenance or for temporary support of children entitled to support. The motion shall be accompanied by an affidavit setting forth the factual basis for the motion and the amounts requested.

(2) As a part of a motion for temporary maintenance or support or by independent motion accompanied by affidavit, either party may request the court to issue a temporary restraining order or preliminary injunction, providing relief proper in the circumstances, and restraining or enjoining any person from:

(a) Transferring, removing, encumbering, concealing, or in any way disposing of any property except in the usual course of business or for the necessities of life, and, if so restrained or enjoined, requiring him to notify the moving party of any proposed extraordinary expenditures made after the order is issued;

(b) Molesting or disturbing the peace of the other party or of an child;

(c) Entering the family home or the home of the other party upon a showing of the necessity therefor;

(d) Removing a child from the jurisdiction of the court.

(3) The court may issue a temporary restraining order without requiring notice to the other party only if it finds on the basis of the moving affidavit or other evidence that irreparable injury could result if an order is not issued until the time for responding has elapsed.

(4) The court may issue a temporary restraining order or preliminary injunction and an order for temporary maintenance or support in such amounts and on such terms as are just and proper in the circumstances.

(5) A temporary order, temporary restraining order, or preliminary injunction:

(a) Does not prejudice the rights of a party or any child which are to be adjudicated at subsequent hearings in the proceeding.

(b) May be revoked or modified;

(c) Terminates when the final decree is entered or when the petition for dissolution, legal separation, or declaration of invalidity is dismissed. [1975 c 32 § 3; 1973 1st ex.s. c 157 § 6.]

26.09.070 Separation contracts. (1) The parties to a marriage, in order to promote the amicable settlement of disputes attendant upon their separation or upon the filing of a petition for dissolution of their marriage, a decree of legal separation, or declaration of invalidity of their marriage, may enter into a written separation contract providing for the maintenance of either of them, the disposition of any property owned by both or either of them, the custody, support, and visitation of their children and for the release of each other from all obligation except that expressed in the contract.

(2) If the parties to such contract elect to live separate and apart without any court decree, they may record such contract and cause notice thereof to be published in a legal newspaper of the county wherein the parties resided prior to their separation. Recording such contract and publishing notice of the making thereof shall constitute notice to all persons of such separation and of the facts contained in the recorded document.

(3) If either or both of the parties to a separation contract shall at the time of the execution thereof, or at a subsequent time, petition the court for dissolution of their marriage, for a decree of legal separation, or for a declaration of invalidity of their marriage, the contract, except for those terms providing for the custody, support, and visitation of children, shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion or on request of the court, that the separation contract was unfair at the time of its execution.

(4) If the court in an action for dissolution of marriage, legal separation, or declaration of invalidity finds that the separation contract was unfair at the time of its execution, it may make orders for the maintenance of either party, the disposition of their property and the discharge of their obligations.

(5) Unless the separation contract provides to the contrary, the agreement shall be set forth in the decree of dissolution, legal separation, or declaration of invalidity, or filed in the action or made an exhibit and incorporated by reference, except that in all cases the terms for custody, support, and visitation shall be set out in the decree, and the parties shall be ordered to comply with its terms.

(6) Terms of the contract set forth or incorporated by reference in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt, and are enforceable as contract terms.

(7) When the separation contract so provides, the decree may expressly preclude or limit the enforcement of any provision for maintenance set forth in the contract. Terms of a separation contract pertaining to custody, support, and visitation of children and, in the absence of express

provision to the contrary, terms providing for maintenance set forth or incorporated by reference in the decree are automatically modified by modification of the decree.

(8) If at any time the parties to the separation contract by mutual agreement elect to terminate the separation contract they may do so without formality unless the contract was recorded as in subsection (2) of this section, in which case a statement should be filed terminating the contract. [1973 1st ex.s. c 157 § 7.]

26.09.080 Disposition of property and liabilities—
Factors. In a proceeding for dissolution of the marriage, legal separation, declaration of invalidity, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall, without regard to marital misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage; and
- (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse having custody of any children. [1973 1st ex.s. c 157 § 8.]

26.09.090 Maintenance orders for either spouse—
Factors. (1) In a proceeding for dissolution of marriage, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, after considering all relevant factors including but not limited to:

- (a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his skill, interests, style of life, and other attendant circumstances;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, physical and emotional condition, and financial obligations of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs and financial obligations while meeting those of the spouse seeking maintenance. [1973 1st ex.s. c 157 § 9.]

26.09.100 Child support—Apportionment of expense. In a proceeding for dissolution of marriage, legal separation, declaration of invalidity, maintenance, or child support, after considering all relevant factors but without regard to marital misconduct, the court may order either or both parents owing a duty of support to any child of the marriage dependent upon either or both spouses to pay an amount reasonable or necessary for his support. [1973 1st ex.s. c 157 § 10.]

26.09.110 Minor or dependent child—Court appointed attorney to represent—Payment of costs, fees, and disbursements. The court may appoint an attorney to represent the interests of a minor or dependent child with respect to his custody, support, and visitation. The court shall enter an order for costs, fees, and disbursements in favor of the child's attorney. The order shall be made against either or both parents, except that, if both parties are indigent, the costs, fees, and disbursements shall be borne by the county. [1973 1st ex.s. c 157 § 11.]

Process—Domestic relations actions: Rules of court: CR 4.1.

26.09.120 Support or maintenance payments—To whom paid—Arrearages. (1) The court may, upon its own motion or upon motion of either party, order support or maintenance payments to be made to:

- (a) The person entitled to receive the payments; or
- (b) The department of social and health services pursuant to chapters 74.20 and 74.20A RCW; or
- (c) The clerk of court as trustee for remittance to the person entitled to receive the payments.

(2) If payments are made to the clerk of court:

(a) The clerk shall maintain records listing the amount of payments, the date when payments are required to be made, and the names and addresses of the parties affected by the order; and

(b) The parties affected by the order shall inform the clerk of the court of any change of address or of other conditions that may affect the administration of the order; and

(c) The clerk of the court shall, if the party fails to make required payment, send by first class mail notice of the arrearage to the obligor. If payment of the sum due is not made to the clerk of the court within ten days after sending notice, the clerk of the court shall certify the amount due to the prosecuting attorney. [1973 1st ex.s. c 157 § 12.]

26.09.130 Support or maintenance payments—Order to make assignment of periodic earnings or trust income—Duty of payor to withhold and transmit. The court may order the person obligated to pay support or maintenance to make an assignment of a part of his periodic earnings or trust income to the person or agency entitled to receive the payments: *Provided*, That the

provisions of RCW 7.33.280 in regard to exemptions in garnishment proceedings shall apply to such assignments. The assignment is binding on the employer, trustee or other payor of the funds two weeks after service upon him of notice that it has been made. The payor shall withhold from the earnings or trust income payable to the person obligated to support the amount specified in the assignment and shall transmit the payments to the person specified in the order. The payor may deduct from each payment a sum not exceeding one dollar as reimbursement for costs. An employer shall not discharge or otherwise discipline an employee as a result of a wage or salary assignment authorized by this section. [1973 1st ex.s. c 157 § 13.]

26.09.140 Payment of costs, attorney's fees, etc. The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.

The court may order that the attorney's fees be paid directly to the attorney who may enforce the order in his name. [1973 1st ex.s. c 157 § 14.]

26.09.150 Decree of dissolution of marriage, legal separation, or declaration of invalidity—Finality—Appeal—Conversion of decree of legal separation to decree of dissolution—Name of wife. A decree of dissolution of marriage, legal separation, or declaration of invalidity is final when entered, subject to the right of appeal. An appeal which does not challenge the finding that the marriage is irretrievably broken or was invalid, does not delay the finality of the dissolution or declaration of invalidity and either party may remarry pending such an appeal.

No earlier than six months after entry of a decree of legal separation, on motion of either party, the court shall convert the decree of legal separation to a decree of dissolution of marriage. The clerk of court shall complete the certificate as provided for in RCW 70.58.200 on the form provided by the department of social and health services. On or before the tenth day of each month, the clerk of the court shall forward to the state registrar of vital statistics the certificate of each decree of divorce, dissolution of marriage, annulment, or separate maintenance granted during the preceding month.

Upon request by a wife whose marriage is dissolved or declared invalid, the court shall order a former name restored and may, on motion of either party, for just and reasonable cause, order the wife to assume a name other than that of the husband. [1973 1st ex.s. c 157 § 15.]

26.09.160 Failure to comply with decree or temporary injunction—Obligation to make support or maintenance payments or permit visitation not suspended—Motion. If a party fails to comply with a provision of a decree or temporary order of injunction, the obligation of the other party to make payments for support or maintenance or to permit visitation is not suspended, but he may move the court to grant an appropriate order. [1973 1st ex.s. c 157 § 16.]

26.09.170 Modification of decree for maintenance or support, property disposition—Termination of maintenance obligation and child support—Grounds. Except as otherwise provided in subsection (7) of RCW 26.09.070, the provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of a substantial change of circumstances. The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

Unless otherwise agreed in writing or expressly provided in the decree the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child or by the death of the parent obligated to support the child. [1973 1st ex.s. c 157 § 17.]

26.09.180 Child custody proceeding—Commencement—Notice—Intervention. (1) A child custody proceeding is commenced in the superior court:

(a) By a parent:

(i) By filing a petition for dissolution of marriage, legal separation or declaration of invalidity; or

(ii) By filing a petition seeking custody of the child in the county where the child is permanently resident or where he is found; or

(b) By a person other than a parent, by filing a petition seeking custody of the child in the county where the child is permanently resident or where he is found, but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.

(2) Notice of a child custody proceeding shall be given to the child's parent, guardian and custodian, who may appear and be heard and may file a responsive pleading. The court may, upon a showing of good cause, permit the intervention of other interested parties. [1973 1st ex.s. c 157 § 18.]

26.09.190 Child custody—Relevant factors in awarding custody. The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:

(1) The wishes of the child's parent or parents as to his custody and as to visitation privileges;

(2) The wishes of the child as to his custodian and as to visitation privileges;

(3) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;

(4) The child's adjustment to his home, school, and community; and

(5) The mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed guardian that does not affect the welfare of the child. [1973 1st ex.s. c 157 § 19.]

26.09.200 Child custody—Temporary custody order—Vacation of order. A party to a custody proceeding may move for a temporary custody order. The motion must be supported by an affidavit as provided in RCW 26.09.270. The court may award temporary custody after a hearing, or, if there is no objection, solely on the basis of the affidavits.

If a proceeding for dissolution of marriage, legal separation, or declaration of invalidity is dismissed, any temporary custody order is vacated unless a parent or the child's custodian moves that the proceeding continue as a custody proceeding and the court finds, after a hearing, that the circumstances of the parents and the best interests of the child require that a custody decree be issued.

If a custody proceeding commenced in the absence of a petition for dissolution of marriage, legal separation, or declaration of invalidity, (subsection (1) of RCW 26.09.180) is dismissed, any temporary order is vacated. [1973 1st ex.s. c 157 § 20.]

26.09.210 Child custody—Interview with child by court—Advice of professional personnel. The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation privileges. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be made part of the record in the case.

The court may seek the advice of professional personnel whether or not they are employed on a regular basis by the court. The advice given shall be in writing and shall be made available by the court to counsel upon request. Counsel may call for cross-examination any professional personnel consulted by the court. [1973 1st ex.s. c 157 § 21.]

26.09.220 Child custody—Investigation and report.

(1) In contested custody proceedings, and in other custody proceedings if a parent or the child's custodian so requests, the court may order an investigation and report concerning custodian arrangements for the child. The investigation and report may be made by the staff of the juvenile court or other professional social service organization experienced in counseling children and families.

(2) In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodian arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if he has reached the age of twelve, unless the court finds that he lacks mental capacity to consent. If the requirements of subsection (3) of this section are fulfilled, the investigator's report may be received in evidence at the hearing.

(3) The court shall mail the investigator's report to counsel and to any party not represented by counsel at least ten days prior to the hearing unless a shorter time is ordered by the court for good cause shown. The investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (2) of this section, and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination. A party may not waive his right of cross-examination prior to the hearing. [1973 1st ex.s. c 157 § 22.]

Authority to make reports to assist courts of other states: RCW 26.27.200

26.09.230 Child custody—Priority status of proceedings—Hearing—Record—Expenses of witnesses. Custody proceedings shall receive priority in being set for hearing.

Either party may petition the court to authorize the payment of necessary travel and other expenses incurred by any witness whose presence at the hearing the court deems necessary to determine the best interests of the child.

The court without a jury shall determine questions of law and fact. If it finds that a public hearing may be detrimental to the child's best interests, the court may exclude the public from a custody hearing, but may admit any person who has a direct and legitimate interest in the work of the court.

If the court finds it necessary to protect the child's welfare that the record of any interview, report, investigation, or testimony in a custody proceeding be kept secret, the court may make an appropriate order sealing the record. [1973 1st ex.s. c 157 § 23.]

26.09.240 Child custody—Visitation rights. A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger the child's physical, mental, or emotional health. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings.

The court may modify an order granting or denying visitation rights whenever modification would serve the best interests of the child but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger the child's physical, mental, or emotional health. [1977 ex.s. c 271 § 1; 1973 1st ex.s. c 157 § 24.]

26.09.250 Child custody—Powers and duties of custodian—Supervision by appropriate agency when necessary. Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training, unless the court after hearing, finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical, mental, or emotional health would be endangered.

If both parents or all contestants agree to the order, or if the court finds that in the absence of the order the child's physical, mental, or emotional health would be endangered, the court may order an appropriate agency which regularly deals with children to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out. Such order may be modified by the court at any time upon petition by either party. [1973 1st ex.s. c 157 § 25.]

26.09.260 Child custody decree—Modification. (1) The court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child. In applying these standards the court shall retain the custodian established by the prior decree unless:

- (a) The custodian agrees to the modification;
- (b) The child has been integrated into the family of the petitioner with the consent of the custodian; or
- (c) The child's present environment is detrimental to his physical, mental, or emotional health and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

(2) If the court finds that a motion to modify a prior custody order has been brought in bad faith, the court shall assess the attorney's fees and court costs of the custodian against the petitioner. [1973 1st ex.s. c 157 § 26.]

26.09.270 Child custody—Temporary custody order or modification of custody decree—Affidavits required. A party seeking a temporary custody order or modification of a custody decree shall submit together with his motion, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other

parties to the proceedings, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted. [1973 1st ex.s. c 157 § 27.]

26.09.280 Child custody or support actions or proceedings—Venue. Hereafter every action or proceeding to change, modify, or enforce any final order, judgment, or decree heretofore or hereafter entered in any dissolution or legal separation or declaration concerning the validity of a marriage, whether under this chapter or prior law, in relation to the care, custody, control, or support of the minor children of the marriage may be brought in the county where said minor children are then residing, or in the court in which said final order, judgment, or decree was entered, or in the county where the parent or other person who has the care, custody, or control of the said children is then residing. [1975 c 32 § 4; 1973 1st ex.s. c 157 § 28.]

26.09.290 Final decree of divorce nunc pro tunc. Whenever either of the parties in a divorce action is, under the law, entitled to a final judgment, but by mistake, negligence, or inadvertence the same has not been signed, filed, or entered, if no appeal has been taken from the interlocutory order or motion for a new trial made, the court, on the motion of either party thereto or upon its own motion, may cause a final judgment to be signed, dated, filed, and entered therein granting the divorce as of the date when the same could have been given or made by the court if applied for. The court may cause such final judgment to be signed, dated, filed, and entered nunc pro tunc as aforesaid, even though a final judgment may have been previously entered where by mistake, negligence or inadvertence the same has not been signed, filed, or entered as soon as such final judgment, the parties to such action shall be deemed to have been restored to the status of single persons as of the date affixed to such judgment, and any marriage of either of such parties subsequent to six months after the granting of the interlocutory order as shown by the minutes of the court, and after the final judgment could have been entered under the law if applied for, shall be valid for all purposes as of the date affixed to such final judgment upon the filing thereof. [1973 1st ex.s. c 157 § 29.]

26.09.300 Restraining orders—Notice—Refusal to comply—Penalty—Defense. (1) Any person having had actual notice of the existence of a restraining order issued by a court of competent jurisdiction in an action for the dissolution of a marriage under this chapter who refuses to comply with the provisions of such order when requested by any peace officer of the state shall be guilty of a misdemeanor.

(2) The notice requirements of subsection (1) may be satisfied by the peace officer giving oral or written evidence to the person subject to the order by reading from

or handing to that person a copy certified to be an accurate copy of the original on file by a notary public or the clerk of the court of the court order which copy may be supplied by the court, the complainant or the complainant's attorney.

(3) The remedies provided by this section shall not apply unless restraining orders subject to this section shall bear the legend: **VIOLATION OF THIS ORDER WITH ACTUAL NOTICE OF ITS TERMS IS A CRIMINAL OFFENSE UNDER CHAPTER 26.09 RCW AND IS ALSO SUBJECT TO CIVIL CONTEMPT PROCEEDINGS.**

(4) It is a defense to prosecution under subsection (1) of this section that the court order was issued contrary to law or court rule: *Provided*, That no right of action shall accrue against any peace officer acting upon a properly certified copy of a court order lawful on its face if such officer employs otherwise lawful means to effect the arrest. [1974 ex.s. c 99 § 1.]

26.09.900 Construction—Pending divorce actions. Notwithstanding the repeals of prior laws enumerated in section 30, chapter 157, Laws of 1973 1st ex. sess., actions for divorce which were properly and validly pending in the superior courts of this state as of the effective date of such repealer (July 15, 1973) shall be governed and may be pursued to conclusion under the provisions of law applicable thereto at the time of commencement of such action and all decrees and orders heretofore or hereafter in all other respects regularly entered in such proceedings are declared valid: *Provided*, That upon proper cause being shown at any time before final decree, the court may convert such action to an action for dissolution of marriage as provided for in RCW 26.09.901. [1974 ex.s. c 15 § 1.]

26.09.901 Conversion of pending action to dissolution proceeding. Any divorce action which was filed prior to July 15, 1973 and for which a final decree has not been entered on February 11, 1974, may, upon order of the superior court having jurisdiction over such proceeding for good cause shown, be converted to a dissolution proceeding and thereafter be continued under the provisions of this chapter. [1974 ex.s. c 15 § 2.]

26.09.902 RCW 26.09.900 and 26.09.901 deemed in effect on July 16, 1973. The provisions of RCW 26.09.900 and 26.09.901 are remedial and procedural and shall be construed to have been in effect as of July 16, 1973. [1974 ex.s. c 15 § 3.]

26.09.905 Construction of chapter with uniform child custody jurisdiction act (chapter 26.27 RCW). See RCW 26.27.900.

Chapter 26.12 FAMILY COURT

Sessions

26.12.010 Jurisdiction conferred on superior court.
26.12.070 Designation of judge—Number of sessions.

California Needs a Formula for Injustice in Child Custody Fights

By JAMES A. COOK

Curbside clutter last week marked the end of the holiday season. Forlornly awaiting garbage trucks, trees with dragging tinsel and heaps of crinkled gift wrap signaled the passing of anticipation and the beginning of memories.

But inside many homes, warm recollections had been purchased at a price of bitter conflict. While others were rushing about from store to store, planning close family gatherings around the tree or menorah, divorced parents in these homes too often were making frantic calls to their lawyers, petitioning courts and waging fierce battles over which one of them would spend the holidays with the children.

No other single time span incites such heated controversy between divorced parents as do the holidays. Wrapped as they are in the mood and myth of family unity, the holidays are meant to be shared with children. Children give purpose to tradition. Thus, this time of the year highlights more poignantly than any other example how badly our courts have failed to protect a child's right to know the love of both parents.

Up until now, the courts have meticulously divided between divorcing parents all the material wealth of the marriage. The car, the couch, the house, were split 50-50. But the most precious part of that marriage, the children, went to one parent, the one designated as custodian, almost exclusively. The other parent was regularly left with only a very small portion of the child's time and frequently had to fight repeatedly, assuming devastating legal expenses, to even maintain that shred of contact with the child.

This formula for injustice is about to become a thing of the past. On Jan. 1, California's new joint custody law AB1460 went into effect. Hereafter, at the request of either parent, judges must consider joint custody awards. Such requests can be made not only for pending divorces, but also in the case of divorces already granted.

From now on divorcing parents will be encouraged either to sit down together and work out joint-custody arrangements or to work them out through their attorneys or counselors. In order to allow the utmost flexibility and, thereby, to insure that various ways of life can be accommodated under the new law, no rigid guidelines have been imposed on litigating couples. Thus, each joint-custody agreement can be tailor-made. Each set of parents can draw up a plan most practical and suitable to their situation. Legislators believe that this "self-ordering" (designating the court order under which they will be bound) will lead to more compliance with court orders on the part of parents, since most people are inclined to honor an agreement they negotiate themselves.

Further, since the court still has the authority to order sole custody to the parent most tolerant of the child's continuing relationship with the other parent, it is believed that this action will prove to be an incentive to greater cooperation between negotiating parents.

The new custody law was inspired in part by the growing number of custody-change suits brought by fathers who had no recourse under the prevailing law to overcome custodial mothers who obstructed the father's attempts to maintain close contact with the child. Non-custodial mothers were also interested in the joint custody concept, though they are fewer in number and thus have not received as much publicity as have the fathers.

Divorced fathers have become more willing in recent years to express their anguish over the loss of their homes, their wives and their children. More people realize the important role a father plays in the child's life. And more fathers develop and value their parenting skills. In fact, the new movie "Kramer vs. Kramer" gains its power from the nurturant father role played by Dustin Hoffman. Still, the courts were caught in a cultural lag. Laws did not change fast enough or sensitively enough to respond to social changes.

The initial push for new legislation came from professionals in psychiatric, sociological and counseling fields. A gratifyingly large number of lawyers also endorsed the necessity of joint custody.

Actually, the outrage over custody awards began to build soon after the "no-fault" divorce Family Act of 1970

was enacted. Subsequent studies regarded the lack of a joint-custody option as the single greatest inequity left unrectified when the no-fault divorce was imposed. Since the statute still provided that custody could only be awarded to either parent (or an outsider under certain circumstances), the parent who demanded it of the court would receive a divorce without showing of cause. The other parent—who may not have been consulted, may not have been desirous of divorce and may not have wittingly given cause for divorce—could be promptly excluded from the child's life except for visitation based on a schedule decreed by the court without consulting the excluded parent.

In fact, the non-custodial parents often are treated as nonpersons. They have been barred from access to their children's medical records, although they often are financially responsible for the medical bills. School administrators and teachers have often colluded with the obstructive parent by refusing to provide the non-custodial parent with any information whatsoever about the child—even though such refusals violate federal law.

The net effect was that law-abiding fathers whose conduct as fathers and husbands was theoretically not in question, were, nevertheless, severed from a normal relationship with their children in degrees as severe as if the men had committed a crime.

Los Angeles Times

Opinion

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Editorials

PART V

SUNDAY, JANUARY 6, 1980

ERASING CALIFORNIA'S UNJUST FORMULA

And, despite the myth of the irresponsible, footloose and fancy-free former husband, many divorced fathers are determined to remain committed parents to their children. Many yearn to rejoice with their child over a school award or to commiserate over a failure. They seek to share influencing and guiding their child through the formative years.

The new law should help avoid two problems that frequently endanger the well-being of children. In the past, excluded parents have sometimes resorted to "child stealing" or to abandoning child support for lack of frequent and extensive contact with their children. Certainly, a pattern of mounting frustration over not being able to see and share the child often precedes abandonment or child stealing by the non-custodial parent.

Studies show that about two-thirds of divorced fathers fall behind in child support after the first year of divorce, and if, as seems to be the case, a significant number of these fathers have had visitation obstructed before finally withdrawing support, joint custody should end this vicious cycle.

Moreover, the new law will shift the focus to a decision based on protecting the child's equal access to both parents regardless of custodial arrangements and on encouraging

parental sharing of responsibility for the child. Thus, the new law stipulates that custody should be awarded in the following order of preference according to the best interests of the child: To both parents jointly or to either parent. When awarding sole custody, the court is encouraged to choose the parent who will most tolerate the child's frequent and continuing contact with the other parent. Preference of custodian will not be made on the basis of the parent's sex.

No longer can the reluctant or vindictive parent easily use custody, visitation obstruction or denial as a weapon against the other parents or use the court as party to such action.

Certainly, all children are entitled to the love and influence of both parents, but when they are pulled between two sparring parents they suffer acutely. Psychologists and psychiatrists have often warned of the long-lasting ill effects of such trauma.

After years of study, in fact, professionals have compiled a list of adverse reactions a child suffers as a result of sole-custody awards. Children immediately feel lost and abandoned regardless of the presence or excellence of the custodial parent. Feelings of anxiety and loyalty conflicts lead to strained relations with the custodial parent, disturbances in the child's social relations and learning problems. There is often confusion in sex-role identification.

But children are not the only ones to undergo trauma. Non-custodial parents feel anxious over the separation and

at the loss of their close family members, and familiar roles and habits. Practical problems such as economic instability create added stress. The ability to parent declines as does self-concept. (Mothers feel less physically attractive and fathers suffer greater initial changes.) Feelings of rootlessness and extreme loneliness also pain these parents.

Joint custody, which preserves as much as possible of the existing relationship between parents and child, will soften many of these symptoms.

Every year about this time, much is written of the large number of Americans who suffer severe depression throughout the holiday season. Suicides increase. Some of these incidents are directly related to the shattered home. Many of my colleagues bewail the high stacks of litigation papers filed by clients who, in the face of the custodial parent's resistance, cling to the hope, however slight, of sharing the holidays with their child.

For these people and for the many, many children who are and confused by embattled parents, the new joint-custody law is a marvelous present for the new year. □

James A. Cook, an administrator of a nonprofit association that researches legislative, regulatory and judicial matters, initiated and authored the original version of AB 1430 which, in modified form, took effect Jan. 1.

Sole Custody
Split Custody
Joint Legal Custody

Divided or Alternating Custody
Joint Custody
Joint Physical Custody
Joint Physical & Legal Custody

As an aid to parents and clients, as well as professional practitioners, the following is intended as a layman's guide to child custody terminology. Counselors may find this compilation useful for distribution to clients so that all parties have a similar comprehension of terms. The ease with which many of these terms have been incorporated into casual conversation, but without definition, has led to misinterpretation. Furthermore, the lay public has been exposed to a wide range of interpretations of custody. Some of the definitions have been erroneous or contradictory, often because the omission or addition of descriptive adjectives alters or restricts the scope of custody.

Confusion also arises because courts, as well as the media, frequently use certain terms interchangeably.

Definition of terms is, primarily, the product of statute and case law precedent. The following definitions have been derived from such sources, but this compilation is intended as a convenience rather than a legal reference. However, a mutual understanding by parents of these terms is less likely to stimulate a legal quest on an erroneous assumption about a form of custody or to necessitate subsequent litigation because of a reinterpretation.

Since our primary intent is to aid the divorced family toward an operable plan of custody rather than a diversion into debating the intent of terms, we hope this information will be useful in establishing a terminology with which the parties agree.

The parent or parents particularly interested in joint custody are advised to consider the term in its larger context, that of joint physical and legal custody. This is the final form of custody described at the conclusion of this compilation. The scope and intent of each previously described custody form aids in clarifying the intent and significance of joint physical and legal custody.

Acknowledgment is extended to the following authorities, from whom definition information has been derived, although we are refraining from indicating specific reference to each authority because of our edited abbreviations or elaborations of their original comments. Therefore, readers will also benefit from the more extensive descriptions of:

H. Jay Fölberg & Marva Graham, 'Joint Custody of Children Following Divorce,' Univ of Calif, Davis, Law Review, Summer 1979.

Robert Mnookin, 'Child Custody Adjudication: Judicial Functions in the Face of Interminancy,' Law & Contemporary Problems, Summer 1975.

A Lindey, 'Separation Agreements and Ante-Nuptial Contracts,' 1977

Sole custody describes an award of custody to one parent with visitation rights to the non-custodial parent.

An early impetus for this form of custody was, and still is, an intention by the court to know whom to hold legally responsible as being in control of the activities and conduct of a child. However, much of the dissension of recent years about sole custody has arisen because participants have frequently assumed that sole custody is less of a responsibility for the conduct of a child in society as a whole and more of a responsibility in control of a child's access to the alternate parent.

Divided or Alternating Custody

Divided or alternating custody permits each parent to have a child for a part of a year or alternating portions of a year, or upon subsequent or alternating years. Reciprocal visitation rights are afforded to the non-custodial parent. Each parent alternates and assumes the responsibility and control accorded a sole custodian during the time period when child is awarded to the respective parent.

Divided or alternating custody is not joint custody.

Split Custody

Split custody awards one or more children to one parent and the other child or remaining children to the alternate parent. Parents and courts considering the split custody alternative will wish to weigh carefully the wisdom and necessity of assuring that the children do or do not have significant time together with their siblings.

Joint Custody

California's Civil Code Section 4600, Section I, taking effect January 1, 1980 opens with a public policy statement of intent "...to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy." In addition, Section 2, Section 4600.5 (c) defines joint custody: "...an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents. Consequently, joint custody, as intended by the California statute is initially and primarily concerned with the joint physical aspect of custody described below under joint physical and legal custody.

In joint custody, both parents retain and share the responsibility and authority for the care and control of the child or children.

Joint legal custody is available, as an alternative, for a parent or parents desirous of solely the legal relationship. California's Civil Code Section 2, Section 4600.5 (c) offers: "...such order may award joint legal custody without awarding joint physical custody."

A primary intent is to offer an opportunity of joint legal sharing to those parents who by reason of distance or isolation (such as military or overseas service) or certain limitations of remarriage are unable to participate in joint physical custody.

The scope and authority and participation by a joint legal custodian has been increasingly limited by decisions and opinions. In its most restrictive interpretation it has been characterized as the 'right of survivorship' with an opportunity to be a successor custodian. In its broadest interpretation, joint legal custody has encompassed nearly all the major responsibilities and opportunities that California relegated to custodians except physical, day to day residence. Those responsibilities and opportunities included decision participation in matters of education, medical care, religion, discipline and financial support.

Apprehension about decreeing merely joint legal custody without concurrent joint physical custody arises because it imposes upon a joint legal custodian all the legal responsibilities and obligations of a child's conduct, delinquency, encounters with the law, vandalism, and creditors with none of the physical relationship that would help a joint custodian to ameliorate or forestall the causes and consequences of a minor's legal problems.

Emphasis upon the necessity of joint physical custody rather than solely joint legal custody was most recently generated by a decision of California's First Appellate District on May 9, 1979, prior to the legislative debate and enactment of California's new joint custody statute in *In Re Marriage of Neal*. That decree, among other pronouncements indicated that joint legal custody was, in effect, meaningless in comparison with sole parent physical custody. Consequently, the subsequent emphasis in California's new custody statute for a reiteration in several locations of 'frequent and continuing contact' was also bolstered with a definition of joint custody as meaning "...that physical custody shall be shared by the parents..." (Section 2, Section 4600.5 (c).) At three different paragraphs within the statute a requirement was imposed that the court specify its reasons if joint custody is not awarded.

Other limitations on joint legal custody, as compared with physical custody, as contained in '*Burge v. San Francisco*,' 41 Cal. 2d 608 (1953) and '*Adoption of Van Anda*,' 62 Cal. App. 3d 189 (1976). In California, these cases are regarded as obstacles to smooth functioning of joint custody.

Consequently, parents establishing joint custody will wish to assure themselves of the full scope of joint physical and legal custody lest subsequent litigation occur that is more the consequence of interpretation than any inherent flaw in the concept of joint parenting.

The sharing of that responsibility can traverse an entire spectrum from casual cooperation to specifically delineated times and functions. The sharing can be of all parenting functions or the parties can adopt or allocate functions to each other depending on capabilities, interests, and practical solutions for assuming responsibility.

The sharing of the child or children's time between joint custodians can also extend across a spectrum, whether the decision is for a scrupulously equitable division of time or a rational and reasonable allocation of time predicated on the time each parent has available to assume custodianship or to grant time to the alternate parent.

Joint custody can also accommodate a wide range of alternatives for the allocation and assumption of the financial obligations of child support. Thus far, no known statute permitting an award of joint custody has specified a concurrent formula concerning child support. The resolution of child support within joint custody remains a matter for the parents to resolve among the alternatives available to them or for the court to determine after an assessment of resources, assets, income and ability of each parent to pay.

Joint custody has also been referred to as joint parenting, co-parenting, shared custody or co-custody. Forms of joint custody have also been characterized as dual parenting, no-fault custody, and concurrent custody. The variations incorporating 'parenting' are applicable definitions sociologically, but they have not yet been given recognition that converts parenting from a description into a keyword. While the various alternative words may stimulate a way of comprehending custody participation for both parents, it appears likely that 'joint custody' will prevail as the terminology in most jurisdictions for the foreseeable future.

While some observers object to use of the term 'custody' because of the connotations of criminal law, the similarity may merely be coincident and is a probable outgrowth of the intent to establish adult responsibility for control of the actions of minors.

A significant alteration occurs when joint custody is amplified or constrained by the addition of specific adjectives as in joint legal custody, joint physical custody, or joint physical and legal custody.

During legislative debate, various qualifications upon the scope of joint custody were proposed, debated, and thereupon eliminated. The limiting qualifications were removed so as not to restrict the scope of options and arrangements available to parents through joint custody. Geographic proximity, for instance, was removed as a qualification that might limit availability of joint custody for a parent or parents desirous of sharing custody.

The sharing of residence, participation in care, and establishment and recognition of the validity of a dual home are integral to the concept of joint physical custody.

The allocation of significant periods of time for the child or children to be resident exclusively with each parent is usually a major consideration of a parent or parents enjoying joint physical custody.

Precise equality of time allocation may become an initial preoccupation of those parents desiring joint physical custody. However, once the principal of sharing jointly has been established and the fear of irreparable loss of the child or children by one of the parents has been dispelled, the practical availability of time by each parent of child-rearing time can become the guideline for allocating residence time.

Hesitancy to accept participation in joint custody by one parent may have assumed the likelihood of acquiring sole parent custody is frequently traceable to (a) an expectation of child support financial income by reason of retaining sole possession of a child, (b) fear and guilt that by more frequent and extensive contact with the alternate parent a child may develop a distaste for the sole custodian, particularly if the parent prone to sole custodianship was clearly the initiator of the divorce, and (c) opportunities for extortion or psychological harassment that are inherent in retaining sole custody if the excluded parent is known to place a high value on a parental relationship with an isolated child or children and longs for their companionship. Hence, counselors and parents will need to encourage a realistic exorcism of financial greed, fear and guilt, and extortion and harassment in order to achieve a more relaxed allocation of time.

Ten basic variations for allocation of time exist from which joint custodians can integrate or elaborate on their preferences and their availability.

Variations for sharing joint physical custody include:

- (1) Freedom of movement between two homes.
- (2) School year versus summer vacation, with exchange weekends & nights.
- (3) Divide Fall & Spring semesters and divide summer vacation.
- (4) 2-3 months versus 2-3 months, with exchange nights and weekends.
- (5) 1 month versus 1 month, with exchange weekends & nights.
- (6) 2 weeks versus 2 weeks, with nights & special vacation periods.
- (7) 1 week versus 1 week, with special vacation period.
- (8) 3 1/2 days versus 3 1/2 days, with special weekend & vacation periods.
- (9) Workday week versus weekends, with special vacation periods.
- (10) Child remains in original home, parents alternate.

The meaningful sharing of significant periods of time for a relaxed relationship by child and parent, free from superficiality and impermanence of "visitation" is paramount to the intent of joint physical custody.

Financial child support for joint physical custody situations is also subject to a range of choices.

Among the choices from which parents can select for resolution of child support:

- (1) One parent assumes all child support costs.
- (2) Each parent alternates and assumes child support costs in response to fluctuations and seasonal variations in each parent's income.
- (3) Each parent assumes child support costs while child is resident with the respective parent.
- (4) Equal split between parents of child support costs
 - (a) based on predetermined collar figure, or
 - (b) based on actual and verifiable expenditures.
- (5) Percentage sharing of costs predicated on respective but different incomes of each parent.
- (6) Sharing of costs based on need and ability of each parent to pay.

Joint Physical & Legal Custody

The intent of California's custody statute of 1980 is to establish a condition and expectation that joint physical and legal custody will prevail unless a parent can establish with sufficient reason that a less equitable custody award should be decreed. The court is required to itemize the reasons for a less than equitable decree of joint custody.

Joint physical and legal custody can encompass the provisions itemized above for joint legal and for joint physical custody, respectively. However, by agreement, parents can also alter, trade or allocate from among the provisions with those custody forms to suit their needs and preferences and those of their children.

A statute, such as California's, that signifies a preferred solution of joint custody and more stringent requirements for the justification of less than joint custody, provides an important incentive for parents to anticipate constructively the merits of joint custody, both legal and physical.

HOUSE RESEARCH AGENCY
Pouch Y
Juneau, Alaska 99811
465-3991

KEY WORD: Child Custody
Research Request No: 82-98

RESEARCH EVALUATION

TO:

Representative Mike Burns

FROM: Duncan L. Read, Director

RE: Evaluation of Research Products

To assist us in improving the quality of our research services, we would appreciate your response to the following questions:

- Was the information unbiased?
- Did it provide answers to (or, at least, useful information on) all the questions you posed?
- Was the research completed and delivered to you in a timely manner?
- Was it clearly written?
- May we release this information to the public?

Now

Three months from the date of transmittal

At the end of the current legislative session

Please be assured that we will take your comments seriously in performing future research for you.

Please return to House Research Agency, Mail Stop 3100.

Thank you.



ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

Pouch Y, State Capitol
Juneau, Alaska 99811
(907) 465-3991

January 29, 1981

MEMORANDUM

TO: Representative Mike Reirne
Attention: Jody Sutherland

FROM: Christine Johnson and Carol Biggs, Research Staff

SUBJECT: Research Request 82-18
Child Custody and Visitation Enforcement

This memorandum is in response to your request for information regarding joint custody and enforcement of parental visitation rights in California, Oregon, and Washington. The relevant statutes from each state are attached, and the major provisions summarized below.

Joint Custody

In California, Oregon, and Washington, as in many other states, the courts have the authority to award custody of children to both parents jointly. In California and Oregon, state statutes expressly give the court this power. In Washington, the court is empowered to award custody as it sees fit, based on a determination of the best interests of the child.

At present, California is the only one of these three states which has enacted legislation pertaining to presumptive joint custody. Legislation regarding presumptive joint custody was introduced in the Oregon Legislature in 1974, and a bill is currently under consideration in the Washington House of Representatives.

California. California is unique among states with joint custody laws in that its statutes establish specific procedural guidelines for the court; in other states, the tendency has been to simply grant the courts the power to award joint custody or to imply the availability of joint custody by defining it.

California law states that custody shall be awarded in the following order of preference, depending on the best interest of the child: first, to both parents jointly; and second, to one of the parents. It is important to note that this provision does not create a presumption of joint custody; rather, it states the public's preference for joint custody awards.

Representative Beirne
January 29, 1981
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California law presumes that joint custody is in the best interest of the child only when both parents have agreed to this award. The court has the right to deny joint custody even under these circumstances; however, it is required by law to state the reasons for the denial.

Where only one parent desires joint custody, California law requires that the court consider it equally with sole custody. If joint custody is not awarded, the court must again explain its rationale.

Legislation is currently pending in the California State Legislature which would make joint custody the presumption in all cases unless:

- (a) the parents have agreed that custody should be awarded to only one of them; or
- (b) the court finds one parent unfit.

Oregon. Currently, under Oregon law, the courts may award custody of children to "one party or jointly."

Oregon House Bill 2538, which was not enacted, would have created a disputable presumption that joint custody is in the best interests and welfare of the child. In contrast to the current California law, this proposal would have made joint custody the presumption in all custody cases, not just cases where the parents had agreed upon a joint custody arrangement. A copy of the legislation is attached for your reference.

Washington. As noted above, legislation regarding joint custody is currently under consideration in Washington. The proposed legislation is similar to California's in that joint custody would be a disputable presumption when both parents were in agreement, and would be considered equally with sole custody at the request of either parent. Unlike California's current law, however, the legislation would establish a stream-lined procedure for modifying existing orders to stipulate joint instead of sole custody. The bill is expected to be revised in committee within the next two days, and we will forward a revised version to you as soon as it arrives.

Enforcement of Parental Visitation Rights

Neither the National Council of State Legislatures nor the National Association of Commissioners for Uniform State Laws were familiar

Representative Beirne
January 29, 1981
Page No. 3

with any model legislation on visitation enforcement. A staff person for the latter felt that there was a general trend among the states towards provisions for mediation or arbitration of visitation disputes.

The procedures for enforcement of visitation in California, Oregon, and Washington are briefly outlined below.

California. An individual who willfully denies visitation can be prosecuted under California Penal Code section 278.5. An individual convicted under this code may be punished by imprisonment for not more than one year and one day, a fine of not more than \$1,000, or both.

According to Jack Trier, who is in charge of visitation enforcement for the Sacramento area, very few people are criminally prosecuted in California for failure to grant visitation. Typically, non-custodial parents who have been denied visitation file a complaint with Trier's office. The custodial parent is then notified by letter that a complaint has been filed; he or she is warned of the possible consequences, and advised to contact the other parent, a private attorney, or Trier's office. Trier estimates that 75% of the cases are resolved by him or his staff, acting, in his words, as "social workers", and persuading the parties to compromise. The remaining cases are referred to the Family Court system for resolution.

Since January of 1981, California law has required that visitation disputes be subject to mediation before being referred to court. The law states that:

The purpose of such mediation proceeding shall be to reduce acrimony which may exist between the parties and to develop an agreement assuring the child or children's close and continuing contact with both parents after the marriage is dissolved. The mediator shall use his or her best efforts to effect a settlement of the custody or visitation dispute.

Cases which are mediated result in a legal court order; however, attorneys are not necessary, and the procedures are less formal than in an actual courtroom.

Trier noted that in the majority of the cases handled by his office, there are conflicts regarding visitation because the original custody order did not specify precisely when and under what circumstances the non-custodial parent may see the child. Trier said that orders typically state that the non-custodial parent has the right to "rea-

Representative Beirne
January 29, 1981
Page No. 4

sonable visitation". Problems arise because the two parents cannot agree about what this constitutes. According to Trier, generally what is necessary in these cases is negotiation of a formal visitation schedule.

Oregon. In Oregon, a non-custodial parent must return to court in order to enforce his or her visitation rights. According to Judge Nachtigal, of the Circuit Court for the Portland area, an individual who is willfully denying visitation may be held in civil contempt of court, and sentenced to up to six months in jail. Often, however, the court will refer the parents to the Family Conciliation Service which attempts to resolve their disputes out of court.

Under Oregon law, there are no criminal penalties for withholding visitation. Oregon law does permit the court to eliminate or reduce child support payments if visitation is being denied; however, according to Judge Nachtigal, very few judges, if any, exercise this power. The court also has statutory authority to award attorneys fees to parents who are in violation of a visitation order.

Washington. The procedure for enforcement of visitation in Washington is very similar to Oregon's. An individual who is being denied visitation must file a motion with the court in order to have his or her visitation order enforced. The court may charge the custodial parent with contempt. Parents are frequently referred to Family Court for mediation.

By law, the court may order a party to pay a reasonable amount for the cost to the other party of maintaining and defending a visitation enforcement proceeding.

We hope this information is of use to you. Please don't hesitate to call us if you require anything further.

CJ/cj

Attachments:

California Statutes
Oregon Statutes
Washington



FAMILY LAW REFORM AND JUSTICE COUNCIL OF ALASKA, INC.

**P.O. BOX 4-1646
ANCHORAGE, ALASKA 99509**

**RUDY JOHNSON, PRESIDENT
(907) 333-6693
"ALASKANS FOR CHILDRENS RIGHTS"**

**FAIRBANKS - BOX 73256
KETCHIKAN - BOX 7176
SITKA - BOX 913**

April 26, 1981

WRITTEN TESTIMONY

**by
RUDY JOHNSON**

**IN SUPPORT
of
H. B. 210
JOINT CUSTODY**

**presented
April 22, 1981**

**via Teleconference Network
Anchorage**



FAMILY LAW REFORM AND JUSTICE COUNCIL OF ALASKA, INC.

P.O. BOX 4-1646
ANCHORAGE, ALASKA 99509

RUDY JOHNSON, PRESIDENT
(907) 333-6693
"ALASKANS FOR CHILDRENS RIGHTS"

FAIRBANKS - BOX 73256
KETCHIKAN - BOX 7176
SITKA - BOX

Present and past methods of dealing with disputed child custody issues have been a disasterous failure. Historically we have allowed biases and not the best interest of the children to be the determining factors in the millions of cases that have filtered through our court systems. The results of over a century of abusive dispositions of these cases are measurable as will be mentioned later. To thoroughly appreciate the need for H.B. 210 we must understand the failures of the present system and be realistic enough to accept the fact it is faili'ng!

In a 1860 opinion the New Hamshire Supreme Court ruled in upholding an award of custody to a father;

"It is a well settled doctrine of the common law, that the father is entitled to the custody of his minor children, as against the mother and everybody else: that he is bound for their maintenance and nurture and has the corresponding right to their obedience and their services."

"It is one of the cardinal principles of nature and of law that, as against strangers, the father, however poor and humble, if able to support the child in his own lifestyle and of good moral character, cannot without the most shocking injustice, be deprived of the privilege by anyone whatever, however brilliant the advantage he may offer. It is not enough to consider the interests of the child alone."
(American Journal of Psychiatry 133:12107, 1976, page 1370)

From this 18th century mentality we went to the other extreme as espoused in the Minnesota Family Law Practice Manual.

"Except in very rare cases the father should not have custody of the minor children of the parties. He is usually unqualified psychologically and emotionally; nor does he have the time and care to supervise the children. A lawyer not only does an injustice to himself, but he is unfair to his client, to the state, and to society if he gives any encouragement to the father that he should have custody of his children. A lawyer who encourages his client to file for custody, unless it is one of the classic exceptions, has difficulty collecting his fees, has a most unreasonable client, has taken the time of the court and the welfare agencies involved, and has put a burden on his legal brethren." (Volume 50, pg 75)

Has the tender years doctrine been eliminated in our system today? In theory yes, we have very good case law and Alaska has some of the most progressive statutory law in the nation. But the facts are the biases still exist and precluded decisions are being made before the facts are ever established in awarding custody of children, to the detriment of the children.

Since 1977, we have been associated with over 185 divorce reform organizations around the nation that have collectively gathered the results of over 350,000 disputed child custody cases. The results shockingly demonstrate the above statements. Out of these cases only 4.5% of them were decided in favor of fathers. It is not remotely the intent of this writer to suggest fathers should receive custody most of the time but common sense tells us that it is not in the best interest of children to be placed in a single parent home headed by a mother 95.5% of the time; the long term negative effects on the children would no doubt be just as disturbing with the figures reversed. This organization is currently doing a study of the Anchorage Court System where we are examining the records of each divorce case for the past two years and the initial results show that in this city the statistical conclusions will not even be as impartial as the national study, as appalling as those figures are.

What are the results of the abuses spoken of so far?

1. 90% of all homicides are a direct result of domestic relation problems.
2. 90% of the American prison population is from a broken home.
3. 90% of all women murdered between the ages of 20 and 30 are killed by their husbands or ex-husbands.
4. 9 out of 10 women on welfare are products of divorce.
5. 70% of the civil case load in the Alaska Court system is domestic relations.

The criminal activities related to these problems are the results of people, normal everyday Americans, being pushed too far by an apathetic system. By being denied the access to their children, by being forced to be financially obligated to their ex-spouse to the point of ridiculousness, by having gasoline poured onto the smoldering pile of emotions by attorneys and others involved with the case as these people are going through the most difficult emotional experience they will ever encounter next to losing a loved one in death. <H.B. 210> will alleviate a lot of the grief for these people and give them alternatives that are encouraged by the courts and the related legal establishment that are more comfortable and that they can live with.

As the law has developed some courts have recognized the failures of the present system and have provided direction to the lower courts in their written opinions.

"Parenthood is a continuing bilateral responsibility and opportunity. It cannot be avoided or successfully divided. A decree of divorce offers no excuse or alibi for the abatement of parental interest or obligation. The dissolution of the marriage contract, leaving in its wake children who are the innocent victims of the resultant broken home, should be a challenge to the fathers and mothers of such children to make an even greater effort to minimize, as far as possible, the incidental and unavoidable losses of love, council and guidance."

(McBetrick vs. McBetrick 284 P2d 352, Oregon)

"Whoever may have custody, it is the duty of each parent and each family member to the children to set aside personal feelings and act in a manner which is supportive of the relationship of the children to the other parent."

(Warren vs. Warren 528 P2d 1088, Oregon, 1974)

Attitudes are slowly being changed and direction is being provided by the Alaskan courts on an individual basis. In a 1975 opinion from the Ketchikan Superior Court, Judge Thomas Schultz emphasized the positions taken here in his remarks as he awarded custody of a 4 year old boy and a 7 year old girl to the father.

"Certainly a factor in determining the fitness of the parent is the kind of learning which might be called fitness that either or both parents are able and willing to provide. In terms of fitness, to provide the care that these children require and in terms of the relationship that the parties bear to the children I find both are fit and both are in fact good parents, have taken good care of the children, love the children and both have a good relationship with them. I am left with the very narrow basis on which to resolve the question and that is the view that I can take from the testimony that I've heard up till now, of which parent is better able to maintain the status quo to facilitate the children and their desire at this point as its reflected in the testimony the relationship they have with the parents, and maintaining a meaningful relation-

ship with both. I am satisfied from what I've heard that the father is better able to do that at this point. And ultimately in this case, it's my considered opinion that the parent most fit will be that parent that demonstrates the best ability to maintain open communications between both. These children were, as all others are, (brought into the world without being asked about it) and they're being left now in a situation that they didn't particularly ask for and probably don't want but they are entitled to the guidance and assistance from both their parents." (Johnson vs. Johnson, Transcript 186 to 189, Ketchikan Superior Court, April 7, 1975)

In considering child custody matters we must recognize the fact that most parents that come before the court are not only fit, they are very fit parents and the state would never consider interfering in their lives so long as there was not a divorce petition filed. (H.B. 210) is a necessary vehicle to help change attitudes. It also recognizes the right of the parents to control their own families and it encourages them to do this. It paves the road to making decisions in disputed custody cases based upon what is right with this family and these parents rather than what is wrong with the parents and the children. It provides a means for settlement that feels better for the parents which in turn helps the children feel better. Recent studies such as the one from California reporting the results of families in transition after divorce over a period of 5 years. (Psychology Today, January, 1980, Enclosed) show that when the parents deal with their divorce constructively and creatively then the children are not adversely affected on the long run whereas if the parents have a lot of turmoil and grief for extended periods of time these children will be affected adversely for years to come and even into their adulthood.

Mediation and joint custody works! The Association of Family Conciliation Courts is an organization made up of judges, social scientists, attorneys and a few lay people like myself and they have concluded with their studies that 60 to 80% of all disputed child custody cases are settled out of court with the existing mediation programs) by the parents themselves. The Association has officially endorsed joint custody as the best first choice in resolution of disputed cases and has published hundreds of studies showing joint custody, joint parenting, does and is working. The concept has been being used for up to 3 years in various jurisdictions and is working even when mediation is required rather than voluntary. Of course, the success rate is lower under those circumstances but if we can settle on the average, 70% of all cases out of court the dollar value alone is astronomical in terms of judicial costs not to mention the emotional benefits to the parties themselves and the resultant decrease in the criminal activities that are related and the welfare costs. But the most important consideration is how all this benefits the children of divorce. The results of the study from California can not be given too much emphasis.

What I have stated here is based upon fact not my opinion. Some people have opposed H.B. 210 but I say anyone who opposes it simply does not know enough about it and the facts surrounding the concept. One attorney for instance testified that by encouraging mediation a man could and will intimidate a woman into agreeing to something she really does not want. I am positive that is not the rule as my experience has shown me and when such a rare thing happens the checks and balances written into the existing law are designed to catch it. For instance in the do it yourself kits available from the efforts of Representative Bradner and Gardiner in 1977 it is a requirement that one of the spouses appear before the court before the divorce is granted. The legislative intent was to allow the judge to ascertain from that party that the agreement was indeed mutual and not coerced.

Other checks and balances exist in H.B. 210. If the court finds that joint custody is not in the best interest of the family he only needs to state his reasons for that conclusion and dismiss the concept. The bill specifically states the presumption for joint custody is rebutable. It is a long way past due that we require the courts to justify their disposition of child custody decisions, that is all this bill requires and it still leaves them a lot of discretion, too much discretion in my opinion but I am willing to compromise on that to get the bill. ?

Joint custody is not for everyone but it works for most, with direction, and I think it would be inhuman to deny this wonderful alternative to the present system to parents and children because of those few that are too immature to make it work. The courts and the present system will always be available for those people who decide they want to go that way.

It was reported that under present law we do not need H.B. 210. This is theoretically correct but what is so important about the bill is it will help change attitudes and attitudes are the key to helping divorcing people experience a creative divorce that will strengthen the family instead of destroying it. ?

If I have appeared anxious in my oral testimony as well as this written testimony, it is because I know that in the time it takes you to read this:

there will be over 1,000 divorces in the United States affecting over 3,000 children;

there will be at least two homicides as a result of the activities surrounding these people;

there will be four more prison inmates;

and we have just gotten 150 more people on our welfare rolls;

<40 Alaskans were divorced today!>
JOINT CUSTODY IS THE ONLY LOGICAL AND MORALLY ACCEPTABLE ALTERNATIVE TO A HAPPY INTACT HOME FOR CHILDREN OF DIVORCE. PARENTS DIVORCE EACH OTHER, CHILDREN NEVER DIVORCE THEIR PARENTS.

Enclosure: California Report

Carbon Copies sent to the following:

Governor Jay Hammond
Representative Rogers
Representative Gardiner
Representative Meekins
Senator Parr
Mr. Mark Lewis, Chicago, Illinois
Mr. Vern Lee, Fairbanks, Alaska
Mr. Wayne Ross, Esquire, Anchorage, Alaska
Mr. Bill Riech, Sitka, Alaska
Mr. John Reese, Esquire, Anchorage, Alaska
United Fathers Organization, Santa Ana, California
M.E.N. International, Wilmington, Delaware
Mr. Max Gruenberg, Esquire, Anchorage, Alaska

Respectfully Submitted:

RUDY JOHNSON

INUICH IKAYUQTAAT SUTIGULLIQAA PITQURATIGUN
ALASKA LEGAL SERVICES CORPORATION
P. O. BOX 309
BARROW, ALASKA 99723
907-852-2311

URGENT
 PLEASE RESPOND BY _____
 NO REPLY NECESSARY

TO: House HESS Committee

DATE: November 30, 1981

SUBJECT: Testimony on HB 210

MESSAGE

Please find enclosed written
testimony on HB 210 from:

1. Linda Wingenbach
2. John Holmes

Thank you for your consideration
of these comments.

REPLY

SENDER: SEND WHITE AND PINK COPIES

FORM NO. 100-100 (REVISED 10-1-80) U.S. GOVERNMENT PRINTING OFFICE: 1980 O-211-100

TESTIMONY BEFORE THE HOUSE OF REPRESENTATIVES'
COMMITTEE ON HEALTH, EDUCATION & SOCIAL SERVICES
HOUSE BILL NO. 210

My name is Linda Wingenbach. I am an attorney with Alaska Legal Services Corporation in Barrow, Alaska. I have been in Barrow for five months. Prior to that, for a period of two years I was in private practice in Portland, Oregon, and during my last year of law school I worked as an intern for the Northwestern Legal Clinic in Portland. Oregon is a state that has a joint custody statute.

I favor joint custody, but I feel there are some problems with this specific bill.

- I. §2 of the bill (page 1, subsection b of AS 09.55.205) reads: "An appointment of a guardian ad litem for a child shall be made under AS 09.65.130." The current AS 09.55.205 provides discretion in the appointment and reads, "Any appointment of a guardian ad litem for a child shall be made under AS 09.65.130." I believe this could be a typographical error in the bill, rather than the intent of this committee. But, as you can see, this particular error drastically changes the meaning of this provision. HB 210, as it reads now, would require a guardian ad litem to be appointed in all cases where an order is made on custody and visitation--that is, all divorce or dissolution cases where children are involved, whether or not custody and/or visitation is disputed.

If this is not a typographical error, then I wish to go on record opposing the unnecessary appointment of guardians ad litem in cases where custody, support, and/or visitation is not disputed. I agree with Master Francis Stevens' oral testimony on this point. In fact,

AS 09.65.130 provides the needed discretion:

- "(a) The court may, . . . upon its own motion, appoint an attorney to represent the minor with respect to his custody, support, and visitation. . . .
- (c) Instead of, or in addition to, appointment of an attorney under (a) of this section, the court may, . . . upon its own motion, appoint an attorney or other person to serve as guardian ad litem to represent the best interests of a minor in any legal proceedings involving his welfare."

Therefore, as written, HB 210 conflicts with the provisions of AS 09.65.130, by removing the discretion of the court in orders on custody and visitation. At the very least, the bill should make these two statutes consistent.

Further, the Alaska Supreme Court believes that the power to appoint guardians ad litem should remain discretionary. In dicta, the Court said: ". . . There will be many custody cases in which a guardian will not be needed, and in such cases neither the statute, the court rules, nor our decisions compel the court to waste its time and money, as well as that of the parties and counsel, in employing one." Veazey v. Veazey, 560 P2d 382, 385 (1977). AS 09.65.130 provides payment of the guardian ad litem from assets held jointly by the parents. It is unfair, then, when parents agree to custody and visitation to require them to pay for an unnecessary appointment of a guardian ad litem.

II. §2 of the bill (page 2, AS 09.55.205(c)(6)) permits the court, in determining the best interests of the child to consider, "the desirability of offering the child a variety of life experiences." This particular consideration could work to the disadvantage of rural parents, especially if the custody decision is to be made by an urban judge. Many people persevere in the belief that "variety of life experiences"

can only be obtained in an urban setting. Therefore, when there is a conflict between a custodian in an urban setting and one in a rural setting, the rural parent would be placed at a disadvantage before an urban judge.

A variety of life experiences has not been defined and is so vague and ambiguous as to encourage individual bias in interpretation.

AS 09.55.205(c)(6) of this bill also seems to conflict with subsection (d) of the same bill wherein "the court may not consider the . . . income, social or cultural environment, . . . of either parent. . . ." Where would "variety of life experiences" come in except due to the "income, social or cultural environment" of a parent?

III. §3 of the bill (page 3, AS 25.20.060) allows the court to settle disputes over the custody of children, based on a child's best interest. The court is specifically instructed to consider the factors enumerated in AS 09.55.205(c). Besides my objections to AS 09.55.205(c)(6), I feel this section should also specifically prohibit the court from considering those factors enumerated in AS 09.55.205(d). Since 25.20.060 concerns the determination of custody of children, both the factors and the prohibitions in AS 09.55.205 should apply. By only specifying subsection (c), the bill suggests that the court may consider the otherwise prohibited factors.

IV. §4 of the bill (page 3, AS 25.20.070) creates a rebuttable presumption that shared custody is in the best interest of the child. I agree with Master Francis Stevens' and Attorney John Reese's testimony that shared or joint custody is an alternative to be considered in all cases, equally with custody in a single parent. Although shared custody is preferable to sole parent custody, raising it to the level of a

rebuttable presumption is unnecessary and can create additional problems for the divorced parents they may not be prepared to handle. The attorney, Timothy Lynch, felt that if joint custody were not made a rebuttable presumption, this bill would completely lose its meaning. That, obviously, is no reason to make shared custody a rebuttable presumption. If it is decided the whole bill is worthless, that decision should be made. If the substance of a bill is lost, the bill should be eliminated--that is, a poor provision should not be retained simply because the bill would otherwise be meaningless. That is what these hearings and written testimony is all about.

Besides, statutorily promoting shared custody is worthwhile. However, shared custody should not be a rebuttable presumption because it brings an improper bias into the court. Shared custody is not always in the best interest of the child. It should be encouraged, yes, but in many cases, as Mr. Lynch and Mr. Reese pointed out, many couples who are divorcing cannot sort out their feelings sufficiently to agree to a joint custody arrangement. And if couples cannot agree to the shared custody arrangement, shared custody will not work because, as Ms. Louster testified, the ability to communicate with each other and come to mutually agreeable decisions concerning the welfare of the child is essential in a joint custody situation. Alaska cannot be compared with California, Oregon, or other lower 48 states where the state court systems provide family counselors to help couples come to agreement on shared custody and offer continuing aid. The majority of the state courts in Alaska cannot offer this kind of help.

With shared custody a rebuttable presumption, parents are pushed into that alternative. It becomes an easy tool to be used by one party or the other in negotiating other aspects of the divorce. It will tend

to delay the dissolution of a marriage, conflicting with the intent of the current statutes providing a speedy resolution to the petition, the delay and intervening bargaining being possibly detrimental to the child. The court should favor agreements between parents concerning the custody of children but should not presume that all caring parents can come up with a joint custody agreement at the time of the divorce. In some cases, the parents may even agree that one or the other of them should have sole custody.

V. §4 of this bill (page 3, AS 25.20.090(d)) allows a court to "require the parents to submit to the court a proposal for award of shared custody." This is objectionable for the same reasons as stated above. Where two people cannot come to an agreement by themselves, the court cannot force them to, particular where the interests of the child are at stake. And unless the parents agree to share custody, the proposal would not be workable. The court should not be able to force negotiations between possibly battling parents under circumstances the court is not fully apprised of. Even if this bill is passed with the above rebuttable presumption intact, this section should be eliminated. If this section is also retained, the court should be required to give the parties an "out" by permitting them to show that such a proposal is inappropriate. If the intent of this section is mediation between parents, that is handled under the proposed AS 25.20.080, which permits the court to appoint, or be, a third party mediator.

VI. §4 of the bill (page 4, AS 25.20.120(4-5)) permits a court, in determining shared custody, to consider "(4) the advantages of maintaining the child in the same community as compared with the potential advantages of a new community; (5) the advantages of providing a varied life experience for the child." This provision is objectionable

for the same reasons as my part II, above. Alaska is a state of vast land area. Many of its communities can only be reached by air or water. In many cases, divorced parents live far away from each other or, at least, in areas where it would be difficult to travel from one to the other. Again, the "variety of life experiences" factor would work to the disadvantage of the parent in the rural community, especially if it is one of the many isolated communities in this state, because of inherent biases against isolated villages. It is not possible, due to the size of Alaska and the distances between communities and the lack of urban centers, to compare this state with any other state in the "lower 48". These factors again conflict with AS 09.55.205(d), above, which prohibits the court from considering a parent's income, social or cultural environment. Those prohibitions should apply here because the determination of shared custody is a determination of custody and therefore the same criteria should apply.

VII. §4 of the bill (page 5, AS 25.20.150) allows the court to award custody to a nonparent if it "finds that an award of custody to a parent would be detrimental to the best interests of the child." This criterion does not give sufficient import to the parent-child relationship, which has Constitutional protection. See, for example, Meyer v. Nebraska, 262 US 390 (1923); Pierce v. Society of Sisters, 268 US 510 (1925); Skinner v. Oklahoma, 316 US 535 (1942); May v. Anderson, 345 US 528 (1953); Stanley v. Illinois, 405 US 645 (1972); Wisconsin v. Yoder, 406 US 205 (1972); Quilloin v. Walcott, 434 US 246 (1958). The Alaska Supreme Court has said:

"We agree that the right of parents to the care, custody and control of their children is an important and substantial right protected by, although not specifically enumerated in, both the United

States and Alaska Constitutions." Matter of S.D., Jr., 549 P2d 1190, 1200 (Alaska, 1976).

The Alaska Supreme Court, in Turner v. Pannick, 540 P2d 1051 (1975), specifically found, contrary to Mr. Lynch's testimony, that "detrimental to the best interest" is the wrong test to apply. In fact, the Supreme Court reversed the order of the Superior Court because the latter had applied the "best interest" test. The court found that custody in the parent is clearly "preferable and only to be refused where clearly detrimental to the child." 540 P2d at 1055. The Court held that "If 'best interest' of the child is the only criterion, then a judge may take children from their parents because the judge personally disagrees with the parents' limited means." 540 P2d at 1054. Therefore, "Unless the superior court determines that a parent is unfit, has abandoned the child, or that the welfare of the child requires that a non-parent receive custody, the parent must be awarded custody." 540 P2d at 1055.

It is difficult to distinguish between the test "best interest" and "detrimental to the welfare." The Alaska Supreme Court explained in Veazey v. Veazey, 560 P2d 382, 286 (1977), that "Between parents, custody is to be awarded according to the best interests of the child. . . . Between parent and a non-parent, the parent is to be preferred unless placing custody with him or her would be detrimental to the child." Under the "Child in Need of Aid" statutes, the State has a set of certain minimum standards for parenting and when parents fall below that standard, the State can step in and make the child a ward of the court. That is, the State must show that the parental care is detrimental to the welfare of the child or the parents are unfit. The "detrimental to the best interests" criterion can be above that standard and interjects a comparative standard. That is, who can provide the most for the child. The "best interest test does not require a determination that the parent

creates harm or a danger to the child's welfare. Therefore, it is an improper test to use to determine custody as between a parent and a non-parent. As in Turner v. Pannick, supra, the test should be "detrimental to the welfare of the child, abandonment of the child, or parental unfitness."

Thank you for considering my statements.

Linda M. Wingenbach
Attorney-at-Law
ALASKA LEGAL SERVICES CORPORATION

John M. Holmes,
Attorney at Law
P.O. Box 309
Barrow, Alaska 99723
Tel: 852-2311

TESTIMONY BEFORE THE HOUSE OF REPRESENTATIVES'
COMMITTEE ON HEALTH, EDUCATION & SOCIAL SERVICES

HOUSE BILL NO. 210

November 29, 1981

My name is John M. Holmes. I am employed as a staff attorney with the Alaska Legal Services Corporation at Barrow, Alaska. I worked in the Fairbanks ALSC office from December, 1977 until August, 1978, and have worked in the Barrow ALSC office since August, 1978. A significant number of my cases involve issues of divorce and child custody.

I am concerned about two aspects of the bill which may not be receiving the focus which they deserve. This testimony will be limited to the following two issues: 1) The erosion of the parent's right to custody, as against a non-parent [AS 25.20.130,150] and 2) The factors enumerated in the proposed best interests test [AS 9.55.205(c); 25.20.120]

I. THE EROSION OF THE PARENT'S RIGHT TO CUSTODY, AS AGAINST A NON-PARENT [25.20.130,150]

This bill would give non-parents nearly equal priority with parents in competing for custody of the child. It thereby erodes the constitutional right of the parent to the care, custody, and control of the child. It also directly contradicts the Alaska Supreme Court's statement in Turner v. Pannick, Alaska, 540 P.2d 1051 (1975), that a non-parent cannot be awarded custody absent a finding of unfitness or abandonment on the part of the parent, or that the welfare of the child requires it. The Court clearly rejected the best interests test, which it distinguished as follows:

"In order to satisfy the "welfare of the child" requirement, the non-parent must show that it clearly would be detrimental to the child to permit the parent to have custody.

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On the other hand, under the "best interests" test, the court is free to consider a number of factors including the moral fitness of the two parties; the home environments offered by the parties; the emotional ties to the child by the parties; the age, sex or health of the child; the desirability of continuing an existing child-third party relationship; and the preference of the child."
(P. 1054, supra)

The "welfare of the child" test is therefore a totally independent test, and one which serves to protect the right of the parent to custody of the child. There may be instances where a parent is not unfit and yet is also in no position to exercise custody; this could happen if the parent were a single parent who had severe medical problems. Under such circumstances a court would not be inclined to adjudge a loving parent 'unfit'; however it might grant custody to a non-parent on the ground that the welfare of the child required it. The parent would still be able to retain priority to exercise custody should his or her condition improve.

The parent's right to custody can be defeated only by showing unfitness, abandonment, or that the welfare of the child requires other placement. Otherwise it is unpersuasive that the child might enjoy superior advantages elsewhere, might be happier elsewhere, or might prefer to live elsewhere.

The proposed References On Award set out in AS 25.20.130(4) and the proposed Award Of Custody To NonParent set out in AS 25.20.150 are dangerous to the constitutionally protected rights of parents to raise their own children. The bill would put the parent on the defensive

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against any third party who could demonstrate superior advantages to those the parent could offer. It would greatly prejudice the rights of rural parents, whose own valuable lifestyle could be ignored as a third party painted compelling images of the advantages of urban life. The bill presently violates its own Intent section, § 1, which promotes the historic and continuing public interest in the preservation of the nuclear family.

II. THE FACTORS ENUMERATED IN THE PROPOSED BEST INTERESTS TEST
[AS 9.55.205(c); 25.20.120]

Several of the factors listed in 9.55.205(c) and 25.20.120 could be prejudicial to the rights of rural parents. Both list "the desirability of offering the child a variety of life experiences". AS 25.20.120 also lists "the advantages of maintaining the child in the same community as compared with the potential advantages of a new community".

These factors could be easily misapplied, on the assumption that an urban lifestyle would be more 'varied' and offer more 'advantages'. In the midst of a custody case, an urban parent would point to the variety of formal educational possibilities and to other activities available in urban areas. A court could then overlook the comparable advantages of rural life.


AS 9.55.205(c)(6) and AS 25.20.120(4)(5) should be deleted from the bill. Subparagraph (6) diminishes the protection given to rural parents in AS 9.55.205(d).

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In summary, it is my request that the bill be redrafted so as to protect the constitutional right of parents to the care, custody, and control of their children. The Alaska Supreme Court provides guidance in Turner v. Pannick, Alaska, 540 P2d 1051 (1975). Factors relating to custody determinations between parents should not be drafted so as to favor urban placements over rural placements.

Thank you for your consideration of these comments. Please contact me at any time if you have any questions regarding this testimony.

Sincerely Yours,


John M. Holmes,
Attorney at Law

P.O. Box 309
Barrow, Alaska 99723
Tel: 852-2311

me 193
April 13, 1981

In Brief,

ALASKA INTRODUCES CUSTODY 'SHARING' LEGISLATION

CONCEPTS WORTHY OF STUDY, EMULATION

Alaska House Bill No 210, introduced by Representative Brian Rogers of Fairbanks and Representative Terry Gardiner, former House Speaker of Ketchikan is based primarily on the initial California example but improves with many worthy priorities and concepts.

(A follower of our efforts writes, "If it passes then Alaska can take its place along side those other states who are actually giving some consideration to the best interests of the children.")

In abbreviated form, following are the major provisions, which have yet to be evaluated by the Alaska legislature.

LEGISLATIVE
INTENT

"...it is generally desirable to assure a minor child frequent and continuing contact with both parents after the parents have separated..."

EQUALITY

"...it is the intent of the legislature that both parents have the opportunity to guide and nurture their child and to meet the needs of the child on an equal footing beyond the consideration of support or actual custody."

ENCOURAGE
OUTSIDE
COURT

"...it is in the best interests of a child to encourage parents to implement their own child care agreements outside of the court setting."

BEST
INTERESTS

"In determining the best interests of the child the court shall consider

- (1) the physical, emotional, mental, religious, and social needs of the child;
- (2) the capability and desires of each parent to meet these needs;
- (3) the child's preference if...of sufficient age...
- (4) the love and affection existing between the child and each parent;
- (5) the length of time the child has lived in a stable... environment...
- ? (6) the desirability of offering the child a variety of life experiences;
- (7) the desire and ability of each parent to allow...relationships... (with) other parent."

NO NOS
child injury

"...the court may not consider the conduct, marital status, income, social or cultural environment, or life style of either parent unless...may cause...injury..."

NEITHER
PARENT
ENTITLED

"Neither parent, regardless of the question of the child's legitimacy, is entitled to preference in the awarding of custody."

PRESUMPTION
'SHARED'
IS BEST

"...there is a rebuttable presumption that shared custody is in the best interest of the child."

MEDIATION

"The court...may request the parties to participate in pre-trial mediation..."

EITHER
APPLIES

"(a) The court may award shared custody
(1) on application of one or both parents;
(2) when the parents have agreed to an award of shared custody; and
(3) on an agreement for shared custody in open court."

COURT
AGREEMENT

REASONS IF
DECLINED

"If the court declines...shared custody, the court shall enter...its reasons..."

MODIFICATIONS

"An award...may be modified to...shared custody..."

REQUIRE
SHARING
PROPOSAL

"The court may require the parents to submit...a proposal for...shared custody."

REASONS

"If a parent opposes the modification or termination of the award of custody, the court shall enter...its reasons..."

CHILD
PREFERENCE

"Court shall give due weight to the preference of the child."

COURT
CONSIDER

"...the court shall consider
(1) the needs of the child
(2) ...stability of the home environment..."
(3) ...quality and the continuity of...education..."
(4) ...advantages of maintaining the child in the same community as compared with...a new community;"
(5) ...advantages of...a varied life experience..."
(6) ...optimal time for child...with each parent considering
(A) ...time spent
(B) ...proximity of each parent...
(C) ...feasibility of travel...
(D) ...needs unique to the child...better met by one parent
(E) ...parent...more likely to encourage...contact...
(7) ...findings...of a...mediator..."

PRIORITY
PREFERENCE

"Custody should be awarded in...following...preference...
(1) to both parents...shared...
(2) to...parent...more likely to allow...frequent and continuing contact..."
(3) to neither...but...person...living in...stable environment;
(4) to...person determined...able..."

TEMPORARY
CUSTODY

"...to greatest degree practical, equal access to both parents during the time...court considers an award of custody..."

RECORDS
ACCESS

"...parent...not...granted custody may have access to...records..

DEFINITION

"... 'shared custody' means an award of custody...to both parents and includes...physical custody which assures...contact with each parent."

Special note. Alaska proposal does not interject the mischievous subterfuge of merely joint legal custody, as compared with the genuine sharing of joint physical custody. ?

The Alaska proposal is good, BUT:

The Alaska proposal fails to imply that the court could decree shared custody and thereupon the parents must create a plan for sharing.

The "Seven items the court shall consider" may be ill advised within a statute. Why?:

We are generally hesitant about the questionable constitutionality of itemizations that imply qualifications to justify joint custody.

While worthy of consideration with a mediator and by each parent, as an integral part of the law considerations dealing with "home environment," "community," "proximity," "travel," etc, may be unconstitutional intrusions by the court into issues best left to the parents...especially since the law has no right to impose such qualifications upon conventionally married parents as a qualification for becoming and continuing as a parent.

Important: Also, this inclusion sets the stage, with itemization, of issues wherein an uncooperative parent could thwart and thereby defeat joint custody for the child and for the otherwise cooperative alternate parent by moving away, accusing the other's environment, objecting to travel, etc.

THE
JOINT
CUSTODY
ASSOCIATION



10506 Wilshire Avenue
Los Angeles, California 90024
(213) 475-5352
James A. Cook
President

A national Association concerned with
the well-being of children and related issues of divorce
including mediation, arbitration, dispute resolution
and legal and counseling practices

THE
JOINT
CUSTODY
ASSOCIATION



10606 Wilkins Avenue
Los Angeles, California 90024
(213) 475-5352
James A. Cook
President

A Nonprofit Association concerned with
the joint custody of children and related issues of divorce
including research, information dissemination
and legal and counseling practices

RE: Alaska House Bill 210

I urge your approval of House Bill 210 which deals with joint custody access to both parents by the children of divorce. Minor amendments are proposed in my concluding two paragraphs, but the overwhelming tenor of H 210 is one of the finest, most sensitive and most humane of all similar joint custody legislative proposals now being studied in the various state legislatures.

Enclosed is a selection of applicable items which I believe will not only aid your legislative evaluation of the topic but may also be increasingly valuable in your conversations with constituents about joint custody. If your constituents raise questions, feel free to duplicate and convey the enclosures to them.

Among the materials, on the third page of the paper marked "Alaska", I question the extensive list of prerequisites which a court might interpret as needing to be ideal before joint custody will be decreed and as a "red flag" for an opponent-parent to assure that some of these issues are not satisfactorily rectified. Although I think each prerequisite is an excellent measure for counselors and parents to consider, as a statute and a legal guideline I surmise they might be decreed unconstitutional.

Lastly, let me mention an item we are all having 'second thoughts' about. That's the old benchmark that hasn't been thoroughly questioned of giving so much weight to the preference of the child. Thoughtful and observant psychiatrically-trained professionals are coming to the conclusion this gives too much impression of power to inexperienced and immature children, gives rise to potential future guilt for having decided for or against a particular parent, and contributes to parents 'catering' to a child in hopes of currying that child's particular approval of one of them exclusively. Hence, I urge you soft-pedal, or downgrade that particular proposal.

Regards,

James A. Cook

THE
JOINT
CUSTODY
ASSOCIATION



10606 Wilkins Avenue
Los Angeles, California 90024
(213) 475-5352

A Nonprofit Association concerned with
the joint custody of children and related issues of divorce,
including research, information dissemination
and legal and counseling practices.

"(Joint custody is) definitely the custody arrangement
of the future.

The practice of nearly always awarding custody of children
to the mother reflects negatively on women who aren't
awarded custody; the public automatically thinks they
are unfit to care for the children."

August 28, 1980

Ms Karen DeCrow
Past President, N.O.W., 1974-77

ABC News 7 West 66th Street New York, New York 10023 Telephone 212 887-4659

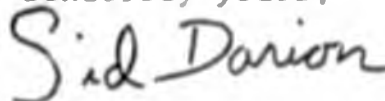
Sidney Darion
Manager Public Affairs

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Sincerely yours,



Sid Darion

Manager of Cultural Affairs

SD:al

DIRECTIONS

Presents

THE WISDOM OF SOLOMON: THE CHILDREN OF DIVORCE

**as broadcast over the
ABC TELEVISION NETWORK**

Sunday, October 4, 1981

1:00-1:30 E.D.T.

Executive Producer: Sid Darion

Correspondent: Herbert Kaplow

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ABC DIRECTIONS

THE WISDOM OF SOLOMON: THE CHILDREN OF DIVORCE

HERBERT KAPLOW:

Last year, the number of divorces in this country rose to more than a million. There were about 1,300,000 young children involved. Coincidentally, with this increasing phenomenon has been a growing interest in alternative ways of divorced parents dealing with their children. Perhaps, the major change under consideration is called joint custody, where the parents share custody of the children. It is an approach of considerable controversy, touching fundamental, legal and psychological issues, and it reaches finally, the basic question of what's best for those children caught between divorced parents. It is a matter, again, of the wisdom of Solomon, these children of divorce.

Good day, I'm Herbert Kaplow in San Francisco. Almost two years ago, California, with one of the highest rates in the country, passed a law providing for joint custody. We mean to see today how that's worked out here. Our guests are the Honorable Donald King, the domestic relations judge of the San Francisco superior court, and Ciji Ware, a writer and broadcast journalist, who has done extensive research on children and divorce, and she herself is a joint custody mother. The term, joint custody, is paralleled by the term, sole custody, and what's the difference, Mrs. Ware?

CIJI WARE:

Well, that is a good question, I think because joint custody means so many things to to various people. Its really one of those code words. You say joint custody and the people in favor of it, say, yeah right. And you say joint custody, and the people who oppose are totally opposed. And definitions I think are important. Judge King, we have to really see if he agrees, what joint custody means to me is an arrangement that says parents are forever, parents continue to be parents even though they're no longer spouses, and the time-sharing formula about who, how they're going to take care of these children, is framed around the needs of the children. Now, I suppose legally you can split it finer than that, but to me, that's the concept of joint custody, and maybe we should get a legal definition from Judge King.

JUDGE DONALD KING:

Well, I think one of the deficiencies in California law is that there is no specific definition. I believe that creates more problems really than if we had one.

(MORE)

JUDGE DONALD KING: (CONT)

A lot of parents think it means cutting the child right down the middle, and the child right down to the second, spends half the time with one parent, and half the time with other.

HERBERT KAPLOW:

And that's where you need Solomon?

CIJI WARE:

And that's not joint custody.

JUDGE DONALD KING:

That's not joint custody. What you're really, talking about is the fact that once the divorce is over, that there is still a family, and it's a family living in two locations instead of one. The joint or shared nature of it is that the child, or children, are really living with both parents ..spending time with both parents in both parents homes and that the parents are joining together making the decisions affecting the child.

HERBERT KAPLOW:

Judge King, am I right in saying we are coming from an environment where most often the children were awarded to the mother?

JUDGE DONALD KING:

Absolutely, and that still is the case today.

CIJI WARE:

And about 92%, I think, of all awards nationwide go to the mother. It's almost automatic.

HERBERT KAPLOW:

Well, let me ask you, why in California are you moving toward a different alternative?

JUDGE DONALD KING:

Well, we have to understand that in most divorces the parties reach their own agreements, and the reason why the percentage is so high is that for many people, the societal view still is that custody of the children goes to the mother, and that the father has something called rights of visitation. I think in California, there are more and more parents who are really sharing child-rearing responsibilities before the marriage breaks up, and want to continue that experience even though they're no longer married to each other.

CIJI WARE:

But I'll tell you, I'll tell you why I think it happened in California. And because I've been a joint custody parent for 8 years, I've sort of been through the wars on this issue. You know, people who aren't in California, think you know, we're falling off the edge of the earth. But in California, you have, as it is nationwide, more and more women in the work force. More and more, as Judge King says, people who are sharing responsibilities, sort of radical attempts at being parents together. But I think the main reason why it started to happen in California is that the old system wasn't working for the children. Because what was happening, was as the divorce statistics went up, and it especially went up in California after no-fault divorce, you were having children who were not only losing one parent, usually the father, they were losing two parents because of the economic situation their parents faced after the divorce, the mother, in 79% of the cases according to the 1980 statistics, 79% of mothers, divorced mothers had to work. So who was there for the children? Nobody, basically there's not childcare as a code in this county, so therefore the parents themselves and parents like me, two-working parents, we had to come up with some situation that made sense to our son, otherwise, who was gonna take care of him.

HERBERT KAPLOW:

Well, why should this work?

JUDGE DONALD KING:

I think the reason it should work is that the fact that people are no longer husband and wife does not mean they aren't still parents to this child or these children. And those responsibilities really have to be separated out.

(MORE)

JUDGE DONALD KING: (CONT)

The mistake I think that's been made historically is that somehow once the family is no longer a family, in terms of being husband and wife, they're really no longer a family as far as both being parents to the children. So I think it will work better, because it means that both parents still remain parents to their children and what we find is more and more parents want this. They don't want the system where one becomes a visitor.

HERBERT KAPLOW:

I think we ought to try to clear out a little bit of the legal underbrush here. The Statute in California, I understand actually you sort of have three companion statutes and you check me if I'm wrong no default divorce, which I guess you passed here in 1970.

JUDGE DONALD KING:

That's correct.

HERBERT KAPLOW:

And then in 1979, you had this joint custody statute and then after that, something called mediation. I don't wanna get bogged down in this, Judge King, but they're related and they're important...and in 30 seconds...

JUDGE DONALD KING:

Okay

HERBERT KAPLOW:

Tell me what they are?

JUDGE DONALD KING:

Well, the reason why the no-default divorce is related to the other two is because if you have fault, it's based on their being an innocent party and a guilty party.

HERBERT KAPLOW:

Uh, huh.

JUDGE DONALD KING:

And that gets all tied up into who should have custody of the child if one person is supposedly guilty and one is innocent. The joint custody statute was important; it was really a modification of our previous statute which provided for sole custody.

(MORE)

JUDGE DONALD KING: (CONT)

And it was important not only because of its aspect of saying that it was legally appropriate to have parents be joint custody parents, but also because they had a very strong declaration that the public policy of the state of California is that when a relationship breaks up, there still is a right of the child to frequent and continuing access to both parents. The mandatory mediation statute which just became effective at the beginning of this year, is revolutionary. It's the first in the country. I think other states will be adopting it very rapidly, and it is an assist to those who want joint custody as well as to those who have sole custody, in helping with a trained and experienced family counselor. Helping parents work out their disputes over custody and visitation in a constructive way, where they agree, where they are the ones who make the decision by agreement as opposed to using the old adversary system, where they get into court, and attack each other, and solve the problem, and try and solve the problem that way.

HERBERT KAPLOW:

Now let's look at the practicalities of this. I understand you have a couple of different kinds of joint custody. You have what's called legal custody, and then you have physical custody.

CIJI WARE:

And then you have joint legal and physical. So basically there's three kinds of custody.

HERBERT KAPLOW:

I think I'm gonna be sorry I asked..

CIJI WARE:

That go through the court.

HERBERT KAPLOW:

But certainly legal custody is whereas the law gives you your certain rights, and, and the physical custody is where the child lives from time to time with each parent?

CIJI WARE

Well, that's a critical thing, though. I mean we can't just gloss over it, because in America, possession is 9/10's of the law, and you can have joint legal custody, but if you don't have parents that are learning to cooperate as parents, which is tricky. I mean here you're severing all your other relationships, financial, legal and everything, and yet, you're being asked to cement this one relationship as parent; that's tricky. But joint custody to me means that you are going to share the decision-making on things that have to be done about the children's schools, religious training and all of that. And also, if possible, if the geography makes it possible, you are also, going to have that child spend meaningful time. It doesn't mean to the minute, as Judge King said, but meaningful time with both parents. Now accomplishing that is not so easy when people are angry at each other, in the real world, and so what was critical in California, which probably will be a model hopefully, is that it's saying that the adversary situation is maybe not the best arena in which to help parents come to the fact that they continue to be parents. So what is needed is a neutral third party that, in a sense, represents the child in the family, helping these parents, you know, get through that, and getting down to the nitty gritty of how do we share these children.

JUDGE DONALD KING:

Legal versus physical custody of what that means it's not spelled out clearly in the law.

CIJI WARE:

No.

JUDGE DONALD KING:

There's no definition at the present time, and I think, for practical purposes, legal custody refers to the decision-making factors affecting the child both in terms of health care, education, religious training, perhaps, that sort of thing...whereas, physical custody really means more of the..

CIJI WARE:

The time-sharing.

JUDGE DONALD KING:

The time allotment of the child with each parent.

HERBERT KAPLOW:

But the question arises then, are you bumping the child back and forth?

CIJI WARE:

The ping pong syndrome, you know..

HERBERT KAPLOW:

I didn't know I was that close.

CIJI WARE:

You were. The ping pong syndrome. It's interesting now. You have to understand, eight years ago, when my former husband and I decided that we felt that...

JUDGE DONALD KING:

They were real pioneers.

CIJI WARE:

Well, we didn't know what we were doing. We didn't know, number one, we were doing joint custody. People thought we were crazy, and they raised this issue over and over. Your child won't know who, to whom he belongs. But the answer to that really is that the child doesn't belong, the child has really, what I think is a civil right of access to both parents. So that the ping pong syndrome is a problem if the time-sharing arrangement isn't appropriate to a child's age and stage. I've been asked this for eight years, and my child started in this when he was around two. Well, at that point, whatever sharing arrangement we had, wouldn't have been appropriate for when he's ten now.

(MORE)

CIJI WARE: (CONT)

When he was two for instance, at that time, he was sort of home-based with me, but he saw his father two or three times a week, and he slept at my house every night. That was a fairly appropriate plan for a two year old. Now that he's a 10 years old, he spends Monday and Tuesday with me, Wednesday and Thursday with his dad and we alternate weekends so that we have chunks of five days. Now that sounds like ping pong, but if you ask my child, you know, where do you live, he says I live with my mom and my dad. And if you say, is it complicated, he'll say, you know, it's not confusing, it is complicated, but it's not confusing.

HERBERT KAPLOW:

Well, is it better?

CIJI WARE:

In the real world....is it better that a child is amputated from one of his parents. I don't think that's better. In the best of all possible worlds, for him, it would have been better if we'd stayed together. We didn't do that. So what are the alternatives? The alternatives you know, I really feel that joint custody parents have come to grips with the reality and for the children, they would rather put up with some of the inconvenience of losing both bags and soccer balls in order to have contact with both parents. And it is a trade off. It's a trade off we were willing to make.

JUDGE DONALD KING:

Well, I think also, that you have to look in these cases, not only at the parents, but at the children. We don't have much information about this. There's been very little research done on it. What little research has been done indicates that you can have joint custody parents and not have joint custody children. That there are some children, probably a minority in numbers...who can't make the adjustment of living in two homes. They need one home, one bedroom, one set of toys and so on...not that they don't love their other parent, they just can't take that kind of movement. We know that this is more of a problem with really young children, and we also know when you get to teenagers, especially upper teenagers...

CIJI WARE:

It goes the other way.

JUDGE DONALD KING:

They probably don't wanna spend any time with either parent. They just wanna be with their friends. So you have to look at the total situation. My feeling is that even if it only works for a short period of time, a two or three year period, it's beneficial for the child because that time frame, following the break-up of the marriage, is the most dramatic to the children, and the time during which they'll either recover from the trauma of their parents or they won't.

HERBERT KAPLOW:

Judge, did you not, as a judge have the power before this was enacted a couple of years ago, here in California to in effect, award joint custody?

JUDGE KING:

It depended on whether or not you were a strict constructionist or not. I believe that I did not because the statute only spoke in terms of sole custody in California. There had been a number of efforts to add to joint custody before and the legislature had constantly turned them down. There were some judges in the state who felt that since the statute did not preclude joint custody, that they could award joint custody. But the enactment of the statute was important as I said, for two reasons, not just because it specifically says, you can have joint custody, but also because it stated this public policy of the child's right, and I think in our society today probably the children are the most underrepresented of any segment of society. And now we have a statute which gives them a right of access to both parents.

HERBERT KAPLOW:

Well, this seems to pivot on the question of the parent getting over their initial bitterness to each other and becoming "reasonable", which is the same standard you could set up for the sole custody phenomena which prevailed up to now. I mean if you can be reasonable now, why couldn't you be reasonable then and make it work? Why do you need this?

CIJI WARE:

Well, I think you need it because I think there has been an assumption that children belong to one parent or the other. And that the adversary system has pitted parents, one parent against the other, winners and losers.

HERBERT KAPLOW:

Well, I mean, in order to make this thing work, you have two people acting reasonable.

CIJI WARE:

Well, I don't agree with that completely. I think, first of all it's much, much better. I mean obviously it is much better if parents are going to cooperate but in...

JUDGE DONALD KING:

Also, there are a lot of parents at the time of the divorce who are acting reasonably. I mean, it's a myth to think they're all battling. There are a lot of people who just come to a conclusion their marriage is not working out, and they should go their own way.

CIJI WARE:

But I was just going to say for those who are not getting along, and in fact they don't like each other at all, which, you know, I think it's often also certainly prevalent. If they were intervened at a point, instead of having and getting into the legal adversary system, and having everything escalate, and you realize I might lose my child, and the whole ball game goes up about 29 degrees, if it was the law and the premises, that alright, you're both going to survive this. The child does have a right to both of you, if that were the premises that we were starting out with, I think it would cool down a lot of the unreasonableness. But even if parents are having a hard time, and many do with the separation and loss and a feeling of grief and failure because the marriage failed, that they can still perceive as parents-in-common, and separate out that role as parents, and still perhaps not even like each other.

HERBERT KAPLOW:

I didn't know you couldn't do that before you had this legislation.

JUDGE DONALD KING:

Herb, the other thing the other thing, though, that you have to understand is that at the moment of divorce people are in a terrible emotional state. Some people say they're the criminal term of diminished capacity really applies to people who are at the time of of the breakup and their whole life, perhaps, they feel, is going.

JUDGE DONALD KING:

And they aren't thinking rationally, and they aren't dealing with things rationally, and there's a lot of upset. The legal process with its adversary system, tends to accentuate this upset, and what we're trying to do with the new law, especially the mandatory mediation law where we require that we will not allow them to come into a court, with a hearing on custody of visitation until they have gone through a mediation process and with the help of a family counselor attempted to come up with their own answer... □

HERBERT KAPLOW:

In fact, a cooling-off period...

JUDGE DONALD KING:

With respect to the child. Well...

HERBERT KAPLOW:

With a mediator.

JUDGE DONALD KING:

It gets people to understand they don't have to fight. A lot of people believe that they have to fight with the other parent. That that's what's natural. And they can fight over other things, but what we try to do through this process is to get them to understand that they're still gonna be parents when the fight is over.

HERBERT KAPLOW:

As I understand it, the basic questions that have been raised about this-and as you pointed out, really the verdict is not in on the success or failure of joint custody one, is that the laws are unnecessary, that you judges already have the power, in effect, to order joint custody.

JUDGE DONALD KING:

I don't agree with that at all.

HERBERT KAPLOW:

Okay.

CIJI WARE:

No. And I've been around the country on this.

HERBERT KAPLOW:

Also, that it encourages judges to take this as an easy way out.

JUDGE DONALD KING:

I don't think that's accurate either, because you see what we should be doing, Herb, the judges have nothing to do with this, or should have nothing to do with it. We have in my court in San Francisco, in the first eight months of 1965, we've had one contested hearing on custody of visitation. All the rest have been resolved by helping the parents reach agreements as to what's best for their children.

HERBERT KAPLOW:

What about as a way out.

JUDGE DONALD KING:

And that's what we should be doing.

HERBERT KAPLOW:

Parent. Maybe it's a cop-out for somebody who would like to get rid of their child half the time.

CIJI WARE:

Well, that may be true, but I really think that's the minority. I think most parents are caring parents. Most parents want to do the right thing. Most parents are terribly guilty and feel they perhaps have failed on their religious beliefs, their moral beliefs. I think most parents are in a state of real pain when they go through this. I certainly remember how I felt about it.

(MORE)

CIJI WARE: (CONT)

But the law was necessary, I think, to state the principles that you continue to be parents even though you're not going to be spouses. But what happens is that if you have a neutral third person who shows you what the options are a lot of people don't even realize that they could cooperate on this level, that it wasn't a kind of incest that, you know, there is a sort of sense of incest if former spouses talk to each other. And if there is an option, you don't even know that.

JUDGE DONALD KING:

I think also this is an important point. Because at the time of the divorce process, they're in an adversary system except for this aspect of it, and they have to understand that they can separate that out because as there are future battles, they still have to separate those aspects related to children to avoid entangling them in their conflict over other matters.

HERBERT KAPLOW:

It is alleged by some critics of joint custody that in effect it confuses the child, forces the child to endure split loyalties. That it causes an atmosphere of instability and inconstancy.

JUDGE DONALD KING:

We have insufficient information to know whether that's true in what number of children. In my mind, there's no question there are some children where that will be true. But with the large majority it simply will not. If anything, it helps them with their loyalty conflicts, because they don't have to feel that they're being traitors to one parent if they enjoy their time with the other parent.

CIJI WARE:

Well, there is a key to this, I think. I don't think that joint custody alone is going to do it. I think, you know, just the fact that they're going to say, well, and congratulations Mr. and Mrs. King, you are now joint custodians. There has to be another element. And that is the element that both parents see it is in their child's interest, that they can soften the impact of the divorce by giving those children permission to love the other parent. Now that may be difficult at a time when you're angry. But if you can be shown that when you look down the long road, which we had to look at with a 2 year old, that the more you invest in a good relationship with the other parent as a partner in this business, the better the payoffs will be, not only for the child, heavens knows, down the road, but for even the former parents.

(MORE)

CIJI WARE: (CONT)

I mean, who needs to have misery and anger for 20 years?

JUDGE DONALD KING:

There are a lot of parents, under the old adversay system, who 5 years later, 10 years later, after the divorce, are still fighting the divorce. Whereas, in this system, what you're trying to do is get people to understand you can fight now over the things you have to fight about as part of the termination of your marriage.

CIJI WARE:

You can fight over money, you can fight over...

HERBERT KAPLOW:

You're...you're asking people to..to compartmentalize their minds in an extraordinary way.

JUDGE DONALD KING:

And there's no reason why it can't be done...

CIJI WARE:

And they can do it.

JUDGE DONALD KING:

We know it works, it's working in a highly successful way.

HERBERT KAPLOW:

Let me ask you this now... there are other institutions involved in this. I'd be curious to know, Judge King and Ms. Ware, other institutions in our neighborhood, in our society, that are concerned about the family.

(MORE)

HERBERT KAPLOW: (CONT)

What do the churches, for instance you touched on the religious and moral values of the parents who might feel that somehow they've violated them by divorce. How do they get into this? Or do they?

JUDGE DONALD KING:

Well, we find the church groups have been very supportive of this concept, even with churches that do not believe in divorce.

HERBERT KAPLOW:

The Catholic Church, you're talking about primarily.

JUDGE DONALD KING:

That's right. Once they recognize that the parties are going to go through a legal process that legally ends their marriage, they are very supportive of this process because it does keep the family together. Again, we're not divorcing the family. The legal relationship of the husband and wife has ended, but there's still a family there living in two locations, a mother and a father and a child who in some fashion is allocating his or her time with both parents. This maintains a family tie that is very beneficial for the children. And I think very beneficial to each parent. And our experience has been that the church groups are very supportive of this.

HERBERT KAPLOW:

Are they actually in the process somehow?

JUDGE DONALD KING:

In some of this mediation counseling, certainly some of it that is longer term than the court staff has abilities to handle. We do have agencies, community resources, many of them church-related, Catholic Social Service being one, who do assist us and provide some of this counseling.

HERBERT KAPLOW:

What do they do?

JUDGE DONALD KING:

They actually meet with the parents, they do much of what we do, except we...

CIJI WARE:

Divorce counseling, really, in some...

JUDGE DONALD KING:

Well, it's parenting, it's parent counseling more. How you as the parents of this child should relate to each other with regard to the matters affecting that child. Our court process in San Francisco, for example, we normally cannot see a family more than 5 or 6 times, simply because of the workload we have. If the problems of this family are such that perhaps they need to be working with a counselor for 8 or 10 or 15 visits, we need to use a community resource and some of the church-related resources to fulfill that need.

CIJI WARE:

I've served on commissions and committees with a lot of Catholic and Protestant and Jewish family service counselors and that kind of thing. But you were asking before about, you know, how does this relate to the success of what happens after they either get joint custody or they don't. And there was an interesting study that was done in the west district of Los Angeles, there was a judge who was fairly supportive of the concept of joint custody. And he tracked about 250 cases plus over 18 months, about 9 months before the joint custody statute went into effect and 9 months after. What they found was in 16 joint custody families, only 16% came back. In the awards for sole custody, 31%. It was almost twice. So that these decisions where the parents had come out with some sort of plan themselves, they could stick with it, they could live by it, it wasn't imposed on them, they had something to say as to how their family would be reorganized as a family.

JUDGE DONALD KING:

We found too, that if people make their own agreement, they work much harder to keep at it. It's rather absurd for somebody sitting in a black robe to tell 2 parents what's best for their children, when they know so...

CIJI WARE:

And who's going to drive the car pool.

JUDGE DONALD KING:

.. when they know so much more what's true. Now, to go back to your other question about the religious, I wanted to mention that the only meaningful study about joint custody and the effects of joint custody that's going on in the country today is in San Francisco and is sponsored by Jewish Family and Children Services. So the church groups are very interested in this.

HERBERT KAPLOW:

Any findings yet, tentative or otherwise?

JUDGE DONALD KING:

Yes, but it is too preliminary.

CIJI WARE:

Well, there were only 25 families in the first study, which is valid but not big.

JUDGE DONALD KING:

And at the moment, their study, which is just starting its third year, has only dealt with people like Ciji who were swimming upstream, in a sense. They have had shared custody for 6 to 8 to 9 years long before it was even thought of. We are now starting to refer some people to them who are interested in starting joint custody. And so they're now going to have an opportunity to compare people who didn't start with the same motivation and commitment toward it.

HERBERT KAPLOW:

Is there any evidence as to whether it's good for the children?

JUDGE DONALD KING:

The study that's being done by Dr. Susan Steinman with Jewish Family and Children Services would seem to indicate that it is beneficial. But it is too early to tell. From the feedback we get from most parents, they feel it is. We have to be sure the children feel the same way. But generally speaking, it appears to be. We really do need more data.

CIJI WARE:

You know, it is amazing how so much of the work has been done about parents, and very little about the children. And I realize, I was halfway through my book on joint custody, and I realized I had never talked to my son about how he felt in this very unusual way he was living. And it was great, because I said, you know, I sat him down and I said, would you mind, may I interview you? And he said okay. And I said what does it mean to be a joint custody kid? And he said, well, at my mom's house I sleep in the bottom bunk, at my dad's house I sleep in the top bunk. In my mom's house I brush with Aim toothpaste, at my Dad's I brush with Crest. Mom makes my sandwiches with whole wheat bread, Dad makes them with...

HERBERT KAPLOW:

Do you have any reservations about this?

CIJI WARE:

Well, I was scared when he said this. And I said, Jamie, isn't that confusing, ping pong, you know? He said, Mom, it's not confusing, it's complicated, but it's not confusing. So that in his mind, this was worth it, it was complicated, it required asking him, probably more than most kids, but he was willing to do it. And he's a happy kid. And I think...

HERBERT KAPLOW:

Can poor families go through this?...

JUDGE DONALD KING:

Yes.

HERBERT KAPLOW:

Is there any requirement for any sort of...

JUDGE DONALD KING:

No, it has nothing to do with that.

CIJI WARE:

No.

HERBERT KAPLOW:

Just let me ask you this, where else is this alternative seriously being considered or already may have been adopted?

JUDGE DONALD KING:

Well, a number of states have adopted it. Nevada just this year adopted it, in effect copied the California Statute.

HERBERT KAPLOW:

So the concept is being studied elsewhere, and there seems to be...

CIJI WARE:

About 13 states at the moment...

HERBERT KAPLOW:

...more and more interest being expressed in it.

JUDGE DONALD KING:

I firmly believe within 10 years almost every state in the country will have it as an option specified by statute.

HERBERT KAPLOW:

Thank you very much, both of you, for being with us today on Directions.

Memorandum

Alaska Court System

TO:

WILLIAM HITCHCOCK
Standing Master

Francis M. Stevens

DATE : MARCH 10, 1981

FROM:

FRANCIS M. STEVENS
Custody Investigator

SUBJECT: JOINT CUSTODY

I have reviewed House Bill 210, entitled "An Act Relating to Child Custody", and have a number of comments I would like to share with you. The initial observation would be taken from the recent publication, "Divorce, Child Custody, and Family," formulated by the committee on the family group to the advancement of psychiatry, where they have referred to joint custody and how it has been labeled "shared custody-divided custody-and alternating custody". They indicated the common element in all these terms is the child lives with each parent a substantial amount of time allowing for a more realistic, normal relationship with each parent. In this arrangement, each parent assumes equal responsibility for physical and psychological development of the child, and they share with each other equal responsibility for major decisions that affect the child.

The advantage of joint custody, if a satisfactory arrangement can be worked out, is that it is most likely to preserve a meaningful access to both parents, moreover, neither parent "loses" the child or becomes a visitor in the child's life.

The disadvantage of joint custody, even assuming that the parents are able to keep the child out of any residual battles between themselves, is that a child may continue to feel a sense of uncertainty and anxiety as he/she moves back and forth between two homes.

There is not a significant amount of data available to establish the effectiveness of joint custody as a primary method in divorce. There have been some small studies, and in over a short term, they have indicated that in the families studied, the joint custody has worked. The studies, however, indicate that there are certain conditions in these families; most of the divorced parents continue to live in the same neighborhood as their ex-spouses so the children have the same friends and the same schools regardless of which home they are in at any given time. It was also noted in the studies referred to that the parents have had counselling or psychotherapy prior to or well into the process of setting up the joint arrangements. It was also

and probably most important, each parent in the cases studied, expended a great deal of time and effort to make the plan work. In the cases studied where joint custody was given a positive review, it was noted that the actual amount of time spent in each home by the children did not have to be equal or balanced for them to feel positive about the plan, but what was important was the fact that they had access to both parents.

In response to the question, "Is joint custody the solution?" the answer has to be, "Not for every family". The answer depends on the wishes, motivations, and capacities of the parents and as the children get older, theirs as well. Specifically, the parents need to be moving to an emotionally completed divorce. They need to have a strong commitment to resolve their disagreements outside of court and/or have a back up arrangement for counselling to help them do so. While there are certain psychological advantages to the parents in the joint custody arrangement; that is, neither wins or loses the child. The same kind of arrangement could often be worked out informally in a sole custody situation, if the parents can, in fact, agree about the care of their children. The critical factor is the capacity for the parents to come to an agreement about the care of their children.

The concept of joint custody is not a solution for parents unable to come to an agreement. It definitely should not be imposed on a fighting couple as a way of compromising or resolving the dispute. Experiences show such arrangements simply cannot work. Joint custody, we believe, should be a goal; an end for divorcing parents to work toward, assuming that both of them can see it's value.

The legislation contemplated, starts with an assumption that shared custody or joint custody is the first order of priority in custodial plans.

In the experiences of this Custody Investigator, it should not be ranked as the preferential method of awarding custody. The method of awarding custody, used in this court for a number of years, has been what is best for the specific family situation.

On reviewing the Bill, I would expect passage of this piece of legislation could very well have a serious impact on the operation of the courts. In Anchorage alone, there are approximately 2,500 divorces a year. Currently, 10 percent of these cases come through the Custody Investigator's office as contested custody cases, and are handled through

MARCH 10, 1981

investigation/mediation and court presentation, either on a stipulated basis or in a contested matter for the final hearing. This Investigator would be very surprised if the impact, in terms of additional work load, on initial divorce filings were less than double with the consideration of shared custody being the preferable method. In addition, this Investigator would be very surprised if we were not to see a substantial number of filings for modification of decrees where sole custody existed, but where, because of the presumption, the non-custodial parent would file for equality in the divorce decree through the modification process.

FMS/lfs

Memorandum

Alaska Court System

RECEIVED

Office of the Presiding Judge
2nd Judicial District

TO: The Honorable Ralph E. Moody
Presiding Judge

DATE : March 19, 1981

FROM:  Honorable J. Justin Ripley
Superior Court Judge

SUBJECT: HB 210

At the request of Mr. Szal, my comments as to HB 210. Although it is difficult to quarrel with the stated intent of the legislation - to involve both divorcing parents in a continuous process of child rearing - I have grave concerns over the wisdom of HB 210.

In my 5-1/2 years on the bench, of which 18 months were devoted nearly full time to domestic relations matters, I have seen nothing to suggest that in the usual divorce/custody situations joint custody is appropriate or beneficial. I have approved joint custody on only a few occasions - approximately six times if memory serves - and in only two cases does it appear to have worked smoothly. Those two sets of parents were highly unusual for divorcing couples. The men were professionals, one a doctor. The women were exceptionally intelligent, very stable, well educated, highly insightful and probably in the 99th percentile in parenting skills. The divorcing spouses had retained or developed a high level of effective communication. In both situations the new and old households were permanently located in Anchorage, physically close together, and the children, by all reports, visited very congenially back and forth. I have no doubt but that even if legal and physical custody had been vested in one exceptional parent or the other, the contact and consultation with the non-custodial parent would have been just as free and wholesome. In short, I believe that those situations worked out well in spite of or aside from the joint custody Order, and not because of it.

By contrast, the majority of such arrangements simply create a continuing line of issues to litigate. If the custodial parent wishes to relocate, or if major changes are contemplated in choice of religious or academic training, to mention only a few problem areas, the joint custodial parent sees it as his or her right, not merely to advise and persuade, but to insist, even to litigate to enforce his views. Since at these hearings the central issue is the best interest of the child, they can seldom be limited merely to consideration of the move, the

copy to: Wm Hitchcock
3/23/81/ajr

religion or the school. The current contested issue must be litigated in the context of general parental fitness and effectiveness, and the hearing becomes, in effect, an attempt to change custody. If there is anything more damaging to a child than the breakup of its home, it is the continuing legal battle coupled with the possible shift in custodial authority. Any statutory scheme which increases the potential for continual contest and instability in the child's life should be viewed with distrust.

Failure to communicate is viewed as a principal cause of divorce. I am incredulous that anyone would believe that two former non-communicators might become able to jointly resolve issues of significance after divorce. In my judgment, HB 210, by reposing equal decisional authority in each parent, will foster litigation and work to the detriment of the child.

I suggest that the author of Section 1.(b) of HB 210, a legislative finding that the best interests of the child are served by parental implementation of child care agreements "outside of the court setting", is more hopeful than practical. Certainly it is desirable that divorcing parents confer and intelligently agree upon a plan truly for the child's benefit. Unfortunately, the reality of nearly 1 divorces is that the parties are motivated by other factors such as disappointment, bitter vengefulness, and considerations of property division and child support payments. A classic, extreme, but not unique example of this type of motivation I once observed was the parties' agreement to give custody of the four year old to mother and the five year old to father. Since this result was contrary to common sense, case law and all literature on the subject, I inquired after any unusual factors in support of it. There were none. Further, it became apparent that the mother wished to remarry, therefore wanting the Dissolution to be swiftly concluded, and the father wished to minimize his support obligation, threatening an extended custody battle if his demands were not met. Hence, the trade-off. Any legislation which increases the possibility that children's interests may become the subject of tactical negotiation ought to be viewed with great caution.

The legislative creation of a presumption favoring joint custody will tend to make child custody a point of tactical negotiation. It is unfortunately true that by the time a separation reaches the litigation phase the parties have at least one issue upon which agreement appears impossible. In the majority of cases, it is my experience that custody is not the issue. It is either property division or the amount

Honorable Ralph E. Moody

March 19, 1981

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of child support, or both. From this I conclude the parties recognize that the Court will attempt to determine custody objectively, applying the best interest of child criteria as established by case law and statute. It further signifies that in the majority of cases one party is clearly more suitable than the other, and the parties recognize this as a matter of common sense, with the assistance of counsel. It should be remembered the present A.S. 9.55.205 provides that neither parent is entitled to a preference.

If a presumption favoring joint custody is created, the presumption is something which must be overcome by the party desiring sole custody, and who, even applying the standards of HB 210, should be entitled to sole custody in the best interest of the child. The threat to aggressively assert the presumption, to the Supreme Court if necessary, thus creates a bargaining chip, a point of tactical negotiation, out of the critical issue of child custody. I see a real danger that, in the often highly charged atmosphere of a divorce litigation, such a threat could be used to coerce inappropriate concessions from a parent who should properly receive sole custody but who felt unwilling or unable to bear the expense, stress and delay involved in the litigation necessary to overcome the presumption.

I recognize while raising the foregoing concern that proposed A.S. 25.20.090 can be read as to require the formal agreement of both parents on the record before the Court can award joint custody, and arguably, the coercion could never occur. I disagree. A close reading of proposed A.S. 25.20.060 and 25.20.070 in conjunction with proposed 9.55.205(c) clearly indicates that the presumption can be placed at issue in all custody proceedings by petition of "either parent". Thus, even though no .090 mutuality exists, the issue keeps the law suit alive until a court eliminates it, perhaps on Motion for Summary Judgment, with the expenditure of additional time, energy and money. Again, this works two potential harms. First, aggressive counsel can increase the nuisance value of his unfit parent's settlement posture by the threat of unnecessary litigation. Second, in a divorce or dissolution in which the parties are not represented by counsel the unfit but dominant parent has an even greater coercive lever.

Because of the press of time I conclude without treating all possible deficiencies of the bill, such as its compliance with Art. IV §5 Constitution of the State of Alaska, the additional hatred and strife level that proposed 9.55.205(d) will

produce by making the child's "emotional or physical injury" the sole vehicle by which relevant background information as to a parent may be introduced, the absolute necessity of Courts to inquire fully for possible coercion, greatly extending divorce proceedings, the confusion proposed A.S. 25.20.150 may inject into existing statutes controlling termination of parental rights, and the enforceability of proposed A.S. 25.20.170 as it cuts across federal and state privacy and confidentiality laws.

House Bill 210 is not necessary and it is potentially very harmful to children of separating parents. It is unnecessary because our existing system of laws already allows for an award of joint custody, which is seldom required, seldom granted, and even less often functional. The potential harms to children are manifold, but particularly so because experience tells us that, by encouraging contentiousness and not compromise and adjustment between parents, the turmoil surrounding the divorce may continue, even to requiring a change of custody to one party or the other, with obvious unsettling of the child.

As one analyzes HB 210, one is struck with the wisdom of our present scheme of custody statutes and case law. There is a mechanism, through the courts continuing jurisdiction, to modify the custodial arrangements if the child is in danger of harm, or if a change in circumstances warrants it, but by requiring a high threshold for modification of custody decrees the temptation to contest disfavored parenting decisions simply out of preference is greatly diminished. Not so with joint custody.

Members of the family law section of the Anchorage Bar Association request that the Court's spokesman join with them in requesting that hearings be conducted on HB 210 in Anchorage. I concur. Moreover, if it is thought to be appropriate, I would be willing to appear to testify in Juneau, in an annual leave status and at my own expense if necessary.

Memorandum

Alaska Court System

TO:
Grant Callow
Staff Counsel

DATE : March 9, 1981

FROM: William D. Hitchcock *wh*
Master, Trial Courts

SUBJECT: HB 210

At this stage, I have only a few brief remarks and observations about this bill which I want to pass on to you. The concept of shared or joint custody is an appealing one from a philosophical standpoint but in practicality it has many pitfalls. Even where all of the objective criteria of close geographic proximity of the parents and ease of travel are met, the fact remains that the adults involved have been unable to reconcile their various differences and may be equally as incapable of agreeing on the ongoing decisions in the life of their child or children. Joint custody has been a very popular "cause" around the country. In my contacts with other judges from around the nation at the National Judicial College family law course in Reno last year, I have found that there is an overall skepticism as to how well joint custody is working in fact. I would venture to say that a general sampling of opinion among judges, domestic relations practitioners and professional counsellors in this state would yield a similar result.

Assuming however that the bill may already be a fait accompli, there are certain considerations which the court needs to deal with. One of these is to assess possible fiscal impacts this bill would have. If courts are going to be routinely presented with shared custody agreements by parties in consensual petitions, e.g. dissolutions, I submit that the court is going to have to rely heavily on professional evaluations of the wisdom of those plans. While it may be philosophically appealing to view such services as coming from the private sector, the hard economic realities are that most parents in dissolution proceedings are not going to be in a position to pay for these. Therefore, the court is either going to have to field these proposals from the bench or have the investigative resources at its disposal to review them. My recommendation is therefore that the court, if it is going to support this bill at all, give serious consideration to mandating and providing statewide custody investigation services within the system.

I am also concerned as to the meaning of the mediation provision, A.S. 25.20.080. Does that cover child custody investigation as well or is it solely traditional mediation? I believe I have clarified the section regarding guardian ad litem appointments. That appears to be nothing more than a restatement of existing language which is already within A.S. 9.55.205 rather than any new requirement mandating GAL appointments in all cases.

cc: Victor D. Carlson
Andrew M. Brown



Superior Court

State of Alaska

THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA
99501

March 19, 1981

Clk - 5475 of
VICTOR D. CARLSON, Judge

The Honorable Donald E. Clocksin
Chairman
Health, Education & Welfare Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

Re: House Bill No. 210
Joint Custody of Children

Dear Mr. Chairman:

This letter is to express my concern over the amendments which House Bill No. 210 would engraft onto the child custody decisions made by judges in divorce proceedings. At present the standard is the child's best interests and an effort is made to structure each parent's relationship with the child in order to reduce the pressure on the child which usually accompanies a contested child custody proceeding.

If House Bill No. 210 becomes law, the presumption will be to leave custody with both parents giving each the same control over the major decisions affecting the child as married parents have. This would result in many opportunities for confrontation in which the child would be caught in the middle, e.g., the choice of a school, public or private, alternative or basic, etc. Neither parent would have the authority to make the decision and the child would be torn in having to make a choice and then the matter, ultimately, would have to be decided by the court.

The Honorable Donald E. Clocksin
Juneau, Alaska 99811

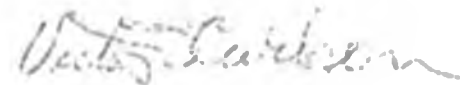
March 19, 1981

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It appears as if the objective of legislation should be to reduce the possibility of confrontation between divorced people and not to increase the opportunities for litigation with its attendant monetary and emotional costs. In addition, passage of the bill would require many additional custody investigator and judicial resources.

Thanking you for considering my comments and requesting that you give representatives of the judiciary the opportunity to testify, I am

Very truly yours,



Victor D. Carlson
Superior Court Judge

VDC:rw

cc: The Honorable Terry Gardiner
The Honorable Brian Rogers

bcc: ✓ William D. Hitchcock, Esq.



Superior Court

State of Alaska

FIRST JUDICIAL DISTRICT
411 MAIN STREET, ROOM 402
KETCHIKAN, ALASKA 99901

Chambers of
THOMAS E. SCHULZ, Judge

Jody Sutherland
House HESS Committee
Pouch V
Juneau, Alaska 99811

Re: Work draft paper - domestic violence
Committee Substitute for HB 210

Dear Mr. Sutherland:

I have finally had an opportunity to review the work draft paper concerning domestic violence and the change in the definition. I cannot support those amendments that change the definition of domestic violence to include endangering the welfare of a minor, criminal nonsupport, failure to permit visitation or contributing to the delinquency of a minor. Those are matters that are particularly not suited to being handled in the expedited procedures available under the domestic violence legislation and, even if they were, that legislation provides only a short term method of dealing with the situation which is already equally available under existing statutes.

The main failure, however, is that the domestic violence procedure does not provide a suitable climate to actually work toward solutions in situations involving danger to the welfare of a minor, failure to permit visitation or even contributing to the delinquency of a minor.

The domestic violence legislation has been quite effective, so far as I can tell, in providing a readily accessible vehicle to deal with immediate threats to the physical welfare of both adults and children living in the same household, but it is successful only in that it gives the parties breathing time relatively free from the threat of further violence in order to work toward more permanent solutions for their problems. I do not believe it is a

Jody Sutherland
February 18, 1982
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particularly effective vehicle for dealing with other types of domestic problems such as are contemplated in the work draft.

I had an opportunity to review HB No. 210 last year, and I have also had an opportunity to review the work draft paper which is titled "a committee substitute for HB 210."

I do not know why it is necessary to transfer the custody considerations from Title 9 to Title 20. It seems to me, however, that if it is advisable to change these custody considerations from Title 9 to Title 20, it would be advisable to transfer the whole divorce code from Title 9 to Title 20 so that it is together in one section of the code.

I do not have any particular concern with the factors set out in the bill on which the court is to base a custody decision except for Subparagraph (d), and the fact that the language "all relevant factors including" is apparently being stricken from the current legislation. The seven factors listed are, I believe, probably the more important of the factors considered by the court in a custody dispute, but I believe it is impossible to list all of the factors that are relevant in a particular case in a statute and I think the court should retain the jurisdiction to consider other factors that may be relevant in a particular case. My concern with Subparagraph (d) is that the conduct, marital status, social or cultural environment, and lifestyle of a parent almost always have a bearing on the well-being of the children involved. In short, I can conceive of only a few cases where those factors would not be of some importance to anybody trying to make a child custody award. In other words, I do not see the necessity for Subparagraph (d) at all.

I am a strong supporter of mediation in child custody disputes and I tend to support on the concept of shared custody between divorcing parents. I do not read this bill as mandating shared custody, at least as far as the draft of the committee substitute is concerned. Section 4 of HB 210 does say that there is a rebuttable presumption that shared custody is in the best interest of the child, and that language causes me some concern. First of all, I think it is simply inaccurate in many cases to say that there is any kind of a presumption that shared custody is in the best interest of the child. I think the proposed committee substitute handles the situation much better in Section 4 when it says that if there is a request for shared custody, the reasons for the denial must be stated on the record.

If I can be of further assistance, please let me know.

Jody Sutherland
February 18, 1982
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Thomas E. Schulz
Thomas E. Schulz
Superior Court Judge

TES:me



Superior Court

State of Alaska

FIRST JUDICIAL DISTRICT

415 MAIN STREET

KETCHIKAN, ALASKA

99901

Chambers of
THOMAS E. SCHULTZ, Judge

May 4, 1981

✓ **Representative Don Clocksin**
Chairman of the Health Education
And Social Services Committee
House of Representatives
Pouch U
Juneau, Alaska 99801

Representative Terry Gardiner
House of Representatives
Pouch U
Juneau, Alaska 99801

Representative Brian Rogers
House of Representatives
Pouch U
Juneau, Alaska 99801

Re: House Bill No. 210

Gentlemen:

There was a hearing scheduled on HB 210 relating to shared custody on Wednesday, April 22. Unfortunately I was involved in a jury trial and I was unable to attend that hearing. I am taking this opportunity to express my support for HB 210.

There is some natural or at least ingrained opposition to joint custody among judges, at least in my experience, and my initial reaction to the bill was negative. However, I have studied the bill in some more depth because of the subject matter and I have also had an opportunity to review some of the recent literature on the subject, and my initial reaction of opposition has changed to one of support.

Representative Don Clocksin
Representative Terry Gardiner
Representative Brian Rogers
May 4, 1981
Page 2

I am enclosing with this letter a copy of an article from the Winter 1981 issue of the Judges' Journal, which is published by the Judicial Administration Division of the American Bar Association. The Article discusses a mediation process which was the subject of a project in Denver, Colorado, and is the most recent thing that I have seen on the subject of shared custody and mediation in child custody disputes. You may find it interesting.

In line with the article discussed above, my only suggestion would relate to Section 25.20.080 in the proposed bill which says that "The court considering a request for custody of a child may request the parties to participate in pretrial mediation of the matters before the court." Divorce litigation and other domestic relations litigation consumes a substantial part of the Superior Court's bench time in every location in the state. In the class of domestic relations litigation, child custody disputes consume a substantial amount of the time consumed by that class of cases. My own experience, and conversations with other judges in Alaska and all over the country tends to confirm this, is that child custody disputes which are resolved by agreement of the parties rarely end up back in court, while judicially imposed resolutions of those disputes are the constant subject of motions to modify the decrees. The ongoing litigation tends to consume more and more of the Court's time with no "final" resolution to a festering dispute. That situation is harmful both to the parents and the children involved. I have come to the point where I believe that mediation ought to be mandatory in child custody disputes. It does not have to be a long involved process, but certainly skilled mediators could do much in most cases to bring the parties to a mutually acceptable resolution of their child custody matters. I am satisfied that when that process is used, it has a lasting effect at both enabling the parties to resolve future problems that may arise and in providing both the parents involved and the children with continuing access to one another. <Therefore> I would suggest that Section .080 be amended to make mediation mandatory and that the Court System be funded to the extent necessary to provide qualified mediators to handle these cases. I do not anticipate that we would need a full time mediator in any of the court locations in southeast Alaska, and cases of disputed custody that required mediation could probably be handled by one person in the First Judicial District. Admittedly, three or four may be required in both the Third District and the Fourth District, but the cost of that, when

Representative Don Clocksin
Representative Terry Gardiner
Representative Brian Rogers
May 4, 1981
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compared to the costs of running a courtroom, must be quite small. I think it is an idea well worth studying at some length, and I would urge that the Committee give it serious consideration.

On April 22 I had occasion to discuss this legislation with Judge Stewart in Juneau, and he told me of his initial negative reaction to the proposal. However, after we had discussed it a little bit, he authorized me to inform the Committee that a further study of the idea was certainly appropriate. It may well be that he will convey his thoughts on the bill to you directly.

Very truly yours,


Thomas E. Schulz
Superior Court Judge

TFC:me

cc: The Honorable Thomas B. Stewart



**Superior Court
State of Alaska**

THIRD JUDICIAL DISTRICT

300 K Street
Anchorage, Alaska 99501

FRANCIS M. STEVENS, ACSW
Custody Investigator

ARDIS J. CRY
Custody Investigator

19071 264-0/28

April 28, 1981

Representative Donald Clocksin, Chairman
House Health, Education & Social Services
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Mr. Clocksin:

I want to thank you for the opportunity to participate in the teleconference hearing which was held Wednesday, April 22, concerning House Bill 210, Shared Custody. I would like to expand on the testimony that was given verbally, and react to some of the testimony that I listened to during the hearings.

For the purpose of background, I am a social worker, a member of the Academy of Certified Social Workers, and have been a practitioner in social work, or related fields, since 1950. I am currently a member of the Association of Family Conciliation Courts, and I am on the Board of Directors, and in the past have been Program Chairman and 2nd Vice-President of that organization. I am not speaking for the Association of Family Conciliation Courts, and wish to have the committee know that there is no one in the State of Alaska authorized to speak on the behalf of the Association other than myself as a member of the Board of Directors. I have been employed with the Alaska Court System for over 8 years and have been a custody investigator for the Alaska Court System for over 5 years. In the course of employment with the court system, I have participated in approximately 1,500 contested custody or visitation cases. I have testified as an expert witness in the matters pertaining to child custody and visitation well over 100 times. I believe that I do have first hand knowledge of the issues involved and can present a professional perspective to the Bill that is involved.

As noted in my oral testimony and memorandum, which was included in prior testimony in Juneau, I am not opposed to joint custody. I, along with many others, believe that joint custody, which is the condition that exists when children are living with both parents under one household, is probably the best arrangement for children. I am opposed to the concept that joint custody, when parents are not living together, but are separated or divorced, is to be presumed to be the preferential method, or the best method for all children. It has been my experience that there are many, many families, which because of the psychological make-up of the individuals, cannot or will not share the parenting responsibility even when they are living together and much less so when the marriage is terminated. To assume that joint custody would be effective for these people would be doing the children a great disservice. The Bill does address the possibility that joint custody should not be awarded to some families and makes a provision whereby the Court is required to give the reasons why it is not awarded. I believe that this factor in the Bill would create substantial problems for many families. I would draw on my own experiences where joint custody is being attempted as panacea for one parent, or as a result of maneuvering, manipulation, coercion and threats, or as a means to get a speedy divorce and not face planning for the children. If in the course of a custody evaluation, these factors are disclosed, and are felt to be strong enough reasons to deny joint custody, the very problems that the parties are not dealing with then becomes part of a public record, and I would doubt that it would be possible to defuse these people, and to help them to see the responsibility they both hold in continued parenting for their children. We have come a long way in our divorce process to attempt to maintain the integrity of the parents, particularly with the no-fault concept; to destroy the integrity of the parents on a court record in order to establish they are not capable of handling joint custody, in my opinion, is a step backward.

In the course of testimony given by various parties there were references to statistics, and numbers were thrown around as if they were facts. I would caution the Committee that it is not likely that any one source of statistical data has a true picture of the "fact" as it pertains to divorce and custody. In the five years that I have been doing custody work in Anchorage, we have determined one significant bit of statistical data, and that is that consistently, ten percent of the cases that are heard in the Anchorage District involving divorce do result in contested custody or visitation disputes. The current figures for divorces in the Anchorage area indicate that roughly 2,500 to 2,700 divorces will take place this year. Of this, approximately 270 of these cases

will involve a dispute over custody, and the remaining 2,400 plus cases will have been settled by the litigants without the use of the Court and by agreement by the litigants. These cases will, for the most part, be cases where custody is stipulated by the father to the mother without any request on his part to be involved in the custody planning. The figures that are used, 4 percent, 6 percent custody to father primarily come out of this block of custody cases. The figures that I cited in my testimony, while hurriedly collected and representing a brief sample of the experiences in our office, indicated that in the first three months in 1981, 22.5% of the cases, custody went to father; 21.2% of the cases, custody was awarded as joint custody; and in 13.8% of the cases, which involved a number of children per family, there was a splitting of the children with one or two or more going to each parent, based on the needs of the children, the ages of the children, and the abilities of the parents. In 42% of the cases, custody did go to mother, following an evaluation. We have found that between four and five percent of the cases that are contested and are not resolved in the process of investigation and evaluation do go on to court to be litigated.

I am taking the liberty of forwarding to you two publications which may be of value to you and your committee. The first is a joint custody handbook for judges, lawyers, and counselors, which was developed through the Association of Family Conciliation Court's staff, giving a fairly comprehensive collection of citations and some fairly good reviews of material pertaining to joint custody. The second one is the most recent publication that I am aware of by a group that does not have an axe to grind, and this is the publication, "Divorce, Child Custody, and the Family" done by the Mental Health Materials Center in New York. These are both my personal copies, and I would appreciate having them back, but feel that they are of enough value that I would like to share them with you.

At the time of the teleconference, I indicated that I had been directed to present a position to the presumptive aspects of the Bill. The judges who specifically were polled and authorized that their names be used in opposition were the Presiding Judges of all Districts, that is: Judge Moody, Judge Blair, Judge Stewart, Judge Tunley, and in addition, Judge Carlson, Judge Bucklew, and Judge Ripley, of the Superior Court in Anchorage and had expressed their desire to have their position known. I point this out, in that, in later testimony, there was a statement made that judges were in favor of the Bill. I believe that it was Mr. Johnson who made the statement, and while he may have talked to specific judges, the judges indicated in my testimony definitely have a position, and I was authorized to state that position.

April 28, 1981

⤵ In reviewing the legislation, it is apparent to me that this is a copy of California legislation, which was introduced around the first of 1980. The introduction of this legislation in California did have some cost factor tied to it, and it did take into consideration that in the State of California, there is a system of Conciliation Courts, which provides for the process of evaluation, counselling and mediation, in order to assist the parties going through the divorce and resolving any custody matters prior to litigating. ⤴ There has been an additional piece of legislation mandating mediation, which went into effect January 1, 1981. There has been recognition in California that personnel must be trained to implement the mandatory Mediation Bill and a training program has to be funded in Los Angeles, California for the purpose of training such personnel. As a member of the Board of Directors of the Association of Family Conciliation Courts, I have frequent contact with the directors of the various conciliation court programs in California, and I do not have any awareness of anyone using the figures that have been cited by one of the witnesses to the effect that 60% of the custody cases in California are now going joint custody as a result of mediation. The information that I have from the contacts that I have in California does not indicate anywhere near that statistical number and does indicate that there is great concern about giving a mandate to the effect that joint custody must be used and will work for everyone.

In summary, I would repeat my earlier position that joint custody is an effective method for planning for children, but the ingredients to make it work are not universally available in the adults that are involved in litigation. I believe it should be used selectively, just as custody to father, or custody to mother should be selectively based on a combination of factors. These factors must include the ability of the adults to understand the responsibility as parents; their willingness to share the parenting role even though they cannot share other roles and responsibilities one with the other. There must be the ability to place the child's interests before the adult's interests. There also must be an ability to function, probably more effectively than they had functioned when living together as parents. The children must be able to know that the parents are working in concert on their behalf to provide them with the optimum parenting. In the absence of these conditions, joint custody is likely to be detrimental to the children and to the adults. In the absence of a willingness to maintain a unified parenting picture for the children, the children become the negotiators between the parents, they become the communicators, and the children learn to be manipulators, telling each parent what they perceive the parent wants to hear, frequently, anything but the truth.

April 28, 1981

I would hope that this Bill would be given very, very serious consideration for a change within the Bill. (I see no problem with the legislature affirming what already exists; that is, that joint custody is one of the options. I do see the creation of extreme emotional problems for people during a time that they are not functioning in a capable manner emotionally if a standard is set where the Court must show they are not capable of doing the parenting role as joint parents in order to protect the children.

Again, I wish to thank the Committee for the concern the Committee is showing over this piece of legislation, which when casually looked at appears to be a good piece of legislation, and one that would be of best interests to the parties involved. I feel very strongly that an indepth look at this legislation, based upon the experiences that I have had as a Custody Investigator, and in the experiences that many of my colleagues throughout the country have had, would indicate that there are some pitfalls in the legislation, and that it could create substantial problems, not only for the Court, but for the parties involved.

Thank you for your consideration.

Very truly yours,



Francis M. Stevens
Custody Investigator

FMS/lfs

Enclosures

cc: Justice Rabinowitz
Judge Moody
Judge Carlson

Memorandum

Alaska Court System

TO:

Grant Callow
Staff Counsel

DATE : March 9, 1981

SUBJECT: HB 210

FROM: William D. Hitchcock
Master, Trial Courts

At this stage, I have only a few brief remarks and observations about this bill which I want to pass on to you. One concept of shared or joint custody is an appealing one from a philosophical standpoint but in practicality it has many pitfalls. Even where all of the objective criteria of close geographic proximity of the parents and ease of travel are met, the fact remains that the adults involved have been unable to reconcile their various differences and may be equally as incapable of agreeing on the ongoing decisions in the life of their child or children. Joint custody has been a very popular "cause" around the country. In my contacts with other judges from around the nation at the National Judicial College family law course in Reno last year, I have found that there is an overall skepticism as to how well joint custody is working in fact. I would venture to say that a general sampling of opinion among judges, domestic relations practitioners and professional counsellors in this state would yield a similar result.

Assuming however that the bill may already be a fait accompli, there are certain considerations which the court needs to deal with. One of these is to assess possible fiscal impacts this bill would have. If courts are going to be routinely presented with shared custody agreements by parties in consensual petitions, e.g. dissolutions, I submit that the court is going to have to rely heavily on professional evaluations of the wisdom of those plans. While it may be philosophically appealing to view such services as coming from the private sector, the hard economic realities are that most parents in dissolution proceedings are not going to be in a position to pay for these. Therefore, the court is either going to have to field these proposals from the bench or have the investigative resources at its disposal to review them. My recommendation is therefore that the court, if it is going to support this bill at all, give serious consideration to mandating and providing statewide custody investigation services within the system.

I am also concerned as to the meaning of the mediation provision, A.S. 25.20.080. Does that cover child custody investigation as well or is it solely traditional mediation? I believe I have clarified the section regarding guardian ad litem appointments. That appears to be nothing more than a reiteration of existing language which is already within A.S. 9.55.205 rather than any new requirement mandating GAL appointments in all cases.

cc: Victor D. Carlson
Andrew M. Brian

Memorandum

Alaska Court System

RECEIVED
Office of the Presiding Judge
3rd Judicial District

TO: The Honorable Ralph E. Moody
Presiding Judge

DATE : March 19, 1981

FROM:  Honorable J. Justin Ripley
Superior Court Judge

SUBJECT: HB 210

At the request of Mr. Szal, my comments as to HB 210. Although it is difficult to quarrel with the stated intent of the legislation - to involve both divorcing parents in a continuous process of child rearing - I have grave concerns over the wisdom of HB 210.

In my 5-1/2 years on the bench, of which 18 months were devoted nearly full time to domestic relations matters, I have seen nothing to suggest that in the usual divorce/custody situations joint custody is appropriate or beneficial. I have approved joint custody on only a few occasions - approximately six times if memory serves - and in only two cases does it appear to have worked smoothly. Those two sets of parents were highly unusual for divorcing couples. The men were professionals, one a doctor. The women were exceptionally intelligent, very stable, well educated, highly insightful and probably in the 99th percentile in parenting skills. The divorcing spouses had retained or developed a high level of effective communication. In both situations the new and old households were permanently located in Anchorage, physically close together, and the children, by all reports, visited very congenially back and forth. I have no doubt but that even if legal and physical custody had been vested in one exceptional parent or the other, the contact and consultation with the non-custodial parent would have been just as free and wholesome. In short, I believe that those situations worked out well in spite of or aside from the joint custody Order, and not because of it.

By contrast, the majority of such arrangements simply create a continuing line of issues to litigate. If a custodial parent wishes to relocate, or if major changes are contemplated in choice of religious or academic training, to mention only a few problem areas, the joint custodial parent sees it as his or her right, not merely to advise and persuade, but to insist, even to litigate to enforce his views. Since at these hearings the central issue is the best interest of the child, they can seldom be limited merely to consideration of the move, the

copy to: Wm Hatcher
2/23/81
/sp

Honorable Ralph E. Moody
March 19, 1981
Page -2-

religion or the school. The current contested issue must be litigated in the context of general parental fitness and effectiveness, and the hearing becomes, in effect, an attempt to change custody. If there is anything more damaging to a child than the breakup of its home, it is the continuing legal battle coupled with the possible shift in custodial authority. Any statutory scheme which increases the potential for continual contest and instability in the child's life should be viewed with distrust.

Failure to communicate is viewed as a principal cause of divorce. I am incredulous that anyone would believe that two former non-communicators might become able to jointly resolve issues of significance after divorce. In my judgment, HB 210, by reposing equal decisional authority in each parent, will foster litigation and work to the detriment of the child.

I suggest that the author of Section 1.(b) of HB 210, a legislative finding that the best interests of the child are served by parental implementation of child care agreements "outside of the court setting", is more hopeful than practical. Certainly it is desirable that divorcing parents confer and intelligently agree upon a plan truly for the child's benefit. Unfortunately, the reality of nearly all divorces is that the parties are motivated by other factors such as disappointment, bitter vengefulness, and considerations of property division and child support payments. A classic, extreme, but not unique example of this type of motivation I once observed was the parties' agreement to give custody of the four year old to mother and the five year old to father. Since this result was contrary to common sense, case law and all literature on the subject, I inquired after any unusual factors in support of it. There were none. Further, it became apparent that the mother wished to remarry, therefore wanting the Dissolution to be swiftly concluded, and the father wished to minimize his support obligation, threatening an extended custody battle if his demands were not met. Hence, the trade-off. Any legislation which increases the possibility that children's interests may become the subject of tactical negotiation ought to be viewed with great caution.

The legislative creation of a presumption favoring joint custody will tend to make child custody a point of tactical negotiation. It is unfortunately true that by the time a separation reaches the litigation phase the parties have at least one issue upon which agreement appears impossible. In the majority of cases, it is my experience that custody is not the issue. It is either property division or the amount

Honorable Ralph E. Moody
March 19, 1981
Page -3-

of child support, or both. From this I conclude the parties recognize that the Court will attempt to determine custody objectively, applying the best interest of child criteria as established by case law and statute. It further signifies that in the majority of cases one party is clearly more suitable than the other, and the parties recognize this as a matter of common sense, with the assistance of counsel. It should be remembered the present A.S. 9.55.205 provides that neither parent is entitled to a preference.

If a presumption favoring joint custody is created, the presumption is something which must be overcome by the party desiring sole custody, and who, even applying the standards of HB 210, should be entitled to sole custody in the best interest of the child. The threat to aggressively assert the presumption, to the Supreme Court if necessary, thus creates a bargaining chip, a point of tactical negotiation, out of the critical issue of child custody. I see a real danger that, in the often highly charged atmosphere of a divorce litigation, such a threat could be used to coerce inappropriate concessions from a parent who should properly receive sole custody but who felt unwilling or unable to bear the expense, stress and delay involved in the litigation necessary to overcome the presumption.

I recognize while raising the foregoing concern that proposed A.S. 25.20.090 can be read so as to require the formal agreement of both parents on the record before the Court can award joint custody, and arguably, the coercion could never occur. I disagree. A close reading of proposed A.S. 25.20.060 and 25.20.070 in conjunction with proposed 9.55.205(c) clearly indicates that the presumption can be placed at issue in all custody proceedings by petition of "either parent". Thus, even though no .090 mutuality exists, the issue keeps the law suit alive until a court eliminates it, perhaps on Motion for Summary Judgment, with the expenditure of additional time, energy and money. Again, this works two potential harms. First, aggressive counsel can increase the nuisance value of his unfit parent's settlement posture by the threat of unnecessary litigation. Second, in a divorce or dissolution in which the parties are not represented by counsel the unfit but dominant parent has an even greater coercive lever.

Because of the press of time I conclude without treating all possible deficiencies of the bill, such as its compliance with Art. IV §15 Constitution of the State of Alaska, the additional hatred and strife level that proposed 9.55.205(d) will

Honorable Ralph E. Moody
March 19, 1981
Page -4-

produce by making the child's "emotional or physical injury" the sole vehicle by which relevant background information as to a parent may be introduced, the absolute necessity of Courts to inquire fully for possible coercion, greatly extending divorce proceedings, the confusion proposed A.S. 25.20.150 may inject into existing statutes controlling termination of parental rights, and the enforcibility of proposed A.S. 25.20.170 as it cuts across federal and state privacy and confidentiality laws.

House Bill 210 is not necessary and it is potentially very harmful to children of separating parents. It is unnecessary because our existing system of laws already allows for an award of joint custody, which is seldom requested, seldom granted, and even less often functional. The potential harms to children are manifold, but particularly so because experience tells us that, by encouraging contentiousness and not compromise and adjustment between parents, the turmoil surrounding the divorce may continue, even to requiring a change of custody to one party or the other, with obvious unsettling of the child.

As one analyzes HB 210, one is struck with the wisdom of our present scheme of custody statutes and case law. There is a mechanism, through the courts continuing jurisdiction, to modify the custodial arrangements if the child is in danger of harm, or if a change in circumstances warrants it, but by requiring a high threshold for modification of custody decrees the temptation to contest disfavored parenting decisions simply out of preference is greatly diminished. Not so with joint custody.

Members of the family law section of the Anchorage Bar Association request that the Court's spokesman join with them in requesting that hearings be conducted on HB 210 in Anchorage. I concur. Moreover, if it is thought to be appropriate I would be willing to appear to testify in Juneau ~~is~~ an annual leave status and at my own expense if necessary.



Trial Courts

State of Alaska

THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA 99501

RALPH E. MOODY
Presiding Judge

April 9, 1981

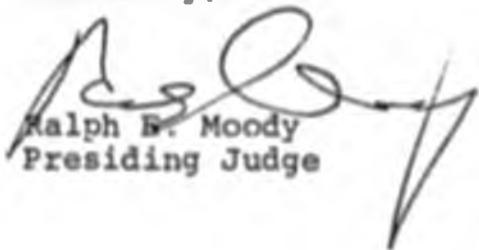
Mr. William Grant Callow, II
General Counsel to Administrative Director
Alaska Court System
303 K Street
Anchorage, Alaska 99501

Re: Presumptive Joint Custody

Dear Mr. Callow:

I wish to convey to you my concurrence in the opinions expressed by the Honorable J. Justin Ripley on April 7, 1981, with regard to presumptive joint custody.

Sincerely,



Ralph E. Moody
Presiding Judge

REM:dpd

cc: A. H. Snowden, II
Judge J. Justin Ripley
Judge Victor D. Carlson
Master William Hitchcock
Master Andrew Brown
Francis Stevens

RECEIVED

APR 13 1981

Office of General Counsel
Alaska Court System



Trial Courts

Seal of Alaska
THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA 99501

RALPH E. MOODY
Presiding Judge

April 9, 1981

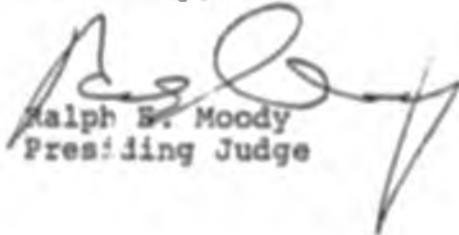
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Sincerely,



Ralph E. Moody
Presiding Judge

REM:dpd

cc: A. H. Stedden, II
Judge J. Justin Ripley
Judge Victor D. Carlson
Master William Hitchcock
Master Andrew Brown
Francis Stevens

RECEIVED

APR 13 1981

Office of General Counsel
Alaska Court System



Trial Courts

State of Alaska
THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA 99501

WILLIAM D. HITCHCOCK
Master, Trial Courts

The Honorable Donald E. Clocksin
Chairman
Health, Education & Welfare Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

March 25, 1981

Re: House Bill No. 210
Shared Custody

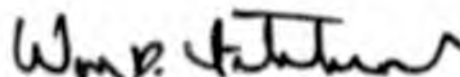
Dear Mr. Chairman:

It is my understanding that a hearing is being held before your committee on March 26, 1981 concerning the above bill. Although this letter will not have reached you in time for that hearing, I feel I must relay my concerns as to the future fate of the legislation.

As Children's Court Master in Anchorage, I have the additional duty of hearing contested domestic motions and devote approximately one-third of my time to that area. I am concerned that if HB 210 becomes law as it is presently written, there will be substantial negative impact on the welfare of children in divorce custody. Rather than address my concerns in this letter, I wish to instead request that the committee conduct further hearings on the bill here in Anchorage and possibly Fairbanks so that a greater cross-section of professional input can be obtained.

Thank you for your consideration to this matter.

Very truly yours,


William D. Hitchcock
Master, Trial Courts

WDH:ys

cc: Honorable Victor D. Carlson
Superior Court Judge, Third Judicial District
Mr. Albert H. Szal
Area Court Administrator, Third Judicial District



Superior Court

State of Alaska

THIRD JUDICIAL DISTRICT

303 K STREET

ANCHORAGE, ALASKA 99501

April 7, 1981

CHAMBERS OF
J. JUSTIN RIPLEY, JUDGE

Mr. William Grant Callow, II, Esq.
General Counsel to Administrative Director
Alaska Court System
303 "K" Street
Anchorage, Alaska 99501

Re: Judge Robin L. Taylor's letter of May 3, 1979
re: presumptive joint custody

Dear Mr. Callow:

There are two things that can be said with absolute certainty about my great and good friend Judge Robin L. Taylor. First, he invests the philosophical positions that he espouses with his own immense personal sincerity. Second, he tends to express himself upon these issues with more eloquence than objectivity. Although his letter to Mrs. Miller and Mrs. Fisher of May 3, 1979 may represent a position which he would be willing to reevaluate in the light of his two additional years of judicial service, insofar as it may be taken as representing current doctrine, I feel constrained to reply. This because I disagree with virtually all his assertions except that contained in the last sentence of paragraph number one.

Dealing first with our single source of agreement, I agree wholeheartedly with Judge Taylor that disputes over child custody have the potential for producing heart reching and tragic consequences. Where I begin my disagreement with Judge Taylor is that it appears to be his thesis in his letter that presumptions as to joint custody, and indeed joint custody decrees themselves, would reduce or discourage these disputes. I respectfully suggest in the strongest terms that the experience of the Bench generally and a careful analysis of the motivations

of the parties to divorce actions clearly indicate otherwise. As I repeatedly stated in my memorandum to Judge Moody of March 19, 1981, the principle evil of the joint custody presumption proposed in House Bill 210 is that it will encourage and to a certain degree even require continuing legal "disputes" over matters related to child custody, long after the divorce and custodial placement is finalized and the parties and children, in the interest of their emotional health, must be committed to going forward with the rebuilding of their lives. Our existing statutes and decisional law provide this essential stability through a decree granting custody which would only be changed in the best interest of the child, and upon a showing of changed circumstances.

One of the factors the trial court must assess in the entry of such a decree is the custodial parent's willingness and ability to foster an open and loving relationship between the child and the noncustodial parent. The concept that the child needs and requires continuing contact with the noncustodial parent is as essential and central to present considerations of custody as it can possibly be. No joint custody presumption is required to make that concept more central to the judge's custody decision, and attempting to do so by inserting joint custody provisions which are likely to lead to further litigation is absolutely contrary to the conditions of stability which are at the heart of the "best interest of the child" analysis.

Strong issue must be taken with Judge Taylor's assertion in paragraph two that the Courts "blandly skip over" custody issues by the use of the phrase "reasonable rights of visitation". It might first be observed that "reasonable visitation" is not an unenforceable clause. A great body of decisional law exists to guide a reviewing court in the determination of whether a custodial party has been reasonable in complying with the visitation order. Further, such language has been found to be desirable since it encourages the parties to work toward agreement as to the amount and type of visitation which is desirable for the child and is possible for them. Finally, Judge Taylor's experience in this field does not appear to extend to the fact that the Court has the authority to be as specific in its visitation order as the parties request or as the conduct of the parties requires. I know of no situation in which I have refused nor can I envision a situation in which any judge would refuse to spell out rights of visitation with great specificity where visitation by the noncustodial parent was apparently consistent with the best interest of the child and such specificity appeared to be required. It is palpably false to suggest as Judge Taylor does in paragraph two that visitation is an issue

which is blandly skipped over.

Judge Taylor incorrectly suggests in paragraph three that the Courts have "only recently" and "very slowly" begun to meet their obligation to consider the necessity of appointment of guardians ad litem for children in contested divorces and in applying the best "interest of the child" standard. I don't know what Judge Taylor's experience has been, but since my appointment to the Anchorage Bench in 1975, guardians ad litem have been appointed routinely when requested by either party. Further, although it is not required, these guardians are often lawyers whose investigations and reports are given great weight by the Court deciding custody issues.

I feel compelled to further suggest that if, in his domestic relations practice as an attorney, Judge Taylor found that the Court was failing to adequately consider the concept of "best interest of the child" in awarding custody, he need only have appealed to the Alaska Supreme Court to have that oversight rectified. For the last nearly twenty years, since Rhodes v Rhodes 375 P2d 902 (Ak. 1962), the Alaska Supreme Court has been committed to the proposition that the welfare and the best interest of the children must be given paramount consideration. I suggest there is no basis in fact for Judge Taylor's suggestion that the Trial Courts of Alaska have given only grudging effect to the concept of "best interest of the child", even before that concept was made part of Alaska's statutory law more than thirteen years ago.

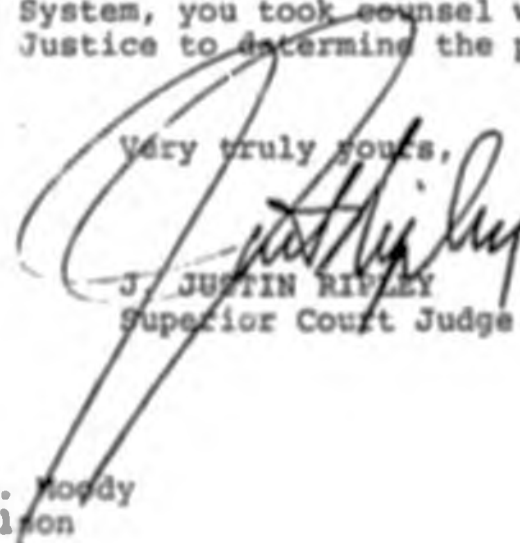
Although time does not permit me to continue with my sentence-by-sentence analysis, fairness and accuracy require me to dispute two theses stated by Judge Taylor in paragraphs four and seven. It cannot be said with accuracy that Courts "rubber stamp" the parties ignorance of the law by routinely and unquestioningly approving custody agreements between parties unrepresented by counsel or otherwise. I have spoken to a goodly number of Superior Court Judges who have primary responsibility for domestic relations matters as well as the two standing masters for domestic relations here in Anchorage. The concerns they express to me indicate that their attitude is the same as mine was when for more than a year and a half I was exclusively assigned to family and children's matters in 1976 and 1977. Agreed custody dispositions, particularly those between parties unrepresented by counsel, require close scrutiny by the Court to ensure that the agreement is in fact arrived at with the best interest of the child in view, and not some other motive, and further that the agreement is truly an agreement and not the result of coercion or some other factor. I call upon my friend Judge Taylor to substantiate this "rubber stamp" activity with any cases he wishes to put forward.

Judge Taylor's second thesis in paragraphs four and seven appears to be that in the usual and typical situation, the father, having consulted his trusted friends, advisors and even his attorney, becomes convinced that he has no opportunity to obtain custody, and further that he must be content with such visitation as his "ex-wife lets him" have. As I stated earlier in this letter, it is a false premise to assume that the phrase "reasonable and liberal rights of visitation" places the entire discretionary control with the ex-wife. Moreover, I challenge Judge Taylor or any other person to produce a single decree granted by the Courts of Alaska which vests total discretionary control over visitation in the custodial parent by its specific terms. (May I request, in order to save us all time, that if anyone is prepared to accept my challenge, he or she read the record which underlies that decree. I would venture an opinion that if such a decree is found, the record underlying it will be replete with evidence supporting the trial judge's decision that such control over the visitation was in fact in the best interest of the child based upon the continuing course of conduct of the noncustodial party.)

Judge Taylor's final paragraphs, eight through fourteen, appear to be a comment on the case of Mr. Rudy Jounson. I leave the record of that case in the various Courts of this jurisdiction to speak for itself, except to observe that it is difficult for me to understand how an allegedly loving and concerned non-custodial parent could attempt to justify, and a judicial officer appear to approve child hostage taking as "the only way left to strike back at a system that won't listen" Page 4, paragraph 13, line 6.

It has not been my intention in this letter to strongly criticise my brother Judge, although I personally believe that his letter of May 3, 1979 requires this type of comment. I would not be adverse however, if, before any of this letter is shared outside the Court System, you took counsel with the Administrator and the Chief Justice to determine the propriety of its release.

Very truly yours,



J. JUSTIN RIPLEY
Superior Court Judge

JJR:ail

(cc) Arthur H. Snowden, II
Honorable Judge Ralph E. Moody
Honorable Victor D. Carlson
William Hitchcock
Andrew Brown
Francis Steven.



Superior Court

State of Alaska

**THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA
99501**

**Chambers of
VICTOR D. CARLSON, Judge**

March 19, 1981

**The Honorable Donald E. Clocksin
Chairman
Health, Education & Welfare Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811**

**Re: House Bill No. 210
Joint Custody of Children**

Dear Mr. Chairman:

This letter is to express my concern over the amendments which House Bill No. 210 would engraft onto the child custody decisions made by judges in divorce proceedings. At present the standard is the child's best interests and an effort is made to structure each parent's relationship with the child in order to reduce the pressure on the child which usually accompanies a contested child custody proceeding.

If House Bill No. 210 becomes law, the presumption will be to leave custody with both parents giving each the same control over the major decisions affecting the child as married parents have. This would result in many opportunities for confrontation in which the child would be caught in the middle, e.g., the choice of a school, public or private, alternative or basic, etc. Neither parent would have the authority to make the decision and the child would be torn in having to make a choice and then the matter, ultimately, would have to be decided by the court.

The Honorable Donald E. Clocksin
Juneau, Alaska 99811

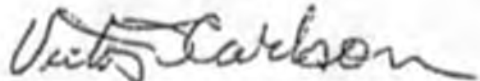
March 19, 1981

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It appears as if the objective of legislation should be to reduce the possibility of confrontation between divorced people and not to increase the opportunities for litigation with its attendant monetary and emotional costs. In addition, passage of the bill would require many additional custody investigator and judicial resources.

Thanking you for considering my comments and requesting that you give representatives of the judiciary the opportunity to testify, I am

Very truly yours,



Victor D. Carlson
Superior Court Judge

VDC:rw

cc: The Honorable Terry Gardiner
The Honorable Brian Rogers