

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 86/2

7439 SENATE HEALTH EDUCATION & SOCIAL SERVICES



THE AMERICAN COUNCIL ON PHARMACEUTICAL EDUCATION

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January 1992

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* Succeeded Leonard J. DeMino, Vice President of Pharmacy, National Association of Chain Drug Stores, whose term of office ended July 1, 1990.

** Succeeded Robert K. Chalmers, Head, Department of Pharmacy Practice, Purdue University School of Pharmacy and Pharmacal Sciences, whose term of office ended July 1, 1990.



Alaska State Legislature

House of Representatives

Committee on Rules

P.O. Box V
Juneau, Alaska 99811

Phone:
(907) 465-3764
465-3765

Official Business

HB 31 APPLICANTS FOR PHARMACIST LICENSING

"An Act relating to applicants for pharmacist licenses."

SPONSOR: REPRESENTATIVE KOPONEN

HB 31 Bill History

01/12/91	24	(H)	PREFILE RELEASED
01/21/91	24	(H)	READ THE FIRST TIME - REFERRAL(S)
01/21/91	24	(H)	L&C, HES
05/03/91	1115	(H)	L&C RPT 1DP 4NR
05/03/91	1115	(H)	DP-FINKELSTEIN
05/03/91	1115	(H)	NR:TAYLOR,BRUCKMAN,IVAN,PARNELL
05/03/91	1115	(H)	-ZERO FISCAL NOTE (DCED) 5/3/91
05/13/91	1300	(H)	HES RPT 4DP 2NR
05/13/91	1300	(H)	DP-LINCOLN,CARNEY,C.DAVIS,B.DAVIS
05/13/91	1300	(H)	NR-HANLEY,GONZALES
05/13/91	1300	(H)	-PREV ZERO FN (DCED) 5/3/91
05/13/91	1300	(H)	REFERRED TO RULES
01/24/92		(H)	RLS RPT CS(RLS) NEW TITLE* 7DP
01/24/92		(H)	(DP: ELLIS,GRUSSENDORF,DAVIDSON,
01/24/92		(H)	GRUENBERG,TAYLOR,MARTIN,DONLEY)
01/24/92		(H)	-ZERO FISCAL NOTE (DCED) 1/24/92
01/24/92		(H)	REFERRED TO RLS

* CS HB 31 (RLS) Attached

HB 31 - House Labor & Commerce Committee Minutes April 25, 1991

Chair Finkelstein opened discussion on HB 31.

Number 122

REPRESENTATIVE NILO KOPONEN, prime sponsor of HB 31, testified. He explained the bill, noting that he had introduced it before. By allowing pharmacists who had received their training outside the U.S. to be licensed in Alaska, HB 31 would bring the practice of pharmacy into line with other health professions, and bring Alaska into line with a majority of other states.

Number 173

Rep. Parnell asked Rep. Koponen why the bill was changing the national organization it referred to, and if the two organizations were competitive at all.

Rep. Koponen stated that they served different purposes, and both backed the idea.

Chair Finkelstein opened discussion on HB 31.

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Rep. Koponen stated that they served different purposes, and both backed the idea.

Number 200

Ms. Boudreaux testified, stating the Department of Commerce and Economic Development (DCED) supported HB 31. She noted that the practice of allowing foreign education equivalents wasn't unusual, and that in Alaska, where a shortage of pharmacists existed, it was important to not narrow the scope of qualified applicants.

Number 218

Rep. Donley asked if the DCED had spoken with pharmacists concerning HB 31.

Ms. Boudreaux stated that the position paper on HB 31 was developed before she was hired, and she didn't know if they had been consulted.

Rep. Donley noted that several pharmacists had spoken to him with concerns about the proposed laws contained in HB 31.

Ms. Boudreaux stated that she would try to find out what their concerns were and get back to the committee. She also suggested that perhaps the requirement that the pharmacists be fluent in English had assuaged the Anchorage pharmacists concerns.

Number 264

Rep. Bruckman stated that she, too, had spoken with pharmacists and concerns had arisen. She asked Ms. Boudreaux if it would be appropriate to ask the DCED to write to the affected individuals to solicit comments.

Ms. Boudreaux stated that it wasn't the focus of the Division, and that, as professionals, pharmacists had organizational frameworks through which concerns could be expressed.

Number 294

Rep. Koponen stated that pharmacists had supported HB 31 in the past and they knew it had been introduced that session. He also noted that under current law, an Alaskan, who had gone to school in overseas to become a pharmacist, couldn't come back to Alaska and practice as a licensed pharmacist.

Rep. Bruckman asked Rep. Koponen how many states had laws similar to the ones proposed.

Rep. Koponen stated that a majority of them did.

Rep. Donley noted that those who had expressed support for HB 31 in the past weren't "rank and file" pharmacists, but managers.

Chair Finkelstein held HB 31 until Tuesday April 30.

HB 31 - House Labor & Commerce Committee Minutes April 30, 1991

Chair Finkelstein opened discussion on HB 31.

Number 606

Rep. Bruckman moved HB 31 pass from committee with individual recommendations.

Chair Finkelstein asked if there was any objection to moving HB 31 from committee with individual recommendations. There being none, HB 31 passed from committee with individual recommendations.

HB 31 - House HESS Committee Minutes May 13, 1991

REP. NILO KOPONEN, Prime Sponsor of HB 31, joined the Committee. Rep. Koponen stated that current law went back to Territorial days, and HB 31 would correct certain inequities in those laws.

(At this point the tape recorder stopped functioning, and

the remainder of the meeting, approximately five minutes, is unrecorded; however shorthand notes are available in the Hess Committee Room, Capital 106.)

Rep. Koponen stated that HB 31 would benefit one individual, an assistant hospital pharmacist, who was working as an assistant although technically she had higher training than the pharmacist, because of that defective law; that the individual involved was from Viet Nam and had been educated and trained in Paris. He believed the objections that had been voiced were based on her sex and race, rather than her qualifications. Rep. Koponen said that HB 31 would extend the same opportunity to pharmacists trained at non-United States institutions as to those who trained in the United States and met American standards of academic and clinical competence. He noted that Alaska was the only state which did not recognize foreign education.

Number 142

Rep. Hanley asked if language in Section 2 was "clean-up" language.

Rep. Koponen replied that it was; that Section 1, part 3, commencing at page 1, line 10, was pertinent new language.

Number 143

Rep. Carney moved to pass HB 31 with fiscal note from committee with individual recommendations. There was no objection, and it was so ordered.
The meeting adjourned at 9:07 a.m.

HB 31 - House Rules Committee Minutes January 23, 1992

Chairperson Ellis called the meeting of the House Rules Committee to order at 8:08 a.m. and noted that members present were Rep. Grussendorf, Rep. Martin, Rep. Taylor and Rep. Davidson. He announced that there were two items on the calendar, HB 31, "an Act relating to applicants for pharmacists licenses; and providing for an effective date", and HB 247 "An Act relating to licensure of dentists, including licensure by credentials; relating to the Board of Dental Examiners; and providing for an effective date." Chairperson Ellis noted for the record that Rep. Gruenberg joined the Committee. Chairperson Ellis announced that the first item for discussion would be HB 31 and invited Rep. Koponen to address the Committee.

REPRESENTATIVE KOPONEN joined the Committee and explained that essentially it was a technical amendment that sunsets at the same time the Board itself would sunset. Rep. Martin inquired as to the difference between the original version and the Rules version. Rep. Koponen responded that the only difference was the sunset. He

further explained that Section 1 would allow licensure of Alaskan's who have studied in foreign schools, Section 2 sunsets after a year of operation.

Number 244

Rep. Grussendorf moved to adopt the committee substitute for HB 31 (Rules). With no objections, the CS was before the Committee for discussion. Chairperson Ellis noted that Rep. Donley joined the Committee. Rep. Gruenberg expressed some confusion as to what had been added to the bill. Chairperson Ellis explained that the committee substitute includes a sunset.

Rep. Martin moved to pass CSHB 31 (Rules) out of Committee. Hearing no objection, it was so ordered.

H B

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FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. 68HB52

Revision Date: February 3, 1992
Title: Act relating to child support for
children who are not minors
Sponsor: Ulmer, B. Davis
Requestor: _____

Department Affected: Department of Revenue
BRU: Child Support Enforcement Division
Component: _____

COMPONENT SERIAL NO. | 1 | 1 | 1 |

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	44.4	46.6	49.1	51.8	54.7	57.1
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	3	0	0	0	0	0
LANDS & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	47.4	46.6	49.1	52.8	54.7	57.1
CAPITAL	0	0	0	0	0	0
REVENUE	26.9	27.2	27.5	27.7	28.0	28.3
*FUND SOURCE: 1004	23.6	23.9	24.2	24.4	24.7	25.0
FUND SOURCE: 1016	3.3	3.3	3.3	3.3	3.3	3.3

UNDING: (Thousands of Dollars)

GENERAL FUND	16.1	15.8	16.7	17.6	18.6	19.4
FEDERAL FUNDS	31.3	30.8	32.4	34.2	36.1	37.7
OTHER	0					
FUND SOURCE:	0					
TOTAL	47.4	46.6	49.1	51.8	54.7	57.1

POSITIONS:

FULL-TIME	1	1	1	1	1	1
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

estimate of current year impact: 0

ANALYSIS: See attached analysis.

Prepared By: Teri D. Mahoney Phone: 263-6279
Division: Child Support Enforcement Division Date: February 3, 1992

Approved by Commissioner: Darrel J. Rexwinkel Date: 2/3/92
Agency: Department of Revenue

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, Com/OSR, Gov. Legis. Off., & impacted agency(ies).

**FISCAL NOTE ANALYSIS
CHILD SUPPORT ENFORCEMENT DIVISION
BUDGET COMPONENT #111
PAGE 2 OF 2**

Reference: HB 52 Child support for children who are not minors

Summary:

This bill would allow the court to order support for 18 year old dependent children who are actively pursuing a high school diploma or vocational training. Support orders for these children would enable CSED to collect support for children over age 18, including children who are receiving public assistance benefits. The Division of Public Assistance grants AFDC benefits to children who are over eighteen and enrolled in school (and expected to graduate before age 19).

Assumptions:

HB 52 will increase child supports collections in AFDC (public assistance) cases and increase the amount of incentives that the State receives from the Federal Government.

Average benefit payment	\$341 per month
41 children with an average support payment of	\$200 per month
Collection rate of	24%

Based on these assumptions, CSED would collect an additional \$23,616 in these AFDC cases the first year. CSED projects an increase in collections of 1% per year.

Positions:

One Child Support Enforcement Officer I at \$44.4 with a 4.5% increase per year.

Other Expenditures:

One time cost of equipment and computer terminal: \$3.0.

Funding:

Funding for the CSED's operating costs is 66% Federal funding and 34% State General Fund Match.

Economic Impact:

Child Support collections in AFDC cases are deposited in the general fund to help pay the State's AFDC General Fund Match. In addition, the State receives Federal incentives for its child support collections, both AFDC and non-AFDC. This would increase incentives by \$3.3 in the first year based on the above assumptions.

Alaska State Legislature

HOUSE OF REPRESENTATIVES



REPRESENTATIVE FRAN ULMER

MEMORANDUM

April 21, 1992

TO: Senator Arliss Sturgulewski, Chair
Senate Health, Education and Social Services Committee

FROM: Rep. Fran Ulmer

RE: SSHB/52(am), relating to child support for non-minors

SSHB 52 makes a small adjustment to child support statutes in order to provide child support for unmarried, 18 year old children who are living as dependents and actively pursuing a high school diploma. Support may be authorized until the child finishes high school or reaches 19 years of age, whichever comes earlier.

Currently, courts are authorized to order child support only for minor children. The result is that many Alaska children must complete their final year of high school without the benefit of financial support from the non-custodial parent. Some families in this situation have applied for Aid to Families with Dependent Children which provides for public assistance payments until the child completes high school or reaches age 19. SSHB 52 would eliminate the need for those families to apply to the state for assistance or would allow the state to collect child support as repayment for assistance received by those families whose 18 year old children are still in school.

For those children with developmental disabilities who may require additional years to complete secondary school, current law already provides the authority to award continuing support payments for a handicapped adult child. *Streb v. Streb*, 774 P.2d 798 (Alaska 1989).

SSHB 52 uses AFDC guidelines in regard to non-minor assistance payments to establish upper limits for the duration of child support. It affirms the importance of completing secondary education and the need for the support of children to be borne equitably by both parents.

SSHB 52 was amended in the House to allow child support for 18 year old children to be paid directly to the child on terms considered appropriate by the court or the Child Support Enforcement Agency. This provision was included in the bill with the assumption that the 18 year old child was old enough to responsibly administer child support funds himself. However, because the custodial parent is, by law, the "administrator" of all child support funds paid on behalf of the child, he or she can be held liable for the disposition of funds paid directly to the 18 year old child. I would urge the committee to adopt the attached amendment which removes the custodial parent as administrator of child support paid directly to the 18 year old child.



The concept for this legislation was recommended by the Family Support Task Force. SSHB 52 has a positive impact on the state's finances and will result in a net gain of \$10.9.

Alaska State Legislature

HOUSE OF REPRESENTATIVES



REPRESENTATIVE FRAN ULMER

MEMORANDUM

April 3, 1992

TO: Rep. Arliss Sturgulewski, Chair
Senate Health, Education and Social Services Committee

FROM: Rep. Fran Ulmer

RE: SSHB 52, child support for post-majority children

I would like to request a hearing for SSHB 52, authorizing child support for unmarried, 18 year old, dependent children actively pursuing a high school diploma. Support may be authorized until the child finishes high school or reaches 19 years of age, whichever comes earlier. Passage of this bill will eliminate the current practice of dependent 18 year old children receiving public assistance from the state because their child support has stopped.

I hope the Senate HESS Committee will find room on its agenda soon to hear this bill.

Thank you for your consideration of this request.



Sponsor Substitute for HB 52 (am)
Sectional Analysis

Section 1. A court appointed representative for a child under the age of 19 whose interests may be affected by a divorce may attend divorce mediation conferences.

Section 2. While divorce litigation is pending, the court is authorized to order reasonable support for unmarried children under the age of 19 who are actively pursuing a high school diploma and who are living as dependents with a parent or guardian.

Section 3. Provides that a judgment may be modified regarding child support for unmarried children under the age of 19 who are actively pursuing a high school diploma.

Section 4. Requires post-majority support to be included, among other items, as issues covered by dissolution agreements.

Section 5. Among other items, a dissolution petition must state the marital and educational status of each child under the age of 19 born to or adopted by the petitioners.

Section 6. A petition for dissolution may be dismissed, or an action continued, if a representative of an unmarried child under the age of 19 objects to a term providing, or failing to provide, support.

Section 7. In an action involving the custody, support or visitation of a child, the court may appoint someone to represent a child under the age of 19 who is actively pursuing a high school diploma or its equivalent and living as a dependent.

Section 8. Replaces the word "minor" with the word "child" regarding the appointment of a person to provide guardian ad litem services in divorce proceedings.

Section 9. Allows court ordered child support for unmarried 18 year old children to be paid directly to the child on terms considered appropriate by the court.

Section 10. Allows child support established administratively by the Child Support Enforcement Agency to be paid directly to the child on terms considered appropriate by the agency.

Section 11. Deletes the word "minor" from "minor child" in regard to the court's authority to order parents to assign to the custodian of the child the portion of salary or wages sufficient to pay the ordered child support.

Section 12. Deletes the word "minor" from "minor child" in regard to subrogated child support orders.

adopted

7-LS0438J.1
Lauterbach
04/21/92

AMENDMENT

OFFERED IN THE SENATE

TO: SSHB 52 am

Page 5, after line 21:

Insert a new bill section to read:

**** Sec. 10.** AS 25.27.060(a) is amended to read:

(a) Unless otherwise provided under AS 25.24.910 or AS 25.27.061, an [AN] order of support establishes a relationship by which the custodian of the child is the administrator for the purposes of administering child support on behalf of the child. The court shall carefully consider the need for support, the ability of both parents to meet such support obligations, the extent to which the parents supported the child before divorce, and the economic ability of the parents to pay after separation and divorce. The court shall also consider the effect on the support obligation of a change in custodian. The need of the child for support shall be considered regardless of the sex of the parent awarded custody of the child."

Renumber the following bill sections accordingly.

THE ASSOCIATION FOR CHILDREN FOR
ENFORCEMENT OF SUPPORT (ACES)

ALASKA CHAPTER
P. O. Box 92910
Anchorage, Alaska 99509
(907) 274-2010

May 3, 1991

Representative Georgianna Lincoln
House HESS Co-Chair
P. O. Box V
Juneau, AK. 99811

Dear Rep. Lincoln:

The Alaska Chapter of ACES encourages all HESS members to vote DO PASS on HB52.

There are many children in the school system who turn 18 (the age of majority) during their senior year in school. My own son turns 18 only three weeks after starting his senior year. Custodial parents do not relinquish their financial responsibilities while their child is a senior in high school, despite the fact that they may turn 18 years old. It doesn't seem fair that non-custodial parents, however, no longer have a responsibility at that point.

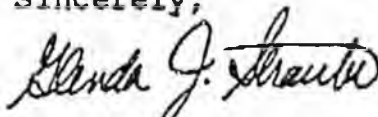
To say the least, the senior year in high school is the most expensive year in a child's life. It is already sad to watch so many of them go without the basic needs, much less the humiliation of not being able to afford to engage in any senior social activities - for lack of funds.

And this problem is only going to get worse since new laws have made it clear that kids will be starting school later, so it is a given that eventually all kids will turn at least 18 years old while they're in high school.

The provision for financial help with a college education will also help Alaskan kids. Since it is not mandatory, and merely allows that issue to be considered before the courts, we encourage you to support that option also.

Alaskan children and custodial parents thank you for your consideration of this bill. Please vote YES.

Sincerely,



Glenda J. Straube
Volunteer Coordinator

JAN 10, 1992

REP. FRAN ULMER

PO BOX V

JUNEAU, AK 99811-3100

RE: HB 52 (SPONSOR SUBSTITUTE)

DEAR FRAN,

THANK YOU FOR CLARIFYING MY CONCERNS ABOUT THE POST-MAJORITY CHILD SUPPORT BILL.

I SUPPORT THE SPONSOR SUBSTITUTE AS WRITTEN AND HOPE YOU WILL SUBMIT IT TO THE LEGISLATURE.

IT IS ALSO MY HOPE THAT THIS BILL WILL NOT BE ALTERED, AS IT PASSES THROUGH COMMITTEES, TO ADD UNFAIR BURDENS ON NON-CUSTODIAL FAMILIES AND CHILDREN THAT THE STATE WOULD NOT ALSO EQUALLY IMPOSE UPON CUSTODIAL FAMILIES AND THEIR CHILDREN. AS YOU KNOW, ALL PERSONS INCLUDING CHILDREN ARE GAURENTEED EQUAL TREATMENT, OPPORTUNITIES, AND PROTECTION UNDER THE LAW.

ON JAN 8, 1992 THE LEGISLATIVE COMMITTEE OF THE GOVERNOR'S COMMISSION ON CHILDREN AND YOUTH DISCUSSED THIS BILL, AND WE PLAN TO CONTINUE THE DISCUSSION AT OUR NEXT MEETING IN LATE JANUARY.

I BELIEVE THIS BILL IS GOOD PUBLIC POLICY AND I WILL ADVOCATE FOR IT AT EVERY OPPORTUNITY.

SINCERELY,

Steve Stucke

UPDATE

Altering the Boundaries of Child Support

by Jeff Ball

Introduction

If one thinks of child support as a cube, one can visualize how recent changes in legislation, case law and philosophy have transmogrified the once-static cube into an expanding elastic shape. If the length of the cube represents the longevity of one's duty to support a child, the width the spectrum of persons having a potential duty of support, and the depth the amount of the duty, including the degree to which non-monetary benefits may be considered as part of the obligation, one can see how all three dimensions are being stretched beyond past borders.

Three separate occurrences have played dominant roles in the degree of fluctuation the cube has recently undergone. The first event was the nationwide reduction in the age of majority from 21 to 18, and the resultant reduction in the length of the support duty in most states. While a few states such as Mississippi and Colorado still use 21 as the age of majority,¹ most states lowered the legal threshold of adulthood to 18 soon after the U.S. Constitution was amended to lower the voting age to 18 in federal elections.² Consequently, many states adjusted the termination of the obligor's responsibility to support the child to the lower age, though some states such as New York did not.³ This created a gray area in which a child may still be dependent on parents for support without any entitlement to it. For instance, if a child is attending high school at age 18 and living at home, he or she would not be entitled to support in states that equate emancipation with age of majority. Most states have adjusted their termination date to take into account post-minority children who are still dependents.⁴ In several states this date has gone beyond a child's completion of secondary education to college or vocational training.⁵ Additionally, parents of adult children who are dependent due to a physical or mental disability may be liable for support in most states.⁶

This ties into the second driving influence in the reshaping of child support — a movement to ensure that someone is responsible for a dependent child,



preferably someone close to the child and not the state. A combination of the conservative philosophy of weaning dependents from state dependence and liberal interest in ensuring that persons who inadequately care for themselves receive support has resulted in safeguards when the primary obligor or obligors cannot provide sufficient support for their children. Step-parents in many states are being held liable for the support of their non-adopted step-children when there is an enduring implicit or explicit parent/child relationship formed and the natural absent parent is not fully supporting the child.⁷ In some states step-parent liability exists as long as the natural parent of the child remains married to the step-parent.⁸ In some cases grandparents are facing liability to support grandchildren who are born to teenaged parents.⁹ The use of the doctrine of *in loco parentis* has led to findings of financial liability of persons who are not next of kin although they fill that role.¹⁰ Clearly the movement is in the direction of holding responsible for support those who have had a substantial, long-term influence on the child.

Another cause for expansion of the cube is the increasing awareness that support awards have, historically, inadequately represented the costs of raising a child, especially the skyrocketing costs of providing children with medical and dental needs.¹¹ As a response, many states are re-examining their methods for computing the support award amount, resulting in significant increases in many instances over what would have been awarded in the past. It appears that the federal government's mandate that all states have support guidelines has accelerated this review.

This article will examine the first two dimensions of the support cube, the length of the support duty and the breadth of responsibility of that duty.

The Length of the Support Duty

From the days of Blackstone and Kent, the law has recognized the duty of parents to support their children.¹³ This common law duty terminated upon emancipation, which either meant living independently from the family,¹⁴ marrying,¹⁵ or reaching a state-determined age at which the rights and responsibilities of adulthood were conferred, invariably age 21.¹⁶

Several states have long recognized the power of parties to contract for support duty that exceeded the statutory duty, and to have that agreement incorporated into a judicially-enforceable court order.¹⁷ Additionally, some states, such as Tennessee and Wyoming, have had judicially-created doctrines entitling adult children who are incapacitated to support from their parents.¹⁸

About 20 years ago, when the youth movement in America was powerful, arguments were made that someone old enough to be drafted should be allowed to vote. Congress passed and two-thirds of the states ratified the 26th Amendment to the U.S. Constitution, which lowered the voting age in federal elections to 18.¹⁹ An avalanche of state legislative activity followed in which states not only lowered the age entitling one to vote in a state election to 18, but also reduced the age of majority to 18.²⁰ The reduction created confusion and litigation regarding then-current orders in which the duty of support lasted until the child reached the age of majority. Did this mean 21 or 18? Case law is divided whether the reduction affected existing orders and agreements in which no age was specified. A child's attaining the age of 18 became the end of the obligor's support duty in many states.²¹

Education Beyond Majority Age

When the age of majority was 21, few cases outside those involving disabled adult children resulted in litigation of the extension of the support duty. Children had finished high school by 21; most children in college were almost finished. Those out of school were supporting themselves by 21. When the age of majority was reduced generally to 18 in the early and mid-seventies, a group of quasi-dependent, healthy children emerged that did not fit under either a blanket dependency or independence niche. These children were either attending high school, college, or vocational school, looking for work or making wages that were too low to sustain self-sufficiency. As housing and rental costs have outpaced inflation since the mid-seventies,

many 18 through 20-years olds cannot afford to live independently of their parents, even many of those with jobs.

Many states have altered their support duty laws to encompass those cases in which it is fair to presume dependency, such as an unmarried child finishing high school and living at home.²² Of course many children do not complete high school by their 18th birthday, and many states have opted not to place high school students in the position of choosing education or work. Some states require that support continue until a child is 19 or finishes high school or its equivalent, whichever occurs first.²³ Other states leave post-minority support decisions to the discretion of the court.²⁴

When it comes to forcing an adult child to choose between post-secondary education and work, or a combination of the two, states vary in their responses. Some states view education of one's child as a paramount parental duty, even if the child would be too old to receive support if not in school.²⁵

Other states review the circumstances of each case and leave it to the discretion of the court to determine whether a support duty exists.²⁶ These states take into account promises made or reasonable expectations the child had of parent-supported, post-secondary education, as well as the financial means of the parents and the child's immediate capacity for full or partial self-support. An interesting situation arises where a duty exists to pay college expenses for a child of divorced parents while one does not exist for a child in similar circumstances of nonseparated parents.²⁷

Another value judgment made in many of these cases has to do with determining the likelihood that, if the family had remained unified, the child would have gone to college and had his or her education bankrolled by the family. Many courts look at family background to see if one can auger a duty.²⁸ A situation may arise where a child of well-educated parents who has little academic potential may be entitled to continued support while a more gifted child from a modest family background may not.

Still some other states do not allow the courts to assert jurisdiction over post-minority children unless the parents had signed a separation agreement incorporated in a court order that provides for adult child support, particularly college expenses.²⁹ The theory is that parties are free to extend a support duty, while the court ensures that there is a minimal duty of support owed while the child is a minor.

Disability

Physical or mental disabilities in an adult child are common exceptions to the termination of sup-

port duty upon the child reaching adulthood.³⁰ Where states diverge is the degree to which the adult child must be mentally or physically disabled, functionally dependent on others, and destitute in order to qualify or continue to qualify for support.³¹

Some states look at the disability factor alone, determining that an adult child found to be at least marginally handicapped is entitled ultimately to parental support.³² A few states include emotionally-dysfunctioning adult children in their definitions of disabled children for the purpose of finding a parental duty of support.³³

States also disagree about the necessity of the disability occurring during the child's minority in order to justify a post-minority support obligation. Some states contend that there cannot be a springing duty of support after an interim of no duty, so that an adult child who becomes disabled would not have recourse to make a support claim against one or both parents.³⁴ Others reason that the need of the child is the determining factor, not the age at which the disability began.³⁵

Dependency

Some states find a support duty if the child is or remains dependent on the obligor. This broad catch-all category may include disabled adult children as well as adult children attending school.³⁶ It may also include children who are indigent, receiving public assistance or unemployed.³⁷ Often a state that has a law requiring a parent to support an indigent child regardless of the child's age to the best of the parent's ability has a reciprocal duty emanating from the child to the parent if the parent is indigent.³⁸

Premature Termination of the Support Duty

So far this article has reviewed ways to elongate a support duty past the age of majority. At the same time, myriad precedents exist for terminating a support duty before a child reaches the age of majority. With duty often based on the premise that support is tied to dependency, both emotionally and financially, parents of children who manifest independence may find themselves without a child support duty. When a child marries, enters the armed services, lives independently of his or her parents, earns enough to be self-sufficient, or is emancipated officially by a court, the parental support duty may be severed.³⁹ Generally, duty termination requires actions by the minor child that indicate independence; a parent may not unilaterally or even through agreement with the other parent absolve himself or

herself of the support duty for a minor child. Courts, ever the third party to a domestic relations matter, have long been hesitant to sanction a parent's attempt to possibly jeopardize a child's welfare by permitting a premature termination of a support duty without strong signs that a minor child will be self-sufficient.⁴⁰

Armed Services

To paraphrase an old adage, the army will make a man (or woman) out of you. Enlisting in the armed services is considered in many states as an act of independence sufficient to support a termination of the parental support duty.⁴¹ Other states require more proof of self-sufficiency than merely the act of enlisting.⁴² Also, since most states have lowered their age of majority to 18, and one cannot enlist in the armed services before 18, the issue of emancipation is mainly academic. In states such as New York where a support duty extends until the child is 21, the issue is still important. Although there is no military draft at this time, and its abolition coincided roughly with the time the age of emancipation and support duty length were lowered in most states to the 18th birthday of the child, it is interesting to speculate whether an involuntary act by a child such as reporting lawfully to the armed services branch that drafted him (or her) would also be grounds for termination of the parent's support duty.

Marriage

In most states, to be pronounced husband and wife is to be pronounced independent of the couple's parents, regardless of the couple's capability to fend for themselves.⁴³ Although considered a prime indicium of self-sufficiency, the marriage ceremony of course does not by itself instill in minor children the ability to function without financial and often emotional support from either set of parents. As a result, some states do not find marriage itself an "emancipating" act, without further proof of the couple's independence.⁴⁴ Indeed, when minor newlyweds expecting a child move in with parents, the financial responsibilities may measurably increase for the parents.

Independent Living

When a minor child voluntarily moves out of his or her parents' home, establishes an independent means of financial support, and acts in a responsible manner that leads one to conclude the child can function adequately in an adult world, the justification for a parent's continued support duty often

ends, and courts will sometimes terminate the legal duty.⁴⁵ Some courts, constrained by statute and precedent, will not find a minor capable of self support regardless of the evidence.⁴⁶ Also, some states require an affirmative court action brought by the responsible parent to terminate the support duty and will not retroactively reduce the arrearages accrued since the date of independence.⁴⁷ Indeed, federal law requires states, as a condition of continuing to receive federal welfare money, to prohibit retroactive modification of accrued arrearages, as each support installment past due is to be considered vested.⁴⁸ Thus a child may earn more than a parent responsible for his or her support and yet the support duty continues until the parent takes steps to terminate it.

Determining whether a child is independent for support purposes generally hinges on the facts of each case. A minor child may live in his or her parents' home and yet the court may still find that the child is independent and the parent's support duty terminated. A minor child may live away from home in a college dormitory or with some friends and the court may still find a parental duty of support. It boils down to a court determining whether it will allow a parent to abrogate a duty prematurely, and if so, under what conditions and presumptions.

Death of a Parent

When an obligor parent dies, does his or her support duty automatically end? States are split on this point, some finding that death terminates all responsibility⁴⁹ and others finding that the obligor's estate may be liable.⁵⁰

In many states with a history of county responsibility for "public charges," the county is statutorily authorized to proceed against the estate of the deceased obligor to collect reimbursement for any county aid provided to the decedent's child.⁵¹ Other states allow the surviving parent to collect from the decedent's estate for past, current and future support, the latter usually as a lump sum.⁵²

The Breadth of the Support Duty — Who is Liable?

Parents

Traditionally, the father was responsible for the support of his minor child.⁵³ Over the last several decades the responsibility has broadened to include

both mother and father, either as the custodial parent or non-custodial parent.⁵⁴ The law has moved away from placing the father only in the center of the family circle, from whom all duties emanate and to whom all responsibilities are owed. Although several states still have possibly unconstitutional language stressing gender distinction, the trend has been to classify duty neutrally by referring to the parent-child relationship itself and the capability of either or both parents to support the child adequately. Also, the distinction between the support duty of fathers of children born out of wedlock and that of fathers at one time or another married to the child's mother has for the most part disappeared, as the children born out of wedlock have received favorable treatment from the U.S. Supreme Court over the past two decades in equal protection cases.⁵⁵

Another interesting consideration is the existence of a parental duty of support when neither parent has legal custody of the child, such as when a custody order ends at 18 or when parents are living together. Is there a support duty to these parents' adult children if they are attending college? Does it matter whether or not the adult child selected a path that was with parental blessings? States vary as to whether a duty exists in such circumstances.⁵⁶

Step-parents

As divorce has become a common phenomenon in America, many children live with spouses of their custodial parents who are not the children's natural parents. Step-parent liability is now a major issue affecting millions of children. Some states impose step-parent liability by statute,⁵⁷ while others have used estoppel and *in loco parentis* principles to create a common law duty.⁵⁸ Estoppel theory comes into play when a step-parent has held him or herself out to be the natural father of the child or has totally assumed a parental role for a long period of time. The latter concept is the basis for the *in loco parentis* theory of liability. It is clear that children adopted by step-parents have the same rights of support from the adoptive step-parent as if the step-parent were a natural parent.

Some states look to the natural parent who is absent from the household as the primary obligor, with the step-parent secondarily liable.⁵⁹ Other states place the liability on both step-parent and natural parent, which is sometimes implicitly done by taking into account the contribution of the step-parent to the payment of the child's expenses and the step-parent's income when determining the natural parent's liability.⁶⁰

Most states tend to terminate the step-parent duty when the relationship between step-parent and

natural parent legally ends, such as by divorce or death.⁶¹ Some states have said that separation does not by itself terminate a step-parent's support duty; there must be a lawful divorce to sever the ties.⁶² States using equity principles may be more likely to terminate a duty when the step-parent/step-child relationship ends or at least fades in intensity, be it before or after an official dissolution.⁶³

Cohabitants

A few states have statutes that make live-in partners of the custodial parent at least secondarily liable for the support of the custodial parent's child.⁶⁴ Cohabitants, who at common law had no duty, often have close relationships with their partners' children, creating in many cases surrogate parencies. This fairly recent addition to the breadth of duty may primarily be linked to the welfare system's byproduct in many states — aid available only to those families whose heads of household are not legally married.⁶⁵ As a consequence, several states want to make sure that the cohabitant faces the same degree of liability as would a natural parent. Also, as a result of a nationwide trend toward more extramarital cohabitation, many children are brought up in homes analogous to a step-parent/natural parent situation except for the lack of a marriage vow between the heads of household. In many of those cases, the cohabitant acts *in loco parentis* to the child.

Grandparents and Other Relatives

Very few states hold grandparents liable for the support of their grandchildren.⁶⁶ Grandparent liability sometimes attaches when the child of the grandparent is a minor at the time the grandchild is born and the child is not married or financially independent.⁶⁷ Some states have dependency laws to cover incapacity or indigency of family members beyond the spouse or issue of the parent.⁶⁸ The idea of extended family liability is not new to many cultures, including many ones indigenous to America. The liability of a grandparent or other relative invariably arises only when the liability of the natural parent, step-parent or *in loco parentis* parent is unenforceable.

Conclusion

Reality shows that children do not automatically become independent, fully-functioning adults upon a birthday or upon the taking of a marriage vow. In

a world more complex (albeit less harsh) than that faced by our predecessors, where children may be less innocent of "adult" ways but remain by and large unsophisticated in the rudiments of "getting by and making a living," a large percentage of post-minority youths lack the immediate and sometimes long-term ability to survive independently. The financial and emotional dependencies of these adult children have not gone overlooked by states, especially in the years following the wholesale lowering of the presumptive age of majority from 21 to 18. Family law has traditionally followed equitable principles, and the extension of a support duty to those who are still dependent owed by those who can best provide it accentuates the triumph of fairness over rigidity. The gray areas persist, though, as what is fair to one person becomes unfair to another, where one person's necessities are another person's luxuries, and where a person whose philosophy may be to teach independence to a child faces legal liability for support until the child is motivated to accept the provider's lesson. One example of the dilemma is determining the "fairness" of holding a modest-income, absent-parent liable for the entire cost of sending a child to private college when the parent may have insisted the child go to a public college or pay for much of his or her education if the absent parent had remained part of the child's household. Is it relevant whether there is a family history of post-secondary school attendance or if the child has shown exceptional academic promise? The issue goes beyond dependency to expectation. It is dealing with this politically-charged area of expectation that courts and legislatures may face their most difficult hurdle, as deciding a family's expectation of entitlement may unavoidably be a very subjective determination. The support cube's boundaries still appear to be fluctuating, often on a case-to-case basis.

Mr. Ball is an assistant director of the ABA Child Support Project, located in Washington, D.C.

Footnotes

1. See, e.g., *In re Plummer*, 703 P.2d 657 (Colo. Ct. App. 1985); *Taylor v. Taylor*, 478 So.2d 310 (Miss. 1985).
2. U.S. CONST. AMEND. 26.
3. N.Y. DOM. REL. LAW § 3-A-31 (Uniform Support of Dependents Law).
4. See, e.g., *Verna v. Verna*, 288 Pa. Super. 511, 432 A.2d 630 (1981); S.C. CODE ANN. § 20-7-90.
5. See IOWA CODE ANN. 598.1 (2); VT. STAT. ANN. tit. 15, § 201.
6. See, e.g., *Feinberg v. Diamant*, 378 Mass. 171, 369

- N.E.2d 998 (1979); Eckenroed v. Eckenroed, 668 S.W. 2d 104 (Mo. Ct. App. 1984).
7. N.D. CENT. CODE § 140-09-09; OR. REV. STAT. § 109.053.
 8. VT. STAT. ANN. tit. 15, § 296; WASH. REV. CODE ANN. § 26.16.205.
 9. Rhodes v. Rhodes, 305 So. 2d 352 (La. Ct. App. 1974); Skeens v. Paterno, 60 Md. App. 48, 480 A.2d 820 (1984).
 10. DEL. CODE ANN. tit. 13, § 501(b); VT. STAT. ANN. tit. 15, § 294.
 11. See generally, R. Williams, Development of Guidelines for Child Support Orders (1987).
 12. 42 U.S.C. § 667 (1987).
 13. Blackstone's Commentaries (Lewis ed.) 419; Kent on American Law 190.
 14. IND. CODE ANN. § 31-1-11.5-12(d); MO. REV. STAT. § 454.460.
 15. C.v.R., 169 N.J. Super. 168, 404 A.2d 366 (1979); Church v. Hancock, 261 N.C. 764, 136 S.E. 2d 81 (1964).
 16. Blair v. Brewington, 445 So. 2d 294 (Ala. 1983).
 17. Gersten v. Gersten, 281 So. 2d 607 (Fla. Dist. Ct. App. 1973); McClain v. McClain, 235 Ga. 417, 211 S.E. 2d 561 (1975).
 18. Sayne v. Sayne, 39 Tenn. App. 422, 284 S.W. 2d 309 (1956); Kamp v. Kamp, 640 P. 2d 48 (Wyo. 1982).
 19. U.S. CONST. AMEND. 26.
 20. MONT. CODE ANN. § 40-5-201; OHIO REV. CODE ANN. § 3109.5.
 21. See, e.g., CONN. GEN. STAT. ANN. § 46b-215; Oviatt v. Oviatt, 43 Mich. App. 628, 204 N.W. 2d 753 (1972).
 22. See, e.g., TENN. CODE ANN. § 34-1-101; TEX. FAM. CODE ANN. § 4.02.
 23. CAL. CIV. CODE § 196; S.D. CODIFIED LAWS ANN. § 25-5-18.1.
 24. See, e.g., Evans v. Evans, 456 So. 2d 956 (Fla. Dist. Ct. App. 1984).
 25. See, e.g., IOWA CODE ANN. § 598.1(2).
 26. Nicolls v. Nicolls, 371 A. 2d 400 (Conn. 1977); Sakovits v. Sakovits, 178 N.J. Super. 623, 429 A. 2d 1091 (1981).
 27. In re Marriage of Urban, 293 N.W. 2d 198 (Iowa 1980).
 28. See, e.g., Wagner v. Wagner, 286 S.C. 489, 335 S.E. 2d 246 (1985).
 29. See, e.g., Kotler v. Spaulding, 4 Mass. App. Ct. 515, 510 N.E. 2d 770.
 30. ARIZ. REV. STAT. ANN. § 25-320B; In re Koltay, 646 P. 2d 405 (Colo. Ct. App. 1982), *aff'd*, 667 P. 2d 1374 (Colo. 1983).
 31. Feinberg v. Diamant, 378 Mass. 171, 389 N.E. 2d 998 (1979), compare with Sayne v. Sayne, 39 Tenn. App. 422, 284 S.W. 2d 309 (1956).
 32. See, e.g., Rose v. Rubenstein, 693 S.W. 2d 580 (Tex. Ct. App. 1985).
 33. Sayne v. Sayne, 39 Tenn. App. 422, 284 S.W. 2d 309 (1956); Com. ex rel Magaziner v. Magaziner, 419 A. 2d 149 (Pa. Super. Ct. 1980).
 34. Kamp v. Kamp, 640 P. 2d 48 (Wyo. 1982); Taylor v. Taylor, 478 So. 2d 310 (Miss. 1985); OHIO REV. CODE ANN. § 3109.5; TEX. FAM. CODE ANN. § 14.05(b); NEV. REV. STAT. § 125B.110.1.
 35. ARIZ. REV. STAT. ANN. § 25-320B; N.H. REV. STAT. ANN. § 546-A; Sininger v. Sininger, 300 Md. 604, 479 A. 2d 1354 (1984).
 36. DEL. CODE ANN. tit. 13, § 503; Blair v. Brewington, 445 So. 2d 294 (Ala. 1983); S.C. CODE ANN. § 20-7-90.
 37. ALASKA STAT. § 25.20.030; IDAHO CODE § 32-1001.
 38. CAL. CIV. CODE § 206; DEL. CODE ANN. tit. 13, § 505.
 39. MO. REV. STAT. § 453.400; MONT. CODE ANN. § 40-5-201.
 40. See, e.g., Bernier v. Bernier, 125 N.H. 517, 484 A. 2d 1088 (1984).
 41. MO. REV. STAT. § 454.460; N.C. GEN. STAT. § 110-129.
 42. See, e.g., Baker v. Baker, 217 Kan. 319, 537 P. 2d 171 (1975).
 43. See, e.g., C.v.R., 169 N.J. Super. 168, 404 A. 2d 366 (N.J. Ch. 1979); Going v. Going, 8 Tenn. App. 690 (Tenn. Ct. App. 1926).
 44. Embree v. Embree, 85 Idaho 443, 380 P. 2d 216 (1963); UTAH CODE ANN. § 78-45-2(4).
 45. MASS GEN. LAWS ANN. ch. 208, § 28; Bernier v. Bernier, 125 N.H. 517, 484 A. 2d 1088 (1984).
 46. In re Marriage of Hughes, 734 S.W. 2d 280 (Mo. Ct. App. 1987).
 47. Baker v. Baker, 217 Kan. 319, 537 P. 2d 171 (1975); Johnson v. Johnson, 215 Neb. 689, 340 N.W. 2d 393 (1983).
 48. 42 U.S.C. § 666(a)(9).
 49. Reinhardt v. Reinhardt, 131 So. 2d 509 (Fla. Dist. Ct. App. 1961); TEX. FAM. CODE ANN. § 14.05(d).
 50. N.M. STAT. ANN. § 40-5-14; Caldwell v. Caldwell, 5 Wis. 2d 146, 92 N.W. 2d 356 (1958).
 51. MONT. CODE ANN. § 40-5-201; S.D. CODIFIED LAWS ANN. § 25-7-14.
 52. ILL. REV. STAT. ch. 40, § 510(c); NEV. REV. STAT. § 125B.130.
 53. N.C. GEN. STAT. § 50-134(b).
 54. OR. REV. STAT. § 109.030; WASH. REV. CODE ANN. § 26.16.205.
 55. Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).
 56. Dubroc v. Dubroc, 284 So. 2d 869 (La. Ct. App. 1973); Hoffman v. Hoffman, 122 A.D. 2d 583, 505 N.Y.S. 2d 273, appeal dismissed, 69 N.Y. 2d 706, 504 N.E. 2d 398 (1986); Childers v. Childers, 89 Wash. 2d 575 P. 2d 201 (1978).
 57. MO. REV. STAT. § 453.400; N.Y. DOM. REL. LAW § 3-A-31 (Uniform Support of Dependents Law); N.D. CENT. CODE § 14-09-09.
 58. A.S. v. B.S., 150 N.J. Super. 122, 374 A. 2d 1259 (1976); Niesen v. Niesen, 38 Wis. 2d 599, 157 N.W., 2d 660 (1968).
 59. Byers v. Byers, 618 P.O. 2d 930 (Okla. 1980); OR. REV. STAT. § 109.053; S.D. CODIFIED LAWS ANN. § 25-7-8.
 60. See, e.g., Ewing v. May, 705 S.W. 2d 910 (Ky. 1986); Guidelines in Determining Child Support as adopted by the State of Hawaii Department of the Judiciary.
 61. OR. REV. STAT. § 109.053; VT. STAT. ANN. tit. 15, § 296.
 62. Stahl v. Dep't of Social and Health Services, 43 Wash. App. 401, 717 P. 2d 320 (Wash. Ct. App. 1986).

H B

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FISCAL NOTE

STATE OF ALASKA
1992 LEGISLATIVE SESSION

BILL NO. HB 93

Revisor Date: February 7, 1992
Title: An Act eliminating a requirement that a court consider the findings and recommendations of a neutral mediator when awarding shared child custody.
Sponsor: House Judiciary Committee
Requestor: _____

Department Affected: Department of Revenue
BRU: Child Support Enforcement Division
Component: _____

COMPONENT SERIAL NO. | 1 | 1 | 1 |

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LANDS & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	(68.4)	(68.4)	(68.4)	(68.4)	(68.4)	(68.4)
FUND SOURCE: 1004	(60.0)	(60.0)	(60.0)	(60.0)	(60.0)	(60.0)
FUND SOURCE: 1016	(8.4)	(8.4)	(8.4)	(8.4)	(8.4)	(8.4)

FUNDING: (Thousands of Dollars)


GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
FUND SOURCE:	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: See attached analysis.

Prepared By: Teri D. Mahaney  Phone: 263-6279
Division: Child Support Enforcement Division Date: February 7, 1992

Approved by Commissioner: Darrel J. Rexwinkel
Agency: Department of Revenue Date: _____

Distribution (by preparer): Log. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Rev 10/07/91

Page 1 of 2

FISCAL NOTE ANALYSIS
CHILD SUPPORT ENFORCEMENT DIVISION
BUDGET COMPONENT #111
PAGE 2 OF 2

Reference: HB 93

Summary:

Child support obligation of obligors receiving Federal disability benefits would be reduced by the amount of child's benefit.

Assumptions:

100 children receiving AFDC and Federal disability benefits each month.
Child support collection of \$50 per case per month.

Based on these assumptions, the State's reimbursement for AFDC payments to the child would decrease \$60,000 per year. Federal incentive payments would decrease \$8,400 per year.

Economic Impact:

HB 93 will decrease child support collections in AFDC (public assistance) cases and decrease the amount of incentives that the State receives from the Federal government.

Child support collections in AFDC cases are deposited in the General Fund to help pay the State's AFDC General Fund Match. In addition, the State receives Federal incentives for its child support collections, both AFDC and non-AFDC. Incentives for non-AFDC collections are also based on the amount of AFDC collections; a decrease in AFDC collections will decrease the incentives for both AFDC and non-AFDC collections.

HB 93 will decrease State revenue by \$68,400 per year.

TDM:tmr

Page 2 of 2



Official Business

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

University - Midtown, District 10

(907) 465-2647

State Capitol, Rm. 12S
Juneau, AK 99801-1152

TO: Senator Arliss Sturgulewski, Chair
Senate Health, Education, & Social Services

FROM: Representative Max Gruenberg *MG*
Representative Cheri Davis *CD*
Representative Kevin "Pat" Parnell *Parnell*

DATE: April 14, 1992

SUBJECT: Request for Scheduling of House Bill 93 amended.

We hereby request scheduling for a committee hearing of HB 93am, "An Act eliminating a requirement that a court consider the findings and recommendations of a neutral mediator when awarding shared child custody; relating to court orders concerning control of a minor's property rights in child custody proceedings; allowing a grandparent or other person to petition a court for visitation rights with a child;..."

Each of us has a portion of HB 93am, which are listed as follows:

Rep. Gruenberg: Would eliminate the current requirement that the court system has to consider the findings of a neutral mediator when awarding child custody.

Rep. Parnell: The second concept will allow the court to designate which parent can file for the permanent fund dividend check on behalf of a minor child, to eliminate the current double-filing that often exists.

Rep. C. Davis: The third issue is the right of grandparents to petition the superior court for an order establishing reasonable rights of visitation between the grandparent and the child.

Thank you for your consideration of this request.



Official Business

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Kevin "Pat" Parnell

University - Midtown, District 10

(907) 465-2647

State Capitol, Rm. 128
Juneau, AK 99801-1182

SPONSOR STATEMENT

CSHB 93am [as amended by HB 397]

Currently in the State of Alaska, there is a trend existing in which parents or guardians of a unemancipated child, are both filing for the Permanent Fund Dividend Checks on behalf of the said child. The present law allows for any parent or guardian to file for their child, and when this co-filing occurs, the check is held until the matter can be solved by the Department of Revenue, Permanent Fund Dividend Division.

According to the Department of Revenue figures, this has resulted in almost 200 disputed cases in 1991, with approximately \$341,000 of Permanent Fund Dividend checks being held from the past years.

This trend can be attributed to many factors, none that can be documented clearly. They include parents or guardians not knowing the other party has filed; believing the other party will use the money inappropriately on behalf of the child; and co-filing to hold up the check for cause of spite.

Whichever the reason, the children are not receiving their checks which are rightly due to them. CSHB 93am as amended by HB 397 would allow the court to specify which party has authority to claim the permanent fund dividend check on behalf of said minor child. This would occur when a court determines or approves custody of a child, including any actions to award temporary custody or modification thereof.

I urge your support in this matter, as the primary people being affected are children. I see no reason why they should not be entitled to their money as are the rest of Alaskan residents.

ALASKA STATE LEGISLATURE

ELECTIVE DISTRICT 1

HYDER
KETCHIKAN
KUPREANOF
MEYERS CHUCK
PETERSBURG
SAXMAN
WRANGELL



HOME

P.O. BOX 5723
KETCHIKAN, AK 99901
PHONE 225-6304

DURING SESSION

P.O. BOX V
STATE CAPITOL BUILDING
JUNEAU, AK 99811
PHONE 465-3424

Representative Cheri L. Davis

SPONSOR STATEMENT FOR CSHB 93 (As amended by HB 136)

Sections one and two of of CSHB 93 address the issue of visitation rights for grandparents.

Current Alaska Statutes allow grandparents to petition the court to allow visitation with their grandchildren in the event of a divorce.

Sections one and two of this legislation will allow a child's grandparents the right to petition the superior court for an order establishing reasonable rights of visitation between the grandparent and the child, even if no divorce or dissolution has taken place.

Grandparents often provide the support children need, especially when there is instability in the child's home.

Furthermore, in the event of a divorce, this bill will allow the court to consider visitation by grandparents and other persons in addition to the parent's visitation agreement.

The intent of this bill is to keep foremost the best interests of the children and to insure grandparents have a right to petition the courts for visitation rights.

ANALYSIS OF H.B. 136 (GRANDPARENTS' VISITATION BILL)I. PROPOSED AMENDMENT TO A.S. 25.20.060(a)

Section 1 amends A.S. 25.20.060(a). This statute applies when parents (married or unmarried) are separated and cannot agree on custody and visitation. The proposed amendment in Section 1 of the bill would appear to give grandparents and "other persons" rights only if the parents have already initiated litigation in a fight between themselves.

A. The Bill Substitutes the State's Decision for the Parents' Regarding Children's Best Interests

Under Section 1 of the bill, the parents lose the right to decide whether grandparents' or "other persons'" visitation is in the best interests of their children. The parents do not have to be in disagreement on the visitation issue. If both parents object to grandparents' (or "other person's) visitation, they lose their right to decide this issue once the complaint is made to the court.

The court does not have to find that the parents have abused their discretion before it can substitute its opinion. All it takes is for a grandparent or "other person" to disagree with the parents, and the parents lose their right to decide.

B. Taking Away Parental Decision-Making is a Radical Departure and Probably Unconstitutional

Under present law, a court can only substitute its decision regarding a child's best interest when there is parental wrongdoing or in cases of necessity. For example, under Title 25, the court decides custody and visitation out of necessity, that is, when parents are separated and cannot agree. A.S. 25.20.060(a) [separation of parents and disagreement over custody]; A.S. 25.24.150 [divorce or legal separation where parents disagree on custody, and cases where one or both parents have abused]. However, in marriage dissolution, which requires parental agreement on all issues, the court cannot substitute its opinion regarding custody and visitation. Under A.S. 25.24.220(g), the court can only change the custody/visitation agreement if "both parents agree." If the court objects to the agreement, all it can do is not approve it.

In children's court cases, the court can substitute its opinion regarding the best interests of children only if there is wrongdoing. In Child in Need of Aid cases, the State must prove parental "abuse or neglect" before the court can override parental decision-making. In juvenile delinquency cases, the State must prove criminal conduct by the minor, which also means

parental failure to instruct and supervise, before the court can impose its opinion on what is best for the child.

q3+
H.B. 136 should be compared to current case law. When a non-parent disputes custody with a parent, the non-parent must prove, by a preponderance of the evidence, that parental custody would be "clearly detrimental to the child." Britt v. Britt, 567 P.2d 308 (Alaska 1977). H.B. 136, however, requires no proof that parents have abused their discretion; there is no burden of proof on the grandparent or "other person" that the parents' decision will hurt the child; there is no standard of proof (e.g., preponderance of the evidence, clear and convincing evidence, or proof beyond a reasonable doubt) that must be met before the court substitutes its opinion for that of the parents'.

q3+
Section 1 of H.B. 136 changes the relationship between parents and the State. Under Section 1 of the bill, even if both parents object to visitation by grandparents or "other persons," the court can substitute its opinion without any proof of wrongdoing or showing of necessity.

There is no zone of privacy more fundamental than parents' decision-making over the best interests of their children. Meyer v. Nebraska, 262 U.S. 390 (1923) (the Supreme Court allowed a teacher, who was convicted of teaching in German, to successfully assert "the rights of the parents to engage him to so instruct their children"). Pierce v. Society of Sisters, 268 U.S. 510 (1925) (the Supreme Court struck down a state law requiring attendance at public schools because it interfered with the parents' decision to send their children to a private, parochial school).

C. The Bill Lacks Standards to Guide the Court

The legislature has provided detailed guidelines or criteria that the court must use in deciding the best interests of children when parents fight over custody or visitation. A.S. 25.24.150(c). As the legislature has recognized, clear standards are essential to keep a judge's opinion from becoming too subjective.

However, Section 1 of the bill gives no standards in disputes between parents on the one hand and grandparents (or "other persons") on the other. In parental disputes, the court must consider past abuse and must look to the quality of the established parent-child relations ("the love and affection existing between the child and each parent"), and the "child's preference." A.S. 25.24.150(c). No similar standards apply to grandparents under this bill.

If the legislature wants the State to take over parental decision-making, in the absence of parental wrongdoing or

necessity, then it is essential for the legislature to establish guidelines.

D. Who Are the "Other Persons"?

Under the bill, parents lose the right to decide their children's best interest not only when grandparents complain about visitation but also when "other persons" complain. Who are these "other persons" that this legislature is concerned about? Under H.B. 136, any boyfriend, girlfriend (whether teenager or adult), religious group (Moonies, Hare Krishna, etc.), music teacher, soccer coach, anybody, can complain about the parent's decision, and once they complain, the parents lose their right to decide.

Legislation should be a solution to a problem, and if the legislature cannot define the problem any more precisely than "other persons," then the problem is not defined well enough to attempt a legislative solution.

E. Does the Legislature Intend to Make Visitation Mandatory Upon Grandparents and "Other Persons" Over Their Objection?

The language of Section 1 of the bill appears to give the court power to force grandparents (and "other persons") to visit over their objections. The proposed amended language says: "The court shall provide for visitation," rather than shall provide for the right to visit. I doubt the Grandparents' Lobby really intends to take away grandparent decision-making, although if the best interest of the child really is what this bill is concerned with, then why not force grandparents to visit? If this is what the legislature wants, then the other sections of the bill should be changed to permit parents to make grandparent visitation not only a right of grandparents but also a legally enforceable responsibility.

F. The Bill is not Tied Into the Existing Statutory Scheme Regarding Mediation and Award of Attorney Fees

Section 1 of the bill does not tie into the other provisions of the existing statutory scheme. The statutes concerning mediation (A.S. 25.20.080), the awarding of attorney fees (A.S. 25.20.115), and attorney fees for the representation of the children (A.S. 25.24.310(b)) only speak in terms of the responsibilities of "parents." H.B. 136 is "all rights and no responsibilities" for grandparents. Why does the legislature want to exempt grandparents (and "other persons") from the responsibilities, and costs, of mediation and attorney fees?

II. PROPOSED NEW STATUTE 25.20.065

A. The Bill Substitutes Parents' Decision-Making Even When the Family is Intact and United Against Grandparent Visitation

Section 2 of the bill adds a new statute which is more revolutionary than the first section. Under the proposed new statute, grandparents do not have to wait for parents to separate and engage in custody litigation, but can themselves initiate litigation even when the parents are living happily together and united in opposition to the grandparents' visitation demands. (Section 2 does not apply to "other persons," however.)

Under Section 2, grandparents can get visitation even if they have no established relationship with the grandchild. Compare this with the "best interest" standards the court applies in disputes between parents: The court must consider the quality (the "love and affection") existing between parent and child. A.S. 25.24.150(c)(4). It is one thing for a court to order continuation of an existing relationship, but quite another to order the creation of a new relationship or expansion of a relationship, especially over the united opposition of an intact family. This is an example of the need for the legislature to establish criterion to guide the court's decision-making. Proposed 25.20.065(1), which gives grandparents the right to force a new relationship, is an increased level of intrusion into family privacy.

B. The Bill Gives Rights to Grandparents But Does Not Recognize Rights of Parents as Individuals or as a Family Unit

When the family is intact (the parents living harmoniously together) or when the parents are united in their opposition to visitation, there are vital social interests at stake beyond those of the "best interests of the child." Parents have rights as individuals, and the family unit also has a right to protection. If grandparent visitation decisions only balance direct negative impact on the child with the grandparents' rights to visit, the court will give insufficient consideration to indirect negative impacts: that is, the negative impact on one or both parents and upon the family unit. Once again, here is the need for legislative guidelines.

Under current law, when parents are separated and fighting over custody, the court can only consider factors which "directly affect the well-being of the child." A.S. 25.24.150(d). But the societal interests at stake are different when the family is intact, and the legislature must recognize these other societal interests. Serious conflicts between parents and grandparents will affect one or both parents and could also create tensions which could hurt the child, as well as the marriage itself. Does the legislature want the judge to exclude considerations of these

indirect effects upon the child or to consider them? Does the legislature want the court to consider the negative effect that forced grandparent visitation will have on one or both parents, even if it will not, on balance, hurt the child?

Don't parents, as individuals, have rights, too, that must be considered when grandparent (or "other persons") visitation is at issue? Under current law, in dissolution agreements regarding custody and visitation, the court considers not only the best interest of the child but also the rights of each parent. The court examines dissolution agreements to be sure they "are just as between spouses and in the best interest of the child." A.S. 25.24.220(d)(2). Is it also not proper for the court to consider what is "just" as to a parent in cases of grandparent visitation disputes, especially when the parents are living together and in agreement against grandparent visitation?

In order to keep families together, it is essential to think of the family as a unit that must be protected and supported. If courts concentrate narrowly on the best interest of the child, they will lose sight of the bigger picture: In the long run, the child's (and society's) interests are advanced by keeping the parent-child unit as strong as possible. This is recognized in the Indian Child Welfare Act, which prohibits State removal of children for their best interests unless the State is actively working to reunite the family. 25 U.S.C.A. 1912(d) states:

"Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the break-up of the Indian family and that these efforts have proved unsuccessful."

Under current children's court law, courts must consider other interests in addition to the child's. Disposition orders in delinquency cases must consider the "best interests of the child and the public." A.S. 47.10.082. In the extension of custody in CINA and delinquency cases, the court must decide if "extension is in the best interests of the minor and the public." A.S. 47.10.080(c)(1). These statutes recognize that, in the long run, children will be hurt if court decisions do not consider the child's interests within the full context of other vital social interests.

The parent-child relationship, that is, the family, is so vital that its best interests must also be focused upon if the long-range interests of children are to be really protected.

43

Section 2 of H.B. 136 gives no consideration to, nor protection of, the family unit. The bill gives rights to grandparents but does not balance their rights with those of the

family unit or of the parents as individuals. Again, it is vital for the legislature to provide guidelines to the courts on what factors it must consider in deciding family disputes.

C. The Bill Radically Upsets Adoption Law

Section 2 of the bill will deprive adoptive families of security against interference by relatives of the natural parents. Public policy requires the encouragement of adoptions and the supporting of adoptive parents as they work to build a family. Adoptive families must be protected from unwanted intrusions by relatives of the natural parents. Present law gives adoptive parents this protection, but H.B. 136 takes it away.

Under current law, adoption protects the new family by cutting all ties with the family of the natural parents (except for inheritance under special circumstances). A.S. - 25.23.130(a)(1):

"The adopted person thereafter is a stranger to the former relatives for all purposes."

However, this same statute is flexible. It allows the old and new families to agree to an "open adoption." A.S. 25.23.130(c):

"Nothing in this Chapter prohibits an adoption that allows visitation between the adopted person and the person's natural parent or relatives."

⁹³H.B. 136 will allow a natural grandparent to sue the adoptive family at any time to gain access to the child (which is no longer legally a relative to them). All the natural grandparent has to do is to skip the adoption hearing, and they can sue. Proposed A.S. 25.20.065(b)(1):

"A grandparent may petition... if the grandparent did not request the court to grant visitation rights during the proceedings under... A.S. 25.23 [the adoption chapter]."

Does the legislature really want to allow this attack on adoptive families?

D. The Bill is Incoherent

Proposed A.S. 25.20.065(a) states that grandparents can sue for visitation "except as provided in (c) of this section." Unfortunately, my copy of the bill has no subsection (c). What evil lurks in subsection (c) only The Shadow knows.

E. Section 2 of the Bill Contains Other Problems as Already Discussed

Section 2 of the bill contains the same problems as Section 1:

- (1) The right to decide the child's best interest is taken away from the parents without any showing of wrongdoing or necessity,
- (2) There are no standards to guide the judge,
- (3) The subsection is probably unconstitutional for violating the privacy rights of the family.

III. PROPOSED AMENDMENT TO A.S. 25.24.220(d)

Section 3 of the bill amends the statute on dissolutions of marriage. It does not give the court power to order the parents to change a dissolution agreement to include grandparent or "other person" visitation over the parents' objection. [However, Section 2 of this bill does give a grandparent (and "other person") the right to upset the parents' united decision. Also, subsection (4) of this bill specifically allows the court in a dissolution proceeding to substitute its opinion over the united opposition of the parents.] Section 3 of the bill gives the court power to reject the dissolution agreement if it disagrees with the parents' united decision regarding visitation by grandparents and "other persons."

This section of the bill will also allow grandparents and "other persons" to appear as litigants in the dissolution proceedings. This will create the two problems that the dissolution procedure has been designed to avoid: the emotional strain and economic drain to parents who are able to terminate their marriage amicably.

Section 3 of the bill is also "all rights and no responsibilities" for the grandparents. There is no provision for mediation or for payment of costs and attorneys' fees. They can stir up litigation, create enormous emotional and financial problems for the parents (and the children), but the bill does not impose responsibilities on the grandparents. See, A.S. 25.20.080, 25.20.115, and 25.24.310(b) for "parents'" responsibilities.

As discussed in the comments regarding Section 1 of the bill, this section does not require the court to consider what is "just" as between the parents and the grandparents (or the "other persons"). Nor does the court consider what is best for the family unit. The bill allows a judge to replace parental decision-making without any showing of wrongdoing (including abuse of parental discretion) or necessity and even when parents are united in their decision regarding the children's best interests.

Furthermore, the court will make its decision without any legislative guidelines or standards.

IV. PROPOSED AMENDMENTS TO A.S. 25.24.220(g)

Section 4 of the bill allows the court, in a dissolution proceeding, to substitute its opinion regarding a child's best interests for the parents' decision when grandparents or "other persons" complain. Proposed subsection (1) states that:

"Notwithstanding A.S. 25.24.220(g), the court can order visitation."

Since subsection (g) prohibits the court from overriding the parents' dissolution agreement, the sole purpose of this amendment is to allow the court to replace the united decision of the parents whenever a grandparent or "other person" disagrees with the parents' decision.

V. THE BILL IGNORES THE PROBLEM AND ONLY ADDRESSES THE SYMPTOM

Grandparents have visitation problems only when there is a serious breakdown in their relations with their adult children. This bill is not aimed at the problem of grandparent-parent discord. The bill does not provide mediation or counseling services which could help restore extended family harmony. Forcing parents to comply with visitation orders they object to, after the expense and stress of fighting the grandparents in court, will not create harmony, and the forced visitation will occur in an atmosphere that will certainly adversely affect children. If the State is going to get involved in extended family disputes over child-rearing, it is better to force them into counseling, with the hope that this will produce voluntary visitation plans.

The only legitimate concern that grandparents can have is when parents, in a bitter divorce or child custody battle, will use denial of grandparent visitation as a weapon against the other parent. However, present law already can handle this situation. Under A.S. 25.24.150(c) the court can consider one parent's retaliatory actions and make appropriate orders at the request of the other parent. However, if grandparents feel that this statute does not sufficiently handle this problem, then the legislature can add a specific and narrow amendment to the statute. *Note that AS 25.24.150(c) already provides for "visitation by grandparents and other persons."*

At some point, we have to face the fact that government cannot solve every problem. We must set budget priorities as well as leave some spheres of private life in the hands of citizens, even though those citizens will sometimes make mistakes. This bill misutilizes resources. We are being flooded with an ever increasing number of child abuse and neglect cases, but there is not enough money for social workers and treatment resources, not to mention preventive programs. Limited social resources (both government and private) must go first to these high priority problems. The true cost of this bill is not only the misallocation of social resources, but also the intrusion of government into family life where there is no abuse or necessity. The bill allows intrusion into the lives of intact families, where the parents are united in their decision on their children's best interests, and where there is no showing the parents have abused their parental discretion.

H.B. 136 is an attack upon the family, constitutionally, emotionally, and financially, and should not be permitted to become law.

[On February 7, 1992, the House passed H.B. 93, which contains provisions similar to H.B. 136. Similar provisions require similar objections.]

MAR 11 1992

SPEAK OUT FOR FAMILIES

File



THE NEWSLETTER OF THE "ALASKA FAMILY SUPPORT GROUP, INC.
P.O. BOX 111691, ANCHORAGE, AK 99511 (907) 344-7707

1992 Legislative Briefing

THE FOLLOWING LEGISLATION IS BEING CONSIDERED THIS SESSION. YOUR LEGISLATORS' DECISIONS CAN AND WILL IMPACT YOUR LIFE. PUBLIC INPUT IS VITAL TO THE DECISION MAKING PROCESS.!!! IT'S UP TO YOU TO LET YOUR LEGISLATORS KNOW YOUR OPINIONS AND COMMENTS ON THESE BILLS.*

HB 52 This bill would require non-custodial parents to support their children past the age of eighteen until finished with high school. While we support this concept, we are concerned that it does not require the same treatment for children of intact families. THIS IS A DISCRIMINATORY AND UNEQUAL BILL.

HB 78 This bill would establish Family Leave for serious health conditions, pregnancy, childbirth and adoption. WE SUPPORT THIS BILL.

* HB 93 This bill eliminates the requirement that a court consider the findings an recommendation of a neutral mediator when awarding shared custody. Lately, grandparents visitation rights (HB 136), determination of who files for a PFD on behalf of a child (HB 397), and credits against child support obligation have been added as amendments. WE SUPPORT THIS BILL.

HJR 70 Resolution for Federal Tax Exemption for child care. WE SUPPORT THIS.

SB 252 Requires identification of a child upon enrollment in school. This would help stop the problem of missing children due to registration under false names. WE SUPPORT THIS BILL.

SB 253 This bill would limit the garnishment level of obligor's wages to allow the obligor adequate funds for minimum subsistence. WE SUPPORT THIS BILL.

SB 400 This bill would continue the Child Visitation Mediation Project under the Office of Public Advocacy. At the moment, the bill contains the "domestic violence exclusion" clause. WE DO NOT SUPPORT THIS BILL WITH THE EXCLUSION.

TO REP PARNELL

Here We Stand



The Monthly Newsletter of the Alaska Family Support Group, Inc.

Volume 3 Issue 3

March 1991

BILL WATCH

MAR 08 1991

There are good bills and there are bad bills in the legislative process this session, here are the good ones:

HOUSE BILL 43; PAY FAMILIES FIRST: This bill, sponsored by Rep. Fran Ulmer requires the state to transfer child support payments to custodial families after they get off public assistance, instead of the dollars being earned by the state to pay back the welfare debt. P.O.M.'s should be sent to the HOUSE HESS COMMITTEE in support of this bill.

HOUSE BILL 136; GRANDPARENT VISITATION: This bill, sponsored by Rep. Cheri Davis, provides for visitation by a grandparent or other person in cases of divorce and dissolution.

This is a good bill because it provides children legal access to grandparents and others to prevent custodial parents from cutting off contact between children and other family members.

P.O.M.'s should be sent to the HOUSE HESS COMMITTEE in support of this bill.

HOUSE BILL 78; FAMILY PROTECTION ACT: This bill, sponsored by Rep. Kay Brown, entitles employees to take reasonable leave for the birth or adoption of a child, for the care of a child, spouse, or parent who has a serious health problem, and in the case of their own serious health condition.

This is a good bill because it gives recognition that BOTH parents are the best providers of care for THEIR children.

P.O.M.'s should be sent to the HOUSE HESS COMMITTEE in support of this bill.

HOUSE BILL 84; YOUTH TOBACCO ADDICTION PREVENTION ACT: This bill, sponsored by Rep. Kay Brown, has provisions that strongly discourages children from acquiring tobacco products.

HERE ARE THE BAD BILLS

HOUSE BILL 44; DOMESTIC VIOLENCE BILL: This bill, sponsored by Rep. Fran Ulmer, changes domestic violence from a family problem to a problem for the accused, and it provided for a mandatory 72 hr. lock-up for anyone with two domestic violence convictions within a ten year period.

We testified against this bill in the HOUSE HESS COMMITTEE. The 72 hr. lock-up clause was removed but the word "family" has not been put back in. This bill is still not acceptable public policy to be adopted into law.

PAGE 1



March 16, 1992

Senator Arliss Sturgelewski
HESS
Room 427, Capitol
P.O. Box V
Juneau, Ak. 99811

RE: HB 93 amendments (particularly HB 136 incorporation into HB 93).

Dear Arliss,

Our group has most recently taken a position of strong opposition to the HB 136 incorporation into HB 93 (the "Grandparents Visitation Bill"). This bill should be in your Senate Hess committee now.

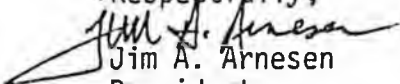
HB 136, although appears on the surface to have considerable merits, actually is very poorly phrased, and as written would clearly be detrimental to all families and ill-advised to allow to become law.

I am requesting that this bill be amended to exclude the amendment regarding "grandparents visitation" in its entirety. The remainder of the bill is quite acceptable in its present form.

I am enclosing a comprehensive analysis written by one of our legislative advisors, a former assistant attorney general in Alaska, Bruce Abramson. After reading the analysis, I'm sure that you will concur with my concerns.

If you have any questions, do not hesitate to contact me.

Respectfully,


Jim A. Arnesen
President

CORRECTION

**THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY**



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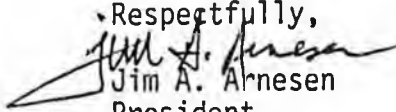
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If you have any questions, do not hesitate to contact me.

Respectfully,


Jim A. Arnesen
President

March 12, 1992

Arliss Sturgulewski
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Re: HB93 and HB136 (Grandparent and "Other Persons" Visitation)

Dear Senator Sturgulewski:

I have written to you previously about HB93 and HB136 (Grandparent and "Other Persons" Visitation), including my detailed analysis of the bills.

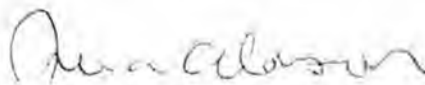
Here are two articles that are very informative on the grandparent visitation issue. One is a People magazine article which describes an actual grandparent visitation case. The grandmother spent over \$5,750 in attorney fees alone by the time that article was written. When the Illinois Legislature saw what it was really doing to families, it repealed the law. With the repeal, the grandmothers case became moot.

I'm also enclosing an article by Dr. Andre Derdeyn, Director of Child and Family Psychiatry, at the University of Virginia Medical Center. Note especially his description of the inter-generational dynamics which fuel these battles:

Adults in the child-rearing years are developing their identities and roles as spouses and parents, and they are achieving autonomy from their own parents as well as competence in their work. For older persons a major task is to relinquish the role of parent with regard to one's children. Their relinquishing parental status with regard to their children and facilitating their children's developing their own autonomy is the natural course of the family life cycle and is a part of the process by which familial boundaries are formed. Grandparent visitation legislation is dissonant with these developmental processes of both generations.

Please review these two articles as you study HB93.

Sincerely Yours,



Bruce Abramson

cc: Paul Fischer, Sam Cotten, Lyman Hoffman, Curt Menard



THE *forgotten* PEOPLE

By Linda Demkovich

"Here we sit. We don't have the funds to hire detectives or attorneys. We can't get a message to our daughter-in-law. If we could, it would be that we have no wish to complicate her life or compete with her where our grandson is con-

cerned. It's just that he needs our love, too—the roots, the traditions—now more than ever."

Thomas Waite is still hoping for a happy ending. Last June, when he expressed these sentiments in a letter to a sympathetic grandparents' group, he and his wife had not seen

their four-year-old grandson for nearly six months. Separated from their son, their daughter-in-law had suddenly vanished, taking the little boy the Waites had doted on.

A few months later, thanks to the intervention of a dedicated employee in Los Angeles County's Department of Children's Services, they

Grandparents learn to fight for their rights

had reestablished contact. Though there would be no attempt to schedule visits, Waite trusted that what he called the common denominator—love—would prevail. "We love our grandson, our daughter-in-law loves her son, and he loves all of us. Nothing else matters," Waite said.

By year's end, the Waites were headed into court where they hoped to work out a regular visitation schedule through a formal mediation process. "We're back to square one," Waite sighs. "There is absolutely no communication."

What happened to Tom and Marilyn Waite is not an isolated incident. Although the reasons vary—divorce or the death of a

son or daughter, an ensuing stepparent adoption or, sometimes, estrangement between adult children and their parents—more and more grandparents are being deprived of the opportunity to see their grandchildren.

And, more and more, they are fighting back. Sometimes the battles are for custody; more often they are merely for the right to visit, even to send letters or birthday cards to their grandchildren or receive an occasional picture of them.

The battleground is also getting larger, ranging from attorneys' offices and judges' chambers to the 50 statehouses and the halls of the U.S. Congress. (Since the late 1970s, all of the states except Nebraska have enacted laws granting grandparents the right to petition for visitation following the breakup of an offspring's marriage. Currently, a resolution is pending in Congress encouraging enactment of a uniform law so that court orders will be enforceable across state lines.)

As the problem gains visibility, the network of grandparents trying to help others in similar straits is also

expanding—through both organizations with official names and letterheads and informal support groups.

Precise figures are hard to come by, since estimating the exact number of cases would require examining court records state by state. But informally, Dr. Arthur Kornhaber, founder and director of the Foundation for Grandparenting in Jay, New York, puts the number "in the tens of thousands." Kornhaber says the various grandparents' rights groups are aware of about 20,000 cases—a figure he says is probably low. With a divorce rate that stands at 50 percent, he believes 50,000 may be closer to the mark.

Although each case is highly personal, the problem of grandparents being kept apart from their grandchildren reflects broader changes in American society: a divorce rate that affects as many as one million children age 18 or younger each year, a population that has become increasingly mobile and, as a result, a diffusion of the traditional family unit.

"A generation ago," says Marjorie Slavin, program coordinator for the Scarsdale New York Family Counseling Service's Grandchildren in Divided Families program, "you couldn't live in the same community [as your parents] and not let them or your in-laws see their grandchildren, if only because of what the neighbors would say." These days, she adds, most people don't seem to care what the neighbors say or think.

Today's message is that "the way to handle an unhappy relationship is to cut it off"—first, a marriage, then, if necessary, a family situation as a whole. "[People] think cutting ties with the former family will ease their pain, and perhaps it will," says Slavin. "But it's likely to add to their children's pain."

Kornhaber, coauthor of *Grandparents/Grandchildren: The Vital Connection* (Transaction Books,

1984), agrees: "We've come to a state in society where if you feud with your family, you can just get rid of them," he says.

He adds to the equation an attitude—one he says is reflected in many court resolutions of divorce—that "emotional bonds, attachments don't count." Ignorant of the importance of the grandparent-grandchild relationship, "the system" (including judges, lawyers and social workers) often works to suit the parents' convenience leaving "a lot of emotional carnage" in its wake.

Dr. Andre P. Derdeyn, director of child and family psychiatry at the University of Virginia Medical Center, expresses concern about the toll visitation battles take on children. The divorce process itself is so painful for children, he says, that the last thing they need is to be in another tug of war for their love and loyalties.

Laws governing visitation are "laid down for nice, positive purposes," says Derdeyn. But if they are invoked, it's generally in an "already very contentious situation, and it's hard to see how that will be constructive."

Although most grandparents are motivated by love, the sincerest of efforts quickly "get ground into the conflict," he declares. "Children are so sensitive to how people get along" that wrenching conflicts between their loved ones ought to be avoided.

In Kornhaber's view, however, the grandparents' presence generally is a plus—a stabilizing force. Divorce and death are frightening to children, he says, and they should not be subjected to the fear of "losing" other important people in their lives.

Dr. Robert N. Butler, chairman of the Geriatrics and Adult Development Department at Mount Sinai Medical Center, describes the grandparent-grandchild relationship

continued

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as "right and natural. They are often the best of pals." And grandparents can be a source of support, emotional and sometimes financial, for their adult children as well, he adds. Where the two generations have had a falling out, it serves no good purpose to force those differences on a third generation—the youngsters.

Butler, author of the Pulitzer Prize-winning book *Why Survive? Being Old in America* (Harper and Row, 1985), says the government should not intrude too much into what is basically a family matter. But by and large he thinks that if grandparents have a good relationship with their grandchildren, the courts should try to preserve it.

Until recently the courts have been reluctant to get involved, generally recognizing the parents' right to decide what is in the best interest of their children. As joint custody arrangements become more common, however, the judicial system has begun to take note of others in the family who also are affected by divorce. State visitation laws have reinforced that trend.

A Maryland grandmother, who asked that her name not be used, is one example. She went to court at the time her daughter was being divorced and won her own visitation schedule. She sees her grandchild now when her daughter has custody, but should something happen to her daughter, she would have court-decreed rights of her own.

Leaders of the grandparents' rights movement are far from satisfied. For one thing, they say, laws vary tremendously. Grandparents who win visitation rights in one state will not necessarily be able to realize them if the parent who has custody moves to another jurisdiction.

A resolution introduced by Representative Mario Biaggi, D-New York, seeks to remedy that situation by encouraging states to enact a uni-

form visitation law. A parent who wants to start a new life by moving away and severing all links with the past is creating a "heartache problem, the worst kind I know of," says Biaggi, who serves as chairman of the House Select Committee on Aging's Subcommittee on Human Services.

"When a child is born, a grandparent is created," he says. "To arbitrarily take children away is to deny them the unselfish love and attention of their grandparents." In addition to achieving reciprocity among states, an aim of the resolution is to encourage the courts to give greater consideration to that relationship when making determinations about visitation. The measure has passed the House twice, in 1983 and again last year. So far, the Senate has taken no action.

Another complaint voiced by grandparents' rights groups is that most state laws apply only to divorce cases. Only a few cover situations where a parent has died and fewer still extend to children living in intact homes, particularly those in which one parent has remarried after a divorce or the death of a spouse. In some of these cases, say the experts, jealousies or uncertainties plaguing a new marriage can come into play to shut the "old" family out; in most, it is simply a matter of wanting to "start a new life."

Lucile and Lee Sumpter, organizers of Grandparents'-Children's Rights Inc., a Michigan-based support group, allege that many children in such situations are victims of abuse—physical as well as psychological—and when grandparents hear about it, they are cut off from further contact.

Scarsdale's Slavin relates one story of grandparents who cared for their three grandchildren following their daughter's death. After a num-

continued

ber of years, their son-in-law reappeared to reclaim his children. It soon became apparent that he was abusing them, so the grandparents sought custody and won.

Others who keep fat files on grandparents' visitation relate stories of divorced daughters with live-in lovers who abuse the children, or of children who are shuttled back and forth between foster homes when a willing grandparent would care for them at no cost to the state.

Arguing that the majority of child-abuse cases happen at home, Sumpter says the states and Congress ought to enact laws linking the issue with grandparents' rights. In fact, Delaware already has a broader law on the books, giving any grandparent the right to petition for visitation. Grandparents' groups would like to see it become the model for the uniform visitation law pending in Congress. Some professionals have argued for widening the scope of the proposed law even further to include other relatives or close friends on whom children may have come to depend. Several states, including California, have taken that step and a few others have acted more narrowly, allowing great-grandparents or stepparents, for example, access to the courts.

Noting the difficulty of getting such legislation enacted, Biaggi believes expanding it to cover children in intact families would be "tactically improper." "There are laws in place that deal with child abuse," he says.

Judith Areen, professor and associate dean of the Georgetown University Law School, says that on balance, courts seem to be viewing grandparents' visitation petitions as "reasonable requests. They're not saying it should always happen or never happen. There's no blanket rule."

Although there are extremes—for



Many court resolutions leave a lot of emotional carnage in their wake.

example, cases where the grandparent has in effect acted as the parent, where cutting ties could clearly be damaging to the child—Areen agrees with Biaggi that government intervention into intact families probably would be going too far.

But Ellen Mayer, an attorney in Delaware, says she thinks the law there allowing grandparents to petition for visitation, even when the parents are still together, is valid, "especially when the court is looking to determine what is in the best interest of the child." If the case is friv-

olous or constitutes harassment, she says, the courts will dismiss it.

Mayer sees grandparents' rights as part of a trend in the law "to broaden the rights of individuals and give them access to the courts." That can be abused, she says, "but the flip side is not being able to sue when you have cause."

Sometimes the stories have happy endings for the petitioning grandparents. Virginia Romero and her husband went to court twice to be able to see their grandson, despite the express wishes of the boy's mother. (The California couple's son had died in an accident.) Now, says Romero, she sees the child every other weekend and over holidays and school vacations. "When I go to pick up the baby, he's waiting at the door," she says, adding that she has had no contact with the mother since the pre-trial settlement was reached in August 1983.

Kornhaber says such agreements have become more common since the state laws were enacted and the courts became more aware of the bond between grandparents and grandchildren. And once visitation is established, he says, it generally sticks—to the point that one court recently found the parents in contempt for violating the rules.

The mediation process can be a useful alternative—less antagonistic and also less costly than a courtroom battle. But its success depends upon the cooperation of all parties. And if it fails, the only options left are to give up the fight or go to court.

Edith and Henry Engel, who have invested eight years and \$15,000 in an effort to see their two grandchildren, illustrate the frustrations. According to the Engels, they remained in touch with their former son-in-law after their daughter left and relinquished the children to him. Relations were so cordial they were even invited to his second wedding.

Things changed abruptly after the remarriage, when they were informed by another family member "that we would never see [our grandchildren] again." Henry Engel recalls. After an informal attempt at reconciliation failed, the Engels went to court. The decision, handed down in late 1982, went against them and they decided not to appeal but to try mediation instead. By offering to pay, they convinced their former son-in-law to take part.

After several meetings, Edith Engel says, "we got two small concessions": to be able to send birthday and Christmas cards to the grandchildren (provided they do not contain personal messages) and to receive photographs of them twice a year. Though that may seem a minuscule victory, Engel is convinced

that "mediation is definitely preferable to litigation" for all concerned.

The courtroom, she says, becomes the setting for an adversary situation: "We tried not to throw mud, because it would have been destructive to future relations with our grandchildren. And we honestly feared that their father's hostility [toward us] could have been a danger to the children."

Henry Engel, taking note of legislation pending in his home state of New York to require mandatory mediation between the two principals before a divorce agreement is finalized, says some experts think grandparents should be included in that process. "That could be more civilized," he emphasizes. "We aren't trying to get custody. We just want communication and contact."

A continent away, Tom Waite also speaks hopefully of the mediation process. He brings up a point often overlooked: that there are two sides to the issue and that mediation offers a way for both to be heard.

Many parents see the grandparents' rights movement as an intrusion into their private lives "and they've got a point," Waite admits. But they in turn ought to at least consider the impact of breaking the bond between grandchildren and grandparents before they act.

"I don't want to paint my daughter-in-law as a villain. There's enough blame to go around," says Waite. "And in all other respects, she is a good mother. I just hope she realizes that her motivation is selfish. We love our grandson and miss him, and we know he feels the same." ■

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ANCOOPERATION

LOVE TAKES MORE THAN WORDS

By Karen Cooksey

Even if you're separated by a half century and a whole continent, you and your grandchild can be the best of friends. If you're a novice at the grandparenting game, or if you aren't as chummy with the grandkids as you'd like to be, here are some tips to help you not only keep in touch but also be an important part of their lives—whether they live down the

block or across the country. When a whole family gathers, there's little chance for individual contact. Yet "The bond between grandparents and grandchildren depends on the time they spend alone together and the undivided attention they give one another," says Arthur Kornhaber, M.D., co-author of *Grandparents and Grandchildren: The Vital Connection*. "Unfortunately, it is not always easy for this to happen." Kornhaber has a summer camp for grandparents and their grandkids in the Adirondacks. There the generations can share secrets, create lifelong mem-

ries, and learn what grand enrichment they can lend each other's lives. • Spend time one-on-one with each grandchild. When a whole family gathers, there's little chance for individual contact. Yet "The bond between grandparents and grandchildren depends on the time they spend alone together and the undivided attention they give one another," says Arthur Kornhaber, M.D., co-author of *Grandparents and Grandchildren: The Vital Connection*. "Unfortunately, it is not always easy for this to happen." Kornhaber has a summer camp for grandparents and their grandkids in the Adirondacks. There the generations can share secrets, create lifelong mem-

• Spend time one-on-one with each grandchild.

• Make more than small talk with your small fry. Build on past discussions, talk about school projects, upcoming recitals, sports events. "If you share a mutual hobby or sport—fishing, skiing, stamp collecting—you won't walk into conversations cold," says Barry Smith, M.D., a pediatrician in El Cajon, California.

• Know what's going on in your grandchild's life. What is his or her favorite TV program? Find out if it's on and tune in too. Which of the four Teenage Mutant Ninja Turtles does your grandchild like best? Why? As your grandchild grows, make phone calls special times to talk about both your lives. Tell him or her how you spent Saturday morning watching a blue jay feed her nest of babies outside your window. Ask about the fine

WHAT ABOUT CUSTODY?



Of the 50 states, only half (red) have specific laws dealing with grandparents' custody rights—but the issue is receiving more and more attention.

or the death of a parent. Some states allow for additional situations—including abuse, neglect, or abandonment of the child (Vermont, Texas and Tennessee), juvenile delinquency, incompetence or incarceration of the parents (Texas), and/or cases where custody has been given to a third party or the child has been placed in foster care (Colorado, Iowa, Michigan, New York and Tennessee). Louisiana adds the death of one of two unmarried parents; in that case the parents of the deceased parent may be granted visitation if the court determines it would be in the child's best interests.

A number of states permit grandparents to seek visitation orders even when the nuclear family is intact. Idaho, for example, may grant visitation when a grandparent has established a "substantial" relationship with a child. North Dakota may grant it if it would be in the best interests of the minor and would not interfere with the parent-child relationship.

points of school so you can celebrate the child's academic successes.

- Remember that a picture can be worth a thousand phone calls. "For many children under eight or nine, phone conversations are difficult," says David Elkind, Ph.D., author of *Grandparenting: Understanding Today's Children*. If you have access to a camcorder, Elkind suggests making a video of yourself talking or singing to your grandchild, or giving a guided tour of your home and neighborhood. Make a photo album of family history for the child, including pictures of yourself, your grandchild's parent when he or she was young, family pets, and places you've lived. Label each picture with a simple description.

- Keep the art of letter-writing alive. Write your grandchild and encourage a written response: Supply colorful paper, envelopes and stamps.

An occasional dollar bill, sticker, comic-strip or riddle enclosed in your letter adds to the fun. "Both generations will look forward to visits from the mailman," says Barry Smith. According to George Newman, co-author of *The Grandparenting Book*, children love getting mail addressed to them, even if they can't read it themselves. It makes them feel very important. By including newspaper or magazine clippings about animals, funny situations, sports or youngsters their age, you might help the child's reading skills—without it seeming like homework. And selecting unusual stamps for the envelope might encourage an interest in stamp collecting.

- "Be with" your grandchild every day by recording yourself telling bedtime stories. You can read them out of a storybook and send the book along so the child can turn the pages and

look at the pictures, or you can tell stories about family history and what you did when you were your grandchild's age, or you can even make up stories about imaginary characters. "You won't have to spend most of your waking hours recording stories to meet the need for a nightly tale," says Miriam Galper Cohen, family therapist and author of *Long Distance Parenting*, "because young children love repetition and will be glad to hear the same story over and over again."

"It's important to establish yourself as a presence in the hearts and minds of your grandchildren," advises Cohen. Instill yourself—your history, your values—in your grandkids. But most of all, have fun with them. They'll be grown before you know it. ■

The author is a freelance writer in Del Mar, California.

During the past year several states have broadened or clarified the circumstances under which a grandparent (or other person) can request visitation. South Dakota, Oklahoma and Illinois, for example, now permit a grandparent seeking visitation to file a petition at any time whether or not the parent is alive, a divorce proceeding is pending, a custody proceeding is concluded, or the parents of the child were ever married. Maine, Massachusetts and New Hampshire, acknowledging the variety in contemporary relationships, now allow a grandparent or other specified person to file a visitation petition in cases when the child's parents were never married.

As a rule, adoption severs all ties between the child and his/her biological family. Nonetheless, many states permit grandparent visitation after adoption by another relative. South Dakota allows visitation following adoption by a stepparent or another grandparent. Missouri allows it

the child's natural parent is deceased, even if the child is adopted by an unrelated person. Georgia, Mississippi, Oklahoma and Texas permit it when the rights of one parent are terminated by court order, Nevada when both parents' rights are terminated.

Although state statutes provide the basic structure in the area of grandparent visitation, they do not address every concern. The court must consider the evidence presented, apply the state's laws, and, in most states, make a decision based on the "best interests" of the child; unfortunately, very few statutes *define* "best interests." In some cases courts have expanded (via their equity powers) the rights of grandparents beyond the limitations of the state statutes.

Further, litigation may not always solve the dispute. Even if visitation is awarded, underlying problems that gave rise to the breakdown in family relations may continue. Some courts may order counseling.

California, Delaware, Maine and Maryland offer mediation services through the courts. Other mediation services exist in varying degrees in local communities. Earlier this year, Alaska authorized the court system to create a mediation pilot project for specific cases—including grandparent visitation disputes.

In 1989 The American Bar Association adopted a policy encouraging mediation services in visitation cases, and recommending that state legislation enumerate specific factors for courts to consider in determining whether grandparent visitation is in a child's best interests.

Because of the complexity of visitation laws, it's wisest to check with a local attorney if you have questions about grandparents' rights. ■

The author is an associate staff director for the American Bar Association Commission on Legal Problems of the Elderly.

Children and Grandparents:



In the last two decades, grandparents have gained ground in their struggle for court-enforced visitation with their grandchildren. Since 1965, every state, excluding the District of Columbia, has enacted a grandparents' visitation rights statute. These statutes, like court decisions of the past, typically speak in terms of the best interests of the child. The difference now is that grandparents are winning cases.

Some attribute the grandparents' success to their growing numbers, wealth and political clout while others cite family disruption due to divorce. Both explanations have merit, but it is still unclear whether, or under what circumstances, grandparents' visitation rights are in the best interests of the child.

Grandparents argue that the grandparent-grandchild bond is unique and precious, and that it is in a child's best interest for the court to grant visitation rights in appropriate situations. In *Minkon vs. Ford*, the New Jersey Supreme Court supported this view in a decision in favor of grandparents. The court stated:

"It is a biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. Visits with a grandparent are often a previous part of a child's experience and there are benefits which devolve upon the grandchild which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known."

Parents, on the other hand, argue that court-ordered visitation rights interfere with proper parental authority. Where there is conflict, the parent is the best judge of what is best for the child and should not have to account to anyone for his or her motive in denying the grandparent

The Right to Visit

by Jody George

visitation.² Judges and legislatures are most receptive to this argument when the family is intact. In such cases the parents are typically free to determine whether grandparent visitation is in their child's best interest.³

This article, which was prepared under a grant from the Administration on Aging, OIDS, to the American Bar Association Commission on Legal Problems of the Elderly, will examine these arguments and the new state statutes on grandparents' visitation rights. As the discussion will illustrate, the controversy is not likely to go away in the near future.

State Statutes

The recent enactment of grandparents' visitation statutes marks a noticeable shift in social policy. Since as early as 1894, the most frequent explanation courts have given when denying petitions for visitation with grandchildren involved the notion of a compelling parental right. "The courts believed [as opponents of grandparents' visitation statutes argue today] that parents had complete control over the upbringing of any child in their custody. Legally decreed grandparent visitation acted as a constraint upon that control" and thus was not in the child's best interest.⁴ Exceptions to this theory were narrow, and occurred in situations when the parent was unfit; when the child had lived with the grandparent; when the parties to a divorce proceeding agreed to visitation; or, in a few cases, to preserve family ties when one parent died.⁵

In the last 25 years, however, state legislatures have broadened the notion of what may be in a child's best interests. Every state has a statute that enables grandparents, and in some states siblings, relatives or other persons, to petition for visitation rights

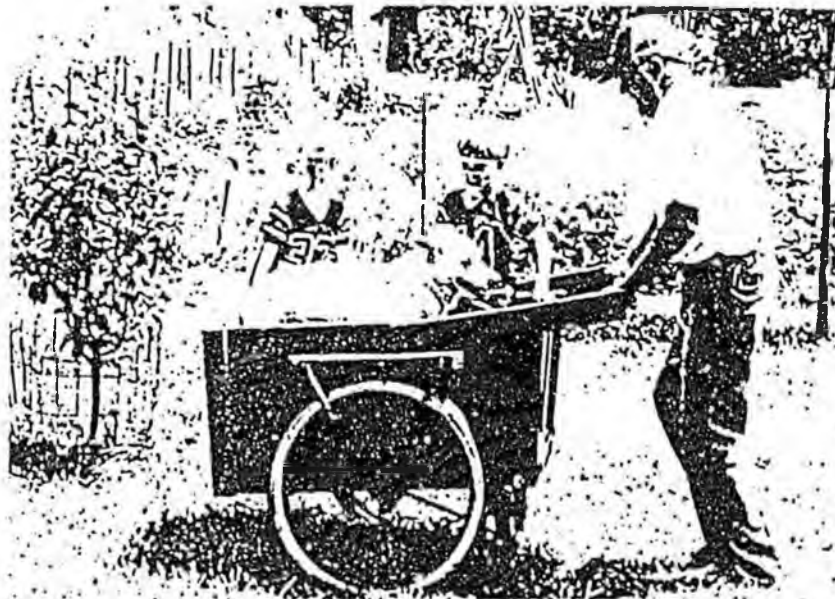
with grandchildren. A combination of reasons lies behind the enactment of these statutes. These include preserving family ties, recognizing that the grandparent-grandchild relationship is unique and precious, and providing stability for children when their homes are disrupted by divorce or death.

Whatever the reasons, these statutes have given grandparents an edge when seeking court-ordered visitation with their grandchildren. Until their enactment, grandparents could only, in general, obtain visitation if they demonstrated that a child would be harmed if visitation rights were not granted. Now, they can obtain court-ordered visitation if they can persuade a court that visitation would be better for a child, a much easier task.

Of course, the grandparents' gains are not unlimited. "No statute gives grandparents an absolute right to visit with their grandchildren. Instead, the statutes give grandparents the right to petition for visitation. The court will grant visitation only if it determines that visitation would be in the best interests of the child."⁶

In addition, the ability of the court to grant visitation rights varies from state to state. While some statutes define the group of people who may petition for visitation rights very narrowly, others allow courts to exercise discretion only in specific family situations, such as divorce or death of a parent. Every statute, however, addresses at least three issues: who may petition for visitation privileges; when a person may petition; and the standard that a judge should apply, usually "the best interests of the child," when deciding whether to grant visitation privileges.

Several statutes have additional provisions concerning such areas as attorney's fees, where to file petitions, who must be notified of actions, how often actions may be filed, and orders modifying or terminating parental rights. Interestingly enough, although the majority of statutes provide that visitation should be granted if it is in the best interests of the child, only those in Connecticut and Vermont state that a court should consult a child about his or her wishes.



The statute in Michigan is considered a model for a number of reasons. It defines important terms such as "custody dispute"; states what shall happen in the event of an adoption; contains several procedural provisions, including how to commence actions and how often complaints or motions may be filed; and has additional provisions on attorney's fees, the limitations of a visitation order and the extent of the court's discretion to modify or terminate an order.

This is in sharp contrast to statutes like the one in South Carolina, which simply states that the family court has exclusive jurisdiction to order periods of visitation for the grandparents of a child. Most statutes lie somewhere in between.

While most grandparent visitation cases are settled by the ruling statute, it is important to recognize the inherent powers of juvenile and family court judges to protect the child's best interest. Under the court's *parens patriae* authority, the court may be able to award grandparent visitation even in the absence of explicit statutory authority.

Who May Petition

States have taken two basic approaches in determining who, besides parents, may petition for visitation rights with children. Thirty-four states have enacted statutes or provisions that permit only grandparents—and in six states this includes great-grandparents as well—to petition for visitation with their grandchildren. Political action by grandparents is certainly one reason for this, but there are others as well. Many people believe that the grandparent-grandchild bond is unique and previous, and "stronger than any other except that between parent and child." Grandparents provide stability and support in a child's life, especially when parents are divorced or separated, or when a parent has

died. In addition, grandparents are uniquely qualified to provide roots and a sense of identity to their grandchildren.

However, there are also arguments that limiting visitation rights to grandparents is too narrow. Grandparents are not the only family members who can lend stability, support and a sense of identity to a family's life. If policy makers are interested in a child's best

*Grandparents ...
assert that visitation
rights are in the
child's best
interests ...*

interests and preserving family ties, they should extend visitation to relatives and anyone else who has a meaningful relationship with a child. It makes little sense to assume that it would be better for a child to see a grandparent with whom the child has had no previous contact than a person with whom a child has had a long-term caring relationship.

In addition, psychologists and sociologists have not produced much literature on the importance of grandparents' visitation rights. However, the little there is does not bear out the grandparents' claim that the relationship is so unique and special that it is in the children's best interests to visit

with them.⁹ Furthermore, the assumption that grandparents always act in the best interests of their grandchildren may not be true. Some may want to visit with grandchildren because of loneliness or as part of a conflict with their own children.

Eleven states take a different approach to visitation rights. They permit a court to grant visitation to siblings, relatives or "any other person" whom it would be in the child's best interests to see. Four of these—Connecticut, Maine, Ohio and Washington—do not mention grandparents specifically, but permit the court to grant visitation to "any person" provided visitation would be in the child's best interests. Presumably, grandparents are included in this broad category.

The advantage of these statutes is that they do not limit a court's ability to grant visitation when it would be in a child's best interests. They also eliminate the assumption, which may be mistaken in some cases, that grandparents and other relatives always act in a child's best interests. They enable grandparents to petition for visitation rights, but extend this right to others as well. In addition, some sociologists believe that the best way to prevent child abuse is to expose a child to a wide range of people. One theory is that without privacy and isolation, a pattern of maltreatment cannot be established and maintained: "Authorities also believe that children who have been maltreated will fare better afterwards if they have someone in their social network who provides compensatory acceptance, nurturance and a positive model for social experience."¹⁰ Thus, a statute that gives courts wide discretion in granting visitation rights could help prevent child abuse.

A problem with these statutes is the conflict a child may feel if torn between a parent with custody and an unlimited number of persons petitioning for visitation rights. There is liter-

ature that supports parents' arguments that a lawsuit between parents and grandparents often creates extreme anxiety and dislocation for a child.¹¹ This problem would only worsen with an unlimited number of litigants. In addition, a statute that enables a court's discretion to grant visitation rights to siblings, relatives and any other person is more intrusive than one that limits visitation rights to grandparents.

When A Person May Petition

The second issue that grandparents' visitation statutes address is when a person may petition for visitation rights. While a few states allow courts to grant visitation rights whenever they find that visitation would be in the best interests of the child, most allow courts to exercise discretion only in specific family situations. Divorce, death of a parent and after living with a grandparent are the most common. Individual statutes, however, permit visitation in a wide range of situations. These include abuse, neglect or abandonment; juvenile delinquency; incompetence or incarceration of the parent; or when custody has been given to a third party or the child has been placed in foster care.¹² Louisiana, even addresses what happens when "the parents of a minor child or children live in concubinage (without the benefits of marriage) and one of the parents dies." According to the statute, the parents of the deceased party may be granted visitation rights if visitation would be in the best interests of the child.

Twenty-one states have provisions, like the one in Louisiana, that make grandparents' visitation rights conditional on their relation to the child's parents. Typically, they provide that grandparents must be related to the noncustodial parent in order to petition for visitation with their grandchildren. In eight of these states, the

restriction applies to every type of action that arises under its statute. However, in the 13 others, restriction applies only in situations involving death, incompetency, termination of parental rights or incarceration. The rationale is that the law protects the side of the family that no longer has a representative; where there is a representative, the court will not intervene.¹³

Parents ... argue that they interfere with proper parental authority.

According to the majority of statutes, however, grandparents may now bring petitions for court-enforced visitation against their own children—even when their children are granted custody after a divorce. These types of suits, which grandparents rarely won at common law, illustrate the gains that they have made in their efforts to visit with grandchildren. Although the most widely publicized cases seem to involve a former son-in-law or daughter-in-law, the grandparents' right to petition is much broader.

Adoption is another common feature in grandparent visitation statutes. Although the majority of state statutes do not address this issue, 19 explicitly state that grandparent visitation rights survive adoption by a stepparent. This

is probably due to the rising divorce rate and a belief that adoption by a stepparent is different than one by people who are strangers to both parents. In the latter situation, courts have ruled that there is a presumption that "termination of a grandparental relationship is in an adopted child's best interest." Such rulings have been based on a variety of grounds, including the need to maximize the available pool of adoptive parents and maintain the confidentiality of such adoptions.¹⁴ In fact, the statutes reflect this belief. Of the 19 that permit grandparents to petition for visitation rights, 13 also specifically state that adoption in all other circumstances cuts off a grandparent's right to petition for visitation privileges. Absent a statutory exception, many state adoption acts, which cut off all relationships between an adopted child and his or her natural relatives, will lead to this conclusion.

Best Interests of the Child

The third issue that visitation statutes address is what standard a court should apply in deciding whether to grant visitation privileges. Forty state that courts should use the "best interests of the child" test. The others use such language as "at the discretion of the court," "as the court shall determine" and whether there has been a "substantial relationship" between the grandparent and grandchild.

Of the statutes that mention the best interests test, only two—those in Vermont and Virginia—specify which factors the court should consider in determining whether visitation is in the child's best interests. In the other states, courts rely on prior case law or other statutory definitions. Factors typically considered include friction and animosity between the parents and grandparents, health of the child, the child's preference, imprisonment of the parent, biological relationship with grandparent, health of the par-

ent, prior residence with the grandparent and previous parental agreement allowing visitation.¹⁵ In addition, several statutes also mention that the nature and quality of the previous relationship between the grandparent and grandchild should be considered. They use such language as "amount of personal contact" and "where a substantial relationship exists." Whatever the factors, it is important to remember that it is the interests of the child, not the grandparents, that are being protected.

The application of the best interests test is difficult. It is often hard to know what is in the best interests of a child caught in the midst of a struggle for visitation rights. As one commentator observed:

"The need for stability is often said to favor allowing existing grandparent-grandchild relationships to continue; especially in helping children adjust when relationships with their parents have been disrupted, whether by a divorce, by the death of a parent or by some other circumstances. However, the impact of a lawsuit on the stability of a child's environment can be extremely detrimental. It is clear from the psychological literature that a lawsuit over visitation rights, with its accompanying intrusions by psychological experts and lawyers and its inevitable

disruption of the nuclear family, often creates extreme anxiety and dislocation for a child."¹⁶

Further, several commentators believe that there are problems with the child's best interests standard—that it is vague, and that although it supposedly protects the child's best interests, in reality the child's best interests often get lost in the struggle between parents and grandparents.¹⁷

Procedural and Other Considerations

As mentioned earlier, several statutes also address such considerations as attorney's fees; where to file petitions; who must be notified of actions; how often actions may be filed; and orders modifying or terminating visitations rights. Although these are fairly standard provisions, they are worth noting because they add clarity to a statute.

Several statutes also have provisions that are not quite as standard. The statutes in Michigan, Oklahoma and Nebraska have provisions that address situations where paternity has not been established. Those in Colorado, Florida and Michigan do not allow the courts to restrict a child's movement as a result of a grandparents' visitation order. Montana's states that the court can provide an

attorney for a child if the child's interests are not adequately represented, while the court in Texas can order counselling to facilitate compliance with a visitation order. This seems a bit more far-reaching than Connecticut's, which allows a court to order mediation to resolve disputes involving the enforcement of visitation rights.

Conclusion

The controversy over grandparents visitation rights is likely to continue in the years to come. Grandparents will continue to assert that visitation rights are in the child's best interests, while parents will argue that they interfere with proper parental authority. The truth is most likely to be somewhere in the middle. Thus, legislatures should continue to pass laws that give judges discretion on this issue. Statutes that yield the same response to every situation are not in the best interests of the child. ■

Judy George, Esq., served as a legal intern at the American Bar Association Commission on Legal Problems of the Elderly, Washington, D.C. Her article is reprinted with permission from the "Children's Legal Rights Journal," Fall 1987. © William S. Hein & Co., 1988.

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2. Broome and Looney, *Grandparent Rights in Custody, Adoption and Visitation Cases*, 79 Ark. L. Rev. 259, 263 (1985).

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4. Note, *Grandparents' Statutory Right to Petition for Visitation: Vermont and the National Framework*, 10 Vt. L. Rev. 55, 58 (1985).

5. Note, *Grandparental Rights to Visitation and Custody: A Trend in the Right Direction*, 15 Cum. L. Rev. 161, 166 (1984); Foster and Freed, *Grandparent Visitation: Vagaries and Vicissitudes*, 23 St. Louis U.L.J. 643, 645-646 (1979); Inguilli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W.Va. L. Rev. 311.

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9. Note, *The Constitutional Constraints on Grandparents' Visitation Statutes*, 86 Colum. L. Rev. 121 (1986); Inguilli, *supra* note 5, at 298-302.

10. Inguilli, *supra* note 5, at 306-307.

11. Note, *supra* note 9, at 124.

12. Note, *supra* note 9, at 119-120.

13. Inguilli, *supra* note 5, at 311.

14. *Illinois v. Golder*, 498 N.E. 2d 370 (Ill. App. Ct. 1986); *L.P.M. v. Department of Social Services*, 507 A.2d 1151 (Md. Ct. Spec. App. 1986). There has probably been more litigation on the effects of an adoption on grandparent visitation than in any other aspect of this topic. Some courts distinguish stepparent

adoption from adoptions by an unrelated mother and father. Compare *Surovick v. Mitchell*, 500 A. 2d 894 (Pa. Super. Ct. 1985) (visitation rights survive stepparent adoption) with *Faust v. Massinger*, 497 A.2d 1351 (Pa. Super. Ct. 1985) (visitation rights do not survive adoption by two unrelated persons). See also *Lingwall v. Hoener*, 483 N.E. 2d 512 (Ill. 1985).

15. Note, *Tennessee Statutory Visitation Rights of Grandparents and the Best Interests of the Child*, 15 Mem. St. U.L. Rev. 635, 641-646 (1985).

16. Note, *supra* note 9, at 124.

17. Note, *Grandparent Visitation Statutes: A Proposal for Uniformity*, 19 J. Mar. 703-724-727 (1986); Bean, *Grandparent Visitation: Can the Parent Refuse*, 24 J. Fam. L. 393, 444 (1985-1986).

CRYING OUT FOR GRANDPARENTS' RIGHTS, AN ILLINOIS WOMAN SUES HER DAUGHTER FOR THE CHANCE TO LOVE HER GRANDSON

CONTROVERSY



It's a gorgeous day in Milwaukee, and 7-year-old Christopher Brooks Jr. can't wait to get outside. But moments later the boy is back with a troubled look in his eye, dark thoughts have intruded on his play. "Grandma wants me and I want Mommy," he says, clinging to Karyn, his mother. "It makes me sad. I think everyone should hug and make up."

If only it were that simple.

Since March 1989, Christopher has been caught in the middle of a bizarre legal battle between his maternal grandmother, Dorothy Dillon, 53, and his parents, Karyn and Chris Brooks. One of the first people to take advantage of an unusual Illinois statute that allows grandparents to seek access to their grandchildren even over the wishes of the parents, Dorothy, a divorced executive secretary who lives outside Chicago, is suing her estranged daughter and son-in-law for regular visits with her only grandchild. Dorothy's right to sue, however, may soon be taken from her. The Illinois State Legislature—caught between the contradictory demands of parents' and grandparents' groups—has just voted to rescind the controversial law; the amendment now awaits

approval by Gov. James Thompson.

For their part, Karyn, 32, and Chris, 29, insist they are not denying Dorothy visitation, but say they don't want her visits mandated by the courts. "We feel like we are fighting off a hostile takeover," says Chris. Dillon, however, believes the law is her only recourse. In the last 18 months,

"I don't regret it," says Dorothy Dillon, above left, of her suit against daughter Karyn Brooks over young Christopher. "Not if it helps me see him."

Photographs by Tara Yamasaki

People Magazine, 7-16-90

▼ "My mother's action has forced us to become adversaries," says Karyn (with Dorothy and Christopher in 1983).



► Christopher watches as his father, aspiring artist Chris Brooks, completes an architectural sketch of an old house.



▼ "We were finally getting on our feet when the lawsuit hit," says Chris, playing with his son in the yard of their Milwaukee home.



she says, she has seen Christopher just three times, all on court-ordered visits. "All I want in the whole world is to be with my grandson, hug him, kiss him and tell him I love him," she says. "Now I worry that he thinks I abandoned him. I've racked my brain trying to understand all the hostility my daughter has toward me."

The conflict between mother and daughter dates back to Karyn's childhood—from the time Dorothy divorced her Chicago fireman husband, the late Anton Konopasek, after a tumultuous eight-year union, in 1963. As a single mother struggling to support two daughters—Karyn has an older sister, Katherine, 33—Dorothy held down two secretarial jobs, working days, evenings, even weekends. "My mother had a hard life, and she

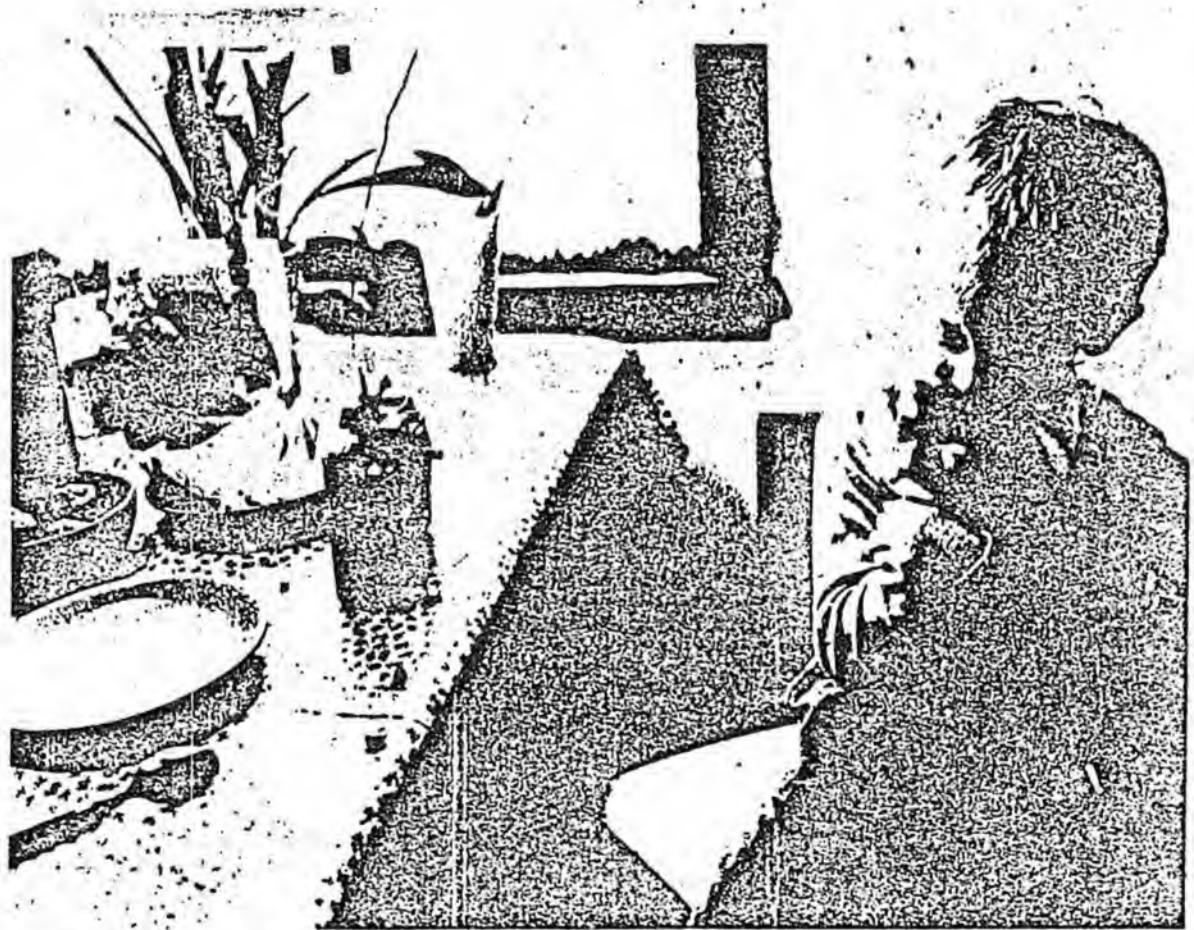
was always unhappy," remembers Karyn. "She went her way and we went ours. I had no direction and no guidance. I never really had a chance to be a child."

Though Karyn denies it, her mother and sister believe the family dispute stems from these resentments. "My sister is an angry woman who blames my mother for everything, from not giving her braces on her teeth to not paying for music lessons," says Katherine Konopasek, an assistant principal at a suburban Chicago elementary school. Adds Dorothy: "I don't see where I was such a mean mother. But Karyn has a grudge against me, and she's using Christopher to get revenge."

While Katherine was an honor student who went on to earn three master's degrees, Karyn, according to her mother, was a flower child who cut classes and defied authority. At 16, Karyn dropped out of school and moved in with friends. Though she remained in contact with her mother, who attended her 1981 wedding to Brooks (a would-be artist working as a dishwasher), the relationship grew more tense after Christopher was born. Dorothy would frequently stop by the Brookses' Chicago apartment and babysit, but seething beneath the surface was Dorothy's discomfort with her daughter's hippie life-style and Karyn's feeling that her mother was "overbearing and demanding too much from our lives." In the spring of 1984, Karyn and Chris moved to a log cabin outside Hannibal, Mo. Dorothy was appalled at the thought of her grandson being raised in primitive conditions, but says she didn't complain. Instead she gave Karyn \$500 to help pay for the move.

The sojourn in the woods didn't work. Karyn and Chris came back to Chicago, where their marriage crumbled under the strain of Chris's drinking. After their divorce in 1987, Karyn attended Northeastern Illinois University to prepare for a career as a teacher, and Dorothy seemed to have less time than ever with Christopher, who spent weekends with his father. "I was too busy to keep in touch with my mother," says Karyn, "and when I did call, there were constant judgments and pressuring to see Christopher. I wasn't trying to keep my mother from him. I was trying to get on with my life."

Even though Dorothy felt cut off by Karyn, "I never questioned her," she says. "I just tolerated and tolerated." Finally a desperate Dorothy consulted a lawyer and



on Jan. 3, 1989, sent Karyn a certified letter, warning that she was considering legal action. (An existing Illinois law permitted grandparents to petition for visitation in cases of parental divorce or death.) In March, Karyn and Chris were summoned to appear in domestic relations court. But despite the efforts of a court-ordered mediation counselor, the battle escalated. In May, Karyn and Chris remarried—to avoid suit, according to Dorothy, although the couple say they had been reconciled for months. Whatever the case, the couple were no longer immune to legal action when the Illinois Legislature passed the law in September allowing grandparents to seek visitation even when the grandchild's parents are not divorced. At one point Karyn and Chris tried to settle by offering Dorothy five visits a year; Dorothy, who wants monthly visits, refused.

The continuing feud has cost Karyn

and Chris several thousand dollars in legal fees, which they can ill afford: Last January, Karyn lost her teaching job at a private school, forcing the family to scrape by on the \$18,000 Chris earns as a security-systems installer. Still, the couple are determined to ride the suit out as a matter of principle. "If we don't take a stand against this law, we are opening up a whole Pandora's box," says Karyn. "Every family has its problems, but when the government and the courts invade your home, it's a different matter." Karyn also has the full support of her parents-in-law. "I'm all for grandparents visiting with grandchildren, but I'm appalled that anyone would put their children under such stress and financial hardship," says Chris's mother, Nancy Brooks, who adds that she sees Christopher mostly "on holidays and special occasions."

Meanwhile the Brookses have pushed ahead with their lives. After moving to Milwaukee last fall, they recently settled into a redbrick bungalow, purchased with

Sensitive to the strains the lawsuit has placed on his parents, Christopher takes some comfort from his kitten, Loki.

a low-interest government loan, where Karyn has planted an herb garden, sewn curtains and set up an attic playroom for Christopher. Ninety miles away, in her immaculate one-bedroom condominium in Morton Grove, Ill., Dorothy waits, not knowing when she will see her grandson again and hoping against hope that the Governor will veto the legislature's decision to rescind the law upon which she has built her case. Both mother and daughter admit they often wonder how things got so bad between them. But neither is willing, as little Christopher suggests, to hug and make up.

—William Plummer,
Civia Tamarkin in Chicago

predictor of time in care. All predictors work better for the national and white samples; the national black sample appears not to have enough variance for the indicators to be useful.

4. The differential between black and white time in care has been documented by the OCR survey. The census analysis looks at the counties with the smallest and the largest ratios of families in poverty, and finds the black-white differentials to be significantly different for those two categories. The differential is minimal in the poorest counties, greatest in the counties with the fewest in poverty.

Although the specific study findings are of interest, more important is the fact that this research suggests a new line of investigation, and recommends that external as well as internal factors be considered in evaluating the func-

tioning of the foster care system. Although such factors have long been thought to be important, the present data analysis provides an empirical, rather than a polemical, base for using a social analysis.

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THEORY AND REVIEW

GRANDPARENT VISITATION RIGHTS: Rendering Family Dissension More Pronounced?

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Legislation allowing grandparents to file suit to gain court-ordered visitation with their grandchildren is now law in most states. Legal issues and reported cases are presented, and problems for children and families that are posed by this sort of legal conflict are outlined.

Under the English common law from which our domestic relations law derives, a grandparent did not have a legal right to petition a court to consider whether that grandparent should be allowed to visit a grandchild.⁵³ For this country's first 300 or so years, there were no grandparent visitation laws. Even in the absence of law allowing grandparents such a right, however, grandparent visitation cases have come through the courts from time to time. But, without this type of legislation, a court could refuse to hear such a case simply because the grandparent had no legal standing to petition the court.

Grandparent visitation cases arose in the past largely in relation to the death of the grandparents' adult child, the parent of the grandchildren. During the late

1950s, there were a number of cases wherein grandparents whose son was overseas in military service came into conflict with their son's wife over visits with their grandchildren. In the 1970s, as divorce came to the fore as the disruptor of families, legislation increased and began to include divorce as well as death as the condition under which grandparents could petition courts. Courts also began to award visitation to grandparents with more frequency than previously was the case.

In 1977, a mere six states had laws permitting grandparents to petition a court for visitation upon the death or divorce of their adult child,⁵⁴ the parent of their grandchildren. Currently these laws are on the books of all but three states.⁵⁵ In addition, despite the fact

that domestic relations law is constitutionally reserved to the states, the matter has come to federal attention as well. Following hearings of the U.S. House of Representatives' Select Committee on Aging of the Subcommittee on Human Services, the House of Representatives passed a resolution, in March 1983, recommending that the National Commission on Uniform State Laws develop a model law for the various states to emulate.¹⁵

Grandparent visitation legislation, at least thus far, simply assures grandparents the right to be heard in court. Generally, the laws state that it is up to the court to determine whether or not it is in the child's best interest to visit with the grandparents.

Psychological Parenthood and Grandparent Custody

Goldstein, Freud and Solnit¹⁹ argued that the law should focus upon securing the child's placement with the psychological parent. They defined a psychological parent as

... one who, on a continuing, day-to-day basis through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological ... parent ... or any other person.

In the literature generally, and in this paper, Goldstein, Freud and Solnit's definition is what is meant by the term psychological parent.

The situation in which a grandparent has had custody of a grandchild deserves further comment. In some cases, following the death or divorce of a parent, grandparents have raised a child for a number of years; then the child's parent, often following remarriage, wishes

to regain custody. In most such instances, the grandparent would clearly be the child's psychological parent. Due to the law's emphasis upon the rights of biological parents, however, rarely can the grandparent retain custody. Some of the grandparents testifying at the Congressional Committee on Aging had had a parental role with regard to their grandchildren for a number of years prior to the parents' insisting upon the return of the children. From the child's point of view, probably most of these children should have stayed with their grandparents. If decisions were truly guided by the principle of maintaining relationships with psychological parents, the child would remain in the custody of the grandparents, and the parent would be awarded the visitation.

CURRENT ISSUES FACING THE COURTS *Animosity*

Distinctions are sometimes made by courts as to the effect of the animosity the adult parties hold for each other upon the feasibility of visitation. Whether animosity is specifically addressed in a particular case or not, however, it is important for the reader to have some awareness of what is involved for a case to come for review by a court of record or appellate court by which it is published. Prior to such a review, there has already been at least one trial. Whether or not the opinion mentions animosity, the parties have had sufficiently strong feelings regarding visitation to have gone to trial at least once previously, and to have committed months to years and hundreds to thousands of dollars to their conflict with each other.

In a 1952 case⁵ a court found "deep and apparently irreconcilable animos-

ity" between a child's father and the maternal grandparents after the death of the mother and remarriage of the father. The court wrote that in such a situation grandparent visitation

... engenders a contest for the child's affection, a contest which can lead only to the detriment of the child. It is not in the best interests of the child to subject her to an atmosphere of hate and estrangement, nor to factions competing for her favor on different days of the week.

In a case where the court found that the children were being subjected to bitter friction between parents and grandparents after the death of the grandparents' daughter and the remarriage of her husband, the children's father and stepmother were given complete control of visitation. The court noted that

... a stepparent's relation to the parents of the spouse whose place the stepparent is taking is a rather delicate one and perhaps it is just as well that the legislature has not provided that the grandparents may appear in a proceeding in which a third party is taking the place of their daughter or son as the parent of their grandchild.²¹

Since that time, however, most state legislatures have provided grandparents with the express right which that court seemed to be quite relieved was not yet made available to them.

In the new climate of grandparent rights, it appears that an acrimonious relationship between the grandparents and the grandchild's parents is of diminishing concern to courts. As one judge wrote, "animosity between the father of a child and the maternal grandmother is not a proper basis for the denial of visitation."²⁰ Animosity between the parties did not preclude a 1984 California court from awarding visitation to grandparents.²² The lone dis-

senting judge described the situation as "a bitter and prolonged legal and inter-familial battle," in which the court should not allow the child to continue as "an innocent pawn in the ongoing battle." He concluded in his dissent that "serious interference with the parental function warrants denial of grandparent visitation."

Adoption: An Independent Right to Visitation?

A question recently arising in the courts is whether adoption, particularly stepparent adoption, terminates the right of grandparents as it does the right of a parent. Traditionally, courts have held that grandparents' rights are derivative of the rights of biological parents, so that when an adoption decree terminates parental rights, the rights of the grandparents are also terminated.^{9, 22} This continues to be the position maintained by the majority of states.²⁵

But the view that adoption precludes grandparent visitation is coming under considerable pressure for change. Some states have legislated that grandparents may seek visitation rights when the grandchild is adopted by a stepparent.²³ In a Kentucky case, in the absence of any statute, grandparents whose son, the child's father, did not visit or otherwise show interest in his child, were successful in gaining visitation. The judge based his opinion in part upon the grandparents deriving visitation rights through an absent parent.⁴⁹ But is this another way of saying that grandparents have an independent right to visitation? Such a right is advocated by the House of Representatives' resolution which would insure that grandparent visitation

rights extend to children adopted by stepparents.¹⁵

It should be mentioned that "independent right" sounds more specific than it really is. It signifies the increased influence or power accorded to grandparents by legislatures and courts. One court interpreted its state's statute as creating "a presumption that the best interests of the child ordinarily are served by maintaining their contact and communication with their grandparents."¹⁸ As a practical matter, any such presumption has much the same meaning as an independent right to visitation: courts are increasingly available to this type of conflict and increasingly disposed to rule in favor of grandparents demanding visitation.

Intrafamilial Disputes

Whether one expresses the new power of grandparents in terms of an independent right or in terms of a presumption that visitation is in children's best interest, death or divorce is no longer a necessary condition to allow the grandparent to petition the court. Grandparents are beginning to bring petitions against their own grown children who are either divorced or separated or even living within intact marriages.

A 1981 California trial²⁴ was the most recent of a decade of legal conflict between a mother and her parents. The prior court had awarded the grandparents visitation rights, had restricted the mother's residence to a particular county, and had compelled the mother to undergo therapy, while at the same time finding the mother to be a fit parent. As the reviewing court in reversing this decision stated it:

Can we contemplate the possibility of a conditional finding of unfitness, i.e., one is a fit parent

only if she has counseling, stays in California, and lets the grandparent influence the child? Such a finding does not foster family stability and continuity for the child. This child should have a permanent and unconditional placement with one fit parent to look after him whose judgment is then to be trusted in the future with respect to such decisions as who shall get therapy, where the family unit shall live, and who the child shall visit. Otherwise, the government . . . will be running the family life of the parent and the child to a most intrusive degree. Such continuing supervision without a strong showing of child needs is incompatible with the concept of the family as we have known it.

Grandparent visitation and the intact family. Two recent cases show the utilization of the courts by grandparents for an increasingly broad spectrum of cases. In the first,²⁰ conflict between grandparents and the married biological parents of a three-year-old girl led to the grandparents petitioning the court for visitation. Visitation was declined because "nothing in the case or statutory law legitimizes such an intrusion by the courts into family life." In the second case, the issues were similar but the outcome was different.

In a 1983 New York case,²⁶ there had been long-standing conflict between a father and his parents. The family was an intact one. The grandparents had been unable to visit their grandchildren for several years because of the resistance of both parents. The father testified that his sister had been his parents' favorite and had been treated preferentially by his parents, and that he had been physically abused by his mother. Further, the father gave his opinion that the grandparents' interest in visitation was largely due to a desire to "control, interfere with, and manipulate" him and his wife.

The court was sympathetic to the grandparents' attempts to see their

grandchildren by attending school functions, their consistently sending gifts (which were returned), and their continuing to deposit funds for the benefit of their grandchildren. The opinion stated:

. . . the mere fact that the parents and grandparents had had a falling out and that animosity exists between them should not preclude visitation if the court finds that visitation would be in the best interests of the children.

The court determined that, indeed, the grandparents should have the right to petition for visitation and ordered that a further hearing take place regarding the visitation issue.

GRANDPARENT VISITATION AND CONFLICTS OF LOYALTY

The courts, when they deal with what they term animosity, are touching upon the dynamic issues that are most determining for loyalty conflicts. They are trying to weigh, from the child's point of view, the benefits against the liabilities of court-enforced grandparent visitation.

The emphasis in the legal literature is upon the benefits of continuity of relationships with grandparents. Legal commentators, for the most part, assume that the litigation made available by these laws can and will lead to better solutions than if it is not available, and that only good is accomplished by having these laws.^{2, 3, 4, 13, 16, 40, 48, 54} Two commentators in the legal literature have addressed potential ill effects of opening the legal doors to grandparent visitation litigation.^{17, 33} One pointed out that, in the average mother-custody divorce, a total of five people can have judicially enforceable visitation rights—the father and four grandparents—and viewed this development

as creating "no end of difficulties for children and the courts."¹¹

Goldstein, Freud and Solnit¹⁹ articulated the conflict of loyalties experienced by children after divorce. Their comments pertain to the parents, but the principle of conflict between a parent and a grandparent would be similar. They stated that:

. . . children have difficulty in relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other.

In discussing their view that, following divorce, the custodial parent should have the right to decide when and if visitation with the noncustodial parent should take place, Goldstein, Freud and Solnit explained that they

. . . take this position because it is beyond the capacity of courts to help a child to forge or maintain positive relationships to two people who are at cross-purposes with each other; because, by forcing visits, courts are more likely to prevent the child from developing a reliable tie to either parent; and because children who are shaken, disoriented, and confused by the breakup of their family need an opportunity to settle down in the privacy of their reorganized family with one person in authority upon whom they can rely for answers to their questions and for protection from external interference.

The behavioral science literature pertaining to the effect upon children of conflict between parents might have some relevance to conflict between grandparents and parent. It is necessary to consider, however, an important difference of parental divorce problems from most instances of conflict regarding grandparent visitation. Divorces usually involve children who were raised by both parents and who have a close and important connection with both of these parents. In many cases of

grandparent visitation litigation, the relationship between grandparents and grandchildren is not a very close one, so that the major issue is not separation from a psychological parent, but onset of a new source or exacerbation of a chronic source of conflict.

The available research shows, as Longfellow³⁴ concluded in her comprehensive review of the effects of divorce upon children, "Marital conflict and discord have consistently been associated with disturbed behavioral reactions in children." Emery's more recent review¹⁴ came to similar conclusions. Rutter⁴⁵ and a number of other investigators have come to the same conclusion: that overt marital hostility correlates with conduct disorders, particularly in boys.^{41, 42, 52} Rutter⁴⁶ also found that, after marital separation, children continued their problematic behavior if the home continued to be discordant, but improved if there was a reduction in family discord.

It should be kept in mind that this paper has to do with conflict of such a degree that grandparents resort to the courts to effect, as the legal terminology puts it, access to grandchildren. It is probably unrealistic to expect that the situations which breed this type of litigation would often permit amicable resolutions after the grandparents have successfully gained court-enforced visitation against the will of the custodial parent or parents.

DISCUSSION

The grandparent visitation movement has had impressive legislative success. This legislation and the changes it will bring will have important and largely unexplored implications for children and families. The situations which breed

grandparent visitation cases are uniformly tragic. These cases reflect vital opportunities lost to all three generations due to hostile, conflictual, and painful relationships between parents and grandparents.³⁸

Advent of the Legislation

In the domestic relations area, law has tended to lag behind social change.⁶ New York state divorce law serves as an example: the 1787 law establishing adultery as the sole ground for divorce was repealed in 1967, and only then because the courts began to recognize Mexican divorces.³⁸ Currently there is considerable legislative resistance to antenuptial agreements,⁸ in spite of their popularity.

Grandparent visitation legislation has arisen quite differently from most other domestic relations law, which generally has codified social change which has already occurred.¹¹ In the case of grandparent visitation, the change is heralded by legislation which is the product of intense political activity. Older citizens are increasingly experiencing the divorce of their children,²⁷ and they are greater in number, healthier, and more politically conscious and powerful than in prior decades. The marked increase in grandparent visitation legislation appears to be largely a political phenomenon, with energetic advocates on the one hand, and, on the other, legislators whose sympathy issues from their own advancing age as well as from the wish to appeal to an important voter group.

The departure from common law tradition and subsequent constitutional law developments which grandparent visitation legislation represents is quite dramatic. Parents' interests and funda-

mental rights to raise their children as they see fit have been assured by the 14th Amendment to the U. S. Constitution.⁴³ In *Lassiter v. Department of Social Services of Durham County*,³¹ the U. S. Supreme Court decision stated:

This court's decisions have by now made plain that . . . "a parent's desire for and right to the companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants deference, and, absent a powerful countervailing interest, protection . . ."

One wonders if there might not be constitutional challenges to grandparent visitation laws.

Psychological Parenthood and Grandparent Visitation

As mentioned previously, part of the impetus for the current legislation has to do with grandparents who had clearly served as psychological parents to the child. A basic problem is that custody law, under the banner of the best interests of the child, is largely focused upon the rights of parents.^{7, 12} An example points up this issue succinctly: in an adoption case where neither litigant was a biological parent, the judge wrote, "In this case, since the natural parents are not contestants, the welfare of the child was the trial court's only concern."⁵⁰ The issue of long-standing custody and psychological parenthood by a grandparent has been addressed by legislation which defines conditions in addition to death, separation, or divorce of parents under which grandparents may petition for visitation; there is no provision in such legislation for grandparents to retain or regain custody.

However, only in some of the cases coming to court have grandparents

served as psychological parents to their grandchildren. In many instances in which this new right is being exercised by grandparents, there is not an established, intense attachment of a child to a grandparent which is critical for the child to maintain.

Divorce and Grandparent Visitation: An Equation of Interests?

There are similarities and differences between parental divorce problems and most instances of conflict regarding grandparent visitation. Divorce occurs when the relationship between the spouses deteriorates. Both parents usually have important emotional relationships with their children, and their children with them. Because parents are accorded responsibility for their children, parents are allowed considerable latitude to settle their differences regarding the care of the children. This latitude includes a toleration for their engaging in bitter and protracted struggles regarding custody and visitation.¹⁰ Like divorce, grandparent visitation cases are often preceded by increasing hostility between the adults. Unlike divorce, the child in grandparent visitation cases does not necessarily have a close relationship with the grandparent, and the grandparent is not responsible for the child's upbringing. It appears inevitable and unavoidable that children must suffer whatever degree of post-divorce conflict in which their parents engage. Yet grandparents are being granted entry to the legal system on a basis not much different from the child's parents. In the words of one judge:

. . . it would be a mistake for the Court to equate grandparent . . . with parent. . . Such an equation might encourage confrontation and litiga-

ion. . . In fairness, how much confrontation and litigation should a child be expected to bear?³⁶

The new legislation does not equate grandparent with parent in terms of custody, but does so in terms of visitation. Perhaps more importantly, it provides a new legal means for children to be involved in and to be used in the service of conflicts of their elders.

The connection between grandchildren and grandparents can, of course, be of great importance to both generations and of great value to children even where there is not an intense attachment of grandchild to grandparents. This connection is certainly of great importance to grandparents, and, ideally, one of the great joys of the later years of life. But, on balance, are children ultimately likely to benefit from their grandparents' new access to the legal system? More important, in a dynamic sense, are children likely to benefit from their grandparents' new power over their parents?

Developmental Issues

Adults in the child-rearing years are developing their identities and roles as spouses and parents, and they are achieving autonomy from their own parents as well as competence in their work.⁴⁷ For older persons a major task is to relinquish the role of parent with regard to one's children. Their relinquishing parental status with regard to their children and facilitating their children's developing their own autonomy is the natural course of the family life cycle and is a part of the process by which familial boundaries are formed. Grandparent visitation legislation is dis-

sonant with these developmental processes of both generations.

Does divorce signify in this society that a person, particularly the woman, has failed as an adult and must return to a situation of subservience to parents? The great increase in grandparent visitation legislation followed upon the great increase in divorce. One cannot help but wonder why it is that, with divorce, the boundaries of the family and the autonomy of the parents seem to be considered in a very new light. Some of the literature celebrates divorce as signifying a new lease on life and a new beginning.³⁹ Does divorce have an analogous effect upon grandparents, revealing to them that their children have not grown up after all, and that their children's offspring are now in need of real grown-ups, the grandparents? There is always some degree of competition between the generations,⁴⁴ and perhaps divorce serves as a powerful stimulus and rationale to grandparents to resume aspects of a former and rewarding role.

Regarding more concrete competitive issues, one can often see in court cases that the grandparents present themselves as economically successful and responsible citizens of their communities. In contrast, the younger couple or divorced parents may not make nearly as good an impression. The local family court is hard pressed not to consider seriously the senior couple's request for some time with their grandchildren.

Grandparent Visitation: An Emotional Haven?

Opinions from some court cases reflect a belief that grandparents as a

group are particularly able to remain above the post-divorce fray and are therefore uniquely able to contribute positively to their grandchildren during these difficult times. As one opinion, often cited in these cases, states:

. . . at best [grandparents] are generous sources of unconditional love and acceptance which complements rather than conflicts with the roles of parents. . . . We can only say that in the unfortunate case of parental separation and death, grandparents should sometimes have privileges of visitation even over the objections of parents.³⁷

Indeed, in instances where parental contention is high or parental functioning is impaired by depression, grandparents may be in a unique position to provide their grandchildren a very necessary emotional haven, and often do so. Many grandparents, particularly maternal ones, successfully maintain relationships with their grandchildren and are of great assistance to their newly divorced daughters.^{41, 37} It is difficult, however, to see how the legislation being discussed can be expected to facilitate this function of grandparents.

This legislation cannot rationally be considered to alleviate situations for children during difficult times. A grandparent's filing suit for visitation during times of children's great losses and changes occasioned by death, divorce, or remarriage of parents or adoption by stepparents can only be experienced as yet another stress or threat by the child's primary caretaker and, therefore, by the child. At times when the child's need for stability and security and for being certain upon whom he can depend are very high, such legal initiatives by grandparents are likely only to add to the child's already excessive

emotional turmoil, if for no more reason than the initiation of such litigation being seen as a threat to the integrity and economy of the family by the parent or parents.

In the author's own experience, grandparents' roles after their child's divorce have varied from very constructive to being caught up in attacking their child's former spouse or even attacking their own child. In the situation of death of the grandparent's child, the wish to cleave to grandchildren may be driven by powerful wishes for restitution and reunion with their deceased son or daughter. This may be reflected by grandparental slips of the tongue, calling the child by the deceased parent's name or speaking of the grandchildren as one's own children. These types of motivations for contact are based upon great love and great loss; but even minor frustration of visitation can result in intense intergenerational conflict.

CONCLUSION

One cannot take exception to the rationales for grandparent visitation. In a 1947 case,³⁵ the opinion referred to the child's right "to meet and to know her grandparents." Another court mentioned "the very special relationships" which grandparents and grandchildren may enjoy, and concluded:

. . . visits with a grandparent are often a precious part of a child's experience, and there are benefits which devolve upon the grandchild . . . which he cannot derive from any other relationship.³⁹

If one leaves the word "right" out of it, the term "grandparent visitation" has a wholesome sound to it. Continuing contact between grandparents and grandchildren is an invaluable part of the course of family life.

When the consideration is that of and parent visitation as a legal issue, however, the situation changes markedly from the enjoyment and struggles of the generations as the natural course of things. There is yet another recruitment of the legal system to settle family matters. The people who come to domestic relations court to settle their differences have failed to do so by themselves due to their anger at or distrust of each other. Visitation laws and visitation determinations by courts are reflective of difficult, contentious situations. The visitor is effecting an entry forced over the resistance of the custodial parent. The cases now coming to court are including ever-widening varieties of intergenerational conflict. Continuing contact of grandparent with grandchild may be assured by emotionally charged and expensive litigation, but the adults' anger and residual resentment can make for some very difficult situations for children. It appears we may be finding, as the judge in the most reported United States grandparent visitation case cautioned, "the intervention of the tribunals would . . . render the dissensions of the family more pronounced by delivering them to the public."⁵¹

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HB

156

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Bill Version: CSSSHR 156(I)M
(H) Publish Date: 3-4-92

Revision Date: _____ Department Affected: Public Safety
Title: An Act providing that communications BRU: Domestic Violence & Sexual Assault
are privileged. Component: Domestic Violence & Sexual Assault
Sponsor: Brown, et al
Requestor: House Judiciary Committee COMPONENT SERIAL NO.

5	2	1
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EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
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REVENUE FUND SOURCE:	-0-	-0-	-0-	-0-	-0-	-0-
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FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact is anticipated.

Prepared By: Marcia Lynn McKenzie Phone: 465-4356
Division: Council on Domestic Violence & Sexual Assault Date: 1-15-92
Approved by Commissioner: Richard L. Burton
Agency: Department of Public Safety Date: 1-15-92

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

FISCAL NOTE

NO. 2

Bill Version: CSSS HB 156 (JUD

(H) Publish Date: 3-4-92

STATE OF ALASKA
1992 LEGISLATIVE SESSION

Revision Date: _____

Department Affected: Department of Law

Title: "...communications between victim and...
counselor are privileged..."

BRU: Prosecution

Sponsor: Representative Brown

Component: All

Requestor: House Judiciary Committee

COMPONENT SERIAL

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Expenditures/Revenues: (Thousands of Dollars)

85 through 91

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER FUND SOURCE:						
TOTAL						

POSITIONS:

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

Estimate of current year impact: _____

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director
Division: Administrative Services

Phone: 465-3672
Date: February 21, 1992

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law

Date: February 21, 1992

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agencies).

1992 LEGISLATIVE SESSION

NO. _____
 Bill Version: CSSS HB 156 (JUD)
 (H) Publish Date: 3-4-92

Revision Date: _____
 Title: Confidentiality/Domestic Violence Counselors

 Sponsor: Brown
 Requestor: House Judiciary

Department Affected: Administration
 BRU: Public Defender
 Component: Public Defender

COMPONENT SERIAL NO.

1	5	3	1
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Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
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REVENUE FUND SOURCE:	0	0	0	0	0	0
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FUNDING: (Thousands of Dollars)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER FUND SOURCE:	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Kevin Brooks
 Division: Administrative Services

Phone: 465-2277
 Date: February 21, 1992

Approved by Commissioner: Nancy Bear Usery
 Agency: Administration

Date: _____

Distribution (by preparer): Leg. Fin., Legislative Sponsor, Requestor, OMB/DBR, Gov. Legis. Ofc., & Impacted Agency(ies).

Representative Kay Brown

ALASKA STATE LEGISLATURE

Legislative Information Office
3111 C Street #435
Anchorage, Alaska 99503
(907) 561-7627

During Session
P.O. Box V
Juneau, Alaska 99811
(907) 465-4998

TO: Senator Arliss Sturgulewski, Chair
Senate Health and Social Services Committee

FROM: Representative Kay Brown

DATE: March 27, 1992

SUBJ: CS SS HB 156 (Judiciary)
Confidentiality in Cases of Domestic Violence & Sexual Assault

In reference to the upcoming Committee hearing on CS SS HB 156 (Judiciary), please find attached the following materials for inclusion in the committee packet:

- 1) CS SS HB 156 (Judiciary)
- 2) Sponsor Statement
- 3) Sectional Analysis
- 4) Fiscal Notes
 - Department of Public Safety (0.0)
 - Administrative Services (0.0)
 - Department of Law (0.0)
- 5) *Annual Report to Governor Hickel and the Alaska Legislature*
Council on Domestic Violence & Sexual Assault (January 1991)
- 6) *President's Task Force on Victims of Crime, Final Report* (1982)
- 7) Alaska Network on Domestic Violence and Sexual Assault
 - Position Paper on HB 156
 - "National Organizations Supporting Victim/Counselor Privilege"
 - "Some States with Victim/Counselor Privilege"
- 8) Letters of Support
- 9) *Anchorage Daily News* Editorial (May 9, 1991)

If you have any questions, please let me know or contact Sudy Sanders of my staff at 465-4998.

DISTRICT 12

Downtown • Fairview • City View • Bootleggers Cove • Inlet View • South Addition • Thunderbird Terrace
Eastridge • Penland Park • Airport Heights • Government Hill

Representative Kay Brown

ALASKA STATE LEGISLATURE

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During Session
P.O. Box V
Juneau, Alaska 99811
(907) 465-4998

TO: Senator Arliss Sturgulewski, Chair
Senate Health and Social Services Committee

FROM: Representative Kay Brown

DATE:: March 23, 1992

SUBJ: CS SS HB 156 (Judiciary)
Confidentiality in Cases of Domestic Violence & Sexual Assault

The purpose of this memorandum is to request that you schedule CS SS HB 156 (Judiciary), Confidentiality/Domestic Violence Counselors, at your earliest possible convenience.

I understand Cindy Smith of the Alaska Network on Domestic Violence and Sexual Assault has talked to Melissa on your staff about definition changes the Council and Network recommended. These changes are agreeable to me. The Alaska Council on Domestic Violence/Sexual Assault and the Alaska Network on Domestic Violence and Sexual Assault have been very involved in the progress of this bill, and I understand they will be available to testify in your committee.

If you have questions about this legislation, please let me know or contact Sudy Sanders of my staff at 465-4998.

enclosure

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Eastridge • Penland Park • Airport Heights • Government Hill

3/27/92 Rep. Kay Brown

SPONSOR STATEMENT

CS SS HB 156 (Judiciary)

Providing for Privileged Communications in Cases of Domestic Violence & Sexual Assault

Domestic violence and sexual assault are growing problems in Alaska. Communities throughout the state have established shelters and safe homes in an effort to provide counseling and safety to victims of these crimes. Since FY 87, the number of nights of safety provided by funded shelters has increased by 44 percent.

As a result of the fear and stigma associated with domestic violence and sexual assault, many victims fail to seek needed medical care and counseling for their emotional trauma. In order to fully recover from domestic violence and sexual assault crimes, it is necessary for victims to discuss thoughts and feelings with someone who is trained to address these issues. Domestic violence/sexual assault counselors provide this assistance. The relationship that develops between a victim and counselor is fragile and requires trust.

Need for Legislation

Current Alaskan law discourages some victims from coming forward by allowing the court system to subpoena records that disclose all information, given in trust, between a sexual assault counselor and victim. At the request of the Alaska Network on Domestic Violence and Sexual Assault, I have introduced CS SS HB 156 (Judiciary) to make changes to the state laws and establish a general rule that communications between a domestic violence or sexual assault victim and a domestic violence or sexual assault counselor are privileged and confidential. The bill allows for exceptions to the privileged communication rule in certain instances, for example, such as cases of child abuse or neglect or if the victim is deceased.

CS SS HB 156 (Judiciary) is necessary to encourage and protect the trust relationship between victim and counselor. Victims of domestic violence and sexual assault should be allowed to choose if and when deeply personal information is to become a matter of public record. CS SS HB 156 (Judiciary) would provide confidentiality for these highly personal, private and confidential communications.

CS SS HB 156 (Judiciary) would provide that the communications between a victim of domestic violence and/or sexual assault and a domestic violence/sexual assault counselor are privileged and may not be disclosed in a civil, criminal, legislative or administrative proceeding without the appropriate consent of the victim.

CS SS HB 156 (Judiciary) would extend to all victims of domestic violence and sexual assault a testimonial privilege encompassing the contents of communication with a domestic violence or sexual assault counselor and to render immune from discovery or legal process the records of the communications maintained by the domestic violence or sexual assault program.

CS SS HB 156 (Judiciary) would make amendments to AS 09.25 (Civil Evidence) and AS 12.45 (Criminal Trial) each adding a new language to provide that confidential communications between a domestic violence or sexual assault victim and a counselor are privileged.

CS SS HB 156 (Judiciary) also amends and adds new sections to AS 25.35 (Domestic Violence) to establish a general prohibition, with certain exceptions, regarding compulsory disclosure of confidential communications between domestic violence and sexual assault victims and their counselors.

Exceptions to this general standard of privileged communications include cases involving:

- 1) reports of child abuse or neglect;
- 2) evidence that the victim is about to commit a crime;
- 3) a proceeding where the victim is deceased;
- 4) a communication relevant to an issue of breach by the victim or victim counselor of a duty arising out of the victim-counselor relationship;
- 5) a communication that is determined to be admissible hearsay as an excited utterance under the Alaska Rules of Evidence;
- 6) a children-in-need-of-aid proceeding under AS 47.10;

- 7) a communication made during the victim-counselor relationship if the services of the counselor were sought, obtained, or used to enable anyone to commit or plan a crime; or
- 8) a criminal proceeding concerning criminal charges against a victim of domestic violence or sexual assault where the victim is charged with a crime under AS 11.41 against a minor.

Further, the legislation provides that the location of a safe house of the identity of a domestic violence counselor may not be disclosed in a civil, criminal, legislative or administrative proceeding unless the court or hearing officer determines that the information is necessary and relevant to the facts of the case.

Discussion

Confidentiality for victims working with domestic violence and sexual assault counselors and shelters serves both the needs of victims and the needs of society to help reduce the damage done by domestic violence and sexual assault crimes.

- As a result of the fear and stigma associated with domestic violence and sexual assault, many victims fail to seek needed medical care and counseling for the emotional injuries resulting from the crime.
- Without adequate psychological support, many of these victims fail to report the crime and cooperate with the criminal justice system.
- Domestic violence and sexual assault counselors are specifically trained to help victims recover from an assault; skills and techniques employed by counselors are designed to encourage the victim to discuss the emotional aftermath of an assault and thereby normalize the life of the victim.
- Full recovery from an assault requires that victims discuss thoughts and feelings that a victim is unlikely to discuss without the assurance of confidentiality, and this confidentiality should be accorded to all assault victims who desire services whether or not they are able to afford the services of private psychiatrists and psychologists.

- These victims hesitate to turn to friends and family because of the social stigma attached to domestic violence and sexual assault.

Questions and Answers

- Why is legislation needed?

Because of the stigma and fear involved in sexual assault and domestic violence, victims simply will not talk to anyone if they think that their confidentiality will not be respected.

In one case in Pennsylvania, when a rape crisis program was forced to turn over counseling records in a rape trial. The numbers of callers to that center's hotline who would even identify themselves on the phone decreased by over 1/3rd. That resulted in the Pennsylvania legislature passing a privilege statute in its next session. We shouldn't wait for that to happen here.

In Alaska's small communities this protection is essential. By offering confidential services these programs have been able to increase the numbers of victims who prosecute which has provided a great benefit to society in terms of convicting known offenders.

- Aren't these records already protected?

Currently records are protected only through state regulation and to some extent because of federal funding requirements. Neither of these have the same force that a statutory change will provide.

- What if the victim wants to release this information? Does this mean she can't do it?

In Alaska privilege belongs to the client. So if the victim wants to release her records to anyone, she can do that. The point of this bill is to ensure that victims can have some control over this issue.

In developing this legislation, I have worked very closely with the Alaska Council on Domestic Violence/Sexual Assault, the Department of Public Safety and the Alaska Network on Domestic Violence and Sexual Assault.

SECTIONAL ANALYSIS

CS SS HB 156 (Judiciary) Confidentiality Regarding Domestic Violence & Sexual Assault

Section 1

Amends AS 09.25 (Code of Civil Procedure) adding a new section to provide that confidential communications between a domestic violence or sexual assault victim and a counselor are privileged.

Section 2

Amends AS 12.45 (Code of Criminal Procedure) adding a new section to provide that confidential communications between a domestic violence or sexual assault victim and a counselor are privileged.

Section 3

Amends AS 25.35 to provide that communications between a domestic violence or sexual assault counselor and a domestic violence and sexual assault victim are privileged. Compulsory disclosure of these communications is generally prohibited, with certain exceptions, and may not be disclosed in a civil, criminal, legislative or administrative proceeding without the "appropriate consent" of the victim or the victim's parent, legal guardian, or guardian ad litem. Provision is made to allow a minor the opportunity to knowingly waive the confidentiality privilege established under this section if a court determines that the minor is capable of knowingly waiving the privilege. This section provides for exceptions to the general rule of confidentiality in certain instances, including among others, cases involving child abuse or neglect under AS 47.17 or if the victim is deceased.

This section also provides that the location of a safe house or the identity of a domestic violence counselor may not be disclosed in a civil, criminal, legislative or administrative proceeding unless the court or hearing officer determines that the information is necessary and relevant to the facts of the case.

7-LS0578S ✓
Lauterbach
3/30/92

Assigned

SENATE CS FOR CS FOR SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 156 (HES)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE HEALTH, EDUCATION AND SOCIAL SERVICES COMMITTEE

Offered:
Referred:

Sponsor(s): **REPRESENTATIVES BROWN, Ulmer, G.Phillips, Navarre, Ellis, B.Davis, Bruckman, Choquette, Lincoln**

A BILL

FOR AN ACT ENTITLED

1 "An Act providing that communications between a domestic violence or sexual assault
2 victim and a domestic violence or sexual assault counselor are privileged, with exceptions;
3 and prohibiting compelled testimony that would give identifying information about counselors
4 and certain types of facilities used by victims of domestic violence or sexual assault, with
5 exceptions."

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

7 * Section 1. AS 09.25 is amended by adding a new section to read:

8 Sec. 09.25.230. PRIVILEGE RELATING TO DOMESTIC VIOLENCE AND SEXUAL
9 ASSAULT COUNSELING. Confidential communications between a victim of domestic violence
10 or sexual assault and a victim counselor are privileged under AS 25.35.052 - 25.35.059.

11 * Sec. 2. AS 12.45 is amended by adding a new section to read:

12 Sec. 12.45.049. PRIVILEGE RELATING TO DOMESTIC VIOLENCE AND SEXUAL
13 ASSAULT COUNSELING. Confidential communications between a victim of domestic violence

1 or sexual assault and a victim counselor are privileged under AS 25.35.052 - 25.35.059.

2 * Sec. 3. AS 25.35 is amended by adding new sections to read:

3 Sec. 25.35.052. COMPULSORY DISCLOSURE OF COMMUNICATIONS

4 PROHIBITED. (a) Except as provided in AS 25.35.054 or 25.35.056, a victim or victim
5 counselor may not be compelled, without appropriate consent, to give testimony or to produce
6 records concerning confidential communications for any purpose in a criminal, civil, legislative,
7 or administrative proceeding. In this subsection, "appropriate consent" means

8 (1) the consent of the victim with respect to the testimony of

9 (A) an adult victim; and

10 (B) a victim counselor when the victim is an adult;

11 (2) the consent of the victim's parent, legal guardian, or guardian ad litem with
12 respect to the testimony of a

13 (A) victim who is a minor or incompetent to testify; and

14 (B) victim counselor when the victim is a minor or incompetent to testify.

15 (b) Either party may apply for appointment of a guardian ad litem for purposes of (a)(2)
16 of this section.

17 (c) A victim or victim counselor may not be compelled to provide testimony in a civil,
18 criminal, or administrative proceeding that would identify the name, address, location, or
19 telephone number of a safe house, abuse shelter, or other facility that provided temporary
20 emergency shelter to the victim of the offense or transaction that is the subject of the proceeding,
21 or the name, address, or telephone number of a victim counselor, unless the court or hearing
22 officer determines that the information is necessary and relevant to the facts of the case.

23 (d) Notwithstanding (a) of this section,

24 (1) a minor may waive the privilege provided under (a) of this section and testify
25 or give consent for a victim counselor to testify if the court determines that the minor is capable
26 of knowingly waiving the privilege;

27 (2) a parent or legal guardian may not, on behalf of a minor, waive the privilege
28 provided under (a) of this section with respect to the minor's testimony or the testimony of a
29 victim counselor if

30 (A) the parent or legal guardian has been charged with a crime against the
31 minor;

1 (B) a protective order or restraining order has been entered against the
2 parent or legal guardian on request of or on behalf of the minor; or

3 (C) the parent or legal guardian otherwise has an interest adverse to that
4 of the minor with respect to the waiver of privilege.

5 Sec. 25.35.054. EXCEPTIONS. The privilege provided under AS 25.35.052 does not
6 apply to

7 (1) reports of suspected child abuse or neglect under AS 47.17;

8 (2) evidence that the victim is about to commit a crime;

9 (3) a proceeding that occurs after the victim's death;

10 (4) a communication relevant to an issue of breach by the victim or victim
11 counselor of a duty arising out of the victim - victim counselor relationship;

12 (5) a communication that is determined to be admissible hearsay as an excited
13 utterance under the Alaska Rules of Evidence;

14 (6) a child-in-need-of-aid proceeding under AS 47.10;

15 (7) a communication made during the victim-victim counselor relationship if the
16 services of the counselor were sought, obtained, or used to enable anyone to commit or plan a
17 crime or to escape detection or apprehension after the commission of a crime; or

18 (8) a criminal proceeding concerning criminal charges against a victim of
19 domestic violence or sexual assault where the victim is charged with a crime under AS 11.41
20 against a minor.

21 Sec. 25.35.056. WAIVER. (a) A victim does not waive the protections provided in
22 AS 25.35.052 by testifying except that, if the victim partially discloses the contents of a
23 confidential communication in the course of testifying in a civil, criminal, or administrative
24 proceeding, then either party may request the court or hearing officer to rule that justice requires
25 the protections of AS 25.35.052 to be waived to the extent they apply to that portion of the
26 communication. A waiver under this subsection applies only to the extent necessary to require
27 a witness to respond to counsel's questions concerning the confidential communications that were
28 disclosed and only to the extent that they are relevant to the facts of the case.

29 (b) A victim counselor may not waive the protections afforded to a victim under
30 AS 25.35.052 without the consent of the victim or the consent of a parent, legal guardian, or
31 guardian ad litem authorized to give consent under AS 25.35.052.

1 Sec. 25.35.058. INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION. (a)
2 The claim of a privilege under AS 25.35.052, whether in a present proceeding or upon a prior
3 occasion, is not a proper subject of comment by a judge, hearing officer, legislator, or counsel.
4 An inference may not be drawn from the claim of privilege.

5 (b) In jury cases, proceedings shall be conducted, to the extent practicable, so as to
6 facilitate the making of a claim of privilege under AS 25.35.052 without the knowledge of the
7 jury.

8 (c) Upon request, a party against whom a jury might draw an adverse inference from a
9 claim of privilege under AS 25.35.052 is entitled to an instruction that an inference may not be
10 drawn from the claim of privilege.

11 Sec. 25.35.059. DEFINITIONS. In AS 25.35.052 - 25.35.059,

12 (1) "confidential communication" means information exchanged between a victim
13 and a victim counselor in private or in the presence of a third party who is necessary to facilitate
14 communication or further the counseling process and that is disclosed in the course of victim
15 counseling resulting from a sexual assault or domestic violence;

16 (2) "sexual assault" means an offense under AS 11.41.410 - 11.41.470 or an
17 offense in another jurisdiction whose elements are similar to the elements of an offense under
18 AS 11.41.410 - 11.41.470;

19 (3) "victim" means a person who consults a victim counselor for assistance in
20 overcoming adverse effects of a sexual assault or domestic violence;

21 (4) "victim counseling" means support, assistance, advice, or treatment to alleviate
22 the adverse effects of a sexual assault or domestic violence on the victim;

23 (5) "victim counseling center" means a private organization or a local government
24 agency that

25 (A) has as one of its primary purposes the provision of direct services to
26 victims for trauma resulting from a sexual assault or domestic violence;

27 (B) is not affiliated with a law enforcement agency or a prosecutor's
28 office; and

29 (C) is not on contract with the state to provide services under AS 47;

30 (6) "victim counselor" means an employee or supervised volunteer of a victim
31 counseling center that provides counseling to victims

- 1 (A) who has undergone a minimum of 40 hours of training in domestic
2 violence or sexual assault, crisis intervention, victim support, treatment and related areas;
3 or
4 (B) whose duties include victim counseling.

Support for . . .

House Bill 156

Confidentiality in Cases of Domestic Violence & Sexual Assault

Council on Domestic Violence and Sexual Assault
Alaska Network on Domestic Violence and Sexual Assault
Alaska Women's Lobby (Statewide)
Abused Women's Aid in Crisis (AWAIC), Anchorage
Advocates for Victims of Violence (AVV), Valdez
Aiding Women in Abuse & Rape Emergencies (AWARE), Juneau
Alaska Women's Resource Center (AWRC), Anchorage
Emmonak Women's Shelter
Arctic Women in Crisis (AWIC), Barrow
Bering Sea Women's Group (BSWG), Nome
Kodiak Woman's Resource & Crisis Center (KWRCC)
Maniilaq Regional Women's Crisis Program, Kotzebue
Tongass Community Counseling Center, Juneau
Parent Aid Family Support Center, Juneau
Safe & Fear-Free Environment (SAFE), Dillingham
Sitkans Against Family Violence (SAFV)
Seward Life Action Council (SLAC)
South Peninsula Women's Services (SPWS), Homer
Standing Together Against Rape (STAR), Anchorage
Tundra Women's Coalition (TWC), Bethel
Unalaskans Against Sexual Assault & Family Violence (USAFV)
Valley Women's Resource Center (VWRC), Palmer
Women in Crisis Counseling & Assistance (WICCA), Fairbanks
Women in Safe Homes (WISH), Ketchikan
Women's Resource & Crisis Center (WRCC), Kenai
Center on Women in Family Law, New York, New York