

H B

210

COMMITTEE REPORT

SENATE

4/19/82

FURTHER: None

Date: April 18, 1982

Mr. President:

The Committee on JUDICIARY has had CSHB 210(R1s) am  
child custody

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass  do not pass
- do pass with attached amendments(s)
- replace with CS for JUD =  same title  
 new title
- and recommends the main RECOMMENDATIONS
- AND attaches a "Letter of Intent"  New Fiscal Note
- reports it back without recommendation
- referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

[Signature]  
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MEMBERS HAVING  
OTHER RECOMMENDATIONS:

Walt Anderson, No Rec.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

CHAIRMAN

# COMMITTEE REPORT

## SENATE

5/5/82

FURTHER: none

Date: May 10, 1982

Mr. President:

The Committee on JUDICIARY has had CSHB 210(Ris) am  
child custody

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass  do not pass
- do pass with attached amendments(s)
- replace with CS for CS 1  same title  
 new title
- and recommends do pass
- AND attaches a "Letter of Intent"  New Fiscal Note
- reports it back without recommendation
- referred to the \_\_\_\_\_ Committee

MEMBERS SIGNING  
DO PASS

[Signature]

[Signature]

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MEMBERS HAVING  
OTHER RECOMMENDATIONS:

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[Signature]  
CHAIRMAN

STATE OF ALASKA  
THE LEGISLATURE

POUCHY STATE CAPITOL  
JULY 24, ALASKA 99811  
707-465-3600

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

May 8, 1982

SUBJECT: 2d SCS CSHB 210 (Judiciary)

TO: Senator Patrick M. Rodey  
Chairman, Senate Judiciary Committee

FROM: Tamara Brandt Cook  
Legislative Counsel *TBC*

You have asked for an explanation of section 2 of this bill amending AS 09.55.205(c) in view of the fact that AS 09.55.-205 as it appears in the printed statutes is not divided into subsections. On March 26, 1982, SCS HB 532 (Rules) am S was approved by the Governor. That Act divided AS 09.-55.205 into subsections, although it made no changes to that portion designated as (c). The actual effective date of that Act is June 24, 1982. Since this bill does not have an effective date that would allow it to take effect before June 24, 1982, section 2 is drafted to coincide with SCS HB 532 (Rules) am S making changes only to the new subsection (c). A copy of SCS HB 532 (Rules) am S is attached for your information.

TBC:ljb

Attachment

Original sponsors: Rogers and Gardiner

Offered: 4/15/82  
For Calendar, Friday  
4/16/82

1 IN THE HOUSE

BY THE RULES COMMITTEE

2 CS FOR HOUSE BILL NO. 210 (Rules) am  
3 IN THE LEGISLATURE OF THE STATE OF ALASKA  
4 TWELFTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to child custody."

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

8 \* Section 1 LEGISLATIVE INTENT. (a) The legislature finds that it is  
9 generally desirable to assure a minor child frequent and continuing contact  
10 with both parents after the parents have separated or dissolved their mar-  
11 riage and that it is in the public interest to encourage parents to share the  
12 rights and responsibilities of child rearing. While actual physical custody  
13 may not be practical or appropriate in all cases, it is the intent of the  
14 legislature that both parents have the opportunity to guide and nurture their  
15 child and to meet the needs of the child on an equal footing beyond the  
16 considerations of support or actual custody.

17 (b) The legislature also finds that it is in the best interests of a  
18 child to encourage parents to implement their own child care agreements  
19 outside of the court setting.

20 \* Sec. 2. AS 09.55.205(c) is amended to read:

21 (c) The court shall determine custody in accordance with the best  
22 interests of the child under AS 25.20.060 - 25.20.150 [NEITHER PARENT IS  
23 ENTITLED TO PREFERENCE AS A MATTER OF RIGHT IN AWARDING CUSTODY OF THE  
24 CHILD]. In determining the best interests of the child the court shall  
25 consider [ALL RELEVANT FACTORS INCLUDING:]

26 (1) the physical, emotional, mental, religious, and social  
27 needs of the child;

28 (2) the capability and desire of each parent to meet these  
29 needs;

IN THE  
MATTER OF THE  
ESTATE OF  
JUDITH A. BROWN

1 (3) the child's preference if the child is of sufficient age  
2 and capacity to form a preference;

3 (4) the love and affection existing between the child and  
4 each parent;

5 (5) the length of time the child has lived in a stable, sat-  
6 isfactory environment and the desirability of maintain'ng continuity;

7 (6) the desire and ability of each parent to allow an open  
8 and loving frequent relationship between the child and his other parent;

9 \* Sec. 3. AS 09.55.205 is amended by adding a new subsection to read:

10 (d) In awarding custody the court may not consider the conduct,  
11 marital status, income, social or cultural environment, or life style of  
12 either parent unless the court determines that the factor affects the  
13 well-being of the child.

14 \* Sec. 4. AS 25.20.060 is amended to read:

15 Sec. 25.20.060. CUSTODY OF THE CHILD. (a) If there is a dispute  
16 over child custody, either parent may petition the superior court for  
17 resolution of the matter under AS 25.20.060 - 25.20.150 [THIS SECTION  
18 UNLESS AN ACTION BETWEEN THE PARENTS IS PENDING UNDER AS 09.55]. The  
19 court shall award custody on the basis of the best interests of the  
20 child. In determining the best interests of the child, the court shall  
21 consider all relevant factors including those factors enumerated in  
22 AS 09.55.205(c) [AS 09.55.205].

23 (b) Neither parent, regardless of the question of the child's  
24 legitimacy, is entitled to preference in the awarding of custody.

25 (c) The court may award shared custody if shared custody is  
26 determined by the court to be in the best interests of the child.

27 \* Sec. 5. AS 25.20 is amended by adding new sections to read:

28 Sec. 25.20.070. TEMPORARY CUSTODY. Unless it is shown to be  
29 detrimental to the welfare of the child, the child shall have, to the

1 greatest degree practical, equal access to both parents during the time  
2 that the court considers an award of custody under AS 25.20.060 - 25.20.-  
3 150.

4 Sec. 25.20.080. MEDIATION OF CUSTODY MATTER. (a) At any time  
5 within 30 days after a petition for child custody is filed under AS 25.-  
6 20.060 the court shall order the parties to submit to mediation.  
7 Each party shall have the right to challenge peremptorily one mediator  
8 appointed.

9 (b) Mediation shall be conducted informally as a conference, or by  
10 telephone, or series of conferences. The parties to the action and a  
11 court-appointed representative of the minor children shall attend.

12 \* (c) [After the first conference either party may withdraw, or] the  
13 mediator may terminate mediation if he determines that mediation efforts  
14 are unsuccessful. Upon [withdrawal by either party or] termination by the  
15 mediator, the mediator shall notify the court that mediation efforts  
16 have failed, and the custody proceeding shall proceed in the usual  
17 manner.

18 (d) Upon submission of the parties to mediation under this section,  
19 a pending child custody proceeding shall be stayed for a period of 30  
20 days or until the court is notified that mediation efforts have failed.  
21 All court orders made during the pending custody proceeding remain in  
22 effect during the period of mediation.

23 (e) Costs of mediation shall be paid by one party or both parties  
24 as ordered by the court.

25 Sec. 25.20.090. FACTORS FOR CONSIDERATION IN AWARDING SHARED  
26 CUSTODY. In determining whether to award shared custody of a child the  
27 court shall consider

28 (1) the child's preference if the child is of sufficient age  
29 and capacity to form a preference;

*PRE  
AMENDMENT*

- 1 (2) the needs of the child;
- 2 (3) the stability of the home environment likely to be offered
- 3 by each parent;
- 4 (4) the education of the child;
- 5 (5) the advantages of keeping the child in the community
- 6 where the child presently resides;
- 7 (6) the optimal time for the child to spend with each parent
- 8 considering
- 9 (A) the actual time spent with each parent;
- 10 (B) the proximity of each parent to the other and to the
- 11 school in which the child is enrolled;
- 12 (C) the feasibility of travel between the parents;
- 13 (D) special needs unique to the child that may be better
- 14 met by one parent than the other;
- 15 (E) which parent is more likely to encourage frequent
- 16 and continuing contact with the other parent;
- 17 (8) the findings and recommendations of a neutral mediator if
- 18 mediation is ordered by the court;
- 19 (9) other factors the court considers pertinent.

20 Sec. 25.20.100. DENIAL OF SHARED CUSTODY. If a parent or the

21 guardian ad litem requests shared custody of a child and the court

22 denies the request, the reasons for the denial shall be stated on the

23 record.

24 Sec. 25.20.110. AWARD OF CUSTODY TO NONPARENT. The court may

25 award custody to a person who is not a parent of a child if

26 (1) the parents of the child consent in writing to the award;

27 or

28 (2) the court makes a written finding that an award of custody

29 to a parent would be detrimental to the child and the award to the

1 person who is not a parent of the child is necessary to serve the best  
2 interests of the child.

3 Sec. 25.20.120. MODIFICATION OF CUSTODY OR VISITATION. An award  
4 of custody of a child or visitation with the child may be modified if  
5 the court determines that the best interests of the child require the  
6 modification of the award. If a parent opposes the modification of the  
7 award of custody or visitation with the child and the modification is  
8 granted, the court shall enter on the record its reason for the modifi-  
9 cation.

10 Sec. 25.20.130. CONFIDENTIALITY. At any stage of a proceeding  
11 involving custody of a child the court may, if it is in the best inter-  
12 ests of the child, close the proceeding to the public or order the court  
13 records closed to the public temporarily or permanently. The court may  
14 modify or vacate an order under this section at any time.

15 Sec. 25.20.140. ACCESS TO RECORDS OF THE CHILD. A parent who is  
16 not granted custody under AS 25.20.060 - 25.20.150 may have access to  
17 the medical, dental, school, and other records of the child notwith-  
18 standing any other provision of law.

19 Sec. 25.20.150. DEFINITION. In AS 25.20.060 - 25.20.150, "shared  
20 custody" means an award of custody of the child to both parents that  
21 assures the child of frequent and continuing contact with each parent.

22 E.D.  
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27  
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Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

#### MEMORANDUM

TO: File

FROM: Kevin Bruce

I talked to Karla Forsythe, Court System General Council, today regarding HB 210. She expressed several reservations with the bill, including the mandatory mediation provision and the lack of language relating to service to indigents. She reported that mediation generally takes an average of 12 hours - at approximately \$75 - \$100 per hour.

Her estimate for costs to the State for indigent persons, should the bill go forward, with the mandatory language to be approximately \$450,000.

She also questioned the incentive for parties to pay mediators if it is mandatory. (She reported a problem with attorney's collecting fees in similar circumstances).

Karla suggested I review the language in SB 723 for possible improvements.

ALASKA STATE LEGISLATURE - SENATE



SENATOR RICHARD I. ELIASON

P.O. BOX 143

SITKA, ALASKA 99835

POUCH V

JUNEAU, ALASKA 99811

COMMITTEES

FINANCE

RESOURCES

STATE AFFAIRS

M E M O R A N D U M

To: Senator Pat Rodey, Chair,  
Senate Judiciary Committee

From: Senator Dick Eliason

Subject: HB 210 and CSSB 741

A handwritten signature in cursive script that reads "Dick Eliason".

This week the Senate unanimously passed CSSB 741 (Finance), the child support enforcement bill. The bill has now gone on to the House but due to the House's decision to hear only bills which are on the priority list it appears that this bill could die there. It would be a shame for this excellent piece of legislation, which the whole Senate endorsed, not to have a chance at final passage.

Your Senate Judiciary committee heard and passed SB 741 earlier in the session. I would like to ask you to consider attaching the final Senate version of it (CSSB 741 (Finance)) to HB 210 which is presently before you. The bills deal with related subjects and statutes and their combination would be appropriate. I hope you will include the language from SB 741 in the version of HB 210 which is returned to the House for concurrence.

SENATE AMENDMENT

By Ferguson, Anderson and Sackett

To: \_\_\_\_\_ SENATE BILL No. \_\_\_\_\_

To: \_\_\_\_\_ HOUSE BILL No. 210 (Judiciary)

PAGE: 2      LINE: 13

after "child" insert:

; however, the court shall comply with the provisions  
of the Indian Child Welfare Act (P.L. (25 U.S.C. 1901-1963)



## SUMMARY AND ANALYSIS

### Clear, Convincing Evidence Needed For Termination Of Parental Rights

The standard of proof states must meet in seeking to terminate parental rights is now a matter of federal constitutional law. The U.S. Supreme Court, 5-4, strikes down a New York child neglect statute that permits termination of parental rights upon proof by a "fair preponderance of the evidence" that a child is permanently neglected. Due process, the Court declares, requires at a minimum that the state prove its case by "clear and convincing" evidence. (*Santosky v. Kramer*, 3/24/82)

Last year, in *Lassiter v. Department of Social Services*, 452 U.S. 18, 49 LW 4586 (1981), the Court held that the Due Process Clause does not require the appointment of counsel for indigent parents in every parental rights termination proceeding. In *Lassiter*, Justice Blackmun explains in the majority opinion, eight Justices agreed that the nature of the process due in such proceedings turns on a balancing of the private interests affected, the risk of error created by the state scheme, and the countervailing governmental interest supporting use of the challenged procedure.

Employing this analysis, Justice Blackmun finds the private interest "commanding," the risk of error "substantial," and the state's interest in the fair preponderance standard "comparatively slight." He then concludes that the "clear and convincing" evidence standard, used by a majority of the states, "strikes a fair balance between the rights of the natural parents and the state's legitimate concerns."

Justice Rehnquist, joined in dissent by the Chief Justice and Justices White and O'Connor, fears that the majority is taking a step in the direction of regulating the entire society by a single source of law. "Fixing the standard of proof as a matter of federal constitutional law will only lead to further federal-court intervention in state schemes." (Page 4333)

### Railway Labor Act Applicable To New York State Railroad Workers

New York's effort to prevent its railroad workers from striking is derailed by a unanimous U.S. Supreme Court ruling that the federal Railway Labor Act, which

allows railroad workers to strike, applies to state-owned railroads. New York was on the wrong track, according to the Court, when it thought a state law prohibiting strikes by public employees could be applied to its railroad workers. (*United Transportation Union v. Long Island Rail Road Co.*, 3/24/82)

Chief Justice Burger, writing for the Court, explains that application to a state-owned railroad of Congress' acknowledged authority to regulate labor relations in the railroad industry does not impair a state's ability to carry out its sovereign function. In *National League of Cities v. Usery*, 426 U.S. 833 (1976), the Court said that a federal law that directly impairs a state's ability to "structure integral operations in areas of traditional governmental functions" violates the Tenth Amendment. Operation of a railroad engaged in interstate commerce is clearly not, in the Court's opinion, an integral part of traditional state activities generally immune from federal regulation.

The Court concludes that to allow individual states, by acquiring railroads, to circumvent federal regulation of railroads would destroy the longstanding and comprehensive uniform scheme thought essential by Congress and would endanger the efficient operation of the interstate rail system. The Court points out that a state acquiring a railroad does so knowing that the railroad is subject to such a scheme of federal regulation. Here, the Court says, New York knew of and accepted federal regulation and, in fact, had operated under it for 13 years without claiming any impairment of its traditional sovereignty. (Page 4315)

### Forged Security Need Not Be Forged Before State Line Crossing

In prosecutions under 18 USC 2314 for transporting forged securities in interstate commerce, the government need not prove that the security was forged before it ever crossed state lines, the U.S. Supreme Court holds, 8-1. The phrase "interstate commerce" has a much broader meaning than merely crossing state lines, the majority says in an opinion written by Justice O'Connor. "[I]nterstate commerce begins well before state lines are crossed, and ends only when movement of the items in question has ceased in the destination

AEC contractors to be shielded by constitutional immunity principles "as interpreted by the courts." S. Rep. No. 694, at 3. But it is worth remarking that DOE is asking us to establish as a constitutional rule something that it was unable to obtain statutorily from Congress. For the reasons set out above, we conclude that the contractors here are not protected by the Constitution's guarantee of federal supremacy. If political or economic considerations suggest that a broader immunity rule is appropriate, "[s]uch complex problems are ones which Congress is best qualified to resolve." *United States v. City of Detroit*, 355 U. S., at 474.

Accordingly, the judgment of the Court of Appeals is

*Affirmed*

GEORGE W. JONES, Assistant to the Solicitor General, Justice Department, Washington, D.C. (WADE H. MCCREE, JR., Solicitor General, M. CARR FERGUSON, Assistant Attorney General, STUART A. SMITH, Assistant to the Solicitor General, JONATHAN S. COHEN and JOHN J. MCCARTHY, Justice Department attorneys, with him on the brief) for petitioner; DANIEL H. FRIEDMAN, Assistant Attorney General, Santa Fe, N.M. (JEFF BINGAMAN, Attorney General, and RICHARD M. KOPEL, Assistant Attorney General, with him on the brief) for respondents.

No. 80-5889

JOHN SANTOSKY II AND ANNIE SANTOSKY, PETITIONERS v. BERNHARDT S. KRAMER, COMMISSIONER, ULSTER COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION,  
SUPREME COURT OF NEW YORK, THIRD JUD. DEPT.

Syllabus

No. 80-5889. Argued November 10, 1981—Decided March 24, 1982

Under New York law, the State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is "permanently neglected." The New York Family Court Act (§ 622) requires that only a "fair preponderance of the evidence" support that finding. Neglect proceedings were brought in Family Court to terminate petitioners' rights as natural parents in their three children. Rejecting petitioners' challenge to the constitutionality of § 622's "fair preponderance of the evidence" standard, the Family Court weighed the evidence under that standard and found permanent neglect. After a subsequent dispositional hearing, the Family Court ruled that the best interests of the children required permanent termination of petitioners' custody. The Appellate Division of the New York Supreme Court affirmed, and the New York Court of Appeals dismissed petitioners' appeal to that court.

*Held:*

1. Process is constitutionally due a natural parent at a state-initiated parental rights termination proceeding.

(a) The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. A parental rights termination proceeding interferes with that fundamental liberty interest. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

(b) The nature of the process due in parental rights termination proceedings turns on a balancing of three factors: the private interests affected by the proceedings; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. *Matthews v. Eldridge*, 424 U. S. 319, 235. In any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the public and private interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. The minimum standard is a question of federal law which this Court may resolve. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.

2. The "fair preponderance of the evidence" standard prescribed by § 622 violates the Due Process Clause of the Fourteenth Amendment.

(a) The balance of private interests affected weighs heavily against use of such a standard in parental rights termination proceedings, since the private interest affected is commanding and the threatened loss is permanent. Once affirmed on appeal, a New York decision terminating parental rights is final and irrevocable.

(b) A preponderance standard does not fairly allocate the risk of an erroneous factfinding between the State and the natural parents. In parental rights termination proceedings, which bear many of the indicia of a criminal trial, numerous factors combine to magnify the risk of erroneous factfinding. Coupled with the preponderance standard, these factors create a significant prospect of erroneous termination of parental rights. A standard of proof that allocates the risk of error nearly equally between an erroneous failure to terminate, which leaves the child in an uneasy status quo, and an erroneous termination, which unnecessarily destroys the natural family, does not reflect properly the relative severity of these two outcomes.

(c) A standard of proof more strict than preponderance of the evidence is consistent with the two state interests at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the child's welfare and a fiscal and administrative interest in reducing the cost and burden of such proceedings.

3. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence. A "clear and convincing evidence" standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process. Determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts.

75 App. Div. 2d 910, 427 N. Y. S. 2d 319, vacated and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE and O'CONNOR, JJ., joined.

JUSTICE BLACKMUN delivered the opinion of the Court.

Under New York law, the State may terminate, over parental objection, the rights of parents in their natural child upon a finding that the child is "permanently neglected." N.Y. Soc. Serv. Law §§ 384-b.4.(d), 384-b.7.(a) (McKinney Supp. 1981-1982) (Soc. Serv. Law). The New York Family Court Act § 622 (McKinney 1975 & Supp. 1981-1982) (Fam. Ct. Act) requires that only a "fair preponderance of the evidence" support that finding. Thus, in New York, the factual certainty required to extinguish the parent-child relationship is no greater than that necessary to award money damages in an ordinary civil action.

Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this. Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.

I

A

New York authorizes its officials to remove a child temporarily from his or her home if the child appears "neglected," within the meaning of Art. 10 of the Family Court Act. See §§ 1012(f), 1021-1029. Once removed, a child under the age of 18 customarily is placed "in the care of an authorized agency," Soc. Serv. Law § 384-b.7.(a), usually a state institution or a foster home. At that point, "the state's first obligation is to help the family with services to . . . reunite it. . . ." § 384-b.1.(a)(iii). But if convinced that "positive, nurturing parent-child relationships no longer exist," § 384-b.1.(b), the State may initiate "permanent neglect" proceedings to free the child for adoption.

The State bifurcates its permanent neglect proceeding into "fact-finding" and "dispositional" hearings. Fam. Ct. Act §§622, 623. At the factfinding stage, the State must prove that the child has been "permanently neglected," as defined by Fam. Ct. Act §§614.1.(a)-(d) and Soc. Serv. Law §384-b.7.(a). See Fam. Ct. Act §622. The Family Court judge then determines at a subsequent dispositional hearing what placement would serve the child's best interests. §§623, 631.

At the factfinding hearing, the State must establish, among other things, that for more than a year after the child entered state custody, the agency "made diligent efforts to encourage and strengthen the parental relationship." Fam. Ct. Act §§614.1.(c), 611. The State must further prove that during that same period, the child's natural parents failed "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so." §614.1.(d). Should the State support its allegations by "a fair preponderance of the evidence," §622, the child may be declared permanently neglected. §611. That declaration empowers the Family Court judge to terminate permanently the natural parents' rights in the child. §§631(c), 634. Termination denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child.<sup>1</sup>

New York's permanent neglect statute provides natural parents with certain procedural protections.<sup>2</sup> But New York permits its officials to establish "permanent neglect" with less proof than most States require. Thirty-three States, the District of Columbia, and the Virgin Islands currently specify a higher standard of proof, in parental rights termination proceedings, than a "fair preponderance of the evidence."<sup>3</sup> The only analogous federal statute of which we

are aware permits termination of parental rights solely upon "evidence beyond a reasonable doubt." Indian Child Welfare Act of 1978, Pub. L. 95-608, §102(f), 92 Stat. 3072, 25 U. S. C. §1912(f) (1976 ed., Supp. III). The question here is whether New York's "fair preponderance of the evidence" standard is constitutionally sufficient.

## B

Petitioners John Santosky II and Annie Santosky are the natural parents of Tina and John III. In November 1973, after incidents reflecting parental neglect, respondent Kramer, Commissioner of the Ulster County Department of Social Services, initiated a neglect proceeding under Fam. Ct. Act §1022 and removed Tina from her natural home. About 10 months later, he removed John III and placed him with foster parents. On the day John was taken, Annie Santosky gave birth to a third child, Jed. When Jed was only three days old, respondent transferred him to a foster home on the ground that immediate removal was necessary to avoid imminent danger to his life or health.

In October 1973, respondent petitioned the Ulster County Family Court to terminate petitioners' parental rights in the three children.<sup>4</sup> Petitioners challenged the constitutionality of the "fair preponderance of the evidence" standard specified in Fam. Ct. Act §622. The Family Court judge rejected this constitutional challenge, App. 29-30, and weighed the evidence under the statutory standard. While acknowledging that the Santoskys had maintained contact with their children, the judge found those visits "at best superficial and devoid of any real emotional content." *Id.*, at 21. After deciding that the agency had made "diligent efforts" to encourage and strengthen the parental relationship," *id.*, at 30, he concluded that the Santoskys were incapable, even with public assistance, of planning for the future of their children. *Id.*, at 33-37. The judge later held a dispositional hearing and ruled that the best interests of the three children required permanent termination of the Santoskys' custody.<sup>5</sup> *Id.*, at 39.

Petitioners appealed, again contesting the constitutionality of §622's standard of proof.<sup>6</sup> The New York Supreme

*Maria*, 15 V.I. 368, 384 (1978); *In re Sego*, 82 Wash. 736, 739, 513 P. 2d 831, 87 (1973) ("clear, cogent, and convincing evidence"); *In re X.*, 607 P. 2d 911, 919 (Wyo. 1980) ("clear and unequivocal").

South Dakota's Supreme Court has required a "clear preponderance" of the evidence in a dependency proceeding. See *In re B.E.*, 287 N.W. 2d 91, 96 (1979). Two States, New Hampshire and Louisiana, have barred parental rights terminations unless the key allegations have been proved beyond a reasonable doubt. See *State v. Robert H.*, 118 N.H. 713, 716, 393 A. 2d 1387, 1389 (1978); La. Rev. Stat. Ann. §13:1603.A (West Supp. 1982).

So far as we are aware, only two federal courts have addressed the issue. Each has held that allegations supporting parental rights termination must be proved by clear and convincing evidence. *Sims v. State Dept. of Public Welfare*, 438 F. Supp. 1179, 1194 (SD Tex. 1977), rev'd on other grounds *sub nom.* *Moore v. Sims*, 442 U. S. 415 (1979); *Alsager v. District Court of Pock City*, 406 F. Supp. 10, 25 (SD Iowa 1975), aff'd on other grounds, 545 F. 2d 1137 (CA8 1976).

<sup>1</sup> Respondent had made an earlier and unsuccessful termination effort in September 1976. After a factfinding hearing, the Family Court judge dismissed respondent's petition for failure to prove an essential element of Fam. Ct. Act §614.1.(d). See *In re Santosky*, 89 Misc. 2d 730, 393 N.Y.S. 2d 486 (1977). The New York Supreme Court, Appellate Division, affirmed, finding that "the record as a whole" revealed that petitioners had "substantially planned for the future of the children." *In re John W.*, 63 App. Div. 2d 750, 751, 404 N.Y.S. 2d 717, 719 (1978).

<sup>2</sup> Since respondent took custody of Tina, John III, and Jed, the Santoskys have had two other children, James and Jeremy. The State has taken no action to remove these younger children. At oral argument, counsel for respondent replied affirmatively when asked whether he was asserting that petitioners were "unfit to handle the three older ones but not unfit to handle the two younger ones." Tr. of Oral Arg. 24.

<sup>3</sup> Petitioners initially had sought review in the United States Supreme Court.

<sup>1</sup> At oral argument, counsel for petitioners asserted that, in New York, natural parents have no means of restoring terminated parental rights. Tr. of Oral Arg. 9. Counsel for respondent, citing Fam. Ct. Act §1061, answered that parents may petition the Family Court to vacate or set aside an earlier order on narrow grounds, such as newly discovered evidence or fraud. Tr. of Oral Arg. 26. Counsel for respondent conceded, however, that this statutory provision has never been invoked to set aside a permanent neglect finding. *Id.*, at 27.

<sup>2</sup> Most notably, natural parents have a statutory right to the assistance of counsel and of court-appointed counsel if they are indigent. Fam. Ct. Act §262(a)(iii).

<sup>3</sup> Fourteen States, by statute, have required "clear and convincing evidence" or its equivalent. See Alaska Stat. Ann. §47.10.080(c)(3) (1980); Cal. Civ. Code Ann. §232(a)(7) (West Supp. 1982); Ga. Code §§24A-2201(c), 24A-3201 (1981); Iowa Code §600A.8 (Supp. 1981) ("clear and convincing proof"); Me. Rev. Stat. Ann., Tit. 22, §4055.1.B.(2) (Supp. 1981-1982); Mich. Comp. Laws §722.25 (Supp. 1981-1982); Mo. Rev. Stat. §211.447.2(2) (Supp. 1982) ("clear, cogent and convincing evidence"); N.M. Stat. Ann. §40-7-1.J. (Supp. 1981); N.C. Gen. Stat. §7A-289.30(e) (Supp. 1979) ("clear, cogent, and convincing evidence"); R.I. Gen. Laws §15-7-7(d) (Supp. 1980); Tenn. Code Ann. §37-246(d) (Supp. 1982); Va. Code §16.1-283.B. (Supp. 1981); W. Va. Code §49-6-2(c) (1980) ("clear and convincing proof"); Wis. Stat. §48.31(1) (Supp. 1981-1982).

Sixteen States, the District of Columbia, and the Virgin Islands, by court decision, have required "clear and convincing evidence" or its equivalent. See *Dale County Dist. of Pensions & Security v. Robles*, 368 So. 2d 39, 42 (Ala. App. 1979); *Harper v. Caskin*, 265 Ark. 558, 560-561, 580 S.W. 2d 176, 178 (1979); *In re J. S. R.*, 374 A. 2d 560, 864 (D.C. 1977); *Torres v. Van Epoel*, 98 So. 2d 735, 737 (Fla. 1957); *Blakey v. Blakey*, 72 Ill. App. 3d 946, 947, 391 N.E. 2d 222, 223 (1979); *In re Kerns*, 225 Kan. 746, 753, 594 P. 2d 187, 193 (1979); *In re Rosenbloom*, 266 N.W. 2d 888, 889 (Minn. 1978) ("clear and convincing proof"); *In re J. L. B.*, — Mont. —, 594 P. 2d 1127, 1136 (1979); *In re Souza*, 204 Neb. 503, 510, 283 N.W. 2d 48, 52 (1979); *J. and E. v. M. and F.*, 157 N.J. Super. 478, 489, 385 A. 2d 240, 246 (App. Div. 1978); *In re J.A.*, 283 N.W. 2d 83, 92 (N.D. 1979); *In re Darren Todd H.*, 615 P. 2d 237, 239 (Okla. 1980); *In re William L.*, 477 Pa. 322, 332, 383 A. 2d 1228, 1233, *cert. denied sub nom. Lehman v. Lycoming County Children's Services*, 439 U. S. 880 (1978); *In re G. M.*, 596 S.W. 2d 846, 847 (Tex. 1980); *In re Pate*, 525 P. 2d 1244, 1248 (Utah 1975); *In re*

Court, Appellate Division, affirmed, holding application of the preponderance of the evidence standard "proper and constitutional." *In re John AA*, 75 App. Div. 2d 910, 427 N.Y.S. 2d 319, 320 (1980). That standard, the court reasoned, "recognizes and seeks to balance rights possessed by the child . . . with those of the natural parents. . . ." *Ibid.*

The New York Court of Appeals then dismissed petitioners' appeal to that court "upon the ground that no substantial constitutional question is directly involved." App. 55. We granted certiorari to consider petitioners' constitutional claim. 450 U. S. 993 (1981).

## II

Last Term, in *Lassiter v. Department of Social Services*, 452 U. S. 18 (1981), this Court, by a 5-4 vote, held that the Fourteenth Amendment's Due Process Clause does not require the appointment of counsel for indigent parents in every parental status termination proceeding. The case casts light, however, on the two central questions here—whether process is constitutionally due a natural parent at a State's parental rights termination proceeding, and, if so, what process is due.

In *Lassiter*, it was "not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." 452 U. S., at 37 (dissenting opinion); see *id.*, at 24-32 (opinion for the Court); *id.*, at 59-60 (STEVENS, J., dissenting). See also *Little v. Streater*, 452 U. S. 1, 13 (1981). The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. *Quilloin v. Walcott*, 434 U. S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U. S. 816, 845 (1977); *Moore v. East Cleveland*, 431 U. S. 494, 499 (1977) (plurality opinion); *Cleveland Board of Education v. LaFleur*, 414 U. S. 632, 639-640 (1974); *Stanley v. Illinois*, 405 U. S. 645, 651-652 (1972); *Prince v. Massachusetts*, 321 U. S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U. S. 510, 534-535 (1925); *Meyer v. Nebraska*, 262 U. S. 390, 399 (1923).

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.<sup>1</sup>

In *Lassiter*, the Court and three dissenters agreed that the nature of the process due in parental rights termination proceedings turns on a balancing of the "three distinct factors" specified in *Mathews v. Eldridge*, 424 U. S. 319, 335 (1976):

peals. That court *sua sponte* transferred the appeal to the Appellate Division, Third Department, stating that a direct appeal did not lie because "questions other than the constitutional validity of a statutory provision are involved." App. 50.

We therefore reject respondent's claim that a parental rights termination proceeding does not interfere with a fundamental liberty interest. See Brief for Respondent 11-16; Tr. of Oral Arg. 38. The fact that important liberty interests of the child and its foster parents may also be affected by a permanent neglect proceeding does not justify denying the natural parents constitutionally adequate procedures. Nor can the State refuse to provide natural parents adequate procedural safeguards on the ground that the family unit already has broken down; that is the very issue the permanent neglect proceeding is meant to decide.

the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. See 452 U. S., at 27-31; *id.*, at 37-48 (dissenting opinion). But see *id.*, at 59-60 (STEVENS, J., dissenting). While the respective *Lassiter* opinions disputed whether those factors should be weighed against a presumption disfavoring appointed counsel for one not threatened with loss of physical liberty, compare 452 U. S., at 31-32, with *id.*, at 41 and n. 8 (dissenting opinion), that concern is irrelevant here. Unlike the Court's right-to-counsel rulings, its decisions concerning constitutional burdens of proof have not turned on any presumption favoring any particular standard. To the contrary, the Court has engaged in a straightforward consideration of the factors identified in *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process.

In *Addington v. Texas*, 441 U. S. 418 (1979), the Court, by a unanimous vote of the participating Justices, declared: "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *Id.*, at 423, quoting *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J., concurring). *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

Thus while private parties may be interested intensely in a civil dispute over money damages, application of a "preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." 441 U. S., at 423. When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Ibid.* The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, *id.*, at 427, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." *Id.*, at 424. See also *In re Winship*, 397 U. S., at 372 (Harlan, J., concurring).

The "minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek v. Jones*, 445 U. S. 480, 491 (1980). See also *Logan v. Zimmerman Brush Co.*, — U. S. —, — (1982) (slip op. 9). Moreover, the degree of proof required in a particular type of proceeding "is the kind of question which has traditionally been left to the judiciary to resolve." *Woodby v. INS*, 385 U. S. 276, 284 (1966).<sup>2</sup>

<sup>1</sup>The dissent charges, *post*, at 3, n. 2, that "this Court simply has no role in establishing the standards of proof that states must follow in the various judicial proceedings they afford to their citizens." As the dissent properly concedes, however, the Court must examine a State's chosen standard to determine whether it satisfies "the constitutional minimum of 'fundamental fairness.'" *Ibid.* See, e.g., *Addington v. Texas*, 441 U. S. 415, 427, 433 (1979) (unanimous decision of participating Justices) (Fourteenth Amendment requires at least clear and convincing evidence in a civil proceeding brought under state law to commit an individual involuntarily to a mental institution).

"In cases involving individual rights, whether criminal or civil, [t]he standard of proof [at a minimum] reflects the value society places on individual liberty." *Addington v. Texas*, 441 U. S., at 425, quoting *Tippett v. Maryland*, 436 F. 2d 1153, 1166 (CA4 1971) (opinion concurring in part and dissenting in part), cert. dismissed *sub nom. Murel v. Baltimore City Criminal Court*, 407 U. S. 355 (1972).

This Court has mandated an intermediate standard of proof—"clear and convincing evidence"—when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas*, 441 U. S., at 424. Notwithstanding "the state's 'civil labels and good intentions,'" *id.*, at 427, quoting *In re Winship*, 397 U.S., at 365-366, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma." 441 U. S., at 425, 426. See, e. g., *Addington v. Texas*, *supra*, (civil commitment); *Woodby v. INS*, 385 U. S., at 285 (deportation); *Chaunt v. United States*, 364 U. S. 350, 353 (1960) (denaturalization); *Schneiderman v. United States*, 320 U. S. 118, 125, 159 (1943) (denaturalization).

In *Lassiter*, to be sure, the Court held that fundamental fairness may be maintained in parental rights termination proceedings even when some procedures are mandated only on a case-by-case basis, rather than through rules of general application. 452 U. S., at 31-32 (natural parent's right to court-appointed counsel should be determined by the trial court, subject to appellate review). But this Court never has approved case-by-case determination of the proper standard of proof for a given proceeding. Standards of proof, like other "procedural due process rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Mathews v. Eldridge*, 424 U. S., at 344 (emphasis added). Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceedings is governed by a constitutionally defective evidentiary standard.<sup>9</sup>

nate period to a state mental hospital); *In re Winship*, 397 U. S. 358, 364 (1970) (Due Process Clause of the Fourteenth Amendment protects the accused in state proceeding against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged).

<sup>9</sup> For this reason, we reject the suggestions of respondent and the dissent that the constitutionality of New York's statutory procedures must be evaluated as a "package." See Tr. of Oral Arg., 25, 36, 38. Indeed, we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous assessment of the "cumulative effect" of state procedures. In the criminal context, for example, the Court has never assumed that "strict substantive standards or special procedures compensate for a lower burden of proof. . . ." *Post*, at 4. See *In re Winship*, 397 U. S. 358, 368 (1970). Nor has the Court treated appellate review as a curative for an inadequate burden of proof. See *Woodby v. INS*, 385 U. S. 276, 282 (1966) ("judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment").

As the dissent points out, "the standard of proof is a crucial component of legal process, the primary function of which is to minimize the risk of erroneous decisions." *Post*, at 16-17, quoting *Greenholtz v. Nebraska Penal Inmates*, 442 U. S. 1, 13 (1979). Notice, summons, right to counsel, rules of evidence, and evidentiary hearings are all procedures to place information before the factfinder. But only the standard of proof "instruct[s] the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions" he draws from that information. *In re Winship*, 397 U. S., at 370 (Harlan, J., concurring). The stat-

### III

In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight. Evaluation of the three *Eldridge* factors compels the conclusion that use of a "fair preponderance of the evidence" standard in such proceedings is inconsistent with due process.

#### A

"The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg v. Kelly*, 397 U. S. 254, 262-263 (1970), quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring). Whether the loss threatened by a particular type of proceeding is sufficiently grave to warrant more than average certainty on the part of the factfinder turns on both the nature of the private interest threatened and the permanency of the threatened loss.

*Lassiter* declared it "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children'" is an interest far more precious than any property right. 452 U. S., at 27, quoting *Stanley v. Illinois*, 405 U. S., at 651. When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. "If the State prevails, it will have worked a unique kind of deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one." 452 U. S., at 27.

In government-initiated proceedings to determine juvenile delinquency, *In re Winship*, *supra*; civil commitment, *Addington v. Texas*, *supra*; deportation, *Woodby v. INS*, *supra*; and denaturalization, *Chaunt v. United States*, *supra*, and *Schneiderman v. United States*, *supra*, this Court has identified losses of individual liberty sufficiently serious to warrant imposition of an elevated burden of proof. Yet juvenile delinquency adjudications, civil commitment, deportation, and denaturalization, at least to a degree, are all reversible official actions. Once affirmed on appeal, a New York decision terminating parental rights is final and irrevocable. See n. 1, *supra*. Few forms of state action are both so severe and so irreversible.

Thus, the first *Eldridge* factor—the private interest affected—weighs heavily against use of the preponderance standard at a State-initiated permanent neglect proceeding. We do not deny that the child and his foster parents are also deeply interested in the outcome of that contest. But at the factfinding stage of the New York proceeding, the focus emphatically is not on them.

The factfinding does not purport—and is not intended—to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the factfinding hearing pits the State directly against the parents. The State alleges that the natural parents are at fault. Fam. Ct. Act §614.1(d). The questions disputed and decided are what the State did—"made diligent efforts,"

utory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent's fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts.

§ 614.1.(c)—and what the natural parents did not do—maintain contact with or plan for the future of the child.” § 614.1.(d). The State marshals an array of public resources to prove its case and disprove the parents’ case. Victory by the State not only makes termination of parental rights possible; it entails a judicial determination that the parents are unfit to raise their own children.<sup>10</sup>

At the factfinding, the State cannot presume that a child and his parents are adversaries. After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge. See Fam. Ct. Act. § 631 (judge shall make his order “solely on the basis of the best interests of the child,” and thus has no obligation to consider the natural parents’ rights in selecting dispositional alternatives). But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.<sup>11</sup> Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures.

However substantial the foster parents’ interests may be, cf. *Smith v. Organization of Foster Families*, 431 U. S., at 845–847, they are not implicated directly in the factfinding stage of a State-initiated permanent neglect proceeding against the natural parents. If authorized, the foster parents may pit their interests directly against those of the natural parents by initiating their own permanent neglect proceeding. Fam. Ct. Act §§ 615, 1055(d); Soc. Serv. Law § 392.7 (c). Alternatively, the foster parents can make their case for custody at the dispositional stage of a State-initiated proceeding, where the judge already has decided the issue of permanent neglect and is focusing on the placement that would serve the child’s best interests. Fam. Ct. Act. §§ 623, 631. For the foster parents, the State’s failure to prove permanent neglect may prolong the delay and uncertainty until their foster child is freed for adoption. But for the natural parents, a finding of permanent neglect can cut off forever their rights in their child. Given this disparity of consequence, we have no difficulty finding that the balance of private interests strongly favors heightened procedural protections.

## B

Under *Mathews v. Eldridge*, we next must consider both the risk of erroneous deprivation of private interests resulting from use of a “fair preponderance” standard and the likelihood that a higher evidentiary standard would reduce that risk. See 424 U. S., at 335. Since the factfinding phase of a

<sup>10</sup> The Family Court judge in the present case expressly refused to terminate petitioners’ parental rights on a “non-statutory, no-fault basis.” App. 22-29. Nor is it clear that the State constitutionally could terminate a parent’s rights without showing parental unfitness. See *Quilloin v. Walcott*, 434 U. S. 246, 255 (1978) (“We have little doubt that the Due Process Clause would be offended [if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.”) quoting *Smith v. Organization of Foster Families*, 431 U. S. 816, 862–863 (1977) (Stewart, J., concurring in the judgment).

<sup>11</sup> For a child, the consequences of termination of his natural parents’ rights may well be far-reaching. In Colorado, for example, it has been noted: “The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . . , but forever.” *In re K.S.*, 33 Colo. App. 72, 76, 515 P. 2d 130, 133 (1973).

Some losses cannot be measured. In this case, for example, Jed Santosky was removed from his natural parents’ custody when he was only three days old; the judge’s finding of permanent neglect effectively foreclosed the possibility that Jed could ever know his natural parents.

permanent neglect proceeding is an adversary contest between the State and the natural parents, the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous factfinding between these two parties.

In New York, the factfinding stage of a State-initiated permanent neglect proceeding bears many of the indicia of a criminal trial. Cf. *Lassiter v. Department of Social Services*, 52 U. S., at 42–44 (dissenting opinion); *Meltzer v. C. Buck Lee-Craw & Co.*, 402 U. S. 954, 959 (1971) (Black, J., dissenting from denial of certiorari). See also dissenting opinion, *post*, at 8–10 (describing procedures employed at factfinding proceeding). The Commissioner of Social Services charges the parents with permanent neglect. They are served by summons. Fam. Ct. Act §§ 614, 616, 617. The factfinding hearing is conducted pursuant to formal rules of evidence. § 624. The State, the parents, and the child are all represented by counsel. §§ 249, 262. The State seeks to establish a series of historical facts about the intensity of its agency’s efforts to reunite the family, the infrequency and insubstantiality of the parents’ contacts with their child, and the parents’ inability or unwillingness to formulate a plan for the child’s future. The attorneys submit documentary evidence, and call witnesses who are subject to cross-examination. Based on all the evidence, the judge then determines whether the State has proved the statutory elements of permanent neglect by a fair preponderance of the evidence. § 622.

At such a proceeding, numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. See *Smith v. Organization of Foster Families*, 431 U. S., at 835, n. 36. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent.<sup>12</sup> Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, *id.*, at 833–835, such proceedings are often vulnerable to judgments based on cultural or class bias.

The State’s ability to assemble its case almost inevitably dwarfs the parents’ ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State’s attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency’s own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.<sup>13</sup>

<sup>12</sup> For example, a New York court appraising an agency’s “diligent efforts” to provide the parents with social services can excuse efforts not made on the grounds that they would have been “detrimental to the moral and temporal welfare of the child.” Fam. Ct. Act § 614.1.(c). In determining whether the parent “substantially and continuously or repeatedly” failed to “maintain contact with . . . the child,” § 614.1.(d), the judge can discount actual visits or communications on the grounds that they were insubstantial or “overtly demonstrat[ed] a lack of affectionate and concerned parenthood.” Soc. Serv. Law § 384-b.7.(b). When determining whether the parent planned for the child’s future, the judge can reject as unrealistic plans based on overly optimistic estimates of physical or financial ability. § 384-b.7.(c). See also dissenting opinion, *post* at 10, notes 8 and 9.

<sup>13</sup> In this case, for example, the parents claim that the State sought to . . .

The disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options. Unlike criminal defendants, natural parents have no "double jeopardy" defense against repeated state termination efforts. If the State initially fails to win termination, as New York did here, see n. 4, *supra*, it always can try once again to cut off the parents' rights after gathering more or better evidence. Yet even when the parents have attained the level of fitness required by the State, they have no similar means by which they can forestall future termination efforts.

Coupled with a "preponderance of the evidence" standard, these factors create a significant prospect of erroneous termination. A standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case. See *In re Winship*, 397 U. S., at 371, n. 3 (Harlan, J., concurring). Given the weight of the private interests at stake, the social cost of even occasional error is sizable.

Raising the standard of proof would have both practical and symbolic consequences. Cf. *Addington v. Texas*, 441 U. S., at 426. The Court has long considered the heightened standard of proof used in criminal prosecutions to be "a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U. S., at 363. An elevated standard of proof in a parental rights termination proceeding would alleviate "the possible risk that a factfinder might decide to [deprive] an individual based solely on a few isolated instances of unusual conduct [or] . . . idiosyncratic behavior." *Addington v. Texas*, 441 U. S., at 427. "Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate terminations will be ordered. *Ibid.*"

The Appellate Division approved New York's preponderance standard on the ground that it properly "balanced rights possessed by the child . . . with those of the natural parents. . . ." 75 App. Div. 2d, at 910, 427 N.Y.S. 2d, at 320. By so saying, the court suggested that a preponderance standard properly allocates the risk of error between the parents and the child.<sup>14</sup> That view is fundamentally mistaken.

The court's theory assumes that termination of the natural parents' rights invariably will benefit the child.<sup>15</sup> Yet we

prevented them from maintaining the contact required by Fam. Ct. Act. § 614.1(d). See Brief for Petitioners 9. The parents further claim that the State cited their rejection of social services they found offensive or superfluous as proof of the agency's "diligent efforts" and their own "failure to plan" for the children's future. *Id.*, at 10-11.

We need not accept these statements as true to recognize that the State's unusual ability to structure the evidence increases the risk of an erroneous factfinding. Of course, the disparity between the litigants' resources will be vastly greater in States where there is no statutory right to court-appointed counsel. See *Lassiter v. Department of Social Services*, 452 U. S., at 34 (only 33 States and the District of Columbia provide that right by statute).

<sup>14</sup>The dissent makes a similar claim. See dissenting opinion, *post*, at 17-22.

<sup>15</sup>This is a hazardous assumption at best. Even when a child's natural home is imperfect, permanent removal from that home will not necessarily improve his welfare. See, e. g., Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 993 (1975) ("In fact, under current practice, coercive intervention frequently results in placing a child in a more detrimental situation than he would be in without intervention.").

Nor does termination of parental rights necessarily ensure adoption. See Brief for Community Action for Legal Services, Inc., *et al.*, as *Amicus Curiae* 22-23 (in 1979, only 12% of the adoptable children in foster care in New York City were actually adopted, although some had been waiting for years, citing *Redirecting Foster Care, A Report to the Mayor of the City of New York* 69, 43 (1980)). Even when a child eventually finds an adoptive family, he may spend years moving between state institutions and

have noted above that the parents and the child share an interest in avoiding erroneous termination. Even accepting the court's assumption, we cannot agree with its conclusion that a preponderance standard fairly distributes the risk of error between parent and child. Use of that standard reflects the judgment that society is nearly neutral between erroneous termination of parental rights and erroneous failure to terminate those rights. Cf. *In re Winship*, 397 U. S., at 371 (Harlan, J., concurring). For the child, the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo.<sup>16</sup> For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family. A standard that allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity.

### C

Two state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings. A standard of proof more strict than preponderance of the evidence is consistent with both interests.

"Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision" at the factfinding proceeding. *Lassiter v. Department of Social Services*, 452 U. S., at 27. As *parens patriae*, the State's goal is to provide the child with a permanent home. See Soc. Serv. Law § 384-b.1.(a)(i) (statement of legislative findings and intent). Yet while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural familial bonds." § 384-b.1.(a)(ii). "[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Stanley v. Illinois*, 405 U. S., at 652.

The State's interest in finding the child an alternative permanent home arises only "when it is clear that the natural parent cannot or will not provide a normal family home for the child." Soc. Serv. Law § 384-b.1.(a)(iv) (emphasis added). At the factfinding, that goal is served by procedures that promote an accurate determination of whether the natural parents can and will provide a normal home.

Unlike a constitutional requirement of hearings, see, e. g., *Mathews v. Eldridge*, 424 U. S., at 347, or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State. As we have observed, 33 States already have adopted a higher standard by statute or court decision with-

"temporary" foster placements after his ties to his natural parents have been severed. See *Smith v. Organization of Foster Families*, 431 U. S., at 833-838 (describing the "limbo" of the New York foster care system).

"When the termination proceeding occurs, the child is not living at his natural home. A child cannot be adjudicated "permanently neglected" until, "for a period of more than a year," he has been in "the care of an authorized agency." Soc. Serv. Law § 384-b.7.(a); Fam. Ct. Act § 614.1(d). See also dissenting opinion, at 20-21.

Under New York law, a judge has ample discretion to ensure that, once removed from his natural parents on grounds of neglect, a child will not return to a hostile environment. In this case, when the State's initial termination effort failed for lack of proof, see n. 4, *supra*, the court simply issued orders under Fam. Ct. Act § 1055(b) extending the period of the child's foster home placement. See App. 19-20. See also Fam. Ct. Act § 632(b) (when State's permanent neglect petition is dismissed for insufficient evidence, judge retains jurisdiction to reconsider underlying orders of placement); § 633 (judge may suspend judgment at dispositional hearing for an additional year).

<sup>16</sup>Any *parens patriae* interest in terminating the natural parents' rights arises only at the dispositional phase, after the parents' rights are

out apparent effect on the speed, form, or cost of their factfinding proceedings. See n. 3, *supra*.

Nor would an elevated standard of proof create any real administrative burdens for the State's factfinders. New York Family Court judges already are familiar with a higher evidentiary standard in other parental rights termination proceedings not involving permanent neglect. See Soc. Serv. Law §§ 384-b.3.(g), 384-b.4.(c), and 384-b.4.(e) (requiring "clear and convincing proof" before parental rights may be terminated for reasons of mental illness and mental retardation or severe and repeated child abuse). New York also demands at least clear and convincing evidence in proceedings of far less moment than parental rights termination proceedings. See, e.g., N.Y. Veh. & Traf. Law § 22<sup>1</sup> (McKinney Supp. 1981) (requiring the State to prove traffic infractions by "clear and convincing evidence") and *In re Rosenthal v. Hartnett*, 36 N.Y. 2d 269, 326 N.E. 2d 811 (1975); see also *Ross v. Food Specialties, Inc.*, 6 N.Y. 2d 336, 341, 160 N.E. 2d 618, 620 (1959) (requiring "clear, positive and convincing evidence" for contract reformation). We cannot believe that it would burden the State unduly to require that its factfinders have the same factual certainty when terminating the parent-child relationship as they must have to suspend a driver's license.

#### IV

The logical conclusion of this balancing process is that the "fair preponderance of the evidence" standard prescribed by Fam. Ct. Act § 622 violates the Due Process Clause of the Fourteenth Amendment." The Court noted in *Addington*: "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." 441 U. S., at 427. Thus, at a parental rights termination proceeding, a near-equal allocation of risk between the parents and the State is constitutionally intolerable. The next question, then, is whether a "beyond a reasonable doubt" or a "clear and convincing" standard is constitutionally mandated.

In *Addington*, the Court concluded that application of a reasonable-doubt standard is inappropriate in civil commitment proceedings for two reasons—because of our hesitation to apply that unique standard "too broadly or casually in non-criminal cases," *id.*, at 428, and because the psychiatric evidence ordinarily adduced at commitment proceedings is rarely susceptible to proof beyond a reasonable doubt. *Id.*, at 429-430, 432-433. To be sure, as has been noted above, in the Indian Child Welfare Act of 1978, Pub. L. 95-608, § 102(f), 92 Stat. 3072, 25 U. S. C. § 1912(f) (1976 ed., Supp. III), Congress requires "evidence beyond a reasonable doubt" for termination of Indian parental rights, reasoning that "the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty. . . ." H.R. Rep. No. 95-1386, p. 22 (1978). Congress did not consider, however, the evidentiary problems that would arise if proof beyond a reasonable doubt were required in all State-initiated parental rights termination hearings.

Like civil commitment hearings, termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of

parental foresight and progress. Cf. *Lassiter v. Department of Social Services*, 452 U. S., at 30; *id.*, at 44-46 (dissenting opinion) (describing issues raised in state termination proceedings). The substantive standards applied vary from State to State. Although Congress found a "beyond a reasonable doubt" standard proper in one type of parental rights termination case, another legislative body might well conclude that a reasonable-doubt standard would erect an unreasonable barrier to state efforts to free permanently neglected children for adoption.

A majority of the States have concluded that a "clear and convincing evidence" standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns. See n. 3, *supra*. We hold that such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process. We further hold that determination of the precise burden equal to or greater than that standard is a matter of state law properly left to state legislatures and state courts. Cf. *Addington v. Texas*, 441 U. S., at 433.

We, of course, express no view on the merits of petitioners' claims." At a hearing conducted under a constitutionally proper standard, they may or may not prevail. Without deciding the outcome under any of the standards we have approved, we vacate the judgment of the Appellate Division and remand the case for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE O'CONNOR join, dissenting.

I believe that few of us would care to live in a society where every aspect of life was regulated by a single source of law, whether that source be this Court or some other organ of our complex body politic. But today's decision certainly moves us in that direction. By passing the New York scheme and holding one narrow provision unconstitutional, the majority invites further federal court intrusion into every facet of state family law. If ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume of logic," it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason.

Equally as troubling is the majority's due process analysis. The Fourteenth Amendment guarantees that a State will treat individuals with "fundamental fairness" whenever its actions infringe their protected liberty or property interests. By adoption of the procedures relevant to this case, New York has created an exhaustive program to assist parents in regaining the custody of their children and to protect parents from the unfair deprivation of their parental rights. And yet the majority's myopic scrutiny of the standard of proof blinds it to the very considerations and procedures which make the New York scheme "fundamentally fair."

#### I

State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. For all of our experience in this area, we have found no

"The dissent's claim that today's decision "will inevitably lead to the federalization of family law," *post*, at 4, is, of course, vastly overstated. As the dissent properly notes, the Court's duty to "refrain from interfering with state answers to domestic relations questions" has never required "that the Court should blink at clear constitutional violations in state stat-

"Unlike the dissent, we carefully refrain from accepting as the "facts of this case" findings that are not part of the record and that have no tendency to be more likely true than not.

fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the States free to experiment with various remedies has produced novel approaches and promising progress.

Throughout this experience the Court has scrupulously refrained from interfering with state answers to domestic relations questions. "Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements." *United States v. Yazell*, 382 U. S. 341, 352 (1966). This is not to say that the Court should blink at clear constitutional violations in state statutes, but rather that in this area, of all areas, "substantial weight must be given to the good faith judgments of the individuals [administering a program] . . . that the procedures they have adopted assure fair consideration of the . . . claims of individuals." *Mathews v. Eldridge*, 424 U. S. 319, 349 (1976).

This case presents a classic occasion for such solicitude. As will be seen more fully in the next part, New York has enacted a comprehensive plan to aid marginal parents in regaining the custody of their child. The central purpose of the New York plan is to reunite divided families. Adoption of the preponderance of the evidence standard represents New York's good faith effort to balance the interest of parents against the legitimate interests of the child and the State. These earnest efforts by state officials should be given weight in the Court's application of due process principles. "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas and Texas Railway Co. v. May*, 194 U. S. 267, 270 (1904).<sup>1</sup>

The majority may believe that it is adopting a relatively unobtrusive means of ensuring that termination proceedings provide "due process of law." In fact, however, fixing the standard of proof as a matter of federal constitutional law will only lead to further federal-court intervention in state schemes. By holding that due process requires proof by clear and convincing evidence the majority surely cannot mean that any state scheme passes constitutional muster so long as it applies that standard of proof. A state law permitting termination of parental rights upon a showing of neglect by clear and convincing evidence certainly would not be acceptable to the majority if it provided no procedures other than one thirty-minute hearing. Similarly, the majority probably would balk at a state scheme that permitted termination of parental rights on a clear and convincing showing merely that such action would be in the best interests of the child. See *Smith v. Organization of Foster Families for Equality & Reform*, 431 U. S. 816, 862-863 (1977) (Stewart,

<sup>1</sup>The majority asserts that "the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left to the judiciary to determine.'" *Woodby v. INS*, 385 U. S. 276, 284 (1966). *Ante*, at 9. To the extent that the majority seeks, by this statement, to place upon the federal judiciary the primary responsibility for deciding the appropriate standard of proof in state matters, it arrogates to itself a responsibility wholly at odds with the allocation of authority in our federalist system and wholly unsupported by the prior decisions of this Court. In *Woodby*, the Court determined the proper standard of proof to be applied under a federal statute, and did so only after concluding that "Congress ha[d] not addressed itself to the question of what degree of proof (was) required in deportation proceedings." 385 U. S., at 284. Beyond an examination for the constitutional minimum of "fundamental fairness"—which clearly is satisfied by the New York procedures at issue in this case—this Court simply has no role in establishing the standards of proof that states must follow in the various judicial proceedings they afford to their citizens.

J., concurring).

After fixing the standard of proof, therefore, the majority will be forced to evaluate other aspects of termination proceedings with reference to that point. Having in this case abandoned evaluation of the overall effect of a scheme, and with it the possibility of finding that strict substantive standards or special procedures compensate for a lower burden of proof, the majority's approach will inevitably lead to the federalization of family law. Such a trend will only thwart state searches for better solutions in an area where this Court should encourage state experimentation. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment." *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). It should not do so in the absence of a clear constitutional violation. As will be seen in the next part, no clear constitutional violation has occurred in this case.

## II

As the majority opinion notes, petitioners are the parents of five children, three of whom were removed from petitioners' care on or before August 22, 1974. During the next four and one-half years, those three children were in the custody of the State and in the care of foster homes or institutions, and the State was diligently engaged in efforts to prepare petitioners for the children's return. Those efforts were unsuccessful, however, and on April 10, 1979 the New York Family Court for Ulster County terminated petitioners' parental rights as to the three children removed in 1974 or earlier. This termination was preceded by a judicial finding that petitioners had failed to plan for the return and future of their children, a statutory category of permanent neglect. Petitioners now contend, and the Court today holds, that they were denied due process of law, not because of a general inadequacy of procedural protections, but simply because the finding of permanent neglect was made on the basis of a preponderance of the evidence adduced at the termination hearing.

It is well settled that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U. S. 564, 569 (1972). In determining whether such liberty or property interests are implicated by a particular government action, "we must look not to the 'weight' but to the nature of the interest at stake." *Id.*, at 571 (emphasis in original). I do not disagree with the majority's conclusion that the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment. See *Smith v. Organization of Foster Families*, 431 U. S., 862-863 (Stewart, J., concurring). "Once it is determined that due process applies, [however,] the question remains what process is due." *Morrissey v. Brewer*, 408 U. S. 471, 481 (1972). It is the majority's answer to this question with which I disagree.

## A

Due process of law is a flexible constitutional principle. The requirements which it imposes upon governmental actions vary with the situations to which it applies. As the Court previously has recognized, "not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey v. Brewer*, *supra*, at 481. See also *Greenholtz v.*

*Nebraska Penal Inmates*, 442 U. S. 1, 12 (1979); *Mathews v. Eldridge*, 424 U. S., at 334; *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895 (1961). The adequacy of a scheme of procedural protections cannot, therefore, be determined merely by the application of general principles unrelated to the peculiarities of the case at hand.

Given this flexibility, it is obvious that a proper due process inquiry cannot be made by focusing upon one narrow provision of the challenged statutory scheme. Such a focus threatens to overlook factors which may introduce constitutionally adequate protections into a particular government action. Courts must examine *all* procedural protections offered by the State, and must assess the *cumulative* effect of such safeguards. As we have stated before, courts must consider "the fairness and reliability of the existing . . . procedures" before holding that the Constitution requires more. *Mathews v. Eldridge*, *supra*, at 343. Only through such a broad inquiry may courts determine whether a challenged governmental action satisfies the due process requirement of "fundamental fairness."<sup>3</sup> In some instances, the Court has even looked to non-procedural restraints on official action in determining whether the deprivation of a protected interest was effected without due process of law. *E. g.*, *Ingraham v. Wright*, 430 U. S. 651 (1977). In this case, it is just such a broad look at the New York scheme which reveals its fundamental fairness.<sup>4</sup>

The termination of parental rights on the basis of permanent neglect can occur under New York law only by order of the Family Court. Social Services Law (SSL) § 384-b(3)(d). Before a petition for permanent termination can be filed in that court, however, several other events must first occur.

The Family Court has jurisdiction only over those children who are in the care of an authorized agency. Family Court Act (FCA) § 614(1)(b). Therefore, the children who are the subject of a termination petition must previously have been removed from their parents' home on a temporary basis. Temporary removal of a child can occur in one of two ways. The parents may consent to the removal, FCA § 1021, or, as occurred in this case, the Family Court can order the removal pursuant to a finding that the child is abused or neglected.<sup>5</sup>

<sup>3</sup>Although, as the majority states, "we have held that the minimum requirements of procedural due process are a question of federal law, such a holding does not mean that the procedural protections afforded by a State will be inadequate under the Fourteenth Amendment. It means simply that the adequacy of the state-provided process is to be judged by constitutional standards—standards which the majority itself equates to "fundamental fairness." *Ante*, at 7. I differ, therefore, not with the majority's statement that the requirements of due process present a federal question, but with its apparent assumption that the presence of "fundamental fairness" can be ascertained by an examination which completely disregards the plethora of protective procedures accorded parents by New York law.

<sup>4</sup>The majority refuses to consider New York's procedure as a whole, stating that "[t]he statutory provision of right to counsel and multiple hearings before termination cannot suffice to protect a natural parent's fundamental liberty interests if the State is willing to tolerate undue uncertainty in the determination of the dispositive facts." *Ante*, at 11, n. 9. Implicit in this statement is the conclusion that the risk of error may be reduced to constitutionally tolerable levels only by raising the standard of proof—that other procedures can never eliminate "undue uncertainty" so long as the standard of proof remains too low. Aside from begging the question of whether the risks of error tolerated by the State in this case are "undue," see *infra*, at 16-22, this conclusion denies the flexibility that we have long recognized in the principle of due process: understates the error-reducing power of procedural protections such as the right to counsel, evidentiary hearings, rules of evidence, and appellate review; and establishes the standard of proof as the *sine qua non* of procedural due process.

<sup>5</sup>An abused child is one who has been subjected to intentional physical injury "which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily

FCA §§ 1051, 1052.

Court proceedings to order the temporary removal of a child are initiated by a petition alleging abuse or neglect, filed by a state-authorized child protection agency or by a person designated by the court. FCA §§ 1031, 1032. Unless the court finds that exigent circumstances require removal of the child before a petition may be filed and a hearing held, see FCA § 1022, the order of temporary removal results from a "dispositional hearing" conducted to determine the appropriate form of alternative care. FCA § 1045. See also FCA § 1055. This "dispositional hearing" can be held only after the court, at a separate "fact-finding hearing," has found the child to be abused or neglected within the specific statutory definition of those terms. FCA §§ 1012, 1044, 1051.

Parents subjected to temporary removal proceedings are provided extensive procedural protections. A summons and copy of the temporary removal petition must be served upon the parents within two days of issuance by the court, FCA §§ 1035, 1036, and the parents may, at their own request, delay the commencement of the fact-finding hearing for three days after service of the summons. FCA § 1048.<sup>6</sup> The fact-finding hearing may not commence without a determination by the court that the parents are present at the hearing and have been served with the petition. FCA § 1041. At the hearing itself, "only competent, material and relevant evidence may be admitted," with some enumerated exceptions for particularly probative evidence. FCA § 1046(b)(ii). In addition, indigent parents are provided with an attorney to represent them at both the fact-finding and dispositional hearings, as well as at all other proceedings related to temporary removal of their child. FCA § 262(a)(i).

An order of temporary removal must be reviewed every 18 months by the Family Court. SSL § 392(2). Such review is conducted by hearing before the same judge who ordered the temporary removal, and a notice of the hearing, including a statement of the dispositional alternatives, must be given to the parents at least 20 days before the hearing is held. SSL § 392(4). As in the initial removal action, the parents must be parties to the proceedings, *id.*, and are entitled to court-appointed counsel if indigent. FCA § 262(a).

One or more years after a child has been removed temporarily from the parents' home, permanent termination proceedings may be commenced by the filing of a petition in the court which ordered the temporary removal. The petition must be filed by a state agency or by a foster parent authorized by the court, SSL 384-b(3)(b), and must allege that the child has been permanently neglected by the parents. SSL § 384-b(3)(d).<sup>7</sup> Notice of the petition and the dispositional proceedings must be served upon the parents at least 20 days before the commencement of the hearing, SSL § 384(3)(e), must inform them of the potential consequences of the hearing, *id.*, and must inform them "of their right to the assistance of counsel, including [their] right . . . to have counsel

organ." FCA § 1012(e). Sexual offenses against a child are also covered by this category. A neglected child is one "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent . . . to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter or education." FCA § 1012(f).

<sup>6</sup>The relatively short time between notice and commencement of hearing provided by § 1048 undoubtedly reflects the State's desire to protect the child. These proceedings are designed to permit prompt action by the court when the child is threatened with imminent and serious physical, mental, or emotional harm.

<sup>7</sup>Permanent custody also may be awarded by the Family Court if both parents are deceased, the parents abandoned the child at least six months prior to the termination proceedings, or the parents are unable to provide proper and adequate care by reason of mental illness or mental retardation. SSL § 384-b(4).

assigned by the court [if] they are financially unable to obtain counsel." *Ibid.* See also FCA § 262.

As in the initial removal proceedings, two hearings are held in consideration of the permanent termination petition. SSL § 384-b(3)(i). At the fact-finding hearing, the court must determine, by a fair preponderance of the evidence, whether the child has been permanently neglected. SSL § 384-b(3)(g). "Only competent, material and relevant evidence may be admitted in a fact-finding hearing." FCA § 624. The court may find permanent neglect if the child is in the care of an authorized agency or foster home and the parents have "failed for a period of more than one year . . . substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so." SSL 384-b(7)(a).<sup>4</sup> In addition, because the State considers its "first obligation" to be the reuniting of the child with its natural parents, SSL § 384-b(1)(iii), the court must also find that the supervising state agency has, without success, made "diligent efforts to encourage and strengthen the parental relationship." SSL 384-b(7)(a) (emphasis added).<sup>5</sup>

Following the fact-finding hearing, a separate, dispositional hearing is held to determine what course of action would be in "the best interests of the child." FCA § 631. A finding of permanent neglect at the fact-finding hearing, although necessary to a termination of parental rights, does not control the court's order at the dispositional hearing. The court may dismiss the petition, suspend judgment on the petition and retain jurisdiction for a period of one year in order to provide further opportunity for a reuniting of the family, or terminate the parents' right to the custody and care of the child. FCA §§ 631-634. The court must base its decision solely upon the record of "material and relevant evidence" introduced at the dispositional hearing, FCA § 624; *In re "Female" M.*, 70 A.D. 2d 812, 417 N.Y.S. 2d 482 (1979), and may not entertain any presumption that the best interests of the child "will be promoted by any particular disposition." FCA § 631.

As petitioners did in this case, parents may appeal any unfavorable decision to the Appellate Division of the New York Supreme Court. Thereafter, review may be sought in the New York Court of Appeals and, ultimately, in this Court if a federal question is properly presented.

<sup>4</sup> As to maintaining contact with the child, New York law provides that "evidence of insubstantial or infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a determination that such child is a permanently neglected child. A visit or communication by a parent with the child which is of such a character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact." SSL § 384-b(7)(b).

Failure to plan for the future of the child means failure "to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent." SSL § 384-b(7)(c).

"Diligent efforts" are defined under New York law to "mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:

(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;  
 (2) making suitable arrangements for the parents to visit the child;  
 (3) provision of services and other assistance to the parents so that problems preventing the discharge of the child from care may be resolved or ameliorated; and  
 (4) informing the parents at appropriate intervals of the child's progress, development and health." SSL § 384-b(7)(f).

As this description of New York's termination procedures demonstrates, the State seeks not only to protect the interests of parents in rearing their own children, but also to assist and encourage parents who have lost custody of their children to reassume their rightful role. Fully understood, the New York system is a comprehensive program to aid parents such as petitioners. Only as a last resort, when "diligent efforts" to reunite the family have failed, does New York authorize the termination of parental rights. The procedures for termination of those relationships which cannot be aided and which threaten permanent injury to the child, administered by a judge who has supervised the case from the first temporary removal through the final termination, cannot be viewed as fundamentally unfair. The facts of this case demonstrate the fairness of the system.

The three children to which this case relates were removed from petitioners' custody in 1973 and 1974, before petitioners' other two children were born. The removals were made pursuant to the procedures detailed above and in response to what can only be described as shockingly abusive treatment.<sup>6</sup> At the temporary removal hearing held before the Family Court on September 30, 1974, petitioners were represented by counsel, and allowed the Ulster County Department of Social Services ("Department") to take custody of the three children.

Temporary removal of the children was continued at an evidentiary hearing held before the Family Court in December 1975, after which the court issued a written opinion concluding that petitioners were unable to resume their parental responsibilities due to personality disorders. Unsatisfied with the progress petitioners were making, the court also directed the Department to reduce to writing the plan which it had designed to solve the problems at petitioners' home and reunite the family.

A plan for providing petitioners with extensive counseling and training services was submitted to the court and approved in February 1976. Under the plan, petitioners received training by a mother's aide, a nutritional aide, and a public health nurse, and counseling at a family planning clinic. In addition, the plan provided psychiatric treatment and vocational training for the father, and counseling at a family service center for the mother. Respondent's Brief 1-7. Between early 1976 and the final termination decision in April 1979, the State spent more than \$15,000 in these efforts to rehabilitate petitioners as parents. App. 34.

Petitioners' response to the State's effort was marginal at best. They wholly disregarded some of the available services and participated only sporadically in the others. As a result, and out of growing concern over the length of the children's stay in foster care, the Department petitioned in September 1976 for permanent termination of petitioners' parental rights so that the children could be adopted by other families. Although the Family Court recognized that petitioners' reaction to the State's efforts was generally "non-re-

<sup>6</sup> Tina Apel, the oldest of petitioners' five children, was removed from their custody by court order in November 1973 when she was two years old. Removal proceedings were commenced in response to complaints by neighbors and reports from a local hospital that Tina had suffered inures in petitioners' home including a fractured left femur, treated with a homemade splint; bruises on the upper arms, forehead, flank, and spine; and abrasions of the upper leg. The following summer John Santosky III, petitioners' second oldest child, was also removed from petitioners' custody. John, who was less than one year old at the time, was admitted to the hospital suffering malnutrition, bruises on the eye and forehead, cuts on the foot, blisters on the hand, and multiple pin pricks on the back. Exhibit to Respondent's Brief 1-5. Jed Santosky, the third oldest of petitioners' children, was removed from his parents' custody when only three days old as a result of the abusive treatment of the two older children.

sponsive, even resentful," the fact that they were "at least superficially cooperative" led it to conclude that there was yet hope of further improvement and an eventual reuniting of the family. Exhibit to Respondent's Brief 618. Accordingly, the petition for permanent termination was dismissed.

Whatever progress petitioners were making prior to the 1976 termination hearing, they made little or no progress thereafter. In October 1978, the Department again filed a termination petition alleging that petitioners had completely failed to plan for the children's future despite the considerable efforts rendered in their behalf. This time, the Family Court agreed. The court found that petitioners had "failed in any meaningful way to take advantage of the many social and rehabilitative services that have not only been made available to them but have been diligently urged upon them." App. 35. In addition, the court found that the "infrequent" visits "between the parents and their children were at best superficial and devoid of any real emotional content." App. 21. The court thus found "nothing in the situation which holds out any hope that [petitioners] may ever become financially self-sufficient or emotionally mature enough to be independent of the services of social agencies. More than a reasonable amount of time has passed and still, in the words of the case workers, there has been no discernible forward movement. At some point in time, it must be said, 'enough is enough.'" App. 36.

In accordance with the statutory requirements set forth above, the court found that petitioners' failure to plan for the future of their children, who were then seven, five, and four years old and had been out of petitioners' custody for at least four years, rose to the level of permanent neglect. At a subsequent dispositional hearing, the court terminated petitioners' parental rights, thereby freeing the three children for adoption.

As this account demonstrates, the State's extraordinary four-year effort to reunite petitioners' family was not just unsuccessful, it was altogether rebuffed by parents unwilling to improve their circumstances sufficiently to permit a return of their children. At every step of this protracted process petitioners were accorded those procedures and protections which traditionally have been required by due process of law. Moreover, from the beginning to the end of this sad story all judicial determinations were made by one family court judge. After four and one-half years of involvement with petitioners, more than seven complete hearings, and additional periodic supervision of the State's rehabilitative efforts, the judge no doubt was intimately familiar with this case and the prospects for petitioners' rehabilitation.

It is inconceivable to me that these procedures were "fundamentally unfair" to petitioners. Only by its obsessive focus on the standard of proof and its almost complete disregard of the facts of this case does the majority find otherwise." As the discussion above indicates, however, such a

"The majority finds, without any reference to the facts of this case, that 'numerous factors (in New York termination proceedings) combine to magnify the risk of erroneous factfinding.' *Ante*, at 15. Among the factors identified by the majority are the 'unusual discretion' of the family court judge 'to underweigh probative facts that might favor the parent', the often uneducated, minority status of the parents and their consequent 'vulnerability' to judgments based on cultural or class bias"; the 'State's ability to assemble its case,' which 'dwarfs the parents' ability to mount a defense' by including an unlimited budget, expert attorneys, and 'full access to all public records concerning the family'; and the fact that 'natural parents have no 'double jeopardy' defense against repeated state' efforts, 'with more or better evidence,' to terminate parental rights 'even when the parents have attained the level of fitness required by the State.' *Id.*, at 15-16. In short, the majority characterizes the State as a wealthy and powerful bully bent on taking children away from defenseless parents. See *ante*, at 15-17. Such characterization finds no support in the record.

The intent of New York has been stated with eminent clarity: "the [S]tate's first obligation is to help the family with services to prevent its

focus does not comport with the flexible standard of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment.

## B

In addition to the basic fairness of the process afforded petitioners, the standard of proof chosen by New York clearly reflects a constitutionally permissible balance of the interests at stake in this case. The standard of proof "represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U. S. 358, 370 (1970) (Harlan, J. concurring); *Addington v. Texas*, 441 U. S. 418, 423 (1979). In this respect, the standard of proof is a crucial component of legal process, the primary function of which is "to minimize the risk of erroneous decisions."<sup>4</sup> *Greenholtz v. Nebraska Penal Inmates*, *supra*, at 13. See also *Addington v. Texas*, *supra*, at 425; *Mathews v. Eldridge*, 424 U. S., at 344.

In determining the propriety of a particular standard of proof in a given case, however, it is not enough simply to say that we are trying to minimize the risk of error. Because errors in factfinding affect more than one interest, we try to

break-up or to reunite it if the child has already left home." SSL § 384-b(1)(a)(iii) (emphasis added). There is simply no basis in fact for believing, as the majority does, that the State does not mean what it says; indeed, the facts of this case demonstrate that New York has gone the extra mile in seeking to effectuate its declared purpose. See *supra*, at 12-15. More importantly, there should be no room in the jurisprudence of this Court for decisions based on unsupported, inaccurate assumptions.

A brief examination of the "factors" relied upon by the majority demonstrates its error. The "unusual" discretion of the family court judge to consider the "affection and concern" displayed by parents during visits with their children, *ante*, at 15, n. 11, is nothing more than discretion to consider reality: there is not one shred of evidence in this case suggesting that the determination of the family court was "based on cultural or class bias"; if parents lack the "ability to mount a defense," the State provides them with the full services of an attorney, FCA § 262, and they, like the State, have "full access to all public records concerning the family" (emphasis added); and the absence of "double jeopardy" protection simply recognizes the fact that family problems are often ongoing and may in the future warrant action that currently is unnecessary. In this case the family court dismissed the first termination petition because it desired to give petitioners "the benefit of the doubt," Exhibit to Respondents' Brief 620, and a second opportunity to raise themselves to "an acceptable minimal level of competency as parents." *Id.*, at 624. It was their complete failure to do so that prompted the second, successful termination petition. See *supra*, at 12-16.

"It is worth noting that the significance of the standard of proof in New York parental termination proceedings differs from the significance of the standard in other forms of litigation. In the usual adjudicatory setting, the factfinder has had little or no prior exposure to the facts of the case. His only knowledge of those facts comes from the evidence adduced at trial, and he renders his findings solely upon the basis of that evidence. Thus, normally, the standard of proof is a crucial factor in the final outcome of the case, for it is the scale upon which the factfinder weighs his knowledge and makes his decision.

Although the standard serves the same function in New York parental termination proceedings, additional assurances of accuracy are present in its application. As was adduced at oral argument, the practice in New York is to assign one judge to supervise a case from the initial temporary removal of the child to the final termination of parental rights. Therefore, as discussed above, the factfinder is intimately familiar with the case before the termination proceedings ever begin. Indeed, as in this case, he often will have been closely involved in protracted efforts to rehabilitate the parents. Even if a change in judges occurs, the Family Court retains jurisdiction of the case and the newly assigned judge may take judicial notice of all prior proceedings. Given this familiarity with the case, and the necessarily lengthy efforts which must precede a termination action in New York, decisions in termination cases are made by judges steeped in the background of the case and peculiarly able to judge the accuracy of evidence placed before them. This does not mean that the standard of proof in these cases can escape due process scrutiny, only that additional assurances of accuracy attend the application of the standard in New York termination proceedings.

minimize error as to those interests which we consider to be most important. As Justice Harlan explained in his well-known concurrence to *In re Winship*:

"In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each." 397 U. S., at 370-372.

When the standard of proof is understood as reflecting such an assessment, an examination of the interests at stake in a particular case becomes essential to determining the propriety of the specified standard of proof. Because proof by a preponderance of the evidence requires that "[t]he litigants . . . share the risk of error in a roughly equal fashion," *Addington v. Texas*, *supra*, 441 U. S., at 423, it rationally should be applied only when the interests at stake are of roughly equal societal importance. The interests at stake in this case demonstrate that New York has selected a constitutionally permissible standard of proof.

On one side is the interest of parents in a continuation of the family unit and the raising of their own children. The importance of this interest cannot easily be overstated. Few consequences of judicial action are so grave as the severance of natural family ties. Even the convict committed to prison and thereby deprived of his physical liberty often retains the love and support of family members. "This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Stanley v. Illinois*, 405 U. S. 645, 651." *Lassiter v. Department of Social Services*, 452 U. S. —, — (1981). In creating the scheme at issue in this case, the New York legislature was expressly aware of this right of parents "to bring up their own children." SSL §384-b(1)(a)(ii).

On the other side of the termination proceeding are the often countervailing interests of the child. "A stable, loving

"The majority dismisses the child's interest in the accuracy of determinations made at the factfinding hearing because "[t]he factfinder does not purport . . . to balance the child's interest in a normal family life against the parents' interest in raising the child," but instead "pits the State directly against the parents." *Ante*, at 12. Only "[a]fter the State has established parental unfitness," the majority reasons, may the court "assume . . . that the interests of the child and the natural parents do diverge." *Id.*, at 13.

This reasoning misses the mark. The child has an interest in the outcome of the factfinding hearing independent of that of the parent. To be sure, "the child and his parents share a vital interest in preventing erroneous

homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline. If the Family Court makes an incorrect factual determination resulting in a failure to terminate a parent-child relationship which rightfully should be ended, the child involved must return either to an abusive home<sup>4</sup> or to the often unstable world of foster care.<sup>45</sup> The reality of these risks is magnified by the fact that the only families faced with termination actions are those which have voluntarily surrendered custody of their child to the State, or, as in this case, those from which the child has been removed by judicial ac-

tionous termination of their natural relationship." *Ante*, at 13 (emphasis added). But the child's interest in a continuation of the family unit exists only to the extent that such a continuation would not be harmful to him. An error in the factfinding hearing that results in a failure to terminate a parent-child relationship which rightfully should be terminated may well detrimentally affect the child. See notes 14, 15, *infra*.

The preponderance of the evidence standard, which allocates the risk of error more or less evenly, is employed when the social disutility of error in either direction is roughly equal—that is, when an incorrect finding of fault would produce consequences as undesirable as the consequences that would be produced by an incorrect finding of no fault. Only when the disutility of error in one direction discernibly outweighs the disutility of error in the other direction do we choose, by means of the standard of proof, to reduce the likelihood of the more onerous outcome. See *In re Winship*, 397 U. S. 358, 370-372 (1970) (Harlan, J., concurring).

New York's adoption of the preponderance of the evidence standard reflects its conclusion that the undesirable consequence of an erroneous finding of parental unfitness—the unwarranted termination of the family relationship—is roughly equal to the undesirable consequence of an erroneous finding of parental fitness—the risk of permanent injury to the child either by return of the child to an abusive home or by the child's continued lack of a permanent home. See notes 14, 15, *infra*. Such a conclusion is well within the province of state legislatures. It cannot be said that the New York procedures are unconstitutional simply because a majority of the members of this Court disagree with the New York legislature's weighing of the interests of the parents and the child in an error-free factfinding hearing.

"The record in this case illustrates the problems that may arise when a child is returned to an abusive home. Eighteen months after Tina, petitioners' oldest child, was first removed from petitioners' home, she was returned to the home on a trial basis. Katherine Weiss, a supervisor in the Child Protective Unit of the Ulster County Child Welfare Department, later testified in Family Court that "[t]he attempt to return Tina to her home just totally blew up." Exhibit to Respondent's Br. of 135. When asked to explain what happened, Mrs. Weiss testified that "there were instances on the record in this court of Mr. Santosky's abuse of his wife, alleged abuse of the children and proven neglect of the children." *Ibid.* Tina again was removed from the home, this time along with John and Jed.

"The New York legislature recognized the potential harm to children of extended, non-permanent foster care. It found "that many children who have been placed in foster care experience unnecessarily protracted stays in such care without being adopted or returned to their parents or other custodians. Such unnecessary stays may deprive these children of positive, nurturing family relationships and have deleterious effects on their development into responsible, productive citizens." SSL §384-b(1)(b). Subsequent studies have proved this finding correct. One commentator recently wrote of "the lamentable conditions of many foster care placements" under the New York system even today. He noted that "foster forty percent of the children in foster care have been in this 'temporary' status for more than two years; over thirty percent for more than five years. During this time, many children are placed in a sequence of ill-suited foster homes denying them the consistent support and nurturing that they so desperately need." Besharov, State Intervention To Protect Children: New York's Definition of "Child Abuse" and "Child Neglect," 26 N. Y. U. L. Rev. 723, 770-771 (1981) (footnotes omitted). In this case, petitioners' three children have been in foster care for more than four years, one child since he was only three days old. Failure to terminate petitioners' parental rights will only mean a continuation of this unsatisfactory situation.

tion because of threatened irreparable injury through abuse or neglect. Permanent neglect findings also occur only in families where the child has been in foster care for at least one year.

In addition to the child's interest in a normal homelife, "the State has an urgent interest in the welfare of the child." *Lassiter v. Department of Social Services, supra*, at \_\_\_\_.<sup>18</sup> Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince v. Massachusetts*, 321 U. S. 158, 168 (1944). Thus, "the whole community" has an interest "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed . . . citizens." *Id.*, at 165. See also *Ginsberg v. New York*, 390 U. S. 629, 640-641 (1968).

When, in the context of a permanent neglect termination proceeding, the interests of the child and the State in a stable, nurturing homelife are balanced against the interests of the parents in the rearing of their child, it cannot be said that either set of interests is so clearly paramount as to require that the risk of error be allocated to one side or the other. Accordingly, a State constitutionally may conclude that the risk of error should be borne in roughly equal fashion by use of the preponderance of the evidence standard of proof. See *Addington v. Texas*, 441 U. S., at 423. This is precisely the balance which has been struck by the New York legislature:

<sup>18</sup> The majority's conclusion that a state interest in the child's well-being arises only after a determination of parental unfitness suffers from the same error as its assertion that the child has no interest, separate from that of its parents, in the accuracy of the factfinding hearing. See note 13, *supra*.

"It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating the parental rights and freeing the child for adoption." SSL § 384-b(1)(b).

### III

For the reasons heretofore stated, I believe that the Court today errs in concluding that the New York standard of proof in parental-rights termination proceedings violates due process of law. The decision disregards New York's earnest efforts to aid parents in regaining the custody of their children and a host of procedural protections placed around parental rights and interests. The Court finds a constitutional violation only by a tunnel-vision application of due process principles that altogether loses sight of the unmistakable fairness of the New York procedure.

Even more worrisome, today's decision cavalierly rejects the considered judgment of the New York legislature in an area traditionally entrusted to state care. The Court thereby begins, I fear, a trend of federal intervention in state family law matters which surely will stifle creative responses to vexing problems. Accordingly, I dissent.

MARTIN GUGGENHEIM, New York, N.Y. (ALAN N. SUSSMAN and RICKEN, GOLDMAN, SUSSMAN & BLYTHE, with him on the brief) for petitioners; STEPHEN DOMENIC SCAVUZZO, Washington, D.C. (HUDSON, CREYKE, KOEHLER, TACKE & BIXLER, H. RANDALL BIXLER, ROBERT A. DeBERARDINIS, JR. and EDWARD E. STROHSAHL, with him on the brief) for respondents.



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

#### MINUTES OF THE SENATE JUDICIARY COMMITTEE

OF

APRIL 27, 1982

Butrovich Committee Room, State Capitol Juneau, Alaska

#### Legislation Before Committee:

HB 210 - "An Act relating relating to child custody."

HB 184 - "An Act authorizing convening special sessions of the legislature at any location in the state."

HB 339 - "An Act relating to the judicial review of administrative regulations."

The meeting of the Senate Judiciary Committee was called to order by Chairman Rodey at 5:10 P.M. Committee members present were: Senators Parr, Anderson, and Rodey. Senators Bennett and Ray were absent.

003 - Call to order.

007 - Chairman Rodey brought HB 210 before the committee.

024 - Ninna Kinney, representing Department of HESS, testified in support of HB 210.

348 - Mr. Bruce relayed concerns expressed by telephone calls.

406 - Senator Parr suggested the following amendment: Page 3, Line 12, delete [After the first conference either party may withdraw, or], and on Page 3, Line 14, delete [Upon withdrawal by either party or]. There was no objection.

510 - Senator Parr moved to pass CSHB 210 from committee with individual recommendations. There was no objection.

528 - Chairman Rodey brought HB 339 before the committee.

535 - Mr. Bruce explains the changes made by the committee substitute.

561 - Diane Colvin, Legal Services, testified giving explanation of committee substitute.

766 - Senator Rodey asks Mr. Bruce to work with Diane Colvin to prepare better language which would require regulations to derive from specific sections of statutes rather than general chapter provisions.

827 - Chairman Rodey laid HB 339 on the table.

831 - Chairman Rodey brought HB 184 before the committee.

SIDE TWO

967 - Chairman Rodey requested Mr. Bruce to get information on special sessions being convened in other areas of the state if the majority so wishes.

985 - The meeting was adjourned at 6:10 P.M.



Official Business

# Alaska State Legislature

## House of Representatives

Committee on

Health, Education & Social Services

Pouch V  
State Capitol  
Juneau, Alaska 99811

### SECTIONAL ANALYSIS

HOUSE BILL 210: An Act relating to child custody.

#### Section 1 PURPOSE

Bill seeks to assure children "frequent and continuing contact with both parents after the parents have separated..." . Amends child custody laws in A.S. 9.55.205 and 25.20.060. Intent is to grant to both parents equal opportunity to guide and nurture the children of the marriage. In addition, out-of-court child care agreements are encouraged.

Section 2 Amends present section of A.S. 9.55.205 specifying that the court shall determine custody in accordance with the best interest of the child under A.S. 25.20.060-25.20.130 (new sections added by the bill-to follow below). Adds that the court shall consider the child's preference if the child is of sufficient capacity to form a preference. The court shall consider the "desirability of offering the child a variety of life experience". Also, the court may not consider lifestyle, income, marital status, social or cultural environment of either parent unless detriment of such factor towards the child can be shown.

Section 3 Custody of the Child. Bill expands on existing section relating to child custody (AS 25.20.060) by adding several new sections to AS 25.20 relating to custody disputes and awards. New sections added are set out in the following section.

#### Section 4

--Sec. 25.20.070 "Shared Custody". When a question involving custody is before the court, there is a rebuttable presumption that shared custody is in the best interest of the child.

--Sec. 25.20.080 "Mediation". Allows court considering child custody case to request the parties to participate in pre-trial mediation.

--Sec. 25.20.100 "Award of Custody". Outlines conditions for award of shared custody (by application and agreement). Also provides that court shall enter reason for denying shared custody when it declines such.

--Sec. 25.20.100 "Modification or Termination of Custody" Court may modify or terminate custody award if in child's best interest.



Official Business

# Alaska State Legislature

## House of Representatives

### Committee on

### Health, Education & Social Services

Pouch V  
State Capitol  
Juneau, Alaska 99811

#### SECTIONAL ANALYSIS (cont'd) HB 210

--Sec. 25.20.110 "Preference of the Child" If the child is of sufficient age and capacity to form an intelligent preference, such preference shall be considered by the court.

--Sec. 25.20.120 "Factors for Consideration by the Court". Outlines factors to be considered by the court in an award of shared custody.

--Sec. 25.20.130 "Preferences on Award". Sets forth the order of preference by which custody should be awarded "according to the best interests of the child".

--Sec. 25.20.140 "Temporary Custody". Unless harm is shown, child shall have equal access to both parents while custody is determined.

--Sec. 25.20.150 "Award of Custody to Nonparent". No custody shall be awarded to a nonparent unless it is demonstrated that award of custody to a parent is detrimental to the best interests of the child.

--Sec. 25.20.160 "Pleadings" An allegation that custody award to the parent would be detrimental may only appear in the pleadings by a general allegation to that effect.

--Sec. 25.20.170 "Access to Records of the Child" A parent not granted custody may have access to medical, school, and other records of the child.

--Sec. 25.20.180 "Definition" Shared Custody is defined as "an award of custody of the child to both parents and includes an award of physical custody which assures the child of frequent and continuing contact with each parent".

# STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K—STATE CAPITOL  
JUNEAU, ALASKA 99811

(907) 465-3603

March 26, 1981

Donald E. Clocksin, Chairman  
House HESS Committee  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Re: House Bill 210

Dear Mr. Clocksin:

You have asked us to comment on HB 210, "an Act relating to child custody." Although this bill has no direct impact on our department, we do have some concerns over the policy expressed in the bill.

The intent of the bill is laudable. It addresses concerns that have been surfacing with increasing regularity around the country. The bill, in promoting shared custody, embodies the notion that it is in the child's interest to perpetuate his or her relationship with both parents. Shared custody also appears to be, in some cases, more equitable with regard to the parents, giving legal recognition to the rights of both parents to participate in decisions which significantly affect the child's life. Although judges probably have inherent power to make shared custody awards in appropriate cases, statutory recognition and authority for such awards may ensure that shared custody is given serious consideration as an alternative in custody disputes. Additionally, statutory authority for a shared custody award may help in surmounting the sexual stereotypes that often operate in custody disputes.

However, conferring upon the notion that shared custody is in the best interests of the child the status of a rebuttable presumption, and requiring that first preference in making an award be given to shared custody, regardless of whether, in either case, the parents actually agree on shared custody, may be going overboard.

By its nature, shared custody requires extensive cooperation between the parents. Without question, there are many instances in which such an arrangement is simply not feasible due to the existence of extreme antagonism between the parents, or perhaps due to other factors (this is implicitly recognized by the listing of the factors to be considered in making an award, § 25.20.120). Many states have recently authorized shared or joint custody awards, and several have accorded it the presumption that it is in the best interests of the child where the parents can agree on an arrangement, but we are aware of none which give shared custody the blanket presumption provided by this bill.

We would suggest the requirement that parents agree on a shared custody award, at least before the presumption and first preference come into operation. Additionally, it may be advisable to require the parents to submit to the court a proposal setting out guidelines for resolution of disputes, and a workable plan if shared physical custody is contemplated, rather than to leave it in the court's discretion.

Section 2, amending AS 09.55.205, is also problematic. Subsection (d) of that statute would prohibit consideration of several factors in making an award of custody -- the conduct, marital status, income, social and cultural environment, and life style of either parent, unless those factors are shown to have caused or to potentially cause emotional or physical injury to the child. While the intent here may be to dispose of many of the conventional but perhaps unfounded presumptions regarding what is and is not a proper and suitable environment for children, this section seems to leave little that can be considered. We wonder, for example, how an assessment of each parent's capability to meet the physical, emotional, mental, religious, and social needs of the child, as required by subsection (c)(2), can be made if there is an exclusion of all reference to the parent's social and cultural environment and life style unless it is shown to be detrimental. We believe that this section is overly broad.

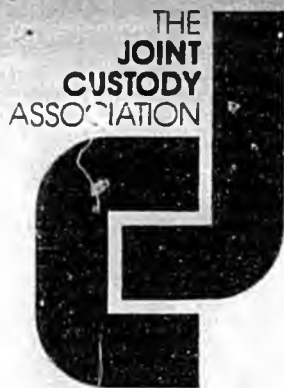
Sincerely,

WILSON L. CONDON  
ATTORNEY GENERAL

By: *Linda Scoccia*  
Linda Scoccia  
Assistant Attorney General

cc: Art Peterson

LS:ml



THE  
JOINT  
CUSTODY  
ASSOCIATION

1024 Wilkins Avenue  
Los Angeles, California 90024  
(213) 475-5352  
James A. Cook  
President

A Nonprofit Association concerned with  
the joint custody of children, related issues of divorce,  
including research, information dissemination  
and legal and counseling practices.

HB 210

April 24, 1982

Senator Pat Rodey  
State Capitol  
Pouch V  
Juneau, Alaska 99811

Dear Senator Rodey:

Re: HB 210, Tuesday, April 27, 1982. Senate

On Tuesday, April 27th. I particularly urge you to encourage the Alaskan Senate in passing HB 210 (relating to child custody.)

However, we also urge that you incorporate certain improvement/amendments that will bring HB210 more nearly into concert with that which is statute and case precedent in other states. (19 other states have provisions for joint custody, 7 have provisions for a presumption or a preference for joint custody.)

1. Joint custody (or shared parenting as you describe it) entails the equitable physical access by a child with both parents. HB 210 needs a recognition that physical custody and physical access is encompassed by HB 210.
2. Most states are now evaluating whether joint custody (or shared parenting) should be a presumption of the law, or first preference in the custody decisions a court can make, or a combination of presumption and preference. No longer is there debate about sanctioning the availability of joint custody; that appears now to be a foregone conclusion.

Hence, improve HB 210 by making shared parenting a presumption and first among preferences in custody alternatives.

3. Alaska is to be commended for encouraging mediation (in HB 210), but I think that the threat of mediation termination after the first conference gives an overwhelmingly disproportionate amount of procedural weight to the most antagonistic and uncooperative parent. Alaska is the only example of which I am aware wherein the evolving, on-going process of mediation (which ordinarily requires time for 'ventilation') can be terminated with the first appointment.

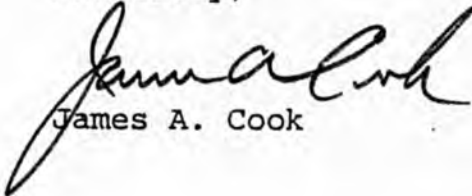
Subparagraph (c) of Sec 25.20.080 (HB 210) could easily be dropped, to the advantage of the bill.

Finally, I encourage your consideration of an important U.S. Supreme Court decision within the past few days (Santosky). It stresses the need for a higher burden of proof ("beyond a reasonable doubt" & "clear and convincing evidence") to sever a parent from a child/parent

relationship. This is a principle that is relevant in joint custody (shared parenting) to assure retention of familial ties, albeit 'Santosky' initially addresses parental termination cases.

Thus, we urge, also, that you assure HB 210 requires a higher burden of proof to isolate a child from one parent through sole parent exclusive custody.

Sincerely,



James A. Cook

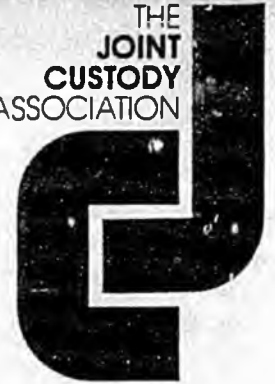
Enclosures.

# U S SUPREME COURT SPEAKS OUT ON CHILD CUSTODY DEPRIVATION

10606 Wilshire Avenue  
Los Angeles, California 90024

James A. Cook  
President

THE  
JOINT  
CUSTODY  
ASSOCIATION



## SUPREME COURT REASSERTS IMPORTANCE OF CHILD/PARENT RELATIONS

Decree addresses parental termination cases.

But contains quotable opinions that imply questioning of arbitrary sole custody divorce decrees.

Stressing retention of child/parent relationship could imply endorsement of "presumption" for joint custody until sole custody seeker produces a higher standard of proof in keeping with "Santosky" below.

Apr 20, 1982

(If the justifying legal standard for sole custody requires higher proof, the obvious judicial recourse is a presumption for the equality of joint custody unless and until the judicial standard for sole custody is demonstrated to the court.)

Child/parent relationship so vital that court decrees severing the relationship must increase the burden of proof to "beyond a reasonable doubt" & "clear & convincing" evidence rather than merely "preponderance of evidence."

(Many individuals with terminated parental rights & decreed unfit nevertheless have visitation rights & schedules as frequent or more so than the non-custodian in conventional sole custody divorce decrees. Convicted criminals have child visitation and are not denied participation in child-rearing decisions. Unless the standards of the Supreme Court cited below are applied, the conventionally-divorced non-custodial parent...in practice...could have less access and rights than an "unfit" terminated parent or a criminal.)

Quotations below from Santosky v Bernhardt S. Kramer, Commissioner; U.S. Supreme Court, No 80-5899, March 24, 1982. Headlines & subheads below are our editorial elaborations.

Clear & convincing evidence needed; outweighs a fair preponderance of evidence

Ease of extinguishing parent/child relationship

"...in New York, the factual certainty required to extinguish the parent-child relationship is no greater than that necessary to award money damages in an ordinary civil action." (In New York, a "fair preponderance of the evidence" (will) "support that finding.")

"Today we hold that the Due Process Clause of the Fourteenth Amendment demands more than this." ". . .due process requires that the State support its allegations by at least clear and convincing evidence."

Cultivating contact; failing to maintain contact

"...the State must establish...that...the agency "made diligent efforts to encourage and strengthen the parental relationship. The State must further prove that during that same period, the child's natural parents failed "substantially and continuously or repeatedly to maintain contact with or plan for the future of the child although physically and financially able to do so."

Standards required to terminate: is "fair preponderance of evidence" sufficient?

"Thirty-three states, the District of Columbia and the Virgin Islands currently specify a higher standard of proof, in parental rights termination proceedings, than a "fair preponderance of the evidence." "The question here is whether New York's "fair preponderance of the evidence" standard is constitutionally sufficient."

Constitutional guarantees to parent/child relationship

"The case casts light, however, on the two central questions here -- whether process is constitutionally due a natural parent at a State's parental rights termination proceeding, and, if so, what process is due."

Establishing standards that minimize possible error

"... this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment."

"The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting State intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."

Federal due process standards are not diminished by state standards

"Addington (Addington v Texas, 441 U.S. 418 (1979)) teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants."

" "...while private parties may be interested intensely in a civil dispute over money damages, application of a "preponderance of the evidence" standard indicates both society's "minimal concern with the outcome" and a conclusion that the litigants "share the risk of error in roughly equal fashion." "When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment."

State mandates intermediate standards of proof that threaten parents' liberty

"The "minimum requirements (of procedural due process) being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse political action."

"The Court has mandated an intermediate standard of proof -- "clear and convincing evidence" -- when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money."

"...the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with "a significant deprivation of liberty" or "stigma."

"In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight."

## Parent's relationship with child more precious than property rights

"Lassiter (Lassiter v. Department of Social Services, 452 U.S. 18 (1981)) declared it "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children' " is an interest far more precious than any property right."

## A parent's interest in accuracy and justice is commanding

"When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it. "If the State prevails, it will have worked a unique kind of deprivation...A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one."

## Child's interests coincide with parents' in use of error-reducing procedures

"The State marshals an array of public resources to prove its case and disprove the parents' case. Victory by the State not only makes termination of parental rights possible; it entails a judicial determination that the parents are unfit to raise their own children."

"But until the State proves parental unfitness, the child and parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures."

"Since the factfinding phase of a permanent neglect proceeding is an adversary contest between the State and the natural parents, the relevant question is whether a preponderance standard fairly allocates the risk of an erroneous fact-finding between these two parties."

## Risk of subjective values, cultural or class bias

"Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge."

"Because parents subject to termination proceedings are often poor, uneducated or members of minority groups,...such proceedings are often vulnerable to judgments based on cultural or class bias."

"The State's ability to assemble its case almost inevitably dwarfs the parents ability to mount a defense."

"Unlike criminal defendants, natural parents have no "double jeopardy" defense against repeated state termination efforts. ...even when the parents have attained the level of fitness required by the State, they have no similar means by which they can forestall future termination efforts."

## Standards based on quantity rather than quality jeopardize marginal cases

"Coupled with a "preponderance of the evidence" standard, these factors create a significant prospect of erroneous termination. A standard of proof that by its very terms demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case."

"Given the weight of the private interests at stake, the social cost of even occasional error is sizable."

## Increase the burden of proof

"Raising the standard of proof would have both practical and symbolic consequences. ...The Court has long considered the heightened standard of proof used in criminal prosecutions to be "a prime instrument for reducing the risk of convictions resting on factual error." ... "an elevated standard of proof in a parental rights termination proceeding would alleviate "the possible risk that a factfinder might decide to (deprive) an individual based solely on a few isolated instances of unusual conduct (or)...idiosyncratic behavior."

"Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate terminations will be ordered."

## An inadequate standard risks destruction of the family

"The Court's theory assumes that termination of the natural parent rights invariably will benefit the child. Yet we have noted above that the parents and the child share an interest in avoiding erroneous termination. Even accepting the Court's assumption, we cannot agree with its conclusion that a preponderance standard fairly distributes the risk of error between parent and child."

"For the natural parents, however, the consequences of an erroneous termination is the unnecessary destruction of their natural family. A standard that allocates the risk of error nearly equally between those two outcomes does not reflect properly their relative severity."

## Separation of children is counter to promoting the child's welfare

(One of) "Two state interests...at stake in parental rights termination proceedings (is) -- a *parens patriae* interest in preserving and promoting the welfare of the child..."

...while there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* favors preservation, not severance, of natural familial bonds." "(T)he State registers no gain towards its declared goals when it separates children from the custody of fit parents."

## Constitutionally mandating "beyond a reasonable doubt" & "clear & convincing" standards

"The next question, then, is whether a "beyond a reasonable doubt" or a "clear and convincing" standard is constitutionally mandated."

"Congress requires "evidence beyond a reasonable doubt" for termination of Indian parental rights, reasoning that "the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty."

## Constitutional violations by states requires federal intervention

"The dissent's claim that today's decision "will inevitably lead to the federalization of family law"...is, of course, vastly overstated. As the dissent properly notes, the Court's duty is to "refrain from interfering with state answers to domestic relations questions" has never required "that the Court should blink at clear constitutional violations in state statutes."

# The Court Speaks for Parents

The Sacramento Bee

There are no clean formulas for determining when and under what circumstances the state should deprive parents of custody over their children. Such determinations are always difficult in the emotionally charged atmosphere involving the relations between parents and children and in face of the terribly painful consequences, physical and psychological, of abuse and neglect.

What makes them particularly difficult, however, is that many children appear to fare better — and with less guilt and fewer conflicts — even under negligent and abusive natural parents than they do in foster homes or in public facilities. In light of the fact that the nation's foster care system is itself so confused and so prone to neglect and mistreat the children in its care, that's not surprising. Yet it's a fact often forgotten in the well-intentioned effort to save children from the battery of abusive parents.

Given all that, the Supreme Court's recent decision requiring high standards of proof to deprive parents of permanent custody of their children was both fair and reasonable. A state, said the court, must prove unfitness

by "clear and convincing evidence" when it moves to permanently deprive parents of custody, and not merely by a "preponderance of the evidence." The court's new standard, already in use in many states, including California, honors the presumption that, absent compelling reasons, the state has no right to abrogate the parent-child relationship.

It is hardly a perfect decision, particularly since it will leave many more children in the no man's land between a temporary removal from the natural parents (for which less stringent standards prevail) and a permanent break that makes them eligible for adoption. Yet there is probably no other course that makes more sense, either in law or as reasonable policy regarding the relations of parents and children. As the court said, "The fundamental liberty of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the state."

Abstract of the Dissertation

EMOTIONAL ADJUSTMENT OF BOYS IN SOLE CUSTODY AND JOINT  
CUSTODY DIVORCES COMPARED WITH ADJUSTMENT OF  
BOYS IN HAPPY AND UNHAPPY MARRIAGES

Presented to the Faculty of the  
CALIFORNIA GRADUATE INSTITUTE  
In Partial Fulfillment  
of the Requirements for the Degree  
Doctor of Philosophy in Psychology

by

Everett Quentin Pojman

July 1981

Leo Weisbender, PhD, Dissertation Chairman

Introduction

Recently, joint custody of children has been tried by some divorcing parents as an alternative to the traditional sole custody. Theorists have conflicting opinions in terms of sharing custody. Some theorists believe that sole custody is the only healthy approach to child rearing following a divorce, whereas other theorists believe that joint custody is preferred. This research was an attempt to compare the emotional adjustment of boys in these two groups. Two other groups were used as controls to determine how these boys of divorce differed from boys living in families where marriages remained intact. These groups were happily married and unhappily married. The questions explored were: Is joint custody fostering a healthier post-divorce adjustment for children than sole custody? Is joint custody fostering a healthier adjustment for children than marriages where parents report an unhappy marital situation?

The hypotheses were:

1. Boys of happy marriages will have significantly better emotional adjustments than boys of joint custody.
2. Boys of happy marriages will have significantly better emotional adjustments than boys of sole custody.
3. Boys of unhappy marriages will have significantly better emotional adjustments than boys of joint custody.
4. Boys of joint custody will have significantly better emotional adjustments than boys of sole custody.

Review of the literature

The literature revealed that after parents divorce, their children generally go through a period of stress and adaptation which may continue long after the divorce. This stress may result in a trauma that often interrupts a child's emotional growth through developmental stages. Studies also support the importance of the involvement of the fathers with their children in order to facilitate healthy adjustment. Both joint custodial and sole custodial care have been reported with support from a theoretical and case study viewpoint, but no experimental research has been accomplished to compare the two types of living arrangements on the emotional effects for children.

Research design

A quasi-experimental study compared four groups of 20 boys between the ages of 5 and 13. Three of these groups were matched on demographic variables. Three

different measurement tools were used to assess the boys: the Louisville Behavior Checklist (parents' rating), the Inferred Self-Concept Scale (teachers' rating), and the California Test of Personality (child's rating). The results of the rating scales were computed and each group was compared by a one-way analysis of variance.

### Findings

Results supported the hypothesis that boys of happily married parents were significantly better adjusted on the California Test of Personality and the Louisville Behavior Checklist, respectively, than were boys of sole custody ( $p < .01$ ) ( $p < .01$ ), and boys of unhappily married parents ( $p < .01$ ) ( $p < .01$ ). However, no significant difference was reported for the Inferred Self-Concept Scale. Boys of happily married parents also demonstrated significantly better adjustment on the Social Adjustment part of the California Test of Personality ( $p < .01$ ), and on 4 of 12 subtests within the same test when compared to boys of joint custody. No significant differences were reported on the other two instruments. It was demonstrated that boys of joint custody were significantly better emotionally adjusted than boys of sole custody and the unhappily married group on both the Louisville Behavior Checklist ( $p < .01$ ). There were no significant differences on any total test or subtest between boys of sole custody and boys of unhappily married parents.

### Conclusions

Hypothesis 1 was partially accepted while Hypotheses 2, 3, and 4, were fully confirmed. The results of this study indicate that boys of joint custody are better adjusted than boys of sole custody and boys of parents who are unhappily married. The research also demonstrated that sole custody divorce has no more adverse emotional effects on a child than living in a home where the parents are unhappily married. Conversely, the results support the possibility that a situation could improve with a change from an unhappy marital situation to a joint custodial divorce situation.

### Recommendations

While the findings confirm the advantages of joint custody, thereby supporting the theorists who believe that joint custody is a preferred approach to child rearing following a divorce, more research is needed on similar subjects in other geographic areas to see if these results can be generalized to other parts of the country. A randomized sample would be beneficial. Longitudinal studies following the course of various custodial arrangements would also be helpful. What would happen to these boys as adults? In this study, the majority of the inventories were filled out by mothers. What would happen if fathers filled out the rating scales and marital inventories? Might this change the results? Would the marital groups still have similar characteristics? Only through replication and more research will these questions be answered.

**'Presumption' & 'Preference': the reasons why.**

**Protecting, & shifting the litigation burden away from the cooperative parent to the childrens' advantage.**

**BEWARE**

Beware of an attempt to convert an altruistic stimulus to seek joint custody into preparations for an acrimonious and litigiously-expensive (lucrative) battle for sole custody through reordering the priority of joint physical custody into merely an option.

**REMEMBER:**

Merely an 'option' for joint custody triggers a different set of reaction intuitions and intentions. \*

Ranking joint custody as co-equal with sole custody converts an admirable goal into anguish, apprehension and a defensive resort to self-protection. \*

Permitting joint legal custody to be substituted in place of joint physical custody deprives a child of equitable physical contact with both parents and burdens the vanquished parent with legal obligations but no equitable physical access to ameliorate those legal problems. \*

**The reasons for 'presumption' & 'preference' for joint custody:  
pitfalls of the spectre of litigation.**

\* The theory behind making joint physical custody a presumption (when both parents agree) and a preference (when one parent requests it):

Heretofore, a knowledge by parents heading into trial that a court can, or has, or will, decree sole custody requires that both parents prepare to fight each other; it requires they think negatively, it requires that they both defend and attack...a gladiator fight by formerly loving spouses for the sadistic amusement and financial income of every courtroom participant whose employment and income rely on family court battles.

(Adversary litigation in family/domestic cases usually elicits shame, anger, damaged pride and permanent memory-scars. Although adversary litigation may have some merit in other civil and criminal cases as a mechanism for eliciting 'truth', family law cases have less bearing on 'truth' than with expectations, hopes, moral judgments, and person security in family relations.

Now, if joint physical custody is known to be a firm requirement of the court as a first preference and a first presumption, then an accepting, forgiving, and cooperative parent proposing joint custody need not be required to assassinate the other parent.

Acceptance, forgiveness and cooperation are far better social policy goals for a state to protect and encourage (by favoring such a parent) than inspiring the alternative of spousal character assassination.

## IN PRACTICE

The modern joint physical custody statute implants a presumption (for agreeing parents) and a preference (when one parent applies) and protects the concept:

- By permitting either parent to apply,
- By allowing previous decrees to be modified,
- By requiring judges to itemize their reasons for declining joint physical custody if either parent applies,
- By transferring custody to the most cooperative and accepting parent (as demonstrated by that parent's custody plan, and other submissions),
- And by requiring the burden of proof be on the parent pursuing sole parent custody.

## BURDEN OF PROOF

If you are confronted by legislative attempts to downgrade joint custody, then do this:

Insist on the requirement of 'burden of proof' upon the parent who seeks sole parent custody and who declines joint custody cooperation with the other parent.

## WHY DID GUARANTEED PRIORITIZING OCCUR?

- Parents agreeing in advance to joint custody were flabbergasted and chagrined when, in court, they encountered a judge who would not decree joint custody nevertheless, and anointed one parent with the status of custodian and relegated the other to subservient visitation. Therefore, the protection of 'presumption' became necessary.
- Preference became necessary, as a ranking for joint custody, when courts placed more value on vesting control with one parent than in encouraging a child's equitable access to both parents. Typical comment in such decrees: 'One parent acted more like they wanted the child than the other parent.'

## Blessed are the peacemakers:

Customarily, an individual so ideologically inclined as to propose and desire participation in joint custody is less likely to aggressively generate and conduct the attack necessary to destroy the opposite parent, as sole custody requires.

A parent proposing joint custody and proposing acceptance of the alternate parent for parttime parenting, cannot logically and vigorously contend that alternate parent is unfit for fulltime parenting.

Yet, a legal system that has merely options rather than goals and that pronounces decrees predicated on aggressive adversary litigation perpetuates destructive battles unless that system is instructed with 'presumptions' 'preferences', and the burden of proof upon the most destructive party.

# Evaluating the 'success' of joint custody decrees

## Repeat court appearances as an indicator of custody stability

One measure of relative success is the frequency of return to court for relitigation of joint custody as compared with sole parent custody.

From: James A. Cook  
10606 Wilkins Ave.  
Los Angeles, Calif.  
90024

November 14, 1980

## Two years of custody decrees evaluated in California analysis

On November 7, 1980, Commissioner John R. Alexander of the West District (Santa Monica) of the Los Angeles County Superior Court summarized the rates of controversy in joint and sole parent custody cases from the Fall of 1978 through September 30, 1980. In the next few months Commissioner Alexander will have completed a more extensive commentary on his statistical review. Meanwhile, this advance 'look' at his preliminary findings will be of special interest to the critics and supporters of joint custody.

Statistics were gleaned from case files and index cards compiled by Commissioner Alexander and fellow jurists in the Santa Monica family law court.

## Joint custody awards compared with sole custody decrees

From Fall 1978 to September 30, 1980, 414 custody cases occurred in this court, of which 67% (277 cases) were sole custody awards and 33% (137 cases) were joint custody awards.

## Joint custody relitigation one-half as frequent as sole custody

Of those cases, only 16% of the joint custody awards resulted in repeat courtroom appearances (22 of the 137 cases.) However, 31% of the sole custody awards resulted in courtroom reappearances (86 of the 277 cases.)

## Results when one parent doesn't agree to joint custody

The gratifyingly high rate of 'stability' within cases where joint custody was decreed regardless of opposition to joint custody by one of the parents is illuminating

17 decrees of joint custody were awarded although parents objected (in 14 of which there was opposition to joint custody by one parent and in 3 of which there were 'defaults' by one parent.)

71% of those cases (12) resulted in no later flareups or courtroom controversy despite the initial objection by one parent to joint custody. 5 (of the 17) resulted in later controversy, 2 of which were settled by agreement, 2 were settled after contested hearing, and 1 is still pending, a notice of appeal having been filed August 26, 1980.

**Joint custody decrees, even when there is no initial agreement, are more stable than arbitrary sole parent custody decrees**

Obviously, a preference is for both parents to agree to joint custody,

But, even when both parents don't agree to joint custody there are fewer flareups in unconsented joint custody than in exclusive sole custody decrees. (29% are compared with 31%).

In short, a decree of joint custody even when one parent disagrees appears to be more stabilizing than the arbitrary and decisive decree of sole parent exclusive custody.

-----  
 Statistics as offered by Commissioner Alexander:

**RATES OF CONTROVERSY IN JOINT AND EXCLUSIVE CUSTODY CASES.**

Results of study conducted by John R. Alexander, Commissioner, Los Angeles County Superior Court, West (Santa Monica) District, Fall '78-Sept 30, '80

Table 1 : Summary of Results

1. Total nr of cases studied	414
2. Exclusive custody awards, Total nr:	277
3. Controversies over custody or visitation arising from the 277 exclusive custody awards:	86
4. Coefficient of controversy (86/277)	0.3105
5. Joint custody awards, Total Nr:	137
6. Controversies arising from 137 joint custody awards:	22
7. Coefficient of controversy (22/137)	0.1606

Table 2 : Unconsented joint custody awards follow-up

1. Joint custody awards made after,	
a) Default by one parent	3
b) Opposition by one parent	14
c) Total:	17
2. Cases with no later flareups of controversy	12
3. Ratio of stability (12/17)	0.7059
4. Flareups of later controversy	
a) Settled by agreement	2
b) Settled only after contested hearing	2
c) Still pending (notice of appeal filed, Aug. 26, 1980)	1
d) Total	5
5. Coefficient of controversy (5/17)	0.2941

(Compare with Table 1, line 4: Coefficient in all exclusive custody cases: 0.3105)

Considering number of cases studied, results are believed accurate within 1% plus or minus.

THE LEGISLATURE OF THE STATE OF ALASKA  
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST  
 Bill/Resolution No. CSHB 210  
 Title An Act Relating to Child Custody  
 Requested by House Judiciary Committee Date 3/3/82

II. FISCAL DETAIL  
 Agency Affected Alaska Court System  
 Program Category Affected Trial Courts  
 BRU, Program, Or Subprogram(s) Affected \_\_\_\_\_  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	0	0	0	0	0	0

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

IV. DATE 3/3/82 PREPARED BY Richard P. Barrier  
 AGENCY Alaska Court System  
 Original: Legislative Finance PHONE 264-0245  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named)

THE LEGISLATURE OF THE STATE OF ALASKA  
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. CSHB 210 (HESS)  
 Title "An act relating to child custody."  
 Requested by Repr. Barnes, House Judiciary Date March 9, 1982

II. FISCAL DETAIL

Agency Affected Department of Law  
 Program Category Affected General Government  
 BRU, Program, Or Subprogram(s) Affected Legal Services  
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	0	0	0	0	0	0

FUNDING (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
FULL TIME	0	0	0	0	0	0
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

This bill involves child custody upon the separation of parents or the dissolution of a marriage which is a matter between private parties and it will therefore not have a fiscal impact on any of the department's activities.

IV. DATE March 9, 1982 PREPARED BY Richard I. Pecues, Director, Admin. Svcs.  
 AGENCY Department of Law  
 Original: Legislative Finance PHONE 465-3672  
 cc: Budget and Management  
 Prime Sponsor (First Legislator Named)  
 33-001 (Rev. 12/81)

*Richard I. Pecues*

*Original position paper also supported the bill.*

POSITION PAPER

CS FOR HOUSE BILL NO. 210 (HESS)

"An Act relating to child custody."

CS for House Bill No. 210 (HESS) provides a statutory basis for shared custody in judgements for custody. The Department feels the Committee Substitute improves on the original Bill. However, we would still question the language in Section 09.55.205(c) due to the deletion of the phrase, "all relevant factors include." This deletion seems to imply that the court's considerations are limited to those factors delineated in the section. It is felt that in the best interests of the child "all relevant factors" should be considered.

In addition, the Department would recommend that the definition of shared custody not necessarily include physical custody. This stems from the concept that, whenever possible, shared physical custody, as well as legal custody, is beneficial but recognizes that shared physical custody is not always possible.

RECOMMENDED BY: *John R. Pugh*  
John R. Pugh, Director  
Division of Family and  
Youth Services

DATE: *1/29/82*

APPROVED BY: *Helen D. Fairne*  
Helen D. Fairne  
Commissioner

DATE: *3-10-82*

THE LEGISLATURE OF THE STATE OF ALASKA  
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST  
Bill/Resolution No. CS for House Bill No. 210 (HESS)  
Title "An Act relating to child custody."  
Requested by \_\_\_\_\_ Date \_\_\_\_\_

II. FISCAL DETAIL  
Agency Affected Department of Health and Social Services  
Program Category Affected \_\_\_\_\_  
BRU, Program, Or Subprogram(s) Affected \_\_\_\_\_  
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS	-0-	-0-	-0-	-0-	-0-	-0-
OTHER (Specify Source)	-0-	-0-	-0-	-0-	-0-	-0-
	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS

FULL TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART TIME	-0-	-0-	-0-	-0-	-0-	-0-
TEMPORARY	-0-	-0-	-0-	-0-	-0-	-0-

III. ANALYSIS (See Fiscal Note Separation Instruction, Section III)

CS for House Bill No. 210 (HESS) has no fiscal impact on the Department of Health and Social Services.

IV. DATE 1/28/82 PREPARED BY J.R.P. John R. Pugh, Director  
AGENCY Division of Family and Youth Services  
Original: Legislative Finance PHONE 465-4170  
cc: Budget and Management  
Prime Sponsor (First Legislator Named)  
33-001 (Rev. 12/81)

JCC



## Trial Courts

State of Alaska

THIRD JUDICIAL DISTRICT  
303 K STREET  
ANCHORAGE, ALASKA 99501

RALPH E. MOODY  
Presiding Judge

April 9, 1981

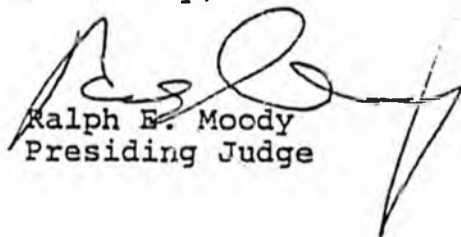
Mr. William Grant Callow, II  
General Counsel to Administrative Director  
Alaska Court System  
303 K Street  
Anchorage, Alaska 99501

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

# Memorandum

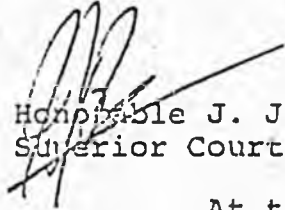
Alaska Court System

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 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  
2/23/81  
Jp.L

Honorable Ralph E. Moody  
March 19, 1981  
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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 vengeance, 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

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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 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

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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 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

SUBJECT: HB 210

FROM: William D. Hitchcock *wh*  
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. 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. 25.20.030. 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

Marko Lewis - Mom's House- Dad's House- Box 136- Hyder, Ak. 99923  
Feb. 4, 1982

To HESS

The committee substitute for HB 210 does not serve the legislative intent for which it was designed. It in no statutory way encourages frequent and continuing and meaningful relationships between both parents and children after divorce, and instead of decreasing points for litigation, actually encourages litigation. It is no surprise that it encourages litigation- it was rewritten to please the legal community. The problem is that the legal community knows very little about child development or child psychology.

A recent California study by Everett Q. Pojman, Ph. D. "Emotional Adjustment of Boys in Sole Custody and Joint Custody Divorces Compared With Adjustment of Boys in Happy & Unhappy Marriages." shows that there is much better adjustment and psychological health in joint custody children than sole custody children. This is just one recent study of many which show simialar results. SHARED CUSTODY IS BETTER FOR CHILDREN.

Another study by Alexander and Elfield in the American Journal of Psychiatry " Does Joint Custody Work? A First Look at Outcome Data of Reconciliation " shows that when joint custody is decreed by the court over the objection of one parent there are FEWER RELITIGATIONS RETURNING TO COURT THAN SOLE CUSTODY DECREES.

If HB 210 is to serve its intent it must SHOW A STAUATORY PREFERANCE FOR SHARED CUSTODY. IT MUST PLACE THE BURDEN OF PROOF ON A PARENT WHO WISHES TO DENY A CHILD EQUITABLE CONTACT WITH THE OTHER PARENT.

Marko Lewis- Mom's House-Dad's House- Box 136  
Hyder, Alaska 99923 Feb. 5, 1982

I have reworked the draft copy of the committee substitute to reflect these needs, by making a ~~circumventing~~ preference for shared custody instead of a ~~circumventing~~ presumption. I have also further clarified the definition of shared custody. I have added the 'Factors for consideration by the court' the words 'in its implementation'. If all these factors must be considered BEFORE an award of shared custody there will be more than ample factors for disagreement and litigation. The proper time to consider these factors is AFTER THE AWARD. I have also added a new section on parents leaving the state, more or less copied from a Wisconsin statute. This is necessary to keep a parent from circumventing a court order simply by leaving the state...and certainly such a big change should be cause for reconsideration of the mechanics of sharing or custody/visitation arrangements.

In conclusion, the committee substitute is a bad bill. It does not serve the legislative intent, it does not reflect the need of children to have a relationship with both parents, it does not do anything to lessen the likelihood of litigation. It does not presume that parents are equal before the law. It continues to assure lengthy and recurring litigation and the ultimate destruction of at least one parent-child bond. I oppose the subcommittee substitute as it now reads.

TO HESS

# PROPOSED AMENDMENTS TO THE COMMITTEE SUBSTITUTE BY MARKO LEWIS

IN THE HOUSE

Proposed COMMITTEE SUBSTITUTE

HOUSE BILL NO. 210  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWELFTH LEGISLATURE - SECOND SESSION

## A BILL

For an Act entitled: "An Act relating to child custody."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

\* Section 1. LEGISLATIVE INTENT. (a) The legislature finds that it is generally desirable to assure a minor child frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing. ~~While actual physical custody may not be practical or appropriate in all cases,~~ <sup>delete</sup> it is the intent of the legislature that <sup>when appropriate</sup> both parents have the <sup>← add:</sup> opportunity to guide and nurture their child and to meet the needs of the child on an equal footing beyond the considerations of support or actual custody.

(b) The legislature also finds that it is in the best interests of a child to encourage parents to implement their own <sup>change</sup> ~~child care~~ <sup>parenting</sup> agreements outside of the <sup>← word</sup> court setting.

\* Sec. 2. AS 09.55.205 is repealed and reenacted to read:

Sec. ~~09~~.55.205. JUDGMENTS FOR CUSTODY. (a) In an action for divorce or for legal separation the court may, if it has jurisdiction under AS 25.30.020 and is an appropriate forum under AS 25.30.050 and 25.30.060, during the pendency of the action, at the final hearing, and at any time thereafter during the minority of a child of the marriage, make an order for the custody of or visitation with the minor child which may seem necessary or proper and may at any time modify or vacate the order.

(b) Any appointment of a guardian ad litem for a child shall be made under AS 09.65.130.

(c) The court shall determine custody in accordance with the best interests of the child under AS 25.20.060 - 25.20.180. In determining the best interests of the child the court shall also consider

- (1) the physical, emotional, mental, religious, and social needs of the child;
- (2) the capability and desire of each parent to meet these needs;
- (3) the child's preference if the child is of sufficient age and maturity to express a preference;
- (4) <sup>the love and</sup> ~~the~~ <sup>parent</sup> ~~relationship~~ <sup>parent</sup> ~~between the child and each~~

(5) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(6) the desire and ability of each parent to allow an open and loving relationship between the child and his other parent.

(d) In making an award of custody under AS 25.20.060 - 25.20.180 and this section, the court may not consider the conduct, marital status, income, social or cultural environment, or life style of either parent unless it is shown that the factor relates to the well being of the child.

Sec. 3. AS 25.20.060 is amended to read:

Sec. 25.20.060. CUSTODY OF THE CHILD. If there is a dispute over child custody, either parent may petition the superior court for resolution of the matter under AS 25.20.060 - 25.20.180. The court shall award custody on the basis of the best interests of the child. In determining the best interests of the child, the court shall consider all relevant factors including those factors enumerated in AS 09.55.205(c). Neither parent, regardless of the question of the child's legitimacy, is entitled to preference in the awarding of custody.

\* Sec. 4 AS 25.20 is amended by adding new sections to read:

Sec. 25.20.070 Custody should be awarded in the following order of preference according to the best interests of the child:

- (1) To both parents jointly. The court in its discretion may require the parents to submit a plan for implementation of the custody order. A parent may voluntarily submit a custody implementation plan to the court prior to issuance of a custody decree; a plan may be submitted individually or together with the other parent.
- (2) 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. In the event that one parent requests joint custody and the other parent requests sole custody the burden of proof that joint custody would not be in the child's best interest shall be on the parent requesting sole custody.
- (3) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.
- (4) 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.

This is now worse than the present law - leaves the door open to judges to consider cultural etc. from a prejudicial standpoint

change to original #8210 wording This is unconstitutional as it now reads

(5) For the purpose of assisting the court in making a determination whether an award of shared custody is appropriate, the court may direct that an investigation be conducted.

(6) If the court declines to enter an award of shared custody the court shall state in its decision the reasons for a denial of shared custody.

Sec. 25.20.080. MEDIATION. The court considering a request for custody of a child may order the parties to participate in pre-trial mediation of the matters before the court pursuant to AS 09.55.115.

Sec. 25.20.090. MODIFICATION OF CUSTODY. An award of custody or visitation may be modified if the court determines that the best interests of the child require the modification of the award. If a parent opposes the modification of the award of custody or visitation, the court shall enter in the record its reason for modifying the award.

Sec. 25.20.100. PREFERENCE OF THE CHILD. If the child is of sufficient age and capacity to form an intelligent preference as to custody, the court shall give due weight to the preference of the child.

Sec. 25.20.110. FACTORS FOR CONSIDERATION BY THE COURT. In an award of shared custody under AS 25.20.060- 25.20.120, the court shall consider in its implementation

*I changed  
order +  
wording to  
reflect a more  
logical sequence.  
"Plain old "needs  
of the child" is too  
broad + is  
redundant.*

- (1) the needs of the child for frequent and continuing relationships with both parents
- (2) the stability of the home environment likely to be offered by each parent
- (3) the advantages of providing a varied life experience for the child
- (4) the quality and continuity of the education of the child

(5) the optimal time for the child to spend with each parent considering

- (A) the actual time spent with each parent;
- (B) the proximity of each parent to the other and to the school in which the child is enrolled;
- (C) the feasibility of travel between the parents;
- (D) special needs unique to the child that may be better met by one parent than the other;

Put this as (A)

~~(E) which parent is more likely to encourage frequent and continuing contact with the other parent;~~ *wrong place for this -*

(6) the findings and recommendations of a neutral mediator where mediation is recommended by the court;

(7) other factors the court considers pertinent.

Sec. 25.20.130. TEMPORARY CUSTODY. Unless it is shown to be detrimental to the welfare of the child, the child shall have, to the greatest degree practical, equal access to both parents during the time that the court considers an award of custody under AS 25.20.060 - 25.20.180. *good*

Sec. 25.20.140. AWARD OF CUSTODY TO NONPARENT. The court may not award custody to a person who is not a parent of the child unless the court finds that an award of custody to a parent would be detrimental to the best interests of the child.

Sec. 25.20.150. CONFIDENTIALITY OF PROCEEDINGS. At any stage of the proceedings, if the court finds it is in the best interests of the marital estate or the child, it may close the hearings or order the court records closed (except for statistical information required by law) or both, temporarily or permanently, and may modify or vacate the order at any time. *good*

Sec. 25.20.160. ACCESS TO RECORDS OF THE CHILD. A parent who is not the parent granted custody under AS 25.20.060 - 25.20.180 may have access to the medical, dental, school, and other records of the child notwithstanding any other provision of the law. *good*

Sec. 25.20.170 NOTIFICATION OF PARENT LEAVING THE STATE. A <sup>custodial</sup>parent

1 leaving the state for the purpose of setting up residence in another  
2 state must notify the court and the other parent 90 days prior to the  
3 date of departure so that the court may consider any necessary modifications  
4 in custody orders.  
5

6 Sec. 25.20.180 DEFINITIONS. In AS 25.20.060-25.20.180 shared custody  
7 means shared physical and legal custody. Shared physical custody means an  
8 order awarding each parent or party significant periods of physical  
9 custody. Shared physical custody shall be divided in such a way so as  
10 to assure a child of frequent and continuing contact with both parents.  
11 Shared legal custody means that the parents or parties <sup>share</sup>, in a manner  
12 determined between them or by the court, the decision making rights,  
13 responsibilities, and authority relating to the health, education and  
14 welfare of a child.  
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**FAMILY LAW REFORM AND JUSTICE COUNCIL OF ALASKA, INC.**

**P.O. BOX 4-1646  
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RUDY JOHNSON, PRESIDENT  
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"ALASKANS FOR CHILDRENS RIGHTS"

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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.**

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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 failing!

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 Psychistry 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 <sup>↑</sup>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. 20% 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 elliviate 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 determing 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

ELLIS LAW OFFICES, INC.

1285 Tongass Avenue  
2518 E. Tudor Road

Ketchikan, Alaska 99901  
Anchorage, Alaska 99507

907-225-9661  
907-272-9632

Peter R. Ellis  
Drew H. Peterson  
Bruce O. Davies  
Christopher M. Keyes

February 4, 1982

Alaska State Legislature  
House of Representatives  
Health, Education and  
Social Services Committee  
Pouch V  
Juneau, Alaska 99811

Re: House Bill 210

Dear Committee Member:

This is the written supplemental testimony which I promised I would provide during my brief oral testimony to your Committee by teleconference on January 29, 1982. You were running late that day and I promised to be brief but to follow up with this letter thereafter.

As was apparently true of many of the witnesses during the teleconference hearing, I first saw the Committee Substitute for House Bill 210 upon arriving at the teleconference hearing room. Thus my remarks were initially tailored to the earlier version of H. B. 210, although I have now obviously had a chance to review the Committee Substitute as well. I am an attorney in private practice in Anchorage and have been in the active practice of law for approximately nine and one half years. A substantial amount of my practice during that time has been in the area of family law. I have resided in and practiced law in Alaska since July of 1976. I am also married, and have two children, ages one and one half and seven.

My initial reaction after reading the original H.B. 210, and my intent in testifying, was that I was substantially in favor of the bill, and the concepts contained therein, but troubled by some of the language which I thought needed work. Upon now reviewing the Committee Substitute, I find that much of the language which previously troubled me has been cleaned up, but at the same time that much of the heart of the original bill has been removed from the Committee Substitute to its detriment.

The primary difference in the bills, of course, is the removal of the rebuttable presumption in favor of joint custody. I am in favor of such a rebuttable presumption, although I would like to see the concept better defined than was the case in the original H. B. 210.

I do not necessarily agree with some of the other witnesses who testified at the hearing that the Committee Substitute totally guts the bill and is worse than having no bill at all. The Committee Substitute if enacted would, in my opinion, be a step in the right direction. I believe that the crux of the matter is that joint custody is a very useful and helpful concept, of substantial benefit in a large number of cases in resolving bitterly acrimonious disputes, by means which are frequently mostly semantic and with little practical difference from traditional custodial awards except that joint custody is considered more satisfactory to a parent who does not have primary custody of children after a divorce or a dissolution is granted. Joint custody is an extremely useful tool which should be encouraged for use in future custody disputes. It is my further belief that the present state of the law in Alaska actually discourages the use of joint custody, benignly if not actively, and that any step towards the more frequent use of joint custody by the courts is a step in the right direction. The Committee Substitute is in fact such a step in the right direction, although it is not nearly as strong a step as I would like to see because it has little substantive effect beyond its mere rhetoric. The adoption of a rebuttable presumption, such as that contained in the original H.B. 210 would be a much stronger step in the right direction.

The largest single difficulty with past joint custody arrangements which I have observed has been when the joint custody concept has been inadequately defined and structured. Thus I would like to see a bill enacted which would create a rebuttable presumption of joint custody but further require that such arrangements be tightly defined in the vast majority of cases. The use of mediation as authorized under both versions of H.B. 210 would be a significant help in arriving at such definition. I believe that all joint custody agreements should be required to include with specificity provisions for the actual physical custody of the children, together with the time to be spent with the children with the non-physical custodian, except in those unusual cases

where such specificity is not required for good reasons which are stated by the Court on the record. Such a requirement of specificity in joint custody awards would, I believe, resolve the major concerns of those persons who have opposed the rebuttable presumption concept. Such an approach also comports with my own experience in dealing with joint custody, which is that carefully defined joint custody arrangements seem to work very satisfactory, whereas loosely defined joint custody arrangements can frequently create more problems than they solve.

Just as there may be rare cases where a loosely defined joint custody arrangement may be appropriate, and should I believe be authorized if good reasons are stated on the record, it is certainly even more true that there are many cases where joint custody is not appropriate. I do not see that as being in any way inconsistent, however, with the rebuttable presumption. My experience has been that such cases are relatively obvious and the presumption can easily be rebutted and thereby disappear. One thing not addressed directly in either of the bills, although at least an attempt was made in the original H.B. 210, would be to provide some additional teeth to the laws and encouragement to the Courts to actively prosecute and stop the sort of outrageous conduct, harassment, manipulating of children and the like which occurs in the all too large minority of cases. While not essential to H.B. 210, such problems are, I believe, worthy of consideration.

I would also like to speak briefly to the mediation provisions of the bill. I am in complete agreement with the comments of Superior Court Judge Tom Schulz in his letter to your Committee dated May 4, 1981, which I found to be an excellent and thought provoking letter and would commend once again to your attention. I firmly believe, as does Judge Schulz, that mediation should be required in all but the most exceptional of cases, and further that doing so would work a tremendous improvement in the resolution of custody disputes, and thereby pay for itself almost immediately in terms of time savings from the crowded Court dockets. Mediation is already authorized by Alaska statutes, but virtually never ordered by the Courts, and anything which your Committee can do to change that situation could, I believe, be of substantial benefit to the entire domestic relations field in the State of Alaska. Again, H.B. 210 is a step in the right direction but does not go far enough.

Alaska State Legislature  
February 4, 1982  
Page 4

One final note. Concerning the comments of myself and other witnesses at the hearing as to language problems with the bill, I feel that such problems do exist with both versions of H.B. 210. I have been involved in legislative drafting in the past, however, and am well aware of the difficulties involved in drafting good statutory language. I have always believed that critics in that regards should be willing to invest some of their own time in attempting to resolve problems which they note, in effect put their time where their mouth is. Should the Committee be interested in my suggestions, you should feel willing to call on me and I will be available to attempt to help draft legislative language along the lines which I have recommended herein.

Thank you for your consideration.

Yours very truly,

ELLIS LAW OFFICES, INC.

By 

Drew Peterson

DP/jb

EQUAL RIGHTS FOR FATHERS OF ALASKA  
"Alaskans for Childrens Rights"

Children of Divorce  
Coalition

Second Partners  
Coalition

A NON-PROFIT ORGANIZATION

February 11, 1982

Michael F. Beirne, Rep.  
Chairman, HESS Committee  
Pouch V  
Juneau, Alaska 99811

Dear Representative Bierne:

Many hours of testimony have been taken concerning House Bill 210. I believe both sides are well presented. I and others I represent, are very distressed over the committee's intention to remove the "rebuttable presumptive" clause from the bill. I cannot urge you too strongly to reconsider that action, as the bill is "gutted" without these two very important words. It is still better than nothing, but without any force or teeth.

The past has shown us that to legislate family law statutes without teeth is futile. I refer to our study which we performed, utilizing the court's own records. The study pertained to the Anchorage Superior Court custody awards for the years 1979 and 1980. During the years studied, only 2.6% of disputed child custody cases were settled in favor of the father. This is raw bias and presents only the tip of the iceberg in view of the overall problem. These shocking results are in spite of the fact that our state statutes prohibit discrimination in areas of child custody and our Supreme Court has further strengthened those statutes.

The testimony you have heard came from all walks of life, and can be condensed into several categories:

1. Lay-people testifying without any specific knowledge of what is really happening, but nevertheless with strong opinions one way or another.
2. Lay-people who have been affected and have tried in vain to enforce the orders of the court granting them unenforceable visitation.
3. Knowledgeable professionals concerning the area of family law, both pro and con.

3605 Arctic Blvd., #588, Anchorage, Alaska, 99503 (907) 272-2345 or  
333-9284. MEMBERS IN: Anchorage, Sitka, Sutton, Ward Cove, Hyder,  
Palmer, Kenai, Fairbanks, Ninilchik, Wasilla, Ketchikan and Soldotna  
CHAPTERS IN: Fairbanks

I believe that it is fair to say that all the testimony is reflected in the letters of Judge Ripley, dated April 7, 1981; Judge Taylor, dated May 3, 1979 and June 24; Judge Schultz, dated May 4, 1981 and Rudy Johnson, dated March 31, 1981 and April 7, 1981.

If those documents are reexamined, the truth about how the system works can be gleaned as well as solutions to prevent further abuses.

In closing, I wish to iterate my strong convictions that House Bill 210 will help change attitudes and that is the key to truly changing our outmoded and obsolete system for adjudication of child custody cases.

It is unbelievable that the bar association (the very element creating the atrocities in domestic relations) represents such a minority and could wield the power to gut House Bill 210!

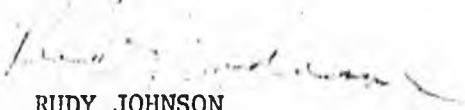
It is equally unbelievable that those legal scholars opposing a rebuttable presumption clause do so under the guise of a need for clarification! Rebuttable is just that, irrebuttable is something quite different and if that was the magic word, the bar would have a valid concern.

I can tell you from past experience that even with the "rebuttable presumptive" clause, the courts will continue to do what they have for the past fifty (50) years. The difference is the appellate courts will clarify the wisdom of a presumption and will further the concept of changing attitudes. In a number of years, attitudes will change to the point when a person goes to his/her attorney and says "I want a divorce and the kids," they will be pointed in the right direction with council that tells them the relationship between the other parent and the children must continue and be protected, short of showing the unfitness. They will be given legal advice, salted with this goal in mind and the long term negative impact on all children of divorce will be greatly reduced. Even with the presumptive, the court only need state it's reason(s) for denying joint custody! Without the presumptive we will lose years in the battle of merely desiring to change attitudes!

If what I have stated above was simply the opinion of one man, Rudy Johnson, it may be looked upon as suspect. But instead, this and my other testimonies are supported with studies, facts and the concurring testimonies of Judges and other members of the bar, not to mention the citizens of the State of Alaska!

To allow a few individuals within the bar association to gut House Bill 210 would be a travesty of justice to the thousands of Alaskan children who will suffer the consequences of their parent's divorce over the next few years. Please do not force these children to inherit the problems we are working so very hard to rid ourselves of...problems our parents passed onto us. Put the "rebuttable presumptive" back in!

Sincerely,

  
RUDY JOHNSON  
President

RJ:peh



Official Business

# Alaska State Legislature

## House of Representatives

Pouch V  
State Capitol  
Juneau, Alaska 99811

January 27, 1982

Katie Green  
6320 Lost Circle  
Anchorage, Alaska 99502

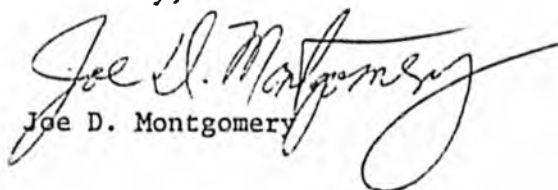
Ms. Green:

HB 210 was introduced last February and was referred to the Health, Education and Social Services Committee and then to the Judiciary Committee.

I have sent a copy of your letter to Rep. Beirne and Rep. Barnes.

I appreciate your comments on this legislation and will give careful consideration to the bill.

Sincerely,

  
Joe D. Montgomery

cc: Rep. Beirne ✓  
Rep. Barnes

JDM:mjc

1/25/82

11/15/82

6320 LOST CIRCLE  
ANCH. AL  
99507

REPRESENTATIVE JOE MONTGOMERY

POUCH V

JUNEAU, AL

99811

DEAR MR. MONTGOMERY,

I AM A REGISTERED VOTER IN THE 12th DISTRICT IN ANCHORAGE, AND HAVE VOTED REGULARLY.

I HAVE BECOME AWARE THAT HOUSE BILL 210 WILL BE INTRODUCED INTO THE LEGISLATURE THIS SESSION. JOINT CUSTODY IS A DEVELOPING CONCEPT WHOSE TIME IS AT HAND. THIS IS THE BEST POSSIBLE ALTERNATIVE FOR A CHILD TO HAVE. IT IS A FUNDAMENTAL BUT NECESSARY CHANGE FOR THE LEGAL SYSTEM. IT WILL EDUCATE PARENTS TO THE CONCEPT THAT CHILDREN ARE NOT TOOLS TO MANIPULATE FORMER SPOUSES.

I HOPE YOU WILL CHOOSE TO GIVE THIS BILL YOUR FULLEST SUPPORT AND AID IN ITS EXPEDITIOUS PASSAGE.

I FEEL VERY STRONGLY IN FAVOR OF THIS H.B. 210 FOR SOME OF THE FOLLOWING REASONS. IN THE PAST, MANY WOMEN HAVE USED A CHILD AS A MEANS TO AVENGE A WRONG THAT A HUSBAND MAY OR MAY NOT HAVE COMMITTED. TOO OFTEN CHILDREN HAVE BEEN USED AS CHATTELS. HOUSE BILL 210 SHOULD DETER THIS TYPE OF CHILD ABUSE.

TIMES ARE QUICKLY CHANGING. MORE WOMEN THAN EVER BEFORE HAVE ACQUIRED SUCCESSFUL CAREERS. IN ESSENCE, WOMEN HAVE BECOME SOCIO-ECONOMICALLY EQUAL TO MEN. ESPECIALLY IN ALASKA WHERE OUR COST OF LIVING IS SUCH THAT BOTH HUSBAND AND WIFE MUST WORK. SO WITH THE ACCEPTANCE OF "WOMENS LIBERATION" INTO OUR SOCIETY, SO SHOULD WE ACCEPT MENS LIB. H.B. 210 WILL INSURE MENS EQUALITY IN THE NUTURING OF CHILDREN. IT WILL ALSO ALLOW BOTH PARENTS TO CONTRIBUTE EQUALLY TO THE FINANCIAL RESPONSIBILITIES OF CHILD REARING.

THIS BILL ENCOURAGES PARENTS TO IMPLEMENT THEIR OWN CHILD CARE PROGRAMS OUTSIDE OF THE COURT SYSTEMS. THE ISSUE OF CHILD CUSTODY IS BEST LEFT OUT OF OUR COURTS AND THE REASONS ARE PRIMARILY TWO FOLD. LITIGATION PLACES PARENTS IN SUCH ADVERSIAL POSITIONS THAT THEY MAY NEVER BE ABLE TO DEAL WITH EACH OTHER EFFECTIVELY AS PARENTS A IN. IT SHOULD ALSO LIGHTEN THE COURT SYSTEMS CASE LOAD WHICH IS ALREADY OVER-BURDENED.

H.B. 210 ALSO CONTAINS A STIPULATION WHICH ALLOWS FOR MEDIATION BETWEEN PARENTS. AGAIN, THIS WILL AID NOT ONLY PARENTS AND THEIR CHILDREN, BUT ALSO THE EXTREMELY BUSY DOMESTIC COURTS.

AND LASTLY, HOUSE-BILL 210 WILL ELIMINATE THE PRACTICE OF MAKING A CHILD CHOSE ONE PARENT OVER ANOTHER. THUS WE WILL BE RELIEVING OUR CHILDREN FROM HAVING TO SUFFER FROM THE EXTREME GUILT OF MAKING SUCH A CHOICE.

I BELIEVE THE IMPLEMENTATION OF  
HOUSE BILL 210 WILL BE IN THE BEST  
INTERESTS OF EVERY FAMILY RESIDING IN  
ALASKA. ONCE AGAIN I URGE YOU TO  
SUPPORT THIS BILL TO YOUR FULLEST  
ABILITIES. I WILL REMAIN ALERT FOR  
ANY PROGRESS I MIGHT DISCOVER  
THROUGH THE NEWS MEDIA. I WOULD  
APPRECIATE HEARING FROM YOU AS TO  
WHETHER OR NOT YOU WILL BE  
SUPPORTING THE PASSAGE OF H.B. 210.  
THANK-YOU AND I HOPE THIS  
LEGISLATIVE SESSION IS A SUCCESSFUL ONE.

SINCERELY

Kate Green



Superior Court

State of Alaska

FIRST JUDICIAL DISTRICT  
415 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  
Page 2

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."

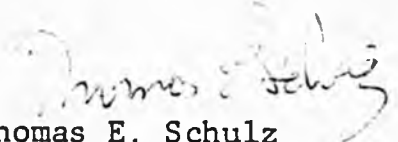
I do not know why it is necessary to transfer the custody considerations from Title 9 to Title 20. It seems to me, however, that if it is advisable to change these custody considerations from Title 9 to Title 20, it would be advisable to transfer the whole divorce code from Title 9 to Title 20 so that 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  
Page 3

  
Thomas E. Schulz  
Superior Court Judge

TES:me

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:**

SIGNED

SIGNED

DATE

SENDER: SEND WHITE AND PINK COPIES.

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, that 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 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 Preferences 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

Box 381  
Kenai, Alaska 99611  
22 Feb. 1982

HB 210

Members of the HESS Committee

Dear Sirs,

I am the non-custodial parent of a beautiful eight-year old girl, Rachel. For the past three to four years, I have been shooting for joint custody at best, for shared custody outside the law at least. The process of reconciliation and building of a mutual trust has been painfully slow. We are not there yet, but we are now closer than we have ever been. We have just taken a giant step toward full understanding and cooperation with the developments over the past month.

Rachel came to visit us for four weeks following Christmas. Three weeks into the visitation, we decided to see if we could keep Rachel for the remainder of this school year. A number of factors went into making this decision; academic performance in the school here compared with performance in Washington, amount of supervision we were giving Rachel compared with the amount her mother was able to provide, and other factors as well. One very important factor was that Rachel definitely wanted to stay.

Initially, Rachel's mother's response was 'no', accompanied with no concrete reasons. She was simply afraid that she would not get her back, and that she might somehow compromise her position as the custodial parent. There was never any reference to what was the best for Rachel. I accepted her decision.

The night before Rachel was due to return to Washington, while packing her suitcases, Rachel broke down crying. She said that she did not want to go back. Attempts at reassurance did not alter her position. I decided to try convincing her Mother again. After an hour on the phone, I got a commitment from her mother that she would give this much more sincere consideration.

At this point, I contacted Rudy Johnson of Equal Rights for Fathers of Alaska. I told him that I was planning to have Rachel stay up with me and accept the consequences. Through his council, I realized that this course of action would not be the best for Rachel. Keeping in mind Rachel's best interests, Mr. Johnson counseled patience, nothing but positive involvement with Rachel's mother in the future, and further positive involvement with Rachel. He suggested ideas, such as, when parents feel good about themselves and their relationship with each other, kids feel good.

This last statement is what I feel is at the heart of HB-210. HB-210 will provide the mechanism whereby separated and divorced parents will no longer be made into legally sponsored adversaries. Instead, parents will be encouraged

to cooperate, to find grounds for agreement over what is the most important thing to each of them, the well-being of their children.

Through talking with Mr. Johnson at length, I know that he represents very closely what my philosophy is pertaining to this issue. Please listen very closely to what he has to say and know that he is a representative of more people than those belonging to his organization. There are a lot of children out there who are needlessly struggling through the kinds of tug-o-wars that this bill is going to eliminate.

Sincerely,



Dana W. Hallett

P.S.

Rachel's mother has consented to letting her stay through the remainder of the school year. Perhaps Mr. Johnson's advice had somehow tempered my attitudes and provided me with incentive to state my case in a more convincing, calm manner. Without his advice, this situation could have set back the painstaking progress to the beginning.

# STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

## DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K-STATE CAPITOL  
JUNEAU, ALASKA 99811

(907) 465-3603

March 26, 1981

Donald E. Clocksin, Chairman  
House HESS Committee  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Re: House Bill 210

Dear Mr. Clocksin:

You have asked us to comment on HB 210, "an Act relating to child custody." Although this bill has no direct impact on our department, we do have some concerns over the policy expressed in the bill.

The intent of the bill is laudable. It addresses concerns that have been surfacing with increasing regularity around the country. The bill, in promoting shared custody, embodies the notion that it is in the child's interest to perpetuate his or her relationship with both parents. Shared custody also appears to be, in some cases, more equitable with regard to the parents, giving legal recognition to the rights of both parents to participate in decisions which significantly affect the child's life. Although judges probably have inherent power to make shared custody awards in appropriate cases, statutory recognition and authority for such awards may ensure that shared custody is given serious consideration as an alternative in custody disputes. Additionally, statutory authority for a shared custody award may help in surmounting the sexual stereotypes that often operate in custody disputes.

However, conferring upon the notion that shared custody is in the best interests of the child the status of a rebuttable presumption, and requiring that first preference in making an award be given to shared custody, regardless of whether, in either case, the parents actually agree on shared custody, may be going overboard.

By its nature, shared custody requires extensive cooperation between the parents. Without question, there are many instances in which such an arrangement is simply not feasible due to the existence of extreme antagonism between the parents, or perhaps due to other factors (this is implicitly recognized by the listing of the factors to be considered in making an award, § 25.20.120). Many states have recently authorized shared or joint custody awards, and several have accorded it the presumption that it is in the best interests of the child where the parents can agree on an arrangement, but we are aware of none which give shared custody the blanket presumption provided by this bill.

We would suggest the requirement that parents agree on a shared custody award, at least before the presumption and first preference come into operation. Additionally, it may be advisable to require the parents to submit to the court a proposal setting out guidelines for resolution of disputes, and a workable plan if shared physical custody is contemplated, rather than to leave it in the court's discretion.

Section 2, amending AS 09.55.205, is also problematic. Subsection (d) of that statute would prohibit consideration of several factors in making an award of custody -- the conduct, marital status, income, social and cultural environment, and life style of either parent, unless those factors are shown to have caused or to potentially cause emotional or physical injury to the child. While the intent here may be to dispose of many of the conventional but perhaps unfounded presumptions regarding what is and is not a proper and suitable environment for children, this section seems to leave little that can be considered. We wonder, for example, how an assessment of each parent's capability to meet the physical, emotional, mental, religious, and social needs of the child, as required by subsection (c)(2), can be made if there is an exclusion of all reference to the parent's social and cultural environment and life style unless it is shown to be detrimental. We believe that this section is overly broad.

Sincerely,

WILSON L. CONDON  
ATTORNEY GENERAL

By: *Linda Scoccia*  
Linda Scoccia  
Assistant Attorney General

cc: Art Peterson

LS:ml



10125 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.

FILE # B 210

April 15, 1982

Senator Pat Rodey  
State Capitol  
Pouch V  
Juneau, Alaska 99811

Dear Senator Rodey:

As a responsible legislative committee member, you may be particularly concerned with the timeliness and importance of the enclosed material.

The assurance of joint custody for the children of divorce, and the ability to secure frequent and continuing contact with both parents through a less litigious proceedings, is the intent of the enclosed model joint custody statute.

We urge you to introduce the enclosed proposal in your legislature.

The text is drawn primarily from two sources: (1) The existing California and Nevada statutes, which afford two of the Nation's largest bordering states with nearly identical child custody statutes. (2) Amendment improvements dictated by experience in implementation and need for guidance to the courts and that are now in the final stage of legislative consideration by California's "second house".

The decisive vote that the joint custody concept is attracting in state legislatures could reflect a perception of the public's readiness for a statute that makes joint custody a first preference, a "rebuttable presumption," and with the burden of proof that joint custody might not be in the best interests of a particular child upon the individual seeking to isolate a child in exclusive sole parent custody.

The enclosure is a recognizable humane and decent refuge for the children of divorce and for salvaging the conscientious parent's desire to be a responsible participant in the upbringing of their children, regardless of divorce. The proposal, as enclosed, does not seek to pass a value judgment on divorce, but is to protect one of the Nation's most valuable resources for stability despite the instability of divorce: the relationship between children and each parent.

Sincerely,

James A. Cook

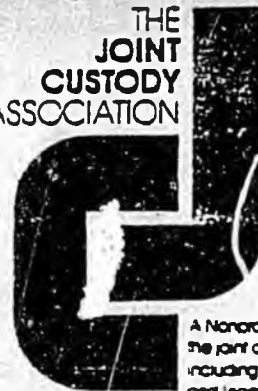
Enclosures

# Master, Model Joint Custody Statute

FOR UNIFORMITY NATIONWIDE

THE  
JOINT  
CUSTODY  
ASSOCIATION

10606 Wilkins Avenue  
Los Angeles, California 90024



A National Association concerned with  
the joint custody of children and related issues of divorce  
including research, information dissemination  
and legal and counseling practices.

Text for a modern, up-to-date joint custody statute available for introduction in state legislatures with the intent of seeking more nearly uniform joint custody practices nationwide and ease of implementation under the Uniform Child Custody Jurisdiction Act.

The following is predicated primarily on California's joint custody statute, combines observations of Nevada's joint custody statute (which was enacted following the California example and provides a similar statute for two major states with one of the Nation's longest contiguous borders)

An advantage of the following is that the issues have undergone legislative analysis and debate, found public approval, and incorporate minor technical improvements that experience has demonstrated as desirable.

Indexing should be integrated with each state's Civil, family and domestic law provisions.

## POLICY

Section 1. Section 100. (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 that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

## AT OUTSET & THEREAFTER

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.

## PRIORITIES

(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 100.5

## PLAN

The court, in its discretion, may require the parents to submit a plan for implementation of the custody order upon finding that both parents are suitable parents, or the parents acting individually or in concert may submit a custody implementation plan to the court prior to issuance of a custody decree.

## COOPERATION

2. 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 burden of

proof that joint custody would not be in a child's best interest shall be upon the parent requesting sole custody

- (3) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.
- (4) To any other person or persons deemed by the court to be suitable and able to provide adequate and stable environment.

(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 non parent 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.

#### PRESUMPTION

Section 2. Section 100.5. (a) There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child unless

- (1) the parents have agreed to an award of custody to one parent or so agree in open court at a hearing for the purpose of determining the custody of a minor child of the marriage or
- (2) the court finds that joint custody would be detrimental to a particular child of a specific marriage.

For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate, the court may direct that an investigation be conducted.

#### REASONS

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

#### DEFINITIONS

(b) For the purposes of this section, "joint custody" means joint physical and legal custody. "Joint physical" means an order awarding each of the parents significant periods of time in which a child resides with or is under the care and supervision of each of the parents or parties. Joint physical custody shall be shared by the parents in such a way as to assure a child of frequent and continuing contact with both parents. "Joint legal" means that the parents or parties share, or shall have voluntarily allocated or the court shall have decreed between them, the decisionmaking rights, responsibilities, and authority relating to the health, education, and welfare of a child.

An award of joint physical and legal custody obligates the parties to exchange information concerning the health, education, and welfare of the minor child, and unless allocated, apportioned, or decreed, the parents or parties shall confer with one another in the exercise of decision-making rights, responsibilities and authority.

- MODIFICATION (c) Any order for joint custody may be modified or terminated  
from  
JOINT CUSTODY 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  
REASONS opposes the modification or termination order.
- MODIFICATION (d) Any order for the custody of a minor child of a marriage  
to  
JOINT CUSTODY entered by a court in this state or in any other state,  
subject to jurisdictional requirements, may be modified at  
any time to an order of joint custody in accordance with  
the provisions of this section.
- CONCILIATION (e) In jurisdictions having a private or publicly-supported  
conciliation service, the court or the parties may, at any  
time, pursuant to local rules of court, consult with the  
conciliation service 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 implementa-  
tion of a plan for custody.
- RECORDS (f) Notwithstanding any other provision of law, access to  
records and information pertaining to a minor child, includ-  
ing but not limited to medical, dental, and school records,  
shall not be denied to a parent because the parent is not the  
child's custodial parent.
- 

Explanatory notes

Issues not to be contained in the statute, but as an outgrowth  
of implementation and as a guide to furthering the statute's  
policy.

- Initiating  
planning To facilitate easing litigating parents into consideration of  
joint custody planning, you are encouraged to examine, and  
duplicate for distribution within the family court system,  
"Initiating Joint Custody Planning; Encouraging & facilitating  
joint physical and legal custody plans."\*
- Decree  
clauses Joint custody provisions and clauses for decrees or agreements,  
as a convenient reference for judges, attorneys and counselors,  
can be found in "Decree or Agreement, Joint Custody Provisions  
& Clauses."\*
- Public  
pamphlet A basic and explanatory booklet suitable for reproduction and  
distribution to parents filing for divorce, written in lay  
language and addressing the divorce process, is available in  
"Cooperative Parenting Following Dissolution: Your child needs  
both of you. Prepared by the Los Angeles Committee to Implement  
California's Joint Custody Statute (Los Angeles Superior  
Court)."
- Best  
interests "Best interests of a child" need not be specified within the  
statute in view of the on-going analysis and redetermination  
of what amounts to "best interests" and lest a listing of  
presumed "best interests" constitute an unconstitutional denial

of access by child and parent to each other and thereby jeopardize the entire custody statute.

However, informal court guidelines, apart from the formal statute, may include the following:

In determining the best interests of the child the court may consider:

1. The physical, emotional, mental, religious, and social needs of the child;
2. The capability and desire of each parent to meet these needs
3. The love and affection existing between the child and each parent;
4. The length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;
5. The desirability of offering the child a variety of life experiences;
6. The desire and ability of each parent to allow an open and loving relationship between the child and his other parent.

Child's  
preference

It is not considered advisable that a child's preference, desire or wish be elicited from the child, under the pretext of 'best interests of a child,' as a prerequisite for court determination of custody because:

- a. Such an action or supposition could vest with a child, at an impressionable age, and prior to a comprehension of the long-term consequences by the child, a sense of power or control or leverage over either or both parents and over the court system.
- b. A decision predicated on a child's decision between two parents raises the spectre of an eventual guilt-feeling by the child regarding the excluded parent and the necessity of a custodial parent to reassure the child of the wisdom of excluding a parent.
- c. By implying the power of decision by a child, the parents are unnecessarily and unwisely thrown into a competitive situation to cater to and curry favor with the child in hopes of influencing a child's decision of one parent over another.

Criteria for  
joint custody

So-called criteria for determining the qualifications or suitability of one or both parents to be decreed joint custody, such as geographic convenience, association with friends, and adequacy of living quarters are not advisable to be specified in a statute. Such criteria have been widely debated and eventually dropped because:

- a. definitive criteria that are largely the product of opinion or cultural viewpoint have the likelihood of being unconstitutional, and
- b. a listing of criteria provokes litigating parents into envisioning methods for defeating joint custody and of scrutinizing comparisons and issues that could be used to belittle the opposite parent.

\* Items available from The Joint Custody Association, James A. Cook, 10606 Wilkins Avenue, Los Angeles, California 90024

# Supportive Background Materials

10606 Wilkins Avenue  
Los Angeles, California 90024

James A. Cook  
President

THE  
JOINT  
CUSTODY  
ASSOCIATION



A Nonprofit Association concerned with  
the joint custody of children and related issues of divorce,  
including research, information dissemination  
and legal and counseling practices

From the Joint Custody Association:

## Joint Custody, Sole Custody: A New Statute Reflects a New Perspective

The legislative evolution of the new California custody law; origins and intent as a guide to understanding and administering joint or sole custody. (Published in the Conciliation Courts Review, Volume 18, Number 1, June 1980.)

## Initiating Joint Custody Planning. Encouraging and Facilitating Joint Physical and Legal Custody Plans

A step-by-step questionnaire to elicit from divorcing parents their preferences in child rearing, to indicate areas of agreement, and to relieve the court of dictating decisions that could be unacceptable to one or both parents. Encompasses areas of medical care, education, religion, residence, travel, support, communications, discipline, dispute resolution, and time allocation.

## Decree or Agreement, Joint Custody Provisions & Clauses

A selection of options for jurists, attorneys and parents in creating decrees or agreements in the form of provisions and clauses dealing with intent, residence, time allocation formulas, holidays, travel, moving residence, education, medical, child support, implementation, review, remarriage, decisions, and conflict resolution.

## Cooperative Parenting Following Dissolution: Your Child Needs Both of You

A pamphlet for parents prepared by the Los Angeles Committee to implement California's joint custody statute.

## Research

Recent and pertinent research regarding the effects of child custody decisions by the courts.

**Effects of  
Child Custody Decisions by the Courts.**

The negative effects of sole parent custody following divorce upon all members of a family, and the probability of long-term, socially-undesirable results of sole parent exclusive child custody have been widely published in numerous studies during the past decade and a half.

There are no known studies which substantiate the wisdom or the likelihood of favorable results in pursuing a policy of presumption for sole parent exclusive custody even though decades of sole parent custody decrees "beg" a justification for having done so.

Hence, the evolving solution of joint custody has been encouraged by the following studies which arose from the detrimental effects of sole parent custody.

**PSYCHOLOGICAL ADJUSTMENT OF JOINT CUSTODY CHILDREN,  
AS COMPARED WITH OTHER CUSTODY ALTERNATIVES**

Pojman, E. Unpublished doctoral dissertation, 1981, California Graduate Institute, 1100 Glendon Ave., Los Angeles, Calif. 90024.

Comparison of four groups of 20 boys each (aged 5-13 years) living in a) joint; b) sole custody; c) happy intact marriages; and d) unhappy intact marriages. Boys were compared on the Louisville Behavior Checklist (parent's rating), the Inferred Self-Concept Scale (teacher's rating), and the California Test of Personality (child's rating). Boys in joint custody arrangements were significantly better emotionally adjusted than boys of exclusive custody and of the unhappily married group, on both the Louisville Behavior Checklist and on the Self-Concept Scale. Boys in joint custody situations had higher personal adjustment scores on the California Test of Personality than did boys in sole custody, just short of statistical significance. Boys in sole custody did not score significantly differently on any of the three tests, when compared to boys living in unhappy intact families.

**RELITIGATION OF JOINT CUSTODY DECREES,  
AS AN INDICATOR OF SATISFACTION COMPARED WITH OTHER CUSTODY DECREES**

Ilfeld, Frederic W., Holly Ilfeld, M.A., and John R. Alexander, J.D., "Does Joint Custody Work? A First Look at Outcome Data of Relitigation," Amer. J. of Psychiatry 139:1, January 1982, pp. 62-66.

Relitigation records on 414 consecutive custody cases were studied in the West District Dept. J of the Los Angeles County Superior Court. Two-thirds of the cases involved sole custody and one-third joint custody. In those cases which were returns

to court, the proportion of relitigation for joint custody families was one-half that of exclusive custody families. A small subsample of contested joint custody cases showed no difference in relitigation rate with sole custody awards. "Considering that the best interests of the children are foremost, all professionals should recognize a strong, positive indication for joint custody. Unless future data persuasively contradict our and Pojman's findings, the burden of proof that joint custody would not be in a child's best interests should be on the parent requesting sole custody." (p. 65.)

#### ANALYSIS OF FAMILIES WITH JOINT CUSTODY

Ahrons, Constance R. "The CoParental Divorce: Preliminary Research Findings and Policy Implications," in Joint Custody: A Handbook for Judges, Lawyers, and Counselors, Association of Family Conciliation Courts, Portland, Oregon, 1979.

41 divorced parents, representing 30 separate families. "Most of the divorced parents in this sample were able to maintain a shared parenting relationship, and to parent their offspring in ways that are satisfactory to them."

Abarbanel, Alice, "Shared Parenting After Separation and Divorce: A Study of Joint Custody," in Joint Custody Handbook, op. cit.

In-depth case study of 4 families. "Joint custody appears to be working effectively in the four families studied. The four major factors contributing to its success are commitment of the parents, support for the co-parent, a flexible sharing of responsibility, and agreement on the implicit rules." Children lived with parents no longer than 2 weeks at a time, and parental division of child care responsibilities ranged from 50/50 to 67/33.

Nehls, Nadine, "Joint Custody of Children: A Descriptive Study," in Joint Custody Handbook, op. cit.

Study of 12 parents, representing 8 families, who shared custody of their child(ren). Twelve children. Eleven of the twelve children perceived by parents as "very" or "fairly" satisfied with the custody arrangement. Nine of the 12 experienced only minor problems. None of the parents said they were dissatisfied. "In general, the results of this study substantiate the feasibility of joint custody arrangements...there are indeed potential benefits of j.c. for divorcing families."

Steinman, Susan, Unpublished paper, Jewish Family and Children's Services, San Francisco, Calif.

25 joint custody families studied 1978-80. 32 children residing in 5 counties in the S.F. Bay Area. 2/3 chose and implemented a j.c. plan of their own. Most children were able to adapt to each household with minimum conflict and confusion. Children felt torn when parental conflict over child-rearing was strong and overt. Overall, children did not suffer from loyalty conflicts, but 1/3 did express "superloyalty" or desire to be absolutely fair to both parents. About 1/4 of the children did experience

## ANALYSIS OF FAMILIES WITH JOINT CUSTODY (Continued)

some confusion, but "overall, children's clarity about their schedule and location of their homes was very impressive."  
"...the findings certainly suggest that children can live in two homes."

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

Extensive research and interviews with mothers and fathers, brothers and sisters, judges, lawyers, and psychiatrists. Woolley concludes that what she calls "shared custody" is best for the emotional health of children and parents. Shared custody is any form of custody or visitation arrangement which allows both parents to have lots of normal, day-to-day interaction with their offspring and provides that each adult participate in both the responsibilities and rewards of child raising.

Ricci, Isolina, Mom's House-Dad's House, MacMillan, 1981.

Based on eight years of clinical experience and research in divorce, custody, and single parenting. Her clinical cases demonstrate successful shared parenting arrangements under a wide range of circumstances: with former spouses who were friendly, angry, vindictive, possessive; with those living in the same community or across the country.

## DOCUMENTED EFFECTS OF SHARED PARENTING ON ADULTS

Keshet, Harry F. and K. Rosenthal, "Fathering After Marital Separation." Social Work, Jan. 1978, pp. 11-18.

Taking on the responsibilities of child-rearing is important for healthy adult development. "Parenting is an important stage in the identity formation of adults." Study of 128 men during first two years after marital dissolution.

Greif, Judith Brown, "Fathers, Children, and Joint Custody," American J. of Orthopsychiatry, April 1979.

Study of 40 legally separated or divorced fathers, and 63 children. Joint custody fathers were less likely to remove themselves from the child's growth and development. Such ties are critical for both the father and the child. "Rather than support imposition of legal visitation restrictions, we should do everything in our power to maximize contact between children and both parents." Study did not find evidence that children were used as pawns, or that joint custody was disruptive to children or to children's friends, or that parents needed to be on good terms with each other.

Steinman, Susan, Jewish Family and Children's Service, unpublished paper.

Study of 25 joint custody families showed that coparenting helped to make separation easier for parents.

NEED OF CHILDREN FOR FREQUENT CONTACT WITH BOTH PARENTS AFTER DIVORCE.

Wallerstein, Judith, and J. Kelly, "The Effects of Parental Divorce: Experiences of the Pre-School Child," J. of the American Academy of Child Psychiatry 14:4, Autumn 1975, pp. 600-616.

-----"The Effects of Parental Divorce: Experiences of the Child in Early Latency," American J. of Orthopsychiatry 46, Jan. 1976, pp. 20-32.

-----"The Effects of Parental Divorce: The Child in Later Latency," American J. of Orthopsychiatry 46, April 1976, pp. 256-269.

60 families in Marin County, California, 131 Children aged 2-18; 5-year longitudinal study (1970-75). Greatest fears of the children were of being abandoned by their parents. Children felt great sense of loss if one parent absent. Effects observed of children being left almost exclusively in the care of only one parent were negative. Best adjustment occurred among children who saw both parents frequently and had parents' support to do so. The conventional visitation arrangement of twice a month found inadequate. Working on the coparenting concept helps both children and parents according to Joan Kelly.

Hetherington, E. Mavis, Martha Cox, Roger Cox, "The Aftermath of Divorce," in J. H. Stevens, Fr. and Marilyn Matthews, eds., Mother-Child, Father-Child Relations, Washington, D.C., NAEYC, 1977.

2-year longitudinal study of 96 families (half divorced and half intact families). Total of 144 children. "When support and agreement occurred between divorced couples, the disruption in family functioning appeared to be less extreme, and the re-stabilizing of family functioning occurred earlier.." Mothers' effectiveness in dealing with child(ren) most dependent on mutually supportive relationship of the divorced couple and continued involvement of the father w. child (mothers were the custodial parents).

Both of these studies indicate that the nature of the parental relationship has a direct impact on children's adjustment. The more conflict between parents over their children, the worse the children's adjustment.

CUSTODY ALTERNATIVES & MEDIATION

Olson, David et. al., "Custody Resolution Counseling: Description and Comparison with Custody Study," in Child Custody: Literature Review and Alternative Approaches, Child Custody Research Project, Hennepin County, Minnesota, Domestic Relations Division, Sept. 1979.

Study of 686 contested custody cases filed between 6/75 and 6/78 in Hennepin Co., Minnesota. Compared cases going to Custody Study (evaluation and recommendation mode) vs. those receiving custody counseling (mediation mode). Both services are offered through the court's Domestic Relations Dept.--parental agreements

# Divorced father seeks clues to son's whereabouts

by Carol Murkowski  
Times Writer

*The only clue Ray Hitchcock has to his three-year-old son's whereabouts is a faded newspaper clipping describing the boy as the youngest hanglider in Oregon.*

*Hitchcock's ex-wife, her new husband, and young Ryan quietly left Anchorage two days after Hitchcock got a court order enforcing his right to visit Ryan. Although he has visitation rights, he has not seen or heard from his son since July.*

*He knows that Ryan has been in Oregon, and is probably living in southern California now; he knows that the boy is hanggliding with his stepfather; he knows that Ryan is being taught that his last name is not Hitchcock.*

*And, although the courts tell him that his ex-wife is in the wrong, he knows there's not much he can do about it.*

One of the group's efforts comes up for a hearing Nov. 20 in Anchorage and Fairbanks. House Bill 210 would encourage joint custody arrangements, in which one parent would have physical custody of children, but both would share in the legal, financial and moral obligations to the children.

The bill would help parents like Hitchcock, says Rudy Johnson, president of Equal Rights for Fathers.

"Ray is a perfect example of what happens without joint custody, when parents are forced into litigation to have access to their children," says Johnson.

With joint custody, "at least I'd have a say in what they were teaching my son," Hitchcock adds.

Hitchcock, 28, and his wife Vicki, 26, were married in 1975 and divorced four years later. Vicki was awarded custody of their son Ryan, and a visitation schedule — alternate

weekends and one month in summer — was set up.

However, Hitchcock says, Vicki and her new husband often refused to comply with the visitation order, hiding, refusing to let Hitchcock take Ryan for the weekend, and twice beating Hitchcock.

"When I've loved, I'd follow the law to the letter," recalls Hitchcock, a stocky young man whose arms are covered with tattoos. "I'd keep my hands in my pockets, and always take somebody with me." Once, when he was refused Ryan, he filed for a writ of assistance, and a state trooper accompanied him to pick up Ryan; even with the trooper's presence, Ryan was not released until Vicki and her husband were threatened with arrest.

In February, Hitchcock filed a suit to enforce his visitation rights. Two days after the court agreed to enforce the order, Vicki left the

state.

Her last address was Rockaway, Ore., but Hitchcock hears she has since moved to California. He has been told by Vicki's friends and relatives that she will get in touch with him in the spring, when his summer visitation rolls around.

Hitchcock is worried that Ryan's stepfather takes the boy hanggliding with him. The newspaper article he received from Oregon says that Ryan "understands there is a very high element of risk and danger," and Hitchcock is unhappy about it. "I don't have any say in something that I think is dangerous for my son," he says.

The article also uses Ryan's stepfather's name — Griffeth — instead of Hitchcock.

"If Ryan decides one day that his stepfather has been more of a father to him, and he wants to change his name legally, that should be his

choice. I'd be hurt, but I wouldn't interfere," Hitchcock says. "But that decision should not be made for him while he's still too young to decide."

Hitchcock admits he has had some bad times in his past which might prevent asking for full custody of his son. He admits to a bout with alcoholism and suicidal tendencies after his divorce, but a psychologist has "assured me that those are normal post-divorce reactions."

He says he is fine now, and "the court has been on my side all the way."

The court ordered Vicki's attorney to find her and tell her to notify Hitchcock and the court where she was living, or a warrant would be issued for her arrest. She complied this summer, and Hitchcock took Ryan for his summer visit in July.

"But since my son left July 30, I have not seen him or heard of him at all," he says. "Apparently she feels I

don't have the right to know where Ryan is 11 out of 12 months. But I still have to pay child support, and I feel I have the right to write my son once in awhile."

In the meantime, he's trying other avenues. He wanted to put an ad in the Los Angeles Times placing a reward for information on Ryan's whereabouts, but he can't afford the \$1,400 it would cost. Neither can he afford a private detective.

And he's researching cases in which "alienation of affection" has been proven, hoping to use it against Vicki. If he can, he'll ask for temporary custody of Ryan until Vicki can come to court and explain her actions. If he doesn't hear from her by spring, when Ryan's annual visit should be arranged, he plans to ask for a hearing to show cause why she is not following the court's orders.

"Until then, my hands are tied."

Hitchcock is a member of Equal Rights for Fathers of Alaska, a group that has been getting its name in the news with increasing frequency by lobbying for changes in domestic relations law.

# Thanksgiving Sal



# The need for Alaska to switch to 'joint custody' of children

by John Havelock

A BILL NOW pending in the Legislature would make "joint custody" the presumptive form of custody of children in divorce proceedings. This bill should pass.

Up to the late 19th century, children, along with wives, were treated in the law as a special form of property of men. In the rare event of a divorce, the man, of course, kept his property in any children of the union.

Women in the 20th century have shucked off the remnants of their role as property, but the powerful analogy of property rights applied to children has persisted in a number of legal arrangements. Now, the man no longer keeps his title to children. As a new, early 20th century image of woman as omniscient nurturant emerged, the title in children has been customarily passed by the courts to the divorced woman.

**THE CHILD'S INTEREST.** But children should not be treated on an analogy to property. If a child of divorcing parents, thinking of her own best interests, could speak for herself she would say, "I am not interested in being under the exclusive control of one of you. I want to maximize my relationship with each of you, despite the circumstance that you will live apart."

Joint custody, adopted by California as the presumptive first choice among custody arrangements in 1979, recognizes that the child's logical preference should be honored to the extent possible. Joint custody arrangements can be worked out to fit the personal circumstances of each parent and child.

The current preference in fact for single parent custody has burdened the rest of society with a heavy burden of direct and indirect costs. Unfortunately, but understandably, the parent who "loses" custody will tend to divorce the child along with the parent.

**SOLE CUSTODY COST.** Directly, this translates into a massive national legal system for the pursuit, frequently unsuccessful, of child support payments and public welfare costs for aid to dependent children. The non-custodial parent, psychologically severed from the child, is permitted to consider the support obligation on the same level as the overdrawn revolving credit account at Sears. In fact, it may be much worse as the non-custodial parent is allowed to indulge in the fantasy that the support payment is actually being used to support the custodial parent in a life of idle debauchery.

Joint custody will not, of course, result in the dismantling of the child support and welfare systems. We will continue to have parents who will prefer to be shed of the child along with the parent. There are lots of people who do not have the psychic capacity to be parents while (regrettably) maintaining the biological capacity. But as joint custody becomes the most common form of custodial relationship, it will help reduce these system costs.

The child is the hook. To the extent that the law supports the customary and natural obligation of a parent to care in an immediate sense for the welfare of a child it will strengthen the parent's psychological stake in the child. That link of direct responsibility and caring, in turn, supports the child's claim on the parent for economic support.

**RELATION TO DELINQUENCY.** The indirect social costs of forced single parent custody are, of course, greater than the direct. When we speak of a child who is the "product" of a "broken" home, we are referring to a child who has been victimized by his divorcing parents. Both parents have put their preference for combat before the interest of the child. Regrettably, the law encourages the adversarial disposition of the child's interests in the context of parental warfare over property and emotional injury.

There is no necessity in this. A divorce need not be a calamity for the child. The divorce becomes the child's disaster to the extent that the relationship with one of the parents is seriously diminished and the role model and learning bond severed. The society bears this cost in delinquent acting out by the hurt and angry child.

**CHANGING MARRIAGE CUSTOMS.** A generation ago, custom dictated that unhappy parents stick together "for the sake of the children." The current conventional wisdom is that the state of unhappiness

in such cases was such that the interests of the child were not in fact served by the cohabitation. However, it is likely that in many cases the parental sacrifice worked, when one or the other spouse adjusted to a lower expectation from the marriage relationship.

Contemporary adult Americans are less likely to sacrifice their own interests on this justification. For better or worse the trend to multiple marriages continues. Its increasing ordinariness has made divorce less explosive and less painful for parent and child alike.

The last remnants of "fault" divorce are now eliminated from the statutes. But our treatment of custody as an adversarial contest of title in the child remains.

While recognizing the best interests of the child in a number of other legal arrangements, the law of child custody has not kept up with the changing social order. We incorrectly assume that the child's interest consists of putting all the chips in one basket. On the contrary, in a divorce, the presumptive best interest of the child is to maximize her relationship with each parent. Alaska should follow California in encouraging joint custodial arrangements.

*John Havelock is director of legal studies at the University of Alaska, Anchorage. He served as attorney general to Gov. William A. Egan, was a White House Fellow in the Johnson administration and has won several Alaska Press Club awards for writing.*

## Berry's World



© 1982 by NEA, Inc. *John Berry*

*"I submit that we should all go down to the Caribbean Basin and check things out while the weather is still crummy around here."*

## \* Men's group files suit against judges

By SHEILA TOOMEY  
Daily News reporter

A group championing equal child custody rights for fathers has filed a class action lawsuit against nine Anchorage Superior Court judges for allegedly giving mothers preferential treatment in their courtrooms.

Equal Rights for Fathers of Alaska named the nine judges and two court custody investigators in a complaint filed Monday in U.S. District Court. Custody decisions made by the judges "unlawfully deny fathers and their children the fundamental constitutionally protected right to a legal and personal relationship that is equal to the relationship accorded . . . to the mother," the

suit claims.

Last year Equal Rights for Fathers issued a study of custody decisions by Anchorage judges indicating mothers received sole custody of children significantly more often than fathers. The group advocates joint custody agreements wherever possible.

Despite new attitudes toward outmoded sexual stereotypes, courts and the Division of Family Services "are reluctant to award or recommend father custody except in the most extraordinary situations," the suit charges.

Presiding Superior Court Judge Mark Rowland denied the allegations. "So far as I know, there is no basis for the

suit, which has been filed . . . either factually or legally," Rowland said.

The suit contends the best interests of children would be best served by ending alleged sexual discrimination against men in child custody cases. "Some custodial mothers abuse or neglect their children. . . . If non custodial fathers were given more fairness in divorce courts, then child abuse and child neglect would immediately drop," the suit claims.

"Custody and visitation are alleged to be, in the women's rights movement, just about the last control women possess over men," the suit says.

Equal Rights for Fathers wants the federal court to

award them \$5 million to "study the devastating effects of paternal deprivation and father absence on child development." In an exhibit filed with their suit, the group calls a \$5 million federal grant reportedly given to the National Organization for Women a "gross and shocking violation" of sex discrimination laws because an equal grant was not awarded to "men's liberation."

Named as defendants in the suit are Judges Victor Carlson, Karl Johnstone, Eban Lewis, Ralph Moody, Justin Ripley, Brian Shortell, James Singleton, Milton Souter, and Rowland. Also named are custody investigators Artis Cry and Francis Stevens.



Official Business

# Alaska State Legislature

## House of Representatives

### Committee on

### Health, Education & Social Services

Pouch V  
State Capitol  
Juneau, Alaska 99811

December 15, 1981

Ms. Joan Bennett Schrader  
P.O. Box 1264  
Kenai, AK 99611

Dear Ms. Schrader:

Thank you for your letter regarding House Bill 210. Your line-by-line analysis is quite helpful and appreciated. Your mention of income tax consequences provides some food for thought also, since it probably has not been adequately considered.

Thank you again for writing.

Sincerely,

Mike Beirne  
State Representative

MB/bw

P.O. Box 1264  
Kenai, Alaska 99611  
November 20, 1981

Health, Education &  
Social Service Committee  
700 H Street  
Anchorage, Alaska 99501

Dear Mr. Chairman and Members of the Committee,

My Name is Joan Bennett Schrader and I am Testifying for myself.

HB 218 "An Act Relating to Child Custody"

Page 6; Lines 3-6

This contains the defination of this Act and is what my family is operating under (in actuality). I speak as a Grandmother of a seven (7) year old male whose custody is not formally "Joint".

Page 1; Lines 24-25

This is good, I believe this reinforces the continued protection of the child/children by enabling the custody terms to be reviewed during the childs/childrens minority.

Page 2; Lines 13-14

This section could predispose awarding the child to the parent who has had custody. While this is a necessary proviso I would caution that care be taken with this section.

Lines 15-16

Good, as this enables the extended family to know the child/children; to offer the care and protection; the background or ROOTS, that these children have a right to. We acknowledge the childs rights to a financial interest in the estates of extended family members --Grandparents, Aunts, Uncles, etc. This section may guarentee the childs/childrens right to the "emotional" estates of the same people. The child, in my opinion, can only benefit.

HESS Committee  
November 20 Hearing  
Page 2

Page 4; Lines 17 & 18

The above applies here also.

Page 5; Lines 11-12

My experience in the Interior and on the Kenai Peninsula is that the extended family has been "locked out" numerous times. Custody has been awarded at the expense of cutting off the child's place in the extended family. This has been especially noticable, to me, over the years, where Native children were involved. Their roots were severed. This is my conception of what I saw happening--my own opinion. Please look carefully at this section.

Lines 20-23

Hereagain I am uneasy. I differ from Mr. Lynch (the attorney from Anchorage) in that the extended family is not considered for custody. I would have the court put their reasons in writing. Families should have that right.

Lines 28-29--and Page 6, Lines 1-2

Excellent and only fair.


---

I have taken several days to consider writing this testimony and I am glad I did as there are two points I wish to mention.

1. The Fairbanks testimony on the safety of the mother where a Abusing husband is concerned. This is a valid concern. but such people can be handled out of a custody hearing.
2. Tax purposes will enter into prominence. Perhaps one parent claims the child one year, the other parent the next.

Thank you,

Yours truly

  
Joan Bennett Schrader



ALASKA STATE LEGISLATURE  
HOUSE OF REPRESENTATIVES  
RESEARCH AGENCY

Pouch Y, State Capitol  
Juneau, Alaska 99811  
(907) 465-3991

February 15, 1982

MEMORANDUM

TO: Representative Mike Beirne  
Attn: Jody Sutherland

FROM: Christine Johnson, Research Staff *Johnson*

RE: Joint Custody  
Research Request 82-18, Additional Information

Enclosed please find an updated version of the joint custody legislation now under consideration in the State of Washington. We hope this is of use to you.

CJ

Attachment

SUBSTITUTE HOUSE BILL NO. 905

State of Washington by Committee on Ethics, Law & Justice (originally  
47th Legislature sponsored by Representatives Wang, Ellis,  
1982 Regular Session Armstrong, Owen, Patrick, Tupper, Becker, King (J),  
Winsley, Brown, Barleen, Granlund, Mitchell,  
Vander Stoep, Salatino, Lewis, Hankins, Johnson, Sherman and Teutsch)

Read first time February 2, 1982, and passed to Committee on Rules for  
second reading.

1 AN ACT Relating to child custody; amending section 9A.40.050,  
2 chapter 260, Laws of 1975 1st ex. sess. and RCW  
3 9A.40.050; amending section 19, chapter 157, Laws of 1973  
4 1st ex. sess. and RCW 26.09.190; amending section 20,  
5 chapter 157, Laws of 1973 1st ex. sess. and RCW  
6 26.09.200; amending section 26, chapter 157, Laws of 1973  
7 1st ex. sess. and RCW 26.09.260; amending section 20,  
8 chapter 157, Laws of 1973 1st ex. sess. as amended by  
9 section 4, chapter 32, Laws of 1975 and RCW 26.09.280;  
10 amending section 9, chapter 50, Laws of 1949 and RCW  
11 26.12.090; amending section 10, chapter 50, Laws of 1949  
12 and RCW 26.12.000; amending section 12, chapter 50, Laws  
13 of 1949 and RCW 26.12.120; amending section 18, chapter  
14 50, Laws of 1949 and RCW 26.12.180; amending section 19,  
15 chapter 50, Laws of 1949 and RCW 26.12.190; amending  
16 section 20, chapter 50, Laws of 1949 and RCW 26.12.200;  
17 adding new sections to chapter 26.09 RCW; creating a new  
18 section; prescribing penalties; and providing an  
19 effective date.

20 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

21 NEW SECTION. Section 1. The legislature finds that it  
22 is the public policy of this state to enable minor children to  
23 have frequent and continuing contact with both parents when such  
24 contact is appropriate. It is the intent of the legislature to  
25 encourage parents to share the rights and responsibilities of  
26 raising their children when in the best interests of the  
27 children. It is also the intent of the legislature to recognize  
28 the importance of flexibility in custody arrangements.  
29 Therefore the legislature finds and declares that, in the

Sec. 1

1 interests of children, it is the public policy of this state to  
2 recognize joint custody as an alternative to be considered with  
3 sole custody.

4 NEW SECTION. Sec. 2. There is added to chapter 26.09  
5 RCW a new section to read as follows:

6 For the purposes of this chapter, "joint custody" means  
7 an order awarding custody of the minor child or children to the  
8 parties in such a way as to continue the sharing of parental  
9 rights and responsibilities and to assure the child or children  
10 of having frequent and continuing contact with the parties. In  
11 its order, the court may award joint custody with or without  
12 shared or alternating residential arrangements.

13 Sec. 3. Section 19, chapter 157, Laws of 1973 1st ex.  
14 sess. and RCW 26.09.190 are each amended to read as follows:

15 The court shall determine custody in accordance with the  
16 best interests of the child. The court shall consider all  
17 relevant factors including:

18 (1) The wishes of the child's parent or parents as to  
19 ((his)) joint or sole child custody and as to visitation  
20 privileges;

21 (2) The wishes of the child as to ((his--custodian))  
22 custody and as to visitation privileges;

23 (3) The interaction and interrelationship of the child  
24 ((with-his)), the child's parent or parents, ((his)) the child's  
25 siblings, and any other person who may significantly affect the  
26 child's best interests;

27 (4) The child's adjustment to ((his)) the child's home,  
28 school, and community; and

29 (5) The mental and physical health of all individuals  
30 involved.

31 The court shall include written findings of fact as to these  
32 relevant factors in any order in which custody is disputed. At  
33 the request of either party or on its own motion, the court may  
34 transfer the cause to the family court or refer the parties to  
35 another counseling or mediation service of their choice for

1 amicable settlement of the issues in controversy. The court  
2 shall not consider conduct of a parent, proposed guardian, or  
3 custodian that does not affect the welfare of the child. The  
4 court shall not prefer a parent, proposed guardian, or custodian  
5 because of the parent's, proposed guardian's, or custodian's  
6 gender.

7 NEW SECTION. Sec. 4. There is added to chapter 26.09  
8 RCW a new section to read as follows:

9 In any temporary or final custody determination, the  
10 parties shall submit to the court a plan for the implementation  
11 of the final custody order. If the parties cannot agree on a  
12 plan, then each party shall submit a proposed plan. The plan  
13 shall include but not be limited to provisions for:

- 14 (1) Residential arrangements for the child;
- 15 (2) Financial resources in support of the child;
- 16 (3) Frequent and continuing contact with the parties  
17 when such contact is appropriate;
- 18 (4) Subsequent amendments of the plan in the event of  
19 the relocation of a party or other major changes affecting the  
20 minor child; and
- 21 (5) Resolution of disputes which may arise between the  
22 parties.

23 NEW SECTION. Sec. 5. There is added to chapter 26.09  
24 RCW a new section to read as follows:

25 (1) A final order for joint custody shall include but  
26 not be limited to:

27 (a) Written findings of fact by the court as to the  
28 relevant factors in determining the best interests of the child  
29 under RCW 26.09.190:

30 (b) The implementation plan ordered by the court  
31 including but not limited to the following:

- 32 (i) Residential arrangements for the child;
- 33 (ii) Provisions for resources in support of the child;
- 34 (iii) Provisions for amendments to the implementation  
35 plan adopted by the court; and



Sec. 5

1 (iv) Provisions for a mechanism for the resolution of  
2 disputes which may arise between parties. Such mechanism may  
3 include counseling, mediation, or the use of family courts.

4 (2) The court may include the factors in subsection (1)  
5 of this section in a temporary joint custody order under RCW  
6 26.09.200.

7 NEW SECTION. Sec. 6. There is added to chapter 26.09  
8 RCW a new section to read as follows:

9 If the parties have agreed to joint custody and have  
10 agreed to an implementation plan under section 4 of this act,  
11 the court shall order joint custody unless the court determines  
12 it is not in the best interests of the child.

13 Sec. 7. Section 20, chapter 157, Laws of 1973 1st ex.  
14 sess. and RCW 26.09.200 are each amended to read as follows:

15 A party to a custody proceeding may move for a temporary  
16 custody order. The motion must be supported by an affidavit as  
17 provided in RCW 26.09.270. The court may award temporary  
18 custody after a hearing, or, if there is no objection, solely on  
19 the basis of the affidavit.

20 The temporary custody order shall be for joint custody if  
21 the parties have agreed to a temporary plan under section 4 of  
22 this act unless the court determines it is not in the best  
23 interests of the child.

24 If a proceeding for dissolution of marriage, legal  
25 separation, or declaration of invalidity is dismissed, any  
26 temporary custody order is vacated unless a parent or the  
27 child's custodian moves that the proceeding continue as a  
28 custody proceeding and the court finds, after a hearing, that  
29 the circumstances of the parents and the best interests of the  
30 child require that a custody decree be issued.

31 If a custody proceeding commenced in the absence of a  
32 petition for dissolution of marriage, legal separation, or  
33 declaration of invalidity, (subsection (1) of RCW 26.09.180) is  
34 dismissed, any temporary order is vacated.

1           Sec. 8. Section 26, chapter 157, Laws of 1973 1st ex.  
2 sess. and RCW 26.09.260 are each amended to read as follows:

3           (1) The court shall modify a prior custody decree  
4 unless it finds, upon the basis of facts that have arisen since  
5 the prior decree or that were unknown to the court at the time  
6 of the prior decree, that a change has occurred in the  
7 circumstances of the child or ((his)) the child's custodian or  
8 joint custodian and that the modification is necessary to serve  
9 the best interests of the child.

10           ((in)) (2) For actions in which the residential  
11 arrangements for the child would be modified, in addition to  
12 applying ((these)) the standards in subsection (1) of this  
13 section, the court shall retain the custodian established by the  
14 prior decree unless:

15           (a) The custodian agrees to the modification;

16           (b) The child has been integrated into the family of the  
17 petitioner with the consent of the custodian; or

18           (c) The child's present environment is detrimental to  
19 ((his)) the child's physical, mental, or emotional health and  
20 the harm likely to be caused by a change of environment is  
21 outweighed by the advantage of a change to the child.

22           ((2)) (3) Subsection (2) of this section shall not  
23 apply to actions in which the residential arrangements for the  
24 child would not be modified.

25           (4) If the court finds that a motion to modify a prior  
26 custody order has been brought in bad faith, the court shall  
27 assess the attorney's fees and court costs of the ((custodian))  
28 respondent against the petitioner.

29           Sec. 9. Section 28, chapter 157, Laws of 1973 1st ex.  
30 sess. as amended by section 4, chapter 32, Laws of 1975 and RCW  
31 26.09.280 are each amended to read as follows:

32           (1) Hereafter every action or proceeding to change,  
33 modify, or enforce any final order, judgment, or decree  
34 heretofore or hereafter entered in any dissolution or legal  
35 separation or declaration concerning the validity of a marriage,



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1 whether under this chapter or prior law, in relation to the  
2 care, custody, control, or support of the minor children of the  
3 marriage may be brought in the county where said minor children  
4 are then residing, or in the court in which said final order,  
5 judgment, or decree was entered, or in the county where the  
6 parent or other person who has the care, custody, or control of  
7 the said children is then residing.

8 (2) For the purposes of this section, a parent or other  
9 person shall only be considered to have the care, custody, or  
10 control of a child if by the terms of any final order, decree,  
11 or judgment the child is to reside with the person more than six  
12 months of the year.

13 (3) For the purposes of this section, a child shall only  
14 be considered to reside within a county if:

15 (a) The county is the county of residence within the  
16 state of the person with whom the child under the terms of any  
17 final order, decree, or judgment is to reside for more than six  
18 months of the year;

19 (b) The county is the county where the child has by  
20 agreement in fact resided for more than six of the last twelve  
21 months; or

22 (c) In the case of a child under twelve months of age,  
23 the county is the county where the child has resided more than  
24 one-half of the child's life.

25 (4) For the purposes of this section, if by the terms of  
26 any final order, decree, or judgment, or by agreement of the  
27 parties, the child spends an equal amount of time with two  
28 parties, the action may be brought in either county where a  
29 party resides.

30 Sec. 10. Section 9, chapter 50, Laws of 1949 and RCW  
31 26.12.090 are each amended to read as follows:

32 Whenever any controversy exists between spouses which may  
33 result in the dissolution of the marriage, legal separation, or  
34 ((annulment)) declaration concerning the validity of the  
35 marriage or the disruption of the household, and there is any

1 minor child of the spouses or of either of them whose welfare  
2 might be affected thereby, or whenever any controversy exists  
3 between the parties as to child custody, the family court shall  
4 have jurisdiction over the controversy and over the parties  
5 thereto and all persons having any relation to the controversy  
6 as provided in this chapter.

7       Sec. 11. Section 10, chapter 50, Laws of 1949 and RCW  
8 26.12.100 are each amended to read as follows:

9       Prior to the filing of any action for ((divorce,  
10 ~~annulment--or--separate--maintenance~~) dissolution of marriage,  
11 legal separation, or declaration concerning the validity of a  
12 marriage, either spouse or both spouses may file in the family  
13 court a petition invoking the jurisdiction of the court for the  
14 purpose of preserving the marriage by mediating or effecting a  
15 reconciliation between the parties or for amicable settlement of  
16 the controversy between the spouses so as to avoid further  
17 litigation over the issue involved. Prior to the filing of any  
18 action for child custody or modification of an order for child  
19 custody, any party may file in the family court a petition  
20 invoking the jurisdiction of the court for the purpose of  
21 mediating or effecting an amicable settlement of the controversy  
22 between the parties so as to avoid further litigation over the  
23 issue involved. In any case where an action for ((divorce,  
24 ~~annulment--or--separate--maintenance~~) dissolution of marriage,  
25 legal separation, a declaration concerning the validity of a  
26 marriage, child custody, or modification of an order for child  
27 custody shall have been filed, either party thereto may by  
28 petition filed therein have the cause transferred to the family  
29 court for proceedings in the same manner as though action had  
30 been instituted in the family court in the first instance.

31       Sec. 12. Section 12, chapter 50, Laws of 1949 and RCW  
32 26.12.120 are each amended to read as follows:

33       The petition shall:

34       (1) Briefly allege that a controversy exists between the  
35 ((spouses)) parties and request the aid of the family court to

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1 mediate or effect a reconciliation or an amicable settlement of  
2 the controversy;

3 (2) State the name and age of each minor child whose  
4 welfare may be affected by the controversy;

5 (3) State the name and address of the petitioner or  
6 petitioners;

7 (4) If the petition is presented by one ((spouse)) party  
8 only, name the other ((spouse)) party as respondent and state  
9 the address of that ((spouse)) party;

10 (5) Name any other person who has any relation to the  
11 controversy and state the address of the person if known to the  
12 petitioner; and

13 (6) State such other information as the court may by rule  
14 require.

15 Sec. 13. Section 18, chapter 50, Laws of 1949 and RCW  
16 26.12.180 are each amended to read as follows:

17 At or after hearing, the court may make such orders in  
18 respect to the conduct of the spouses and the subject matter of  
19 the controversy as the court deems necessary to preserve the  
20 marriage ~~((or))~~, to mediate or implement the reconciliation of  
21 the spouses, or to effect an amicable settlement of a  
22 controversy involving child custody between the parties, but in  
23 no event shall such orders be effective for more than thirty  
24 days from the filing of the petition, unless the parties  
25 mutually consent to an extension of such time.

26 Sec. 14. Section 19, chapter 50, Laws of 1949 and RCW  
27 26.12.190 are each amended to read as follows:

28 During the period of thirty days after filing a petition  
29 for conciliation no action for ~~((divorce, annulment or separate~~  
30 ~~maintenance))~~ dissolution of marriage, legal separation, a  
31 declaration concerning the validity of a marriage, child  
32 custody, or modification of an order for child custody shall be  
33 filed by either ((spouse)) party and further proceedings in an  
34 action then pending in the superior court shall be stayed and  
35 the case transferred to the family court: PROVIDED, The family

1 court shall have full power in all pending cases to make, alter,  
2 modify and enforce all temporary orders, orders for custody of  
3 children, possession of property, attorneys' fees, suit money or  
4 costs as may appear just and equitable; if, after the expiration  
5 of such thirty day period or the formal conclusion of the  
6 proceedings for conciliation, the controversy between the  
7 ~~((spouses))~~ parties, in the meantime not having been terminated,  
8 either ~~((spouse))~~ party may apply for ~~((diveree; annulment-of~~  
9 ~~marriage; -or- separate-maintenance))~~ dissolution of marriage,  
10 legal separation, a declaration concerning the validity of a  
11 marriage, child custody, or modification of an order for child  
12 custody by filing in the clerk's office additional pleadings  
13 complying with the requirements relating to ~~((diveree; annulment~~  
14 ~~of-marriage; -or- separate-maintenance))~~ dissolution of marriage,  
15 legal separation, a declaration concerning the validity of a  
16 marriage, child custody, or modification of an order for child  
17 custody respectively, or by asking that the pending case be set  
18 for trial; and the family court shall have full jurisdiction to  
19 hear, try, and determine such action for ~~((diveree; annulment-of~~  
20 ~~marriage; -or- separate-maintenance))~~ dissolution of marriage,  
21 legal separation, a declaration concerning the validity of a  
22 marriage, child custody, or modification of an order for child  
23 custody under the laws relating thereto, and to retain  
24 jurisdiction of the case for further hearings on decrees or  
25 orders to be made therein. The conciliation provisions of this  
26 chapter may be used in regard to ~~((post-diveree))~~ post-  
27 dissolution of marriage problems, concerning support, child  
28 custody, visitation, contempt, or for modification based on  
29 changed conditions, in the discretion of the family court.

30 The family court may retain jurisdiction in any  
31 proceedings for a longer period than thirty days upon good cause  
32 appearing therefor on its own motion for further conciliation or  
33 upon application of either of the ~~((spouses))~~ parties, but in no  
34 event shall retain jurisdiction more than ninety days without  
35 the written consent of both ~~((spouses))~~ parties filed with the  
36 court. Except as specifically so provided nothing in this

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1 chapter shall be construed to repeal, nullify or change the law  
2 and procedure relating to ~~((divorce,--annulment--or--separate  
3 maintenance))~~ dissolution of marriage, legal separation, a  
4 declaration concerning the validity of a marriage, child  
5 custody, or modification of an order for child custody; and the  
6 family court shall, when application for relief is made under  
7 this chapter, apply such laws in the same manner as if the  
8 action had been brought thereunder in the superior court, save  
9 that the conciliation procedures of the family court shall be  
10 applied so far as appropriate to mediate or arrive at an  
11 amicable settlement of all issues in controversy.

12 Sec. 15. Section 20, chapter 50, Laws of 1949 and RCW  
13 26.12.200 are each amended to read as follows:

14 Whenever any action for ~~((divorce,--annulment--of--marriage  
15 or--separate--maintenance))~~ dissolution of marriage, legal  
16 separation, a declaration concerning the validity of a marriage,  
17 child custody, or modification of an order for child custody is  
18 filed in the superior court and it appears to the court at any  
19 time during the pendency of the action that there is any minor  
20 child of the ~~((spouses--or--of--either--of--them))~~ parties whose  
21 welfare may be affected by the dissolution ~~((or--annulment--of--the  
22 marriage))~~ of marriage, legal separation, declaration concerning  
23 the validity of a marriage, the child custody proceedings, or  
24 the disruption of the household, the case may be transferred to  
25 the family court for proceedings for reconciliation of the  
26 ((spouses)) parties, mediation, or amicable settlement of issues  
27 in controversy in accordance with the provisions of this  
28 chapter.

29 Sec. 16. Section 9A.40.050, chapter 260, Laws of 1975  
30 1st ex. sess. and RCW 9A.40.050 are each amended to read as  
31 follows:

32 (1) A person is guilty of custodial interference if,  
33 knowing that she or he has no legal right to do so, she or he  
34 takes ~~((or))~~ from, entices from, or refuses to return to lawful  
35 custody any incompetent person or other person entrusted by

1 authority of law to the custody of another person or  
2 institution.

3 (2) Custody shall include "residential care" where the  
4 incompetent person or other person entrusted by authority of law  
5 to the custody of another person or institution is the subject  
6 of a joint custody order or decree.

7 (3) Custodial interference is a ((gross-misdemeanor))  
8 class C felony.

9 NEW SECTION. Sec. 17. If any provision of this act or  
10 its application to any person or circumstance is held invalid,  
11 the remainder of the act or the application of the provision to  
12 other persons or circumstances is not affected.

13 NEW SECTION. Sec. 18. This act shall take effect on  
14 July 1, 1983.

