ALASKA LEGISLATURE COMMITTEE FILES 1981-1982 8672

1343 HHESS HB 210 (#3)

1343

Should you have any additional questions or comments, please don't hesitate to give my office a call.

Sincerely,

Mike Beirne
State Representative

MB/jz

IñUICH IKAYUQTAAT SUTIGULLIQAA PITQURATIGUN
LAW OFFICES OF
ALASKA LEGAL SERVICES CORPORATION
POST OFFICE BOX 309
BARROW, ALASKA 99723
TELEPHONE (907) 852-2311

November 23, 1981

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 concerned

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

Erasable Bond
25% COTTON FIBER

ELLIS, SUND & WHITTAKER, INC.
LAW OFFICES

1285 TONGASS AVENUE
KETCHIKAN, ALASKA 99901
907-225-9661

RICHARD WHITTAKER
PETER R. ELLIS
JOHN L. SUND
DENNIS L. McCARTY
LUCY M. LOWDEN

29 June 1979

Honorable John Carr
White House Conference on Families
The White House
Washington, D. C.

Dear Mr. Carr:

I write you to recommend the participation of Rudy Johnson of the Family Law Reform and Justice Council of Alaska, in the upcoming White House Conference on Families.

If ever there was a lay person who earned his spurs the hard way, in learning about the American legal system as it deals with problems of families, it is Rudy Johnson.

I first met Rudy as his attorney, handling at trial level his custody battle for the right to raise his two children. During that time, Rudy made it his business to learn all there was to be known about the law and the courts, and in addition to learning to research and evaluate decisional law, his studies took him to concerns far beyond the law and into the policy questions in this vital area. He became a factor in bringing about legislative change, and most certainly was a factor in changing Alaskan law, both legislative and decisional, to provide a more realistic approach to solving the problems of distressed families.

The work Rudy Johnson has done these past few years, has been of immense benefit to Alaska, and he has turned himself into an important resource on these questions for our state.

As a former Alaskan legislator, I know how distressing legislative action and political leadership is to a person who is truly knowledgeable on a question, but Rudy's actions have been those of leadership, and of providing ideas and information to our legislature, and his zeal and patience have been most important.

In short, as an attorney and political person, I cannot recommend him too highly to you as a person who would make an important contribution to the vital work of the conference.

Sincerely yours,

Richard Whittaker

RW:mh

cc: Mr. Rudy Johnson
Box 4-1646
Anchorage, Alaska 99509

JOINT CUSTODY, SOLE CUSTODY: A NEW STATUTE REFLECTS A NEW PERSPECTIVE

The legislative evolution of the new California custody law; origins and intent as a guide to understanding and administering joint or sole custody.

James A. Cook*

The greatest impact of California's new child custody Statute is the effect it will have upon the expectations and conduct of parents prior to a court hearing. Secondarily, the new law modifies the options available to the court and the considerations which must be weighed in disposing of custody cases. Transition into the new concept may initially be difficult [illegible] the courts. However the burden of change w[illegible] lessened as the divorcing public becomes [illegible] in advance of custody proceedings, of the [illegible]te's intent. The new Statute facilitates preservation of the child's needs for contact with both parents; it reduces use of the courtroom by one parent to destroy the other parent, to the detriment of the child's best interests. This new Statute's emphasis on joint custody is intended to alleviate other problems frequently generated under the former law:

1. Defusing child-stealing and support-avoidance

This legislative recognition of joint custody and its implementation by the courts may defuse and reverse the increasingly menacing recourse by excluded parents to "child stealing" and/or abandonment of financial support for lack of meaningful, frequent and extensive contact with their children. Legal practitioners have been reluctant to apply punitive or confiscatory sanctions in cases of child-stealing or abandonment of support. Observers have been uneasy about a legal solution that focused solely on punishment and support-collection on behalf of custodial parents, when many custodial parents share the responsibility for the provocation. Instead, joint custody provides an opportunity to demonstrate and increase respect for equality under the law while effecting a possible reduction of child-stealing and support-avoidance.

2. Redressing the imbalance between mother vs father custody fights.

Additionally, it is intended that this new emphasis upon joint custody will result in tempering a recent trend of fathers to strive for sole custody. While the opportunity for fathers to compete for sole custody tests the equality of the sexes insofar as sole-custody decrees are concerned, the result is increasingly hostile custody battles because of a heightened expectation of unilateral victory by both parents. The new law will shift the view of equality – from a statistical determination of how frequently fathers rather than mothers achieve sole custody – to a decision based on protecting a child's access to both parents and on encouraging parental sharing of responsibility for the child.

*James A. Cook initiated and authored the initial version of AB 1480, secured sponsorship by California Assemblyman Charles Imbrecht of Ventura, encouraged the fourteen additional Senators and Assemblymen who became cosponsors, and coordinated and monitored the endorsements, hearings and amendments that resulted in passage and signature into law of AB 1480.

James A. Cook, 10606 Wilkins Avenue, Los Angeles, California 90024
Home: (213) 475-5352, Office: (213) 772-4200

3. Discouraging the use of child custody for intimidation.

The most immediately apparent feature of California's new child custody law is "the message it sends in advance to divorcing parents": a power-play for exclusive child custody, either for purposes of intimidation or to force subservience in negotiation, is less likely to be tolerated by the court. Therein, the new Civil Code Section 4600 and 4600.5 is regarded as one of the most significant evolutions of California's family law since the advent of "no fault" divorce in 1970, which eliminated the airing of "faults" as justification for divorce. Henceforth, the new child custody Statute will largely dissolve the recourse to winner-take-all custody litigation that has heretofore been substituted for the catharsis of airing "faults."

Preference is likely to favor joint custody, or sole custodianship for that parent who demonstrates the most cooperation and tolerance for the child's frequent and continuing contact with the alternate parent. Consequently, an antagonistic and covetous parent is likely to be denied sole custody and may jeopardize the opportunity to participate equally in joint custody.

The intentions and consequences of the legislation, as they evolved during the legislative process and as amended into Section 4600 and Section 4600.5 of the Civil Code, are itemized below. The itemization is not necessarily in the order of importance to petitioners or counselors. For ease of reference the items are in the same sequence as the issues occur in the new Statute.

Policy Statement

Intent

The intention of the original version of AB 1480 was to establish a guide, a goal, and a preference for divorcing parents. By making sole custody less likely to be decreed by the courts, the intent of the original as well as the final version of AB 1480 is to caution divorcing parents who would otherwise be prone to pursuing sole parent custody for purposes of vindictiveness, leverage or extortion. Since the advent of California's "no fault" divorce a decade ago, there has been widespread supposition that the battleground has subtly shifted from personal accusations to custody and visitation rights thus confounding rather than resolving the divorce process.

While serving as a guide to divorcing parents, the original version of AB 1480 placed no restraints on the discretion of the judiciary other than a first preference consideration of joint custody before recourse to sole parent custody.

As an early endorser of AB 1480, Professor Jay Folberg of the Lewis & Clark College, Portland, Oregon, and Executive Director of the Association of Family Conciliation Courts, characterized the intent succinctly: "We too often forget that one of the most noble functions of law is to provide a model of what is expected of people. I believe that the approach of AB 1480, creating a 'preference' for joint custody, is the best alternative."

SB 477, which also made joint custody available to the court, placed constraints of justification on the court's selection of sole parent custody rather than making joint custody a preferred alternative. SB 477 requires that the court must state the reasons denying joint custody in cases where (a) both parents sought joint custody, (b) one parent petitioned for joint custody, (c) or a termination or modification of joint custody was objected to by a parent. The legislative conference which resulted in the final version of AB 1480, and which incorporated most of the provisions of SB 477 to assure the likelihood of passage, resulted in AB 1480 adopting these same restraints upon the court's discretion. Thus, although sole and joint custody are co-equal preferences in the new law, the court must justify its decision to award sole custody in specified situations.

The policy statement which introduces the new Statute makes clear the intent of the new law, despite the court's continued discretion to award sole custody.

Frequent and continuing contact

Section I. Section 4600. The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage,. . .

Originally, a policy statement describing custody intent appeared as a concluding paragraph of SB 477, while a briefer policy statement intending "equal access" by a child to both parents appeared at the outset of AB 1480.

In the final version of AB 1480, the policy statement of SB 477 was adopted as the opening and guiding heading to the statute: ". . . to assure minor children of frequent and continuing contact with both parents . . ."

Prior to amendment, the policy statement contained the phrase "close and continuing contact." However, it was conjectured that "close" might be erroneously interpreted to imply a requirement of physical proximity of residence for both parents and, as such, place a proximity qualification on the availability of joint custody. But it was subsequently stressed that physical proximity was not essential for implementation of joint custody, given the availability of modern transportation, and that "frequent and continuous contact" was a goal worthy of precluding any possible misinterpretation of "close" contact.

"Equal access" succumbs to reasonableness

Fairness has been an influential stimulus in the quest for joint custody legislation. Consequently, equality of contact by each parent with the child or children was an initial preoccupation of the proponents. Nevertheless, the proponents also did not want to obscure or jeopardize this humanitarian concept by attempting to define with precision an equal allocation of time. While balance of contact is encouraged by the new law, the limiting requirement of "equal" has been removed, and instead parents are encouraged to seek, and to offer, time with the child or children on the basis of that which is practically and conveniently available. Parents are encouraged not to be exclusively concerned with equitability. This opportunity for flexibility should allow both parents an escape-hatch from the slavery of equitability if it is within their ability to assume more time with a child, or to offer more of such time to the alternate parent.

Encourage parents to share

Section I, Section 4600 . . . and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

Encouragement of joint custody, in the opening policy statement, occurs because of the desire by proponents to enlist the aid of judges, Conciliation Court counselors, and private practitioners to encourage divorcing parents to opt for or acquiesce to the joint custody solution.

The necessity of encouragement and the preferable goal of joint custody now places upon the State, in the form of a policy statement, the obligation to develop imaginative methods for inducing parents to voluntarily prefer joint custody. While the Statute has not specified the mechanism for doing so, the new law may cultivate imaginative means of encouragement.

Initially, the burden will fall heavily upon Conciliation Courts and jurists during hearings. Eventually, a more widespread awareness of the Statute by the divorcing public is likely to precondition divorcing parents to an expectation of joint custody.

The combination of "no fault" divorce and equal division of community property had diminished the courtroom airing of "faults" and reasons for unequal divisions. Faults and contentions are still voiced, but to a lesser degree. Similarly, although reasons for not granting an alternate parent joint custody are likely to be aired, it is hoped that courtroom practice will reflect the spirit and intent of this Act, as occurred with the "no fault" law, with expectation of a joint custody resolution of child care by divorcing parents.

Order of preference: To both parents jointly or to either parent

Section I. Section 4600. In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an award of custody or modification thereof. Custody should be awarded in the following order of preference, according to the best interests of the child:

(a) To both parents jointly pursuant to Section 4600.5 or to either parent.

The new law did not spring full blown without attention to previous phraseology. On the contrary, if there was any single phrase in the prior Statute that spawned AB 1480's concept, it was the long adhered-to directive which is repeated in the new law. "Custody should be awarded in the following order of preference." The previous statute permitted no other alternatives than: (a) To either parent, (b) To the person or persons in whose home the child has been living, (c) To any other person or persons deemed suitable.

Proponents of joint custody assumed that the most desirable goal with the least likely trauma for child and parents would be to list joint custody as the first preference, ahead of the other alternatives. An interim version of SB 477 specified "to either parent or to both parents jointly." The word order was reversed when adopted from SB 477 into the final version of AB 1480, so that "To both parents jointly" appears prior to the alternative of "to either parent."

No single issue within this legislation was more vigorously debated than whether "To both parents" should be listed separately and unequivocally as the first preference, or if there should be equal consideration, within the same paragraph, of the alternative of sole parent custody. Ultimately, the "both parents jointly" provision was further secured as a preferred goal by provisions in Section 4600.5 and by the addition of a qualification that if joint custody is not decreed the court must consider which parent will be most likely to facilitate contact between the child and non-custodial parent.

The intention of the proponents for a separate, unequivocal and first preference of joint custody is worth reporting. The intent was to establish a goal that would minimize the necessity for adversary litigation. Presumably, a parent seeking joint custody and willing to tolerate the alternate parent in joint custody would be less likely to conduct an aggressive, adversary litigation attack and consequently be less effective as a litigant. A preference for joint custody was also viewed as the best way to guarantee equal protection of both parental roles in those cases where two parents are competing for the exclusive care of their child.

When given equal ranking with joint custody, the presence of a sole custody alternative inspires an ominous spectre of needing to attack the alternate parent as unfit to be a sole custodian. In addition, an apprehensive parent who would otherwise consider joint custody as acceptable, may be fighting for sole custody because of a fear that an uncertain evaluation between joint and sole custody may result in their loss of custody together.

Conscientious jurists, mindful of the public policy goal of the new Statute, will have to discern whether a parent litigating custody is doing so for purposes of protective self-defense because the new Statute has not clearly and separately itemized joint custody as a first priority consideration of the court.

Considering the parent most likely to allow frequent and continuing contact

Section I. Section 4600. In making an award of custody to either parent, the court shall consider which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent . . .

The caveat of cooperation as a character trait in selecting a sole custodian, if joint custody is not to prevail, had its origin in simple wisdom.

Responding to the wrangles and dissension that evolved from the leverage inherent in sole parent custody, Dr. Jose Santiago of the University of Arizona Department of Psychiatry suggested (during a Phoenix, Arizona conference on May 22, 1976, at a time when the joint custody concept was still a rarity), "give the child to the parent who will tolerate the most the child's relationship with the other parent." This proposal became known colloquially as 'favoring the most tolerant parent' as a means of both rewarding and inducing cooperation.

The opportunity of giving this proposal the force of law occurred during a final amending session of AB 1480, in August 1979, when Dr. Diane Trombetta of Los Gatos, California suggested this terminology in the version of AB 1480 that succeeded SB 477. This particular provision favoring the tolerant and cooperative parent in sole custody decisions could become one of the most significant and influential changes in evaluating the suitability of sole custodians. As a minimum, it may inspire more guarantees and demonstration of tolerance and cooperation than has been customary of sole custody seekers heretofore.

At a concluding amendment conference, Judge David B. King of the San Francisco Superior Court's Domestic Law Court cautioned that, although important, he didn't consider the cooperation criterion as overriding, that there were also other worthy considerations, and that demonstrated tolerance of the alternate parent should be "among other considerations" and not the sole determinant.

No preference of a custodian because of that parent's sex

Section I, Section 4600. In making an award of custody to either parent, the court . . . shall not prefer a parent as custodian because of that parent's sex.

This qualifier was adopted during an early amendment to SB 477 and ultimately included in its entirety within AB 1480.

In the court's discretion, a plan for implementation of custody

Section I, Section 4600. (b) (i) The court, in its discretion, may require the parents to submit to the court a plan for implementation of the custody order.

One of the unique effects of allowing the court to require a custody implementation plan is that it may also require the submission of a plan for the implementation of sole custody before, or after, decreeing sole custody. In addition, the opportunity of the court's discretion in requiring a custody plan is another means to discern how cooperatively an individual parent would subsequently administer custody.

Heretofore, although the court might hear all manner of testimony about the worthiness, or lack thereof, of a parent to be sole custodian, it was neither required nor customary for the sole custodian to give any of his/her plans for implementing sole custody. Implementation decisions were solely at the discretion of the recipient of custody, frequently to the pain of the excluded noncustodial parent. Challenges and a return to court for new hearings were often fomented by implementing sole custody, without such a plan.

The genesis of a discretionary requirement for submission of a plan was an outgrowth, however, of hearings and debate about provisions suggested for inclusion in an early version of SB 477. The initial version of SB 477 also proposed topics for evaluation within mandatory joint custody plans, while such topics may be prudent for divorcing parents to consider voluntarily when creating a joint custody plan, they were ultimately eliminated from SB 477 as being too great a potential incursion into private decision-making, as being culturally biased against some parents upon whom they would impose, and as requiring more flexibility to accommodate changing economic conditions and the evolution of growing children's interests.

The plan provisions amended into SB 477 in April, 1979, but later removed in response to objections during hearings, were not mandatory

nor essential to the court's granting of joint custody. The provisions were suggested to enable parents to determine the manner of carrying out (a) "the child's education," (b) "daily routine," (c) "association with friends," (d) "religious training," (e) "and other activities." Considering the differences of opinion that most couples ordinarily experience during divorce, the itemization was sardonically characterized as a new selection of controversial topics that the divorcing couple might not have otherwise considered, and sufficiently provocative to make joint custody agreement virtually unattainable. If consensus on such topics is not forthcoming, it may be prudent merely to allow most or all of these considerations to be resolved by each parent for that period of time when the child is in the respective parent's care.

The fact that the plan topics were eliminated from SB 477 during its legislative processing and were never a requirement of AB 1480 may imply to the court that, as such, these topics are not an influential determinant of joint custody but that divorcing parents are prudently advised to consider these issues voluntarily even though they do not influence a decision for or against joint custody.

Out of state residence not a barrier to joint custody. An initial version of SB 477 excluded joint custody when one of the parents lives out of the state and also provided for termination of joint custody if a parent established or was likely to establish a residence in another state. Both of those provisions were eliminated during the amendment process of SB 477. The reasons for their elimination are a useful instruction to individuals administerin or adjudicating the new law.

First, the provision would have provided a perverse opportunity for a recalcitrant parent to defeat the implementation of joint custody merely by leaving the state.

Second, a requirement of residence within the state for both parents and children could defeat the availability of joint custody for the numerous families living in California border communities wherein one parent might be living a short distance away in the bordering state. The family would be denied the opportunity of joint custody while other parents residing hundreds of miles apart within California could avail themselves of joint custody.

Third, the prevelance and availability of travel and transportation, regardless of state borders, is already facilitating an exchange of children between parents that should not be denied future petitioners of joint custody.

Plans subsequent to custody orders

Section I. Section 4600. (b) (I) The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

The version of AB 1480 that was ultimately passed was careful not to specify that, as a condition of granting joint custody, a custody plan must first be submitted to and approved by the court.

A requirement of a plan in advance was considered as potentially hamstringing the goal of joint custody for at least two reasons: First, plans prior to order could tend to inspire the thwarting of joint custody if one party or the other took that opportunity to insist on implementing provisions that would make joint custody unfeasible. Second, the requirement of a plan in advance might redirect the court's energies from the preferred public policy goal of encouraging joint custody into being an arbiter of plan details – a time-consuming task that might make the court long for the expediency of the past wherein a sole parent was decreed custodian, the alternate parent was restrained to visitation, and the custodian was given the relatively unexamined implementation of a plan.

Thus, in the new law, the court is permitted to discern whether joint custody would be in the best interests of the child, to so decree, and to require a plan from the parents subsequently.

On the other hand, durin the first several months of hearings under this new Code Section, courts may be asking for plans in advance as a means of determining how cooperative the parents

are likely to be, and which parent is more likely to facilitate frequent and continuing contact with his or her co-parent. Since non-cooperation could jeopardize custody altogether, the request of a plan in advance of order could induce cooperation for fear of the alternate consequences.

Custodianship in the home where the child has been living.

Section I. Section 4600. (b)(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

With the exception of the opening phrase, "If to neither parent," the remainder of the statement is derived, in its entirety, from the prior law. Customarily, and almost universally, this decision is applied when the child is not awarded jointly or to either parent.

The opening qualifier, "If to neither parent," was added as a precaution just in case a narrow interpretation of the statement without that phrase gave an undue opportunity for sole parent custodianship to the parent who had obtained initial and temporary custody, pending resolution in trial, because of the advantage of an interim period of residence. AB 1480 proponents urging such a qualifying phrase were painfully aware of how influential upon an ultimate custody decision the obtaining of temporary but exclusive custody has been in administering the prior statute.

Custody to other persons: no new 4600 changes

Section I. Section 4600. (b) (3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

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

This section is repeated, without change, from the prior law.

A presumption of joint custody where both parents agree.

Section 2. Section 4600.5 is added to the Civil Code to read: 4600.5 (a) There shall be a presumption affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.

Reportedly, there have been instances of the court previously refusing to grant joint custody although both parents had volunteered a joint custody resolution of the custody decision. The reasons for refusal covered a broad spectrum, ranging from a lack of authority for the court to do so in the previous law to a supposition about the inability of divorced parents to share parenting decisions.

This portion of 4600, granting joint custody to parents who so agree, was the least controversial provision of the proposed joint custody legislation. Both AB 1480 and SB 477 started with this assumption, and from this base of agreement some of the less tractable proposals emanated.

One observer commented, "It hardly seems necessary to lecture the court about presumption when both parents agree."

"... or so agree in open court..." is the provision within this portion that will probably give jurists the greatest opportunity to advise, guide, caution and to strike a phrase for 4600's policy statement. At the moment of court appearance, the tension and emotion of the events is frequently a high-water mark of both resentments and expectations wherein the voice of authority, prudently

restrained, may elicit the agreement resulting in joint custody. For this reason, the proponents of this measure purposely did not limit agreement solely to that achieved prior to appearance in court.

Court statement of reasons for denial of joint custody.

> *Section 2. Section 4600.5 (a) If the court declines to enter an order awarding joint custody pursuant to this subdivision, the court shall state in its decision the reasons for denial of an award of joint custody.*

This is the first of three times within 4600 wherein the court is required to state reasons for denying joint custody. This portion refers to situations wherein both parents agree to joint custody. The addition of this "reasons for denial" requirement occurred midway in the amendment process, and was accepted without objection when referring to two parents who agreed to joint custody.

Later, during the concluding amendment sessions that led to acceptance of an AB 1480 that would be superseding SB 477, the "reasons for denial" requirement became a vigorously pursued last minute addition to subsequent portions of 4600.5.

Philosophies are legislated as much by coincidence as by deliberate intent. The evolution of the "reasons for denial" requirement is an interesting case in point. Originally, AB 1480 sought a clearcut first-priority, preferential consideration of joint custody by the court before recourse to other custody alternatives. Options other than joint custody were not foreclosed from the court's discretion, however. The intent had been encouragement and inducement toward a joint custody consideration, first. Opponents contended that AB 1480 was imposing mandatory joint custody, presumably in every case, although there was no word or phrase combination in the original version of AB 1480 that imposed a categorical demand upon the court for joint custody. Most significantly, there was no requirement upon the court to justify why joint custody had not been ordered.

On the other hand, SB 477, which was being attacked as not sufficiently assuring of joint custody placated some opponents by amending-in the "reasons for denial" obligations, at least within the portion wherein both parents have agreed to joint custody.

Ironically, SB 477 which initially imposed the least change from prior practice, ultimately became the vehicle that would require the court to justify its 'no joint custody' reasons. In other words, these obligations upon the court's discretion were ultimately to be adopted by AB 1480, a bill which did not originally require the court to justify decisions, but which superseded SB 477 in passage through the legislature.

The effect of this present legislation seems to be a Statute that more narrowly defines the court's goal and discretion, as well as justification for doing otherwise, than any party to the legislation at the outset had envisioned.

But, does a "reasons for denial" requirement make joint custody any more assured? A theory, voiced at the time the phrase was amended-in, contended that such a requirement provided a specific record that could be questioned upon appeal, that it might lead to more joint custody decisions because of the appeal scrutiny and, to a certain extent, diminish the frequency of "reasons for denial" in situations wherein both parents were more nearly equal and fit.

The prime aim: application for joint custody by either parent

> *Section 2. Section 4600.5 (b) Upon the application of either parent, joint custody may be awarded in the discretion of the court in other cases.*

No other issue was so vigorously debated than whether an individual parent (as compared to both parents petitioning concurrently) could apply for and successfully achieve joint custody.

Given the competitive and adversary dynamics of divorce, proponents of joint custody contended that joint custody would be less likely to occur if

agreement by both parents were required; such a requirement would leave the power of decision solely within the hands of the least cooperative parent to the disadvantage of children and an alternate cooperative parent.

Altruism rather than antagonism is more likely to "win" something for each parent by permitting either to apply. The new Act encompasses a principle of successful negotiation: an opportunity for either party to propose a solution that results in both "winning" something from a less than ideal situation.

Heretofore, the decree of sole custody resulted in the appearance of a "winner" and an excluded parent who resentfully nurtured plans and hopes that fueled repeated court appearances. While joint custody may not entirely eliminate return engagements in the courtroom, it is likely that most such hearings will revolve around plan modification rather than another round of the zero-sum game of "exclusion" versus "access."

The court may investigate

Section 2. Section 4600.5 (b) For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate under this subdivision, the court may direct that an investigation be conducted pursuant to the provisions of Section 4602.

This provision, enabling the court to initiate and direct an investigation to determine the appropriateness of joint custody, resulted from the amendment of a slightly different concept contained in SB 477. SB 477 permitted either party to initiate such an investigation through a request to the court. However, it was feared that giving opposing parties the opportunity to initiate investigations might inspire a wave of costly investigations strategically initiated to catch the other party at a moment when they are less equipped to accommodate joint custody, such as shortly after they are excluded from the former home and while one party had possession of the child's customary living quarters.

By giving the court the discretion of initiation, it was intended to relieve the excluded parent from the implied pressure of scrambling to establish and assume the expense of creating living quarters that would appear, upon investigation, as suitable for a joint custodian even before the parent had been assured of the likelihood of a joint custody decree. Although it is hoped that investigation would center on the quality and sincerity of the eventual joint custodian's parenting, it is recognized that the politics of investigation, as inspired by opponents, seek to reveal inadequate physical quarters, inconveniently located and at variance with the child's pre-separation home.

The court's denial reasons when one parent applies for joint custody.

Section 2. Section 4600.5 (b) If the court declines to enter an order awarding joint custody pursuant to this subdivision, the court shall state in its decision the reasons for denial of an award of joint custody.

This is the second of the three provisions in the new statute requiring the court to spell out justifications if joint custody is denied. Some observers concluded that this provision would permit a parent who had applied for joint custody, and who had been denied, the opportunity to evaluate the possibilities of appeal.

The intent of this statute is not to increase the incidence or provocation of appeal.

It is hoped that, in those situations wherein a denial of joint custody is likely to occur, the court will probe the reasons for denial during hearings wherein interpretations may be resolved, or confirmed, rather than entering the order and leaving appeal as the only recourse for clarifying misinterpretations.

Sharing physical custody, integral to 'joint custody'

Section 2. Section 4600.5 (c) For the purposes of this section, "joint custody" means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents;

During drafting, this paragraph became the so-called "definition" of joint custody that links physical custody with the goal of the opening policy statement: "assure the child or children of frequent and continuing contact with both parents." The purpose of the paragraph is primarily aimed at an understanding, and consideration of the physical aspect of joint physical custody. However, the paragraph purposely does not elaborate with constraining prerequisites such as scrupulously equal contact or conditions of residence. Instead, the parents are encouraged to work out personally the details of sharing physical custody as best befits their circumstances, or through counselors or other helpful intermediaries who will aid the parents in traversing the antagonisms of the just-divorcing period into the implementation of joint custody.

Joint legal custody for parents unavailable for joint physical custody

Section 2. Section 4600.5 (c) . . . provided, however, that such order may award joint legal custody without awarding joint physical custody.

Of all the provisions of Section 4600 and 4600.5 that may be productive of mischief, or antagonistic interpretation or decree, the opportunity for the court to award joint legal custody without awarding joint physical custody could intrigue the most litigious of counselors and parents.

Curtailment of the opposite parent's 'access' in joint custody to mere legal participation was not the intent of this wording. The opportunity for joint legal custody was inserted in response to the few requests of divorced parents who wished to participate jointly in the legal decisions of custody but, by reason of distance, isolation, circumstances of remarriage or other restraints, were unable to participate in joint physical custody.

Three months after AB 1480 and SB 477 were underway in the legislative process and had left their respective legislative houses of origin, Division Four of California's First Appellate District, on May 9, 1979, handed down a decision In Re Marriage of Neal. In view of the extensiveness of the comments within In Re Marriage of Neal, readers can draw innumerable inferences from the ruling. For divorcing parents the most anxiety-producing observation was that joint legal custody was, in effect, meaningless in comparison with the practical, day-to-day presence of sole parent physical custody. The few individual parents who had joint legal custody were increasingly apprehensive that their sharing opportunities were non-existent. (AB 1480, which was legislatively considered after the In Re Marriage of Neal decree of May 9, 1979 and chaptered on September 21, 1979, supersedes In Re Marriage of Neal as well as imposes a policy that a child must be assured of frequent and continuing contact with both parents regardless of joint legal custody.)

Furthermore, there was, and is, concern that a joint legal custodian will have acquired all the legal responsibilities and obligations of a child's conduct, encounters with the law, creditors and litigants but with none of the frequent and continuing physical relationship that might enable such a custodian to forestall or ameliorate in advance the delinquency resulting in the child's legal problems.

A succinctly worded resolution of this phraseology problem was proposed during the final amendment scramble, and practitioners may wish to adopt the intent of the proposal, although this particular phrase did not find its way into the final text in competition with numerous other considerations elsewhere in the legislative bill. The resolving proposal: That joint legal custody be awarded to a parent who requests joint legal custody only, without awarding joint physical custody.

Modification or termination of joint custody orders upon petition

Section 2. Section 4600.5 (d) Any order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interests of the child require modification or termination of the order.

Of all the paragraphed provisions within AB 1480, few are more cautionary to parents about assuring "the best interests of the child" than that regarding modification or termination of joint custody orders.

One parent, both parents, or the court can move for modification or termination, but the operative consideration for change is a showing of detriment to the child's best interests. Heretofore, an excluded parent frequently "gunnysacked" a reserve of complaints about the sole custodial parent's presumed violation of the child's best interests, as ammunition toward a reversal of sole custody or liberalization of visitation rights. At least in joint custody situations the parents can "keep book on each other" with some equality, and perhaps eventually with tolerance and practicality as each experiences similar responsibilities. If each is nevertheless tempted to scrutinize the other parent's child-rearing toward the goal of threatening modification or termination, the overall effect may be a better attention to parenting, responsibility, and moral and ethical conduct than occurs in conventional families. The spectre of "answering up" in court is chastening.

But the deciding proof will lie in "the best interests of the child." There is no certainty that "best interests" are served by isolating a child from experience with conflict, by imposing sameness rather than diversity, by labeling one parent to be "visited" and the other to be custodian, and by depriving a child from access to the alternate parent for substantial periods of time.

Previous interpretations of "best intsrests" placed more emphasis on routine, discipline and isolation than upon tolerance, forgiveness and accommodation. The latter trio may be among the better interests in preparing a child for survival in a crowded, changing adult world.

Contentions for and against joint custody will probably unearth more novel and provocative insights into a child's best interests than we have heard in the past.

Unilaterally, the court by its own motion will have some difficulty demonstrating that a modification or termination of joint custody is in the best interests of the child if both parents have agreed to joint custody, since Section 4600.5 (a) presumes that under circumstances of such agreement joint custody is in the best interests of a minor child.

Opposition by a parent to modification requires a court's justification

Section 2. Section 4600.5 (d) The court shall state in its decision the reasons for modification or termination of the joint custody order if either parent opposes the modification or termination order.

The third situation in which the court is required to state reasons substantiating orders other than joint custody comes into play if either parent opposes modification or termination of joint custody. Consequently, there is a strong likelihood that for purposes of appeal or remodification, attorneys representing clients about to be excluded from joint custody will oppose modification from joint custody as a matter of protective procedure.

The penalties for objection to an alternate parent who desires to cooperate in joint custody are so uncertain, and so potentially counterproductive as implied by 4600 (b) (1) with its favoritism for the cooperative parent that, rather than moving directly for modification or termination, an unhappy co-custodian is better advised to first test the possibilities of drawing a tighter fence around the alternate parent's freedom of action or of negotiating tradeoffs during conciliation.

Previous orders modifiable to joint custody

Section 2. Section 4600.5 (e) Any order for the custody of the minor child or children of a marriage entered by a court in this state or any other state may, subject to the jurisdictional requirements set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody in accordance with the provisions of this section.

Will the court be swamped with requests for modification to joint custody? Probably, but requests will be tempered by a consideration of the expense of successful modification, or by apprehension about how successful modification is likely to be. Non-custodial parents who have adapted to the expectation that sole parent custody would always prevail and who have developed another lifestyle may not now seek joint custody.

Because of the incessant requests for information about retroactivity during the legislative process, an accommodation for modification was assured. Since divorce is better comprehended in retrospect than in prospect, and though AB 1480 is intended to benefit children and parents who are not yet aware they will be divorced, it is understandable that most of the followers of this legislation were doing so from retrospect.

The court may not necessarily bear the brunt of the first wave of modification actions. A parent desirous of joint custody may find it expensive, antagonistic, and of uncertain outcome to make the first overture to the alternate parent through court ordered hearing. Instead, the resourceful, parent who does not enjoy easy rapport with the other parent may find it productive to have a counselor (marriage, family, religious or legal) make the initial overture for exploratory conversations leading to joint custody. Joint custody implementation plans worked out between parents, as directly as possible, are probably preferable to risking the court's arbitrariness in decreeing implementation.

California's joint custody decree affecting another state's

Section 2. Section 4600.5 (e) Any order for . . . custody . . . entered by a court in . . . any other state may, subject to the jurisdictional requirements set forth in Sections 5152 and 5163, be modified at any time to an order of joint custody . . .

Qualms about the ability to enforce a California custody decree in other states led proponents of SB 477 to author into an early version the provision that joint custody could not be ordered if one parent lived in another state, and that joint custody could be terminated if one of the co-custodians moved to another state. A similar restraint was not a part of AB 1480, and AB 1480 proponents opposed such provisions in SB 477. The outcome was to mesh these considerations with the protections of the Uniform Child Custody Jurisdiction Act.

Section 5152 of California's Civil Code is similar to Section 3 of the Uniform Child Custody Jurisdiction Act, while Section 5163 is similar to Section 14 of the Uniform Child Custody Jurisdiction Act. Section 5152 requires that California be the home state of the child at the time of commencement of the proceedings or within six months prior to commencement of the proceeding. Or, California could assume jurisdiction if the child and the child's parents have a significant connection with California. Physical presence of the child within the state is influential but that criterion alone is not sufficient to confer jurisdiction.

Section 5163 restrains California from assuming jurisdiction over custody decrees made by another state unless it appears that the court which rendered the decree does not now have jurisdiction or has declined to assume jurisdiction. Even so, California is obligated to give due consideration to the transcript and proceedings that have occurred in another state if California assumes jurisdiction.

Thirty-nine states have now adopted the Uniform Child Custody Jurisdiction Act drafted in 1968. California adopted the UCCJA in 1973. States adopting in 1979 include Arkansas, Illinois,

Maine, Nebraska, New Jersey, North Carolina, Tennessee, Virginia and Washington.

The states that are outside of the UCCJA agreement, as of Fall 1979, are Alabama, District of Columbia, Kentucky, Massachusetts, Mississippi, New Mexico, Oklahoma, Puerto Rico, South Carolina, Texas, Utah, Vermont and West Virginia.

If a parent intends to use the new California law to achieve a joint custody decree not awarded in another state, the provisions of the UCCJA are the first of the obstacles to be considered.

On the other hand, the UCCJA will assist in protecting a California decree in other UCCJA-endorsing states as long as the parents and child adhere to the prerequisites for California to retain jurisdiction.

Using conciliation to ease the court's burden

Section 2. Section 4600.5 (f) In counties having a conciliation court, the court or the parties may, at any time, pursuant to local rules of court, consult with the conciliation court for the purpose of assisting the parties to formulate a plan for implementation of the custody order or to resolve any controversy which has arisen in the implementation of a plan for custody.

The new law could facilitate access to conciliation court consultation regarding any custody plan, whether sole parent or joint. "Local rules of court" may limit the availability of court-assisted conciliation as well as the procedures for such access. In California only the larger metropolitan jurisdictions maintain conciliation court services thus far.

At least five consequences are likely to evolve from the new statute, and in particular from paragraph 4600.5 (f).

1. Burden reduction. Utilization of conciliation court assistance will likely have the potential of substantially reducing the hearing court's burden, the consumption of time through adherence to courtroom procedure, and the issuance of decrees that may be unpalatable to one or both parents.

2. Active assistance. ". . . assisting the parties to formulate a plan . . ." places the conciliation court in a more active, goal-oriented role than it has occupied since an earlier era when the court was known colloquially as reconciliation rather than conciliation court. In other words, rather than primarily serving as an instrument for the parties to recognize, accept and "live with" a pending or previous court order, the possibility now exists for a conciliation court to assist parties in formulating plans for submission to the court.

3. Resource accumulating. Implementation plans, particularly for joint custody, are expected to be diverse, individualized, and probably novel. Since parents are invited to participate in the planning, the relative simplicity of the traditional sole parent custody decree will no longer prevail. Consequently, conciliation court personnel are likely to become repositories and resources for a wide range of concepts that can be used to stimulate parental imagination about ways to resolve and implement joint custody. Information exchange about joint custody planning will, by necessity, increase dramatically.

4. Private counseling. There was no known or purposeful intent to exclude access to privately-reimbursed conciliation counseling or to impose exclusive recourse to public, tax-supported conciliation court services. Although passage of the new law will increase the clamor for expansion of conciliation court services, the availability of funds and competing political considerations may restrain the ability of the public system to expand in the same ratio as parental interest in achieving joint custody decrees. The result will probably be increased gravitation to privately-paid counseling as well as that available from non-governmental charitable organizations. The new custody law implies the potential of considerable growth for such private and philanthropic services.

5. Stature opportunity. Since so much of the possibility for success in joint custody planning and implementation will hinge on negotiation effectiveness during the planning process, and since

this conciliation service can be such an important assist to jurists, there is now a substantial opportunity for conciliation courts and counselors to achieve a greatly increased appreciation and recognition.

Furthermore, the "resolving of controversy" portion of paragraph (f) could shunt to the conciliation court first those requests for modification or termination that might ordinarily go directly to the hearings court. Arrangement for and success of joint custody is a highly personal matter for the participants. However, skeptics are likely to question the efficacy of joint custody, based on the statistical reoccurrence of hearings requests. The magnitude of those statistics may be affected substantially by how readily joint custodial parents can utilize the conciliation courts prior to hearings.

Access to records by noncustodial parents

Section 2. Section 4600.5 (g) Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including but not limited to medical, dental, and school records, shall not be denied to a parent because such parent is not the child's custodial parent.

The statute's concluding paragraph requiring records about the child to be accessible to noncustodial parents was also one of the last amendments proposed at a concluding amendment-drafting session. As such, the proposal represented the reaction of noncustodial parents to that which they have perceived as an abuse of the exclusivity of sole parent custody. Some observers contended that the provision was not strictly necessary in view of other means available to achieve the same effect. As a caution to the custodial parent, however, the paragraph does imply a measure for evaluating the cooperation of a custodial parent with a noncustodial parent.

Since the paragraph does not limit information to merely medical, dental and school records, it does open up the possibility of seeking information about such other topics as diet, clothing purchases, income, religious activity, clubs and camps, work and rest, and similar inquiries.

Evaluate in its entirety

Because the version of AB 1480 that ultimately passed into law has so many more provisions than the simplicity of the originally introduced version, there may be a tendency to become preoccupied with the ramifications and opportunities for litigation in specific clauses. Therefore, it behooves all parties to pause, place in perspective, and view the statute in its overriding intent. AB 1480 affords a rewardable premium for cooperation and accommodation, to the advantage of a child's continued access to both parents. Frequent and continuing contact, through joint custody or sole custody, is preferred. The opportunity is now available to parents and the court to reduce post-divorce tension and antagonism through joint custody.

Fate of the 1977 proposal

During the 1976-77 two-year session of the California legislature a Joint Senate-Assembly Committee on Judicial Equality was created to examine inequality in California laws and to propose rectification. California's 'no fault divorce' Family Act of 1970 was particularly singled-out for examination. The lack of a joint child custody option was regarded as the single greatest inequity left unrectified when 'no fault' divorce was imposed in 1970. In 1974 the "mother's preference doctrine" (regarding children of tender years) was modified to permit the designation of either parent as custodian based on the child's best interests. But, the statute still provided that custody could be awarded only to either parent or to an outsider just as it had when so-called 'fault' was a consideration in designating a custodian. Thus a parent who demanded it of the court would receive a divorce without showing of cause, while the other parent (who may not have been consulted or wittingly given cause for divorce) could promptly be excluded from the child's life, except for 'visitation' based on a schedule decreed by the court without consulting the excluded parent.

Consequently, a joint custody bill, AB 3475, was submitted and processed through the California legislature in 1977. The bill captured wide public attention when enroute from passage by the Assembly to the Senate it was discerned that the measure capitalized on the humanitarianism of joint custody but made the achievement of joint custody virtually unattainable. 1977's AB 3475 required that both parents agree to petition the court simultaneously for joint custody before the court would consider decreeing joint custody. Instead of facilitating agreement and cooperation toward a goal of benefit to the child, the measure gave a unilateral power of veto to the most recalcitrant, possessive and uncooperative parent with no similar or offsetting advantage for the cooperative and sharing parent.

Several individuals, groups and organizations, including the southern California representative of the National Organization for Women coalesced to endorse and seek a single amending phrase permitting either parent to petition for joint custody. Such an amendment would have cultivated a socially desirable goal: recognition by the court for a cooperative and accepting parent. The California legislative system permits a bill's sponsor to refuse an amendment and to refuse to carry a bill further, regardless of majority legislative support for the amendment and for an amended bill. Amendment of 1977's AB 3475 was categorically refused and the bill remained in the Senate Judiciary Committee until the end of the session a month and a half later whereupon the joint custody issue was effectively dead, legislatively.

Although no publicly outspoken opposition to joint custody was identified at any legislative forum or hearings, the legislative quest for joint custody was foreclosed at the end of 1977 for another year and a half because of doubt that a sponsoring legislator could be identified who would dedicate the energy required to assure passage of such a measure.

Postponement builds demand for specificity

The new California statute is unique in its constraints on the court's latitude, although California is not the first state with a joint custody statute. The intensity of demand for and scrutiny of joint custody legislation in California during 1979 probably spawned the specificity missing in the statutes of the five other states recognizing joint custody: (Iowa, Maine, North Carolina, Oregon and Wisconsin.) Most of the five passed joint custody legislation starting in 1977, before the demand had become so insistent as to place specific procedural requirements on the court, as does the California statute. Generally, the other five states simply grant a court the power to decree joint custody or imply the availability of joint custody by defining joint custody.

Pressure for specific legislative support of joint custody and specific constraints on the court's discretion came from a wide range of sources. The initiating or authoring of AB 1480 was not the product of a fathers' rights group, although remarks by opponents following passage of AB 1480 might

lead the public to believe so. At the time AB 1480 was submitted and acquired its initial endorsers I was not an active member of such a group, although as the following implies, their support was crucial. The earliest supporters were among the professionals. A number of professionals in the psychiatric, sociological and counseling fields endorsed the concept of joint custody. A gratifyingly large number of lawyers also endorsed the necessity of joint custody. But the intensity of the need was most vividly evident in both the ad hoc and the formal groups of divorced fathers. I was also to find this intensity matched by divorced mothers who, (voluntarily and involuntarily) did not have custody. The divorced mother without custody has an interest in joint custody as intense as the divorced fathers who have garnered the lion's share of publicity for warranting joint custody.

The indignation of the ostracized parent has the intensity of the self righteous because a tenet of "no fault" divorce is that a parent can be divorced and deprived of access to an offspring. Hence, innumerable fathers' rights groups are populated by law-abiding and otherwise circumspect fathers who have been deprived of access to their children through imposition by the legal system of a "no fault" divorce.

The net effect was that law abiding fathers whose conduct as fathers and husbands was theoretically not in question, were nevertheless severed from a normal relationship with their children in decrees as severe as if these men had committed a crime. The result was acute disdain for the law as practiced from the bench.

Politicians and propagandists sense the power inherent in justified indignation. Scholars know the dangers to a nation when its legal system is more convenient for severing a family than preserving it.

A rage from righteousness is also dangerous and dedicated. It can also transcend personal safety and self-preservation, as was evident among fathers who spoke threateningly.

Such was the atmosphere within which the ameliorating proposal that became AB 1480 was introduced, and none too soon. As I indicated to the California Senate Judiciary Committee's Advisory Committee at their March 5th San Diego meeting, "It is imperative that the Legislature enact a genuinely equitable joint custody statute before the summer is out because dedicated but disenfranchised fathers are becoming so numerous and the anguish so intense that the reaction is cresting toward personal, unilateral action that will be widely evaluated as justified."

The disdain for "the system" and the skepticism of effecting any peaceful change through the legislature (after the 1977 experience) had become so widespread that, as I told a May 9th Assembly Judiciary Committee hearing, "More than once I have been grabbed by the lapel in men's group meetings with a demand that my diversion of their anxieties toward AB 1480 better damn well not be just another hoax!"

Such was the pressure valve threatening release, or resolution, in early 1979.

Satisfactory joint custody legislation would have another virtue, or diversion . . . depending on your view . . . as expressed to me by Vert Vergon, the pioneer organizer of Fathers Demanding Equal Justice and advocate of joint custody since 1974: "If you succeed in getting joint custody implemented, most of the men's rights groups will probably cease to exist since child custody is the single most important issue that holds them together."

Thus, the scrutiny of the judiciary's latitude that occurred during legislation of AB 1480 might not have been nearly so specific if California had adopted the milder version sought two years earlier.

Sponsorship in 1979

In February and March, 1979, Assemblyman Charles Imbrecht of Ventura offered to assure that the concept and wording proposed to him would be submitted to the Legislative Counsel's office for review and deposited in the legislative bill hopper. Assemblyman Imbrecht's position as Vice Chairman of the Assembly Judiciary Committee was crucially important since that Committee was the legislative forum in which the bill would first be

heard. Thirteen additional Assembly members and Senators were encouraged to become co-sponsors. The first of those co-sponsors was Assemblyman Art Torres of Los Angeles, also a member of the Assembly Judiciary Committee.

The extensive burden of bills processed by California legislators requires that the obligation of sponsoring and guaranteeing a new measure is not lightly assumed. 3,546 measures were introduced into the California legislative process during 1979, of which 1,843 were passed during the 139 days the legislature was in session. As a consequence, the sponsor's burden is numerically large for nearly every legislator. Assemblyman Imbrecht's legislative burden is typical. At any one time during the 1979 legislative session he was sponsoring over 100 different bills and was the primary and lead sponsor of over 30 measures of varying degrees of complexity. In view of these obligations, it is important to a legislator's credibility and effectiveness that a bill's initiating constituents be prompt in response, accurate in representations, comprehensive in gaining adherents, and cooperative in accommodating a legislator's schedule.

In a search for legislator sponsors, the text that eventually became AB 1480 was delivered to all Assembly members and Senators who had seats on the Judiciary Committees in their respective houses. Support for the concept was expressed informally and provisionally during personal follow-up visits with the Assembly members and Senators. During this routine procedure we learned that the Senate Judiciary Committee staff was researching the joint custody topic for possible submission of such a bill by the Senate Judiciary Committee Chairman. Copies of joint custody measures legislated by other states and a copy of 1977's AB 3475 had been received by that staff.

Several months prior, a blue ribbon Citizens' Advisory Committee had been created by the Senate Judiciary Committee to meet monthly for the evaluation of a broad range of proposed family law legislation topics. The Advisory Committee consisted of two Superior Court judges, a law professor, a director of counselling for a county conciliation court, a deputy county clerk, a psychologist and a family law attorney. Los Angeles County Superior Court Judge Robert Fainer served as the Chairman.

Monday, March 5th was indicated as the date for consideration in San Diego by the Committee of child custody concepts, presumably to be considered in creating a joint custody bill. But that presumption subsequently appears to have been misinterpreted. Proponents of the text that became AB 1480 appeared at the March 5th San Diego Advisory Committee meeting, but on the previous Thursday, March 1st, SB 477 had already been placed in the Senate's bill hopper by Judiciary Committee Chairman Jerry Smith. Consequently, the Advisory Committee moved on to family law topics other than child custody during the March 5th meeting after the Advisory Committee Chairman recommended to the proponents of the alternate text that they deliver their concept to the Assembly Judiciary Committee since a Senate version was already underway.

Prior to March 1st, the text that became AB 1480 was already being favorably considered for sponsorship by several Assembly members. While the extensiveness of support was being evaluated, Assemblyman Imbrecht's office temporarily held the text in abeyance until the last calendar date for submitting a text to the Legislative Counsel's office for approval prior to delivery of a bill to the Assembly. Consequently, SB 477 started the formal legislative cycle (on March 1) ahead of the temporarily delayed AB 1480, which was filed with the Assembly on March 29. The effect of this lack of synchronization was that the two bills never coincided for simultaneous consideration in the respective policy committees. Examination and eventual passage of SB 477 occurred without concurrent comparison with AB 1480. Thereupon, AB 1480 became the bill for making changes in SB 477 because it became the last of the two bills to be considered for passage.

That which some observers characterized as the distinctly opposing character of both bills, in their initial versions, increased the intensity of debate and attention to the topic by child custody advocates.

Comparisons & consequences: the original AB 1480

The original version of AB 1480 was succinct. The original merely added new subparagraphs (a) and (b) to the order of preference statement in California's long standing Section 4600 of the Civil Code:

"Custody should be awarded in the following order of preference:

(a) to both parents in joint physical and legal custody.

(b) to either parent if a preponderance of the evidence establishes that it is in the best interest of the child that custody should be awarded to one parent or if the parents agree that one parent shall assume custody."

Subsequently there was concern that subparagraph (b) imposed the burden of an evidence test on custody litigation. Persia Woolley, author of "The Custody Handbook", had a similar proposal: place the burden of proof on the parent seeking sole custody.

Ultimately, the criteria for sole custody that evolved from amended versions of SB 477 were adopted within AB 1480. For no discernible reasons, the one seemingly agreeable second criterion for sole custody of the original AB 1480, "if the parents agree that one parent shall assume custody" disappeared during hearings and amendment sessions.

Comparisons & consequences: the original SB 477

The original version of SB 477, which was lengthier, did not amend Section 4600 of the Civil Code with its order of preference awarding custody to either parent. Instead SB 477 added Section 4600.5 to the Civil Code spelling out the circumstances wherein joint custody would be presumed in the best interests of the child, ". . . where all of the following factors are present:

1. The parties have agreed in writing to an award of joint custody or so agree in open court. . .

2. The parties have submitted to the court for its approval a written plan for the implementation of the joint custody arrangement.

3. Both parties presently reside in this state and state that they intend to reside in this state in the future."

The proposal also defined joint custody as, ". . . an arrangement whereby the minor child or children of the parents shall be in the physical custody of each parent for a period of time with the parents having equal control of the care, upbringing, and education of the child or children."

Additionally, SB 477 proposed that ". . . joint custody shall be terminated by the court if one parent establishes his or her principal residence in another state." The proposed bill also permitted termination of joint custody by the court after consideration of ". . . evidence of any substantial failure of a parent to adhere to the plan for implementation of the joint custody arrangement . . ."

The ensuing hearings and amendment debates substantially changed most of those provisions. The reasons for doing so are instructive of the legislative intent behind Chapter 915 as enacted in the Statutes of 1979. The major changes to SB 477:

- A coincident series of preconditions were not required to establish a presumption for joint custody.

- Agreement by the parents to joint custody was not to be required since it gave a disproportionate leverage to the recalcitrant parent, to the disadvantage of children and of a cooperative parent.

- Implementation plans are not necessarily required in advance by the court and may be developed subsequent to court order, but the requirement of a plan in advance could result in delays by a litigious parent.

- Residence within the state, and the opportunity to terminate joint custody by moving or threatening to move from the state, were also

dropped since they suggest mechanisms for defeating joint custody, to a child's disadvantage, and with no compensating opportunity for the other parent to protect and ensure joint custody.

- The emphasis on "equal" periods of physical custody or of control in care, upbringing and education were also dropped. The qualifying word "equal" was eliminated so that the focus of the parents would be on such practical considerations as sharing the available time and apportioning responsibilities reasonably rather than scrutinizing the division of time and responsibilities. Trading of duties and responsibilities, one for the other, was considered as desirable as the splitting of a particular duty.

- Failure to adhere to a joint custody plan was eliminated as a cause for terminating joint custody lest antagonistic parents "keep book on each other" with the intent of contesting for sole custody based on plan performance rather than accommodating the vagaries of life.

Following the passage of AB 1480, proposals are now being offered for counseling of parents by public and private counselors about the creation of custody implementation plans. Simultaneously, another conclusion for the disposal of such parenting provisions is being voiced: let each parent determine the parenting decisions and styles that take place while the child is with the respective parent.

The omissions that were debated and determined during amendment are as instructive as the final version of AB 1480 which passed into law. The omissions dealt with so many issues that are likely to arise during hearings brought under the new statute that the reasons for eliminating such provisions provide an additional guide to the intention of the statute.

Dissimilar bills but unanimous votes

It is presumptive of me to assign simplistic but different motives to each of the two bills that were so dissimilar at the outset. At the risk of ignoring the complexities, I will assert that AB 1480 sought a clearcut acceptance of joint custody (as the first in a series of considerations) on the confident assumption that there was sufficient approval of the concept to assure the necessary legislative votes in both houses for passage. On the other hand, SB 477 with its many preconditions and hurdles to joint custody, appears to have been predicated on a belief that there were insufficient votes for joint custody to assure passage, that SB 477 could overcome objection by selling it as a modest change merely confirming the few joint custody decrees that were occurring recently in the courts, and that SB 477 could become the first in a series of amendments that would make joint custody legislation more unequivocal in subsequent years, in the style of AB 1480.

The vote intrigues observors. The vote particularly baffles observors who were concerned about the distinctly different consequences of the two bills. Each measure, SB 477 and AB 1480, was voted on, separately, five different times (both Judiciary Committees, both houses, and concurrence). And although slightly out-of-synchronization, the legislative processing alternated back and forth (first on SB 477, then upon AB 1480, back to SB 477, etc.), but never in the same forum simultaneously. Yet, if I am correct in recall, both measures always received a unanimous approval, each of five times, with no objection publicly voiced in debate. (Observors are reminded that the amendment battles, which were vigorous, took place in the respective Judiciary Committees.)

Explanation for such voting patterns depend upon one's point of view. One explanation is that the legislature was prepared to accept any joint custody bill, with the content a matter for the proponents to negotiate. Both passed and both were signed by Governor Brown, although AB 1480 had the more tortuous requirement of passing through the Senate Judiciary Committee, at the expense of assuming many of the provisions of the previously-passed SB 477, whereupon AB 1480 prevailed to become California's second joint custody statute within a month and a half. The competitiveness of the two brought more enlightened debate than might have occurred if only one bill was heard, the exercise worried proponents of AB 1480 into taking less for granted about passage, and it is a credit to the legislators that the competitive nature

of the measures was not allowed to rigidify into a stalemate or stand-off that might once again have killed joint custody legislation.

A mandatory appellation becomes a mandatory assumption

Why is the measure so frequently referred to as California's "mandatory" joint custody law?

Midway in the legislative debates, AB 1480 was offhandedly characterized as "mandatory" joint custody, an appelation most often bestowed by opponents in an attempt to rationalize support toward SB 477. Followers of joint custody have also assumed the statute to be "mandatory".

The reasons for such an opinion seem to lie in an interesting amalgam of law, legislature and literature.

Just prior to introduction of AB 1480 to the legislature, Woodland Hills, California, lawyer Burton Bach had been counseling a divorced, non-custodial mother, who wished to seek the sharing of joint custody with her former husband. Earlier, upon divorce, she had opted for giving custody to the father since she was apprehensive about her ability to obtain work and establish a home and to assume the obligations of custody. But, prior to passage of AB 1480, and despite the aid which Bach could provide, she decided not to proceed in the quest for joint custody because of apprehension that custody litigation would create an atmosphere so antagonistic for child and parents as to jeopardize their already tenuous relationship.

Bach authors a satirical commentary, "The Bach's Score," published in the southern California newspaper for the legal community, The Los Angeles Daily Journal. He was intrigued by AB 1480. With tongue in cheek, and satire so obscure it may have eluded those who were compulsively intent on the joint custody topic, on June 11, 1979 he bemoaned the do-gooders in the legislature, "One of the few areas of litigation still permitted lawyers to make healthy contributions to their Keogh accounts was the good old-fashioned child custody fight. . . . between "no fault" divorce and the kind of clients whose assets usually range between zilch and zilch and a half, all the fun and most of the profit has evaporated from the domestic relations cases. The only thing left for the parties to fight about (and thereby enrich their counsel) is the custody of the children."

In defense of Bach and to rectify an impression most others failed to read, he concluded, "I ask you: Can we accept such a radical concept as that of 'joint custody?'. You bet we can—and the sooner the better!"

But, unfortunately, few read the satire to its conclusion. Instead most remembered the prominent bold face heading of the article, "Mandatory Joint Child Custody Bill—A Help Or a Hinderance to Lawyers?"

The headline became the popular definition of AB 1480. The bill, however, contained no demandingly rigid requirement for the decree of joint custody.

Subsequently, the adoption from SB 477 into AB 1480 of the requirement for the court to indicate reasons for not granting joint custody has caused jurists to remark that the effect is almost tantamount to "mandatory," however.

Transition: Public perception of court implementation

Sole custody defeats the use of divorce as a social remedy by perpetuating the winner/loser antagonisms. On the other hand, joint custody intervenes on behalf of the child's interests to curtail a parent's opportunity for extending pre-divorce antagonisms through captive custody by requiring more equitable access. For the June 6, 1979 Assembly Judiciary Committee hearings, Persia Woolley testified, "I interviewed and listened to literally hundreds of divorced parents with all kinds of child custody arrangements. My research shows this (that joint custody won't succeed unless parents have a "friendly divorce" and initiate joint custody between themselves) to be a completely erroneous assumption on the part of the professionals. It is not necessary to be friends with your ex spouse in order to become an effective co-parent, although most parents who agreed to share their

children reported that their hostilities diminished after sharing was instigated. All sharing parents interviewed reported that the paramount consideration was that each parent must respect the rights and needs of the children to have normal relations with the other parent."

A similar emphasis was conveyed to the legislators in correspondence from Virginia Anne Church, "It makes sense to me to design a therapeutic holding pattern, putting parents on notice that the children will continue to have two parents and that whether or not they love and desire to live with one another they will continue their responsibilities as parents, learning to cooperate, or forfeiting the rights to guide their children." Dr. Church is a psychologist, practicing attorney, former dean of a Chicago law school and past chairmen of the American Bar Association Committee on Marriage Counseling and Conciliation.

We are now in a period of transition. Chapter 915 of the Statutes of 1979 is being implemented. Implementation is being conducted by professionals in the several related fields who counseled, litigated and decreed under the former statute. Many are aware of the failures of the previous procedure, yet some retain a vested interest in past decisions and skepticism about the change. Until more experience is gained and new practitioners enter the field the transition may be uneven. The transition is not entirely the court's responsibility. As stated at the outset, the transition will be aided by the expectations of the parents prior to a court hearing conditioned by their awareness of the new statute. But, now we conclude with the caution of another parameter: the expectations of parents will also be conditioned by their impression of the court's implementation of the law's policy intent and precepts.

Literature and Sources

Throughout the 1970's articles and books for the professional and lay public about joint custody became available in at least three successive contents. First, during the early 1970's joint custody was acknowledged gradually in literature dealing primarily with the effects of divorce on children. By the mid-1970's literature specifically recognizing joint custody and advocating legitimization of joint custody appeared. Recently, a few literary works deal almost exclusively with the implementation of joint custody. Publications in the later category, that of 'how to' implementation handbooks, will probably become more numerous in the early 1980's. Temporarily, the relatively few 'how to' books reflect the concentration thus far by advocates in obtaining recognition of joint custody by legislatures and legitimization by statute. Having achieved legislative approval, those energies are now available for explanations, improvements, and implementation of joint parenting.

A comprehensive bibliography is available upon request from the author of this article.

Additionally, probably the most extensive, convenient and recent bibliography (September 16, 1979) itemizing 354 publications subdivided in 28 categories is available from its compiler, Richard C. Pasco, a newsletter editor of Equal Rights for Fathers, 235 College Avenue, Mountain View, California 94040.

A newcomer to the joint custody topic will find the following recent and relevant publications to be an efficient use of limited time. All were authored by specialists who gave their personal support and endorsement of AB 1480 to the California legislature and for signature into law by Governor Brown.

Diane Trombetta, Ph.D. and Betsey Warren Lebbos, Attorney at Law, "Co-Parenting: The Best Custody Solution," The Los Angeles Daily Journal Report, No. 79-12, pp. 11-23, June 22, 1979 and Conciliation Court Review, December 1979.

For the lawyer, parent and counselor, an annotated itemization of the effects of divorce and sole custody upon children and parents with references to joint custody solutions. An important and essential reference for individuals preparing to confront custody decisions in court.

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

Currently the most recent and pre-eminent guide to designing custody arrangements with particular emphasis on joint custody. Highly suitable for independent reading by estranged parents in demonstrating how joint custody plans are ahcieved even though divorced parents are not otherwise communicating.

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

A 'how to do it' handbook with suggestions for schedules, relationship with your ex-spouse, dealing with adjustment, and practical considerations. Lively, handy, fast-reading.

Ciji Ware, "Joint Custody: One Way to End the War," New West, pp 42-55, February 16, 1979.

Opens the imagination to various possibilities for joint custody through interviews with several co-parents in differing situations. Conveys an understanding of joint custody through personal experiences. The publication and distribution of this article to California legislators, concurrently with the distribution of the text that became AB 1480 was an important factor in securing attention for and approval of AB 1480. Ciji Ware is currently authoring a 'how to' handbook; I Win, You Win, to be published by Putnam in 1980.

Jay Folberg and Marva Graham, "Joint Custody of Children Following Divorce," University of California—Davis Law Review, Special Symposium on Children and the Law, May, 1979.

Analyzes the law of joint custody as well as its history, terminology and use. The concerns of attorneys, judges, and others are examined. Suggests criteria for joint custody and advocates its decree more often. An important guide for parents approaching court hearings and for legislative advocates. Jay Folberg, whose endorsement of AB 1480 was helpful in acquiring and reassuring legislator supporters of the measure, is a Professor of Law at Lewis and Clark College, Portland, Oregon, and Executive Director of the Association of Family Conciliation Courts.

Mel Roman and William Haddad, The Disposable Parent: The Case for Joint Custody. Holt, Rinehart and Winston, New York 1978.

A widely read book that has been instrumental in stopping the overburdening of a sole custodial parent and of creating ex-parents from non custodial parents. Melvin Roman, Ph.D., Professor of Psychiatry and Director of Group and Family Studies at the Albert Einstein College of Medicine is one of the nation's pioneering proponents of joint custory.

Isolina Ricci. The following four items by Isolina Ricci, the former director of family services in Santa Monica, California, and currently completing her Ph.D. dissertation at Stanford University, are useful in establishing the legitimacy of joint custody.

"Dispelling the Stereotype of the Broken Home," 12 Conciliation Courts Review 7, Iss. 2, 1976.
"Cooperative Parenting after Divorce: Myth or Reality?," Conference on the Divorcing Family, University of Southern California, Jan. 27, 1979, reported in Los Angeles Times, Jan. 3, 1979, Part IV at 4, Col. 2.
"Shared Custody," Conciliation Courts Review, January 1976. Mom's House, Dad's House, published source unknown.

Virginia Anne Church, Ph.D., Director, Institute for Rational Living, 2435 Ocean Avenue, San Francisco, California. Dr. Church, psychologist, counselor and lawyer, was one of the earliest pioneering professionals in vigorous advocacy of joint custody in Florida and California. Publications to be obtained directly from the Institute.

"A Rational Approach to Making Court-Ordered Counselling Work." Skill Training.
The Little Loser in the Victor's Circle, (Yet to be published).

CHAPTER 915

An act to amend Section 4600 of, and to add Section 4600.5 to, the Civil Code, relating to child custody.

[Approved by Governor September 21, 1979. Filed with Secretary of State September 22, 1979.]

Digest

AB 1480. Imbrecht. Child Custody.

Former law specified certain preferences in making an award of child custody. In making such an award the overriding concern, however, was the best interests of the child. There was no specific authorization for an award of joint custody and there was no presumption that joint custody was in the best interests of the child.

AB 1480 specified circumstances in which a presumption favoring an award of joint custody shall operate, as well as specifically authorizing such an award in other cases, as designated. AB 1480 also specified that access to records and information pertaining to a minor child shall not be denied to a parent because such person is not a child's custodial parent.

AB 1480 also incorporated further changes in Sec. 4600. Civ.C. by AB 167, contingent upon enactment and prior chaptering of AB 167.

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

SECTION 1. Section 4600 of the Civil Code is amended to read:

4600. (a) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

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

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

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

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

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

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

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

SEC. 2. Section 4600.5 is added to the Civil Code, to read:

4600.5. (a) There shall be a presumption, affecting the burden of proof, that joint custody is in the best interests of a minor child where the parents have agreed to an award of joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child or children of the marriage.

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

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

(c) For the purposes of this section, "joint custody" means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents; provided, however, that such order may award joint legal custody without awarding joint physical custody.

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

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

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

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

LAW OFFICES
Hedland, Fleischer & Friedman
A PROFESSIONAL CORPORATION
1016 WEST 6th AVENUE, SUITE 400
ANCHORAGE, ALASKA 99501

(907) 279-5528
(907) 276-3633

JOHN S. HEDLAND
HUGH W. FLEISCHER
SAUL R. FRIEDMAN
JAMES T. BRENNAN
JANALEE R. STRANDBERG
PATRICK M. ANDERSON
JAMES D. GRANDJEAN

March 19, 1981

Representative Don Clocksin
Alaska State Legislature
Health, Education & Social
Services Committee
Pouch V
Juneau, Alaska 99811

Re: House Bill No. 210

Dear Don:

I have had an opportunity to read and review House Bill No. 210, introduced by Representatives Rogers and Gardiner on February 23, 1981. I have in the past and am currently representing individuals who are strong, stable, and well respected members of the community who, through personal misfortune, are in the process of divorcing a spouse. A very strong concern of each and every client has been the preservation of their relationship with minor children. In particular, I am presently involved in a situation concerning an Alaska Native and a non-Native, with custody of an adopted Native child at issue. I have advised my client of the unwritten predisposition of courts in this state toward maternal custody, and of the courts' general reluctance to approve shared custody arrangements, but have nonetheless been requested to work out a shared custody arrangement. I am willing to encourage shared custody in this situation. I believe that, in a good number of circumstances, shared custody of minor children is far and away in the best interests of the child. This is particularly true where such an arrangement is mandated by the Legislature and neither party is under the misconception that a court will award an arrangement differently. This type of an arrangement, in my view, would force the parties to realize that they must deal with each other on a continuing basis until their child is of sufficient age to leave the home. As a result of my experience, I strongly urge adoption of House Bill 210, or a bill similar in substance, during this present legislative session.

Sincerely,

Patrick M. Anderson

PMA/clb

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

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

February 15, 1982

MEMORANDUM

TO: Representative Mike Beirne
Attn: Jody Sutherland

FROM: Christine Johnson, Research Staff

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

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

CJ

Attachment

SUBSTITUTE HOUSE BILL NO. 905

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

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

1 AN ACT Relating to child custody; amending section 9A.40.060,
2 chapter 260, Laws of 1975 1st ex. sess. and RCW
3 9A.40.060; amending section 19, chapter 157, Laws of 1973
4 1st ex. sess. and RCW 26.09.190; amending section 20,
5 chapter 157, Laws of 1973 1st ex. sess. and RCW
6 26.09.200; amending section 26, chapter 157, Laws of 1973
7 1st ex. sess. and RCW 26.09.260; amending section 28,
8 chapter 157, Laws of 1973 1st ex. sess. as amended by
9 section 4, chapter 32, Laws of 1975 and RCW 26.09.280;
10 amending section 9, chapter 50, Laws of 1949 and RCW
11 26.12.090; amending section 10, chapter 50, Laws of 1949
12 and RCW 26.12.100; amending section 12, chapter 50, Laws
13 of 1949 and RCW 26.12.120; amending section 18, chapter
14 50, Laws of 1949 and RCW 26.12.180; amending section 19,
15 chapter 50, Laws of 1949 and RCW 26.12.190; amending
16 section 20, chapter 50, Laws of 1949 and RCW 26.12.200;
17 adding new sections to chapter 26.09 RCW; creating a new
18 section; prescribing penalties; and providing an
19 effective date.

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

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

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

4 NEW SECTION. Sec. 2. There is added to chapter 26.09
5 RCW a new section to read as follows:
6 For the purposes of this chapter, "joint custody" means
7 an order awarding custody of the minor child or children to the
8 parties in such a way as to continue the sharing of parental
9 rights and responsibilities and to assure the child or children
10 of having frequent and continuing contact with the parties. In
11 its order, the court may award joint custody with or without
12 shared or alternating residential arrangements.

13 Sec. 3. Section 18, chapter 157, Laws of 1973 1st ex.
14 sess. and RCW 26.09.190 are each amended to read as follows:
15 The court shall determine custody in accordance with the
16 best interests of the child. The court shall consider all
17 relevant factors including:
18 (1) The wishes of the child's parent or parents as to
19 ((his)) joint or sole child custody and as to visitation
20 privileges;
21 (2) The wishes of the child as to ((his custodian))
22 custody and as to visitation privileges;
23 (3) The interaction and interrelationship of the child
24 ((with his)), the child's parent or parents, ((his)) the child's
25 siblings, and any other person who may significantly affect the
26 child's best interests;
27 (4) The child's adjustment to ((his)) the child's home,
28 school, and community; and
29 (5) The mental and physical health of all individuals
30 involved.
31 The court shall include written findings of fact as to these
32 relevant factors in any order in which custody is disputed. At
33 the request of either party or on its own motion, the court may
34 transfer the cause to the family court or refer the parties to
35 another counseling or mediation service of their choice for

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

7 NEW SECTION. Sec. 4. There is added to chapter 26.09
8 RCW a new section to read as follows:
9 In any temporary or final custody determination, the
10 parties shall submit to the court a plan for the implementation
11 of the final custody order. If the parties cannot agree on a
12 plan, then each party shall submit a proposed plan. The plan
13 shall include but not be limited to provisions for:
14 (1) Residential arrangements for the child;
15 (2) Financial resources in support of the child;
16 (3) Frequent and continuing contact with the parties
17 when such contact is appropriate;
18 (4) Subsequent amendments of the plan in the event of
19 the relocation of a party or other major changes affecting the
20 minor child; and
21 (5) Resolution of disputes which may arise between the
22 parties.

23 NEW SECTION. Sec. 5. There is added to chapter 26.09
24 RCW a new section to read as follows:
25 (1) A final order for joint custody shall include but
26 not be limited to:
27 (a) Written findings of fact by the court as to the
28 relevant factors in determining the best interests of the child
29 under RCW 26.09.190;
30 (b) The implementation plan ordered by the court
31 including but not limited to the following:
32 (i) Residential arrangements for the child;
33 (ii) Provisions for resources in support of the child;
34 (iii) Provisions for amendments to the implementation
35 plan adopted by the court; and

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

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

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

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

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

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

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

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

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

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

(1) The court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or ((his)) the child's custodian or joint custodian and that the modification is necessary to serve the best interests of the child.

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

(a) The custodian agrees to the modification;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 Sec. 11. Section 10, chapter 50, Laws of 1949 and RCW
8 26.12.100 are each amended to read as follows:
9 Prior to the filing of any action for ((divorce,
10 annulment--or--separate--maintenance)) dissolution of marriage,
11 legal separation, or declaration concerning the validity of a
12 marriage, either spouse or both spouses may file in the family
13 court a petition invoking the jurisdiction of the court for the
14 purpose of preserving the marriage by mediating or effecting a
15 reconciliation between the parties or for amicable settlement of
16 the controversy between the spouses so as to avoid further
17 litigation over the issue involved. Prior to the filing of any
18 action for child custody or modification of an order for child
19 custody, any party may file in the family court a petition
20 invoking the jurisdiction of the court for the purpose of
21 mediating or effecting an amicable settlement of the controversy
22 between the parties so as to avoid further litigation over the
23 issue involved. In any case where an action for ((divorce,
24 annulment--or--separate--maintenance)) dissolution of marriage,
25 legal separation, a declaration concerning the validity of a
26 marriage, child custody, or modification of an order for child
27 custody shall have been filed, either party thereto may by
28 petition filed therein have the cause transferred to the family
29 court for proceedings in the same manner as though action had
30 been instituted in the family court in the first instance.

31 Sec. 12. Section 12, chapter 50, Laws of 1949 and RCW
32 26.12.120 are each amended to read as follows:
33 The petition shall:
34 (1) Briefly allege that a controversy exists between the
35 ((spouses)) parties and request the aid of the family court to

1 mediate or effect a reconciliation or an amicable settlement of
2 the controversy;
3 (2) State the name and age of each minor child whose
4 welfare may be affected by the controversy;
5 (3) State the name and address of the petitioner or
6 petitioners;
7 (4) If the petition is presented by one ((spouse)) party
8 only, name the other ((spouse)) party as respondent and state
9 the address of that ((spouse)) party;
10 (5) Name any other person who has any relation to the
11 controversy and state the address of the person if known to the
12 petitioner; and
13 (6) State such other information as the court may by rule
14 require.

15 Sec. 13. Section 18, chapter 50, Laws of 1949 and RCW
16 26.12.180 are each amended to read as follows:
17 At or after hearing, the court may make such orders in
18 respect to the conduct of the spouses and the subject matter of
19 the controversy as the court deems necessary to preserve the
20 marriage ((or)), to mediate or implement the reconciliation of
21 the spouses, or to effect an amicable settlement of a
22 controversy involving child custody between the parties, but in
23 no event shall such orders be effective for more than thirty
24 days from the filing of the petition, unless the parties
25 mutually consent to an extension of such time.

26 Sec. 14. Section 19, chapter 50, Laws of 1949 and RCW
27 26.12.190 are each amended to read as follows:
28 During the period of thirty days after filing a petition
29 for conciliation no action for ((divorce, annulment or separate
30 maintenance)) dissolution of marriage, legal separation, a
31 declaration concerning the validity of a marriage, child
32 custody, or modification of an order for child custody shall be
33 filed by either ((spouse)) party and further proceedings in an
34 action then pending in the superior court shall be stayed and
35 the case transferred to the family court: PROVIDED, The family

1 court shall have full power in all pending cases to make, alter,
2 modify and enforce all temporary orders, orders for custody of
3 children, possession of property, attorneys' fees, suit money or
4 costs as may appear just and equitable; if, after the expiration
5 of such thirty day period or the formal conclusion of the
6 proceedings for conciliation, the controversy between the
7 ((spouses)) parties, in the meantime not having been terminated,
8 either ((spouse)) party may apply for ((divorce, annulment of
9 marriage, or separate maintenance)) dissolution of marriage,
10 legal separation, a declaration concerning the validity of a
11 marriage, child custody, or modification of an order for child
12 custody by filing in the clerk's office additional pleadings
13 complying with the requirements relating to ((divorce, annulment
14 of marriage, or separate maintenance)) dissolution of marriage,
15 legal separation, a declaration concerning the validity of a
16 marriage, child custody, or modification of an order for child
17 custody respectively, or by asking that the pending case be set
18 for trial; and the family court shall have full jurisdiction to
19 hear, try, and determine such action for ((divorce, annulment of
20 marriage, or separate maintenance)) dissolution of marriage,
21 legal separation, a declaration concerning the validity of a
22 marriage, child custody, or modification of an order for child
23 custody under the laws relating thereto, and to retain
24 jurisdiction of the case for further hearings on decrees or
25 orders to be made therein. The conciliation provisions of this
26 chapter may be used in regard to ((post-divorce)) post-
27 dissolution of marriage problems, concerning support, child
28 custody, visitation, contempt, or for modification based on
29 changed conditions, in the discretion of the family court.
30 The family court may retain jurisdiction in any
31 proceedings for a longer period than thirty days upon good cause
32 appearing therefor on its own motion for further conciliation or
33 upon application of either of the ((spouses)) parties, but in no
34 event shall retain jurisdiction more than ninety days without
35 the written consent of both ((spouses)) parties filed with the
36 court. Except as specifically so provided nothing in this

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

12 Sec. 15. Section 20, chapter 50, Laws of 1949 and RCW
13 26.12.200 are each amended to read as follows:
14 Whenever any action for ((divorce,-annulment-of--marriage
15 or---separate---maintenance)) dissolution of marriage, legal
16 separation, a declaration concerning the validity of a marriage,
17 child custody, or modification of an order for child custody is
18 filed in the superior court and it appears to the court at any
19 time during the pendency of the action that there is any minor
20 child of the ((spouses--or--of-either-of-them)) parties whose
21 welfare may be affected by the dissolution ((or-annulment-of-the
22 marriage)) of marriage, legal separation, declaration concerning
23 the validity of a marriage, the child custody proceedings, or
24 the disruption of the household, the case may be transferred to
25 the family court for proceedings for reconciliation of the
26 ((spouses)) parties, mediation, or amicable settlement of issues
27 in controversy in accordance with the provisions of this
28 chapter.

29 Sec. 16. Section 9A.40.050, chapter 260, Laws of 1975
30 1st ex. sess. and RCW 9A.40.050 are each amended to read as
31 follows:
32 (1) A person is guilty of custodial interference if,
33 knowing that she or he has no legal right to do so, she or he
34 takes ((or)) from, entices from, or refuses to return to lawful
35 custody any incompetent person or other person entrusted by

1 authority of law to the custody of another person or
2 institution.
3 (2) Custody shall include "residential care" where the
4 incompetent person or other person entrusted by authority of law
5 to the custody of another person or institution is the subject
6 of a joint custody order or decree.
7 (3) Custodial interference is a ((gross-misdemeanor))
8 class C felony.

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

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

MEN International of CALIFORNIA

DR. CARLO E. ABBRUZZESE
Director of Human Rights Commission
Treasurer

P.O. Box 6185
Santa Ana, CA 92706 (714) 547-3712

Men's Equality Now International, Inc.

SENT TO EVERY EMBASSY IN THE WORLD, THAT WAS SIGNATOR TO UNIVERSAL HUMAN RIGHTS DECLARATION, SWITE, 1954

His Excellency
The Ambassador of Netherland Antiles
Aruba Information Center
777 3rd Avenue
New York, N.Y.

March 31, 1978

Your Excellency:

We have been directed to appeal to you as representatives of a group of desperate fathers who are seeking political asylum for themselves and their children in countries like yours who sincerely cher sh the concepts of human rights and human dignity for their citizens.

Although the United States of America has signed both the United Nations Charter and the Universal Declaration of Human Rights, which provide protection for the family unit and for each member of the family, in practice fathers in our country, when involved in a divorce, are being deprived of their homes, of their children, of their incomes and of their dignity by our judiciary on a daily basis in a statistical proportion (91.6%) which by itself makes a prima facie case of sex discrimination.

Their God-given rights, their constitutional guarantees are being denied not only by the courts but even by the President and his close officials when they answer to our pleas: "Our main focus is on human rights in foreign policy not on domestic human rights. Just to quote Ms. Heidi Hanson, Special Assistant to the Coordinator for Human Rights and Humanitarian Affairs.

For these reasons we have denounced both the United States and Canada for violation of the Declaration of Human Rights and of the International Covenants and our petition was accepted by the United Nations in Geneva on November 28, 1977, when personally delivered by our Human Rights Commission Chairman, Dr. Carlo Abbruzzese.

Dr. Abbruzzese is a veteran in the fight for human rights, as he began his struggle against oppression during World War II when he worked in the underground helping hundreds of Jews and political dissidents seeking safety from Hitler's Gestapo.

It is very significant that Dr. Abbruzzese has repeatedly claimed that, when captured by the SS Police, he was treated with more dignity and justice by the Nazi judges and jailors than he was in the American Divorce Courts and jails.

Like thousands of our members he was illegally jailed twice without a jury trial for alleged contempt of court. He was stripped of his estate, robbed of his children, denied an appeal and humiliated beyond belief in solitary confinement, forced to assume debts and to surrender his passport - being a naturalized citizen - in order to purge himself of contempt and get out of jail. Unfortunately his situation is not unique as documented in our files: of the 237.00 cases which we have recently reviewed only 7.4% of the time were children awarded to their fathers.

To emphasize the crisis and the scope of the injustices please consider the following excerpt from a guide book on family law published by the family law committee of the Minnesota State Bar Association:

"Except in very rare cases the father should not have custody of the minor children of the parties. He is usually unqualified psychologically and emotionally; nor does he have the time and care to supervise the children. A lawyer not only does an injustice to himself, but he is unfair to his client, to the State, and to society if he gives any encouragement to the father that he should have custody of his children. A lawyer who encourages his client to file for custody, unless it is one of the classic exceptions, has difficulty collecting his fees, has a most unreasonable client, has taken the time of the court and the welfare agencies involved, and has put a burden on his legal brethern." (Minnesota Family Law Practice Manual Volume 50, page 75, 1970.)

One would hope this doctrine to be outdated but you will find the manual proudly displayed in every law library in Minnesota . Other State directories for attorneys are quite similar, at least by implication. Studies we have compiled in fact prove the very existence of the family unit is being threatened by the demoralizing and castrating of North American fathers by our judicial system. We offer our research skills and dedication to you in exchange for the right to raise our children.

Our organization consists of some 85 groups representing about 76,000 members who are dedicated to bringing justice and equality to the

divorce courts of North America. We have research that unequivocably destroys the erroneous premises promoted by officers of the court, Attorneys and State Bar Associations. In fact our research indicated that a father involvement is vital to the mental and emotional health of children from birth onward.

If your country is amicable to aiding our fathers on the run we will promise in exchange:

1. To carefully screen those fathers seeking asylum to guarantee that only the most dedicated and sincere are referred to you.

2. To submit resumes of the potential citizens to you so you can determine if they have skills and abilities that will enhance your own political and domestic needs.

3. To cooperate in any way possible to insure a mutually rewarding exchange of cultures, ideas and preservation of human rights.

Our members seeking political asylum represent common laborers, psychologists, journalists, technicians, medical doctors, and almost all other segments of society that could contribute substantially to your country and your society. Our people come to you in desperation seeking human rights, to work with you, not change you, as we seek political asylum for the North American father and his children.

To exploitation of the North American male and the destruction of the family unit by the United States Judicial System would be of purely American affair were it not for the deadly contagiousness of those attitudes. In fact, unfortunately, the economic hegemony of the United States influences not just the politics, science, research and culture of most other countries but, to a great extent, the social behavior of their populations. We sincerely believe the family units of the world and our western civilization are in danger of extinction if the current trend in North America is allowed to spread abroad. A final point I would like to bring to your consideration. America is made of many ethnic cultures and many of the members in our groups are even citizens of other countries. When the Divorce Courts in the United States are depriving the children of their fathers in 91.6% of times they are practically committing cultural genocide of the ethnic people.

Hoping to receive help from your country and awaiting for an answer to our petition. We remain.

Very truly yours,

Carlo E. Abbruzzese M.D.

CEA/rm

10606 Wilkins Avenue
Los Angeles, California 90024
(213) 475-5352
James A. Cook
President

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

April 13, 1981

Representative Brian Rogers
Nancy Lord
Alaska State Legislature
Pouch V
Juneau, Alaska 99881

Dear Representative Rogers
Nancy Lord

I have been remiss in moving more swiftly in response to your introduction of House Bill 10, the providing of joint, or shared, custody for the children of divorce.

As a direct aid in providing the pros and cons, and as recent information as is available about this issue within the legislative and judiciary process, I am enclosing a packet of applicable materials.

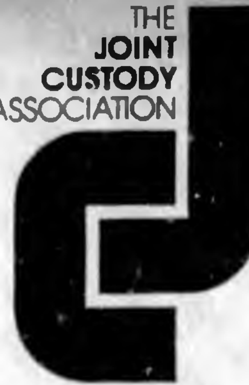
Since Representative Terry Gardiner also appears on the measure as one of the sponsors, I am taking the expediency of also sending a similar kit to his attention.

Among the materials is a brief critical inquiry about the Alaska proposal,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-peddle, or downgrade that particular proposal.

Regards,

RESEARCH



10606 Wilkins Avenue
Los Angeles, California 9002

Effects of

Child Custody Decisions by the Courts.

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

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

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

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

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

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

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

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

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

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

ANALYSIS OF FAMILIES WITH JOINT CUSTODY

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

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

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

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

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

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

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

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

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

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

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

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

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

DOCUMENTED EFFECTS OF SHARED PARENTING ON ADULTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

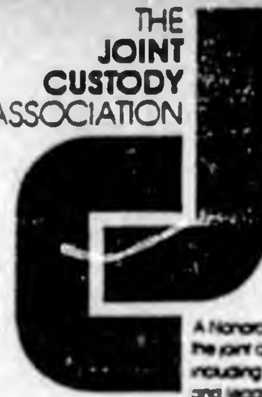
CUSTODY ALTERNATIVES & MEDIATION

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

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

Master, Model Joint Custody Statute

FOR UNIFORMITY NATIONWIDE



10606 Wilkins Avenue
Los Angeles, California 90024

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

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

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

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

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

POLICY — Section 1. Section 100. (a) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and that it is in the public interest to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

AT OUTSET & THEREAFTER — In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper.

PRIORITIES — (b) Custody should be awarded in the following order of preference, according to the best interests of the child.

1. To both parents jointly pursuant to Section 100.5

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

COOPERATION — 2. To either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex. The burden of

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

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

(4) To any other person or persons deemed by the court to be suitable and able to provide adequate and stable environment.

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

PRESUMPTION

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

(1) the parents nave agreed to an award of custody to one parent or so agree in open court at a hearing for the purpose of determining the custody of a minor child of the marriage or

(2) the court finds that joint custody would be detrimental to a particular child of a specific marriage.

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

REASONS

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

DEFINITIONS

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

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

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

<u>REASONS</u>

<u>MODIFICATION</u> to JOINT CUSTODY — (d) Any order for the custody of a minor child of a marriage entered by a court in this state or in any other state, subject to jurisdictional requirements, may be modified at any time to an order of joint custody in accordance with the provisions of this section.

<u>CONCILIATION</u> — (e) In jurisdictions having a private or publicly-supported conciliation service, the court or the parties may, at any time, pursuant to local rules of court, consult with the conciliation service for the purpose of assisting the parties to formulate a plan for implementation of the custody order or to resolve any controversy which has arisen in the implementation of a plan for custody.

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

- -

<u>Explanatory notes</u>

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

Initiating planning — To facilitate easing litigating parents into consideration of joint custody planning, you are encouraged to examine, and duplicate for distribution within the family court system, "Initiating Joint Custody Planning; Encouraging & facilitating joint physical and legal custody plans."*

Decree clauses — Joint custody provisions and clauses for decrees or agreements as a convenient reference for judges, attorneys and counselors can be found in "Decree or Agreement, Joint Custody Provisions & Clauses."*

Public pamphlet — A basic and explanatory booklet suitable for reproduction and distribution to parents filing for divorce, written in lay language and addressing the divorce process, is available in "Cooperative Parenting Following Dissolution: Your child needs both of you. Prepared by the Los Angeles Committee to Implemen California's Joint Custody Statute (Los Angeles Superior Court)."*

Best interests — "Best interests of a child" need not be specified within the statute in view of the on-going analysis and redetermination of what amounts to "best interests" and lest a listing of presumed "best interests" constitute an unconstitutional denia

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

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

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

Child's preference

It is not considered advisable that a child's preference, desire or wish be elicited from the child, under the pretext of 'best interests of a child,' as a prerequisite for court determination of custody because:
a. Such an action or supposition could vest with a child, at an impressionable age, and prior to a comprehension of the long-term consequences by the child, a sense of power or control or leverage over either or both parents and over the court system.
b. A decision predicated on a child's decision between two parents raises the spectre of an eventual guilt-feeling by the child regarding the excluded parent and the necessity of a custodial parent to reassure the child of the wisdom of excluding a parent.
c. By implying the power of decision by a child, the parents are unecessarily and unwisely thrown into a competitive situation to cater to and curry favor with the child in hopes of influencing a child's decision of one parent over another.

Criteria for joint custody

So-called criteria for determining the qualifications or suitability of one or both parents to be decreed joint custody, such as geographic convenience, association with friends, and adequacy of living quarters are not advisable to be specified in a statute. Such criteria have been widely debated and eventually dropped because:
a. definitive criteria that are largely the product of opinion or cultural viewpoint have the likelihood of being unconstitutional, and
b. a listing of criteria provokes litigating parents into envisioning methods for defeating joint custody and of scrutinizing comparisons and issues that could be used to belittle the opposite parent.

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

Supportive Background Materials

10606 Wilkins Avenue
Los Angeles, California 90024

James A. Cook
President

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

THE
JOINT
CUSTODY
ASSOCIATION

From the Joint Custody Association:

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

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

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

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

Decree or Agreement, Joint Custody Provisions & Clauses

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

Cooperative Parenting Following Dissolution: Your Child Needs Both of You

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

Research

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

Alaska State Legislature

House of Representatives

Committee on

Health, Education & Social Services

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

Feb. 23, 1982

Honorable Joe Hayes
Speaker, House or Representatives
Alaska State Legislature

Dear Mr. Speaker:

It is the desire of the Committee on Health, Education, and Social Services that this letter accompany CS for HB 210(HESS) to reflect Committee intent.

Persuant to Section 25.20.110, Award of Custody to Nonparent, the court shall have the discretion to award custody of the child to a non-parent if either conditions (1) or (2) are met.

Sincerely,

Representative Mike Beirne
Chairman

Alaska State Legislature

House of Representatives

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

January 27, 1982

Katie Green
6320 Lost Circle
Anchorage, Alaska 99502

Ms. Green:

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

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

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

Sincerely,

Joe D. Montgomery

cc: Rep. Beirne
Rep. Barnes

JDM:mjc

1/25/82

1/15/82

6320 LOST CIRCLE
ANCH. AK
99502

REPRESENTATIVE JOE MONTGOMERY
POUCH V
JUNEAU, AK
99811

DEAR MR. MONTGOMERY,

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

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

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

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

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

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

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

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

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

THANK-YOU AND I HOPE THIS LEGISLATIVE SESSION IS A SUCESSFUL ONE.

SINCERELY

Kathe Green

PLEASE NOTE: THE FOLLOWING PAGES WERE TREATED AS A UNIT IN THE ORIGINAL DOCUMENT.

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

Sidney Darion
Manager, Public Affairs

Dear Viewer:

Thank you very much for your interest in our DIRECTIONS program. Communications such as yours are very important guides to us in programming plans for the future.

We hope you will keep watching DIRECTIONS, and that you will continue to send us your reactions.

Sincerely yours,

Sid Darion

Manager of Cultural Affairs

SD:al

DIRECTIONS

Presents

THE WISDOM OF SOLOMON: THE CHILDREN OF DIVORCE

as broadcast over the

ABC TELEVISION NETWORK

Sunday, October 4, 1981

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

Executive Producer: Sid Darion

Correspondent: Herbert Kaplow

Copyright (c) American Broadcasting Companies, Inc. 1981

All Rights Reserved

THE WISDOM OF SOLOMON: THE CHILDREN OF DIVORCE

HERBERT KAPLOW:

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

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

CIJI WARE:

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

JUDGE DONALD KING:

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

(MORE)

JUDGE DONALD KING: (CONT)

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

HERBERT KAPLOW:

And that's where you need Solomon?

CIJI WARE:

And that's not joint custody.

JUDGE DONALD KING:

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

HERBERT KAPLOW:

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

JUDGE DONALD KING:

Absolutely, and that still is the case today.

CIJI WARE:

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

HERBERT KAPLOW:

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

JUDGE DONALD KING:

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

CIJI WARE:

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

HERBERT KAPLOW:

Well, why should this work?

JUDGE DONALD KING:

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

(MORE)

JUDGE DONALD KING: (CONT)

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

HERBERT KAPLOW:

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

JUDGE DONALD KING:

That's correct.

HERBERT KAPLOW:

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

JUDGE DONALD KING:

Okay

HERBERT KAPLOW:

Tell me what they are?

JUDGE DONALD KING:

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

HERBERT KAPLOW:

Uh, huh.

JUDGE DONALD KING:

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

(MORE)

JUDGE DONALD KING: (CONT)

And it was important not only because of its aspect of saying that it was legally appropriate to have parents be joint custody parents, but also because they had a very strong declaration that the public policy 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, i 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 pheonomen.. 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 1981, we've had one contested hearing on custody of visitation. All the rest have been resolved by helping the parents reach agreements as to what's best for their children.

HERBERT KAPLOW:

What about as a way out.

JUDGE DONALD KING:

And that's what we should be doing.

HERBERT KAPLOW:

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

CIJI WARE:

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

(MORE)

CIJI WARE: (CONT)

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

JUDGE DONALD KING:

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

HERBERT KAPLOW:

It is alleged by some critics of joint custody that in effect it confuses the child, forces the child to endure split loyalties. That it causes an 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 process that legally ends their marriage, they are very supportive of this process because it does keep the family together. Again, we're not divorcing the family. The legal relationship of the husband and wife has ended, but there's still a family there living in two locations, a mother and a father and a child who in some fashion is allocating his or her time with both parents. This maintains a family tie that is very beneficial for the children. And I think very beneficial to each parent. And our experience has been that the church groups are very supportive of this.

HERBERT KAPLOW:

Are they actually in the process 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 b[illegible] We really do need more data.