ALASKA LEGISLATURE COMMITTEE FILES 1981-1982 8672

1342 HHESS HB 210 (#2-#3)

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☐ URGENT
☐ PLEASE RESPOND BY _____
☐ NO REPLY NECESSARY

TO: House HESS Committee

DATE: November 30, 1981

SUBJECT: Testimony on HB 210

MESSAGE:

Please find enclosed written testimony on HB 210 from:

1. Linda Wingenbach
2. John Holmes

Thank you for your consideration of these comments.

REPLY:

SENDER: SEND WHITE AND PINK COPIES

TESTIMONY BEFORE THE HOUSE OF REPRESENTATIVES'
COMMITTEE ON HEALTH, EDUCATION & SOCIAL SERVICES
HOUSE BILL NO. 210

My name is Linda Wingenbach. I am an attorney with Alaska Legal Services Corporation in Barrow, Alaska. I have been in Barrow for five months. Prior to that, for a period of two years I was in private practice in Portland, Oregon, and during my last year of law school I worked as an intern for the Northwestern Legal Clinic in Portland. Oregon is a state that has a joint custody statute.

I favor joint custody, but I feel there are some problems with this specific bill.

I. §2 of the bill (page 1, subsection b of AS 09.55.205) reads: "An appointment of a guardian ad litem for a child shall be made under AS 09.65.130." The current AS 09.55.205 provides discretion in the appointment and reads, "Any appointment of a guardian ad litem for a child shall be made under AS 09.65.130." I believe this could be a typographical error in the bill, rather than the intent of this committee. But, as you can see, this particular error drastically changes the meaning of this provision. HB 210, as it reads now, would require a guardian ad litem to be appointed in all cases where an order is made on custody and visitation--that is, all divorce or dissolution cases where children are involved, whether or not custody and/or visitation is disputed.

If this is not a typographical error, then I wish to go on record opposing the unnecessary appointment of guardians ad litem in cases where custody, support, and/or visitation is not disputed. I agree with Master Francis Stevens' oral testimony on this point. In fact,

AS 09.65.130 provides the needed discretion:

> "(a) The court may, . . . upon its own motion, appoint an attorney to represent the minor with respect to his custody, support, and visitation. . . .
> (c) Instead of, or in addition to, appointment of an attorney under (a) of this section, the court may, . . . upon its own motion, appoint an attorney or other person to serve as guardian ad litem to represent the best interests of a minor in any legal proceedings involving his welfare."

Therefore, as written, HB 210 conflicts with the provisions of AS 09.65.130, by removing the discretion of the court in orders on custody and visitation. At the very least, the bill should make these two statutes consistent.

Further, the Alaska Supreme Court believes that the power to appoint guardians ad litem should remain discretionary. In dicta, the Court said: ". . .There will be many custody cases in which a guardian will not be needed, and in such cases neither the statute, the court rules, nor our decisions compel the court to waste its time and money, as well as that of the parties and counsel, in employing one." Veazey v. Veazey, 560 P2d 382, 385 (1977). AS 09.65.130 provides payment of the guardian ad litem from assets held jointly by the parents. It is unfair, then, when parents agree to custody and visitation to require them to pay for an unnecessary appointment of a guardian ad litem.

II. §2 of the bill (page 2, AS 09.55.205(c)(6)) permits the court, in determining the best interests of the child, to consider, "the desirability of offering the child a variety of life experiences." This particular consideration could work to the disadvantage of rural parents, especially if the custody decision is to be made by an urban judge. Many people persevere in the belief that "variety of life experiences"

can only be obtained in an urban setting. Therefore, when there is a conflict between a custodian in an urban setting and one in a rural setting, the rural parent would be placed at a disadvantage before an urban judge.

A variety of life experiences has not been defined and is so vague and ambiguous as to encourage individual bias in interpretation.

AS 09.55.205(c)(6) of this bill also seems to conflict with subsection (d) of the same bill wherein "the court may not consider the. . . income, social or cultural environment, . . .of either parent. . . ." Where would "variety of life experiences" come in except due to the "income, social or cultural environment" of a parent?

III. §3 of the bill (page 3, AS 25.20.060) allows the court to settle disputes over the custody of children, based on a child's best interest. The court is specifically instructed to consider the factors enumerated in AS 09.55.205(c). Besides my objections to AS 09.55.205(c)(6), I feel this section should also specifically prohibit the court from considering those factors enumerated in AS 09.55.205(d). Since 25.20.060 concerns the determination of custody of children, both the factors and the prohibitions in AS 09.55.205 should apply. By only specifying subsection (c), the bill suggests that the court may consider the otherwise prohibited factors.

IV. §4 of the bill (page 3, AS 25.20.070) creates a rebuttable presumption that shared custody is in the best interest of the child. I agree with Master Francis Stevens' and Attorney John Reese's testimony that shared or joint custody is an alternative to be considered in all cases, equally with custody in a single parent. Although shared custody is preferable to sole-parent custody, raising it to the level of a

rebuttable presumption is unnecessary and can create additional problems for the divorced parents they may not be prepared to handle. The attorney,Timothy Lynch, felt that if joint custody were not made a rebuttable presumption, this bill would completely lose its meaning. That, obviously, is no reason to make shared custody a rebuttable presumption. If it is decided the whole bill is worthless, that decision should be made. If the substance of a bill is lost, the bill should be eliminated--that is, a poor provision should not be retained simply because the bill would otherwise be meaningless. That is what these hearings and written testimony is all about.

Besides, statutorily promoting shared custody is worthwhile. However, shared custody should not be a rebuttable presumption because it brings an improper bias into the court. Shared custody is not always in the best interest of the child. It should be encouraged, yes, but in many cases, as Mr. Lynch and Mr. Reese pointed out, many couples who are divorcing cannot sort out their feelings sufficiently to agree to a joint custody arrangement. And if couples cannot agree to the shared custody arrangement, shared custody will not work because, as Ms. Louster testified, the ability to communicate with each other and come to mutually agreeable decisions concerning the welfare of the child is essential in a joint custody situation. Alaska cannot be compared with California, Oregon, or other lower 48 states where the state court systems provide family counselors to help couples come to agreement on shared custody and offer continuing aid. The majority of the state courts in Alaska cannot offer this kind of help.

With shared custody a rebuttable presumption, parents are pushed into that alternative. It becomes an easy tool to be used by one party or the other in negotiating other aspects of the divorce. It will tend

to delay the dissolution of a marriage, conflicting with the intent of the current statutes providing a speedy resolution to the petition, the delay and intervening bargaining being possibly detrimental to the child. The court should favor agreements between parents concerning the custody of children but should not presume that all caring parents can come up with a joint custody agreement at the time of the divorce. In some cases, the parents may even agree that one or the other of them should have sole custody.

V. §4 of this bill (page 3, AS 25.20.090(d)) allows a court to "require the parents to submit to the court a proposal for award of shared custody." This is objectionable for the same reasons as stated above. Where two people cannot come to an agreement by themselves, the court cannot force them to, particular where the interests of the child are at stake. And unless the parents agree to share custody, the proposal would not be workable. The court should not be able to force negotiations between possibly battling parents under circumstances the court is not fully apprised of. Even if this bill is passed with the above rebuttable presumption intact, this section should be eliminated. If this section is also retained, the court should be required to give the parties an "out" by permitting them to show that such a proposal is inappropriate. If the intent of this section is mediation between parents, that is handled under the proposed AS 25.20.080, which permits the court to appoint, or be, a third party mediator.

VI. §4 of the bill (page 4, AS 25.20.120(4-5)) permits a court, in determining shared custody, to consider "(4) the advantages of maintaining the child in the same community as compared with the potential advantages of a new community; (5) the advantages of providing a varied life experience for the child." This provision is objectionable

for the same reasons as my part II, above. Alaska is a state of vast land area. Many of its communities can only be reached by air or water. In many cases, divorced parents live far away from each other or, at least, in areas where it would be difficult to travel from one to the other. Again, the "variety of life experiences" factor would work to the disadvantage of the parent in the rural community, especially if it is one of the many isolated communities in this state, because of inherent biases against isolated villages. It is not possible, due to the size of Alaska and the distances between communities and the lack of urban centers, to compare this state with any other state in the "lower 48". These factors again conflict with AS 09.55.205(d), above, which prohibits the court from considering a parent's income, social or cultural environment. Those prohibitions should apply here because the determination of shared custody is a determination of custody and therefore the same criteria should apply.

VII. §4 of the bill (page 3, 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 302, 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
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Tel: 852-2311

TESTIMONY BEFORE THE HOUSE OF REPRESENTATIVES'

COMMITTEE ON HEALTH, EDUCATION & SOCIAL SERVICES

HOUSE BILL NO. 220

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.

> 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

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).

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

we 193

ALASKA

April 13, 1981

In Brief,

ALASKA INTRODUCES CUSTODY 'SHARING' LEGISLATION

CONCEPTS WORTHY OF STUDY, EMULATION

Alaska House Bill No 210, introduced by Representative Brian Rogers of Fairbanks and Representative Terry Gardiner, former House Speaker of Ketchikan is based primarily on the initial California example but improves with many worthy priorities and concepts.

(A follower of our efforts writes, "If it passes then Alaska can take its place along side those other states who are actually giving some consideration to the best interests of the children.")

In abbreviated form, following are the major provisions, which have yet to be evaluated by the Alaska legislature.

LEGISLATIVE INTENT

"...it is generally desirable to assure a minor child frequent and continuing contact with both parents after the parents have separated..."

"...it is the intent of the legislature that both parents have the opportunity to guide and nurture their child and to meet the needs of the child on an equal footing beyond the consideration of support or actual custody."

EQUALITY

ENCOURAGE OUTSIDE COURT

"...it is in the best interests of a child to encourage parents to implement their own child care agreements outside of the court setting."

BEST INTERESTS

"In determining the best interests of the child the court shall consider

(1) the physical, emotional, mental, religious, and social needs of the child;
(2) the capability and desires of each parent to meet these needs;
(3) the child's preference if....of sufficient age...
(4) the love and affection existing between the child and each parent;
(5) the length of time the child has lived in a stable... environment...
(6) the desirability of offering the child a variety of life experiences;
(7) the desire and ability of each parent to allow...relationshi...(with) other parent."

NO NOS when injury

"...the court may not consider the conduct, marital status, income, social or cultural environment, or life style of either parent unless...may cause...injury..."

NEITHER PARENT ENTITLED	"Neither parent, regardless of the question of the child's legitimacy, is entitled to preference in the awarding of custody
PRESUMPTION 'SHARED' IS BEST	"...there is a rebuttable presumption that shared custody is in the best interest of the child."
MEDIATION	"The court...may request the parties to participate in pre-trial mediation..."
EITHER APPLIES COURT AGREEMENT	"(a) The court may award shared custody (1) on application of one or both parents; (2) when the parents have agreed to an award of shared custody; and (3) on an agreement for shared custody in open court."
REASONS IF DECLINED	"If the court declines...shared custody, the court shall enter ...its reasons..."
MODIFICATIONS	"An award...may be modified to...shared custody..."
REQUIRE SHARING PROPOSAL	"The court may require the parents to submit...a proposal for ...shared custody."
REASONS	"If a parent opposes the modification or termination of the award of custody, the court shall enter....its reasons..."
CHILD PREFERENCE	"Court shall give due weight to the preference of the child."
COURT CONSIDER	"...the court shall consider (1) the needs of the child (2) ...stability of the home environment..." (3) ...quality and the continuity of...education..." (4) ...advantages of maintaining the child in the same community as compared with....a new community;" (5)....advantages of...a varied life experience..." (6) ...optimal time for child...with each parent considering (A) ...time spent (B) ...proximity of each parent... (C) ...feasibility of travel... (D) ...needs unique to the child...better met by one parent (E) ...parent...more likely to encourage...contact... (7) ...findings...of a...mediator..."
PRIORITY PREFERENCE	"Custody should be awarded in...following...preference... (1) to both parents...shared... (2) to...parent...more likely to allow...frequent and continuing contact..." (3) to neither...but...person...living in...stable environment; (4) to...person determined...able..."
TEMPORARY CUSTODY	"...to greatest degree practical, equal access to both parents during the time...court considers an award of custody..."

RECORDS ACCESS "...parent...not...granted custody may have access to...records..

DEFINITION "..'shared custody' means an award of custody...to both parents and includes...physical custody which assures...contact with each parent."

Special note. Alaska proposal does not interject the mischievous subterfuge of merely joint legal custody, as compared with the genuine sharing of joint physical custody. ?

The Alaska proposal is good, BUT:

The Alaska proposal fails to imply that the court could decree shared custody and thereupon the parents must create a plan for sharing.

The "Seven items the court shall consider" may be ill advised within a statute. Why?:

We are generally hesitant about the questionable constitutionality of itemizations that imply qualifications to justify joint custody.

While worthy of consideration with a mediator and by each parent, as an integral part of the law considerations dealing with "home environment," "community," "proximity," "travel," etc, may be unconstitutional intrusions by the court into issues best left to the parents...especially since the law has no right to impose such qualifications upon conventionally married parentsas a qualification for becoming and continuing as a parent.

Important: Also, this inclusion sets the stage, with itemization, of issues wherein an uncooperative parent could thwart and thereby defeat joint custody for the child and for the otherwise cooperative alternate parent by moving away, accusing the other's environment, objecting to travel, etc.

THE JOINT CUSTODY ASSOCIATION
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Jeanne A. Cook
President

A not-for-profit Association concerned with the continuity of children and related issues of divorce including mediation, adjudication, dissolution and legal and counseling practices

THE JOINT CUSTODY ASSOCIATION

10606 Wilkins Avenue
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James A. Cook
President

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

RE: Alaska House Bill 210

I urge your approval of House Bill 210 which deals with joint custody access to both parents by the children of divorce. Minor amendments are proposed in my concluding two paragraphs, but the overwhelming tenor of H 210 is one of the finest, most sensitive and most humane of all similar joint custody legislative proposals now being studied in the various state legislatures.

Enclosed is a selection of applicable items which I believe will not only aid your legislative evaluation of the topic but may also be increasingly valuable in your conversations with constituents about joint custody. If your constituents raise questions, feel free to duplicate and convey the enclosures to them.

Among the materials, on the third page of the paper marked "Alaska", I question the extensive list of prerequisites which a court might interpret as needing to be ideal before joint custody will be decreed and as a "red flag" for an opponent-parent to assure that some of these issues are not satisfactorily rectified. Although I think each prerequisite is an excellent measure for counselors and parents to consider, as a statute and a legal guideline I surmise they might be decreed unconstitutional.

Lastly, let me mention an item we are all having 'second thoughts' about. That's the old benchmark that hasn't been thoroughly questioned of giving so much weight to the preference of the child. Thoughtful and observant psychiatrically-trained professionals are coming to the conclusion this gives too much impression of power to inexperienced and immature children, gives rise to potential future guilt for having decided for or against a particular parent, and contributes to parents 'catering' to a child in hopes of currying that child's particular approval of one of them exclusively. Hence, I urge you soft-pedal, or downgrade that particular proposal.

Regards,

James A. Cook

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"(Joint custody is) definitely the custody arrangement of the future.

The practice of nearly always awarding custody of children to the mother reflects negatively on women who aren't awarded custody; the public automatically thinks they are unfit to care for the children."

August 28, 1980

Ms Karen DeCrow
Past President, N.O.W., 1974-77

HB 210

ABC News 7 West 66th Street New York, New York 10023 Telephone 212 887-4659

Sidney Darion
Manager Public Affairs

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Sincerely yours,

Sid Darion

Sid Darion

Manager of Cultural Affairs

SD:al

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Presents

THE WISDOM OF SOLOMON: THE CHILDREN OF DIVORCE

as broadcast over the

ABC TELEVISION NETWORK

Sunday, October 4, 1981

1:00-1:30 E.D.T.

Executive Producer: Sid Darion

Correspondent: Herbert Kaplow

THE WISDOM OF SOLOMON: THE CHILDREN OF DIVORCE

HERBERT KAPLOW:

Last year, the number of divorces in this country rose to more than a million. There were about 1,300,000 young children involved. Coincidentally, with this increasing phenomenon has been a growing interest in alternative ways of divorced parents dealing with their children. Perhaps, the major change under consideration is called joint custody, where the parents share custody of the children. It is an approach of considerable controversy, touching fundamental, legal and psychological issues, and it reaches finally, the basic question of what's best for those children caught between divorced parents. It is a matter, again, of the wisdom of Solomon, these children of divorce.

Good day, I'm Herbert Kaplow in San Francisco. Almost two years ago, California, with one of the highest rates in the country, passed a law providing for joint custody. We mean to see today how that's worked out here. Our guests are the Honorable Donald King, the domestic relations judge of the San Francisco superior court, and Ciji Ware, a writer and broadcast journalist, who has done extensive research on children and divorce, and she herself is a joint custody mother. The term, joint custody, is paralleled by the term, sole custody, and what's the difference, Mrs. Ware?

CIJI WARE:

Well, that is a good question, I think because joint custody means so many things to to various people. Its really one of those code words. You say joint custody and the people in favor of it, say, yeah right. And you say joint custody, and the people who oppose are totally opposed. And definitions I think are important. Judge King, we have to really see if he agrees, what joint custody means to me is an arrangement that says parents are forever, parents continue to be parents even though they're no longer spouses, and the time-sharing formula about who, how they're going to take care of these children, is framed around the needs of the children. Now, I suppose legally you can split it finer than that, but to me, that's the concept of joint custody, and maybe we should get a legal definition from Judge King.

JUDGE DONALD KING:

Well, I think one of the deficiencies in California law is that there is no specific definition. I believe that creates more problems really than if we had one.

JUDGE DONALD KING: (CONT)

A lot of parents think it means cutting the child right down the middle, and the child right down to the second, spends half the time with one parent, and half the time with other.

HERBERT KAPLOW:

And that's where you need Solomon?

CIJI WARE:

And that's not joint custody.

JUDGE DONALD KING:

That's not joint custody. What you're really, talking about is the fact that once the divorce is over, that there is still a family, and it's a family living in two locations instead of one. The joint or shared nature of it is that the child, or children, are really living with both parents ..spending time with both parents in both parents homes and that the parents are joining together making the decisions affecting the child.

HERBERT KAPLOW:

Judge King, am I right in saying we are coming from an environment where most often the children were awarded to the mother?

JUDGE DONALD KING:

Absolutely, and that still is the case today.

CIJI WARE:

And about 92%, I think, of all awards nationwide go to the mother. It's almost automatic.

HERBERT KAPLOW:

Well, let me ask you, why in California are you moving toward a different alternative?

JUDGE DONALD KING:

Well, we have to understand that in most divorces the parties reach their own agreements, and the reason why the percentage is so high is that for many people, the societal view still is that custody of the children goes to the mother, and that the father has something called rights of visitation. I think in California, there are more and more parents who are really sharing child-rearing responsibilities before the marriage breaks up, and want to continue that experience even though they're no longer married to each other.

CIJI WARE:

But I'll tell you, I'll tell you why I think it happened in California. And because I've been a joint custody parent for 8 years, I've sort of been through the wars on this issue. You know, people who aren't in California, think you know, we're falling off the edge of the earth. But in California, you have, as it is nationwide, more and more women in the work force. More and more, as Judge King says, people who are sharing responsibilities, sort of radical attempts at being parents together. But I think the main reason why it started to happen in California is that the old system wasn't working for the children. Because what was happening, was as the divorce statistics went up, and it especially went up in California after no-fault divorce, you were having children who were not only losing one parent, usually the father, they were losing two parents because of the economic situation their parents faced after the divorce, the mother, in 79% of the cases according to the 1980 statistics, 79% of mothers, divorced mothers had to work. So who was there for the children? Nobody, basically there's not childcare as a code in this county, so therefore the parents themselves and parents like me, two-working parents, we had to come up with some situation that made sense to our son, otherwise, who was gonna take care of him.

HERBERT KAPLOW:

Well, why should this work?

JUDGE DONALD KING:

I think the reason it should work is that the fact that people are no longer husband and wife does not mean they aren't still parents to this child or these children. And those responsibilities really have to be separated out.

(MORE)

JUDGE DONALD KING: (CONT)

The mistake I think that's been made historically is that somehow once the family is no longer a family, in terms of being husband and wife, they're really no longer a family as far as both being parents to the children. So I think it will work better, because it means that both parents still remain parents to their children and what we find is more and more parents want this. They don't want the system where one becomes a visitor.

HERBERT KAPLOW:

I think we ought to try to clear out a little bit of the legal underbrush here. The Statute in California, I understand actually you sort of have three companion statutes and you check me if I'm wrong no default divorce, which I guess you passed here in 1970.

JUDGE DONALD KING:

That's correct.

HERBERT KAPLOW:

And then in 1979, you had this joint custody statute and then after that, something called mediation. I don't wanna get bogged down in this, Judge King, but they're related and they're important...and in 30 seconds...

JUDGE DONALD KING:

Okay

HERBERT KAPLOW:

Tell me what they are?

JUDGE DONALD KING:

Well, the reason why the no-default divorce is related to the other two is because if you have fault, it's based on their being an innocent party and a guilty party.

HERBERT KAPLOW:

Uh, huh.

JUDGE DONALD KING:

And that gets all tied up into who should have custody of the child if one person is supposedly guilty and one is innocent. The joint custody statute was important; it was really a modification of our previous statute which provided for sole custody.

JUDGE DONALD KING: (CONT)

And it was important not only because of its aspect of saying that it was legally appropriate to have parents be joint custody parents, but also because they had a very strong declaration that the public policy in the state of California is that when a relationship breaks up, there still is a right of the child to frequent and continuing access to both parents. The mandatory mediation statute which just became effective at the beginning of this year, is revolutionary. It's the first in the country. I think other states will be adopting it very rapidly, and it is an assist to those who want joint custody as well as to those who have sole custody, in helping with a trained and experienced family counselor. Helping parents work out their disputes over custody and visitation in a constructive way, where they agree, where they are the ones who make the decision by agreement as opposed to using the old adversary system, where they get into court, and attack each other, and solve the problem, and try and solve the problem that way.

HERBERT KAPLOW:

Now let's look at the practicalities of this. I understand you have a couple of different kinds of joint custody. You have what's called legal custody, and then you have physical custody.

CIJI WARE:

And then you have joint legal and physical. So basically there's three kinds of custody.

HERBERT KAPLOW:

I think I'm gonna be sorry I asked..

CIJI WARE:

That go through the court.

HERBERT KAPLOW:

But certainly legal custody is whereas the law gives you your certain rights, and, and the physical custody is where the child lives from time to time with each parent?

CIJI WARE

Well, that's a critical thing, though. I mean we can't just gloss over it, because in America, possession is 9/10's of the law, and you can have joint legal custody, but if you don't have parents that are learning to cooperate as parents, which is tricky. I mean here you're severing all your other relationships, financial, legal and everything, and yet, you're being asked to cement this one relationship as parent; that's tricky. But joint custody to me means that you are going to share the decision-making on things that have to be done about the children's schools, religious training and all of that. And also, if possible, if the geography makes it possible, you are also, going to have that child spend meaningful time. It doesn't mean to the minute, as Judge King said, but meaningful time with both parents. Now accomplishing that is not so easy when people are angry at each other, in the real world, and so what was critical in California, which probably will be a model hopefully, is that it's saying that the adversary situation is maybe not the best arena in which to help parents come to the fact that they continue to be parents. So what is needed is a neutral third party that, in a sense, represents the child in the family, helping these parents, you know, get through that, and getting down to the nitty gritty of how do we share these children.

JUDGE DONALD KING:

Legal versus physical custody of what that means it's not spelled out clearly in the law.

CIJI WARE:

No.

JUDGE DONALD KING:

There's no definition at the present time, and I think, for practical purposes, legal custody refers to the decision-making factors affecting the child both in terms of health care, education, religious training, perhaps, that sort of thing...whereas, physical custody really means more of the..

CIJI WARE:

The time-sharing.

JUDGE DONALD KING:

The time allotment of the child with each parent.

HERBERT KAPLOW:

But the question arises then, are you bumping the child back and forth?

CIJI WARE:

The ping pong syndrome, you know..

HERBERT KAPLOW:

I didn't know I was that close.

CIJI WARE:

You were. The ping pong syndrome. It's interesting now. You have to understand, eight years ago, when my former husband and I decided that we felt that...

JUDGE DONALD KING:

They were real pioneers.

CIJI WARE:

Well, we didn't know what we were doing. We didn't know, number one, we were doing joint custody. People thought we were crazy, and they raised this issue over and over. Your child won't know who, to whom he belongs. But the answer to that really is that the child doesn't belong, the child has really, what I think is a civil right of access to both parents. So that the ping pong syndrome is a problem if the time-sharing arrangement isn't appropriate to a child's age and stage. I've been asked this for eight years, and my child started in this when he was around two. Well, at that point, whatever sharing arrangement we had, wouldn't have been appropriate for when he's ten now.

(MORE)

CIJI WARE: (CONT)

When he was two for instance, at that time, he was sort of home-based with me, but he saw his father two or three times a week, and he slept at my house every night. That was a fairly appropriate plan for a two year old. Now that he's a 10 years old, he spends Monday and Tuesday with me, Wednesday and Thursday with his dad and we alternate weekends so that we have chunks of five days. Now that sounds like ping pong, but if you ask my child, you know, where do you live, he says I live with my mom and my dad. And if you say, is it complicated, he'll say, you know, it's not confusing, it is complicated, but it's not confusing.

HERBERT KAPLOW:

Well, is it better?

CIJI WARE:

In the real world....is it better that a child is amputated from one of his parents. I don't think that's better. In the best of all possible worlds, for him, it would have been better if we'd stayed together. We didn't do that. So what are the alternatives? The alternatives you know, I really feel that joint custody parents have come to grips with the reality and for the children, they would rather put up with some of the inconvenience of losing both bags and soccer balls in order to have contact with both parents. And it is a trade off. It's a trade off we were willing to make.

JUDGE DONALD KING:

Well, I think also, that you have to look in these cases, not only at the parents, but at the children. We don't have much information about this. There's been very little research done on it. What little research has been done indicates that you can have joint custody parents and not have joint custody children. That there are some children, probably a minority in numbers...who can't make the adjustment of living in two homes. They need one home, one bedroom, one set of toys and so on...not that they don't love their other parent, they just can't take that kind of movement. We know that this is more of a problem with really young children, and we also know when you get to teenagers, especially upper teenagers...

CIJI WARE:

It goes the other way.

JUDGE DONALD KING:

They probably don't wanna spend any time with either parent. They just wanna be with their friends. So you have to look at the total situation. My feeling is that even if it only works for a short period of time, a two or three year period, it's beneficial for the child because that time frame, following the break-up of the marriage, is the most dramatic to the children, and the time during which they'll either recover from the trauma of their parents or they won't.

HERBERT KAPLOW:

Judge, did you not, as a judge have the power before this was enacted a couple of years ago, here in California to in effect, award joint custody?

JUDGE KING:

It depended on whether or not you were a strict constructionist or not. I believe that I did not because the statute only spoke in terms of sole custody in California. There had been a number of efforts to add to joint custody before and the legislature had constantly turned them down. There were some judges in the state who felt that since the statute did not preclude joint custody, that they could award joint custody. But the enactment of the statute was important as I said, for two reasons, not just because it specifically says, you can have joint custody, but also because it stated this public policy of the child's right, and I think in our society today probably the children are the most underrepresented of any segment of society. And now we have a statute which gives them a right of access to both parents.

HERBERT KAPLOW:

Well, this seems to pivot on the question of the parent getting over their initial bitterness to each other and becoming "reasonable", which is the same standard you could set up for the sole custody pheonomena which prevailed up to now. I mean if you can be reasonable now, why couldn't you be reasonable then and make it work? Why do you need this?

CIJI WARE:

Well, I think you need it because I think there has been an assumption that children belong to one parent or the other. And that the adversary system has pitted parents, one parent against the other, winners and losers.

HERBERT KAPLOW:

Well, I mean, in order to make this thing work, you have two people acting reasonable.

CIJI WARE:

Well, I don't agree with that completely. I think, first of all it's much, much better. I mean obviously it is much better if parents are going to cooperate but in...

JUDGE DONALD KING:

Also, there are a lot of parents at the time of the divorce who are acting reasonably. I mean, it's a myth to think they're all battling. There are a lot of people who just come to a conclusion their marriage is not working out, and they should go their own way.

CIJI WARE:

But I was just going to say for those who are not getting along, and in fact they don't like each other at all, which, you know, I think it's often also certainly prevalent. If they were intervened at a point, instead of having and getting into the legal adversary system, and having everything escalate, and you realize I might lose my child, and the whole ball game goes up about 29 degrees, if it was the law and the premised, that alright, you're both going to survive this. The child does have a right to both of you, if that were the premises that we were starting out with, I think it would cool down a lot of the unreasonableness. But even if parents are having a hard time, and many do with the separation and loss and a feeling of grief and failure because the marriage failed, that they can still perceive as parents-in-common, and separate out that role as parents, and still perhaps not even like each other.

HERBERT KAPLOW:

I didn't know you couldn't do that before you had this legislation.

JUDGE DONALD KING:

Herb, the other thing the other thing, though, that you have to understand is that at the moment of divorce people are in a terrible emotional state. Some people say they're the criminal term of diminished capacity really applies to people who are at the time of of the breakup and their whole life, perhaps, they feel, is going.

JUDGE DONALD KING:

And they aren't thinking rationally, and they aren't dealing with things rationally, and there's a lot of upset. The legal process with its adversary system, tends to accentuate this upset, and what we're trying to do with the new law, especially the mandatory mediation law where we require that we will not allow them to come into a court, with a hearing on custody of visitiation until they have gone through a mediation process and with the help of a family counselor attempted to come up with their own answer...

HERBERT KAPLOW:

In fact, a cooling-off period...

JUDGE DONALD KING:

With respect to the child. Well...

HERBERT KAPLOW:

With a mediator.

JUDGE DONALD KING:

It gets people to understand they don't have to fight. A lot of people believe that they have to fight with the other parent. That that's what's natural. And they can fight over other things, but what we try to do through this process is to get them to understand that they're still gonna be parents when the fight is over.

HERBERT KAPLOW:

As I understand it, the basic questions that have been raised about this-and as you pointed out, really the verdict is not in on the success or failure of joint custody one, is that the laws are unnecessary, that you judges already have the power, in effect, to order joint custody.

JUDGE DONALD KING:

I don't agree with that at all.

HERBERT KAPLOW:

Okay.

CIJI WARE:

No. And I've been around the country on this.

HERBERT KAPLOW:

Also, that it encourages judges to take this as an easy way out.

JUDGE DONALD KING:

I don't think that's accurate either, because you see what we should be doing, Herb, the judges have nothing to do with this, or should have nothing to do with it. We have in my court in San Francisco, in the first eight months of 19 , we've had one contested hearing on custody of visitation. All the rest have been resolved by helping the parents reach agreements as to what's best for their children.

HERBERT KAPLOW:

What about as a way out.

JUDGE DONALD KING:

And that's what we should be doing.

HERBERT KAPLOW:

Parent. Maybe it's a cop-out for somebody who would like to get rid of their child half the time.

CIJI WARE:

Well, that may be true, but I really think that's the minority. I think most parents are caring parents. Most parents want to do the right thing. Most parents are terribly guilty and feel they perhaps have failed on their religious beliefs, their moral beliefs. I think most parents are in a state of real pain when they go through this. I certainly remember how I felt about it.

CIJI WARE: (CONT)

But the law was necessary, I think, to state the principles that you continue to be parents even though you're not going to be spouses. But what happens is that if you have a neutral third person who shows you what the options are a lot of people don't even realize that they could cooperate on this level, that it wasn't a kind of incest that, you know, there is a sort of sense of incest if former spouses talk to each other. And if there is an option, you don't even know that.

JUDGE DONALD KING:

I think also this is an important point. Because at the time of the divorce process, they're in an adversary system except for this aspect of it, and they have to understand that they can separate that out because as there are future battles, they still have to separate those aspects related to children to avoid entangling them in their conflict over other matters.

HERBERT KAPLOW:

It is alleged by some critics of joint custody that in effect it confuses the child, forces the child to endure split loyalties. That it causes an atmoshere of instability and inconstancy.

JUDGE DONALD KING:

We have insufficient information to know whether that's true in what number of children. In my mind, there's no question there are some children where that will be true. But with the large majority it simply will not. If anything, it helps them with their loyalty conflicts, because they don't have to feel that they're being traitors to one parent if they enjoy their time with the other parent.

CIJI WARE:

Well, there is a key to this, I think. I don't think that joint custody alone is going to do it. I think, you know, just the fact that they're going to say, well, and congratulations Mr. and Mrs. King, you are now joint custodians. There has to be another element. And that is the element that both parents see it is in their child's interest, that they can soften the impact of the divorce by giving those children permission to love the other parent. Now that may be difficult at a time when you're angry. But if you can be shown that when you look down the long road, which we had to look at with a 2 year old, that the more you invest in a good relationship with the other parent as a partner in this business, the better the payoffs will be, not only for the child, heavens knows, down the road, but for even the former parents.

(MORE)

CIJI WARE: (CONT)

I mean, who needs to have misery and anger for 20 years?

JUDGE DONALD KING:

There are a lot of parents, under the old adversay system, who 5 years later, 10 years later, after the divorce, are still fighting the divorce. Whereas, in this system, what you're trying to do is get people to understand you can fight now over the things you have to fight about as part of the termination of your marriage.

CIJI WARE:

You can fight over money, you can fight over...

HERBERT KAPLOW:

You're...you're asking people to..to compartmentalize their minds in an extraordinary way.

JUDGE DONALD KING:

And there's no reason why it can't be done...

CIJI WARE:

And they can do it.

JUDGE DONALD KING:

We know it works, it's working in a highly successful way.

HERBERT KAPLOW:

Let me ask you this now... there are other institutions involved in this. I'd be curious to know, Judge King and Ms. Ware, other institutions in our neighborhood, in our society, that are concerned about the family.

(MORE)

HERBERT KAPLOW: (CONT)

What do the churches, for instance you touched on the religious and moral values of the parents who might feel that somehow they've violated them by divorce. How do they get into this? Or do they?

JUDGE DONALD KING:

Well, we find the church groups have been very supportive of this concept, even with churches that do not believe in divorce.

HERBERT KAPLOW:

The Catholic Church, you're talking about primarily.

JUDGE DONALD KING:

That's right. Once they recognize that the parties are going to go though a legal proces. that legally ends their marriage, they are very supportive of this process because it does keep the family together. Again, we're not divorcing the family. The legal relationship of the husband and wife has ended, but there's still a family there living in two locations, a mother and a father and a child who in some fashion is allocating his or her time with both parents. This maintains a family tie that is very beneficial for the children. And I think very beneficial to each parent. And our experience has been that the church groups are very supportive of this.

HERBERT KAPLOW:

Are they actually in the process someway?

JUDGE DONALD KING:

In some of this mediation counseling, certainly some of it that is longer term than the court staff has abilities to handle. We do have agencies, community resources, many of them church-related, Catholic Social Service being one, who do assist us and provide some of this counseling.

HERBERT KAPLOW:

What do they do?

JUDGE DONALD KING:

They actually meet with the parents, they do much of what we do, except we...

CIJI WARE:

Divorce counseling, really, in some...

JUDGE DONALD KING:

Well, it's parenting, it's parent counceling more. How you as the parents of this child should relate to each other with regard to the matters affecting that child. Our court process in San Francisco, for example, we normally cannot see a family more than 5 or 6 times, simply because of the workload we have. If the problems of this fmaily are such that perhaps they need to be working with a counselor for 8 or 10 or 15 visits, we need to use a community resource and some of the church-related resources to fulfill that need.

CIJI WARE:

I've served on commissions and committees with a lot of Catholic and Protestant and Jewish family service counselors and that kind of thing. But you were asking before about, you know, how does this relate to the success of what happens after they either get joint custody or they don't. And there was an interesting study that was done in the west district of Los Angeles, there was a judge who was fairly supportive of the concept of joint custody. And he tracked about 250 cases plus over 18 months, about 9 months before the joint custody statute went into effect and 9 months after. What they found was in 16 joint custody families, only 16% came back. In the awards for sole custody, 31%. It was almost twice. So that these decisions where the parents had come out with some sort of plan themselves, they could stick with it, they could live by it, it wasn't imposed on them, they had something to say as to how their family would be reorganized as a family.

JUDGE DONALD KING:

We found too, that if people make their own agreement, they work much harder to keep at it. It's rather absurd for somebody sitting in a black robe to tell 2 parents what's best for their children, when they know so...

CIJI WARE:

And who's going to drive the car pool.

JUDGE DONALD KING:

.. when they know so much more what's true. Now, to go back to your other question about the religious, I wanted to mention that the only meaningful study about joint custody and the effects of joint custody that's going on in the country today is in San Francisco and is sponsored by Jewish Family and Children Services. So the church groups are very interested in this.

HERBERT KAPLOW:

Any findings yet, tentative or otherwise?

JUDGE DONALD KING:

Yes, but it is too preliminary.

CIJI WARE:

Well, there were only 25 families in the first study, which is valid but not big.

JUDGE DONALD KING:

And at the moment, their study, which is just starting its third year, has only dealt with people like Ciji who were swimming upstream, in a sense. They have had shared custody for 6 to 8 to 9 years long before it was even thought of. We are now starting to refer some people to them who are interested in starting joint custody. And so they're now going to have an opportunity to compare people who didn't start with the same motivation and commitment toward it.

HERBERT KAPLOW:

Is there any evidence as to whether it's good for the children?

JUDGE DONALD KING:

The study that's being done by Dr. Susan Steinman with Jewish Family and Children Services would seem to indicate that it is beneficial. But it is too early to tell. From the feedback we get from most parents, they feel it is. We have to be sure the children feel the same way. But generally speaking, it appears to be. We really do need more data.

CIJI WARE:

You know, it is amazing how so much of the work has been done about parents, and very little about the children. And I realize, I was halfway through my book on joint custody, and I realized I had never talked to my son about how he felt in this very unusual way he was living. And it was great, because I said, you know, I sat him down and I said, would you mind, may I interview you? And he said okay. And I said what does it mean to be a joint custody kid? And he said, well, at my mom's house I sleep in the bottom bunk, at my dad's house I sleep in the top bunk. In my mon's house I brush with Aim toothpaste, at my Dad's I brush with Crest. Mom makes my sandwiches with whole wheat bread, Dad makes them with...

HERBERT KAPLOW:

Do you have any reservations about this?

CIJI WARE:

Well, I was scared when he said this. And I said, Jamie, isn't that confusing, ping pong, you know? He said, Mom, it's not confusing, it's complicated, but it's not confusing. So that in his mind, this was worth it, it was complicated, it required asking him, probably more than most kids, but he was willing to do it. And he's a happy kid. And I think...

HERBERT KAPLOW:

Can poor families go through this?...

JUDGE DONALD KING:

Yes.

HERBERT KAPLOW:

Is there any requirement for any sort of...

JUDGE DONALD KING:

No, it has nothing to do with that.

CIJI WARE:

No.

HERBERT KAPLOW:

Just let me ask you this, where else is this alternative seriously being considered or already may have been adopted?

JUDGE DONALD KING:

Well, a number of states have adopted it. Nevada just this year adopted it, in effect copied the California Statute.

HERBERT KAPLOW:

So the concept is being studied elsewhere, and there seems to be...

CIJI WARE:

About 13 states at the moment...

HERBERT KAPLOW:

...more and more interest being expressed in it.

JUDGE DONALD KING:

I firmly believe within 10 years almost every state in the country will have it as an option specified by statute.

HERBERT KAPLOW:

Thank you very much, both of you, for being with us today on Directions.

Memorandum

Alaska Court System

TO: WILLIAM HITCHCOCK
Standing Master

DATE : MARCH 10, 1981

FROM: FRANCIS M. STEVENS
Custody Investigator

SUBJECT: JOINT CUSTODY

I have reviewed House Bill 210, entitled "An Act Relating to Child Custody", and have a number of comments I would like to share with you. The initial observation would be taken from the recent publication, "Divorce, Child Custody, and Family," formulated by the committee on the family group to the advancement of psychiatry, where they have referred to joint custody and how it has been labeled "shared custody-divided custody-and alternating custody". They indicated the common element in all these terms is the child lives with each parent a substantial amount of time allowing for a more realistic, normal relationship with each parent. In this arrangement, each parent assumes equal responsibility for physical and psychological development of the child, and they share with each other equal responsibility for major decisions that affect the child.

The advantage of joint custody, if a satisfactory arrangement can be worked out, is that it is most likely to preserve a meaningful access to both parents, moreover, neither parent "loses" the child or becomes a visitor in the child's life.

The disadvantage of joint custody, even assuming that the parents are able to keep the child out of any residual battles between themselves, is that a child may continue to feel a sense of uncertainty and anxiety as he/she moves back and forth between two homes.

There is not a significant amount of data available to establish the effectiveness of joint custody as a primary method in divorce. There have been some small studies, and in over a short term, they have indicated that in the families studied, the joint custody has worked. The studies, however, indicate that there are certain conditions in these families; most of the divorced parents continue to live in the same neighborhood as their ex-spouses so the children have the same friends and the same schools regardless of which home they are in at any given time. It was also noted in the studies referred to that the parents have had counselling or psychotherapy prior to or well into the process of setting up the joint arrangements. It was also

and probably most important, each parent in the cases studied, expended a great deal of time and effort to make the plan work. In the cases studied where joint custody was given a positive review, it was noted that the actual amount of time spent in each home by the children did not have to be equal or balanced for them to feel positive about the plan, but what was important was the fact that they had access to both parents.

In response to the question, "Is joint custody the solution?" the answer has to be, "Not for every family". The answer depends on the wishes, motivations, and capacities of the parents and as the children get older, theirs as well. Specifically, the parents need to be moving to an emotionally completed divorce. They need to have a strong commitment to resolve their disagreements outside of court and/or have a back up arrangement for counselling to help them do so. While there are certain psychological advantages to the parents in the joint custody arrangement; that is, neither wins or loses the child. The same kind of arrangement could often be worked out informally in a sole custody situation, if the parents can, in fact, agree about the care of their children. The critical factor is the capacity for the parents to come to an agreement about the care of their children.

The concept of joint custody is not a solution for parents unable to come to an agreement. It definetly should not be imposed on a fighting couple as a way of compromising or resolving the dispute. Experiences show such arrangements simply cannot work. Joint custody, we believe, should be a goal; an end for divorcing parents to work toward, assuming that both of them can see it's value.

The legislation contemplated, starts with an assumption that shared custody or joint custody is the first order of priorty in custodial plans.

In the experiences of this Custody Investigator, it should not be ranked as the preferential method of awarding custody. The method of awarding custody, used in this court for a number of years, has been what is best for the specific family situation.

On reviewing the Bill, I would expect passage of this piece of legislation could very well have a serious impact on the operation of the courts. In Anchorage alone, there are approximately 2,500 divorces a year. Currently, 10 percent of these cases come through the Custody Investigator's office as contested custody cases, and are handled through

investigation/mediation and court presentation, either on a stipulated basis or in a contested matter for the final hearing. This Investigator would be very surprised if the impact, in terms of additional work load, on initial divorce filings were less than double with the consideration of shared custody being the preferable method. In addition, this Investigator would be very surprised if we were not to see a substantial number of filings for modification of decrees where sole custody existed, but where, because of the presumption, the non-custodial parent would file for equality in the divorce decree through the modification process.

FMS/lfs

Memorandum

Alaska Court System

TO: The Honorable Ralph E. Moody
Presiding Judge

DATE : March 19, 1981

FROM: Honorable J. Justin Ripley
Superior Court Judge

SUBJECT: HB 210

At the request of Mr. Szal, my comments as to HB 210. Although it is difficult to quarrel with the stated intent of the legislation - to involve both divorcing parents in a continuous process of child rearing - I have grave concerns over the wisdom of HB 210.

In my 5-1/2 years on the bench, of which 18 months were devoted nearly full time to domestic relations matters, I have seen nothing to suggest that in the usual divorce/custody situations joint custody is appropriate or beneficial. I have approved joint custody on only a few occasions - approximately six times if memory serves - and in only two cases does it appear to have worked smoothly. Those two sets of parents were highly unusual for divorcing couples. The men were professionals, one a doctor. The women were exceptionally intelligent, very stable, well educated, highly insightful and probably in the 99th percentile in parenting skills. The divorcing spouses had retained or developed a high level of effective communication. In both situations the new and old households were permanently located in Anchorage, physically close together, and the children, by all reports, visited very congenially back and forth. I have no doubt but that even if legal and physical custody had been vested in one exceptional parent or the other, the contact and consultation with the non-custodial parent would have been just as free and wholesome. In short, I believe that those situations worked out well in spite of or aside from the joint custody Order, and not because of it.

By contrast, the majority of such arrangements simply create a continuing line of issues to litigate. If the custodial parent wishes to relocate, or if major changes are contemplated in choice of religious or academic training, to mention only a few problem areas, the joint custodial parent sees it as his or her right, not merely to advise and persuade, but to insist, even to litigate to enforce his views. Since at these hearings the central issue is the best interest of the child, they can seldom be limited merely to consideration of the move, the

copy to: Wm Hitchcock
3/23/81 /pd

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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 desireable that divorcing parents confer and intelligently agree upon a plan truly for the child's benefit. Unfortunately, the reality of nearly all divorces is that the parties are motivated by other factors such as disappointment, bitter vengefulness, and considerations of property division and child support payments. A classic, extreme, but not unique example of this type of motivation I once observed was the parties' agreement to give custody of the four year old to mother and the five year old to father. Since this result was contrary to common sense, case law and all literature on the subject, I inquired after any unusual factors in support of it. There were none. Further, it became apparent that the mother wished to remarry, therefore wanting the Dissolution to be swiftly concluded, and the father wished to minimize his support obligation, threatening an extended custody battle if his demands were not met. Hence, the trade-off. Any legislation which increases the possibility that children's interests may become the subject of tactical negotiation aught 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

of child support, or both. From this I conclude the parties recognize that the Court will attempt to determine custody objectively, applying the best interest of child criteria as established by case law and statute. It further signifies that in the majority of cases one party is clearly more suitable than the other, and the parties recognize this as a matter of common sense, with the assistance of counsel. It should be remembered the present A.S. 9.55.205 provides that neither parent is entitled to a preference.

If a presumption favoring joint custody is created, the presumption is something which must be overcome by the party desiring sole custody, and who, even applying the standards of HB 210, should be entitled to sole custody in the best interest of the child. The threat to aggressively assert the presumption, to the Supreme Court if necessary, thus creates a bargaining chip, a point of tactical negotiation, out of the critical issue of child custody. I see a real danger that, in the often highly charged atmosphere of a divorce litigation, such a threat could be used to coerce inappropriate concessions from a parent who should properly receive sole custody but who felt unwilling or unable to bear the expense, stress and delay involved in the litigation necessary to overcome the presumption.

I recognize while raising the foregoing concern that proposed A.S. 25.20.090 can be read as to require the formal agreement of both parents on the record before the Court can award joint custody, and arguably, the coercion could never occur. I disagree. A close reading of proposed A.S. 25.20.060 and 25.20.070 in conjunction with proposed 9.55.205(c) clearly indicates that the presumption can be placed at issue in all custody proceedings by petition of "either parent". Thus, even though no .090 mutuality exists, the issue keeps the law suit alive until a court eliminates it, perhaps on Motion for Summary Judgment, with the expenditure of additional time, energy and money. Again, this works two potential harms. First, aggressive counsel can increase the nuisance value of his unfit parent's settlement posture by the threat of unnecessary litigation. Second, in a divorce or dissolution in which the parties are not represented by counsel the unfit but dominant parent has an even greater coercive lever.

Because of the press of time I conclude without treating all possible deficiencies of the bill, such as its compliance with Art. IV §15 Constitution of the State of Alaska, the additional hatred and strife level that proposed 9.55.205(d) will

produce by making the child's "emotional or physical injury" the sole vehicle by which relevent 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 arrangments if the child is in danger of harm, or if a change in circumstances warrants it, but by requiring a high threshold for modification of custody decrees the temptation to contest disfavored parenting decisions simply out of preference is greatly diminished. Not so with joint custody.

Members of the family law section of the Anchorage Bar Association request that the Court's spokesman join with them in requesting that hearings be conducted on HB 210 in Anchorage. I concur. Moreover, if it is thought to be appropriate, I would be willing to appear to testify in Juneau, in an annual leave status and at my own expense if necessary.

Memorandum

Alaska Court System

TO: Grant Callow
Staff Counsel

DATE : March 9, 1981

FROM: William D. Hitchcock wh
Master, Trial Courts

SUBJECT: HB 210

At this stage, I have only a few brief remarks and observations about this bill which I want to pass on to you. The concept of shared or joint custody is an appealing one from a philosophical standpoint but in practicality it has many pitfalls. Even where all of the objective criteria of close geographic proximity of the parents and ease of travel are met, the fact remains that the adults involved have been unable to reconcile their various differences and may be equally as incapable of agreeing on the ongoing decisions in the life of their child or children. Joint custody has been a very popular "cause" around the country. In my contacts with other judges from around the nation at the National Judicial College family law course in Reno last year, I have found that there is an overall skepticism as to how well joint custody is working in fact. I would venture to say that a general sampling of opinion among judges, domestic relations practitioners and professional counsellors in this state would yield a similar result.

Assuming however that the bill may already be a fait accompli, there are certain considerations which the court needs to deal with. One of these is to assess possible fiscal impacts this bill would have. If courts are going to be routinely presented with shared custody agreements by parties in consensual petitions, e.g. dissolutions, I submit that the court is going to have to rely heavily on professional evaluations of the wisdom of those plans. While it may be philosophically appealing to view such services as coming from the private sector, the hard economic realities are that most parents in dissolution proceedings are not going to be in a position to pay for these. Therefore, the court is either going to have to field these proposals from the bench or have the investigative resources at its disposal to review them. My recommendation is therefore that the court, if it is going to support this bill at all, give serious consideration to mandating and providing statewide custody investigation services within the system.

I am also concerned as to the meaning of the mediation provision, A.S 25.20.080. Does that cover child custody investigation as well or is it solely traditional mediation? I believe I have clarified the section regarding guardian ad litem appointments. That appears to be nothing more than a restatement of existing language which is already within A.S.9.55.205 rather than any new requirement mandating GAL appointments in all cases.

cc: Victor D. Carlson
Andrew M. Brown

Adm. F-1
Rev. 2-73

Superior Court
State of Alaska

THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA
99501

Chambers of
VICTOR D. CARLSON, Judge

March 19, 1981

The Honorable Donald E. Clocksin
Chairman
Health, Education & Welfare Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

Re: House Bill No. 210
Joint Custody of Children

Dear Mr. Chairman:

This letter is to express my concern over the amendments which House Bill No. 210 would engraft onto the child custody decisions made by judges in divorce proceedings. At present the standard is the child's best interests and an effort is made to structure each parent's relationship with the child in order to reduce the pressure on the child which usually accompanies a contested child custody proceeding.

If House Bill No. 210 becomes law, the presumption will be to leave custody with both parents giving each the same control over the major decisions affecting the child as married parents have. This would result in many opportunities for confrontation in which the child would be caught in the middle, e.g., the choice of a school, public or private, alternative or basic, etc. Neither parent would have the authority to make the decision and the child would be torn in having to make a choice and then the matter, ultimately, would have to be decided by the court.

It appears as if the objective of legislation should be to reduce the possibility of confrontation between divorced people and not to increase the opportunities for litigation with its attendant monetary and emotional costs. In addition, passage of the bill would require many additional custody investigator and judicial resources.

Thanking you for considering my comments and requesting that you give representatives of the judiciary the opportunity to testify, I am

Very truly yours,

Victor D. Carlson

Victor D. Carlson
Superior Court Judge

VDC:rw

cc: The Honorable Terry Gardiner
The Honorable Brian Rogers

bcc: William D. Hitchcock, Esq.

Superior Court

State of Alaska

FIRST JUDICIAL DISTRICT
[illegible] 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

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.

Thomas E. Schulz
Superior Court Judge

TES:me

Superior Court
State of Alaska
FIRST JUDICIAL DISTRICT
415 MAIN STREET
KETCHIKAN, ALASKA
99901

Chambers of
THOMAS E. SCHULZ, JUDGE

May 4, 1981

Representative Don Clocksin
Chairman of the Health Education
And Social Services Committee
House of Representatives
Pouch U
Juneau, Alaska 99801

Representative Terry Gardiner
House of Representatives
Pouch U
Juneau, Alaska 99801

Representative Brian Rogers
House of Representatives
Pouch U
Juneau, Alaska 99801

Re: House Bill No. 210

Gentlemen:

There was a hearing scheduled on HB 210 relating to shared custody on Wednesday, April 22. Unfortunately I was involved in a jury trial and I was unable to attend that hearing. I am taking this opportunity to express my support for HB 210.

There is some natural or at least ingrained opposition to joint custody among judges, at least in my experience, and my initial reaction to the bill was negative. However, I have studied the bill in some more depth because of the subject matter and I have also had an opportunity to review some of the recent literature on the subject, and my initial reaction of opposition has changed to one of support.

I am enclosing with this letter a copy of an article from the Winter 1981 issue of the Judges' Journel, which is published by the Judicial Administration Division of the American Bar Association. The Article discusses a mediation process which was the subject of a project in Denver, Colorado, and is the most recent thing that I have seen on the subject of shared custody and mediation in child custody disputes. You may find it interesting.

In line with the article discussed above, my only suggestion would relate to Section 25.20.080 in the proposed bill which says that "The court considering a request for custody of a child may request the parties to participate in pretrial mediation of the matters before the court." Divorce litigation and other domestic relations litigation consumes a substantial part of the Superior Court's bench time in every location in the state. In the class of domestic relations litigation, child custody disputes consume a substantial amount of the time consumed by that class of cases. My own experience, and conversations with other judges in Alaska and all over the country tends to confirm this, is that child custody disputes which are resolved by agreement of the parties rarely end up back in court, while judicially imposed resolutions of those disputes are the constant subject of motions to modify the decree. The ongoing litigation tends to consume more and more of the Court's time with no "final" resolution to a festering dispute. That situation is harmful both to the parents and the children involved. I have come to the point where I believe that mediation ought to be mandatory in child custody disputes. It does not have to be a long involved process, but certainly skilled mediators could do much in most cases to bring the parties to a mutually acceptable resolution of their child custody matters. I am satisfied that when that process is used, it has a lasting effect at both enabling the parties to resolve future problems that may arise and in providing both the parents involved and the children with continuing access to one another. Therefore, I would suggest that Section .080 be amended to make mediation mandatory and that the Court System be funded to the extent necessary to provide qualified mediators to handle these cases. I do not anticipate that we would need a full time mediator in any of the court locations in southeast Alaska, and cases of disputed custody that required mediation could probably be handled by one person in the First Judicial District. Admittedly three or four may be required in both the Third District and the Fourth District, but the cost of that, when

compared to the costs of running a courtroom, must be quite small. I think it is an idea well worth studying at some length, and I would urge that the Committee give it serious consideration.

On April 22 I had occasion to discuss this legislation with Judge Stewart in Juneau, and he told me of his initial negative reaction to the proposal. However, after we had discussed it a little bit, he authorized me to inform the Committee that a further study of the idea was certainly appropriate. It may well be that he will convey his thoughts on the bill to you directly.

Very truly yours,

Thomas E. Schulz
Superior Court Judge

TFS:me

cc: The Honorable Thomas B. Stewart

Superior Court
State of Alaska

THIRD JUDICIAL DISTRICT

303 K Street
Anchorage, Alaska 99501

(907) 264-0728

FRANCIS M. STEVENS, ACSW
Custody Investigator

ARDIS J. CRY
Custody Investigator

April 28, 1981

Representative Donald Clocksin, Chairman
House Health, Education & Social Services
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Mr. Clocksin:

I want to thank you for the opportunity to participate in the teleconference hearing which was held Wednesday, April 22, concerning House Bill 210, Shared Custody. I would like to expand on the testimony that was given verbally, and react to some of the testimony that I listened to during the hearings.

For the purpose of background, I am a social worker, a member of the Academy of Certified Social Workers, and have been a practitioner in social work or related fields, since 1950. I am currently a member of the Association of Family Conciliation Courts, and I am on the Board of Directors, and in the past have been Program Chairman and 2nd Vice-President of that organization. I am not speaking for the Association of Family Conciliation Courts, and wish to have the committee know that there is no one in the State of Alaska authorized to speak on the behalf of the Association other than myself as a member of the Board of Directors. I have been employed with the Alaska Court System for over 8 years and have been a custody investigator for the Alaska Court System for over 5 years. In the course of employment with the court system, I have participated in approximately 1,500 contested custody or visitation cases. I have testified as an expert witness in the matters pertaining to child custody and visitation well over 100 times. I believe that I do have first hand knowledge of the issues involved and can present a professional perspective to the Bill that is involved.

As noted in my oral testimony and memorandum, which was included in prior testimony in Juneau, I am not opposed to joint custody. I, along with many others, believe that joint custody, which is the condition that exists when children are living with both parents under one household, is probably the best arrangement for children. I am opposed to the concept that joint custody, when parents are not living together, but are separated or divorced, is to be presumed to be the preferential method, or the best method for all children. It has been my experience that there are many, many families, which because of the psychological make-up of the individuals, cannot or will not share the parenting responsibility even when they are living together and much less so when the marriage is terminated. To assume that joint custody would be effective for these people would be doing the children a great disservice. The Bill does address the possibility that joint custody should not be awarded to some families and makes a provision whereby the Court is required to give the reasons why it is not awarded. I believe that this factor in the Bill would create substantial problems for many families. I would draw on my own experiences where joint custody is being attempted as panacea for one parent, or as a result of maneuvering, manipulation, coercion and threats, or as a means to get a speedy divorce and not face planning for the children. If in the course of a custody evaluation, these factors are disclosed, and are felt to be strong enough reasons to deny joint custody, the very problems that the parties are not dealing with then becomes part of a public record, and I would doubt that it would be possible to defuse these people, and to help them to see the responsibility they both hold in continued parenting for their children. We have come a long way in our divorce process to attempt to maintain the integrity of the parents, particularly with the no-fault concept; to destroy the integrity of the parents on a court record in order to establish they are not capable of handling joint custody, in my opinion, is a step backward.

In the course of testimony given by various parties there were references to statistics, and numbers were thrown around as if they were facts. I would caution the Committee that it is not likely that any one source of statistical data has a true picture of the "fact" as it pertains to divorce and custody. In the five years that I have been doing custody work in Anchorage, we have determined one significant bit of statistical data, and that is that consistently, ten percent of the cases that are heard in the Anchorage District involving divorce do result in contested custody or visitation disputes. The current figures for divorces in the Anchorage area indicate that roughly 2,500 to 2,700 divorces will take place this year. Of this, approximately 270 of these cases

will involve a dispute over custody, and the remaining 2,400 plus cases will have been settled by the litigants without the use of the Court and by agreement by the litigants. These cases will, for the most part, be cases where custody is stipulated by the father to the mother without any request on his part to be involved in the custody planning. The figures that are used, 4 percent, 6 percent custody to father primarily come out of this block of custody cases. The figures that I cited in my testimony, while hurriedly collected and representing a brief sample of the experiences in our office, indicated that in the first three months in 1981, 22.5% of the cases, custody went to father; 21.2% of the cases, custody was awarded as joint custody; and in 13.8% of the cases, which involved a number of children per family, there was a splitting of the children with one or two or more going to each parent, based on the needs of the children, the ages of the children, and the abilities of the parents. In 42% of the cases, custody did go to mother, following an evaluation. We have found that between four and five percent of the cases that are contested and are not resolved in the process of investigation and evaluation do go on to court to be litigated.

I am taking the liberty of forwarding to you two publications which may be of value to you and your committee. The first is a joint custody handbook for judges, lawyers, and counselors, which was developed through the Association of Family Conciliation Court's staff, giving a fairly comprehensive collection of citations and some fairly good reviews of material pertaining to joint custody. The second one is the most recent publication that I am aware of by a group that does not have an axe to grind, and this is the publication, "Divorce, Child Custody, and the Family" done by the Mental Health Materials Center in New York. These are both my personal copies, and I would appreciate having them back, but feel that they are of enough value that I would like to share them with you.

At the time of the teleconference, I indicated that I had been directed to present a position to the presumptive aspects of the Bill. The judges who specifically were polled and authorized that their names be used in opposition were the Presiding Judges of all Districts, that is: Judge Moody, Judge Blair, Judge Stewart, Judge Tunley, and in addition, Judge Carlson, Judge Buckelew, and Judge Ripley, of the Superior Court in Anchorage and had expressed their desire to have their position known. I point this out, in that, in later testimony, there was a statement made that judges were in favor of the Bill. I believe that it was Mr. Johnson who made the statement, and while he may have talked to specific judges, the judges indicated in my testimony definitely have a position, and I was authorized to state that position.

In reviewing the legislation, it is apparent to me that this is a copy of California legislation, which was introduced around the first of 1980. The introduction of this legislation in California did have some cost factor tied to it, and it did take into consideration that in the State of California, there is a system of Conciliation Courts, which provides for the process of evaluation, counselling and mediation, in order to assist the parties going through the divorce and resolving any custody matters prior to litigating. There has been an additional piece of legislation mandating mediation, which went into effect January 1, 1981. There has been recognition in California that personnel must be trained to implement the mandatory Mediation Bill and a training program has to be funded in Los Angeles, California for the purpose of training such personnel. As a member of the Board of Directors of the Association of Family Conciliation Courts, I have frequent contact with the directors of the various conciliation court programs in California, and I do not have any awareness of anyone using the figures that have been cited by one of the witnesses to the effect that 60% of the custody cases in California are now going joint custody as a result of mediation. The information that I have from the contacts that I have in California does not indicate anywhere near that statistical number and does indicate that there is great concern about giving a mandate to the effect that joint custody must be used and will work for everyone.

In summary, I would repeat my earlier position that joint custody is an effective method for planning for children, but the ingredients to make it work are not universally available in the adults that are involved in litigation. I believe it should be used selectively, just as custody to father, or custody to mother should be selectively based on a combination of factors. These factors must include the ability of the adults to understand the responsibility as parents; their willingness to share the parenting role even though they cannot share other roles and responsibilities one with the other. There must be the ability to place the child's interests before the adult's interests. There also must be an ability to function, probably more effectively than they had functioned when living together as parents. The children must be able to know that the parents are working in concert on their behalf to provide them with the optimum parenting. In the absence of these conditions, joint custody is likely to be detrimental to the children and to the adults. In the absence of a willingness to maintain a unified parenting picture for the children, the children become the negotiators between the parents, they become the communicators, and the children learn to be manipulators, telling each parent what they perceive the parent wants to hear, frequently, anything but the truth.

I would hope that this Bill would be given very, very serious consideration for a change within the Bill. I see no problem with the legislature affirming what already exists; that is, that joint custody is one of the options. I do see the creation of extreme emotional problems for people during a time that they are not functioning in a capable manner emotionally if a standard it set where the Court must show they are not capable of doing the parenting role as joint parents in order to protect the children.

Again, I wish to thank the Committee for the concern the Committee is showing over this piece of legislation, which when casually looked at appears to be a good piece of legislation, and one that would be of best interests to the parties involved. I feel very strongly that an indepth look at this legislation, based upon the experiences that I have had as a Custody Investigator, and in the experiences that many of my colleagues throughout the country have had, would indicate that there are some pitfalls in the legislation, and that it could create substantial problems, not only for the Court, but for the parties involved.

Thank you for your consideration.

Very truly yours,

Francis M. Stevens
Custody Investigator

FMS/lfs

Enclosures

cc: Justice Rabinowitz
Judge Moody
Judge Carlson

Memorandum

Alaska Court System

TO: Grant Callow
Staff Counsel

DATE : March 9, 1981

FROM: William D. Hitchcock
Master, Trial Courts

SUBJECT: HB 210

At this stage, I have only a few brief remarks and observations about this bill which I want to pass on to you. The concept of shared or joint custody is an appealing one from a philosophical standpoint but in practicality it has many pitfalls. Even where all of the objective criteria of close geographic proximity of the parents and ease of travel are met, the fact remains that the adults involved have been unable to reconcile their various differences and may be equally as incapable of agreeing on the ongoing decisions in the life of their child or children. Joint custody has been a very popular "cause" around the country. In my contacts with other judges from around the nation at the National Judicial College family law course in Reno last year, I have found that there is an overall skepticism as to how well joint custody is working in fact. I would venture to say that a general sampling of opinion among judges, domestic relations practitioners and professional counsellors in this state would yield a similar result.

Assuming however that the bill may already be a fait accompli, there are certain considerations which the court needs to deal with. One of these is to assess possible fiscal impacts this bill would have. If courts are going to be routinely presented with shared custody agreements by parties in consensual petitions, e.g. dissolutions, I submit that the court is going to have to rely heavily on professional evaluations of the wisdom of those plans. While it may be philosophically appealing to view such services as coming from the private sector, the hard economic realities are that most parents in dissolution proceedings are not going to be in a position to pay for these. Therefore, the court is either going to have to field these proposals from the bench or have the investigative resources at its disposal to review them. My recommendation is therefore that the court, if it is going to support this bill at all, give serious consideration to mandating and providing statewide custody investigation services within the system.

I am also concerned as to the meaning of the mediation provision, A.S. 25.20.080. Does that cover child custody investigation as well or is it solely traditional mediation? I believe I have clarified the section regarding guardian ad litem appointments. That appears to be nothing more than a restatement of existing language which is already within A.S. 9.55.205 rather than any new requirement mandating GAL appointments in all cases.

cc: Victor D. Carlson
Andrew M. Brown

Adm. F-1
Rev. 2-73

Memorandum

Alaska Court System

RECEIVED
Office of the Presiding Judge
3rd Judicial District

TO: The Honorable Ralph E. Moody
Presiding Judge

DATE : March 19, 1981

FROM: Honorable J. Justin Ripley
Superior Court Judge

SUBJECT: HB 210

At the request of Mr. Szal, my comments as to HB 210. Although it is difficult to quarrel with the stated intent of the legislation - to involve both divorcing parents in a continuous process of child rearing - I have grave concerns over the wisdom of HB 210.

In my 5-1/2 years on the bench, of which 18 months were devoted nearly full time to domestic relations matters, I have seen nothing to suggest that in the usual divorce/custody situations joint custody is appropriate or beneficial. I have approved joint custody on only a few occasions - approximately six times if memory serves - and in only two cases does it appear to have worked smoothly. Those two sets of parents were highly unusual for divorcing couples. The men were professionals, one a doctor. The women were exceptionally intelligent, very stable, well educated, highly insightful and probably in the 99th percentile in parenting skills. The divorcing spouses had retained or developed a high level of effective communication. In both situations the new and old households were permanently located in Anchorage, physically close together, and the children, by all reports, visited very congenially back and forth. I have no doubt but that even if legal and physical custody had been vested in one exceptional parent or the other, the contact and consultation with the non-custodial parent would have been just as free and wholesome. In short, I believe that those situations worked out well in spite of or aside from the joint custody Order, and not because of it.

By contrast, the majority of such arrangements simply create a continuing line of issues to litigate. If a custodial parent wishes to relocate, or if major changes are contemplated in choice of religious or academic training, to mention only a few problem areas, the joint custodial parent sees it as his or her right, not merely to advise and persuade, but to insist, even to litigate to enforce his views. Since at these hearings the central issue is the best interest of the child, the can seldom be limited merely to consideration of the move, the

copy to: Wm Hitchcock
3/23/81 tpd

Adm. F-1
Rev. 2-73

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 desireable that divorcing parents confer and intelligently agree upon a plan truly for the child's benefit. Unfortunately, the reality of nearly all divorces is that the parties are motivated by other factors such as disappointment, bitter vengefulness, and considerations of property division and child support payments. A classic, extreme, but not unique example of this type of motivation I once observed was the parties' agreement to give custody of the four year old to mother and the five year old to father. Since this result was contrary to common sense, case law and all literature on the subject, I inquired after any unusual factors in support of it. There were none. Further, it became apparent that the mother wished to remarry, therefore wanting the Dissolution to be swiftly concluded, and the father wished to minimize his support obligation, threatening an extended custody battle if his demands were not met. Hence, the trade-off. Any legislation which increases the possibility that children's interests may become the subject of tactical negotiation aught 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

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

produce by making the child's "emotional or physical injury" the sole vehicle by which relevent 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 arrangments 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 on an annual leave status and at my own expense if necessary.

Trial Courts
State of Alaska
THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA 99501

RALPH E. MOODY
Presiding Judge

April 9, 1981

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

Re: Presumptive Joint Custody

Dear Mr. Callow:

I wish to convey to you my concurrence in the opinions expressed by the Honorable J. Justin Ripley on April 7, 1981, with regard to presumptive joint custody.

Sincerely,

Ralph E. Moody
Presiding Judge

REM:dpd

cc: A. H. Snowden, II
Judge J. Justin Ripley
Judge Victor D. Carlson
Master William Hitchcock
Master Andrew Brown
Francis Stevens

Trial Courts
State of Alaska
THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA 99501

RALPH E. MOODY
Presiding Judge

April 9, 1981

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REM:dpd

cc: A. H. S: den, II
Judge J. Justin Ripley
Judge V ctor D. Carlson
Master William Hitchcock
Master Andrew Brown
Francis Stevens

Trial Courts
State of Alaska
THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA 99501

WILLIAM D. HITCHCOCK
Master, Trial Courts

The Honorable Donald E. Clocksin
Chairman
Health, Education & Welfare Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

March 25, 1981

Re: House Bill No. 210
Shared Custody

Dear Mr. Chairman:

It is my understanding that a hearing is being held before your committee on March 26, 1981 concerning the above bill. Although this letter will not have reached you in time for that hearing, I feel I must relay my concerns as to the future fate of the legislation.

As Children's Court Master in Anchorage, I have the additional duty of hearing contested domestic motions and devote approximately one-third of my time to that area. I am concerned that if HB 210 becomes law as it is presently written, there will be substantial negative impact on the welfare of children in divorce custody. Rather than address my concerns in this letter, I wish to instead request that the committee conduct further hearings on the bill here in Anchorage and possibly Fairbanks so that a greater cross-section of professional input can be obtained.

Thank you for your consideration to this matter.

Very truly yours,

William D. Hitchcock
Master, Trial Courts

WDH:ys

cc: Honorable Victor D. Carlson
Superior Court Judge, Third Judicial District

Mr. Albert H. Szal
Area Court Administrator, Third Judicial District

HB210

Superior Court

State of Alaska

THIRD JUDICIAL DISTRICT

303 K STREET

ANCHORAGE, ALASKA 99501

CHAMBERS OF
J. JUSTIN RIPLEY, JUDGE

April 7, 1981

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

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

Dear Mr. Callow:

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

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

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

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

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

which is blandly skipped over.

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

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

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

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

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

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

Very truly yours,

J. JUSTIN RIPLEY
Superior Court Judge

JJR:ail

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

Superior Court

State of Alaska

Chambers of
VICTOR D. CARLSON, Judge

THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA
99501

March 19, 1981

The Honorable Donald E. Clocksin
Chairman
Health, Education & Welfare Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

Re: House Bill No. 210
Joint Custody of Children

Dear Mr. Chairman:

This letter is to express my concern over the amendments which House Bill No. 210 would engraft onto the child custody decisions made by judges in divorce proceedings. At present the standard is the child's best interests and an effort is made to structure each parent's relationship with the child in order to reduce the pressure on the child which usually accompanies a contested child custody proceeding.

If House Bill No. 210 becomes law, the presumption will be to leave custody with both parents giving each the same control over the major decisions affecting the child as married parents have. This would result in many opportunities for confrontation in which the child would be caught in the middle, e.g., the choice of a school, public or private, alternative or basic, etc. Neither parent would have the authority to make the decision and the child would be torn in having to make a choice and then the matter, ultimately, would have to be decided by the court.

It appears as if the objective of legislation should be to reduce the possibility of confrontation between divorced people and not to increase the opportunities for litigation with its attendant monetary and emotional costs. In addition, passage of the bill would require many additional custody investigator and judicial resources.

Thanking you for considering my comments and requesting that you give representatives of the judiciary the opportunity to testify, I am

Very truly yours,

Victor D. Carlson
Superior Court Judge

VDC:rw

cc: The Honorable Terry Gardiner
The Honorable Brian Rogers

HB
210
3/3

Legislative Teleconference Network

TELECONFERENCE CONFIRMATION/CONTACT

INSTRUCTION: Please complete, sign and return by _____
to: Juneau Teleconference Office
Capitol, Rm. 30

TO: Jody Sutherland / H HESS

RE: T/C Public Hearing on Friday 11/29

TELECONFERENCE OBJECTIVE/GOAL: to receive input from public who have not yet had the opportunity of testifying on ~~this issue~~ before the H HESS committee

PLEASE ATTACH THOSE ITEMS CHECKED:

___ Legislation to be discussed; list bill numbers _____

___ Summaries, postion papers, etc.

___ Agenda (if applicable)

___ Other Special Documents

___ Attach List of SPECIAL WITNESSES OR SPEAKERS.

Jean Haumes (Bar) 852-231

Linda Wongbach (BAR)

PUBLICITY: Please attach a copy of your Public Service Announcement. Indicate if you wish to have any of the following additional publicity done by local moderators.

___ Call Media

___ Call Local Individuals (attach list)

___ If Public Hearing, who do you want to hear from? List agencies or people who would be interested in this topic.

PLEASE ADD ANY COMMENTS HERE THAT YOU THINK WILL BE HELPFUL TO OUR MODERATORS AND WHICH WILL ADD TO THE SUCCESS OF YOUR TELECONFERENCE.

- Continued on Reverse Side -

SPONSOR: House H.E.S.S. TAKEN BY: Deborah

SUBJECT: ~~HB 210 Lemon Law Study~~ Public Hearing on Child Custody T/C DATE/DAY 1/29/82 Fri (2) Wed (3)

MAILING ADDRESS: Room 112, Capitol TIME: 3pm Pacific

1 pm Alaska

zip 12 am Bering

PHONE: 465-3777 CONTACT: Joey Sutherland DURATION OF T/C: 2 hrs.

SITES PARTICIPATING:

ALL ALASKAN	Anchorage	Dillingham	(Juneau)	Mat-Su	Seward
	(Barrow)	~~Fairbanks~~	Ketchikan	Nome	Soldotna(Kenai)
WASHINGTON DC	Bethel	Haines	Kodiak	*Petersburg	Valdez
	Delta Junction	Homer	Kotzebue	Sand Point	*Wrangell
LIO				Sitka	
Sen. Stevens					
Sen. Murkowski					
Office Governor					

*Off-Net Dial In LTN Locations. Available by special arrangements.

SPECIAL OFF-NET LOCATIONS/PHONE NUMBERS:

CALLING SITE/PERSON Rep Brown | Rm 112

time permitting if other sites kept and want to testify they can.

if notify H HESS First

Deborah L. Sutherland 1/18/82

Signature of Sponsor Contact Person Date

*** TELECONFERENCE OFFICE USE ONLY ***

MODERATOR NOTES

Publicity and Back-up

Technical Problems

Other Comments

Site Information

Site Address:

POST TELECONFERENCE NOTES

SITE/LOCATION:

LOCAL MODERATOR:

T/C Started:

T/C Ended:

T/C BROADCAST OVER RADIO OR TV

YES ___ NO ___

If yes, what stations?

DID SITE RECORD THIS TELECONFERENCE?

YES ___ NO ___

TESTIFIED/PARTICIPATE:

UNABLE TO TESTIFY

OBSERVED

TOTAL

Memorandum

Alaska Court System

fib 1d8210

TO: Grant Callow, Staff Counsel

DATE : March 27, 1980

FROM: Andrew M. Brown and William D. Hitchcock

SUBJECT: Problems with the Uniform Child Custody Jurisdiction Act AS 25.30.010 - .900

Two sections of the Act need immediate revision by the legislature in order for the courts to be able to handle certain child custody matters.

First, AS 25.30.020 is the section which states when the courts would have jurisdiction over children. It is different from the model Uniform Act in that the following Section 3(a) of the model Act was not included in Alaska's version:

> (2) it is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and person relationships;

A significant problem with our present .020 is that we would not have jurisdiction in uncontested divorces or dissolutions of marriage wherein the children never resided in Alaska or did so but left more than six months prior to the commencement of the action even though both parents consent to the court having personal jurisdiction over themselves and have entered into a child custody agreement. The model Act provision would allow us to assume such

jurisdiction because at least one parent would still reside here and through that parent's testimony substantial evidence could be obtained as to the child's interests. However our present §.020 emphasizes the child's present or recent residence regardless of whether it is an amiable, uncontested, fully agreed-upon custody agreement or a contested case.

In those cases which we do not have jurisdiction to render a custody decision, it must be done by the court of the state which has jurisdiction. This means that the parties will probably have to hire attorneys in that state and file new papers there just for a custody decision. This necessitates not only additional costs, but also the real possibility that because of those added costs, the parties will feel disinclined to ask for another state's custody decision, thus leaving the custody issue unresolved by a court. The problem with this is that should there ever be future litigation over custody a court would be hindered in making a decision without there being a proper original custody decree.

A solution to this jurisdiction problem where the pa.ents agree on child custody is for either the model Act's language to be used or the following, which is limited to the uncontested custody cases, be used:

(a)(4) the parents of the child have agreed in writing as to custody and visitation and it is in the best interest of the child that this court assume jurisdiction;

#2

The other problem which needs quick attention is the effect of AS 25.30.040(b) which requires that notice to persons outside the state be in accordance with Civil Rule 4 and "...be served, mailed, delivered, or published at least 20 days before any hearing in this state." It is not unusual for the courts here to be presented with ex parte temporary restraining order motions under Civil Rule 65 or shortened time motions under Civil Rule 77(j) asking that an order be granted prohibiting an out of state parent from seizing a child or interfering with the child's present custodial arrangement. These motions are usually based upon the affidavit of the Alaskan parent that there is an imminent threat the out of state parent is likely to come to Alaska and take the child. Under Civil Rule 65 there must be a preliminary injunction hearing within 10 days of the granting of an ex parte temporary restraining order, however this conflicts with §.040 (b) because the latter says at least 20 days notice is required before there can be a hearing. Civil Rule 77(j) also conflicts with §.040(b) because it allows for a hearing just 24 hours after notice. The court then is left with the alternative of having a preliminary injunction hearing or shortened time hearing pursuant to the Rules of Civil Procedure but in violation of §.040(b) or not holding any substantive hearing until 20 days lapse but granting extensions of an exparte temporary restraining order.

A possible solution would be amending §.040 so that an emergency hearing can be held in less than 20 days after notice is made. The following language could be added to §.040(b):

except that based upon affidavits stating that a

person outside this state is likely to imminently interfere with the custody or visitation of a child in this state, the court may hear the matter as permitted by the Alaska Rules of Civil Procedure.

This language would allow for there to be preliminary injunction hearings under Civil Rule 65 or shortened time hearings under Civil Rule 77(j) - both of which require there to be notice to the parties, but have less than the 20 days requirement of §.040(b). The children and custodial parent are protected by this proposal since they could have a court hearing on the problem sooner than the present statute allows, and the out of state parent is protected by requiring that notice still be given to him under either Civil Rule 65 or 77(j) and requiring the filing of affidavits showing the likely and imminent custodial interference.

There may be other problems with the Act, but these two are the most pressing in the sense of convenience to the parties and children in uncontested cases and protection of children when a parent is out of state. We would be pleased to answer any inquiries you may have on this matter.

Trial Courts
State of Alaska
THIRD JUDICIAL DISTRICT
303 K STREET
ANCHORAGE, ALASKA 99501

WILLIAM D. HITCHCOCK
Master, Trial Courts

The Honorable Donald E. Clocksin
Chairman
Health, Education & Welfare Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

March 25, 1981

Re: House Bill No. 210
Shared Custody

Dear Mr. Chairman:

It is my understanding that a hearing is being held before your committee on March 26, 1981 concerning the above bill. Although this letter will not have reached you in time for that hearing, I feel I must relay my concerns as to the future fate of the legislation.

As Children's Court Master in Anchorage, I have the additional duty of hearing contested domestic motions and devote approximately one-third of my time to that area. I am concerned that if HB 210 becomes law as it is presently written, there will be substantial negative impact on the welfare of children in divorce custody. Rather than address my concerns in this letter, I wish to instead request that the committee conduct further hearings on the bill here in Anchorage and possibly Fairbanks so that a greater cross-section of professional input can be obtained.

Thank you for your consideration to this matter.

Very truly yours,

Wm D. Hitchcock

William D. Hitchcock
Master, Trial Courts

WDH:ys

cc: Honorable Victor D Carlson
Superior Court Judge, Third Judicial District

Mr. Albert H. Szal
Area Court Administrator, Third Judicial District

INUICH IKAYUQTAAT SUTIGULLIGAA PITQURATIGUN

LAW OFFICES OF

ALASKA LEGAL SERVICES CORPORATION

POST OFFICE BOX 309

BARROW, ALASKA 99723

TELEPHONE (907) 852-2311

Jody

November 23, 1981

Jens I'm giving you this cause Jody's on vacation.

Tom

Rep. Mike Beirne, Chairman
H.E.S.S. Committee
700 "H" Street, Suite G
Anchorage, Alaska 99501

Re: Teleconference on HB 210, November 20, 1981

Dear Representative Beirne:

I was disappointed in the way the above teleconference was organized. I am further frustrated by not knowing for sure how to remedy the matter--whether through your Committee as the sponsors or the Teleconference people. So I will send similar comments to both.

The hearing, as I understand it, was orignally set to be aired only in Anchorage and Fairbanks. Then Barrow and Soldotna were added. Perhaps this is where the shortage of time resulted. Whatever the reason, it was poorly handled. People in Anchorage were scheduled to testify until 3:00 p.m., with another two hour period in the evening. People on the telconference network were to be allowed to testify from 3:00-5:00. As you well know, Anchorage testimony was taken with unlimited time until 4:00 and thereafter, people on the network were only permitted to testify for 5 minutes each. This was unfair to the non-Anchorage people who are vitally concerned about this bill.

My suggestion for future conferences is to either limit everyone's comments to 10-15 minutes, with additional time allowed at the end of a hearing if it is available. Or, especially in the situation where a further evening session was to be held in Anchorage, which was not teleconferenced, to take testimony from the teleconference people first, giving Anchorage people the remainder of the time. In the schedule we had at this last teleconference, Anchorage testimony could have been cut off at 3:00 in order to give sufficient time for the outlying areas to testify. This is, after all the reason for having such a teleconference system to begin with.

I understand that John Holmes of our office has talked to you about these same matters and you suggested that a second conference may be held. I strongly support this idea, but am concern d

about the time involved. Mr Holmes tells me that in the next few weeks, the majority of the work on the bill will be conducted. Since I believe there are many problems with the bill, I want to be sure that the opinions of the non-Anchorage communities are heard and fully considered--a feeling I did not receive from the last teleconference.

HB 210 has important ramifications in the rural communities, so I am concerned that these communities can offer their full impact.

Sincerely,

Linda M. Wingenbach

Linda M. Wingenbach
Attorney-at-Law

cc: Legislative Affairs

ALASKA STATE LEGISLATURE - HOUSE OF REPRESENTATIVES

IN SESSION:

POUCH V
JUNEAU, ALASKA 99811
TELEPHONE: (907) 465-3777

P.O. BOX 4-1539
ANCHORAGE, ALASKA 99509
TELEPHONE: (907) 277-6219

REP. M. F. "MIKE" BEIRNE

MEMBER OF:
FIFTH STATE LEGISLATURE
NINTH STATE LEGISLATURE
TENTH STATE LEGISLATURE
ELEVENTH STATE LEGISLATURE
TWELFTH STATE LEGISLATURE

COMMITTEES:
HEALTH, EDUCATION
AND SOCIAL SERVICES, CHAIRMAN
AND LEGISLATIVE COUNCIL

December 7, 1981

Linda Wingenbach, Attorney-at-Law
Alaska Legal Services Corporation
P.O. Box 309
Barrow, Alaska 99723

Dear Ms. Wingenbach:

I received your letter regarding House Bill 210 and your concerns about whether those individuals outside of Anchorage were given adequate time to present their testimony. I would have to agree with your observation and as chairman of the H.E.S.S. Committee, I should have limited the comments of the Anchorage group so that you and several other would have received more time.

There is however a reason why I did not do this. I relates to the last two teleconferences which were held on this bill under the previous chairman, Representative Clocksin. Several individuals in Anchorage and Fairbanks expressed concern that they too had not been given enough time or adequate notice and that the testimony was "s' d" in favor of the opponents of the bill. I therefore felt an obligation to allow them as much time as they needed.

While you may not agree with my position, I would hope that you at least understand the reasons for my action. I realize that House Bill 210 has important ramifications in the rural communities, just as it does in the urban areas of the state. Therefore, I plan on scheduling another teleconference from Juneau sometime in January and you can rest assured that everyone will be given adequate notice and time to testify.

You also expressed concern that the majority of the work on the bill will be done in the next few weeks thereby implying that it will be too late for any other input. While it is true that my staff is working on changes in the bill, nothing is ever "written in stone". Legally, the committee cannot adopt a substitute until we are back in session so this still allows plenty of time for additional testimony. You might also note that the bill has a further referral to the House Judiciary Committee and the chances are pretty good that it will go through further changes before it ever reaches the House floor.